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.

258

VOLUME LXIII.

1003

VICTORIA, B. C.
Printed by The Colonist Printing & Publishing Company, Limited
1948

Entered according to Act of Parliament of Canada in the year one thousand nine hundred and forty-eight by The Law Society of British Columbia.

JUDGES

OF THE

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

During the period of this Volume.

CHIEF JUSTICE OF BRITISH COLUMBIA:

THE HON. GORDON McGREGOR SLOAN.

JUSTICES OF THE COURT OF APPEAL.

CHIEF JUSTICE:

THE HON. GORDON McGREGOR SLOAN.

JUSTICES:

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

SUPREME COURT JUDGES.

CHIEF JUSTICE:

THE HON. WENDELL BURPEE FARRIS.

PUISNE JUDGES:

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

DISTRICT JUDGE IN ADMIRALTY:

THE HON. SIDNEY ALEXANDER SMITH.

COUNTY COURT JUDGES:

HIS HON. WALTER ALEXANDER NISBET,	West Kootenay
HIS HON. WILLIAM EDWARD FISHER,	Prince Rupert
HIS HON. CHARLES JAMES LENNOX,	Vancouver
HIS HON. HERBERT HOWARD SHANDLEY,	Victoria
HIS HON. PAUL PHILLIPPS HARRISON,	Nanaimo
HIS HON. LAURENCE ARNOLD HANNA,	Nanaimo
HIS HON. JAMES ROSS ARCHIBALD,	Yale
HIS HON. JAMES BRUCE BOYD,	Vancouver
HIS HON. HARRY WILFRID COLGAN,	East Kootenay
HIS HON. ERIC DONALDSON WOODBURN,	Cariboo
HIS HON. McLEOD MUNRO COLQUHOUN,	Yale
HIS HON. JAMES ARTHUR McGEER,	Cariboo
HIS HON. REY AGLER SARGENT,	Vancouver
HIS HON. HARRY JOSEPH SULLIVAN,	Westminster
HIS HON. ERIC POWELL DAWSON,	West Kootenay
HIS HON. WILLIAM OTIS FULTON,	Prince Rupert

ATTORNEY-GENERAL:

THE HON. GORDON SYLVESTER WISMER, K.C.

MEMORANDUM.

On the 29th of April, 1947, Eric Powell Dawson, Barrister-at-Law, was appointed a Judge of the County Court of the County of West Kootenay, and a Local Judge of the Supreme Court of British Columbia, effective on the 1st of May, 1947, in the room and stead of His Honour Walter Alexander Nisbet, resigned.

On the 3rd of June, 1947, William Otis Fulton, Barrister-at-Law, was appointed a Judge of the County Court of Prince Rupert and a Local Judge of the Supreme Court of British Columbia, in the room and stead of His Honour William Edward Fisher, resigned.

On the 3rd of June, 1947, Charles Holland Locke, one of His Majesty's Counsel learned in the law, was appointed a Puisne Judge of the Supreme Court of Canada.

On the 11th of September, 1947, the Honourable Norman William Whittaker, one of His Majesty's Counsel learned in the law, was appointed a Puisne Judge of the Supreme Court of British Columbia.

On the 11th of September, 1947, Herbert Spencer Wood, one of His Majesty's Counsel learned in the law, was appointed a Puisne Judge of the Supreme Court of British Columbia.

On the 5th of December, 1947, John Robert Brown, retired Judge of the County Court of the County of Yale, died at the City of Vancouver.

On the 12th of December, 1947, the Honourable Andrew Miller Harper, retired Judge of the Supreme Court of British Columbia, died at the City of Vancouver.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A

PAGE

Ackerman, Welch and, Rex v. 183
Anderson, Booth and Geen, Bulman and Bulman v. 142, 297
Angelucci, Rex v. 294
Antrobus, Rex v. 372
Armstrong (J. T.) and George L. MacInnes, Mary E. Hodgson v. *In re* Estate of Noah C. Skippen, Deceased, and *In re* Estate of Rebecca Skippen, Deceased 75
Arnett, Rex v. 405
Arthur, Rex *ex rel.* Fleming v. 557
Attorney-General for British Columbia, Fisher and Fisher and the, Erickson v. 419
Attorney-General of Canada acting on behalf of His Majesty The King, The v. Hellenic Colonization Association 16

B

Barr *et al.,* The British Columbia Society for the Prevention of Cruelty to Animals 250
Barre v. McManus 345
Better Business Bureau of Vancouver, Margaret M. Hare, Married Woman and The Grolier Society Ltd. 24, 241, 341
Blank, National Health Association v. 71
Blyth, Nanaimo Ice and Cold Storage Ltd. v. 150
Booth and Geen, Anderson, Bulman and Bulman v. 142, 297
Boyd and Boyd v. Kuhn 545
British Columbia Electric Ry. Co., Ltd. v. Buckerfield's Ltd. 385

PAGE

British Columbia Society for the Prevention of Cruelty to Animals, The v. Barr *et al.* 250
Brown v. Storoschuk 225
Browne v. White 402
Buckerfield's Ltd., British Columbia Electric Ry. C., Ltd. v. 385
Bulman and Bulman v. Anderson, Booth and Geen 142, 297

C

Cameron, Rex *ex rel.* v. H. and H. 449
Campbell, Rex v. 279
No. 2, Rex v. 307
Canadian Transport Co. Ltd., Owners of the Schooner "City of Alberni" v. Hunt, Leuchars, Hepburn, Ltd. "City of Alberni." 262
Carey and Munroe, Rex v. 173
Carmichael v. Dolmage and MacInnes 352, 441
"City of Alberni." Canadian Transport Co. Ltd., Owners of the Schooner "City of Alberni" v. Hunt, Leuchars, Hepburn, Ltd. 262
Clare v. Clare 343
Clark, Rex v. 401
Cline, Wilson v. 81
Congregation of St. Andrew's-Wesley Church at Vancouver, The, a Congregation of the United Church of Canada *et al.,* The Toronto General Trusts Corporation, Executors of the Estate of Alice Grant MacKay, Deceased v. 321

PAGE

Coville (H. L.) and. Annie T. Coville, In the Matter of an Application by under Section 105 as Amended of the Land Registry Act, In the Matter of the Land Registry and Amendments and 177
Cruickshanks *et al.*, Rex v. 102

D

Darlyn, Rex v. 428
DeWolf, Moore v. 161
District Lot 816, In the Matter of a Portion of, and the Westerly 80 acres of District Lot 793, Group 1, New Westminster District, Plan 1598, *In re* the Land Registry Act and Amendments and 177
Dolmage and MacInnes, Carmichael v. 352, 441

E

Eaton v. Heyman *et al.* *In re* Estate of George Goodwin Norris, Deceased 62
Erickson v. Fisher and Fisher and the Attorney-General for British Columbia 419
Estate of Alice Grant MacKay, Deceased, The Toronto General Trusts Corporation, Executors of the v. The Congregation of St. Andrew's-Wesley Church at Vancouver, a Congregation of the United Church of Canada *et al.* 321
Estate of Walter C. Nichol, Deceased, *In re.* The Royal Trust Co. v. Q. J. M. Nichol, *et al.* 205
Estate of George Goodwin Norris, Deceased: Eaton v. Heyman *et al.* 62

PAGE

Estate of Noah C. Skippen, Deceased, *In re,* and *In re* Estate of Rebecca Skippen, Deceased. Mary E. Hodgson v. J. T. Armstrong and George L. MacInnes 75

F

Feeney, Rex v. 131
Fenchurch Export Corporation v. Sitka Spruce Lumber Co. Ltd. *et al.* 362, 368
Fisher and Fisher and the Attorney-General for British Columbia, Erickson v. 419
Fleming, Rex *ex rel.* v. Arthur 557

G

Geen, Anderson, Booth and, Bulman and Bulman v. 142, 297
Gilmore, Waterfield and, Rex v. 407
Gordon and Rycer, Rex v. 44
Goult, Rex *ex rel.* v. Nanaimo Dry Cleaning and Laundry Workers Union Local No. 1 493
Green and Green, Morrow v. 210, 297
Grolier Society Ltd., The, Margaret M. Hare, Married Woman and v. Better Business Bureau of Vancouver 24, 141, 341

H

H. and H., Rex *ex rel.* Cameron v. 449
Haggerty, Rex v. 416
Hanson *et al.*, Ingle and Ingle v. 481
Hare (Margaret M.), Married Woman and the Grolier Society Ltd. v. Better Business Bureau of Vancouver 24, 241, 341

PAGE

Hellenic Colonization Association, The Attorney-General of Canada Acting on behalf of His Majesty the King v. 16
Hemow and Valovich, Rex v. 42
Hepburn, Hunt, Leuchars, Ltd., Canadian Transport Co. Ltd., Owners of the Schooner "City of Alberni" v.: "City of Alberni." 262
Heyman *et al.*, Eaton v.: *In re* Estate of George Goodwin Norris, Deceased 62
Hnatnicky v. Pacific Pine Co. Ltd. 460
Hodgson (Mary E.) v. J. T. Armstrong and George L. MacInnes. *In re* Estate of Noah C. Skippen, Deceased, and *In re* Estate of Rebecca Skippen, Deceased 75
Holliston v. Zaluski *et al.* 1
Hormidge v. Magur 188
Hunt, Leuchars, Hepburn, Ltd., Canadian Transport Co. Ltd., Owners of the Schooner "City of Alberni v.: "City of Alberni" 262
Hunter v. Lake of the Woods Milling Co. Ltd. and White 33

I

Ingle and Ingle v. Hanson *et al.* 481

J

Johanson, Rex v. 393

K

Kerr, Rex *ex rel.* Pallen v. 554
Kuhn, Boyd and Boyd v. 545

L

Lake of the Woods Milling Co. Ltd. and White, Hunter v. 33

PAGE

Land Registry Act and Amendments, In the Matter of the and In the Matter of an Application by H. L. Coville and Annie T. Coville under Section 105 as Amended of said Act and In the Matter of a Portion of District Lot 816 and the Westerly 80 Acres of District Lot 793, Group 1, New Westminster District, Plan 1598 and In the Matter of an Appeal by the Municipality of the District of West Vancouver to the County Court of the County of Vancouver 177
Leuchars, Hepburn, Ltd., Hunt, Canadian Transport Co. Ltd., Owners of the Schooner "City of Alberni" v.: "City of Alberni." 262
Logan v. Logan and Zajac 444
Lusk and Lusk v. Ye Olde English Fish and Chips Ltd. 30, 464

M

MacInnes, Dolmage and, Carmichael v. 352
MacInnes (George L.), J. T. Armstrong and, Mary E. Hodgson v. *In re* Estate of Noah C. Skippen, Deceased, and *In re* Estate of Rebecca Skippen, Deceased 75
MacKay (Alice Grant), Deceased, The Toronto General Trusts Corporation, Executors of the Estate of v. The Congregation of St. Andrew's-Wesley Church at Vancouver, a Congregation of the United Church of Canada *et al.* 321

PAGE

McManus, Barre v. 345
Magur, Hormidge v. 188
Mark Wong v. Quon Yuen Han 191
Moore v. DeWolf 161
Morrow v. Green and Green 210
Municipality of the District of West Vancouver, The, In the Matter of an Appeal by to the County Court of the County of Vancouver, In the Matter of the Land Registry Act and Amendments and 177
Munroe, Carey and, Rex v. 173
Murray v. Murray 540

N

Nanaimo Dry Cleaning and Laundry Workers Union Local No. 1, Goult, Rex *ex rel.* v. 493
Nanaimo Ice and Cold Storage Ltd. v. Blyth 150
National Health Association v. Blank 71
Nichol (Walter C.), Deceased, *In re* Estate of. The Royal Trust Co. v. Q. J. M. Nichol, *et al.* 205
Norris (George Goodwin), Deceased, *In re* Estate of: Eaton v. Heyman *et al.* 62
Northey *et al.*, Rex v. 515

O

O'Hara, Rex v. 380
Olsen, Rex v. 275

P

Pacific Pine Co. Ltd., Hnatnicky v. 460
Pallen, Rex *ex rel.* v. Kerr 554
Perry, Sadler and v. Scott *et al.* 313

Q

Quon Yuen Han, Mark Wong v. 191

R

PAGE

Rex v. Angelucci 294
v. Antrobus 372
v. Arnett 405
v. Campbell 279
v. Campbell (No. 2) 307
v. Carey and Munroe 173
v. Clark 401
v. Cruickshanks *et al.* 102
v. Darlyn 428
v. Feeney 131
v. Gordon and Rycer 44
v. Haggerty 416
v. Hemow and Valovich 42
v. Johanson 393
v. Northey *et al.* 515
v. O'Hara 380
v. Olsen 275
v. Santiago Mines Ltd. (Non-Personal Liability) 87
Rex v. Waterfield and Gilmore 407
v. Welch and Ackerman 183
ex rel. Cameron v. H. and H. 449
Rex *ex rel.* Fleming v. Arthur 557
ex rel. Goult v. Nanaimo Dry Cleaning and Laundry Workers Union Local No. 1 493
Rex *ex rel.* Pallen v. Kerr 554
Royal Trust Co., The v. Q. J. M. Nichol *et al.* *In re* Estate of Walter C. Nichol, Deceased 205
Rycer, Gordon and, Rex v. 44

S

Sadler and Perry v. Scott *et al.* 313
St. Andrew's-Wesley Church at Vancouver, the Congregation of, a Congregation of the United Church of Canada *et al.*, The Toronto General Trusts Corporation, Executors of the Estate of Alice Grant MacKay, Deceased v. 321

PAGE

Santiago Mines Ltd. (Non-Personal Liability), Rex v. 87
Scott *et al.*, Sadler and Perry v. 313
Sitka Spruce Lumber Co. Ltd. *et al.*, Fenchurch Export Corporation v. 362, 368
Skippen (Noah C.), Deceased, *In re* Estate of, and *In re* Estate of Rebecca Skippen, Deceased. Mary E. Hodgson v. J. T. Armstrong and George L. MacInnes 75
Storoschuk, Brown v. 225
Sutherland v. Sutherland 194

T

Toronto General Trusts Corporation, The, Executors of the Estate of Alice Grant MacKay, Deceased v. The Congregation of St. Andrew's-Wesley Church at Vancouver, a Congregation of the United Church of Canada *et al.* 321

V

PAGE

Valovich, Hemow and, Rex v. 42

W

Waterfield and Gilmore, Rex v. 407
Welch and Ackerman, Rex v. 183
West Vancouver, In the Matter of an Appeal by the Municipality of the District of to the County Court of the County of Vancouver, In the Matter of the Land Registry Act and Amendments and 177
White, Browne v. 402
Lake of the Woods Milling Co. Ltd. and, Hunter v. 33
Wilson v. Cline 81

Y

Ye Olde English Fish and Chips Ltd., Lusk and Lusk v. 30, 464

Z

Zajac, Logan and, Logan v. 444
Zaluski *et al.*, Holliston v. 1

TABLE OF CASES CITED.

A

		PAGE
Adair v. M'Garry	[1933] J.C. 72	216
Addie (Robert) & Sons (Collieries) v. Dumbreck	98 L.J.P.C. 119; [1929] A.C. 358	32, 466, 471, 478, 484
Air-Raid Distress Fund's Trusts	[1946] 1 All E.R. 501	323
Aitken v. Associated Carpenters and Joiners of Scotland	12 R. 1206	502
Aldham v. United Dairies (London) Ltd.	[1940] 1 K.B. 507; 109 L.J.K.B. 323	470, 482, 551
Alison, *In re.* Johnson v. Mounsey	11 Ch. D. 284	152
Allcard v. Skinner	36 Ch. D. 145	204
Allen v. Esquimalt and Nanaimo Ry. Co.	[1921] 1 W.W.R. 750	386
v. Flood	[1898] A.C. 1	201, 202
v. Regem	44 S.C.R. 331; 18 Can. C.C. 1	280, 515, 518, 527, 529, 534
Allgood and others v. Blake	45 L.J. Ex. 101	364
Allison v. Standard Lumber Co.	34 B.C. 257	163
Alonzo v. Bell *et al.*	58 B.C. 220	36, 83
Alsip v. Monkman	9 D.L.R. 97, at p. 109	2
Amalgamated Builders Council v. Herman	65 O.L.R. 296	502
Society of Railway Servants v. Osborne	[1910] A.C. 87	503
American Boy, *In re*	7 B.C. 268; 1 M.M.C. 304	420, 422
Foundries v. Tri-City Council	257 U.S. 184	398
Securities Corporation v. Woldson	39 B.C. 145, at p. 150	46
Anderson v. Midland Railway	[1902] 1 Ch. 369	420
Andler v. Duke	47 B.C. 282	370
Andreas v. Canadian Pacific Ry. Co.	37 S.C.R. 1	40, 386, 390
Angliss & Co., W. (Australia) Proprietary v. Peninsular and Oriental Steam Navigation Co.	[1927] 2 K.B. 456	272
Annable v. Coventry	46 S.C.R. 573	233
Apothecaries Company v. Jones	[1893] 1 Q.B. 89	554
Appleby v. Myers	L.R. 2 C.P. 651	6, 7, 8, 9, 10
Arnot v. United African Land Co.	70 L.J. Ch. 306	152
Asher v. Whitlock	L.R. 1 Q.B. 1	151, 153
Ashton's Estate, *Re*	[1938] 1 All E.R. 707	340
Attorney-General v. Beech	[1898] 2 Q.B. 147	361
v. Bradlaugh	14 Q.B.D. 667	375
v. Brown	[1920] 1 K.B. 773	100
v. Dunlop	7 B.C. 312	422
v. Hanwell Urban Council	[1900] 2 Ch. 377	299
v. McGowan	37 N.S.R. 35	421
v. Price	[1912] 1 Ch. 667	326
v. Richmond and Gordon (Duke)	[1909] A.C. 466	361
Attorney-General v. Sillem and Others	10 H.L. Cas. 704; 11 E.R. 1200	112, 172, 512
Attorney-General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia	[1898] A.C. 700; 67 L.J.P.C. 90	152, 153
Attorney-General for the Dominion of Canada v. Ritchie Contracting and Supply Company	[1919] A.C. 999; 88 L.J.P.C. 189	153, 154, 155
Attorney-General of Canada v. Higbie *et al.* and Attorney-General for British Columbia	[1945] S.C.R. 385; [1945] 3 D.L.R. 1	152, 154, 155, 156, 158
Attorney-General of Canada v. Keefer	1 B.C. (Pt. 2) 368	154
Auerbach v. Hamilton	19 O.L.R. 570	72

B

		PAGE
Bailey v. Granite Quarries	18 B.C. 149	163, 168
Bain, *In re.* Public Trustee v. Ross	[1930] 1 Ch. 224	338, 340
v. Bank of Canada and Woodward	50 B.C. 138	251
Banks v. Goodfellow	L.R.5 Q.B. 549	69
Barber v. McCuaig	31 Ont. 593	211
Barker v. Eager	67 L.J.P.C. 115	108
Barnes, *In re.* Simpson v. Barnes	[1930] 2 Ch. 80*n*	324, 332, 326, 338
v. Merritt & Co.	15 T.L.R. 419	243
Barnett v. Hickmott	[1895] 1 Q.B. 691	135, 136
Baron v. Regem	[1930] S.C.R. 194; 59 Can. C.C. 154	518, 532
Baroness Wenlock v. River Dee Company	10 App. Cas. 354	299
Barr v. Musselburgh Merchants Association	[1912] S.C. 174	28, 243
Barris v. Aberdeen Steam Trawling and Fishing Co.	[1933] A.C. 402	89
Bay-Front Garage, Ltd. v. Evers	[1944] S.C.R. 20	490
B.C. Electric R. Co. v. Protopappas	[1946] 4 D.L.R. 1	386
Beal v. Michigan Central R.R. Co.	19 O.L.R. 502	226
Beattie Estate, *In re*	[1944] 3 W.W.R. 727	70
Belanger v. Regem	54 S.C.R. 265	299
Bell v. Grand Trunk Rway. Co.	48 SC.R. 561	299
Belyea v. Regem	[1932] S.C.R. 279	61
Bentley v. Vancouver Exhibition Association	50 B.C. 343	482, 489
Betts v. Stevens	79 L.J.K.B. 17	395, 398
Bickford v. The Corporation of the Town of Chatham	16 S.C.R. 235	227
Bilby v. Bilby	71 L.J.P. 31; [1902] P. 8	448
Biscoe v. Jackson	35 Ch. D. 460	327
Bistry *et al.* v. Cloak Contractors Association	[1936] O.W.N. 511	503
Black v. Veinot	[1934] 1 D.L.R. 803	546
Blackwood v. The Queen	8 App. Cas. 82	152
Board of Education v. Rice	80 L.J.K.B. 796	168
Bodega Company Limited, The *In re*	[1904] 1 Ch. 276	89
Booth v. Booth	2 Atk. 343; 26 E.R. 609	227
v. Ford and Shaw	38 B.C. 279	466
v. Turle	L.R. 16 Eq. 182	426
Borrowman v. The Permutit Company	[1925] S.C.R. 685; 3 D.L.R. 113	4, 466, 551
Boston Deep Sea Fishing and Ice Company v. Ansell	(1888) 39 Ch. D. 339	6
Bottomley v. Bannister	[1932] 1 K.B. 458	482, 490
Boulianne v. Regem	[1931] S.C.R. 621	186, 188, 529
Bouvier v. Fee	[1932] S.C.R. 118	546
Bowman v. Secular Society, Limited	[1917] S.C. 406	335
Bradlaugh v. Clarke	8 App. Cas. 354	149
Brasier's Case	1 Leach, C.C. 199	374, 378, 379
Brinsmead v. Harrison	L.R. 6 C.P. 584	315
Britain v. Rossiter	11 Q.B.D. 123; 48 L.J.Q.B. 362	6, 227
British American Timber Co. Ltd. v. Jones	60 B.C. 174	366
Columbia Electric Rway. Co. v. Dunphy	59 S.C.R. 263	387
British Columbia Electric Railway Company, Limited v. Loach	[1916] 1 A.C. 719	84, 546
Brockelbank, *In re. Ex parte* Dunn & Raeburn	23 Q.B.D. 461	299
Brodie v. Regem	[1936] S.C.R. 188	44, 45, 50, 51, 52, 59, 310
Bromley v. Mercer	[1922] 2 K.B. 126	482, 489

		PAGE
Bronek v. Winnipeg, Selkirk and Lake Winnipeg Ry. Co.	[1933] A.C. 61	390
Brooks v. Regem	[1927] S.C.R. 633; [1928] 1 D.L.R. 268	184, 519
Brown v. Allan	25 W.L.R. 128	2
v. Draper	[1944] 1 All E.R. 246	353
v. London Fence Limited	11 W.L.R. 411	366
v. T. and E. C. Cotterill	51 T.L.R. 21	482
v. Walton *et al.*	58 B.C. 498	84, 470, 549
Browne v. Brandt	[1902] 1 K.B. 696	192
v. Flower	[1911] 1 Ch. 219	189, 191
Bruce v. The Presbytery of Deer	L.R. 1 H.L. Sc. 96	340
Bruck v. Regem	80 Can. C.C. 52	243
Brunet v. Regem	57 S.C.R. 83	282, 289, 293
v. Regem	[1928] S.C.R. 375; [1928] 3 D.L.R. 822; 50 Can. C.C. 1	184, 279, 283, 284, 289, 290, 294
Bulli Coal Mining Company v. Osborne	[1899] A.C. 351	421
Burch v. Towder	[1923] 1 W.W.R. 180	160
Burchell v. Hickisson	50 L.J.Q.B. 101	490
Burns v. Hodgson	[1946] 1 D.L.R. 510	346
Burrard Inlet Tunnel & Bridge Co. v. The "Eurana"	[1931] 1 W.W.R. 325	299
Burrows v. Rhodes	[1899] 1 Q.B. 816	420
Butterfield v. Forrester	11 East 60; 103 E.R. 926	86
Butterworth v. Butterworth and Englefield, &c.	89 L.J. P. 151; [1920] P. 126	444, 446, 447

C

Caldeira v. Gray	[1936] 1 All E.R. 540	228
Call v. Smith and Hellofs	[1938] 3 W.W.R. 539	82
Callahan v. Coplen	6 B.C. 523; 1 M.M.C. 348; 30 S.C.R. 555	424
Cameron v. Church of Christ, Scientist	57 S.C.R. 298	323
v. David Spencer Ltd.	55 B.C. 167	471, 477
et ux v. Wait	3 A.R. 175	301
Campbell v. Shelbourne Hotel	[1939] 2 All E.R. 35	465
Campbell Auto Finance Co. Ltd. v. Bonin	[1945] S.C.R. 175	442
Canada Bread Co. v. Grigg	[1946] 2 D.L.R. 375	82
Canada Rice Mills, Ltd. v. The Union Marine and General Insurance Co. Ltd.	54 B.C. 10; [1941] A.C. 55	111, 112, 137, 342, 343
Canada Sugar Refining Company v. Reg.	[1898] A.C. 735	100
Canadian National Railways v. Croteau	[1925] S.C.R. 384	442
Pacific Ry. Co. v. Anderson	[1936] S.C.R. 200	482
Pacific Railway v. Parke	[1899] A.C. 535	299
Canning's Case	19 St. Tri. 283	410
Carlson v. Smilak	27 W.L.R. 187	2
Carter v. Van Camp *et al.* Van Camp v. Carter and Anderson	[1930] S.C.R. 156	82
Caswell v. Powell Duffryn Associated Collieries, Ld.	[1940] A.C. 152	466, 473, 551
Cavalier v. Pope	[1905] 2 K.B. 757; [1906] A.C. 428	481, 482, 488, 489, 490
Central Trust &c. Co. v. Snider and Carleton	85 L.J.P.C. 87	227
Chamberlayne v. Brockett	8 Chy. App. 206	341
Chapdelaine v. Regem	[1935] S.C.R. 53	188, 529
Chaplin v. Smith	95 L.J.K.B. 449; [1926] 1 K.B. 198	353, 355, 356, 357, 358, 359, 360
Chapman and Corporation of London, *Re*	10 Ont. 33	503

		PAGE
Chassy and Wolbert v. May and Gibson Mining Co.	29 B.C. 83	421
Chichester Diocesan Fund v. Simpson	[1944] 2 All E.R. 60	334
Children's Aid Society of the Catholic Archdiocese of Vancouver v. City of Salmon Arm	55 B.C. 495	558, 559
Cities Service Oil Co. Ltd. v. Rubel	66 O.L.R. 475	226
City of London v. Grand Trunk R.W. Co.	32 O.L.R. 642	392
, The v. Vanacre	3 Mod. 270	23
Verdun v. Yeoman	[1925] 2 D.L.R. 448	386
"Clarence, The"	3 Wm. Rob. 283	318
Claridge v. British Columbia Electric Railway Co. Ltd.	55 B.C. 462	83, 228, 546
Clark v. Regem	61 S.C.R. 608	46, 61, 312
v. Taylor	1 Drew. 642	327
Clay Products Workers' Union v. Dominion Fire Brick & Clay Products	[1947] 1 D.L.R. 378	503, 510
Cleary v. Boscowitz	8 B.C. 225; 1 M.M.C. 506; 32 S.C.R. 417	425
Coca-Cola Company of Canada Ltd. v. Florence Matthews	[1944] S.C.R. 385	441, 443
Cocks v. Manners	L.R. 12 Eq. 574	323
Coffin v. Coffin	Jacob 70	252
Cohen v. Sellar	95 L.J.K.B. 629	192
Cole v. Harris	[1945] K.B. 474	215, 220, 224
Columbia Bithulitic Limited v. British Columbia Electric Rway. Co.	55 S.C.R. 7	391
Commissioners for Special Purposes of Income Tax v. Pemsel	[1891] A.C. 531	331
Companies Act and British American Timber Co., *Re*	58 B.C. 49	369
Connor v. Cornell	57 O.L.R. 35	32
v. West	5 Burr. 2672	346
Consolidated Tungsten-Tin Mines Ltd. *et al.* v. MacCulloch and The London & Western Trusts Co. Ltd.	58 B.C. 396	369
Constitutional Questions Determination Act, *In re*, and *In re* Vancouver Incorporation Act, 1921	62 B.C. 114; [1946] 1 W.W.R. 177	51
Cook v. School Commissioners, Halifax	35 N.S.R. 405	243
Cooke v. Gill	L.R. 8 C.P. 107	163
Corby v. Hill	4 C.B. (N.S.) 556; 140 E.R. 1209	473
Cotton Co. Ltd. v. Coast Quarries Ltd.	4 W.W.R. 142	314
Cowling (A. C.), *In re.* Jinkin v. Cowling	[1924] P. 113	69
Craig v. Sinclair	60 B.C. 157; 61 B.C. 256	35, 36, 39
Crane v. Regem	90 L.J.K.B. 1160	48, 49, 53, 59
Craven v. Smith	L.R 4 Ex. 146	74
Creighton v. United Oils Ltd.	[1927] 3 D.L.R. 804	346
Cross v. Rix	29 T.L.R. 85	426
Crusoe v. Bugby	2 W. Bl. 766; 96 E.R. 448	355
Cunard and Wife v. Antifyre	[1933] 1 K.B. 551	488, 489
Currie v. Milne and Milne	[1930] 2 W.W.R. 159	83
Curtis v. Stovin	22 Q.B.D. 513	152
Cutter v. Powell	6 Term Rep. 320; 2 Sm. L.C. 1	6, 7
Czernewicz v. Winnipeg Wholesale Grocery and Confectionery Ltd.	48 Man. L.R. 76	366

D

Dakin (H.) & Co., Limited v. Lee	84 L.J.K.B. 2031; [1916] 1 K.B. 566	2, 7, 10, 12, 15
Daly v. Edwardes	83 L.T. 548	353

		PAGE
Darbishire v. Darbishire and Baird	62 L.T. 664	447
Davies, *In re.* Lloyd v. Cardigan County Council	[1915] 1 Ch. 543	324
Davies v. E. B. Eddy Co. Ltd.	57 B.C. 200	11
v. Mann	10 M. & W. 546	86
Davis v. Foots	[1940] 1 K.B. 116	482
Dawes v. Gaye	[1942] S.C.R. 369	83
De Laval Co. Ltd. v. Bloomfield	[1938] O.R. 294	228
Derkach v. Lachowicz	[1944] O.W.N. 549	2
Des Brisay v. Canadian Government Merchant Marine Ltd.	51 B.C. 57	363
De Soysa (Lady) v. Stanislaus de Pless Pal	81 L.J.P.C. 126	167
DeVoin v. DeVoin	(Unreported)	443
De Vries v. Smallridge	[1928] 1 K.B. 482	163
Digby v. Financial News, Limited	[1907] 1 K.B. 502; 76 L.J.K.B. 321	242, 247
Dill v. Dominion Bank	17 Pr. 488	362, 366
Diplock, *In re.* Wintle v. Diplock	[1941] Ch. 253	323
Dipple v. Corles	11 Hare 183	238
Dixie v. Royal Columbian Hospital	56 B.C. 74	346
Doane v. Thomas	31 B.C. 457	442
Dobie v. Lemon	12 Pr. 64	75
Dobson v. Horsley	[1915] 1 K.B. 634	490
Dockendorff v. Johnston	34 B.C. 97	83
Doe v. Hogg	4 D. & R. 226	355
v. Payne	1 Stark. 86	353
v. Perkes	3 B. & Ald. 489	69
dem. Smith v. Smart	1 M. & Rob. 476	226
Dominion Iron and Steel Co. v. Burt	86 L.J.P.C. 97	239
of Canada Inv. & Debenture Co. Ltd. v. Carstens *et al.*	10 W.W.R. 469	163
Dominion Salvage and Wrecking Company v. The Attorney-General of Canada	21 S.C.R. 72	22, 23
Dominion Trust Co., Boyce and MacPherson, *In re.*	26 B.C. 302	314
Dominion Trust Co. v. Masterton	20 B.C. 389	346
Donaldson v. Moose Jaw Transportation Co. Ltd.	[1945] 1 W.W.R. 678	82
Donoghue v. Stevenson	[1932] A.C. 562; 101 L.J.P.C. 119	482, 486, 490
Dorrell v. Campbell	23 B.C. 500	155, 156
Doty and Marks, *Re*	57 O.L.R. 623	211
Downey v. Hyslop	65 O.L.R. 548	82
Drake, *Em parte. In re* Ware	5 Ch. D. 866	315
Duncan v. Cammell Laird & Co., Ltd.	[1942] 1 All E.R. 587	541, 542, 543
Dunlop v. Haney	7 B.C. 455	443
Dunne v. Byrne	[1912] A.C. 407	323, 327, 328, 329, 334, 339
Duperreault, *Re*	[1941] 1 D.L.R. 38	421
Duval (Charles) & Co., Limited v. Gans	[1904] 2 K.B. 685	404
Dyson v. Attorney-General	[1911] 1 K.B. 410	421

E

E. & N. Ry. v. Wilson. E. & N. Ry. v. Dunlop	[1919] 3 W.W.R. 961	420
Eastern Archipelago Company, The v. The Queen	23 L.J.Q.B. 82	23
Eastern Trust Company v. McKenzie, Mann & Co., Limited	[1915] A.C. 750	421
Edglie v. Woodward Stores Ltd.	50 B.C. 403	466
Edwardes v. Barrington	85 L.T. 650	353

		PAGE
Herschorn v. St. Mary's Young Men's Society *et al.*	49 N.S.R. 260	253
Heyes, In the Estate of. Walker v. Gaskill	[1914] P. 192	79
Hickey v. Stalker	53 O.L.R. 414	421
Hill v. Manchester and Salford Water Works Co.	5 B. & Ad. 866	517
Hillas and Co. Limited v. Arcos Limited	147 L.T. 503	228
Hills v. Croll	2 Ph. 60; 41 E.R. 864	227
Hodge's Case	2 Lewin, C.C. 227	176, 417
Hodges v. Webb	[1920] 2 Ch. 70	202
Hoffar Ltd. v. Canadian Credit Men's Trust Association	40 B.C. 454	314
Hole v. Chard Union	[1894] 1 Ch. 293; 63 L.J. Ch. 469	163, 164, 168, 171
Holland v. Holland	41 T.L.R. 431	343, 344
Hollywood Theatres Ltd. v. Tenney	54 B.C. 247	499, 506, 508, 509
Holman v. Green	6 S.C.R. 707	152, 153, 154
Hontestroom, S.S. v. S.S. Sagaporack. S.S. Hontestroom v. S.S. Durham Castle	[1927] A.C. 37	228
Hooper v. Western Counties, &c., Telephone Company	68 L.T. 78	89, 93, 94, 96
Houghton v. C.N.R.	6 W.W.R. 160	366
Howard v. Miller and Nicholson	20 B.C. 227	227
Hudson v. Cripps	[1896] 1 Ch. 265	189
Hudson's Bay Company v. Wyrzykowski	[1938] S.C.R. 278	466
Humphrey v. Wilson	25 B.C. 110	518
Hunter v. Attorney-General	[1899] A.C. 309	323; 327
v. White *et. al.*	(Unreported)	83
Hutchinson v. Mathias	[1943] 1 W.W.R. 451	2
I		
Ibrahim v. Regem	[1914] A.C. 599	381, 524
Inch v. Farmers' Co-operative Dairy Co. Ltd.	15 M.P.R. 315; [1941] 2 D.L.R. 27	12
Indermaur v. Dames	L.R. 1 C.P. 274; 35 L.J.C.P. 184; L.R. 2 C.P. 311; 36 L.J.C.P. 181	31, 466, 471, 472, 473, 474, 478, 486
Initiative and Referendum Act, The, *In re.*	[1919] A.C. 935	299
International Ladies Garment Workers Union *et al.* v. Rothman	[1941] S.C.R. 388	510
Isaac v. Evans	16 T.L.R. 480	426
J		
Jackson, *In re.* Midland Bank Executor and Trustee Co. v. Archbishop of Wales	[1930] 2 Ch. 389	334
Jackson v. Simons	92 L.J. Ch. 161; [1923] 1 Ch. 373	353, 355, 356, 359
and Jackson v. Chow	[1946] 2 W.W.R. 161	31
James v. Allen	3 Mer. 17	323, 339
v. Joseph Evans and Co.	66 L.J.Q.B. 742	164, 168
Jardine v. Northern Co-operative Timber and Mill Association.	61 B.C. 86	111, 387
Jaremy v. Vita Co-op. Ltd.	[1943] 1 D.L.R. 391	228
Jarman's Estate, *In re.* Leavers v. Clayton	8 Ch. D. 584	324, 336
Jenkins v. Jackson	40 Ch. D. 71	189
Jesse v. Roy	1 Cr. M. & R. 316	6
Johnson and Stockdill v. Grossman	59 B.C. 88	51, 366
Jones' Settlement. Stunt v. Jones	[1915] 1 Ch. 373	226
Jones v. Simes	43 Ch. D. 607	170
v. Toronto and York Radial R.W. Co.	25 O.L.R. 158	392
v. Victoria	2 B.C. 8	252

		PAGE
Jordaine v. Lashbrooke	7 Term Rep. 601	410, 412
Julius v. Bishop of Oxford	49 L.J.Q.B. 577	301

K

Kelly v. Watson	61 S.C.R. 482; [1920] 1 W.W.R. 939	227
Kennedy v. Union Estates Ltd.	55 B.C. 1; [1940] S.C.R. 625	471, 473, 485
Lumber Co. Ltd. v. Porter	[1932] 1 W.W.R. 230	82
Kerr v. John Mottram, Ltd.	109 L.J. Ch. 243	152
Kester v. Hamilton	[1936] 4 D.L.R. 76; [1937] 2 D.L.R. 330	466
Keystone Knitting Mills' Trade Mark, *In re.*	[1929] 1 Ch. 92	170
Kidd v. Henderson	22 N.S.R. 138	243
Kierzkowski v. Dorion	5 Moore, P.C. (N.S.) 397	409
King, The v. Dubeau	[1946] S.C.R. 415	547
v. Lanchick. Safety Storage and Warehousing Co. v. Lanchick	31 B.C. 193	167
King, The v. Laperriere—The King v. Dubeau	[1946] S.C.R. 415	547
, The v. Lee Moon Koo	43 B.C. 458	444
, The v. Licence Commissioners of Point Grey	18 B.C. 648	255
Kleman v. Kleman and Wilson	[1940] 1 W.W.R. 382	448
Knights of St. John v. Golakie	20 O.W.N. 320	252
Koeppel v. Colonial Coach Lines Ltd.	[1936] S.C.R. 529	82
Koufis v. Regem	[1941] S.C.R. 481	287, 529
Kreglinger (G. and C.) v. New Patagonia Meat and Cold Storage Company, Limited	[1914] A.C. 25	226, 237
Kruciak v. Antoniuk	[1946] 3 W.W.R. 252	221

L

L. v. L.	[1943] 2 W.W.R. 308	228
Labour Relations Board v. Dominion Fire Brick & Clay Products	[1947] 3 D.L.R. 1	502, 503
Lacroix Bros. & Co. v. Cook	21 Sask. L.R. 46; [1926] 3 W.W.R. 385	12
LaJeffries v. Roberts	[1946] O.R. 10	353
Landes v. Kusch	7 W.W.R. 1076	227
Landlord and Tenant Act, *In re.* Yue Shan Society v. Chinese Workers' Protective Assn. (No. 2)	[1944] 3 W.W.R. 497	502, 511, 513
Langrick v. Langrick and Funnell	[1920] P. 90	446
L'Association Internationale des Debardeurs Local 375 v. Dussault	[1945] S.C.R. 768	442
Latham v. R. Johnson & Nephew, Limited	[1913] 1 K.B. 398; 82 L.J.K.B. 258	468, 482, 490
Lauder v. Robson	55 B.C. 375	36, 84
Lavender v. Betts	[1942] 2 All E.R. 72	189
Lavery v. Pursell	57 L.J. Ch. 570	227
Law v. Smith	60 B.C. 437	192, 211
Lawrence v. Finch	[1931] 1 D.L.R. 689	243
v. Tew	[1939] 3 D.L.R. 273	228
Ledwith v. Roberts	[1936] W.N. 281	466
Lee v. Gansel	Lofft 374; 1 Cowp. 1	134
Legh v. Lillie	6 H. & N. 164	299
Lennard's Carrying Company, Limited v. Asiatic Petroleum Company, Limited	[1915] A.C. 705	273
Lennie v. The Township of Etobicoke	[1943] O.W.N. 622	465, 468, 477
Le Roi v. Rossland Miners Union	8 B.C. 370	508
Leslie v. Clark and Buzza Ltd.	42 B.C. 391	546
Letang v. Ottawa Electric Railway	95 L.J.P.C. 153	468, 477

		PAGE
Levesque & Graveline v. Regem	[1934] 4 D.L.R. 416; 62 Can. C.C. 241	518, 529
Leviten v. C.N.R.	[1940] 1 D.L.R. 622	386
Leys *et al.* v. Fiskin *et al.*	12 U.C.Q.B. 604	353
Lindsay v. Klein. The Tatjana	[1911] A.C. 194	267
Lloyd v. Hanafin	43 B.C. 401	39
Lochgelly Iron and Coal Co. v. M'Mullan	102 L.J.P.C. 123	551
London Association for Protection of Trade v. Greenlands, Liimited	[1916] 2 A.C. 15; 85 L.J.K.B. 698	28, 29, 243
Lord v. Lord	[1900] P. 297	446, 447, 448
Lord Advocate for Scotland v. Hamilton	1 Macq. H.L. 46	147, 303
Lusk and Lusk v. Ye Olde English Fish & Chips Ltd.	63 B.C. 464	482
Lynde v. Nash	[1928] 2 K.B. 93	554

M

M'Alister (Pauper) v. Stevenson	101 L.J.P.C. 119; [1932] A.C. 562	471
McCallum v. Hemphill Trade Schools Ltd.	[1920] 1 W.W.R. 114	31, 466
v. Hooper	67 Que. S.C. 139	546
, Hill & Co. v. Imperial Bank *et al.*	30 W.L.R. 343	353
McCauley, *Re*	28 Ont. 610	323
McConaghy v. Denmark	4 S.C.R. 609	160
McDonald v. Simons	15 W.L.R. 218	2
Macdougall v. Knight	14 App. Cas. 194	454
v. Paterson	11 C.B. 755; 138 E.R. 672	301
McFall v. Vancouver Exhibition Association	58 B.C. 290	363
MacGill v. Duplisea	18 B.C. 600	72, 74, 75
McIntosh v. Bell	[1932] 2 D.L.R. 55	82
Macintosh v. Dun	[1908] A.C. 390	243
Mackay and Mackay v. International Association Machinists Lodge No. 1057, Saskatoon	[1946] 2 W.W.R. 257	498, 502, 503, 510
M'Lean v. Bell	48 T.L.R. 467	84
Gold Mines, Ltd. v. Attorney-General for Ontario	[1926] 3 W.W.R. 193	421
McMeekin v. Furry	13 B.C. 20; 2 M.M.C. 432, 536; 39 S.C.R. 378	421
McMicken, *Re*	20 Can. C.C. 334	455
McMillan v. Murray	[1935] S.C.R. 572	466, 478, 545, 552, 553
M'Nab v. Dunlop and M'Keever	3 U.C.Q.B. 135	353
McNeil v. Regem	[1931] S.C.R. 505	56, 61
McPhee v. Esquimalt and Nanaimo Rway. Co.	49 S.C.R. 43	111, 137, 226
Mahadeo v. Regem	[1936] 2 All E.R. 813	384
Maisel v. Financial Times, Lim. (No. 1)	84 L.J.K.B. 2145	242, 249
v. Financial Times, Lim. (No. 2)	84 L.J.K.B. 2148	242, 249
Makin v. Attorney-General for New South Wales	63 L.J.P.C. 41; [1894] A.C. 57	285, 286, 288, 292, 518, 522, 523, 524, 528
Malkin Company Limited v. McGaghran	20 B.C. 479	371
Mallett v. Kovar	14 W.L.R. 327	2, 16
Manley v. Callon	8 B.C. 153; 1 M.M.C. 487; 32 S.C.R. 371	423, 425
Marriage Act, *In re*, and *In re* H.	60 B.C. 46	72
Marshall or Wilkinson v. Wilkinson	[1943] 2 All E.R. 175	89
Martin's Case	R. & R. 108	135
Martin v. Jarvis	37 O.L.R. 269	228
Maskell v. Horner	[1915] 3 K.B. 106	202
Mattinson v. Hewson	43 N.S.R. 339	2
Maxine, Limited v. Cuillerier	61 B.C. 345	192, 346
Maxwell v. The Director of Public Prosecutions	103 L.J.K.B. 501; [1935] A.C. 309	287, 431, 524
May v. Hartin	53 B.C. 411	426

		PAGE
May and Butcher, Limited v. The King	[1934] 2 K.B. 17	227
Mellor v. Walmesley	[1905] 2 Ch. 164	152
Menetone v. Athawes	3 Burr. 1592	10
Merritt v. Hepenstal	25 S.C.R. 150	546
Mersey Steel & Iron Co. v. Naylor, Benzon & Co.	9 App. Cas. 434	5
Metallic Roofing Co. v. Local Union No. 30	9 O.L.R. 171	502
Metropolitan Railway Co. v. Jackson	3 App. Cas. 193	312, 410
Middlefield v. Gould *et al.*	10 U.C.C.P. 9	517
Millard v. MacEwan	[1945] 1 W.W.R. 509	403
Miller v. Salomons	7 Ex. 475	375
Minchau v. Busse	[1938] 4 D.L.R. 744	345
Modern Construction Co. v. Shaw	35 B.C. 331	7, 8, 9, 10, 12, 15
Montreal Street Ry. Co. v. Boudreau	36 S.C.R. 329	170
Moore v. DeWolf	61 B.C. 81	171
v. The Pope	[1919] 1 I.R. 316	335
Morgan (Henry) and Co. Ltd. v. Bloomfield	55 Que. K.B. 452	546, 550
Morice v. The Bishop of Durham	9 Ves. 399; 10 Ves. 522	323, 327, 335
Morrell v. Fisher	4 Ex. 591	152
Morris v. Kanssen	[1946] 1 All E.R. 586	299
Morrison v. The Dominion Iron & Steel Co. Ltd.	45 N.S.R. 466	386, 392
Mortgage Corporation of Nova Scotia, The v. Walsh *et al.*	57 N.S.R. 547	346
Morton Estate, *In re*	[1941] 1 W.W.R. 310	323
Munro v. Butt	8 El. & Bl. 738	6
Murdoch v. Davis	[1939] 2 W.W.R. 621	82
v. The Attorney-General of British Columbia	54 B.C. 496	252
Murphy v. McSorley	[1929] S.C.R. 542	227
Murray v. Gibson	28 Gr. 12	517

N

National Trust Company Ltd. v. The Christian Community of Universal Brotherhood Ltd. and the Board of Review for B.C.	56 B.C. 102; [1941] S.C.R. 601	51, 343
National Union of General and Municipal Workers v. Gillian	[1946] K.B. 81	506, 507, 514
N.B. Land & Inv. Co. v. Sime	[1928] 4 D.L.R. 214	403
Nelson and Fort Sheppard Railway Co. v. Dunlop	7 B.C. 411	421
Nelson and Fort Sheppard Ry. Co. v. Jerry *et al.*	5 B.C. 396; 1 M.M.C. 161	420
Ne Page, McKenny & Co. v. Pinner & McLellan	21 B.C. 81	11
Newby v. Colt's Patent Fire-arms Co.	L.R. 7 Q.B. 293	501, 503
v. Newby and White	77 L.T. 142	447
Newen, *In re.* Carruthers v. Newen	[1903] 1 Ch. 812	346
New Plymouth Borough Council v. Taranaki Electric Power Board	[1933] A.C. 680	299
New Zealand Shipping Company v. Societe des Ateliers et Chantiers de France	[1919] A.C. 1	194
Nicholls v. Ely Beet Sugar Factory	[1931] 2 Ch. 84	153
Norman, *In re. Ex parte* Board of Trade	[1893] 2 Q.B. 369	345
Norris v. Norris and Smith	87 L.J.P. 119; [1918] P. 128	447
North London and General Property Company, Limited v. Moy, Limited	[1917] 2 K.B. 617	403
North Pacific Lumber Co. v. Sayward	25 B.C. 322	421
Northern Counties v. Nathan	7 B.C. 136	251, 256

O

		PAGE
Oates' Case	10 St. Tri. 1079	410
Oatway v. Canadian Wheat Board	[1945] S.C.R. 204	443
Oldham, *In re.* Hadwen v. Myles	[1925] Ch. 75	79
Omichund v. Barker	Willes 538; 1 Atk. 21	374, 375, 376
O'Regan v. White	[1919] 2 I.R. 339	227
Ottawa Brick & Terra Cotta Co. v. Marsh	[1940] 2 D.L.R. 417	82
Otto and Another v. Bolton and Norris	52 T.L.R. 438	482, 490
Oxweld Acetylene Co. v. Oxyweld Co. of Canada Limited	53 O.L.R. 455	22

P

Paradis v. Regem	[1934] S.C.R. 165	519, 535
Parry v. Croydon Gas Co.	15 C.B. (N.S.) 568	89, 97
Parsons Produce Co. v. Given	5 B.C. 58	163
Paterson Steamships Ld. v. Canadian Co-operative Wheat Producers, Ld.	[1934] A.C. 538	265
Paul v. Dines	41 B.C. 49	83
Pawluk v. Northeastern Flour Mills Ltd.	[1941] 3 W.W.R. 1	547
Payne v. Rogers	2 H. Bl. 349; 126 E.R. 590	482
Pearks, Gunston & Tee Limited v. Richardson	[1902] 1 K.B. 91	503
Peebles v. Crosthwaite	13 T.L.R. 198	353, 355
Peterson v. Mann	[1942] 1 W.W.R. 705	83
Phelps v. City of London Corporation	[1916] 2 Ch. 255	189
Picariello *et al.* v. Regem	39 Can. C.C. 229	312
Pickup v. Thames Insurance Co.	3 Q.B.D. 594	465
Pincott v. Moorstons Limited	156 L.T. 139	357, 359
Pitre v. Regem	[1933] S.C.R. 69; 59 Can. C.C. 148	558, 559
Placatka v. Thompson	[1941] 1 W.W.R. 528	547
Pope Appliance Corporation v. Spanish River Mills, Ltd.	98 L.J.P.C. 50	226
Powell and Wife v. Streatham Manor Nursing Home	[1935] A.C. 243	228
Power v. Attorney-General for Nova Scotia	35 S.C.R. 182	325
v. Hughes	53 B.C. 64	482
Prat v. Hitchcock	36 B.C. 142	167, 172
Price v. Manning	42 Ch. D. 372	439
Priske v. Priske and Goldby	29 L.J.P. 195	448
Province of Bombay v. Municipal Corporation of Bombay	62 T.L.R. 643	419, 425
Provincial Board of Health for Ontario and City of Toronto	51 D.L.R. 444	502
Provincial Fisheries, *In re*	26 S.C.R. 444	152

Q

Queen, The v. Geering	18 L.J.M.C. 215	243
v. The City of London	Skin. 310	23
Quieting Titles Act, *In re* and *In re* The Hirst Estate Land Co.	59 B.C. 321	151, 153, 155, 156
Quilter v. Mapleson	9 Q.B.D. 672	346
Quinn v. Leathem	[1901] A.C. 495	202

R

R. v. Adams	36 Can. C.C. 180	115
v. Anderson	50 B.C. 225	243, 279, 282, 283, 289, 292, 293
v. Anderson	58 B.C. 88	517

PAGE

R. v. Armstrong . . . . [1922] 2 K.B. 555; 91 L.J.K.B. 904 . . . . . 243, 249
v. Armstrong . . . . 21 Cr. App. R. 115 . . . 115
v. Armstrong . . . . 59 Can. C.C. 172 . . 408, 416
v. Atkinson . . . . 24 Cr. App. R. 123 . . 412, 430
v. Bahrey . . . . . [1934] 1 W.W.R. 376 . . . 277
v. Bainbridge . . . . [1918] 62 O.L.R. 203 . . 45, 65
v. Ball (William Henry). Rex v. Edith Lilian Ball . . . . [1911] A.C. 47 . . 286, 287, 294
R. v. Barbour . . . . . [1938] S.C.R. 465 . . . 287
v. Barker . . . . . [1941] 3 All E.R. 33 . . . 517
v. Barry and Others . . . 4 F. & F. 389 518
v. Baskerville . . . . [1916] 2 K.B. 658 . . . 384
v. Blackman and Smith . . . 44 B.C. 115 . . . 113, 126
v. Board of Education . . . 79 L.J.K.B. 595 168
v. Bond . . . . . [1906] 2 K.B. 389 . . 284, 285
v. Bond . . . . . 68 Can. C.C. 1 107
v. Bowes . . . . . 15 Can. C.C. 326 . . . 381
v. Braddon and Speke . . . 9 St. Tri. 1127 377
v. Brice . . . . . 7 Man. L.R. 627 . . . 384
v. Broad . . . . . [1915] A.C. 1110 . . 387, 391
v. Brombrilla . . . . 22 Cr. App. R. 74 . . . 115
v. Brown . . . . . 49 Can. C.C. 37 433
v. Buck *et al.* . . . . 57 Can. C.C. 290 . . . 50
v. Burdett . . . . . 4 B. & Ald. 91; 106 E.R. 873 . . 312
v. Bush . . . . . 53 B.C. 252 . 185, 373, 518, 522, 537
v. Cameron . . . . . 2 Can. C.C. 173 . . 45, 47, 49, 53
v. Cameron . . . . . 4 Can. C.C. 385 384
v. Campbell . . . . . [1947] 1 D.L.R. 904 . . . 522
v. Carr-Briant . . . . . [1943] 2 All E.R. 156 . . . 97
v. Caskie . . . . . 31 B.C. 368 . . . 111, 558
v. Caskie . . . . . 35 B.C. 78 299
v. Cavasin . . . . . 60 B.C. 497 111
v. Charles King . . . . 9 Can. C.C. 426 277
v. Cheshire County Court Judge and United Society of Boilermakers. *Ex parte* Malone . . . . . 90 L.J.K.B. 772; [1921] 2 K.B. 694 . . . . . 163, 173
R. v. Chow Duck Yuet . . . 43 B.C. 152 . . . 126, 163
v. Clifton . . . . . [1945] 3 W.W.R. 480 . . 405, 406
v. Cohen . . . . . 26 O.L.R. 497 . . 54, 55, 65, 66, 67
v. Cohen and Bateman . . . 2 Cr. App. R. 197 . . 525, 526
v. Comba . . . . . [1938] O.R. 200; [1938] S.C.R. 396 . 417
v. Conlin . . . . . 1 Can. C.C. 41 406
v. Cruickshanks *et al.* . . . 63 B.C. 102 137
v. Cruikshanks . . . . 23 Can. C.C. 23 554
v. Cumyow . . . . . 36 B.C. 435 . . . 111, 141
v. Dale . . . . . 54 B.C. 134 . . . 307, 310
v. Davidson . . . . . 25 Cr. App. R. 21 . . . 277
v. Davies . . . . . 22 Cr. App. R. 33 . . . 184
v. Davis . . . . . 55 B.C. 552; 75 Can. C.C. 224 . 174, 177
v. Dawley . . . . . 58 B.C. 525 417
v. De Bortoli . . . . . 38 B.C. 388 . . . 435, 436
v. De Mesquito . . . . . 21 B.C. 524 381
v. Denyer . . . . . [1926] 2 K.B. 258 . . . 201
v. Desjardins . . . . . 45 Can. C.C. 100 . . 45, 47
v. Dibblee: *In re* Thompson . . 32 N.B.R. 242 503
v. Dickman . . . . . 5 Cr. App. R. 135 . . . 408
v. Dillabough . . . . . 60 B.C. 534 . . . 185, 518
v. Disano . . . . . 81 Can. C.C. 272 . . . 413
v. Doblanko . . . . . 86 Can. C.C. 284 . . . 431

		PAGE
R. v. Duncan	[1945] 3 D.L.R. 415	402
v. Dyson	[1908] 2 K.B. 456	523
v. East Teignmouth (Inhabitants)	1 B. & Ad. 244	556
v. Eldridge (George)	60 B.C. 315	131, 132, 133, 136, 137, 140, 141
v. Ellis	[1910] 2 K.B. 746	524
v. England	43 Can. C.C. 11	113
v. Essex Justices	96 L.J.K.B. 530	433, 434, 440
v. Eveleigh	54 B.C. 94	460
v. Exall	4 F. & F. 922; 176 E.R. 850	311
v. Farid	30 Cr. App. R. 168	526
v. Feeney	63 B.C. 131; [1946] 3 W.W.R. 163	214
v. Findlay	60 B.C. 481	311, 560
v. Finlay	43 Can. C.C. 62	115, 126
v. Fisher	[1910] 1 K.B. 149	524, 527
v. Fitzpatrick	32 B.C. 789; 40 Can. C.C. 75	174, 177
v. Flett	59 B.C. 25	185, 312, 410
v. Frampton	12 Cr. App. R. 202	431
v. Francis	1 Cr. App. R. 259	127
v. Francis and Barber	51 Can. C.C. 343	433
v. Frank MacTemple	64 Can. C.C. 18	408
v. Fraser	17 Cr. App. R. 182	46
v. Gibson	16 Cox, C.C. 181	521, 522
v. Gilling	12 Cr. App. R. 131	408
v. Gilson and Cohen	29 Cr. App. R. 174	437
v. Godwin	[1924] 2 D.L.R. 362	383
v. Golden	51 B.C. 236	393, 394
v. Gore	21 Cr. App. R. 175; 22 Cr. App. R. 129	115, 127
v. Goverluk	61 B.C. 261	42
v. Griffin	63 Can. C.C. 254	372
v. Guilbault	72 Can. C.C. 254	372
v. H.	[1931] 2 W.W.R. 917	164
v. Haddy	[1944] K.B. 442; 29 Cr. App. R. 182	185, 518, 526, 527
v. Hall (No. 1)	81 Can. C.C. 31	185
v. Hand	62 B.C. 359	457
v. Harris	34 Can. C.C. 129	373
v. Harris	20 Cr. App. R. 144	279, 411, 412, 413, 433
v. Henderson	81 Can. C.C. 132	414
v. Herron	36 Can. C.C. 398	103, 104
v. Hicks	44 Can. C.C. 13	115
v. Hirsch	42 Can. C.C. 153	104, 113, 121, 122, 126
v. Holmes	2 F. & F. 788	377, 378
v. Howard	6 Cr. App. R. 17	119
v. Imperial Tobacco Co.	[1939] 3 W.W.R. 577; [1940] 1 D.L.R. 148	45, 46, 61
v. J.	52 Can. C.C. 72	408
v. James	61 B.C. 161	185, 186, 518, 532, 537
v. Jenkins	14 B.C. 61	313
v. Jing Foo	54 B.C. 202	384
v. Johnson and Creanza	62 B.C. 199	457
v. Jones	19 Cr. App. R. 40	384
v. Jones (William)	[1929] 1 K.B. 211	119
v. Jung Quon Chong	52 B.C. 316	113, 127
v. Kadishevitz	61 Can. C.C. 193	412
v. Kelly	27 Can. C.C. 282	529
v. Kerr	29 B.C. 522	135
v. Kerr *et al.*	53 O.L.R. 228	45, 55, 56, 61
v. Kirkham	50 B.C. 197	108

		PAGE
R. v. Kishen Singh	56 B.C. 282	49
v. Kolberg	51 B.C. 535	174, 175, 176
v. Labourdette	13 B.C. 443	58
v. Lake	28 Can. C.C. 138	408
v. Lang (Unreported)		530
v. Laurin (No. 5)	6 Can. C.C. 135	433
v. Ledrew and Gouthro	83 Can. C.C. 28	429, 433, 434
v. Lee Fong Shee	47 B.C. 205	521
v. Lew	17 B.C. 77	408, 416
v. Lewis	26 Cr. App. R. 110	184
v. Lewis	57 B.C. 83	74, 346
v. Loftus	45 Can. C.C. 390	45, 47, 54, 55
v. Logan and Inglee	62 B.C. 357; [1946] 1 W.W.R. 431	185, 296
v. Loxdale	1 Burr. 445	556
v. Lyons	60 B.C. 250	287
v. McCarthy	57 B.C. 155	431, 438
v. McCathern	48 Can. C.C. 54	114
v. McDonald	16 B.C. 191	398
v. MacDonald	[1939] 4 D.L.R. 60	184
v. McIntosh	52 B.C. 249	413
v. McKechnie	83 Can. C.C. 189	144, 121, 127
v. MacKenzie	85 Can. C.C. 233	116
v. Mackie	60 B.C. 293	114, 127
v. McKinnon	56 B.C. 186	313
v. McLane. Rex v. Noon	38 B.C. 306	558, 560
v. McLeod	55 B.C. 439	50
v. McNab	61 B.C. 74; [1945] 1 W.W.R. 228	45, 50, 52, 310
v. McQuarrie	[1944] 1 W.W.R. 33	312
v. Madill (No. 2)	[1943] 1 W.W.R. 370	61
v. Malina	62 B.C. 532	457
v. Mandzuk	62 B.C. 16	286, 382, 383, 415
v. Marsham	[1912] 2 K.B. 362	522
v. Martin	60 B.C. 554	136, 137, 138, 141
v. Mason	63 Can. C.C. 97	399
v. May	21 B.C. 23	439
v. Mazerall	[1946] 4 D.L.R. 336	517
v. Mellichamp	16 Cr. App. R. 83	408
v. Meyrick and Ribuffi	21 Cr. App. R. 94	517, 535
v. Miller	55 B.C. 121	517, 520, 522, 535, 537
v. Mohamed Farid	30 Cr. App. R. 168	184
v. Morgan	22 Cr. App. R. 177	115
v. Moscovitch	18 Cr. App. R. 37	373
v. Mouers	34 Can. C.C. 287	532
v. Munroe	44 B.C. 481	436
v. Nerlich	34 O.L.R. 298	518
v. Newell	77 Can. C.C. 81	429, 435
v. Noon	38 B.C. 306	558, 560
v. Nowell	54 B.C. 165	183, 185, 186, 187
v. O'Brien	7 Cr. App. R. 29	558, 559
v. O'Brien	[1918] 3 W.W.R. 848	456
v. O'Donnell	12 Cr. App. R. 219	437
v. Oldaker	52 Can. C.C. 318	107
v. O'Leary	59 B.C. 440	186, 188
v. O'Malley	[1943] 1 W.W.R. 127	45
v. Orford (Charles T.)	[1943] S.C.R. 103	131
v. Ortynsky	[1927] 1 W.W.R. 957	518
v. Pais	56 B.C. 232	382
v. Parker	6 Cr. App. R. 285	408

		PAGE
R. v. Pawlett	40 Can. C.C. 312	417
v. Penney	60 B.C. 348	243, 249, 284
v. Picariello and Lassandra	39 Can. C.C. 1	533
v. Pomeroy	51 B.C. 161	174, 175, 176
v. Pulak, *In re*	[1939] 2 W.W.R. 219	504
v. Quinn and others	19 Cox, C.C. 78	517
v. Reardon	[1945] O.R. 85	382
v. Reeves	57 B.C. 90	384
v. Rhodes	[1899] 1 Q.B. 77	294
v. Rossignol and Roy	40 Can. C.C. 253	131
v. Sankey	38 B.C. 361	381
v. Santiago Mines Limited	63 B.C. 87; [1946] 3 W.W.R. 129	557
v. Seabrooke	[1932] O.R. 575	383
v. Shellaker	[1914] 1 K.B. 414	287
v. Shumarin	[1928] 1 W.W.R. 300	138, 139
v. Silverstone	44 Can. C.C. 335	109, 114, 121, 127
v. Sims	62 T.L.R. 431	249
v. Smart	61 B.C. 321	312
v. Smith	1 M. & Rob. 256	135
v. Smith (George Joseph)	84 L.J.K.B. 2153	287
v. Smith	23 B.C. 197	89
v. Smith (Clarence F.)	66 O.L.R. 244	43
v. Smith	52 Can. C.C. 193	279, 408
v. Smith	[1925] 2 K.B. 144	163
v. Soames	33 O.W.N. 207	114
v. Somers	1 Can. C.C. 46	65
v. Southern	22 Cr. App. R. 6	373
v. Spain	28 Can. C.C. 113	530
v. Sparks	18 B.C. 116	504
v. Spratling	[1911] 1 K.B. 77	459
v. Steele	33 B.C. 197	280
v. Stewart	71 Can. C.C. 206	384
v. Stoddart	2 Cr. App. R. 217	435, 524
v. Stone and McLean	81 Can. C.C. 237	429, 434
v. Surgenor	27 Cr. App. R. 175	272, 373
v. Sussex Justices	93 L.J.K.B. 129	433, 434
v. Sutherland	59 B.C. 159	396, 400
v. Switzki	54 Can. C.C. 332	122
v. Teal and Others	11 East 307; 103 E.R. 1022	410, 412
v. The Army and Navy Veterans in Canada	30 B.C. 248	252
R. v. Theriault	11 B.C. 117	296
v. Thompson	[1917] 2 K.B. 630	293
v. Volpatti	[1919] 1 W.W.R. 358	558
v. Wah Sing Chow	38 B.C. 491	309
v. Wallace	24 Can. C.C. 95	45, 58
v. Watson	2 Stark. 116	417
v. Weedmark	50 Can. C.C. 443	114
v. Weir (No. 3)	3 Can. C.C. 262	53
v. Weir (No. 5)	3 Can. C.C. 499	45, 47
v. Toronto Railway Co.	2 Can. C.C. 471	500, 503
v. Travener and Tobitt	21 Cr. App. R. 63	408
v. Welch and Ackerman	63 B.C. 183; [1946] 3 W.W.R. 655	536
v. Wheatly	2 Burr. 1125	58
v. Whelan	4 Can. C.C. 277	554
v. White	17 Cr. App. R. 60	433
v. Whitehouse	55 B.C. 420	184
v. Wicks	[1946] 2 All E.R. 529	556
v. Wigman	25 B.C. 350	456, 457, 459
v. Williams	7 Car. & P. 320	376, 377

		PAGE
R. v. Williams	49 B.C. 379	184, 185, 187
v. Wood	22 Cr. App. R. 53, 128	115, 127
v. Wyatt	[1904] 1 K.B. 188	294
v. Wyatt	60 B.C. 255	50
v. Yates	62 B.C. 307	414
v. Yeaman	33 B.C. 390	45
v. Zarelli	43 B.C. 502	111
v. Zimmerman	37 B.C. 277	115
ex rel. Kingston v. Sutcliffe	59 Can. C.C. 108	554
Radley v. London & North Western Rail. Co.	46 L.J. Ex. 573	84
Ray v. Ruby Hou	39 B.C. 128	353
Read v. Brown	22 Q.B.D. 128	163
Reid v. Regem	[1943] 2 D.L.R. 786	518
Rickard v. Ramsay	[1936] S.C.R. 302	546, 547, 550
River Weir Commissioners v. Adamson	47 L.J.Q.B. 193	365
Robbins v. Jones	15 C.B. (N.S.) 221	482
v. National Trust Co.	[1927] A.C. 515	542
Roberts v. Havelock	3 B. & Ad. 404	10
Robey v. Snaefell Mining Company	[1904] 2 K.B. 685	404
Robinson v. Kilvert	41 Ch. D. 88	189
v. State of South Australia [No. 2]	[1931] A.C. 704	542
v. Sunderland Corporation	[1899] 1 Q.B. 751	46
Rochefoucauld v. Boustead	[1897] 1 Ch. 196	232, 236, 238, 240, 426
Rogers and McFarland, *Re*	19 O.L.R. 622	421
Rose v. Peterkin	13 S.C.R. 677	232
Rosebery Surprise Mining Co. v. Workmen's Compensation Board	28 B.C. 284	560
Royal Bank v. Fullerton	17 B.C. 11	72, 163
Trust Company, The v. Toronto Transportation Commission	[1935] S.C.R. 671	86
Rubinstein v. Malkin	[1937] 3 W.W.R. 529	82
Rudlen v. Bridgeman	[1930] 3 D.L.R. 224	466, 472
Rundle v. Hearle	[1898] 2 Q.B. 83	482
Rural Municipality of Dundurn v. Short	[1939] 3 W.W.R. 523	346
Russell v. Beecham	[1924] 1 K.B. 525	353
v. Russell	[1924] A.C. 687	343, 344

S

St. Anne's Well Brewery Company v. Roberts and Others	44 T.L.R. 603	486
Salayka and Hains v. Wilby	60 B.C. 407	192
Sanders v. Sanders	19 Ch. D. 373	152
Sanderson v. Mayor of Berwick on Tweed	13 Q.B.D. 547	189
Sankey v. Regem	48 Can. C.C. 97; [1927] S.C.R. 436	372, 373, 379
Sapiro v. Leader Pub. Co. Ltd., Sapiro v. Star Pub. Co. (Saskatoon) Ltd.	[1926] 2 W.W.R. 268	29, 243
Scammell v. Ouston	[1941] 1 All E.R. 14	227
Schmidt v. Regem	[1945] S.C.R. 438	184, 185, 186, 518, 529, 536
Schoales, *In re.* Schoales v. Schoales	[1930] 2 Ch. 75	324, 326, 338
Schram v. Kearns	[1941] 2 W.W.R. 177	546
Schuberg v. Local No. 118, International Alliance Theatrical Stage Employees	37 B.C. 284	506, 508
Schweppes, Limited, *In re*	[1914] 1 Ch. 322	89
Scott v. Scott	28 T.L.R. 127	455
v. Scott	[1913] A.C. 417	454
Scovil v. Lewis	37 B.C. 241	72
Seattle Construction and Dry Dock Co. v. Grant Smith & Co.	26 B.C. 560	316

		PAGE
Seiden v. Pinkerton	31 O.W.N. 325	546, 550
Shannon v. Corporation of Point Grey	30 B.C. 136; 63 S.C.R. 557	301
Sharpe v. Wakefield	60 L.J.M.C. 73	164
Shaw v. Masson	[1923] S.C.R. 187	227
Shepheard v. Broome	[1904] A.C. 342	421
Sherlock v. Powell	26 A.R. 407	2
Shirvell v. Hackwood Estates	[1938] 2 All E.R. 1	482
Simons v. Winslade	[1938] 3 All E.R. 774	466
Simpson v. The Palace Theatre Limited	69 L.T. 70	89
Western Ltd. (Robt.) v. Goldman	[1936] 3 W.W.R. 429	82
Sinclair v. Bowles	9 B. & C. 92	6
Skelding v. Daly	57 B.C. 121	410
Skinner v. Farquharson	32 S.C.R. 58, at p. 78	67, 69
Skinner's Company v. Irish Society	1 Myl. & Cr. 162	252, 254
Smith v. Smith	94 L.J.K.B. 813; [1925] 2 K.B. 144	163, 165, 166, 167, 172
v. Smith and Reed	[1922] P. 1	448
v. Swaffield	[1941] 3 W.W.R. 807	82
et al. v. Stubbert	57 B.C. 328	6, 7, 11, 83
, Hogg & Co. v. Black Sea and Baltic General Insurance Co.	[1940] A.C. 997	273
Snyder v. Minnedosa	5 W.W.R. 151	163
Society Brand Clothes Ltd. v. Amalgamated Clothing Workers of America	[1931] S.C.R. 321; [1931] 3 D.L.R. 361	502, 510
South African Supply and Cold Storage Company, *In re.* Wild v. Same Company	[1904] 2 Ch. 268	89, 90, 94, 96
Sorrell v. Smith	[1925] A.C. 700	202
Soward v. Leggatt	7 Car. & P. 613	465
Spencerley v. De Willott	7 East 108	249
Speton v. Gilmour	14 Man. L.R. 706	163
Spicer v. Martin	14 App. Cas. 12	190
Spottiswoode, Ballantyne & Co. v. Doreen Appliances, Ld.	[1942] 2 K.B. 32	227
Springett v. Ball	4 F. & F. 472	84
S.S. Eurana v. Burrard Inlet Tunnel and Bridge Co.	[1931] A.C. 300	303
Stancliffe & Co. (C. W.) v. City of Vancouver	18 B.C. 629	83
Star v. White	9 B.C. 9	371
Steele v. Regem	42 Can. C.C. 375	381
Stening v. Abrahams	[1931] 1 Ch. 470	353
Stephen *et al.* v. Stewart *et al.*	59 B.C. 410	499
Stirland v. Director of Public Prosecutions	[1944] A.C. 315	185, 186, 526, 527, 529, 536
Stone v. Brooks	3 O.W.N. 527	346
v. Hoskins	[1905] P. 194	79
v. S.S. "Rochepoint"	30 B.C. 113	314
Stooke v. Taylor	5 Q.B.D. 569	72
Stradling v. Morgan	1 Plowd. 199; 75 E.R. 305	51, 100
Stribling v. Halse	16 Q.B.D. 246	135
Stussi v. Brown	5 B.C. 380; 1 M.M.C. 195	421
Sullivan *et al.* v. Dworchuk	[1933] O.W.N. 186	386
Sunder Singh v. McRae	31 B.C. 67	346
Sutherland v. Stopes	94 L.J.K.B. 166; [1925] A.C. 47	242, 247
Sutton v. Bootle Corporation	[1947] K.B. 359	489
Swain v. Mizner	74 Mass. 182	134, 135
Swartz v. Wills	[1935] S.C.R. 628	82, 386, 553
Sweeney v. Coote	[1907] A.C. 221	518
Sykes v. One Big Union	[1934] 1 W.W.R. 655	502
Symonds v. Clark Fruit and Produce Co.	26 B.C. 548	162

T

		PAGE
Taff Vale Railway v. Amalgamated Society of Railway Servants	[1901] A.C. 426; 70 L.J.K.B. 219, 905	502, 505, 508, 509, 510
Tait v. B.C. Electric Rway. Co.	54 S.C.R. 76	166
Tate v. Hennessey	8 B.C. 220	251, 255, 256
Taylor v. Caldwell	32 L.J.Q.B. 164	357
v. People's Loan & Savings Corp.	[1930] S.C.R. 190	489
v. The Vancouver General Hospital *et al.*	62 B.C. 42, 79	250, 252, 257, 261
Taylor Hardware Co. v. Hunt	39 O.L.R. 85	12
Teagle v. Teagle and Nottingham	27 L.J.P. 55	447, 448
Tebb v. Cave	[1900] 1 Ch. 642	189
Terainshi v. Canadian Pacific Ry. Co.	25 B.C. 497	482, 488
Thiffault v. Regem	[1933] S.C.R. 509; 60 Can. C.C. 97	383, 529
Thompson v. Lacy	3 B. & Ald. 283	192
v. McCaig	[1938] 2 W.W.R. 15	82
(James) & Sons v. Denny	25 B.C. 29	444
v. Regem	[1918] A.C. 221	283, 287
Thomson Groceries Ltd. v. Scott	[1943] 3 D.L.R. 25	228
Thornton v. Howe	31 Beav. 14	332
Tiderington, *In re*	17 B.C. 81	314
Tobin v. Commercial Investment Co.	22 B.C. 481	165
Todd v. Flight	9 C.B. (N.S.) 377; 142 E.R. 148	485, 486
Totem Steam Navigation Co. v. Inland Revenue Commissioners	[1941] 2 K.B. 194	554
Tottenham Local Board of Health, The v. The Lea Conservancy Board	2 T.L.R. 410	163
Town of Brockville v. Dobbie and Ritchie	64 O.L.R. 75	354
Township of York and Township of North York, *Re*	57 O.L.R. 644	421
Travers v. Gloucester Corporation	[1946] 2 All E.R. 506	482, 490
Tremblay v. Beaumont	[1946] 3 D.L.R. 514	233
Triangle Storage Ltd. v. Porter	56 B.C. 422	2, 316
Trower & Sons Ltd. v. Ripstein	[1944] 4 D.L.R. 497	163
Tuff v. Warman	27 L.J.C.P. 322	84
Turner v. Robinson	5 B. & Ad. 789	6
Turner's Dairy Ltd. *et al.* v. Williams *et al.*	55 B.C. 81	502
Tuxedo Holding Co., Ltd. v. University of Manitoba	[1930] 1 W.W.R. 464	421

U

United Mine Workers v. Coronado Co.	259 N.S. 344	506
States v. Luce	141 Fed. 385	554
Steel Workers of America, Local 1005 v. Steel Co. of Canada Ltd.	[1944] 2 D.L.R. 583	503, 506

V

Valin v. Langlois	3 S.C.R. 1	51
Van Snellenberg, Jr. v. Cemco Electrical Manufacturing Co. Ltd.	61 B.C. 507	463
Vegelahn v. Guntner	167 Mass. 92	201
Venables v. Venables and Wheeler	32 T.L.R. 330	446
Victoria City (Corporation) v. Bishop of Vancouver Island	90 L.J.P.C. 213; [1921] 2 A.C. 384	166, 365, 366
Vigeant v. Regem	[1930] S.C.R. 396	184, 528
Vigers v. Cook	88 L.J.K.B. 1132	7
Viney v. B.C. Electric Ry. Co.	31 B.C. 434	72

W

		PAGE
Wagner v. International Ry. Co.	232 N.Y. 176; 133 N.E. 437	470
Wakelin v London and South Western Railway Co.	12 App. Cas. 41	465
Walker v. Regem	[1939] S.C.R. 214	517
Wall v. London and Northern Assets Corporation, Lim.	67 L.J. Ch. 596	252
Wallace v. Hesslein	29 S.C.R. 171	227
Wallis v. Solicitor General for New Zealand	72 L.J.P.C. 37; [1903] A.C. 173	325, 341
Walton v. Biggs	19 W.L.R. 895	189
Ware and De Freville, Ld. v. Motor Trade Association	[1921] 3 K.B. 40	201, 202
Washington and Great Northern Townsite Co., The v. Holbrook	33 B.C. 388	160
Watson v. Girardi, Girardi and Calabrigo	62 B.C. 406	426
v. Howard	34 B.C. 449	560
Watt v. Barnett	3 Q.B.D. 183, 363	72, 75
Wedgwood, *In re.* Allen v. Wedgwood	[1915] 1 Ch. 113	258
Welch v. Kracovsky	27 B.C. 170	134
Wells v. Petty	5 B.C. 353	232, 238
Welsh v. Roe	87 L.J.K.B. 520	346
West v. Gwynne	[1911] 2 Ch. 1	346
Wheatley v. Ellis and Hendrickson	61 B.C. 55	250, 252, 254, 255, 256, 257, 260
Wheeler v. Keeble (1914), Ld.	[1920] 1 Ch. 57	163
v. United States	159 U.S. 523	379
White's Case	1 Leach, C.C. 430	375
White, *In re.* White v. White	[1893] 2 Ch. 41	326, 332, 338
Whitehead v. City of North Vancouver	53 B.C. 572	466
Whitten v. Burtwell	47 O.L.R. 210	546
Williams, *In re*	8 Chy. App. 690	135
v. Eady	10 T.L.R. 41	550
Wilson, *In re.* Twentyman v. Simpson	[1913] 1 Ch. 314	327
v. Rastall	4 Term Rep. 753	163
v. Rebotoy	[1930] 1 D.L.R. 273	546, 550
Wingfield and Wife v. Jenkinson	1 T.L.R. 102	466
Winnipeg Electric Co. v. Geel	[1932] 4 D.L.R. 51	465
Ry. Co. v. Wald	41 S.C.R. 431	546
Witt v. David Spencer Ltd.	50 B.C. 35	466
Wood and Fraser v. Paget	53 B.C. 125	82
Woods v. Forsyth	25 B.C. 427	163
v. Opsal	[1918] 1 W.W.R. 985	191
Woodstock Electric Light Co., *Ex parte*	34 N.B.R. 460	503
Woolmington v. The Director of Public Prosecutions	[1935] A.C. 462; 104 L.J.K.B. 433	276, 282, 525, 526
Wright, *Re*	[1938] O.W.N. 136	323
Wringe v. Cohen	[1940] 1 K.B. 229	486

Y

Young, *Re*	9 O.W.R. 566	323
& Co. v. Liverpool Assessment Committee	[1911] 2 K.B. 195	353
Young (J. L.) Manufacturing Company, Limited, *In re*	69 L.J. Ch. 868	255
Young et *al.* v. Robertson *et al.*	4 Macq. H.L. 314	327
Yuill v. Yuill	[1945] P. 15; [1945] 1 All E.R. 183	4, 437

Z

Zachariah v. Morrow	34 N.Z.L.R. 893	153
Zellinsky v. Rant	37 B.C. 119	226

"LAND REGISTRY ACT"

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that, pursuant to section 254 of the "Land Registry Act," being chapter 140 of the "Revised Statutes of British Columbia, 1936," fees be established in respect of the following items in the Second Schedule of the Act, in place of the fees therein set out, namely:—

Item 1	$1.00
Item 2	2.00
Item 3	2.00
Item 4	2.00
Item 9	2.00
Item 12	3.00
Item 14	2.50
Item 25	1.00
Item 29	4.00
Item 42	4.00
Item 46	3.00
Item 49	2.50

That the scale of fees as herein provided do take effect on the 2nd day of July, 1948.

G. S. WISMER,
Attorney-General.

Attorney-General's Department,
Victoria, B. C., May 28th, 1948.

"COURT RULES OF PRACTICE ACT."

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that, under authority of "Court Rules of Practice Act," being chapter 249 of the "Revised Statutes of British Columbia, 1936," and all other powers thereunto enabling, Schedule No. 3 of Appendix M of the "Supreme Court Rules, 1943," be repealed, and the following substituted:—

SCHEDULE No. 3.

FEES PAYABLE TO THE CROWN.

(Unless otherwise provided by Statute.)

	WRITS, ETC.	
1.	Writ of summons	$4.00
	Any other writ or renewed writ, or any citation or warning or similar document	2.00
	APPEARANCE.	
2.	Entering and filing any memorandum	2.00
	For each defendant after the first	.50
	INTERLOCUTORY, ETC.	
3.	Every application in Chambers, whether by summons, motion, notice, petition, originating summons, or otherwise, including filing or setting down	1.00
	ORDERS, JUDGMENTS, ETC.	
4.	Judge's order, including entry	1.00
	Judgment of Court order, including entry	2.00
5.	Fiat	.50
6.	Judgment by default or under Order XIV, or other formal judgment, including entry	2.00
	PAYMENT IN AND OUT.	
7.	Payment of money into Court	2.00
8.	Payment of money out of Court	2.00
	(No fee to be charged upon payment into Court by garnishee under garnishee order.)	
	EXAMINATIONS, REFERENCES, REPORTS, ETC.	
9.	Reference, inquiry, examination, or other special matter referred to the Registrar, for every sitting not exceeding one hour (except on taxation of costs)	2.00
	For every additional hour or part thereof	2.00
10.	Report by Registrar	2.00
	If over three folios and prepared in Registrar's office, per folio in addition	.20
	Or if prepared by solicitor, per folio in addition	.10
	SEARCH.	
11.	Searching document in any cause or matter	.25
12.	General search in any one cause	.50

13.	Certificate of search, including search fee	1.50
14.	Certificate of search in reply by mail, including search fee	2.00

WITNESSES.

15	Commission for examination of witnesses	2.00
16.	Subpœna	.50

TRIAL, APPEAL, ETC.

17.	Entry of record for trial or assessment of damages or argument or other hearing in Court	2.00
18.	Hearing fee on appeal or trial or assessment of damages or argument on point of law, for the first day or portion thereof (to be paid before the trial or hearing is proceeded with)	5.00
19.	For every hour or part thereof after the first day	1.00
20.	Deposit to be made with the Registrar before trial or hearing is proceeded with on each subsequent day (Refund, if any, to be made by the Registrar.)	5.00
21.	Bill of costs under $25 as presented for taxation	.50
	Bill of costs over $25 and under $50 as presented for taxation	1.00
	Bill of costs over $50 and under $100 as presented for taxation	1.50
	Bill of costs over $100 as presented for taxation	2.00
	Per hour after the first	2.00
22.	Allocatur, if required	1.00
23.	Entering satisfaction on record and filing satisfaction piece, including any necessary search	1.00
24.	Entry of appeal	5.00

DIVORCE FEES

25.	Petition	3.00
	Affidavit in support	.10
	Sealed copy of petition	.50
	Sealed copy of notice to appear	.50
26.	Deposit to apply on cost of transcript and fee for entry of decree (to be paid before the trial or hearing is proceeded with), subject to refund by the Registrar upon entering the decree or upon the dismissal of the petition of such portion thereof as is not required)	25.00
27.	Petition for alimony or maintenance	2.00
28.	Certificate of pleadings and proceedings under Rule 30 (*a*) of the Divorce Rules	2.00

ADOPTION FEES.

29.	Deposit to apply on cost of all adoption proceedings, including fee on filing petition and material in support and entry of adoption order, subject to refund by the Registrar upon entering the adoption order or upon the dismissal of the petition or such portion thereof as is not required	15.00

PROBATE FEES.

30.	Issuing probate, letters of administration, letters with will annexed, sealing under "Probates Recognition Act"	2.00
	Certified copies of above	1.00
	And if over six folios and prepared in Registrar's office, per folio in addition	.10
	Or if prepared by solicitor	.05
31.	Filing caveat and forwarding certified copies thereof to other Registries	5.00
	If copies prepared by solicitor	1.00
	If copies prepared in Registrar's office, per folio in addition	.10

WINDING-UP FEES.

32.	For presenting every petition	5.00
	And other fees according to fees in this Tariff for corresponding proceedings in the Supreme Court.	

MISCELLANEOUS

33.	Affidavit, affirmation, etc., taken before the Registrar	.50
34.	Amending every writ or other proceeding	.50
35.	Any necessary certificate	1.00
	If over three folios, when prepared in Registrar's office, per folio in addition	.10
	Or when prepared by solicitor	.05
36.	Filing every affidavit, writ, or other proceeding	.10
37.	Office copies, if prepared in Registrar's office, per folio	.20
	If prepared by solicitor, per folio	.10
38.	Seal of the Court to any document not herein specified, in addition to any other charges	1.00
	NOTE.—The above several charges shall include the filing of præcipes whenever they are required.	

39. And where any of the above fees are payable in respect of any matter or thing to be done by any officer, or in any office of the Supreme Court, and it shall not have been customary or may not be necessary to use any præcipe, document, or paper in reference to such matter or thing whereon the stamp could be fixed, the party, or his solicitor, requiring such matter or thing to be done shall make application for same by a præcipe, or short note in writing or print, and a stamp denoting the amount of the fees so payable shall be stamped or affixed to such præcipe or note.

And that the repeal and substitution be effective on and from the 1st day of October, 1948.

G. S. WISMER,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., August 31st, 1948.

AMENDMENTS TO TARIFF OF COSTS APPROVED BY JUDGES OF THE SUPREME COURT, JULY 15th, 1920, AND BEING APPENDIX M TO THE RULES OF THE SUPREME COURT OF BRITISH COLUMBIA.

Appendix M to the Rules of the Supreme Court of British Columbia, 1943, being the tariff of costs approved by the Judges of the Supreme Court on the 15th day of July, 1920, is amended:—

1. By striking out the words "in all . . . fee" following Item 42 of Schedule 5.

2. By striking out Items 52 to 66, inclusive, in Schedule 5 and inserting the following:—

"52. All services rendered in probate and administration matters, actions, causes, or proceedings, whether contentious or not, shall, save as herein otherwise provided, be taxed and allowed in accordance with Schedules 4 and 5 hereof.

"53. In lieu of fees allowed under Item 52, the following fees or charges, exclusive of disbursements, may be charged, and if charged, shall, subject to the provisions hereinafter contained, be allowed for all necessary services to obtain a grant of letters probate or of administration, preparation and filing of probate and succession duty forms or similar statements or affidavits for the Province of British Columbia and the Dominion of Canada, and settling all duties assessed by the said Province and Dominion (not including any application to a Judge or the Court or other Court proceedings in respect of such duties) and, where necessary, all process and proceedings relating to the passing of the first accounts of the executor or administrator:—

"For any estate of which the aggregate value exceeds $400 but does not exceed $500,000, 2 per cent. of such value, with a minimum of $50;

"For any estate of which the aggregate value exceeds $500,000, the above fee on the first $500,000 plus 1 per cent. of the amount by which such aggregate value exceeds the sum of $500,000.

"54. In all cases of resealing in British Columbia, grants of letters probate or administration or similar proceedings, the fees set out in Items 52 or 53 may be allowed, but the aggregate value

of the estate shall be the aggregate value of that portion of the estate situate within British Columbia.

"55. Aggregate value of an estate shall be deemed to include the value of all real and personal property or interest therein passing or accruing to any person upon the death of the deceased by operation of law or otherwise, and to include the value of any life insurance payable as a consequence of the death of the deceased other than life insurance payable to a person who is neither the personal representative of the deceased nor a beneficiary of the estate."

3. By striking out Schedule 6, including the words following Item 9, and inserting in the place thereof the following:—

"SCALE OF CONVEYANCING FEES.

"1. For ordinary conveyance or mortgage or agreement for sale, including searching title, checking taxes, water rates and fire insurance, preparation and execution of conveyance, mortgage, or agreement for sale, settling adjustments, drawing application to register and attending to register:—

"One per cent. on the first $2,500 on the purchase money or money advanced on mortgage, with a minimum of $15;

"One-half of 1 per cent. on the next $47,500;

"One-quarter of 1 per cent. on any amount over $50,000.

"2. If the conveyance or mortgage contains special covenants, then in addition to the above fees:—

"(*a*) Drawing, per folio..... $0.30

"(*b*) Engrossing, per folio..... .15

"(*c*) Fee to counsel to settle..... 25.00

"Provided that the fee for an ordinary conveyance pursuant to a registered agreement for sale shall be one-half the fees provided by Item 1.

"And provided further that where the purchase of property is carried out by a conveyance and the taking back of a mortgage to secure the balance of the purchase price, the fees shall be based on the total purchase price and shall be one and one-half times the fees provided by Item 1.

"3. Procuration fee when a loan is negotiated by a solicitor:—

"One-half of 1 per cent. up to $10,000; and

"One-quarter of 1 per cent. for any amount beyond $10,000.

"4. Perusing title deeds and documents, per folio, 30 cents.

"5. All attendances and journeys not provided for in this Schedule shall be taxed and allowed in accordance with Items 22 to 31 of Schedule 5.

"There may be included in any bill to which Schedule 4, 5 or 6 of this tariff is applicable, and if included shall be allowed by the Registrar, a further allowance equal to 25 per cent. of the said bill exclusive of actual disbursements: Provided that nothing herein contained shall increase the minimum fees as fixed by Item 53 of Schedule 5 and the fees fixed by Items 1 to 3 of Schedule 6.

"The Registrar shall have power:—

"(*a*) To allow such fees or make such allowances as he may deem reasonable and proper for any services which are not covered by or included in any of the items in the said Schedules 4, 5, and 6:

"(b) The Registrar shall have power (if the special circumstances warrant) to increase or reduce the fees or any of them hereinbefore provided for.

"The findings of the Registrar under the power hereinbefore provided for shall be subject to review by a Judge as if it had come before him in the first instance."

The foregoing amendments shall apply to all taxations held on or after the 15th day of May, 1948, and shall extend to all costs subject to taxation which have been incurred prior to that date and which shall not have been theretofore taxed.

Dated at Vancouver, British Columbia, this 25th day of February, A.D. 1948.

W. B. FARRIS, C.J.
A. M. MANSON, J.
J. M. COADY, J.
A. D. MACFARLANE, J.
J. O. WILSON, J.
H. S. WOOD, J.
N. W. WHITTAKER, J.

"SUPREME COURT ACT."

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that, pursuant to sections 65 and 76 of the "Supreme Court Act," and all other powers thereunto enabling, the following rules relating to fees chargeable by official stenographers and deputy official stenographers for transcripts and other matters be made Rules of Court:—

1. An official stenographer or deputy official stenographer be entitled to charge for transcripts of evidence or of other proceedings in Court or Chambers the following rates:—

(*a.*) To the party ordering the transcript, at the rate of 50 cents a page of three folios of 100 words each, or where less than a page at the rate of 17 cents a folio; such rates to cover the cost of the original transcript filed in Court and one copy to the party ordering same.

(*b.*) For all other copies, at the rate of 10 cents a folio.

2. For attendance at examinations or references, an official stenographer or deputy official stenographer shall be entitled to charge the party requiring the attendance of the stenographer at the rate of $2 an hour for the first hour or any part thereof, and $1.50 for each subsequent hour or part thereof.

3. The above fees for transcripts and attendances shall supersede the fees heretofore charged for these services.

4. The transcript fees allowed by Rule 1 of these rules shall not apply to the Crown in right of the Province, which shall continue to pay for transcripts at the rates heretofore prevailing.

G. S. WISMER,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., February 27th, 1947.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

HOLLISTON v. ZALUSKI *ET AL.*

C. A.

1946

May 21; *June* 26.

Building contract—Work contracted for completed but in a negligent or improper manner—Contractor may recover contract price less sum necessary to complete work as specified.

Zaluski and his wife let a contract to Holmes for the construction of a dwelling-house with written specifications. Holmes verbally employed the plaintiff to do the interior plastering and exterior stucco work on the house, but said nothing about specifications. The plaintiff completed the work and rendered a bill which included $325 for stucco work. Zaluski found fault with the stucco work under the terms of the contract and specifications and Holmes withheld payment of $300, but paid the balance of the bill. The plaintiff brought action claiming a mechanic's lien against the lands and premises for $300 and to recover that sum from Holmes. It was held on the trial that the stucco work was not done in a workmanlike manner nor according to specifications in that cracks had developed in the stucco work and the action was dismissed.

Held, on appeal, reversing the decision of SHANDLEY, Co. J. (O'HALLORAN, J.A. dissenting), that in a case such as this where the plaintiff did the work called for but some of it was done in a negligent or improper manner, he is entitled to judgment against Holmes for the balance of the contract price less a deduction in a sum necessary to complete the

C. A.
1946

HOLLISTON
v.
ZALUSKI
ET AL.

work in a proper and workmanlike manner and to a lien for the balance due less the sum required to pay to have the work set right.

APPEAL by plaintiff from the decision of SHANDLEY, Co. J. of the 25th of February, 1946. The defendant Holmes entered into a contract in writing with the defendants Paul and Mary Zaluski for the erection of a dwelling-house according to written specifications. Holmes sub-let the interior plastering and exterior stucco work to the plaintiff. On completion of the sub-contract the plaintiff sued for a balance of $300 due on the sub-contract and for a declaration that he was entitled to a mechanic's lien on the property. The action was dismissed. The facts are set out in the reasons for judgment.

The appeal was argued at Vancouver on the 21st of May, 1946, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Clearihue, K.C., for appellant: When done in a workmanlike manner the builder is entitled to recover: see *H. Dakin & Co., Limited* v. *Lee,* [1916] 1 K.B. 566; *Modern Construction Co.* v. *Shaw* (1923), 35 B.C. 331. He should receive the amount agreed upon less the cost of replacing the defective work: see *Hutchinson* v. *Mathias,* [1943] 1 W.W.R. 451; *Derkach* v. *Lachowicz,* [1944] O.W.N. 549; *Carlson* v. *Smilak* (1913), 27 W.L.R. 187; *Mattinson* v. *Hewson* (1909), 43 N.S.R. 339, at p. 346. Judgment should be against Holmes for the full amount. He is entitled to a lien even if he does not comply with the specifications: see Wallace on Mechanic's Liens, 3rd Ed., 93; *Mallett* v. *Kovar* (1910), 14 W.L.R. 327; *Alsip* v. *Monkman* (1912), 9 D.L.R. 97, at p. 109; *Triangle Storage Ltd.* v. *Porter* (1941), 56 B.C. 422. Holmes never pleaded there was no money due: see *Brown* v. *Allan* (1913), 25 W.L.R. 128.

Higgins, K.C., for respondents: The doctrine of substantial performance has no standing here: see *McDonald* v. *Simons* (1910), 15 W.L.R. 218; *Sherlock* v. *Powell* (1899), 26 A.R. 407. He did not comply with the specifications. He put on a second coat before letting the first coat dry: see *H. Dakin & Co., Limited* v. *Lee,* [1916] 1 K.B. 566, at p. 579; *Eshelby* v. *Federated European Bank, Ld.,* [1932] 1 K.B. 423.

Clearihue, in reply, referred to *Hazell* v. *Lund* (1915), 22 B.C. 264.

Cur. adv. vult.

26th June, 1946.

SLOAN, C.J.B.C.: I agree with my brother ROBERTSON.

O'HALLORAN, J.A.: This appeal touches an important aspect of the law of contract with particular interest to the building trades and to those who lend money on mortgage for the construction of dwelling-houses and other buildings upon written specifications. If a sub-contractor does not do work in accordance with the specifications in the contract between the owner and the contractor, can he legally recover any sum at all against the contractor, let alone (which is the main issue in this appeal) be entitled to a mechanic's lien against the lands of the owner?

The respondent owners Zaluski entered into a contract with a contractor Holmes for the construction of a dwelling-house at a cost of $6,300 in accordance with written specifications which are stipulated in the case of houses to be financed under the National Housing Act as this house was. Holmes sub-contracted the interior plastering and exterior stucco work to the appellant Holliston for $1,050. There was no privity of contract between the owners and the sub-contractor Holliston. The owners refused to pay the balance of $300 to the contractor Holmes (who in turn refused to pay the sub-contractor Holliston), on the grounds that the stucco work did not comply with the specifications and was not done in a good and workmanlike manner.

The sub-contractor commenced action for personal judgment against the contractor for $300, and also for a declaration that he was entitled to a mechanic's lien for that amount against the lands of the owners. The appeal is taken from the learned judge's dismissal of the action. He found as a fact that the stucco work did not comply with the specifications and was not done in a good and workmanlike manner. The learned judge found that Holliston put on the second coat of stucco immediately on top of the first coat, instead of taking the workmanlike precaution that the first coat should be well scratched and kept moist for two or three days as the specifications required. When Zaluski pro-

C.A.
1946
HOLLISTON
v.
ZALUSKI
ET AL.
O'Halloran,
J.A.

tested this breach of the specifications, Holliston said that was the way he used to do it in Vancouver but it would cost too much money. The learned judge accepted Zaluski's evidence. That finding makes it clear there was a substantial and unworkmanlike departure from the specifications.

Holliston admitted there were cracks in the stucco work. He did not count them but Zaluski did. The latter testified there were 32 cracks in the east wall, 27 cracks in the south wall, 12 cracks in the west wall and 9 cracks in the north wall, some of them being five feet in length. That is evidence the work was not substantially completed. Holliston testified that Zaluski sprayed water on the stucco without his consent and that this caused the cracks. The learned judge said he believed the evidence of Zaluski and his son that the spraying of water on the stucco work was done at Holliston's express request, and held that the cracks were caused by putting on the second coat of stucco immediately after the first coat, in direct breach of the specifications.

There was no official stenographer present at the trial. The learned judge's notes of the evidence are terse and to the point. They amply support his findings of fact. On the relevant points he believed Zaluski and did not believe Holliston. There is nothing before this Court which enables me to justify a conclusion that the learned judge misconceived the evidence or misapprehended its weight, and *cf. Borrowman* v. *The Permutit Co.*, [1925] S.C.R. 685, and recent decisions in *Yuill* v. *Yuill*, [1945] P. 15, at p. 19 and *In re Harmes Estate. Harmes* v. *Hinkson*, [62 T.L.R. 445]; [1946] 2 W.W.R. 433, at p. 449.

The learned trial judge did not say in so many words that the contract was not substantially performed, but as I understand his reasons for judgment, with respect, that is the only permissible inference which may be drawn from his findings of fact. This is not a case of insubstantial defects in a completed contract. Nor is it a case of the owners, by word or conduct, accepting the substantial and unworkmanlike departure from the written specifications which occurred. This is a case where the owners and the mortgagees received something quite different from that which the written specifications demanded. The

specifications required the stucco work to be done in a certain way. It was not done in that way, and the result is a different and inferior type of construction. The improper work cannot be added to or improved to comply with the specifications. Since the second coat of stucco was put on immediately after the first coat, the only way to comply with the specifications is to remove all the stucco work, and do it over again in the way the specifications require. Failure to wait the required time before putting on the second coat of stucco was non-performance of an essential term of the contract. That breach went to the root of the contract and *cf. Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434, Lord Blackburn at pp. 443-4.

If A telephones a grocery for a dozen oranges of a named superior type, and is sent instead one dozen of an inferior type with patent defects in some of them, no one could say the grocery had substantially performed A's order, and that the grocery was entitled to collect the price of the inferior oranges from A (unless of course A agreed to pay for them). This accepted every-day principle is illustrated in a greater degree by *Forman & Co., Lim.* v. *The "Liddesdale"* (1900), 69 L.J.P.C. 44, which decided that when a contract provides for stipulated work at a lump sum (as here) and such work is not done, but its equivalent or better work is effected no claim for such substituted work can be sustained. That decision carries the principle much further than it need be carried here. It is to be noted also that the Judicial Committee held there, that sale of the ship at an enhanced price due to the unauthorized work, did not amount to ratification on the owner's part or denote his acceptance of liability for the work done.

In this Court the appellant's submission developed in a way that has been accepted by the majority of the Court, *viz.*, that the case be referred back to the trial judge to determine the sum to be deducted for defective work and the appellant to be then entitled to a mechanic's lien against the lands of the owners and to personal judgment against the contractor, for the difference between the $300 claimed and the sum to be so found. I cannot fail to regard that in the first place as an allowance of the appellant's claim upon a *quantum meruit*. But since the contract in

C. A.
1946
HOLLISTON
v.
ZALUSKI
ET AL.
O'Halloran,
J.A.

this case was an express agreement for a stipulated sum, I must hold, with respect, that *quantum meruit* is necessarily excluded and *cf. Turner* v. *Robinson* (1833), 5 B. & Ad. 789, Parke, J., and *Boston Deep Sea Fishing and Ice Company* v. *Ansell* (1888), 39 Ch. D. 339, Bowen, L.J. at pp. 364-5. Again when parties have acted under an express agreement as in this case, the express provisions of that agreement naturally exclude any implied agreement between them in substitution for their express agreement and *cf. Cutter* v. *Powell* (1795), 6 Term Rep. 320, Lord Kenyon, Ch. J., and *Britain* v. *Rossiter* (1879), 11 Q.B.D. 123, Brett, L.J. at p. 127.

In *Appleby* v. *Myers* (1867), L.R. 2 C.P. 651; 36 L.J.C.P. 331, Lord Blackburn, then Blackburn, J., speaking for the Exchequer Chamber (Martin and Bramwell, BB. and Blackburn, Shee and Lush, JJ.) which reversed the Court of Common Pleas, said at p. 337:

> . . . We think that on the principles of English law laid down in *Cutter v. Powell*, [(1795)] 2 Sm. L.C. 1; *Jesse* v. *Roy*, [(1834)] 1 Cr. M. & R. 316, *Munro* v. *Butt*, [(1858)] 8 El. & Bl. 738, *Sinclair* v. *Bowles* [(1829)] 9 B. & C. 92, and other cases, the plaintiffs, having contracted to do an entire work for a specific sum, can receive nothing unless the work be done, or it can be shown that it was the defendant's fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract.

That statement of the law was approved by the Judicial Committee in *Forman & Co., Lim.* v. *The "Liddesdale"* (1900), 69 L.J.P.C. 44, at p. 49. I do not interpret that to exclude substantial performance of the contract, for the law only intends that which is reasonable. And whether or not there has been substantial performance is essentially a question of fact, as is well illustrated by the examination of the testimony in that respect in *Smith et al.* v. *Stubbert* (1942), 57 B.C. 328, at p. 334. Substantial performance may arise when there is a failure to perform trivial matters. As pointed out in the *"Liddesdale"* case, *supra,* at p. 47 that has no greater effect than to give the owner a cross-claim if damaged by such trivial variation. In the case at Bar, as already stated, failure to wait several days before putting on the second coat of stucco on top of the first, constituted non-performance of an essential term of the speci-

fications. By no standard of judgment could it be described as a trivial matter. The stucco work as between the owner and the contractor, was part of one entire contract, *viz.*, the construction of the house at one entire price and *cf. Vigers* v. *Cook* (1919), 88 L.J.K.B. 1132.

The foregoing authorities recognize (so far as it relates to circumstances existing here) the principle that a contractor who has not substantially performed an entire contract for a stipulated sum according to the specifications cannot recover unless the owner has accepted the work done. That principle has been applied by this Court in *Harris & Co.* v. *Westholme Lumber Co.* (1913), 3 W.W.R. 783, and in *Smith et al.* v. *Stubbert* (1942), 57 B.C. 328, at p. 333. However, it was submitted at this Bar that the principle has been varied or extended by the Court of Appeal in England in *H. Dakin & Co., Limited* v. *Lee*, [1916] 1 K.B. 566, and by an unreported* decision of the Supreme Court of Canada in *Modern Construction Co.* v. *Shaw*. Whether that is so may be the real point for determination in this appeal.

In *H. Dakin & Co., Limited* v. *Lee* the defects (involving £14 in £264) were described throughout the case as insignificant. In my view that decision ought not to be extended beyond its own facts. To regard it as laying down any principle of law would in my view at least, bring it into conflict with the principle stated in *Appleby* v. *Myers* and *Forman & Co. Lim.* v. *The "Liddesdale," supra,* and make it difficult to reconcile with what is said in subsequent Court of Appeal decisions in *Vigers* v. *Cook* (1919), 88 L.J.K.B. 1132 and *Eshelby* v. *Federated European Bank, Ltd.* (1931), 101 L.J.K.B. 245. Chitty on Contracts, 19th Ed., 159 refers to the apparent divergence between the *Dakin* case and the later decision of *Vigers* v. *Cook*. In the latter case Bankes, L.J. observed at p. 1137, that the head-note in the *Dakin* case does not reflect the decision of the Court of Appeal. In *Eshelby* v. *Federated European Bank, Ltd.*, Greer, L.J. said at p. 256:

. . . , if the decision in *Dakin & Co.* v. *Lee* lays down a principle of law, it seems to me to be contrary to the principle laid down in a long series of cases, based on *Cutter* v. *Powell*, that where work is to be done for

* (1923), 35 B.C. 338 n.

C. A.
1946

HOLLISTON
v.
ZALUSKI
ET AL.

O'Halloran,
J.A.

a named sum, neither that sum, nor any part of it, can be recovered while the work remains undone.

That the Supreme Court of Canada did not intend in *Modern Construction Co.* v. *Shaw* to extend or vary any principle of law is indicated, I think, from the fact that *Appleby* v. *Myers* and its approval by the Judicial Committee in *Forman & Co. Lim.* v. *The "Liddesdale," supra,* was not mentioned. One would be inclined to assume that in any event, since the decision does not appear to be reported in the Supreme Court of Canada Reports, the Dominion Law Reports or the Western Weekly Reports. Study of the judgments in the Supreme Court of Canada, which appear as a foot-note to the report of the appeal in this Court in 1923—35 B.C. 331, at pp. 338-43, reveal that it hinged upon questions of fact, *viz.,* what was the contract, and had it been substantially performed (see Mignault, J.). A building contract with specifications was drawn up, but never signed. It became common ground that the building (an apartment-house) was not to cost more than $7,000, but the parties differed as to which of two plans (if either) had been mutually accepted. The owner had taken over the building and had received its rents and profits for a "long time," but refused to pay the balance of $5,150 on the ground the work had not been substantially performed.

The trial judge, after a view of the building, held it was substantially completed but found some defects in construction which he assessed at $189 and in giving judgment deducted this from the balance of $5,150. This Court was divided equally on the question of substantial performance. In the Supreme Court of Canada, two members of the Court (the Chief Justice and Mignault, J.) felt, that on a question of fact found by the trial judge after a view, they ought not to interfere. Two other members of the Court (Duff, and Anglin, JJ.) increased the deductions from $189 to $1,000. Idington, J. held the owner "never got what she was led to believe she would get for $7,000," and thought she should have $700 to $1,500 damages, but agreed to $1,000 as damages which Duff and Anglin, JJ. allowed as "deductions." The *ratio* of the decision is difficult to extract. I take the decision to be a finding of fact, that the work (quite apart from which plan of construction was followed) was sub-

stantially completed, and that the defects, omissions or changes were not of a serious character.

Analysis of the judgments in this Court and in the Supreme Court of Canada leaves me with the distinct impression that the foregoing findings of fact were largely influenced by the uncertainty as to what the contract was, due to the conflicting evidence regarding which plan governed, and were markedly influenced also by the conduct of the owner in benefiting from the work done (*viz.*, receiving rents and profits for "a long time" and refusing to pay the balance of 75 per cent. of the agreed cost). That case is entirely different from the one at Bar which is based on specific written specifications, and which lacks evidence of conduct by the owners adopting the contract as substantially performed. It may be added that there is no hint in *Modern Construction Co.* v. *Shaw* that the long accepted principle in *Appleby* v. *Myers* is questioned.

There is, however, another feature in this case which strengthens the applicability of the principle in *Appleby* v. *Myers*. The dwelling-house to which this appeal relates was constructed under the written specifications authorized by the National Housing Act covering "minimum standards of materials and construction to be used" (Exhibit 5). The mortgage company advancing a substantial portion of the cost of construction is a well known life insurance company, as disclosed by the copy of the specifications required "to be kept on the job" (Exhibit 5). The owner was required to sign a certificate (Exhibit 5) appended to these specifications that if granted a mortgage loan he would erect the house "according to these specifications," and he agreed therein that the loan may be cancelled, if he changes or permits any changes to be made without the written permission of the mortgagees. The contractor was likewise required to sign a certificate (Exhibit 5) appended to the specifications that he would follow the specifications, and that if he departed from them without the written permission of the owner and mortgagees, he would make the required corrections at his own expense.

There was a provision of a somewhat analogous nature in the specifications in *Forman & Co. Lim.* v. *The "Liddesdale," supra.*

C. A.
1946
HOLLISTON
v.
ZALUSKI
ET AL.
O'Halloran,
J.A.

It stipulated that the contractor should not make any alteration in the specifications without the written sanction of the captain or his agents (pp. 45-6). A clause of this kind did not exist in *H. Dakin & Co., Limited* v. *Lee* or in *Modern Construction Co.* v. *Shaw*. In the case at Bar the contract was to be performed in the manner set forth in the specifications and any change (which I do not understand to mean a trivial change) therefrom required the written permission of the mortgagees. That excludes consideration of benefit to the owner and acceptance by his conduct which play so great a part in cases where no such clause exists. That is the contract the parties have made and that is the condition upon which the mortgage company agreed to advance its money, and see *The "Liddesdale"* case, *supra,* at p. 50.

In delivering the judgment of the Exchequer Chamber in *Appleby* v. *Myers,* Lord Blackburn said at p. 336:

> . . . Generally, in the absence of something to shew a contrary intention, the bricklayer, or tailor or shipwright is to be paid for the work and materials he has done and provided, although the whole work is not complete. It is not material whether in such a case the incompletion is because the shipwright did not choose to go on with the work, as was the case in *Roberts* v. *Havelock,* [(1832)] 3 B. & Ad. 404, or because in consequence of a fire he could not go on with it, as in *Menetone* v. *Athawes,* [(1764)] 3 Burr. 1592. But though this is the *prima facie* contract between those who enter into contracts for doing work and supplying materials, there is nothing to render it either illegal or absurd in the workman to agree to complete the whole, and be paid when the whole is complete, and not till then.

Under this branch of the case, it is to be emphasized that both the owner and the contractor recognize in their contract (see their certificates in Exhibit 5) that no changes will be permitted without the written permission of the mortgagees. The owner by his certificate (Exhibit 5) is in the position that he could not accept any change by conduct or implication. If he did so and it could be regarded as acceptance of substantial performance, the mortgagees could cancel the loan. By the departure from the specifications in this case the mortgage company received a security inferior to that upon which it agreed to lend its money. This aspect of the case seems to come close in principle to the point upon which the decision turned in *Eshelby* v. *Federated European Bank, Ltd.* (1931), 101 L.J.K.B. 245, *supra.*

In the result, the sub-contractor's claim for a mechanic's lien

was properly denied on two grounds. In the first place since he did not substantially complete the sub-contract his right to a mechanic's lien cannot be enforced—see section 19 (1) (*a*) and (*b*) of the Mechanics' Lien Act, Cap. 170, R.S.B.C. 1936, and *NePage, McKenny & Co.* v. *Pinner & McLellan* (1915), 21 B.C. 81, at p. 85; and *Davies* v. *E. B. Eddy Co. Ltd.* (1942), 57 B.C. 200, at p. 202. In the second place his default in the above respect has left the contractor's contract with the owners substantially unperformed, with the result there is no money owing by the owners to the contractor. That being so, the sub-contractor's right to a lien cannot attach in any event, and see section 8 of the Mechanics' Lien Act, *supra,* and *NePage, McKenny & Co.* v. *Pinner & McLellan, supra,* and *Smith et al.* v. *Stubbert* (1942), 57 B.C. 328, at p. 336.

His claim for personal judgment against the contractor must be refused also since he failed to substantially complete his sub-contract.

In my judgment, with respect, the learned trial judge reached the right conclusion in fact and in law. I would dismiss the appeal.

ROBERTSON, J.A.: The plaintiff appeals from the judgment dismissing his action for personal judgment against Holmes, with whom he contracted to do the work in question, and for a mechanic's lien against the property of Zaluski on which he did the work and supplied the materials. Although Holmes did not plead expressly that the plaintiff's work was not done in a workmanlike manner, he denied all the material allegations in the plaint and set up that he was willing to pay the sum claimed by the plaintiff "in whole or in part according to the merits of the case." He also pleaded that the contract between himself and the plaintiff was that all work should be done to the satisfaction of the Zaluskis and that the plaintiff had not completed the work in a manner satisfactory to these persons. The result of this was that when the case came on for trial the plaintiff had to prove his claim (see County Court Rules, 1932, Order IX., r. 24); and it then appeared this work had not been properly done. No evidence was called on Holmes' behalf at the trial.

C. A.
1946
HOLLISTON
v.
ZALUSKI
ET AL.
Robertson, J.A.

The plaintiff gave evidence that Holmes "simply asked me to do the job." Nothing was said about specifications and he never saw them. That when he presented his bill to Holmes, Holmes told him it was a good, solid job. He said, however, that the Zaluskis would not pay "unless the crack was taken out," that he and Holmes inspected the job and Holmes said he would advise the plaintiff later what was to be done about the crack, but he never did. He advised the plaintiff to file his lien. The defendant Paul Zaluski said there were many cracks in the stucco. It seems to me clear then upon the whole of the evidence that there were cracks in the stucco that would have to be set right. I venture to refer to *Hutchinson* v. *Mathias,* [1943] 1 W.W.R. 451, at p. 453 to show the view I then held, and still hold as to the law to be applied to this case:

> The law seems clear that in a contract of this sort where the builder has substantially complied with the contract, that it, where all the work to be done has been done, but where it has been done negligently or in an improper manner, the builder is entitled to recover with deductions necessary to complete the work as specified in the contract. See *Modern Construction Co.* v. *Shaw, supra; Taylor Hardware Co.* v. *Hunt* (1917), 39 O.L.R. 85; *Inch* v. *Farmers' Co-operative Dairy Co. Ltd.,* 15 M.P.R. 315, [1941] 2 D.L.R. 27; *H. Dakin & Co., Limited* v. *Lee,* [1916] 1 K.B. 566, [(1915)] 84 L.J.K.B. 2031; *Lacroix Bros. & Co.* v. *Cook,* [1926] 3 W.W.R. 385, at 387-8, 21 Sask. L.R. 46.

In the case at Bar, on the whole of the evidence, while the plaintiff had done the work called for by the contract, it had been done in a negligent or improper manner and consequently he is entitled to judgment against Holmes for the balance of the contract price, *viz.,* $300, less a deduction in a sum necessary and sufficient to complete the work in a proper and workmanlike manner. Then is the plaintiff entitled to a mechanic's lien against the Zaluskis? Section 10 of the Mechanics' Lien Act provides that all work or improvements (which by virtue of the definition of these words in section 2, includes every act or undertaking for which a lien may be claimed under the Act) constructed upon any lands with the knowledge, but not at the request of the owner, shall be held to have been constructed at the instance and request of the owner. In this case the Zaluskis were actually present when the work was being done. In consequence the plaintiff is clearly entitled to a lien, but it can only

be, of course, for the sum of $300, less whatever sum is required to pay to have the work set right. Unfortunately, there is no evidence as to the amount required to make the necessary repairs, so that the case will have to be remitted for a reference to find the amount required to put the work into shape.

The appeals should be allowed and personal judgment should go against the defendant Holmes for the amount ascertained after the reference and a declaration of mechanic's lien against the lands in question for the same amount.

SIDNEY SMITH, J.A.: I agree with my brother ROBERTSON.

BIRD, J.A.: The respondents Zaluski let a contract to one Holmes for the construction of a dwelling-house in accordance with written specifications. Holmes then verbally employed the appellant to perform the interior plastering and exterior stucco work on the house, but failed to tell the appellant of the necessity to comply with any specifications.

The appellant completed the plastering and stucco work, then rendered his bill to the defendant Holmes in the sum of $1,050, which included $325 for exterior stucco work. The respondents Zaluski having questioned the due performance of the stucco work under the terms of the contract and specifications, Holmes withheld payment to the appellant of the sum of $300, but paid the balance of the bill. The appellant then entered suit against Holmes and the respondents claiming a mechanic's lien against the respondents' lands and premises for the sum of $300 and to recover that sum from the defendant Holmes.

The learned trial judge held that the stucco work was not done in a workmanlike manner nor according to specifications, in that cracks had developed in the stucco work. The action was accordingly dismissed as against all defendants, but without costs to the defendant Holmes.

The appellant appeals from that judgment both as to the dismissal of the claim against Holmes for $300 as well as the dismissal of the claim for a lien against the respondents' lands. Holmes did not appear on the hearing of the appeal nor was he represented by counsel.

C. A.
1946

HOLLISTON
v.
ZALUSKI
ET AL.

Bird, J.A.

Turning first to consideration of the appeal in so far as it relates to dismissal of the action against Holmes, examination of the pleadings discloses that Holmes did not allege failure to perform the work in a workmanlike manner or in accordance with the specifications. He does allege that if any contract existed between him and the appellant it was a term thereof that the work be done to the satisfaction of the respondents. Support for this allegation is not to be found in the evidence on the trial as appears from the judge's notes. The testimony of the appellant shows that when Zaluski questioned the sufficiency of the stucco work Holmes examined the work and "said it was a good, solid job." The learned trial judge found upon appellant's evidence that the mechanic's lien was filed on Holmes' advice. Although the learned trial judge has found that the stucco work was not done in a workmanlike manner, that issue was not raised as between Holmes and the appellant either on the pleadings or the evidence. Holmes, although represented by counsel at the trial, did not adduce evidence in opposition to the appellant's claim. The judge's notes of the cross-examination of appellant's witnesses by Holmes' counsel, scanty though they are, convey the impression that Holmes supported the appellant's claim. No indication is found therein of any attempt to minimize the effect of the appellant's testimony that the stucco work was pronounced satisfactory by Holmes.

In these circumstances I think it is open to question whether Holmes is entitled to the benefit of the finding made by the learned trial judge that the work was not done in a workmanlike manner, a finding which is based upon a defence raised by the Zaluskis.

This line of defence was not put forward nor supported on the trial by Holmes who, on the contrary, appears to have conceded that the job had been satisfactorily performed.

In these circumstances, support can be found for the submission of appellant's counsel that Holmes accepted the work unconditionally since he failed to establish that acceptance of the job by the Zaluskis was a term of the contract between him and the appellant and consequently should be held liable to the appellant for the full balance of $300 claimed by the appellant.

However, in view of the denial of the plaintiff's claim by Holmes as set up in his dispute note and the finding that the work was not done in a workmanlike manner, I concur in the disposition of the appeal as it relates to Holmes proposed by my brother ROBERTSON in his reasons for judgment which I have been privileged to read.

Then as to the appeal from that part of the judgment which relates to dismissal of the claim for lien, I think, with respect, that here there was a substantial compliance with the contract. The learned judge, as before stated, has found that the work was done in an unworkmanlike manner, a finding which is based upon the subsequent development of cracks in the stucco. The existence of cracks in that work did not, in my opinion, warrant the conclusion that there was a refusal to perform that part of the contract, *i.e.*, that appellant abandoned the work and left it unfinished. It does not appear on the evidence adduced that the cracks are so numerous or extensive as to render the work valueless to the owner. I think the contrary appears. The existence of the cracks in my opinion shows no more than that the work was negligently done. Under those conditions the rule is

> that the builders are entitled to recover the contract price, less so much as it is found ought to be allowed in respect of the items which [are] found to be defective:

H. Dakin & Co., Limited v. *Lee,* [1916] 1 K.B. 566, *per* Lord Cozens-Hardy, M.R. at p. 579, approved in the Supreme Court of Canada in *Modern Construction Co.* v. *Shaw* (1923), 35 B.C. 338 n, at p. 339.

Here there is not a finding upon which this Court can reach any satisfactory conclusion as to what sum should be deducted to compensate for the defective work.

Counsel for the respondents has said before us that the respondents "would be satisfied if a reference is ordered to ascertain the cost of repairing the cracks."

In the result there must be a direction that the case be sent back to the learned trial judge to determine the sum to be allowed in respect of the defective work as a deduction from the claim of $300.

Since the respondents do not contend that there is no balance

C.A.
1946
HOLLISTON v. ZALUSKI ET AL.
Bird, J.A.

of contract price owing to the contractor Holmes (Mechanics' Lien Act, R.S.B.C. 1936, Cap. 170, Sec. 8), I think that the appellant is entitled to a mechanic's lien as claimed limited to the balance so found due after such deduction—3rd Ed., Wallace's Mechanics' Liens, p. 93 *et seq.* *Mallett* v. *Kovar* (1910), 14 W.L.R. 327.

I would therefore allow the appeal accordingly as against the Zaluskis, with costs here and below.

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

Solicitor for appellant: *W. B. Monteith.*
Solicitor for respondents Zaluski: *Frank Higgins.*
Solicitor for respondent Holmes: *J. H. Harman.*

S.C.
1946
May 29; *June* 26.

THE ATTORNEY-GENERAL OF CANADA ACTING ON BEHALF OF HIS MAJESTY THE KING v. HELLENIC COLONIZATION ASSOCIATION.

Association—Granted charter under Part II. of The Companies Act, 1934—Branches started in several places—Used only for gambling—All convicted for keeping disorderly houses—Action to annul charter for abuse and misuser—Can. Stats. 1934, Cap. 33.

In August, 1935, the Secretary of State pursuant to Part II. of The Companies Act, 1934, did grant a charter under said Act to Sutro Pappas and others in the city of Vancouver under the name of Hellenic Colonization Association for the following purposes: (a) To inculcate, cultivate and promote among its members the social virtues, good fellowship, mutual helpfulness and rational recreation; (b) to assist and promote the immigration to Canada of worthy Europeans and to encourage and comfort them and generally to promote colonization; (c) to promote social welfare among its members by arranging all forms of social entertainment; (d) to create branches or lodges throughout the Dominion of Canada and to establish clubrooms where its members may meet together to promote the objects aforesaid. One of those to whom the charter was granted was Sutro Pappas who remained a director from its incorporation until the trial. A charter for a branch of the association known as branch 5, Princeton, was granted by the association to Sutro Pappas and under his management club premises operated in January, February and March, 1938, and on or about the 14th of

March, 1938, Pappas was convicted for unlawfully keeping a disorderly house, to wit, a common gaming-house. The charter was then cancelled and regranted to Pappas who operated in Dawson Creek and in September, 1943, he was convicted of the same offence. Branches were also established in Prince Rupert, Calgary and Alberni and in each place the managers were in due course similarly convicted. In an action for a declaration that the defendant had misused and abused its letters patent and charter and for judgment cancelling said letters patent and charter and dissolving the defendant corporation:—

Held, that the evidence discloses that the association was incorporated, not for the purpose set out in its charter, but for the purpose of operating a chain of gambling branches, all paying tribute to the promoters of the association. The defendant association has at no time *bona fidely* operated under its charter, but wrongly used its charter as a cloak under which to operate its illegal branch club gambling operations and misused and abused its charter to such an extent as being against general public policy. The Attorney-General was the proper person to bring the action, the Dominion Companies Act has taken nothing away from the common-law rights to have a charter annulled and an action can be maintained to have a charter annulled for abuse or misuser. The abuse or misuse must be of such consecutive acts and the general policy of the association such as would indicate a clear intention that the association wished to use the charter as a mere cloak for its improper acts. The charter shall be annulled in accordance with the plaintiff's prayer.

ACTION for a declaration that the defendant had misused and abused its letters patent and charter and the rights thereby conferred and has not used same lawfully and that the said letters patent and charter are forfeited together with all the rights thereby conferred and a judgment cancelling, setting aside and annulling the said letters patent and charter and dissolving the defendant corporation. Tried by FARRIS, C.J.S.C. at Vancouver on the 29th of May, 1946.

Donaghy, K.C., and *McKinlay*, for plaintiff.
Murdock, for defendant.

Cur. adv. vult.

26th June, 1946.

FARRIS, C.J.S.C.: This action came on for hearing before me on May 29th, 1946. The plaintiff sought a declaration that the defendant had misused and abused its letters patent and charter, and the rights, powers, privileges and franchises thereby conferred, and has not used same lawfully and that the said letters

S. C.
1946
ATTORNEY-GENERAL v. HELLENIC COLONIZATION ASSOCIATION
Farris, C.J.S.C.

patent and charter are forfeited together with all the rights, powers, privileges and franchises thereby conferred and a judgment cancelling, setting aside and annulling the said letters patent and charter, and dissolving the defendant corporation. The facts are briefly: On the 23rd of August, 1935, the Secretary of State, pursuant to Part II. of The Companies Act, 1934, did grant a charter under the said Act to Harry Wright, Thomas George Lappas, Sutro Pappas and Einar Plambeck in the city of Vancouver and Province of British Columbia under the name of Hellenic Colonization Association for the following purposes: (a) To inculcate, cultivate and promote among its members the social virtues, good fellowship, mutual helpfulness and rational recreation; (b) To assist and promote the immigration to Canada of worthy Europeans and to encourage and comfort them, and generally to promote colonization; (c) To promote social welfare among its members by arranging all forms of social entertainment; (d) To create branches or lodges throughout the Dominion of Canada and to establish club rooms where its members may meet together to promote the objects aforesaid. One of those to whom a charter was granted was Sutro Pappas who remained a director from the incorporation of the company until the trial of this action. He was called as a witness for the plaintiff.

A charter for a branch of the association known as branch No. 5, Princeton, B.C., was granted to Sutro Pappas the director mentioned. Under his management club premises were operated during the months of January, February and March, 1938, and on or about the 14th of March, 1938, Pappas was convicted for unlawfully keeping a disorderly house, to wit, a common gaming-house. The charter was then cancelled and later on, approximately in the year 1943, was regranted to Pappas under the name of the Alaska Club or Alaska Social Club, and was apparently operated at Dawson Creek, B.C., during the months of July, August and September, 1943, when on the 17th of September, 1943, Pappas was again convicted for unlawfully keeping a disorderly house, to wit, a common gaming-house. Apparently the management changed hands in this club but the methods of operating did not change, and on the 24th of Decem-

ber, 1943, the then management was convicted of keeping a disorderly house, to wit, a common gaming-house; Pappas had at this time apparently disappeared from the management. The management was again changed, and on the 20th of March, 1944, the members of the new management were convicted of the same offence. A further charter was granted by the defendant association to branch No. 12, Prince Rupert. This branch operated during the months of July, August and September, 1943, under the management of one Greenstein who was on the 10th of September, 1943, convicted of the same offence as were the managers of the other branches referred to. Again apparently the manager of this branch was changed and it operated under the name of North Star Club, Prince Rupert, under the management of one Gold, being operated during the months of August, September and October, 1944, when Gold was convicted of the same offence.

In 1941 a charter was granted to branch No. 11, Calgary, Province of Alberta; this club operating during the months of September, October, November and December, 1941, and was on or about the 6th of December, 1941, convicted of the same offence hereinbefore mentioned. In this case the branch itself was convicted and not the manager as in all other cases.

A branch was established in Alberni known as the Alberni Social Club, branch No. 14, and the managers of this branch were convicted on the 16th of March, 1946, of keeping a disorderly house. Similarly a branch was established at Nanaimo under the name of the Nanaimo Sports Club, branch No. 16, and on the 15th of March, 1946, the managers were similarly convicted.

As to what was done by the defendant association I refer to the following evidence given by the witness Pappas:

Well, you knew very well, Mr. Pappas, what you were doing in regard to that matter. Did you do anything, take any steps towards the assisting or promoting of immigration? No, I didn't know. I don't know anything about it.

You never knew of them doing anything of that at all? No, we never go that far. I never go that far.

What did you do to inculcate, cultivate and promote among the members the social virtues, good fellowship, mutual helpfulness and rational recreation? I never did anything at the time.

S. C.
1946
ATTORNEY-GENERAL v. HELLENIC COLONIZATION ASSOCIATION
Farris, C.J.S.C.

Has there anything ever been done in that line? No.

What have you done to promote social welfare among its members by arranging all forms of social entertainment? I never done anything.

Or to create branches or lodges throughout the Dominion of Canada, and to establish club rooms where its members may meet together to promote the objects aforesaid. What have you done in that? The mother charter never operated at all.

The mother charter never did operate? No.

It is just the local ones? Just the local ones.

And they were all operating on the same basis, the same members being in partnership and getting 25 cents a month from members and then making their expenses out of the cards and so on, is that it? Yes.

They were all carried on on the same basis? Yes.

And that was the entire social work done by any of the clubs under any of the charters as far as you know the practice. Is that right? Yes.

Donaghy: There is just one more question. The finances of the Hellenic Colonization Organization, I take it the association got some money from these people to whom they sold these club charters? Yes.

Some of the directors got club charters for nothing, without paying any money to the association for them. Is that correct? I couldn't say that.

Did you pay anything for yours? I did.

How much? I pay about $100.

Now the moneys that were got in by the parent association, what happened to that? That was put in the association so that we can make expenses before we can pay fees for the lawyers, for the meetings and stuff like that.

It was all used for that? Yes.

THE COURT: What was the purpose of the parent association? You say it did nothing at all. It never operated on this charter. What expense would the parent association have? Well, it would have to pay fees for the lawyer and we would have to pay the charter for the government. We spent some money out of it, you know.

Donaghy: You mean the fees to the parent association went to pay for the costs and expenses of incorporating the association, lawyers' expenses, and fees to the government and so on? Yes.

That is what they would use this money for? Yes.

Donaghy: Your witness.

. . . . .

Well now, you must be able to answer that? You were a director and you know they were cancelled for this gambling. Now you must surely know—you are a director—on what basis these charters were granted? I can't say. I can't tell you anything.

Who ran the main company and granted these charters. Was it this Plambeck who did it? All himself? Yes, Mr. Plambeck.

He just ran the whole thing? Yes, and at the time Mr. Wright.

Mr. Wright has not been there for five or six years? I don't remember exactly. He run that maybe three or four. I don't know.

. . . . .

On what basis then did they grant these charters. Was it so much paid? Yes, they paid so much for expenses.

I don't care what it was for. How much do they have to pay to get a charter? I don't know. I remember one charter I was supposed to pay $20 a month.

One charter was to pay $20 a month? Yes.

And were the others to pay similarly? I don't know about the others.

Well, did you ever look at the books of the main company? No, I did not.

Well, what was the purpose of the main company? What was it—just simply to get enough money to pay costs of incorporation and your lawyers' fees. You say you never operated under the terms of your charter, and I am just trying to find out what on earth was the purpose of this company? I can't explain to you, sir.

The only other man I suppose that could explain, is Mr. Plambeck or Mr. Wright and they are both now out of the country? That is right.

. . . . .

THE COURT: Were you at that meeting? Yes.

What about the terms of the Prince Rupert? That is what I say, $20.

Twenty dollars a month? Twenty dollars a week.

If they had enough clubs, 100 clubs, $20 a month, that would be rather profitable for the head office, wouldn't it? I don't know. We never make any profit, lose money out of it.

Apparently they didn't operate very long before conviction took place. Is that right? Yes.

Considerable testimony was given by police officers, who had made the various raids on the clubs mentioned, which resulted in their convictions. In each and every case the premises were generally similar and apparently only suitable for carrying on gambling. Rake-offs in various forms were taken for various games: these rake-offs while varying were very substantial and if the games had been allowed to run unchecked would have brought huge profits to the operators. I did not find the witness Pappas a convincing witness and did not believe him when he said he did not know under what terms the various charters were granted. From the evidence before me there was no doubt in my mind that the association was incorporated not for the purposes set out in its charter, but for the purpose of operating a chain of gambling branches, all paying tribute to the promoters of the defendant association.

No evidence was furnished by the defendant association to show that at any time it operated a *bona-fide* branch fulfilling the purposes of its charter. In the action against the branch operated at Calgary under a second charter the association was

S. C.
1946

ATTORNEY-GENERAL v. HELLENIC COLONIZATION ASSOCIATION

Farris, C.J.S.C.

convicted by the police magistrate, but on appeal this conviction was reversed and it was argued that this showed that the association was carrying on a *bona-fide* operation. No evidence was tendered, however, showing the nature of the club being run. I find therefore as a fact that the defendant association at no time *bona fidely* operated under its charter but wrongly used its charter as a cloak under which to operate its illegal branch club gambling operations and that the defendant misused or abused its charter to such an extent as being against general public policy. It was contended by the defence, first, that the Attorney-General of Canada was not the proper person to bring this action. With this contention I do not agree. See *Dominion Salvage and Wrecking Company* v. *The Attorney-General of Canada* (1892), 21 S.C.R. 72, and particularly the words of Taschereau, J. at p. 83:

> It seems to me unquestionable, as held by all the judges in the two courts below, that the Attorney-General of the Dominion has the right to impeach the legality or ask the forfeiture of a Dominion statutory charter.

Oxweld Acetylene Co. v. *Oxyweld Co. of Canada Limited* (1923), 53 O.L.R. 455, Ferguson, J.A. at pp. 457-8:

> . . . I am of opinion that the principle on which actions by individuals against the Crown or against third parties to annul patents to land have been maintained, is not applicable, and therefore that the Court has no jurisdiction to annul letters patent incorporating a company except at the instance of the Attorney-General, suing on behalf of the Crown, or upon the relation of some one interested.

It would seem clear to me that the Attorney-General was the proper person to bring this action.

This brings me to the next point and that is whether a common-law right exists to annul a charter for misuser or abuse when that charter has been granted under the Dominion Companies Act. Counsel for the defence contended that Parliament never intended the charter to be cancelled after it was granted except subject to section 28 of The Companies Act, 1934, and that if it was so intended it would have provided for such under the Act itself.

Counsel for the plaintiff, while admitting that in so far as he was able to ascertain the common law had never been resorted to in Canada to have a charter cancelled on the grounds of misuser or abuse, contended that nevertheless common-law rights

which were not subsequently dealt with under the Act still remain and that therefore the right of action existed to have the charter annulled for misuser or abuse.

The Eastern Archipelago Company v. *The Queen* (1853), 23 L.J.Q.B. 82, Martin, B. at p. 89:

. . . But a view of the case which, so far as I can collect, was not under the consideration of the Court of Queen's Bench at all, has been submitted to us, namely, that quite independent of the peculiar wording of the charter, and whether the provisions contained in it be directions or conditions, there appeared upon the record that there had been such an abuse and misuser of the privileges conferred by the charter as entitled the Crown to have it annulled; and the argument of the learned counsel on behalf of the Crown has satisfied me that this is the correct legal conclusion upon the facts appearing upon the record. I find it laid down that a corporation may be dissolved for either of these two causes—misuser or abuse; and that there is a tacit or implied condition annexed to all such grants as the present, that they shall not be misused or abused, and that if they be, the charter or franchise is forfeited. In *The Queen* v. *The City of London,* [(1692)] Skin. 310 Lord Holt lays down, in regard to a corporation or a body politic to which a trust is annexed, that any maladministration of it is a cause of forfeiture, and that it may, therefore, be dissolved; and, again, in *The City of London* v. *Vanacre,* [(1699)] 3 Mod. 270, the same eminent judge states, that all franchises are granted upon conditions that they shall be duly executed according to the grant, and if the parties to whom they are granted neglect to perform the terms of the patent, it may be repealed by *scire facias.* . . . Mr. Justice Blackstone, in his Commentaries, vol. 4, p. 473, lays it down, "that a charter is forfeited by abuse of its franchises, in which case the law judges that the body politic has broken the condition upon which it was incorporated, and, therefore, the incorporation is void.

This case was referred to with approval in the case of *Dominion Salvage and Wrecking Company* v. *The Attorney-General of Canada, supra.*

In my opinion the Dominion Companies Act has taken nothing away from the common-law rights to have a charter annulled but has given certain other grounds on which it may be cancelled under the statute.

I therefore find that an action can be maintained to have a charter annulled for abuse or misuser.

It was argued that to give effect to this ruling would jeopardize many of our great Canadian corporations having branches across Canada, when some branch might misuse or abuse the charter and this would mean that the whole charter would be destroyed

S. C.
1946

ATTORNEY-GENERAL v. HELLENIC COLONIZATION ASSOCIATION

Farris, C.J.S.C.

creating a chaotic condition in the management of our Canadian corporate structures. This view I cannot agree with. This must be a matter to be determined in each separate case. Isolated cases of abuse or misuse should not be sufficient for a declaration or annulment. The abuse or misuse must be of such a nature as to be offensive to public policy.

To my mind the abuse or misuse must be of such consecutive acts and the general policy of the association such as would indicate a clear intention that the company or association wished to use the charter as a mere cloak for its improper acts.

I therefore direct that the charter shall be annulled in accordance with the plaintiff's prayer. There will be judgment accordingly and for costs.

Judgment for plaintiff.

S. C.
1946
May 1, 2; *July* 10.

MARGARET M. HARE, MARRIED WOMAN AND THE GROLIER SOCIETY LIMITED v. BETTER BUSINESS BUREAU OF VANCOUVER.

Libel—Publication—Whether defamatory in their natural and primary sense—Justification—Whether occasion of qualified privilege—What constitutes.

The plaintiff company is the publisher of a literary work known as the "Book of Knowledge" and the plaintiff Hare is a saleslady in the company's employ. The defendant is an incorporated society under the Societies Act of British Columbia. The objects of the defendant are set out in the judgment. In an action for damages for libel the words complained of are as follows:—

"GROLIER SOCIETY

"A woman giving the name Miss Hare has a new method of selling 'The Book of Knowledge.' She states she represents the Vancouver School Board and is attached to the Family Allowance Department of the Government and is interested in the Children's Aid. Her proposition is that the woman on whom she calls makes a down payment of $10 by signing over their family allowance for one year. She claims to be operating all across Canada. She is about 35 years of age, well dressed, blonde, and drives a cream-coloured coupe, the number of same not known. A report to the police or the bureau should be made if she calls."

Several defences are raised, three of which are: (a) That the words

are not defamatory in their natural and primary sense, and are incapable of bearing the meaning assigned to them by the plaintiff; (b) justification as to the words in their ordinary sense, and (c) qualified privilege. The publication is admitted and it is admitted the "Grolier Society" named in the published statement refers to the plaintiff company.

Held, that the words are defamatory in their natural and primary sense, that is, their plain and popular meaning and the defence of justification clearly fails. The burden of proving the truth of the statement published falls on the defendant and this burden has not been discharged. As to the defence of qualified privilege, the defamatory statements and the circumstances under which they were made go far beyond anything that the doctrine is intended to protect and applying the principles laid down in the cases referred to one cannot find that under the particular circumstances here that the occasion was a privileged one. The plaintiffs are therefore entitled to damages.

ACTION for damages for libel. The facts are set out in the reasons for judgment. Tried by COADY, J. at Vancouver on the 1st and 2nd of May, 1946.

Gilbert Hogg, and *Douglas Brown*, for plaintiffs.
Campbell, K.C., and *G. L. Murray*, for defendant.

Cur. adv. vult.

10th July, 1946.

COADY, J.: This is an action for damages for libel. The defamatory words complained of are as follows:

GROLIER SOCIETY

A woman giving the name of Miss Hare has a new method of selling "The Book of Knowledge." She states she represents the Vancouver School Board and is attached to the Family Allowance Department of the Government and is interested in the Children's Aid. Her proposition is that the woman on whom she calls makes a down payment of $10 by signing over their family allowance for one year. She claims to be operating all across Canada. She is about 35 years of age, well dressed, blonde, and drives a cream-coloured coupe, the number of same not known.

A report to the police or the bureau should be made if she calls.

The plaintiff company is the publisher of a literary work known as the "Book of Knowledge" and the plaintiff Hare is a saleslady in the employ of the plaintiff company.

The defendant is a duly-incorporated society under the Societies Act of the Province of British Columbia. The objects

S. C.
1946

HARE AND THE GROLIER SOCIETY LTD. v. BETTER BUSINESS BUREAU OF VANCOUVER

Coady, J.

of the defendant as set out in the declaration filed (Exhibit 2) herein, are *inter alia*:

(a) To further and promote honesty, truthfulness and reliability in merchandising and advertising of all kinds, discourage fraudulent and deceptive methods in business and thereby to increase public confidence in advertising, salesmanship and business generally.

(b) By instruction and education to aid in increasing the investing knowledge of the public and to teach prospective purchasers of securities to discriminate between legitimate investments, on the one hand, and illegitimate and fraudulent investments, on the other.

(c) To investigate, give publicity to, and aid in procuring proper legal action against vendors offering securities, commodities or services of doubtful value, by fraudulent or deceptive methods.

(d) The society shall not be conducted for gain or profit, but shall be supported and maintained by such membership fees, assessments, contributions, benefactions and endowments as the board of directors shall determine to be necessary for the proper functioning of the said organization.

Several defences are raised. I need only mention the following three:

(a) That the words are not defamatory in their natural and primary sense, and are incapable of bearing the meaning assigned to them by the plaintiff; (b) justification as to the words in their ordinary sense, and (c) qualified privilege.

The publication is admitted. It is admitted that "Grolier Society," named in the published statement, refers to the plaintiff company.

I have no hesitation in finding that the words are defamatory in their natural and primary sense, that is, their plain and popular meaning. I likewise have no hesitation in finding that the defence of justification clearly fails. The burden of proving the truth of the statement published falls on the defendant, and this burden has not been discharged. On the contrary I am not greatly impressed by the evidence of Mrs. Geddes as to the statements which she says were made to her by Mrs. Hare. I think she rather hastily drew conclusions that were not warranted. I prefer to accept the evidence of Mrs. Hare on that. The same applies to the evidence of Mrs. Whitty.

The only defence therefore that remains to be considered is that of qualified privilege.

The defendant maintains a business office. A complaint was received from a Mrs. Geddes by the secretary at the office who

made a memorandum of it, and this was subsequently drawn to the attention of the manager, Mr. Templeton. No proper care was taken by him to check the truth of the statement before publication. Mrs. Geddes was not known to the defendant, but before publication Mr. Templeton telephoned her, and his conversation with her indicated to him that at least with respect to one of the statements made by her and subsequently appearing in the published article she was uncertain. This should have put him on his guard and indicated to him the necessity of checking the other statements with greater care. Publication was made by the defendant not only to the members of the association, some 350 in all, but 65 copies were distributed to the public generally. No enquiry was made of the plaintiffs or either of them before publication. Even if the statements made by Mrs. Geddes concerning the plaintiff Hare as contained in the published article were believed to be true by the defendant, to add thereto a description of the plaintiff as was done, and a suggestion that the police should be communicated with if this woman should call, was clearly going beyond anything that the statements made by Mrs. Geddes would justify, and were most defamatory of the plaintiff Hare. The meaning assigned by the plaintiffs to the defamatory statement as set out in paragraph 6 of the statement of claim to the effect

> that by this publication the defendant meant and was understood to mean that the plaintiff was acting in a fraudulent and dishonest manner in attempting to sell the book, and was attempting to sell the said "Book of Knowledge" by making fraudulent misrepresentation, and was attempting to obtain, and had in fact obtained large sums of money from divers members of the public by deception and false pretences, and had been guilty of a criminal offence

would in substance seem to be an almost obvious conclusion in the public mind from the published statement. Mr. Templeton's evidence supports the plaintiffs' allegation here.

> Now, you state that a report to the police should be made if this woman calls. Why do you make that statement? They are interested in knowing persons who are misrepresenting what they are selling.
>
> And attempting to obtain money by misrepresentation? Yes.

While this is indicative of malice I cannot find that there was malice in fact, that is, anything in the nature of ill will towards the plaintiffs or malice in the legal sense of indirect or improper

S. C.
1946

HARE AND THE GROLIER SOCIETY LTD. v. BETTER BUSINESS BUREAU OF VANCOUVER

Coady, J.

motive. I attribute Mr. Templeton's action in publishing the defamatory statement to an overzealousness on his part and a misconception of his duty in the circumstances, and a lack of judgment that one is surprised to find in a man of his undoubted ability and experience. Templeton acted, I think, in good faith and in a manner which he thought was consistent with his duty as a manager of the defendant association. But good faith on his part does not render the occasion a privileged one if in fact it was not. On this point Gatley on Libel and Slander, 3rd Ed., at p. 270, has the following excerpts from two of the leading cases, to which reference is there made as follows:

"That the defendant acted under a sense of duty, though important on the question of malice, is not, I think, relevant to the question whether the occasion was or was not privileged."

"Good faith, however strong its foundation, cannot convert a non-privileged occasion into a privileged occasion, although it may afford excellent evidence of the absence of malice."

Notwithstanding the worthy objects of the association and the good intentions of Mr. Templeton I do not think the cloak of privilege can protect the defendant from defamatory statements made under the circumstances. There are definite limits to this doctrine, and in my view it does not carry quite so far as counsel for the defendant submits. The defamatory statements in this instance and the circumstances under which they were made go far beyond anything that the doctrine is intended to protect. Publication was not confined to its own members, and this is an important element, as the cases show (*Barr* v. *Musselburgh Merchants Association,* [1912] S.C. 174). It is a matter of law whether the occasion is a privileged one or not, and as was observed by Lord Buckmaster, L.C. in the case of *London Association for Protection of Trade* v. *Greenlands, Limited,* [1916] 2 A.C. 15, at p. 22:

. . . Indeed, the circumstances that constitute a privileged occasion can themselves never be catalogued and rendered exact.

The principles are, however, laid down in the cases. I shall not endeavour to restate them since, as observed by the Lord Chancellor in the same case (p. 22):

There is, indeed, danger of confusion if new words are used to define or explain that which is already well established and clear.

A great many cases were referred to by counsel in the lengthy

and helpful arguments filed, and most of the relevant authorities cited. The authorities are reviewed at some considerable length by Duff, J., later Sir Lyman P. Duff, C.J., in the case of *Halls* v. *Mitchell,* [1928] S.C.R. 125, where at p. 147 he summarized the underlying principles. The leading authorities are likewise reviewed in the case of *Sapiro* v. *Leader Publishing Co., Ltd.,* [1926] 2 W.W.R. 268. As stated by Earl Loreburn in *London Association for Protection of Trade* v. *Greenlands, Limited, supra* (pp. 28-9):

> . . . But we must remember that private reputation and credit are at stake, and I cannot think that privilege should be allowed unless there is not merely good faith but also real care to make inquiry only in reliable quarters, and to verify it where practicable. The absence of such care may, no doubt, be evidence of malice, but it is also relevant on the point whether there is privilege or not, and may, in my judgment, be fatal to the privilege even if malice is disproved. The Court has to hold the balance, and, looking at who published the libel, and why, and to whom, and in what circumstances, to say whether it is for the welfare of society that such a communication, honestly made, should be protected by clothing the occasion of the publication with privilege.

Applying the principles laid down in these cases to which I have referred and in the cases referred to therein, I cannot find that under the particular circumstances here that the occasion was a privileged one. The plaintiffs are therefore entitled to damages. The plaintiff company, it seems to me on the evidence, is more interested in the vindication of its name and the reputation than in the *quantum* of damages. I would fix the damages to which the plaintiff company is entitled at the sum of $100.

The defamatory statements reflect most seriously upon the reputation and character of the plaintiff Mrs. Hare. The defendants refused to retract and pleaded justification. I fix the amount to which she is entitled at the sum of $1,000. The plaintiffs are entitled to their costs.

Judgment for plaintiffs.

S. C.
1946
April 24, 25;
July 12.

LUSK AND LUSK v. YE OLDE ENGLISH FISH & CHIPS LTD.

Negligence—Injury to invitee in restaurant—Falling down stairway—Light facing stairway had burned out—Light had been on about an hour previous to accident—Whether keeper negligent.

The plaintiffs Mr. and Mrs. Lusk with their son went to the restaurant premises of the defendant at 44 Hastings Street West in Vancouver on the 16th of February, 1943, at about 9 o'clock in the evening for a meal. The plaintiff Frances Lusk asked the waitress where the washroom was and she was directed to it. It was on the mezzanine floor with a closed stairway leading up from the ground floor. There was a light almost immediately above the bottom of the stairway, also a light near the top but somewhat to the right. The light at the bottom was intended to light the stairway which, at this time of night, would otherwise be quite dark. No appreciable amount of light from the restaurant floor reached the stairway. This light at the bottom was unfortunately burned out at the time. Mrs. Lusk went up the stairs safely, but when returning down she fell and was injured. Her evidence was accepted that the stairway was very dark. The light at the top only threw a side light on the two top steps. The evidence of the manager of the defendant company was that the light at the bottom of the stairway was on at between 7 and 8 o'clock and it burned out apparently some time between that hour and 9 o'clock when the accident happened. A Mrs. Clarke said that some days prior to this, she told the manager this light was out. The manager did not remember this, but said that if she did so it would be replaced at once.

Held, that in face of the manager's evidence the light was on earlier that evening and assuming the light was out when Mrs. Clarke informed him, the light had been replaced before the evening of the accident, but unfortunately burned out again. There was no reason for considering the manager an untruthful witness. The burden of showing negligence was on the plaintiff and the burden has not been discharged. The action is dismissed.

ACTION for damages for injuries sustained by the plaintiff Frances Lusk in falling down a stair in the restaurant premises of the defendant on Hastings Street West in Vancouver. The facts are set out in the reasons for judgment. Tried by COADY, J. at Vancouver on the 24th and 25th of April, 1946.

Marsden, and *Prenter,* for plaintiffs.
Tysoe, and *Lefeaux,* for defendant.

Cur. adv. vult.

12th July, 1946.

S. C.
1946

LUSK AND LUSK v. YE OLDE ENGLISH FISH & CHIPS LTD.

COADY, J.: This is an action for damages for injuries sustained by the plaintiff Frances Lusk. Richard Samuel Lusk, her husband, also joins in a claim for certain special damages. The facts may be briefly stated. The plaintiffs, together with their son, went to the restaurant premises of the defendant at 44 Hastings Street West, city of Vancouver, on the 16th of February, 1943, at about 9 o'clock in the evening, for the purpose of having a meal. The plaintiff Frances Lusk asked the waitress where the washroom was and she was directed to it. The washroom is situated on a mezzanine floor with a closed stairway leading thereto from the restaurant. There is a light almost immediately above the bottom of the stairway and also a light near the top but somewhat to the right. The light at the bottom is intended to light the stairway, which particularly at this time of night would otherwise be quite dark. No appreciable amount of light from the restaurant premises reaches the stairway. This light at the bottom was unfortunately burned out at the time. The plaintiff Frances Lusk, while noticing the stairway was dark, went up safely, but when coming down fell and was injured. I accept her evidence that the stairway was very dark. The light at the top of the stairway, situated as it is some distance to the right, would not throw any light on the stairway itself, except as to a portion of the first two steps at the top where the light cuts across at an angle.

It seems clear to me, and I think it is not greatly in dispute, that the plaintiff was an invitee on the premises. *Jackson and Jackson* v. *Chow,* [1946] 2 W.W.R. 161, at p. 165, *McCallum* v. *Hemphill Trade Schools Ltd.,* [1920] 1 W.W.R. 114. That being so, the next question is, What was the duty owed to her by the invitor, the defendant in this case; and was there a breach of that duty? It has been expressed in different ways, but the principle as laid down in the judgment of Willes, J., in *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274, at p. 288, so often quoted, is thus stated:

"And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that,

S. C.
1946
LUSK AND LUSK v. YE OLDE ENGLISH FISH & CHIPS LTD.
Coady, J.

where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by the jury as a matter of fact.

As stated in Salmond on Torts there is an "unfortunate ambiguity" in the foregoing passage, but as pointed out by MARTIN, J.A., afterwards MARTIN, C.J.B.C., in *Gordon* v. *The Canadian Bank of Commerce* (1931), 44 B.C. 213, that "unfortunate ambiguity" has been cleared up in the case of *Robert Addie & Sons (Collieries)* v. *Dumbreck,* [1929] A.C. 358, where it was said (p. 365):

Towards such persons the occupier has the duty of taking reasonable care that the premises are safe.

I need not consider, it seems to me, the question of whether the plaintiff in this case used reasonable care for her own safety, and I express no opinion upon that. But, assuming that she did, then in the view that I take of the facts in relation to the above principle of law defining the defendant's duty, it seems to me she cannot succeed. That the absence of a light at the bottom of the stairway created a situation of danger is obvious, but it is quite clear on the evidence that the defendant did not know, and it cannot be held that it ought to have known, that the light was out at the time the plaintiff went to the washroom. Mr. Rogers, the manager of the defendant company, says that this light at the bottom of the stairway was on at between 7 and 8 o'clock that evening. It burned out, apparently, some time between that hour and the time when the plaintiff went to the washroom at about 9 o'clock. The failure to observe that it was burned out during that period of time I cannot hold to be negligence on the part of the defendant. The danger that was created by the absence of this light was not a danger that the defendant knew or ought to have known under the circumstances. As stated in the case of *Connor* v. *Cornell* (1925), 57 O.L.R. 35, at p. 38,

The invitor is not an insurer of the invitee against all accidents that may befall him while upon the premises.

There was some evidence given by Bertha Clarke to the effect that some days prior to this accident she had spoken to Mr. Rogers, the manager of the defendant company, drawing his attention to the fact that this light was out. If that be so, then,

while Mr. Rogers has no recollection of it, he says that the usual and ordinary practice would have been followed and the burned out light would have been replaced without delay, although he does not recall having replaced it at that time, someone else may have done so. In the face of his evidence, however, that the light was on earlier that evening, then I must assume that if the light was out when Mrs. Clarke informed him of it which she says she did, the light had been replaced before the evening of this accident but unfortunately had burned out again. I cannot disregard that evidence of Rogers, as I have no reason for considering him an untruthful witness. It was argued that there should have been a hand-rail on this stairway, but on the plaintiff's own evidence I cannot find that the absence of a hand-rail in any way contributed to the accident, nor can I find that the half inch difference in rise in the top step was a contributing factor The burden, too, of showing negligence is on the plaintiff and that burden under the circumstances has not been discharged.

The action must therefore be dismissed. The defendant is entitled to its costs, if it insists upon them, which I trust under the circumstances it may not.

Action dismissed.

HUNTER v. LAKE OF THE WOODS MILLING COMPANY LIMITED AND WHITE.

C. A.
1946
Jan. 8, 9; March 6.

Negligence—Damages—Motor-vehicles—Collision at an intersection—Right of way—R.S.B.C. 1936, Cap. 116, Sec. 21.

In an action for damages resulting from a collision of cars at the intersection of 29th Avenue and McKenzie Street in the city of Vancouver at about 5.30 in the afternoon of the 7th of October, 1944, the plaintiff was travelling east on 29th Avenue and the defendant White, driving a car of the Lake of the Woods Milling Company Limited with its consent, was proceeding south on McKenzie Street. The plaintiff, as he approached the intersection, saw no one on his right and then looking to the left saw a car approaching the intersection at a leisurely pace and he then proceeded to go through the intersection; when reaching just past the centre of the intersection he was hit by the defendant's

C. A.
1946

HUNTER
v.
LAKE OF
THE WOODS
MILLING
CO. LTD.
AND WHITE

car. A witness, one Anderson, who was driving his car south on McKenzie Street testified that the defendant White caught up to him some 90 feet from the north kerb of 29th Avenue driving at about 30 miles per hour and on his reaching the intersection had not yet got back to his proper side of the road and did not slacken his speed until he put on his brakes at the moment of impact. The defendant said he saw the plaintiff when he was about 40 feet north of the kerb on 29th and he thought the plaintiff would give him the right of way as he reached the intersection first. The plaintiff saw Anderson's car as it neared 29th, but he did not see White's car as it was behind Anderson's car when he looked and he did not see it until it was almost on him in the centre of the intersection. It was held that White was wholly to blame for the accident.

Held, on appeal, affirming the decision of SARGENT, Co. J. (SIDNEY SMITH, J.A. dissenting in part and holding the plaintiff one-third to blame), that the negligence of White in the manner mentioned was the decisive cause of the accident. The fact that the plaintiff did not see White until he was close to him may have been that it was hidden behind the Anderson car. In any case his failure to see it was not the decisive cause of the accident.

APPEAL by defendant from the decision of SARGENT, Co. J. of the 5th of October, 1945, in an action for damages resulting from a collision between the plaintiff's car and defendant's car at the intersection of 29th Avenue and McKenzie Street in Vancouver. On the 7th of October, 1944, at about 5.45 p.m. the plaintiff was driving east on 29th Avenue and approaching the intersection at McKenzie Street and at the same time the defendant White was driving a car of the defendant company south on McKenzie Street and approaching the said intersection. When he was about 90 feet north of the intersection, he caught up to another car going in the same direction with the intention of passing it and was going at about 30 miles per hour. He did not get back to the proper side of the road until after reaching the intersection and continued at 30 miles per hour until two or three feet before the impact, saying in his evidence that he expected the plaintiff would let him pass. The plaintiff states that as he approached the intersection on 29th Avenue he saw a driver on his left on McKenzie Street driving at a leisurely pace towards the intersection, evidently the car that White passed, and he did not see the defendant until just before the impact. The defendant's car struck the forepart of the left side of the

plaintiff's car. Judgment was given for plaintiff for $201.50 and costs.

The appeal was argued at Victoria on the 8th and 9th of January, 1946, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Tysoe, for appellant: There was no stop sign on McKenzie Street and the defendant had a right to proceed on reaching the intersection. On the facts the learned judge should have held that both drivers were to blame. There was a stop sign at the north-east corner of the intersection against west-bound traffic: see *Craig* v. *Sinclair* (1944), 60 B.C. 157, and on appeal (1945), 61 B.C. 256.

D. McK. Brown, for respondent: The defendant's failure to give the plaintiff, who was on his right, the right of way was the cause of the collision. On his own story White saw the plaintiff coming from his right and approaching the intersection at a reasonable speed. He passed the Anderson car on McKenzie Street at an excessive speed and was not on his proper side of the road after reaching the intersection. On his own statement he saw Hunter in time to avoid the accident, but he continued on in the teeth of the statute as to right of way.

Tysoe, replied.

Cur. adv. vult.

6th March, 1946.

SLOAN, C.J.B.C.: I would dismiss the appeal.

O'HALLORAN, J.A.: The motor-cars of the appellant White and the respondent plaintiff collided near the centre of an intersection which they approached "at right angles." The respondent approaching from White's right had a statutory right of way. White was held wholly to blame for driving his car too fast and for failure to give the respondent the right of way.

If by that finding the learned trial judge meant that the respondent's statutory right of way was not displaced by a reasonable and substantial prior entry into the intersection (*cf. Fewster* v. *Milholm and Vallieres and McAndless* (1943), 59 B.C. 244) by the appellant White, then I am in agreement, for

C. A.
1946

HUNTER
v.
LAKE OF THE WOODS MILLING CO. LTD. AND WHITE

O'Halloran, J.A.

that is the conclusion I must draw from the whole of the testimony after allowing for the conflict to be found therein. In my opinion the effective question for decision is, was White wholly or only partly responsible?

The testimony as a whole leads me to conclude that in the circumstances of this case the lack of care attributed to the respondent was not a causative factor in the occurrence of the collision. This is not a case (such as *Lauder* v. *Robson* (1940), 55 B.C. 375; *Alonzo* v. *Bell et al.* (1942), 58 B.C. 220 and *Fewster* v. *Milholm and Vallieres and McAndless, supra*) wherein it appears that the respondent could have avoided the consequences of White's negligence. Anderson, a defence witness called on White's behalf, testified the latter passed his car just before reaching the intersection and entered it with no decrease in speed. That would afford a reasonable explanation why the respondent—although he saw Anderson's car to the left—did not also see White's car. That is one of the respects in which this case is distinguishable from *Craig* v. *Sinclair* (1945), 61 B.C. 256, and other decisions holding a motorist responsible for failing to see what he ought to have seen.

Moreover, White testified he had seen the respondent before passing Anderson's car, but expected the respondent to allow him to go through. The appellant in *Alonzo* v. *Bell, supra,* attempted unsuccessfully to excuse himself by saying that he thought the cyclist would allow him to pass. I find it difficult to resist the view that White's own testimony supports the conclusion that he was solely responsible for the collision.

I would dismiss the appeal.

ROBERTSON, J.A.: The facts are set out in the reasons for judgment of the learned trial judge. Hunter, being on White's right, had a statutory right of way unless White had made a reasonable and substantial prior entry into the intersection before he had reached the entrance to the intersection. See *Fewster* v. *Milholm and Vallieres and McAndless* (1943), 59 B.C. 244, which in effect overrides *Hall* v. *Tinck* (1932), 45 B.C. 540, which the learned trial judge found "applied to this case." There is no evidence to show that either had made a

reasonable and substantial prior entry into the intersection, or as to which car reached the intersection first. White is not at all certain as to what distance his car was from the north boundary of 29th Avenue when he first saw Hunter's car; but he judges that Hunter's car was twice the distance from the west boundary of McKenzie Street his car was from the north boundary of 29th Avenue. White was travelling between 25 and 30 miles per hour, and he maintained this speed until just before the crash. He says Hunter's car was travelling between 45 and 50 miles per hour, "coming at a good clip." He did not think at this time there was any danger. He could not see "whether he [Hunter] was going to stop or may be going to go through or slow up and turn and go south to McKenzie Street."

Again White said when he first saw Hunter's car it was going "so fast" that he determined that the Hunter car was going through and he made up his mind to give him the right of way. He kept his eye on Hunter's car and when he came to the conclusion that Hunter's car was not going to stop because "he kept on and he could see he wasn't slowing up" he put on his brakes to let Hunter's car get by. This would be just a few feet from where the collision occurred. It was too late. The collision took place when two-thirds of Hunter's car was on the east side of the centre line of McKenzie Street. White's car was apparently on the wrong side of the road. White suggests that Hunter increased his speed, but there is no satisfactory evidence as to when he did this. White said he saw Hunter "coming so fast he seemed to speed up to me." Anderson says that Hunter's car when his (Anderson's) car was 60 feet from the north kerb of 29th Avenue, was going probably between 30 and 40 miles per hour, and that Hunter's car continued at that speed until he got "about 30 feet, roughly, back from the bus line," when he accelerated the speed of his car. There is no evidence as to where the bus line is, but assuming it is the black top pavement shown on the plan, then its western boundary was about 23 feet from the west boundary of McKenzie Street; so that if Hunter did increase his speed it would only be when he was in or about to enter the intersection.

White says that Hunter's car was proceeding at a very high

C. A.
1946

HUNTER
v.
LAKE OF
THE WOODS
MILLING
CO. LTD.
AND WHITE

Robertson, J.A.

rate of speed and that he was determined to assert his right to the right of way. Yet he (White) maintained his same speed throughout and took no precautions whatever to avoid the collision until it was too late.

In my opinion the negligence of White in the manner mentioned was the decisive cause of the accident. It was submitted that Hunter was guilty of negligence in that he did not see White's car at all. Hunter said he looked to the left and saw only Anderson's car. The learned judge makes no finding as to this. It may be that the reason why Hunter did not see White's car was that it was hidden behind Anderson's car, which it was passing. In any case, I think his failure to see White's car was not the decisive cause of the accident.

I would therefore dismiss the appeal.

SIDNEY SMITH, J.A.: This is an intersection case. The plaintiff car was proceeding east on 29th Avenue in the city of Vancouver, while the defendant car was proceeding south on McKenzie Street. The two cars collided approximately at the centre of the intersection. There was no unusual obstruction to the line of vision of either driver.

The learned judge found the defendant car to blame for excessive speed, namely, 30 miles per hour, and in failing to accord to the plaintiff (the respondent herein) his statutory right of way. The defendants did not dispute on appeal their liability on this finding, but submitted that the plaintiff was also at fault. As to this the judge made no finding on the speed of the plaintiff car, but the plaintiff said that it was from 20 to 25 miles per hour. The judge, however, found that the plaintiff did not see the defendant car until just before the impact. The plaintiff makes this very clear in his evidence. He said he did not see the defendant car till it was "right on top of me"—that he "just saw it, and bang"—that his seeing the car and the impact with it were "just instantaneous, you might say." Why did he fail to see the other car before the impact? It was submitted before us that this was because of the interposition of another car (driven by one Anderson) which the defendant car had passed just prior to entering the intersection, and which the plaintiff said he was

watching. I have the greatest difficulty in accepting this view. In the first place, it is not borne out by the evidence and the learned trial judge does not so find. Moreover, the plaintiff himself, when expressly asked this question, gave no such explanation or indeed any explanation of his failure to see the defendant car until it was "right on top" of him.

In these circumstances therefore I think the failure of the plaintiff to see the defendant's car prior to the impact was due to bad look-out on the part of the plaintiff, whereby he incapacitated himself from being able to take any steps whatever to avoid this collision. I think this was negligence contributing to the collision within the principles discussed by O'HALLORAN, J.A. in *Craig* v. *Sinclair* (1945), 61 B.C. 256, at p. 258. As there, so here, I would accordingly find the respondent one-third to blame.

BIRD, J.A.: This is an appeal from the judgment of SARGENT, Co. J. in an action arising out of a collision between motor-cars at an intersection in a residential area in the city of Vancouver. The learned trial judge found the appellant wholly at fault by reason of excessive speed and failure to give to the respondent his statutory right of way.

The respondent's car proceeding east on 29th Avenue, being the car on the right, was entitled in the circumstances recited to the statutory right of way over the appellant's car going south on McKenzie Street, unless it is made to appear that such right of way was displaced in consequence of respondent having made a reasonable and substantial prior entry into the intersection—*Lloyd* v. *Hanafin* (1931), 43 B.C. 401; *Fewster* v. *Milholm and Vallieres and McAndless* (1943), 59 B.C. 244.

The learned trial judge made no finding as to which car first entered the intersection. It is clear on the evidence that the front of appellant's car struck the respondent's car about midway on its left or north side, and at a point slightly east and south of the centre of the intersection. I conclude from consideration of the reasons for judgment that the learned judge did not accept the evidence of witnesses called by respondent who deposed to the excessive speed of the respondent's car, which those witnesses

C. A.
1946
HUNTER
v.
LAKE OF
THE WOODS
MILLING
CO. LTD.
AND WHITE
Bird, J.A.

estimated at 45 miles per hour. No comment is made in his reasons upon that evidence or upon the question of speed of the respondent's car, while there is a finding of excessive speed on the part of the appellant's driver, *i.e.*, 30 miles per hour. Therefore I think we are entitled to assume that the learned judge negatived the charge of negligence on the part of the appellant and accepted the evidence of respondent that he entered the intersection at a reasonable speed—*The Hampstead Steamship Co.* v. *The Vaughan Electric Co.* (1908), 38 N.B.R. 418 and *Andreas* v. *Canadian Pacific Ry. Co.* (1903), 37 S.C.R. 1.

In those circumstances, there being no direct evidence on the point, I think the only inference open upon the evidence adduced is that the appellant entered the intersection at best from his point of view simultaneously with the respondent's entry, or as I think more probable, shortly after the respondent entered, having in mind the point of impact and the fact which I think must be taken as established that the respondent's speed was not excessive. In any event, the evidence considered in the light of such findings as were made, clearly falls short of supporting the contention that the appellant made a reasonable and substantial prior entry into the intersection. Consequently the learned judge's finding of negligence on the part of the appellant must be sustained.

Then can it be said that the respondent, though he had the right of way, failed to exercise reasonable care and was therefore guilty of contributory negligence?

The respondent said he had not seen the appellant's car until immediately before the impact, though he did see another car driven by one Anderson and also proceeding south on McKenzie Street when that car was ten to 20 feet north of the intersection. The respondent says he was then closer to the intersection than Anderson's car.

Evidence of witnesses called by the appellant discloses that the appellant passed the Anderson car when the latter was about 60 feet from the intersection and the appellant acknowledged that at the time of the impact his car, having turned out to pass Anderson, had not resumed its position on the right or west side of McKenzie Street.

The learned judge says in his reasons for judgment:

When he [the respondent] had attained and was passing through the centre thereof, [the intersection] he was hit by the defendant's car, driven by White, [the appellant] which had just passed the other, [Anderson's] and had not as yet wholly returned to its proper side of the road.

The reasons for judgment are silent upon the sufficiency of the look-out maintained by the respondent, though I think it appears from the reasons that the learned judge did accept respondent's statement that on approaching the intersection he had looked to his left and saw the Anderson car and no other. It is possible that when the respondent looked to the left the appellant's car was wholly obscured by the Anderson car. In view of the fact that appellant's car had not resumed its proper place on the road at the time of impact, it may be that the learned judge inferred that the point where respondent passed Anderson was closer to the intersection than as stated by the defence witnesses. That being so, the fact that the respondent's view of the appellant's car was obscured when he looked to the left, would I think explain the appellant's failure to see the respondent's car.

I entertain some doubt in regard to the maintenance of a proper look-out by the respondent, more particularly in view of the fact that it was shown that he had a field of vision of from 70 to 90 feet north on McKenzie Street from the time that his car was moving east between points 145 to 75 feet west of the intersection. However, in all the circumstances, I am unable to say that it is shown that respondent's look-out was inadequate, nor does it appear that he was otherwise guilty of negligence contributing to the accident. Consequently I am of opinion that the judgment below must be sustained.

I would therefore dismiss the appeal.

Appeal dismissed, Sidney Smith, J.A. dissenting in part.

Solicitors for appellants: *Craig & Tysoe.*
Solicitor for respondent: *L. St. M. Du Moulin.*

C. A.
In Chambers
1946
July 2.

REX v. HEMOW AND VALOVICH.

Criminal law—Conviction—Application for bail pending appeal—Sufficiency of grounds for.

Accused Hemow was convicted of robbery with violence on May 28th, 1946, but was not sentenced until the end of June when the Assizes concluded. It was then too late to appeal to the Court of Appeal as it had finished its sittings in June. Notice of appeal on a point of law was given for the sittings of the Court of Appeal to commence on the 10th of September, the ground of appeal being that the evidence was circumstantial and not sufficient to warrant a conviction. The accused is 24 years old; he has had no previous conviction; his record is good. He has a good trade. He has been working "as an engineer" for the past three years earning $4,000 a year during the fishing-season in each year and during this time supported an invalid father, an invalid brother and his mother and sisters. His employer says that during this period he has always been a man of good character who does his work properly and effectively. He wishes to employ him during the fishing-season between July 5th and September 10th. The jury recommended leniency. On an application for bail:—

Held, that in this case the facts are sufficient to warrant an order for bail.

APPLICATION by accused Hemow for bail. Heard by ROBERTSON, J.A. in Chambers at Vancouver on the 2nd of July, 1946.

Crux, for the application.
Castillou, K.C., contra.

ROBERTSON, J.A.: On the 28th of May, 1946, the accused Hemow was convicted at the Vancouver Assizes, along with another man, Valovich, of robbery with violence. He was not sentenced until the end of June when the Assizes concluded. It was then too late to appeal to the Court of Appeal which had finished its sittings in June. The notice of appeal on a point of law has been given for the sittings of this Court to commence on the 10th of September. The ground is that the evidence was circumstantial and not sufficient to warrant a conviction. The accused now applies for bail. The Crown objects and relies upon *Rex* v. *Goverluk* (1945), 61 B.C. 261. In this case I think there are exceptional or unusual circumstances within the

Goverluk case to warrant granting the application. The accused is 24 years of age; he has had no previous conviction; his record is good; he has a good trade. He has been working "as an engineer" for the past three years, earning $4,000 per year during the fishing-season, in each year. During that time he has supported his invalid father, his invalid brother and his mother and sisters. He thus has the family ties and obligations referred to in *Rex* v. *Clarence F. Smith* (1924), 56 O.L.R. 244, at p. 246. His employer during the period mentioned says that the accused "has always been a man of good character who does his work properly and effectively." He wishes to employ him as his engineer during the fishing-season, commencing the 5th of July, and states that between that date and the 10th of September he will earn a considerable portion of his annual income. As I have said, the accused, although convicted on the 28th of May, was, according to the usual practice in this Province, remanded until the end of the Assizes for sentence; so that the first Court at which his appeal may be heard will be the sitting on the 10th of September. Had he been sentenced when he was convicted he could have appealed to this Court when sitting in June. I do not wish to be understood to be in any way criticizing the practice of imposing sentences at the end of the Assizes. It is a practice which has long obtained in that Court and one which I adopted on numerous occasions when I was a member of that Court and presiding at Assizes. In addition to these facts the jury recommended leniency. Each case, of course, must depend upon its special facts. I think in this case the facts are sufficient to warrant an order for bail.

An order is made accordingly.

Application granted.

C. A.
1946
Mar. 27, 28; May 3.

REX v. GORDON AND RYCER.

Criminal law—Formal charge setting forth offence—Indictment—Essential averment omitted—Insufficiency—Motion by Crown to amend indictment—Granted—Criminal Code, Sec. 889, Subsec. 2.

The two accused were charged under section 399 of the Criminal Code that they "unlawfully did retain in their possession certain stolen goods knowing the same to have been stolen." On the trial the jury disagreed as to the accused Gordon but found the accused Rycer guilty and he was sentenced to three years' imprisonment. He appealed on the ground that the trial judge, without jurisdiction so to do, allowed an amendment to be made to the indictment during the course of the trial. The amendment consisted of the addition of the words "knowing the same to have been stolen," which were lacking from the indictment upon which the accused were arraigned. After Crown witnesses had given their evidence, counsel for the appellant moved to quash the indictment. After argument the motion was refused, but the judge allowed a counter-motion to amend the indictment as aforesaid under section 889, subsection 2 of the Code.

Held, on appeal, affirming the decision of HARPER, J. (O'HALLORAN, J.A. dissenting), that the words omitted from the indictment were words "requisite to constitute the offence" and they contained allegations of matters "essential to be proved." There is no doubt that unless this charge can be amended under section 889, subsection 2, it cannot be amended at all. But the language of that subsection seems to be sufficient. If there has already been proof given of the missing element and if the accused cannot be prejudiced thereby, the amendment may in the discretion of the judge be granted. The learned judge found there was ample evidence on which he could so find and as to prejudice there clearly could be none here.

Brodie v. *Regem*, [1936] S.C.R. 188, distinguished.

APPEAL by accused Rycer from his conviction before HARPER, J. and the verdict of a jury on the 22nd of February, 1946, at Vancouver, on a charge that he, with accused Gordon,

unlawfully did retain in their possession certain stolen goods, . . . knowing the same to have been stolen.

The jury disagreed as to the accused Gordon, but found Rycer guilty. The appeal is on the ground that the learned judge, without jurisdiction so to do, allowed an amendment to be made to the indictment during the course of the trial by adding the words "knowing the same to have been stolen" which were lacking in the indictment.

The appeal was argued at Vancouver on the 27th and 28th of

March, 1946, before SLOAN, C.J.B.C., O'HALLORAN and SIDNEY SMITH, JJ.A.

A. R. MacDougall, for appellant: We ask that the indictment be quashed as against the two accused. The motion was made under section 898 of the Code. A motion to quash may be made at any stage of the proceedings: see section 1007 of the Code; *Rex* v. *Imperial Tobacco Co.,* [1940] 1 D.L.R. 148. A necessary averment is lacking, namely, "knowing the same to be stolen": see *Brodie* v. *Regem,* [1936] S.C.R. 188. The indictment is bad and not amendable. There is the right to move at any time during the trial: see *Rex* v. *Desjardins* (1919), 45 Can. C.C. 100; *Rex* v. *O'Malley,* [1942] 1 W.W.R. 127, at p. 128; *Rex* v. *McNab,* [1945] 1 W.W.R. 228, at p. 231. An amendment of the indictment was allowed under section 889, subsection 2 of the Code. They have no right to amend under that section: see *Reg.* v. *Cameron* (1898), 2 Can. C.C. 173; *Rex* v. *Kerr et al.* (1922), 53 O.L.R. 228; *Rex* v. *Bainbridge* (1918), 42 O.L.R. 203, at p. 214; *Reg.* v. *Somers* (1893), 1 Can. C.C. 46; *Rex* v. *Loftus* (1926), 45 Can. C.C. 390, at p. 395; *Rex* v. *Cohen* (1912), 26 O.L.R. 497; Tremeear's Criminal Code, 5th Ed., pp. 1112-3; *Reg.* v. *Weir (No. 5)* (1900), 3 Can. C.C. 499, at p. 503. If an indictment charges no crime at all, it cannot be amended.

Jestley, on the same side: On the question of the charge being altered see *Rex* v. *Yeaman* (1924), 33 B.C. 390, at p. 394. After the amendment of the indictment it is a new charge and the accused should have pleaded after the amendment was granted.

Norris, K.C., for the Crown: There was the motion to quash which was refused. The learned judge then granted leave to amend. The matter admitted was proved in the evidence and the amendment was justified in the circumstances. The indictment may be amended if there is no prejudice. *Brodie* v. *Regem* [1936] S.C.R. 188 has nothing to do with the amendment: see also *Rex* v. *Bainbridge* (1918), 42 O.L.R. 203. We can rely on section 893 of the Code: see *Rex* v. *Wallace* (1915), 24 Can. C.C. 95, at p. 97; *Rex* v. *Kerr et al.* (1922), 53 O.L.R., 228.

C. A.
1946

REX
v.
GORDON
AND RYCER

This case was brought up squarely within section 889, subsection 2 of the Code. In this case there was an indictment which contained all the ingredients after amendment: see *Rex* v. *Imperial Tobacco Co.*, [1939] 3 W.W.R. 577, at p. 579; *Rex* v. *Cohen* (1912), 26 O.L.R. 497, at p. 504. With relation to an amendment under section 893 see *Rex* v. *Fraser* (1923), 17 Cr. App. R. 182. There is ample evidence to show guilty knowledge: see *Clark* v. *Regem* (1921), 61 S.C.R. 608. Whether the learned judge was wrong in finding that the matter omitted was proved by the evidence see *Robinson* v. *Sunderland Corporation*, [1899] 1 Q.B. 751, at p. 757. On reversal of trial judge in the exercise of his discretion see *American Securities Corporation* v. *Woldson* (1927), 39 B.C. 145, at p. 150.

Macdougall, replied.

Cur. adv. vult.

3rd May, 1946.

SLOAN, C.J.B.C.: I agree with my brother SIDNEY SMITH.

O'HALLORAN, J.A.: This appeal turns upon whether an indictment, which lacks an essential ingredient and therefore charges no offence at all, may, under Code section 889, subsection 2 be amended during the course of the trial. The essential ingredient "knowing the same to have been stolen" was omitted from the indictment charging unlawful retaining possession of designated stolen goods. Shortly before the Crown closed its case, counsel for the defence moved to quash the indictment on the ground it disclosed no offence known to the law. The learned judge invoked section 889, subsection 2 and directed the indictment to be amended by adding the omitted essential ingredient. The trial then continued resulting in the appellant's conviction.

Several other sections in the Code relate to amendment of indictments (*viz.*, sections 889, subsection 1, 893, and 898), but the governing decisions limit their application to defects in form as distinguished from defects in substance, under the principle that an irregularity is amendable but a nullity is incurable, and *cf.* the Criminal Statute Law of Canada, 2nd Ed. (1888), by Mr. Justice Taschereau, later Chief Justice of Canada, pp. 781-3 and 918-33 and notes of Mr. Greaves, Q.C.

therein, *Reg.* v. *Cameron* (1898), 2 Can. C.C. 173, at p. 175 (Wurtele, J.); *Reg.* v. *Weir (No. 5)* (1900) 3 Can. C.C. 499, at p. 503 (Wurtele, J.); *Rex* v. *Cohen* (1912), 26 O.L.R. 497, Magee, J.A. at pp. 506-7; *Rex* v. *Loftus* (1926), 45 Can. C.C. 390, at pp. 395-6 and *Rex* v. *Desjardins* (1919), *ib.* 100.

Section 889, subsections 1 and 2 read:

1. If on the trial of any indictment there appears to be a variance between the evidence given and the charge in any count in the indictment, either as found or as amended, or as it would have been if amended in conformity with any particular furnished as provided in section eight hundred and fifty-nine, the Court before which the case is tried may, if of opinion that the accused has not been misled or prejudiced in his defence by such variance, amend the indictment or any count in it or any such particular so as to make it conformable with the proof.

2. If it appears that the indictment has been preferred under some other Act of Parliament instead of under this Act, or under this instead of under some other Act, or that there is in the indictment, or in any count in it, an omission to state or a defective statement of anything requisite to constitute the offence, or an omission to negative any exception which ought to have been negatived, but that the matter omitted is proved by the evidence, the Court before which the trial takes place, if of opinion that the accused has not been misled or prejudiced in his defence by such error or omission, shall amend the indictment or count as may be necessary.

This appeal becomes of general importance because it involves determination whether the phrase:

. . . an omission to state or a defective statement of anything requisite to constitute the offence . . .

which appears none too conspicuously in the middle of section 889, subsection 2 includes jurisdiction to supply an omission of a defect in the substance of the indictment, that is to say to supply an omitted essential averment. That phrase is to be read in the light of its restriction to a case where the accused has not been misled or prejudiced in his defence by the omission. The point is not covered by much direct authority on section 889, subsection 2. I may say now that in the view I take of section 889, subsection 2 it is not necessary to consider whether the omitted matter has been "proved" by the evidence.

Subsections 1 and 2 of section 889 first appeared in their present form when the Criminal Code was enacted in 1892, being there numbered section 723, subsections 1 and 2. While The Criminal Procedure Act, Cap. 174, R.S.C. 1886 discloses the source of section 889, subsection 1 (*cf.* sections 237 and 238

C. A.
1946
REX
v.
GORDON
AND RYCER
O'Halloran,
J.A.

thereof), the origin of section 889, subsection 2 remains obscure. In The Criminal Code of Canada published in 1893 after the enactment of the Code Mr. Justice Taschereau paid only glancing notice to section 723, subsection 2 (now 889, subsection 2). Section 128 of The Criminal Procedure Act of 1886, *supra,* did deal with "omissions" but its influence on section 889, subsection 2 is not indicated.

The authorities cited at the outset make it clear that prior to the enactment of the Code in 1892, an indictment containing a defect in substance was a nullity and could not be amended. A new indictment had to be preferred. The question now is, did section 723, subsection 2 (now 889, subsection 2) of the 1892 Code change the law in that respect? That seems to be the real point of this case. My search and studies convince me, with respect, that no substantial change was made. First, I find no evidence of the intention of Parliament to do so; secondly, careful study of the language of the subsection indicates no substantial change was made, and thirdly the trend of the reported decisions supports that view.

I extract the intention of Parliament not to make a substantial change in that respect from the statement made by Sir John Thompson as Minister of Justice when he introduced the Bill codifying the Criminal Law in the House of Commons in 1892 and I extract it also from the consistent policy appearing in the Code itself to preserve the distinction between defects in form and defects in substance. In Crankshaw's first edition of the Criminal Code (1894) there appears at pp. 806 to 894, the Hansard text of the House of Commons Debates on the Criminal Code. At p. 807, Sir John Thompson declared "substantially the Bill follows the existing law" with the exceptions he outlined at pp. 807-809. Conferring jurisdiction to amend a null indictment without opportunity to the accused to plead thereto would be such an important if not revolutionary change if it had been intended, that the failure to mention it would be hard to understand. Such a change would go to the root of jurisdiction. For, if an indictment charges no offence it is a nullity and in legal effect there is no indictment. If an accused is "tried" on a null indictment, there is no trial *cf. Crane* v. *Regem* (1921), 90

L.J.K.B. 1160; the "trial" is void *ab initio*. The judge is without jurisdiction to try a man for an offence unknown to the law, *cf. Rex* v. *Kishen Singh* (1941), 56 B.C. 282, at pp. 296-99. It has been said often and authoritatively that the judge cannot amend a null indictment in the course of the trial, because there is nothing to amend, *cf. Reg.* v. *Cameron* (1898), 2 Can. C.C. 173, at p. 175.

The jurisdictional aspect of such a change (if change had been intended) could not have escaped the draughtsman of the 1892 Code. Mr. Justice Taschereau, for many years a judge of the Supreme Court of Canada had published in 1888 the second edition of the "Criminal Statute Law of Canada" with notes of Mr. Greaves, Q.C., who had drafted the English Act of 1851 ("An Act for further improving the Administration of Criminal Justice"—14 & 15, Vict., Cap. 100). At p. 780 it was said:

> Defects in matters of substance are not amendable, so if a material averment is omitted the court cannot allow the amendment of the indictment by inserting it, for the very good reason that if there is an omission of a material averment, of an averment without which there is no offence known to the law charged against the defendant, then strictly speaking there is no indictment; there is nothing to amend by.

Reverting to the 1st edition of Crankshaw, at pp. 809-10 Mr. Laurier spoke of the retention of the grand jury and its value as a protection against persecution. Such an observation would have been most unlikely if the new Code had contained a section providing that a null indictment could be amended without reference back to the grand jury. From pp. 806 to 894 there is reported *verbatim* the discussion upon the various sections of the Bill. At p. 875 an amendment was accepted to section 898, then section 629. But section 723, subsections 1 and 2 receive no explanation or comment. Reviewing what took place in Parliament the inference points unmistakably to an intention not tc make fundamental changes in the existing law, except those, to which the Minister of Justice referred and those which were later discussed by members of the House of Commons. If a change of the fundamental and jurisdictional nature now ascribed to section 889, subsection 2 had been intended, it is reasonable to believe it would have received discussion and would have been contained in a section or subsection specifically and

C. A.
1946

REX
v.
GORDON
AND RYCER

O'Halloran,
J.A.

unequivocally devoted to it. It would have appeared under its own flag. An intention to make such a fundamental change cannot be extracted from equivocal phraseology appearing in the middle of a subsection relating to other matters not associated with such a substantial change in the law.

Parliament's intention not to make such a fundamental change is also evidenced by the consistent policy in the Code itself to preserve the distinction between defects in substance of indictments and defects in their form. Two other sections relating to amendments which appeared in the 1892 Code were section 889, subsection 1 (then section 723, subsection 1), and section 898 (then section 629 taken with slight change from section 143 of The Criminal Procedure Act, Cap. 174, R.S.C. 1886). But they concerned defects in form only as is made abundantly clear in the decisions mentioned at the outset of this judgment. Section 898 which deals with defects apparent on the face of the indictment, in particular emphasizes the preservation of the distinction. With respect I find no satisfactory explanation why amendment of apparent defects should be restricted to defects in form only, unless the explanation is that it was intended to preserve the jurisdictional distinction between defects in form and defects in substance.

The distinction appears plainly also in section 852 *et seq.* The particulars to which section 859 relates cannot cure a null indictment *cf. Rex* v. *Buck et al.* (1932), 57 Can. C.C. 290, at p. 293 referred to in *Rex* v. *McLeod* (1940), 55 B.C. 439, at p. 459 which was appealed [1941] S.C.R. 228. The leading case of *Brodie* v. *Regem,* [1936] S.C.R. 188 contains a considered examination of the meaning and legal effect of Code section 852 *et seq.* which state what an indictment must contain. The *Brodie* case was applied by this Court in *Rex* v. *Wyatt* (1944), 60 B.C. 255 and in *Rex* v. *McNab* (1945), 61 B.C. 74. In the latter case it was said at pp. 76-7:

> . . . It was remarked in *Rex* v. *Wyatt* . . . , that the *Brodie* case acknowledges a rational distinction between a count which is "bad" in law (*e.g.*, because it omits an averment of essential circumstances, or charges no crime at all by omitting an essential ingredient), and on the other hand a count, which is merely defective (*e.g.*, which does charge a crime but with insufficient particularity of an essential circumstance). It is the distinction (p. 198) between a charge which is imperfectly stated,

and a charge wherein an averment of an essential circumstance is wholly omitted.

In the case at Bar the indictment charged no crime at all, because an essential ingredient "knowing the same to have been stolen" was omitted. It was not a charge imperfectly stated, but a charge wherein an averment of an essential ingredient of the offence was wholly omitted.

It is true that the *Brodie* case was not concerned with the power to amend indictments. But the fundamental distinction which it recognizes to be perpetuated in the Criminal Code between defects in the substance and in the form of indictments, reflects a policy in the Code which cannot help exerting a powerful influence upon the interpretation of an isolated phrase which is couched in language which may appear to be inconsistent with that statutory policy. *Stradling* v. *Morgan* (1560), 1 Plowd. 199, at pp. 203 and 205, 75 E.R. 305, at pp. 311 and 315 may be invoked in order that the purpose of Parliament shall not be defeated. *Stradling* v. *Morgan* has been applied by the Supreme Court of Canada in *Valin* v. *Langlois* (1879), 3 S.C.R. 1, at p. 27 and in *National Trust Co. Ltd.* v. *The Christian Community of Universal Brotherhood Ltd. and the Board of Review for B.C.*, [1941] S.C.R. 601; by the House of Lords in *Garnett* v. *Bradley* (1879), 3 App. Cas. 944 and by this Court in *Johnson and Stockdill* v. *Grossman* (1943), 59 B.C. 88, at p. 99, and *In re Constitutional Questions Determination Act and In re Vancouver Incorporation Act, 1921* (1945), 62 B.C. 114, at p. 130; [1946] 1 W.W.R. 177, at p. 192.

The second reason I conclude Parliament intended no fundamental change in section 889, subsection 2 is found in its language. I discuss it in two branches (a) the meaning conveyed by its words and (b) its restriction to a case where the accused is not misled or prejudiced in his defence by the omission. The words in the phrase,

an omission to state or a defective statement of anything requisite to constitute the offence,

invite examination. If they stood by themselves the words "anything requisite to constitute the offence" could describe either an essential averment or an insufficient particularity as those expressions are used in *Brodie* v. *Regem*, [1936] S.C.R.

C. A.
1946

REX
v.
GORDON
AND RYCER

O'Halloran,
J.A.

188. But when they are joined with the expression "defective statement" the former must be chosen, since it would not make sense to have a defective statement of an imperfect statement. However, if they are joined with the expression "omission to state," the same thing does not follow for there may be an omission to state with sufficient particularity (*viz.*, an imperfect statement), as well as an omission to state an essential averment.

A "defective statement" of an essential averment is a defect in form. It describes an essential averment imperfectly stated. An "omission to state" an essential averment is a defect in substance, while "an omission to state" with sufficient particularity is a defect in form, since the latter is an essential averment imperfectly stated, and *cf. Brodie* v. *Regem, supra.* As I read the whole phrase

> omission to state or a defective statement of anything requisite to constitute the offence,

the expressions "omission to state" and "defective statement" appear as subordinate classes of the same *genus.* They relate to the same subject-matter, except that one does so positively and the other does so negatively. That is to say the subject-matter which is omitted, is confined to the same class of subject-matter as its positive prototype "defective statement." In short, the *genus* is imperfect statement, appearing positively by way of a statement in one class, and appearing negatively by way of non-statement or omission in another class.

I think this reasoning is borne out by the limitation at the end of the subsection restricting the power of amendment to cases where

> the accused has not been misled or prejudiced in his defence by such omission.

That seems to point conclusively to exclusion of a defect in substance. That view is based on this reasoning. To enable the "omission" to prejudice the accused in his defence, the thing omitted must have deprived the accused of the opportunity of full answer and defence according to law *cf. Rex* v. *McNab* (1945), 61 B.C. 74, at pp. 77-8. That must assume a valid indictment in which something is defectively stated or defectively omitted. It cannot refer to a null indictment (which lacks an essential averment) for then, as there is no indictment, there

can be no trial (*Crane* v. *Regem* (1921), 90 L.J.K.B. 1160, *supra*) and hence there can be no defence, and consequently no "prejudice" in the defence. The accused is prejudiced, of course, by being put on trial for an offence unknown to the law, but the latter is not the "prejudice" to which section 889, subsection 2 refers. It refers to "prejudice" in the accused's defence, *viz.*, in the merits of his defence to a valid indictment.

This reasoning is fortified by the difference between section 238 of the Canadian Criminal Procedure Act, Cap. 174, R.S.C. 1886, and the English Act of 1851 noted by Mr. Justice Taschereau and Mr. Greaves, Q.C.—see Taschereau's Criminal Statute Law of Canada, 2nd Ed., *supra*, pp. 931-33, *viz.*, that in the English Act it was the amendment by which the accused must not be prejudiced, while in the Canadian Act it was the misstatement which must not prejudice the accused in his defence upon the merits. Mr. Justice Taschereau at p. 932 thought this was an error in section 238 of the Canadian Criminal Procedure Act of 1886. The draughtsman of the 1892 Code, with that criticism undoubtedly before him, chose to perpetuate the "error" in the Criminal Code. In the result I conclude it can no longer be regarded an error but on the contrary leads strongly to the inference that the "omission" in section 889, subsection 2 is confined to something which relates to the defence on the merits of the case, and has no relation to any jurisdictional aspect of the indictment.

The two reasons above outlined for interpreting section 889, subsection 2 as restricted to defects in form receive strong support from the trend of Canadian decision since the Code enactment in 1892. The first case is *Reg.* v. *Weir (No. 3)* (1899), 3 Can. C.C. 262 before Wurtele, J. who the year before in *Reg.* v. *Cameron* (1898), 2 Can. C.C. 173, at p. 175 had discussed the distinction between defects in form and defects in substance and the power to amend the former and the lack of power to amend the latter. In *Reg.* v. *Weir (No. 3)* after all the evidence was in, but before counsel for the defence addressed the jury, the Court ordered that the indictment (which charged making a false return) be amended by inserting the word "containing" before the words "a wilful, false . . . state-

C. A.
1946
REX
v.
GORDON
AND RYCER
O'Halloran,
J.A.

ment." Counsel for the defence objected that the amendment did not come within section 723, subsection 2 and completely changed the character of the offence charged.

Wurtele, J. at p. 268 said the amendment filled up a hiatus and connected two phrases with the word "containing," but did not change the sense in any respect and only corrected the wording from a literary point of view. Although the omission of the word "containing" would appear to have been an omission to state something requisite to the offence, Wurtele, J. dealt with it as a "defective statement" within section 723, subsection 2 for he said at p. 268:

> Section 723 . . . allows the Court to amend a defective statement, in an indictment, of anything requisite to constitute the offence, provided it be of opinion that the accused has not been misled or prejudiced in his defence by such defective statement . . .

In discussing the test of "prejudice" at p. 268 the learned judge said in part:

> The test whether a defendant can be prejudiced by such an amendment is whether a defence under an indictment as it originally stood would be equally available after the amendment is made, . . .

That was all premised upon the existence of a valid indictment. But even, if it were not, it is manifest that an objection to an indictment because it was a nullity could not be available as a defence once the amendment had been made.

In *Rex* v. *Cohen* (1912), 26 O.L.R. 497, the charge of obtaining money by false pretences was amended during the course of the trial (at the close of the Crown's case) to one of obtaining credit by false pretences. The conviction was quashed. Magee, J.A. at p. 506 said section 889, subsection 1 could not be fairly interpreted to authorize the change to an entirely different charge from that in the count. Referring to section 889, subsection 2 the learned judge continued at p. 507:

> It is evident from the second sub-section of sec. 889 that there no change from one offence to another is intended, but that the substance of the charge which the accused has to meet must remain the same.

A change from a charge of no offence known to the law to one that is known to the law is no less a change in substance than a change from one offence to another offence.

In *Rex* v. *Loftus* (1926), 45 Can. C.C. 390 the charge was unlawfully enticing away a child of 14 years "contrary to the

Criminal Code of Canada." There being no such offence the trial judge at or near the conclusion of the Crown's case amended the indictment by inserting the words "fourteen years" after the words "under the age of." Sir William Mulock, C.J.O. in giving the judgment of the Court (with Magee, Hodgins, Ferguson and Smith, JJ.A.) approved of what Magee, J.A. said in *Rex* v. *Cohen* regarding section 889, subsection 1 to which I have referred and said at p. 396:

> . . . The charge in the indictment was in respect of a child of the age of 14 years. The amended charge was in respect of a child under the age of 14 years, a substantially different charge and one which was never before the grand jury. These observations also apply to section 889 (2).

Omission of the words "under the age of fourteen years" rendered the indictment in *Rex* v. *Loftus* a nullity in the same way the omission of the words "knowing the same to have been stolen" made the indictment a nullity in the case at Bar. The amendment here presented "a substantially different charge" in the same way the proposed amendment did in *Rex* v. *Loftus*. *Rex* v. *Loftus* was a unanimous decision of five Ontario Justices of Appeal upon section 889, subsection 2. It is noted that Sir William Mulock, C.J.O. who gave the judgment of the Court took an active part as a member of the House of Commons in the debates on the Criminal Code in 1892, *cf.* Crankshaw, 1st Ed., *supra*, p. 814 *et seq.* The *Loftus* decision was rendered in 1926 and if it had run counter to the intention of Parliament in enacting the Code in 1892, one would have expected, if not an amendment to section 889, subsection 2 at least an appeal to the Supreme Court of Canada. Twenty years have elapsed without an amendment. It is a pretty certain indication that *Rex* v. *Loftus* did not incorrectly reflect the intention of Parliament, *viz.*, that section 889, subsection 2 does not refer to defects in substance.

Counsel for the Crown relied upon two decisions, which it was submitted, throw doubt upon the foregoing conclusions. The first is *Rex* v. *Kerr et al.* (1922), 53 O.L.R. 228, where the Appellate Division by a majority allowed the indictment to be amended by including the omitted words "without lawful excuse" in a charge under Code section 464 (*a*). Two of the five justices in that case sat in the *Loftus* case decided four years

C. A.
1946
REX
v.
GORDON
AND RYCER
O'Halloran,
J.A.

later. If there is a conflict between *Rex* v. *Kerr et al.* and *Rex* v. *Loftus* I prefer the latter as a unanimous and more recent decision, and because its reasoning is more in harmony with the views which I have reached independently. If there was a conflict between the two decisions it was all the more reason either for the Crown to take an appeal to the Supreme Court of Canada, or to secure an amendment to section 889, subsection 2. In *Rex* v. *Kerr et al.* the majority associated section 889, subsection 2 with their view, that the burden of proving lawful excuse under section 464 (*a*) rested on the accused. So regarded the words "proved by the evidence" may have had a significance inapplicable to this case. That view of the burden of proof also may have interjected another consideration in section 889, subsection 2, with which this case is not concerned, *viz.*,

> an omission to negative any exception which ought to have been negatived.

The second case upon which counsel for the Crown relied was *McNeil* v. *Regem,* [1931] S.C.R. 505. The judgment of the Court was given by Smith, J. who had joined in the judgment in *Rex* v. *Loftus.* The Supreme Court of Canada quashed a conviction for entering the shop of C.P. to assault her, because an essential averment the statutory word "therein" had been omitted from the charge. The Court said twice at p. 511, that the charge did not describe any crime because the statutory word "therein" was omitted. The Crown seeks support from phraseology at p. 511, which standing alone could imply that the charge could have been amended. But at p. 508, the Court said of section 889, subsection 2:

> It is not necessary here to determine the extent to which this section goes in the matter of allowing amendments, because, by its terms, the amendment is only to be made where the matter omitted is proved by the evidence.

That declaration I think makes it clear the Court did not intend to pass upon, and did not pass upon the construction of section 889, subsection 2. The Court said in effect, it was not necessary for it to decide whether or not such an amendment could be allowed under section 889, subsection 2, because the factual basis for that decision did not exist, *viz.*, the omitted matter was not proved by the evidence. The *McNeil* case refers to none of the relevant decisions, which is also substantial evidence that

the Court had no intention to examine the true interpretation of the subsection.

Failure to return the indictment to the grand jury for amendment receives considerable attention in the *Loftus* case, but I think the true ground for the decision was the substantial change in the charge from an indictment which charged no offence known to the law to one which did. If failure to send a null indictment back to the grand jury for amendment invites jurisdictional objection, it is because the prisoner is being charged with an offence, with which he was not charged before and in order to proceed against him he must be charged anew and given opportunity to plead thereto. That is the real reason in my judgment for emphasizing failure to return a null indictment to the grand jury, where the grand jury system exists.

A plea of not guilty to a null indictment, let alone a plea of guilty thereto, in legal reality is not a plea at all. If a null indictment could be amended in the course of trial, and the trial proceed to conviction without the prisoner being charged anew with the amended indictment and without an opportunity of pleading thereto, then he could be convicted for something with which he has never been charged and to which he has never pleaded. If a null indictment could be amended without charging and pleading anew, the indictment would contain a new charge where one did not exist before. Or to put it another way as it was in *Rex* v. *Loftus, supra,* it would contain a substantially different charge from the charge originally presented against him.

For the foregoing reasons in my judgment the construction of section 889, subsection 2 is not affected by the fact that the grand jury system was abolished in this Province in 1932. Code section 873, subsection 5 now provides that in certain Provinces including British Columbia, it shall not be necessary to prefer any bill of indictment before a grand jury,

> . . . , but it shall be sufficient that the trial of any person charged with a criminal offence be commenced by a formal charge in writing setting forth as an indictment the offence with which he is charged.

The indictment must still set forth the offence with which the accused is charged. The indictment must contain an offence

C. A.
1946

REX
v.
GORDON
AND RYCER

O'Halloran,
J.A.

known to the law, and the accused must be charged with it, and he must have the opportunity to plead to it.

That is done by calling the prisoner to the Bar by name, reading the indictment to him and asking him whether he is guilty or not of the offence charged. If that does not require a trial judge to be satisfied that the charge does contain an offence known to the law, it does demand that the patent omission of an essential ingredient shall not then be passed over, *cf. Rex* v. *Labourdette* (1908), 13 B.C. 443. *Rex* v. *Wallace* (1915), 24 Can. C.C. 95, is an Alberta decision which I do not regard as applicable to British Columbia. The grand jury system never existed in Alberta or in the North-West Territories, and by section 983 of the Criminal Code in 1892 the latter were excepted from the provisions relating to the grand jury system. In passing it is noted that the amendment in *Rex* v. *Wallace* did not alter the nature of the offence. Nor was it an omission to state an essential ingredient. Hence it did not relate to a defect in substance.

In my judgment, with respect, the true construction of section 889, subsection 2 does not extend it to defects in the substance of an indictment and also that the existence or non-existence of the grand jury system in this Province does not affect that conclusion. I am of opinion that the law of Canada by which section 889, subsection 2 must be interpreted, is today substantially the same as it was stated by Wurtele, J. in *Reg.* v. *Cameron* (1898), 2 Can. C.C. 173, at p. 175:

> When a motion is made to quash for a formal defect, the Court may order the indictment to be amended; but when the motion to quash is founded on the total absence of an essential ingredient, so that the indictment charges no offence in law, it must be set aside and quashed; but in such a case a new bill of indictment may be preferred.
>
> Defects in matters of substance are not amendable, for the very good reason that if there is an omission of the averment of a material ingredient, without which there is no offence known to the law charged against the defendant, then there is no indictment; there is nothing to amend, and the only thing to be done is to quash the defective document and set it aside.

In *Rex* v. *Wheatly* (1761), 2 Burr. 1125, at p. 1127, it was said *per* Lord Mansfield that

> in a criminal charge, there is no latitude of intention, to include any thing more than is charged; the charge must be explicit enough to support itself.

To meet a situation illustrated by the case at Bar, one would

think there is room for provision in the Criminal Code, that upon discovery of the omission of an essential ingredient of the offence charged, the prisoner should be given the option of having the omitted essential ingredient added and the trial continue without further charge or plea as if it had been charged originally or the option of being charged anew in proper form and the trial proceed afresh.

In this case, as in *Crane* v. *Regem* (1921), 90 L.J.K.B. 1160 in my opinion no trial took place in the legal sense of the term. It is a case for a *venire de novo*. With deference I would quash the conviction accordingly.

SIDNEY SMITH, J.A.: This is an important case involving as it does consideration of whether an indictment, unamendable within the principles of *Brodie* v. *Regem*, [1936] S.C.R. 188, may nevertheless be amended under the provisions of section 889, subsection 2 of the Criminal Code. On reflection, I think it can.

The question presented itself in this way: the two accused were charged under section 399 of the Criminal Code, that they "unlawfully did retain in their possession certain stolen goods knowing the same to have been stolen," and appeared before HARPER, J. and a jury at the last Vancouver Assize. The jury disagreed as to the accused Gordon but found the accused Rycer guilty, and he was in due course sentenced to three years' imprisonment. From this conviction he now appeals, upon the ground that the learned judge, without jurisdiction so to do, allowed an amendment to be made to the indictment during the course of the trial. The amendment consisted of the addition of the words "knowing the same to have been stolen" which were lacking from the indictment upon which the accused were arraigned.

After several Crown witnesses had given their evidence, counsel for the appellant moved to quash the indictment. The judge, after lengthy argument, refused this motion, but allowed a counter-motion of the Crown to amend as aforesaid. The amendment was allowed under section 889, subsection 2 of the Code, which reads as follows: [already set out in the judgment of O'HALLORAN, J.A.].

C. A.
1946
REX
v.
GORDON
AND RYCER
Sidney Smith,
J.A.

We were pressed on behalf of the appellant with the *Brodie* case, *supra*. But with respect I think the question now under consideration stands wholly outside that important authority. The *Brodie* case dealt with a charge of seditious conspiracy and the Supreme Court quashed the conviction upon the ground that the indictment as laid was insufficient for lack of particulars. The Court considered various sections of the Code, including particularly section 852. But in his closing words Rinfret, J. was careful to point out that the Court was not to be taken

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

No reference was made to section 889 or to the question of amendment in any form.

I think there can be no doubt that the words omitted from the indictment were words "requisite to constitute the offence" and that they contained allegations of matters "essential to be proved" as described at p. 194 of the *Brodie* case. And I think, too, that there equally can be no doubt that unless this charge can be amended under section 889, subsection 2 it cannot be amended at all, for no other section contains the wide language of section 889, subsection 2. But the language of that subsection seems to be sufficient. Indeed it would be difficult to frame clearer language for the purpose. It may be useful to repeat the relevant words:

> If it appears . . . that there is in the indictment, . . . , an omission to state . . . anything requisite to constitute the offence, . . . , the Court . . . , shall amend the indictment . . . as may be necessary.

Where legislation is ambiguous it may be a good reason for construing it in a particular way, that some other way would lead to impossible or irrational results. But reading these words in their plain ordinary meaning leads to a result at once rational and intelligible. The object of this part of the subsection would appear to be to meet a case where an amendment is sought with the trial half completed. Then if, at that moment, there has already been proof given of the missing element, and if the accused cannot be prejudiced thereby, the amendment may, in the discretion of the judge, be granted. It seems to me

that such a provision offends neither against principle nor authority.

We were referred to a number of authorities but none of them dealt decisively with this point (*cf. Rex* v. *Kerr et al.* (1922), 53 O.L.R. 228; *Rex* v. *Loftus* (1926), 45 Can. C.C. 390; *Belyea* v. *Regem,* [1932] S.C.R. 279; *Rex* v. *Imperial Tobacco Co.,* [1939] 3 W.W.R. 577; *Rex* v. *Madill (No. 2),* [1943] 1 W.W.R. 370). In my opinion there is nothing in any of these cases, or in any of the others to which we were referred, which prevents us from holding that in the case at Bar the amendment was rightly allowed. But in *McNeil* v. *Regem,* [1931] S.C.R. 505 the Supreme Court indicates clearly that such an amendment might in a proper case be made. Smith, J. said this at p. 508:

> It is not necessary here to determine the extent to which this section [*i.e.*, section 889, subsection 2] goes in the matter of allowing amendments, because, by its terms, the amendment is only to be made where the matter omitted is proved by the evidence.

Then he proceeds to examine the evidence and finds there no such proof.

I am satisfied therefore that this amendment may be made provided (1) that the matter omitted is proved by the evidence, and (2) that the accused has not been prejudiced by the omission. As to the matter of proof, it may be observed that "proved" is not a word of art. It may have different shades of meaning, varying according to the subject-matter in connection with, and the context in, which it is used (*Clark* v. *Regem* (1921), 61 S.C.R. 608, at p. 625). In the circumstances of the present case it must mean proof, to the satisfaction of the judge, on the testimony so far as it has then been adduced. The learned judge so found, and there was ample evidence on which he could so find. As to prejudice, there clearly could be none here. The charge at the preliminary hearing was correct, *i.e.*, it included the missing words. At the trial guilty knowledge was opened to the jury by counsel. Crown witnesses gave evidence with respect to it and were cross-examined thereon. I think the judge was clearly right in thinking that the accused could not have been prejudiced by the amendment he subsequently made.

In the result I would dismiss the appeal.

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

S. C.
1946
May 14;
Aug. 7.

IN RE ESTATE OF GEORGE GOODWIN NORRIS, DECEASED: EATON v. HEYMAN *ET AL.*

Will—Torn when found—Evidence of unsoundness of mind—Whether intention to revoke—Burden of proof—R.S.B.C. 1936, Cap. 308, Sec. 18.

The will of George Goodwin Norris sought to be established was executed in Alberta in May, 1927, and it was found that at the time of execution he was of sound mind. The testator left his wife and three children in England in 1908 and came to Canada with the defendant Frederica Heyman with whom he lived as man and wife until his death. After living a short time in Saskatchewan, they moved to Alix, Alberta, where he practised law until 1929. During these years they passed as a married couple and a daughter was born to them in 1912. The testator had a sister living in Calgary with whom they were on friendly terms. In 1929, owing to failing health, he decided to retire, being then 60 years of age, and they moved to North Vancouver. In 1939 there was a marked change for the worse in his health and he suffered from hallucinations and from that time on he had medical assistance. In 1941 when the testator was bedridden he told his niece that he had left Miss Heyman well provided for and she was not forgotten in his will, and before leaving Alberta he had told Miss Heyman that he was leaving everything to her except a legacy and he gave her the combination of his safe where the will was kept. Later in 1941 he showed Miss Heyman the will which he kept in a black box in a drawer of his dresser. The testator died on January 3rd, 1942. When the envelope with the will was taken from the black box, there came from it a shower of small papers being the mutilated will sought to be proven. The question then arose, was the will sought to be established revoked by tearing?

Held, that in coming to a conclusion as to whether the tearing was done with *animo revocandi*, all the surrounding circumstances must be considered. If it was torn by Norris it was done either unintentionally or in a moment of mental confusion with no intention of putting an end to the will. The careful preservation of the parts in the original envelope by a testator who must have had considerable difficulty in making the replacement by reason of his physical condition is some indication which, combined with other features of this case, lead me to the conclusion that this is a valid will and must be admitted to probate.

ACTION for probate of the last will and testament of George Goodwin Norris who died at West Vancouver on the 3rd of January, 1942. The facts are set out in the reasons for judg-

ment. Tried by HARPER, J. at Vancouver on the 14th of May, 1946.

Bull, K.C., for plaintiff.

Clyne, for defendants Frederica W. Heyman and Royal Waite.

A. Bruce Robertson, for other defendants.

Cur. adv. vult.

7th August, 1946.

HARPER, J.: This is an action for probate in solemn form of the last will and testament of George Goodwin Norris, who died in the municipality of West Vancouver on the 3rd of January, 1942.

The plaintiff is the executor named in the said will, and is a nephew of the deceased Norris.

The defendant, Frederica Wilhelmina Heyman, lived in Alix, Province of Alberta and West Vancouver, Province of British Columbia for many years with the deceased, and by nearly all friends of the deceased was thought to be his wife. She is the chief beneficiary under the will presented for probate.

The defendant Royal Waite (formerly Royal Eaton, sister of the plaintiff) is a niece of the deceased and also a beneficiary. The defendant Fanny Norris is the widow of the deceased, and resides in London, England.

The other defendants, Catherine Margaret Mary Lang, Caroline Bettye Bayley and Henrietta Margery Holland are three children of the deceased, and all live in London, England.

The will sought to be established was signed by Norris in Alberta, Canada, on the 18th day of May, A.D. 1927. The proper execution of the will by the deceased and that at the time of its execution in May, 1927, Norris was of testimentary capacity, whilst not admitted, was not contested, and I find as a fact that the will now sought to be probated was the last will of Norris and that at the time of execution he was of sound mind.

The sole point at issue here is whether the will which was found after the testator's death in such a torn condition in a black box along with other personal effects of Norris, was so

S. C.
1946

IN RE ESTATE OF G. G. NORRIS, DECEASED.

EATON v. HEYMAN ET AL.

Harper, J.

mutilated by the deceased, when of sound mind, that the Court should find that this will was torn with *animo revocandi* and that therefore the Court should declare that Norris died intestate.

Frederica Heyman, the chief beneficiary under the will now attacked, lived with Norris for approximately 33 years. They cohabited together and had one daughter born to them. Miss Heyman is blessed with a most retentive memory, and with a wealth of detail recounted their life together. Many instances of Norris' delusions featured her evidence, to support her claim that if Norris tore the will, it was done during a period of time of insanity. As a preliminary to an analysis of the evidence it may be said that Miss Heyman was accepted generally as his wife, and was treated by Norris as such. Throughout their long existence together there were acts on his part that showed confidence in her, and there was no evidence to prove other than affectionate regard.

Frederica Heyman deposed that in March, 1908, she and the deceased left England together. At that time she said Norris was heavily in debt owing to the extravagance of his wife. He procured funds from his father's trust fund to discharge his wife's debts, and taking with him 50 pounds he and Frederica Heyman left for Alberta, Canada, to start life anew. After a year's stay in Saskatchewan, he and Miss Heyman went to Alberta, where he was admitted to the Bar, after which he started the practice of law in a small town called Alix, and they stayed there together from 1910 to 1929. During all these years they passed as a married couple. Norris had a sister in Calgary, Alberta, whom they visited on various occasions, and with whom they were on friendly terms.

As a result of the cohabitation of Norris and Miss Heyman a daughter was born in 1912.

I have no reason to doubt that Miss Heyman was accepted by Norris' sister and his nephew and niece and that harmonious relations existed between them.

According to Miss Heyman, the first illness suffered by the deceased was in 1921 when after playing tennis he was suddenly taken ill and became unconscious for some 20 minutes, and either

in the following year, or in 1923, Norris took another spell of unconsciousness.

In 1929 Norris, according to Miss Heyman, decided to retire from practice on account of a "mental blackout" which had occurred during a trial in Court. They came to live in West Vancouver, British Columbia, on account of the milder climate. A house was at first rented, but later a house was built and paid for by Mr. Norris and the title placed in the name of Frederica Norris. At this time Norris was in his 60th year. If his health was good, this seems a somewhat unusual age for a barrister's retirement and lends support to Miss Heyman's statement that Norris realized that he was failing physically and mentally.

This witness stated that Norris from 1933 was subject to falls, although his mind was not affected. These falls became more frequent as time went on, until in 1938 he was an invalid and had to stay most of the time in bed.

Medical attention was secured and Norris from then on was under medical treatment.

The year 1939, according to this witness, saw a marked deterioration in his physical and mental condition. He was said to suffer from hallucinations. He imagined he was under observation by various people. If the evidence of this witness is to be accepted Norris was then not at times mentally competent to execute any business.

Norris was a man of a reserved disposition, and he and Miss Heyman lived a somewhat solitary home life. She acted as his nurse and they do not seem to have had any very intimate friends. From 1938 until his death in 1942 Norris was an invalid, necessitating constant care and attention, and the burden of this fell upon Miss Heyman.

The hallucinations from which he suffered seem to have started in the year 1938. Miss Heyman's evidence is at that time Norris imagined he saw a man in the room. Afterwards he would have a lucid interval and would express the opinion that he was losing his mind. During the years 1940 and 1941 he became alarmed that he was being watched by people sitting in adjacent trees or on the roof of a next-door house. With great detail Miss Heyman gave many instances which, if accepted, one

S. C.
1946

IN RE ESTATE OF G. G. NORRIS, DECEASED.

EATON v. HEYMAN ET AL.

Harper, J.

could only conclude that Norris at times had become mentally deranged.

Emile F. Therrien, a duly-qualified physician practising in West Vancouver, was first called in for professional attention on Norris in January, 1938. He found him suffering from a shaking palsy known as Parkinson's disease. This disease had become fully developed, the whole of the body being affected. The previous medical history of Norris was given to Dr. Therrien and confirmed the evidence of Miss Heyman that he had suffered previous strokes, beginning in 1921. Dr. Therrien was only a general medical practitioner and his evidence did not deal with his mental condition. Doctor G. A. Davidson, a specialist of high standing in nerve and mental diseases was of the opinion that the strokes suffered by Norris suggested arterial trouble, and in such cases mental changes were more marked.

The patient would be suffering from paranoiac ideas—fears that would express it in delusions, accompanied by times of lucidity.

Doctor E. A. Campbell, who has had considerable experience with mental cases, testified that mental derangement did not necessarily accompany paralysis agitans, but it could exist independently caused by senile dementia or arterio sclerosis. Assuming that Miss Heyman had given a truthful description of Norris' ailment, his conclusion was that he suffered from mental confusion.

George G. Eaton, a nephew of Norris and the executor named in the will sought to be established, gave evidence which supported Miss Heyman's statements that her relations with Norris were always on an affectionate and harmonious basis. He last saw his uncle in 1929 and at that time although his mind was clear it was noticeable that he was suffering from paralysis agitans. Eaton's sister, Mary Royal Waite (Royal Eaton, a beneficiary to the extent of $1,000 in the will sought to be established) corroborated her brother's evidence as to the affectionate relations existing between her uncle and Miss Heyman. On a visit to West Vancouver in 1941, she found her uncle bed-ridden, and in conversation with her he expressed the opinion that he would not live long. An important part of her evidence was the

statement made to her by Norris that he had left her auntie (Miss Heyman) well provided for, and that she was not forgotten in his will. I have been impressed by the evidence of Mrs. Royal Waite and her brother the plaintiff. Being relatives of the deceased they had good opportunity to observe the atmosphere of the Norris' home. It is clear from Mrs. Waite's evidence (which I accept) that in 1941 Norris had not in his mind any intention of revoking the will. At this time he did not give her any impression of suffering from delusions. Although Mrs. Waite did not discern any signs of specific delusions on the occasion of her talks with her uncle, it does not follow that such delusions did not exist.

As was said by Sedgewick, J. in *Skinner* v. *Farquharson* (1902), 32 S.C.R. 58, at p. 78:

> The skill and ability of persons labouring under insane delusions to conceal them successfully is not unknown to the courts.

Coming to the will produced in Court, Miss Heyman's evidence was that Norris when in practice at Alix, one day in his office spoke to her about his will, stating he was leaving her everything except a legacy, at the same time giving her the combination of the safe in which it was kept. Later, according to this witness, in December, 1941, he told her the will was in a black box in a chest of drawers where he kept his shirts, at this time stating, "I want to make sure you know where it is."

Later, about 11.30 a.m. of the same day, at his request she went to get this box. She got the keys to it from the top drawer of the dresser and gave them to Norris He opened the box, showed her an envelope in the box and said "There is the will." He asked her when the time came to go to the manager of The Royal Bank of Canada and get advice from him as to what to do. A further remark, Miss Heyman stated, was that Norris stated he did not think there would be trouble from the Old Country, but if there was, she was to fight it.

Norris died January 3rd, 1942. The will was then in the box in an envelope which had been slit open. She shook the envelope and out came a shower of small papers, being the mutilated will now sought to be proven in solemn form. In the box were also several personal effects. The next day she took the black box

S. C.
1946

IN RE ESTATE OF G. G. NORRIS, DECEASED.

EATON v. HEYMAN ET AL.

Harper, J.

containing the will to Mr. *Geo. E. Housser,* solicitor for The Royal Bank of Canada.

The question now arises was the will sought to be established revoked by tearing, as provided in section 18 of the Wills Act, R.S.B.C. 1936, Cap. 308?

The testator was a member of the Bar of England and practised for many years in a small town or village in Alberta. It is reasonable to assume that he had many years' experience in the drawing of wills and would know the presumption which arises from the tearing of a will if at the time he was in one of his lucid moments. It is evidenced from his conversation with Miss Heyman and Mrs. Royal Waite that he did have intervals of lucidity.

Why were the pieces of the torn will carefully put back in the envelope which contained the will? If his intention had been to create an intestacy, would he not have thrown the pieces of the will into the fire or waste-paper basket? Has the executor who has produced this will discharged the *onus* which lies upon him? It is submitted on behalf of the defendants other than the defendants Waite and Heyman that the presumption is that there was an *animus revocandi.*

There is to be considered the question of whether the will remained in the possession of the testator, Miss Heyman. The evidence of Miss Heyman as one who must benefit from a finding in favour of the validity of this will must be carefully scanned. One may fairly and should consider her many years of association with Norris, the years of nursing she gave him, and whatever can be deduced from the evidence as to Norris' attitude and disposition toward her. Disregarding her evidence that their relations were affectionate, many acts on his part have been disclosed from which it may fairly be concluded that his affection for her did not cease. Considering the whole of the evidence, I find as a fact that the will was in December, 1941, placed in her possession by Norris, in the belief that it was a valid will.

The next question that arises is, was the will torn by the testator? Miss Heyman was of the opinion that the paralysis agitans from which he suffered was of such a violent nature that it would have been physically impossible for Norris to have torn

the will and then replaced all the pieces in the envelope in which is was found.

In view of the fact that Norris and Miss Heyman were the only inhabitants of the house in which they lived, my conclusion is that Norris did himself either unintentionally or when suffering from mental delusions tear the will and then successfully replaced it in the box. An inspection of the will reveals that each page was torn into some five or six pieces, fairly large, and the signature of the testator was not torn. By piecing the torn parts properly together there is no difficulty in deciding that the words are both distinct and legible.

In coming to a conclusion whether the tearing was done with *animo revocandi,* all the surrounding circumstances must be considered.

In drawing a distinction between cases where a testator had cut out his signature or, under earlier law, had cut off the seal, and cases where there was only a tearing, the President of the Court of Probate (Sir Henry Duke) said in *In re A. C. Cowling. Jinkin* v. *Cowling,* [1924] P. 113, at pp. 116-17:

> It is not so with regard to tearing. In point of authority it could not have been so when *Elme* v. *Elme* (1858), 1 Sw. & Tr. 155, and *Doe* v. *Perkes* (1820), 3 B. & Ald. 489 were decided. Those cases show that the nature of the acts and of the surrounding circumstances must be looked at; and the act done here, the act to be attributed to the testatrix, is the partial tearing across the face of this document in a way which left every word of it legible. This must be taken in connection with the fact that the testatrix had demonstrated the desire to die tesate and with the fact that, so far as the evidence goes, there had been no change in her relationship, that is, in her desire for the persons proposed by the will of 1921 to be benefited, and the further fact that this document with the tear upon it, perfectly legible and containing every part of a good will, had been carefully folded up by the testatrix and put in the place where she would naturally put her will.

Counsel for the next of kin have referred me to the case of *Banks* v. *Goodfellow* (1870), L.R. 5 Q.B. 549, followed in *Skinner* v. *Farquharson* (1902), 32 S.C.R. 58, to the effect that assuming that Norris suffered from delusions inasmuch as these were unconnected with Miss Heyman no inference should be drawn that Norris was mentally deficient when the act of tearing the will was done. This circumstance must, however, be considered in conjunction with the other facts disclosed in evidence such as the statements made by Norris in his last conversation

S. C.
1946

IN RE ESTATE OF G. G. NORRIS, DECEASED.

EATON v. HEYMAN ET AL.

Harper, J.

with his niece (Mrs. Royal Waite) intimating to her that a will was in existence and also bearing in mind the fact that the torn will was preserved by Norris, instead of being destroyed.

Nor should it be overlooked that Norris when he received requests from his wife for financial assistance he refused to comply with her wishes. As to the married daughters living in England, there is no evidence that he ever had any correspondence with them. They seemed to have passed out of his life entirely.

From 1908 until his death in 1942 Norris and Miss Heyman had lived together in affectionate and intimate relationship. Some of these later years were spent together when he was an invalid and she alone did the nursing. When they moved from Alberta to West Vancouver the new house was placed in her name. She passed in the neighbourhood and to relatives as his wife. When he made his income-tax return in 1941 he described her as his wife. His income at that time was very small, and the difference in the exemption for taxation by so describing her would have been very slight, if any at all.

I am convinced that though at times he had lucid intervals, even very close to the time of his death, there were periods of time when hallucinations and recurring delusions clouded his intellect. His actions at such times were those of a person of unsound mind.

In my opinion, if the will was torn by Norris it was done either unintentionally or in a moment of mental confusion with no intention of putting an end to this will. The careful preservation of the parts in the original envelope by a testator who must have had considerable difficulty in making the replacement by reason of his physical condition is some indication, which, combined with other features of this case lead me to the conclusion that this is a valid will and must be admitted to probate.

A case similar in some respects as to the tearing and preservation of the will is that of *In re Beattie Estate,* [1944] 3 W.W.R. 727. The testator, Beattie, died in February, 1943, and in September, 1943, letters of administration were granted to his widow, no one at that time having knowledge of any will. In 1944 the widow found, in an old box, along with some other

S. C.
1946
IN RE ESTATE OF G. G. NORRIS, DECEASED.
EATON v. HEYMAN ET AL.
Harper, J.

papers, a will of the deceased made in 1906. This document had been torn into two pieces and then put back in the envelope in which it was found. The learned trial judge in making a finding says at p. 729:

> The tearing of a will into two pieces although attributable to the testator, who nevertheless preserved it, is not sufficient *per se* to revoke it. An intention to revoke must still be shown as upon a question of fact.

This case has been ably argued by counsel representing all interested parties, and as was said in the Alberta decision quoted above, "There could be an honest difference of opinion." All parties before the Court will therefore have their taxed costs payable out of the estate.

Order accordingly.

NATIONAL HEALTH ASSOCIATION v. BLANK.

C. A.
1946
May 28; *June* 11.

Practice—County court judgment in default of dispute note—Application to set aside—Omission by solicitor—Discretion—Exercise of—Imposition of terms—Severity of—County Court Rules, Order IX., r. 9.

Upon appeal by the defendant from an order made upon the defendant's application to set aside a default judgment entered against him upon terms which required the defendant to pay into Court the sum claimed:—

Held, affirming the decision of LENNOX, Co. J., that under Order IX., r. 9 of the County Court Rules it is essential that the defendant show *prima facie* a reasonable ground of defence and where the Court entertains doubt as to the reasonableness or the possible merit of the defence, then the Court in the exercise of its discretion may be justified in imposing more onerous terms than it would be proper to impose where reasonable grounds for defence have been shown *prima facie*. There are exceptional circumstances here which render it equitable to require the defendant to pay the money in dispute into Court.

APPEAL by defendant from the order of LENNOX, Co. J. of the 3rd of May, 1946, made upon the defendant's application to set aside a default judgment entered against him in the action. The application was granted upon terms which required the defendant to pay into Court the sum claimed. The appeal is limited to this term of the order.

The appeal was argued at Vancouver on the 28th of May, 1946, before ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

C. A.
1946
NATIONAL HEALTH ASSOCIATION v. BLANK

John L. Farris, for appellant: In this case there was an order for substitutional service. Judgment entered two days after time for entering a dispute note had expired. That a dispute note was not filed was due to a misunderstanding between Mr. *Chertkow,* the defendant's solicitor, and Mr. *Tufts* who was acting for the plaintiff. He has sworn the defendant has a good defence to the action. The defendant has a contra account for $1,400 and if correct is more than sufficient to cover the claim. A condition precedent to pay the whole amount of the claim into Court is unfair and wrong. The general rule is that he should pay the costs thrown away and no more: see *MacGill* v. *Duplisea* (1913), 18 B.C. 600; *Viney* v. *B.C. Electric Ry. Co.* (1922), 31 B.C. 434. There are no exceptional circumstances to impose such severe terms. Substitutional service is not a ground for harsh terms: see *Auerbach* v. *Hamilton* (1909), 19 O.L.R. 570; *Watt* v. *Barnett* (1878), 3 Q.B.D. 363. On question of exercising discretion see *In re Marriage Act and In re H.* (1944), 60 B.C. 444; *Evans* v. *Bartlam,* [1937] A.C. 473; *Royal Bank* v. *Fullerton* (1912), 17 B.C. 11.

Bray, K.C., for respondent: The order setting aside the judgment should not be made at all: see order IX., r. 9 of the County Court Rules and section 84 of the County Courts Act; *Scovil* v. *Lewis* (1926), 37 B.C. 241. He admits he owes the money and a counterclaim is not a defence: see *Stooke* v. *Taylor* (1880), 5 Q.B.D. 569. Here discretion was properly exercised: *Royal Bank* v. *Fullerton* (1912), 17 B.C. 11. He has not set up any substantial ground of defence on the merits.

Farris, replied.

Cur. adv. vult.

11th June, 1946.

Per curiam (BIRD, J.A.): This appeal is taken from the order of LENNOX, Co. J. made upon the defendant's application to set aside a default judgment entered against him in this action. The learned judge granted the application upon terms which required the defendant, *inter alia,* to pay into Court the sum claimed. The defendant's appeal is limited to this term of the order.

County Court Order IX., r. 9, which in effect is identical with section 84 of the County Courts Act, reads as follows:

Where a defendant has failed or neglected to file a dispute note, the Judge may, upon an affidavit disclosing a defence upon the merits and satisfactorily explaining such failure or neglect, set aside the judgment and let in the defendant to defend upon such terms as shall be just.

It appears from the material filed below that service of the plaint and summons was made substitutionally on April 5th, 1946; that the defendant on the day following, instructed his solicitor to negotiate for settlement of accounts alleged by him to have been outstanding between the parties from the termination of their business relationship on December 31st, 1944, in which accounts were included the sum claimed by the plaintiff; and that failing satisfactory settlement, the solicitor should enter a dispute note in the action.

Although some telephone conversations took place between the solicitors for the parties, it is not conclusively established on the material filed that any firm understanding was reached between them, either as to settlement or for any extension of time to file a dispute note. Judgment by default having been entered, the defendant moved below to set aside the judgment, alleging that his omission to file a dispute note was due to a misunderstanding between the solicitors, and that he has a meritorious defence to the action.

The defence set up on the material is that the defendant appellant under the terms of an agreement with the plaintiff, operated a sub-agency office for the plaintiff in the period of approximately six months ending December 31st, 1944. He contends that if all credits are given to which he is entitled in respect of that period of operation of the business, the plaintiff's claim will be offset and a balance of $1,760.12 will be found due to the defendant.

Since there was incorporated in the appeal book the order for substitutional service made in the Court below, we have had occasion to examine the records of that Court to ascertain upon what material the order for substitutional service was made. That material consisted of an affidavit of the plaintiff's solicitor which compels the conclusion that over a period of three months following the issue of the plaint the defendant successfully evaded many attempts on the part of the plaintiff's solicitor to cause personal service to be made upon him. The Court may

C. A.
1946

NATIONAL HEALTH ASSOCIATION v. BLANK

look at its records in the case under review. *Rex* v. *Lewis* (1941), 57 B.C. 83; *Craven* v. *Smith* (1869), L.R. 4 Ex. 146.

Counsel for the appellant submits that the material before the learned Chamber judge establishes that the omission to file a dispute note was inadvertent and that the defendant may have a good defence on the merits. He contends that so severe a term as that requiring payment into Court of the sum claimed will not be imposed unless exceptional circumstances are shown. He relies upon the decision of this Court in *MacGill* v. *Duplisea* (1913), 18 B.C. 600, wherein MACDONALD, C.J.A. at p. 601, said:

> . . . , under some circumstances, when the Court thinks it would be equitable to require the defendant to bring the money in dispute into Court, that is done. But that is not the universal rule. In fact, it seems to be the exception.

Counsel urges that no exceptional circumstances have been shown here to justify the imposition of such onerous terms, and consequently there was a wrong exercise of discretion.

I conclude from the remarks made by the learned trial judge in the course of delivery of his oral reasons for judgment that he entertained doubt that the alleged defence was meritorious. He says:

> I must say I have a little hesitation in making up my mind in this matter, because there has been evidently some little time putting it off one way and another, and it is time the matter should be settled.

And again:

> There is something in the background, and looking at the question of the time the actual happening occurred and the cause of action arose and the time the action was taken following that, then the necessity for substitutional service—they all come into the matter, of course.

There was, we think, room for such doubt in the circumstances mentioned by the learned judge, confirmation of which is to be found in the affidavit of the plaintiff's solicitor, upon which the order for substitutional service was made. The fact that the defendant during a period of 16 months after termination of business relations with the plaintiff, omitted to take any active steps to arrange settlement of accounts outstanding or to recover the sum of $1,760.12, which he alleges has been owing to him since December 31st, 1944, serves to arouse some doubt as to the merits of the proposed defence. That factor, coupled with the

material disclosing the defendant's evasion of service of the plaint, upon which the order for substitutional service was made, constituted, in our opinion, exceptional circumstances which fully justify the imposition of onerous terms.

We adopt the views expressed by Cameron, C.J. in *Dobie* v. *Lemon* (1887), 12 Pr. 64, on the subject of reopening a judgment entered by default, when he said at pp. 74-5:

> . . . . [When a defendant has shown] *prima facie*, . . . a reasonable ground of defence . . . the defendant should be in no worse position than he would have been in if he had for some excusable cause neglected to appear, the plaintiff not being placed in a worse position through that neglect than he otherwise would have held.

But it is essential under the rule that the defendant show *prima facie* a reasonable ground of defence, and where the Court entertains doubt as to the reasonableness or the possible merit of the defence, then the Court in the exercise of its discretion, may be justified in imposing more onerous terms than it would be proper to impose where reasonable grounds for defence have been shown *prima facie*. *Watt* v. *Barnett* (1878), 3 Q.B.D. 183.

There were exceptional circumstances which in our opinion rendered it equitable to require the defendant to bring the money in dispute into Court—*MacGill* v. *Duplisea, supra.*

The appeal is therefore dismissed.

Appeal dismissed.

Solicitor for appellant: *D. A. Chertkow.*
Solicitor for respondent: *S. S. Tufts.*

IN RE ESTATE OF NOAH C. SKIPPEN, DECEASED, AND *IN RE* ESTATE OF REBECCA SKIPPEN, DECEASED. MARY E. HODGSON v. J. T. ARMSTRONG AND GEORGE L. MacINNES.

S. C.
In Chambers
1946
Sept. 9, 13.

Mutual wills—Identical terms—Husband and wife—Fresh will made by party who survives the other—Whether first will irrevocable on death of other—Interest of third party.

On the 25th of August, 1944, Noah C. Skippen and his wife Rebecca Skippen made mutual wills, each providing for a life interest in favour of the survivor with remainder over to a daughter Mary E. Hodgson, the plaintiff herein. The wills were identical in form and at the time of

S. C.
In Chambers
1946

IN RE ESTATE OF NOAH C. SKIPPEN, DECEASED, AND IN RE ESTATE OF REBECCA SKIPPEN, DECEASED.

HODGSON v. ARMSTRONG AND MACINNES

their execution Noah C. Skippen was 93 years old and his wife 85. They were registered as joint owners of a certain property in Vancouver which was occupied by them as their home. They had entered into an agreement with each other and with the plaintiff that the plaintiff would come to reside with them for the remaining period of their lives and give them such care and attention as they required from time to time and that they would by mutual wills to be made by them, after providing for the life interest of the survivor of them, leave to the plaintiff the residue of their estates and pursuant to this understanding and arrangement between them the mutual wills in question were executed. Thereafter the plaintiff resided with them and looked after and cared for them. Rebecca Skippen died in January, 1945, and her will was probated. Noah C. Skippen obtained the life interest in her estate and he died in March, 1946. On January 8th, 1946, Noah C. Skippen executed another will revoking his former will and disposing of his estate in a different manner. On originating summons by the daughter Mary Hodgson the question to be determined was whether under the circumstances here, the deceased Noah C. Skippen was, by reason of his contract or agreement with his deceased wife, precluded from revoking his mutual will and making some other disposition of his estate.

Held, that the facts disclose the existence of an agreement between the parties as alleged by the plaintiff herein pursuant to which they executed the wills and by which each was bound. Having so found, the surviving husband was precluded from making any other disposition of his estate and while on the authorities it is quite clear that the subsequent will will be admitted to probate, nevertheless the executor of that estate will be held to take the property subject to the trust in favour of the plaintiff.

ORIGINATING summons issued on the application of Mary E. Hodgson who claims as sole residuary beneficiary under mutual wills made by Noah C. Skippen and his wife Rebecca Skippen on the 25th of August, 1944, for good consideration and in such manner as to bind the assets of said testators in the hands of the personal representatives of both and to create the defendant Armstrong, executor of the estate of Noah C. Skippen, deceased, a trustee for the plaintiff of the entire estate of Noah C. Skippen which may come into his hands. The following questions were submitted for determination:

1. Did the mutual wills executed by the said Noah C. Skippen and Rebecca Skippen sever the joint tenancy theretofore enjoyed and held by the said Noah C. Skippen in and to said lands above described and being lots 11, 17 and 13 in block 500 of D.L. 472, group 1, N.W.D., plan 723 and convert the same into a tenancy in common? 2. what estate or interest (if any) in the said above described lands does the plaintiff take under the

last will and testament of the said Rebecca Skippen? 3. did not the mutual will made by the said Noah C. Skippen become irrevocable upon the death of the said Rebecca Skippen? 4. Is the defendant Armstrong, as executor of the last will of Noah C. Skippen, a trustee to perform the contract or obligation set out in the mutual wills of the said Noah C. Skippen and Rebecca Skippen? 5. if the answer to question No. 4 be in the negative, what are the rights of the plaintiff in and to the assets of the estate of the said Noah C. Skippen? 6. How are the costs of this application to be borne?

MacInnes, K.C., for plaintiff.
Warner, for defendant Armstrong.
Farrand, for beneficiaries under last will of N. C. Skippen.
Geo. L. MacInnes, in person.

Cur. adv. vult.

13th September, 1946.

COADY, J.: This is an originating summons. On the 25th of August, 1944, the above named Noah Cotton Skippen and his wife, Rebecca Skippen, made mutual wills, each providing for a life interest in favour of the survivor, with remainder over to a daughter, Mary Elizabeth Hodgson, the plaintiff in these proceedings. The wills are identical in form, except in the interchange of the donees for life. There is a recital in each of the wills as follows:

Having already in my lifetime given to each of my several children such assistance as lay within my power and according to the needs of each as occasions arose and having now received from my daughter Mary Elizabeth who of all my children is best suited by temperament and present position so to do the promise that she will to the best of her ability continue to live with my wife [husband] and myself during our remaining days and give to us the care and attention of a daughter to her aged parents.

It appears that at the time of the execution of these wills, Noah Cotton Skippen was about 93 years of age and his wife, Rebecca Skippen, about 85 years. The facts set out in the originating summons, verified by the affidavit of the plaintiff herein, are not in dispute. From these it would appear that, at the time the wills were executed, the parties were then registered as joint owners of certain real property in the city of Vancouver, which was occupied by them as their home, and this was practically the only estate; that owing to their advanced age and condition of health and the necessity of having someone to look after them if this home was to be maintained, they had made an agreement with each other and with the plaintiff herein

S. C.
In Chambers
1946

IN RE ESTATE OF NOAH C. SKIPPEN, DECEASED, AND IN RE ESTATE OF REBECCA SKIPPEN, DECEASED.

HODGSON v. ARMSTRONG AND MACINNES

Coady, J.

that the plaintiff would come to reside with them for the remaining period of their lives and give them such care and attention as they required from time to time, and that they would, by mutual wills to be made by them, after providing for the life interest of the survivor of them, leave to the plaintiff the residue of their estates; and that pursuant to this understanding and arrangement between them the mutual wills in question were executed. Thereafter the plaintiff resided with them and looked after and cared for them.

Rebecca Skippen died on the 11th of January, 1945, and her will was probated in due course. Noah Cotton Skippen, who, after his wife's death, enjoyed the life interest in her estate, died on or about the 19th of March, 1946. There was authority given in the wills enabling the survivor to sell all or any part of the estate of the deceased and to use the capital as well as the income for the support and maintenance of the survivor, but this authority was not exercised. On or about the 8th of January, 1946, however, Noah Cotton Skippen executed another will revoking his former will and disposing of his estate in a different manner. The executors of the two estates were represented before me; likewise the beneficiaries named in the last will of Noah Cotton Skippen dated the 8th of January, 1946.

The questions submitted for determination are:

1. Did the mutual wills executed by the said Noah Cotton Skippen and Rebecca Skippen sever the joint tenancy theretofore enjoyed and held by the said Noah Cotton Skippen in and to said lands above described and being lots 11, 17 and 13, in block 500 of D.L. 472, group 1, N.W.D., plan 723, and convert the same into a tenancy in common?

2. What estate or interest (if any) in the said above-described lands does the plaintiff take under the last will and testament of the said Rebecca Skippen?

3. Did not the mutual will made by the said Noah Cotton Skippen become irrevocable upon the death of the said Rebecca Skippen?

4. Is the defendant Armstrong as executor of the last will of Noah Cotton Skippen a trustee to perform the contract or obligation as set out in the mutual wills of the said Noah Cotton Skippen and Rebecca Skippen?

5. If the answer to Question No. 4 be in the negative, what are the rights of the plaintiff in and to the assets of the estate of the said Noah Cotton Skippen?

6. How are the costs of this application to be borne?

Counsel agree that on the facts stated there was a severance of the joint estates in the real property on the execution of the joint wills. In Halsbury's Laws of England, 2nd Ed., Vol. 34, p. 18, the law is stated as follows:

When mutual wills, whether contained in a joint will or separate documents, relate to a joint property, the agreement to make the mutual wills, and the making of the dispositions in pursuance of the agreement, sever the joint tenancy, and convert it into a tenancy in common.

It is therefore agreed by counsel, as I understand, that the answer to Question 1 must be in the affirmative; and in answer to Question 2 that the plaintiff under the will of Rebecca Skippen took an undivided one-half interest in the said lands and premises subject to the life interest in favour of the survivor Noah Cotton Skippen.

It is in relation to Question 3 that the difficulty arises here. The question as stated is not happily worded. While in some of the cases reference is made to a mutual will as being irrevocable, if made under circumstances which establishes an agreement not to revoke, yet strictly speaking a will is always revocable. See *In the Estate of Heys. Walker* v. *Gaskill,* [1914] P. 192. But, though revocable, the revocation by a subsequent will may be in breach of a covenant not to revoke, in which case the personal representative will be held a trustee to perform the contract.

The real question therefore to be determined is whether under the circumstances here the deceased Noah Cotton Skippen was, by reason of his contract or agreement with his deceased wife, precluded from revoking his mutual will and making some other disposition of his estate.

In *Stone* v. *Hoskins,* [1905] P. 194, the head-note states:

Where two persons have made an arrangement as to the disposal of their property and executed mutual wills in pursuance of that arrangement, and one of them who predeceases the other dies with the implied promise of the survivor that the arrangement shall hold good; and if the survivor, after taking a benefit under the arrangement, alters his will, his personal representative takes the property upon trust to perform the contract, for the will of the one who died first has, by the death, become irrevocable.

This statement of the law is approved of in *In re Oldham. Hadwen* v. *Myles,* [1925] Ch. 75, where the cases are reviewed somewhat fully, and wherein Astbury, J. says (p. 87):

In order to enforce the trust for which the plaintiff contends I must be satisfied that its terms are certain and unequivocal and such as in the circumstances I am bound to give effect to.

In *Gray* v. *Perpetual Trustee Co.,* [1928] A.C. 391, the head-note reads as follows:

The fact that a husband and wife have simultaneously made mutual wills giving each to the other a life interest with similar provisions in remainder, is not in itself evidence of an agreement not to revoke the wills; in the absence of a definite agreement to that effect there is no implied trust precluding the wife from making a fresh will inconsistent with her former

S. C.
In Chambers
1946

IN RE ESTATE OF NOAH C. SKIPPEN, DECEASED, AND IN RE ESTATE OF REBECCA SKIPPEN, DECEASED.

HODGSON v. ARMSTRONG AND MACINNES

Coady, J.

will, even though her husband has died and she has taken the benefits conferred by his will.

The law, therefore, seems clear, that the making of the mutual wills is not of itself sufficient to establish the agreement; it must be shewn that there was an agreement that each party was to be bound; in the absence of such agreement, the survivor is not bound.

It is necessary, therefore, to consider what evidence is here submitted to establish such agreement. We have the recital in the mutual wills themselves to which I have already referred. This recital, it seems to me, is significant and indicates—when one considers the ages of the parties, the limited estate they had to dispose of, the necessity of having someone to look after them, the promise made by the daughter to look after them as set out in the recital, their confidence in her ability to do so—an agreement between the parties pursuant to which the mutual wills were made and by which the survivor was to be bound. This inference arising from the recitals in the mutual wills is supported by the affidavit of the plaintiff herein, to which reference has been already made. In addition to this, there is the affidavit of *George L. MacInnes,* the executor named in the mutual wills, and the solicitor who received instructions for and prepared the wills that

> after a full discussion both Mr. and Mrs. Skippen expressed themselves as satisfied that these draft wills fully disclosed their wishes as they set out the agreement they had just formulated between themselves which made provisions for the continuation of their own home, not only for their joint lives but also for the life of the survivor.

It seems to me all of this points to one conclusion—the existence of an agreement between the parties as alleged by the plaintiff herein, pursuant to which they executed the wills and by which each was bound. Having found such agreement, then the surviving husband, it seems to me, was precluded from making any other disposition of his estate and, while on the authorities it is quite clear that the subsequent will will be admitted to probate, nevertheless the executor of that estate will be held to take the property subject to the trust in favour of the plaintiff herein.

Question 3 will be answered in the affirmative.

Question 4 likewise in the affirmative.

No answer is required to Question 5.

Under the particular circumstances here, the costs of all parties are payable out of the estate.

Order accordingly.

WILSON v. CLINE.

C. A.
1946
May 30, 31; *June* 11.

Negligence—Contributory negligence by plaintiff—Street collision—Continuing negligence of defendant—Cause of accident.

At about 8.35 o'clock on the morning of the 17th of May, 1945, the plaintiff was driving his delivery truck south on Hall's Prairie Road. On reaching the intersection of Trans-Canada Highway, he stopped at the stop sign and allowed a west-bound car on the highway to pass and he then observed defendant's east-bound car on the highway some 750 feet to his right. He proceeded to cross the highway in low gear at about 6 or 7 miles an hour. The defendant saw the plaintiff's truck at the "stop sign" when he was about 750 feet to the west and he had the truck in constant view until the moment of impact. He was in control of the situation from the first time he saw the truck and was proceeding at 40 miles an hour. He did not sound his horn or apply his brakes until about 18 feeet from the point of impact, when it was too late for effective action and he struck the plaintiff's truck "amidships" just as it was completing its crossing of the highway. It was held on the trial that the defendant was solely responsible for the collision because he failed to avail himself of the opportunity to avoid collision which was open to him at all material times, and no question of statutory right of way is involved here.

Held, on appeal, affirming the decision of SULLIVAN, Co. J. (SIDNEY SMITH, J.A. dissenting and holding the parties were equally liable), that even if the respondent had been careless in crossing the road as he did, it cannot be regarded as a causative factor since the oncoming appellant, by the exercise of ordinary care, could have avoided the consequences of any lack of care which, on the case as presented, could be attributed to the respondent. The appellant was not sufficiently alert to the likelihood of danger ahead and did not take proper action to reduce his speed in due time.

APPEAL by defendant from the decision of SULLIVAN, Co. J. of the 7th of March, 1946, in an action for damages resulting from a collision between a Chevrolet light delivery truck of the plaintiff and a motor-vehicle driven by the defendant at the intersection of Trans-Canada Highway and Hall's Prairie Road in the municipality of Surrey, county of Westminster. The facts are sufficiently set out in the head-note and reasons for judgment.

The appeal was argued at Vancouver on the 30th and 31st of May, 1946, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

C. A.
1946
WILSON
v.
CLINE

Haskins, for appellant: About 8.35 on the morning of the 17th of May, 1946, the plaintiff was driving his delivery truck south on Hall's Prairie Road and when crossing the Trans-Canada Highway was in collision with the defendant who was driving his car easterly on the Trans-Canada Highway. The plaintiff was negligent in five respects: (1) When he stopped before crossing the highway he should have stayed there until the defendant passed; (2) he should have crossed in the intersection; (3) he neglected to keep a proper look-out; (4) he should have given defendant the right of way; (5) he did not make calculation of speed of defendant before he crossed. The *onus* is on the respondent to show we were negligent: see *Kennedy Lumber Co. Ltd.* v. *Porter,* [1932] 1 W.W.R. 230, at p. 232; *Thompson* v. *McCaig,* [1938] 2 W.W.R. 15, at p. 18; *Smith* v. *Swaffield,* [1941] 3 W.W.R. 807; *Murdoch* v. *Davis,* [1939] 2 W.W.R. 621, at p. 623; *Swartz* v. *Wills,* [1935] S.C.R. 628, at pp. 632-3; *Donaldson* v. *Moose Jaw Transportation Co. Ltd.,* [1945] 1 W.W.R. 678. We had the right to assume he would give us the right of way: see *Carter* v. *Van Camp et al. Van Camp* v. *Carter and Anderson,* [1930] S.C.R. 156; *Call* v. *Smith and Hellofs,* [1938] 3 W.W.R. 539, at pp. 544-5; *Canada Bread Co.* v. *Grigg,* [1946] 2 D.L.R. 375. He could have stopped and that would have avoided the accident: see *Koeppel* v. *Colonial Coach Lines Ltd.,* [1933] S.C.R. 529; *Robt. Simpson Western Ltd.* v. *Goldman,* [1936] 3 W.W.R. 429; *Rubinstein* v. *Malkin,* [1937] 3 W.W.R. 529; *McIntosh* v. *Bell,* [1932] 2 D.L.R. 55, at p. 61. The plaintiff placed himself in jeopardy in crossing as he did.

Colin D. McQuarrie, for respondent: As he crossed the highway the plaintiff swerved slightly to the right as he was going to the store on the opposite side, but this did not affect the defendant who by taking reasonable care should have avoided him. The plaintiff had stopped at the "stop sign" and then continued on when the defendant was some 750 feet to his right: see *Downey* v. *Hyslop* (1930), 65 O.L.R. 548, at p. 551. There was no attempt to show the learned judge was clearly wrong: see *Ottawa Brick & Terra Cotta Co.* v. *Marsh,* [1940] 2 D.L.R. 417, at p. 427; *Wood and Fraser* v. *Paget* (1938), 53 B.C. 125;

Claridge v. *British Columbia Electric Railway Co. Ltd.* (1940), 55 B.C. 462; *Fewster* v. *Milholm and Vallieres and McAndless* (1943), 59 B.C. 244. The plaintiff used due caution, he stopped at the stop sign to let a car pass, he had substantial prior entry on the intersection and was nearly across when he was struck. He was in full view of the defendant: see *C. W. Stancliffe & Co.* v. *City of Vancouver* (1912), 18 B.C. 629; *Dockendorff* v. *Johnston* (1924), 34 B.C. 97. They must show the learned judge was clearly wrong: see *Paul* v. *Dines* (1929), 41 B.C. 49; *Currie* v. *Milne and Milne,* [1930] 2 W.W.R. 159.

Haskins, in reply, referred to *Peterson* v. *Mann and Mann,* [1942] 1 W.W.R. 705 and *Dawes* v. *Gaye,* [1942] S.C.R. 369.

Cur. adv. vult.

11th June, 1946.

O'HALLORAN, J.A.: There can be little doubt, I think, that the appellant approaching at 40 miles an hour saw or ought to have seen the respondent's truck crossing the Trans-Canada Highway at a slow speed in front of him in sufficient time to have avoided crashing into it. The country was level. The appellant did not reduce his speed or sound his horn. He did not put on his brakes or swerve his car until it was too late to avoid a collision.

The appellant testified he thought the truck was completing a wide turn and would proceed westerly on the Trans-Canada Highway, instead of crossing it. Assuming that to have been his first impression, nevertheless the evidence supporting the learned judge's findings of fact leaves no uncertainty that when the truck actually began to cross the centre line and was heading directly across the road, the appellant was then far enough away to have effectively taken ordinary precautions to avoid a collision.

The appellant in *Alonzo* v. *Bell et al.* (1942), 58 B.C. 220, at p. 225 attempted unsuccessfully to excuse himself by saying he thought the cyclist would allow him to pass; *cf.* also *Fewster* v. *Milholm and Vallieres and McAndless* (1943), 59 B.C. 244, at pp. 248-9, and *Hunter* v. *White et al.* delivered 6th March, 1946. Even if the respondent had been careless in crossing the road as he did I cannot regard it as a causative factor, since the

C. A.
1946
WILSON
v.
CLINE
O'Halloran, J.A.

oncoming car, by the exercise of ordinary care, could have avoided the consequences of any lack of care which, on the case as presented, could be attributed to the respondent. The appellant was not sufficiently alert to the likelihood of danger ahead and did not take proper action to reduce his speed in due time.

In view of the nature of the argument addressed to the Court on this latter point, reference is now made among other decisions to *M'Lean* v. *Bell* (1932), 48 T.L.R. 467; *British Columbia Electric Railway Company, Limited* v. *Loach,* [1916] 1 A.C. 719, at p. 728; *Radley* v. *London & North Western Rail. Co.* (1876), 46 L.J. Ex. 573; *Lauder* v. *Robson* (1940), 55 B.C. 375, at p. 384; and *Brown* v. *Walton et al.* (1943), 58 B.C. 498, at pp. 514-16 and 518-20; *Tuff* v. *Warman* (1858), 27 L.J.C.P. 322, and the brief but comprehensive charge to the jury of Cockburn, C.J. in *Springett* v. *Ball* (1865), 4 F. & F. 472, at pp. 473-4 may also be usefully examined.

I would dismiss the appeal.

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

SIDNEY SMITH, J.A.: The plaintiff Wilson was driving south along Hall's Prairie Road (which runs north and south); he arrived at the Trans-Canada Highway (which runs approximately east south east and west north west) and stopped his car at the stop sign there. He allowed a west-bound car to go by. He saw the defendant Cline coming from the west, and when Cline was about 750 feet away the plaintiff started his car and began to cross the intersection at a speed of 6 to 7 miles an hour. He was going to a store situate at the south-west corner of the intersection and so diverged slightly to his right while crossing the highway. The defendant says that this divergence from Hall's Prairie Road confused him, and caused him to believe that the plaintiff intended to turn to his right and proceed westerly along the Trans-Canada Highway. The defendant therefore kept his course and speed, which was 40 miles per hour, and about which no complaint was made. He remained under this wrong impression (as the event proved) till he was possibly 50 or 60 feet from the plaintiff. He then realized his mistake

and tried to avoid the plaintiff by swerving to the right. In this he failed and collided with the plaintiff just as the plaintiff was completing his crossing of the paved portion of the highway. Meanwhile the plaintiff had continued to proceed across the intersection, taking no measures whatever to avoid a collision. He did not see the defendant from the time he started his car until the impact.

In these circumstances the judge found, in his helpful and full reasons for judgment, that the defendant Cline was alone to blame and he now appeals from that decision. For the purposes of my judgment I accept the judge's findings of fact, as there was evidence to support them. Nevertheless I have some difficulty in seeing how this collision could have occurred if the defendant was in fact 750 feet away when the plaintiff started to cross the highway. My own view on inferences drawn from the evidence as a whole, would be that probably less than half that distance separated them. But that by the way. I am prepared to accept the judge's findings, and have already set them out in the foregoing narrative. But there was this additional, important finding, *viz.*, that the defendant Cline was not justified in thinking that the plaintiff Wilson, when making the aforesaid divergence from Hall's Prairie Road was carrying out the first part of a turning movement to his right designed to carry him west along the highway. In view of these findings, I agree that the defendant cannot be exonerated from negligence directly causing the collision.

But in my view neither can the plaintiff. On his own evidence he saw the defendant on his right coming towards him at a speed which he said it was impossible for him to estimate. Nevertheless he proceeded across in front of the defendant's advancing car at little more than a walking rate, and paid no attention to that potential danger until the impact. It seems to me, in the light of the ordinary good sense of the matter, that that was an improper thing to do; that it amounted to negligence on his part; that such negligence continued up to the time of the collision; and that it was a contributing cause thereof. The learned judge seems to impliedly find that the plaintiff was in a

C. A.
1946

WILSON
v.
CLINE

Sidney Smith, J.A.

position of danger, for he says, referring to the divergence to the right made by the plaintiff:

If anything, such slight deviation tended to speed plaintiff's crossing of dangerous ground.

If the plaintiff was on dangerous ground, then he must move with that extra caution which the occasion demands; and that extra caution of necessity involves keeping a proper look-out. It is not disputed that the plaintiff at the speed at which he was travelling could have stopped almost instantaneously. Can there be any doubt that he could and would have done so had he become aware, almost at any time up to the impact, that the plaintiff was not giving way to him, and can it be doubted that collision would have been thereby avoided? In my view his neglect of the simple precaution of keeping a look-out was in the circumstances tantamount to an act of folly which I believe any jury would say was negligence and truly contributory to the accident.

The donkey case—*Davies* v. *Mann* (1842), 10 M. & W. 546; 132 E.R. 588, was referred to in argument. But as counsel for the appellant aptly said,

there the donkey was a donkey, while here the plaintiff is a human being and must be held to some sense of accountability.

I think that is so. The comparable case of *Butterfield* v. *Forrester* (1809), 11 East 60; 103 E.R. 926, was also referred to. But there Lord Ellenborough, C.J. pointed out that a man cannot avail himself of the fault of another

if he do not himself use common and ordinary caution to be in the right.

The most recent decisive authority is *The Royal Trust Company* v. *Toronto Transportation Commission,* [1935] S.C.R. 671. There a street-car with a statutory right of way was held equally at fault with a motor-car for a collision in an intersection, the speeds being 22 miles and 35 miles an hour respectively, upon the ground that both drivers should have had their cars under such control as would enable them to stop to avoid the collision. Davis, J., at p. 676, quoted with approval the following passage from Viscount Dunedin's speech in the House of Lords in *Fardon* v. *Harcourt-Rivington* (1932), 48 T.L.R. 215, at p. 216:

The root of this liability is negligence, and what is negligence depends on the facts with which you have to deal. If the possibility of the danger

C. A.
1946
WILSON
v.
CLINE
Sidney Smith, J.A.

emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.

Can it be said in the circumstances here that it would never occur to the mind of a reasonable man situated as was the plaintiff, to keep an eye on the potential danger rapidly advancing on his right? I cannot bring myself to think so. I would hold the parties equally at fault and to this extent would allow the appeal.

Appeal dismissed, Sidney Smith, J.A. dissenting in part.

Solicitor for appellant: *Gordon S. Wismer.*
Solicitor for respondent: *Colin D. McQuarrie.*

REX v. SANTIAGO MINES LIMITED (NON-PERSONAL LIABILITY).

C. A.
1946
March 7, 8; April 9.

Company—"Reorganization"—Increase of capital—Allotment of shares in course of reorganization—Securities Act, R.S.B.C. 1936, Cap. 254, Secs. 3 (g) and 4 (1)—B.C. Stats. 1937, Cap. 69, Sec. 3—R.S.B.C. 1936, Cap. 271, Sec. 30 (2).

On the 18th of August, 1944, when the capital stock of the defendant company consisted of 1,500,000 shares of 50 cents each and the company was in a helpless position financially, the directors passed a resolution that in view of negotiations with Eastern mining interests the capital stock of Santiago Mines Limited be increased to not exceeding 6,000,000 shares of the par value of 50 cents per share and on the 5th of September, 1944, the resolution was confirmed by the shareholders. On the 11th of December, 1944, the company's capital was increased to $2,000,000 divided into 4,000,000 shares of 50 cents each. On the 18th of December, 1944, the company gave an option to Remsen Financial Corporation Limited to purchase 2,000,000 shares at certain prices upon certain terms. On January 3rd, 1945, three persons were appointed directors of the company and on the application of the company the Ontario Securities Commission on the 12th of January, 1945, gave permission for the sale through the medium of any registered broker in Ontario of shares of company referred to in the agreement of December 11th, 1944. On the 19th of January, 1945, the company issued to one Crowe-Swords

C. A.
1946
REX
v.
SANTIAGO
MINES
LIMITED

500,000 of its shares and this exhausted the company's total share capital irrespective of the 2,000,000 shares optioned to the Remsen Company. On January 22nd, 1945, the directors of the company resolved that 2,000,000 shares should be allotted to the Remsen Company in accordance with the terms of the option agreement above mentioned. On February 23rd, 1945, the superintendent of brokers wrote the company stating that the issue of 2,000,000 of its shares appeared to be trading in contravention of section 4 (1) of the Securities Act. On a prosecution commenced on the 19th of June, 1945, that between the 1st of December, 1944, and the 31st of January, 1945, the Santiago Mines Limited unlawfully did act as a broker contrary to the provisions of section 4 (1) of the Securities Act, it was submitted that what took place was in the course of reorganization of the company and therefore fell within the exception in section 3 (*g*) of the Securities Act, there being no difference in meaning between "reorganization" and "reconstruction." On appeal from the dismissal of the charge by deputy police magistrate W. W. B. McInnes it was held that Santiago Mines Limited was guilty.

Held, on appeal, reversing the decision of LENNOX, Co. J. (ROBERTSON and BIRD, JJ.A. dissenting), that "reorganization" is a commercial rather than a legal term. The company in its own resolutions made before any of these questions arose referred to its activities as being a "reorganization" and on the evidence this is not an inapt word to express in a commercial sense what took place here. The magistrate came to a conclusion different from that of the learned judge who arrived at his conclusion with some hesitation. The point is therefore not free from doubt. This is a penal statute and must be strictly construed. The *onus* of proving its case has not been discharged by the Crown, moreover if the *onus* of proving that these various matters amounted to a "reorganization" falls upon the appellant under section 30 (2) of the Summary Convictions Act, such *onus* would be discharged by the appellant proving the probability that this was so, and this has been done. The appeal is allowed and the conviction quashed.

APPEAL by defendant from its conviction by LENNOX, Co. J. on the 10th of January, 1946, on the charge that the said Santiago Mines Limited between the 1st of December, 1944, and the 31st of January, 1945, in the city of Vancouver, British Columbia, unlawfully did act as a broker contrary to the provisions of section 4, subsection (1) of the Securities Act without holding a certificate of registration as a broker under said Act.

The appeal was argued at Vancouver on the 7th and 8th of March, 1946, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

McPhillips, for appellant: This is a conviction under sec-

tion 4 (1) of the Securities Act. The charge first came before deputy police magistrate McInnes who dismissed it and was then heard by LENNOX, Co. J. We did not have a certificate of registration as a broker, but we say this is not required by reason of section 3 (*g*) of said Act. There was error in not holding that the allotment of stock to the Remsen Financial Corporation Limited and Robert Crowe-Swords were allotments of stock in the course of reorganization of the company. There was error in not holding that the commercial meaning was the meaning to be applied in law to the word "reorganization." On the commercial meaning of reorganization see *Hooper* v. *Western Counties, &c., Telephone Company* (1892), 68 L.T. 78; *In re South African Supply and Cold Storage Company. Wild* v. *Same Company,* [1904] 2 Ch. 268; 20 L.Q.R. 392; Palmer's Company Law, 17th Ed., 84. The learned judge below termed it as a border-line case. The company in such a case is entitled to the benefit of the doubt.

Des Brisay, K.C., for the Crown: This was a trade in securities in course of reorganization. On the interpretation of the statute see Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., 310-11; Maxwell on Statutes, 8th Ed., 20 and 269. Reorganization has been judicially interpreted: see Interpretation Act, Sec. 23 (6); *Barris* v. *Aberdeen Steam Trawling and Fishing Co.,* [1933] A.C. 402, at p. 411; *Marshall or Wilkinson* v. *Wilkinson,* [1943] 2 All E.R. 175; *Hooper* v. *Western Counties, &c., Telephone Company* (1892), 68 L.T. 78; Fraser on Company Law, 9th Ed., 273; *Simpson* v. *The Palace Theatre Limited* (1893), 69 L.T. 70, at p. 71; *In re Schweppes, Limited,* [1914] 1 Ch. 322, at p. 329. Here they wanted to be in a position to sell shares: *Rex* v. *Smith* (1916), 23 B.C. 197; *In re The Bodega Company, Limited,* [1904] 1 Ch. 276.

McPhillips, in reply: On interpretation of the Act see Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., 497; *Parry* v. *Croydon Gas Co.* (1863), 15 C.B. (N.S.) 568.

Cur. adv. vult.

9th April, 1946.

SLOAN, C.J.B.C.: I agree with my brother SIDNEY SMITH.

C. A.
1946
REX
v.
SANTIAGO
MINES
LIMITED

O'HALLORAN, J.A.: I am in such substantial agreement with the views expressed by my brother SIDNEY SMITH that I find it unnecessary to enlarge upon those reasons for holding the appeal ought to be allowed and the conviction quashed. The appellant did not receive the benefit of the real doubt, which, with respect, appears in a perspective view of the whole case.

ROBERTSON, J.A.: The charge against the appellant was that

> between the 1st day of December, 1944, and the 31st day of January, 1945, at . . . Vancouver . . . . [it] unlawfully did act as a broker contrary to the provisions of Section Four, Subsection One of the Securities Act, Chapter 254, Revised Statutes of British Columbia, 1936 . . . without holding a Certificate of Registration as a broker under the said Act.

Section 4 reads as follows:

> 4. (1.) No person shall directly or indirectly act as a broker or salesman unless he holds a certificate of registration therefor under this Act which is in full force and effect.

The defence was that what the appellant had done was legal, being "in the course of the reorganization of the company," and therefore exempt from the operation of section 4 by reason of section 3 (*g*) of the Act. Sections 3 (*f*) and 3 (*g*) of the Act read as follows:

> 3. Part I. of this Act shall not apply with respect to any trade in a security within the scope of any of the clauses following:—
>
> (*f.*) A trade in its own securities . . . or for the purpose of securing additional capital or funds, if notice thereof is first given to the Superintendent and the securities are issued or sold exclusively to existing members of the company or holders of its issued securities, ...
>
> (*g.*) A trade in its own securities by a company in the course of the reorganization of the company, . . .

The deputy police magistrate dismissed the charge. The respondent's appeal was heard by LENNOX, Co. J., who convicted the appellant and imposed a penalty.

Buckley, J. said in *In re South African Supply and Cold Storage Company. Wild* v. *Same Company,* [1904] 2 Ch. 268, at p. 282:

> Beyond that, I have to consider whether the winding-up is "for the purpose of reconstruction or amalgamation." I cannot answer that question simply by reading the resolutions for liquidation and seeing whether they are expressed to be "for the purpose" I have named; I must go further and ascertain whether, as a matter of substance and of fact, the winding-up was arrived at for one of those purposes.

It is then necessary to consider the facts, which are as follows:

On the 18th of August, 1944, the company was "absolutely broke." At that time its share capital consisted of 1,500,000 shares of 50 cents each. On the 18th of August, 1944, the directors passed the following resolutions:

RESOLVED: That in view of negotiations now being carried on between Santiago Mines Limited, (N.P.L.) and Eastern Mining interest, and in order that sufficient additional shares be made available so as to meet the terms and conditions of the proposals and vest control of the Company in the new operators, or Underwriters, BE IT RESOLVED, that the Authorized Capital of Santiago Mines Limited, (N.P.L.), be increased from its present amount of 1,500,000 common shares up to but not exceeding 6,000,000 common shares, having a par value of 50c per share, and that the Directors be and are hereby authorized to effect such increase without delay.

BE IT FURTHER RESOLVED: That the Directors of Santiago Mines Limited, (N.P.L.) be and are hereby authorized to complete such negotiations or proposals as above stated, or the total reorganization of and financing of the Company and its operators on whatever terms and conditions they may deem advisable and in the best interests of the Company, and that these resolutions be submitted to the shareholders at an Extraordinary General Meeting as soon as possible for consideration and approval.

On the 5th of September, 1944, the shareholders of the company at an extraordinary general meeting, passed the following resolutions:

. . . , that the resolution as set forth and adopted by the Directors of the Company on August 18th, 1944, which reads as follows:

"THAT THE authorized capital of Santiago Mines Limited, N.P.L., be increased up to but not to exceed 6,000,000 common shares having a par value of 50 cents per share."

is hereby unanimously confirmed and the Directors are fully authorized to effect such increase to whatever number of shares they deem advisable up to 6,000,000 shares at such time as is required for the purpose of reorganization, the vesting of control or otherwise with any group or corporation who may become interested in the development of the "Doratha Morton" and "Enid Julie" group of mineral claims situated at Phillips Arm, B.C.

Carried.

It was regularly moved and seconded that additional Directors be appointed at the discretion of the present Directors when deemed advisable so as to give any group of mining and financial interests full representation on the Board of Directors of Santiago Mines Limited, (N.P.L.). Such nominees to be appointed at a meeting of the Directors if and when expedient.

Carried.

On the 11th of December, 1944, the capital of the appellant was increased to "the sum of $2,000,000 divided into 4,000,000 shares of 50c each."

On the 18th of December the appellant gave an option to the

C. A.
1946

REX
v.
SANTIAGO
MINES
LIMITED

Robertson, J.A.

Remsen Financial Corporation Limited, to purchase 2,000,000 shares, fully paid and non-assessable, at certain prices, "to be taken up and paid for at the rate of not less than 50,000 shares" within one month after the date upon which the Ontario Securities Commission grants permission for the sale of the company's shares through any registered broker or dealer in the Province of Ontario (hereinafter called the commencement date), not less than 50,000 shares within each of the next succeeding 13 months, not less than 100,000 shares within each of the next succeeding eight months and the remaining 500,000 shares at 50 cents per share within 30 months from the commencement date or within six months from the date upon which the Government of the Dominion of Canada removes and rescinds all restrictions against the underground development of gold mining prospects in Canada, whichever period shall be the later.

On the 3rd of January, 1945, three persons were appointed directors of the appellant. The option agreement said nothing about control or the appointment of further directors. Paragraph 7 of the option agreement provided as follows:

> The Company shall forthwith make application to the Ontario Securities Commission for permission for the sale through any registered broker or dealer in the Province of Ontario of the shares optioned aforesaid and shall do all things necessary to comply with the requirements of the Ontario Securities Commission in order to obtain said permission.

On the 12th of January, 1945, the Ontario Securities Commission gave permission for the sale through the medium of any registered broker in Ontario, of shares of the appellant referred to in the agreement dated 11th December, 1944.

On the 19th of January, 1945, the appellant issued to one Crowe-Swords 500,000 of its shares. This exhausted the appellant's total share capital, irrespective of the 2,000,000 shares optioned to the Remsen Company.

On the 22nd of January, 1945, the directors of the company resolved that 2,000,000 shares should be allotted to the Remsen Company (an already existing shareholder) in accordance with the terms of the option agreement "for the purchase of the said shares," and provided these shares should be issued in four certificates of 500,000 shares each and handed to a trust company

to be turned over to Remsen Financial Corporation Limited as and when required, and of course upon payment therefor.

On the 23rd of February, 1945, the superintendent of brokers wrote to the appellant stating that the issue of 2,000,000 of its shares appeared to be a trading in contravention of the Securities Act, and asking for an explanation. The appellant's solicitor replied to this letter, but the reply is not in evidence.

On the 27th of February, 1945, the deputy superintendent of brokers wrote to the appellant's solicitors as follows:

Re: Santiago Mines Limited (N.P.L.)

Acknowledging receipt of your letter herein of the 26th instant, the Superintendent of Brokers wishes me to say that he does not see how you can claim the exemption 3 (*f*) of the "Securities Act" as no notification was given to him of any intention to sell shares to the Company's own shareholders. Furthermore, Section 3 (*g*) does not apply, as an increase of share capital is not a reorganization of the Company.

The prosecution was commenced on the 19th of June, 1945. Neither the appellant nor the Remsen Company was a broker within the meaning of the Act.

It would appear from the superintendent's letter of the 27th of February, 1945, that the company's solicitors took the position that their client was entitled to the exemption contained in section 3 (*f*) of the Act. It is clear that no notice was given to the superintendent and therefore subsection (*f*) could not apply. At the trial it was admitted by the appellant's counsel that what had taken place "was a trade in its own securities," but it was submitted that this took place "in the course of the reorganization of the company," and therefore fell within the exception in section 3 (*g*), *supra*. The appellant submitted that there was no difference in meaning between "reorganization" and "reconstruction," and in support of this referred to what Chitty, J. said in *Hooper* v. *Western Counties, &c., Telephone Company* (1892), 68 L.T. 78, at p. 80, *viz.*,

Reorganization, . . . , [could] have no wider meaning than reconstruction;

and although it was not necessary to express an opinion, he thought the two terms were used as alternative expressions. And further, it was argued, the word "reconstruction" was to be regarded in its commercial sense. Reference was made to what

C. A.
1946

REX
v.
SANTIAGO
MINES
LIMITED

Robertson, J.A.

Buckley, J. said in the *South African* case, *supra,* at pp. 281-2, as follows:

> The only question I have to determine is whether, in the case of each of these two companies, there has or has not been a winding-up "for the purpose of reconstruction or amalgamation." Neither of these words, "reconstruction" and "amalgamation," has any definite legal meaning. Each is a commercial and not a legal term, and, even as a commercial term, bears no exact definite meaning. In each case one has to decide whether the transaction is such as that, in the meaning of commercial men, it is one which is comprehended in the term "reconstruction" or "amalgamation."

No evidence was given as to the meaning taken by commercial men of the words "reconstruction" or "reorganization."

Looking then at the resolutions to determine whether as "a matter of substance and of fact" what took place was arrived at for the purpose of reconstruction, it is clear that what was finally accomplished was merely an option for the purchase of its shares. The Remsen Company did not obtain control. It had 5,000 shares at the time the 2,000,000 shares were issued in its name, subject to being delivered upon payment therefor. It is clear therefore that it was necessary for that company to acquire nearly all the 2,000,000 shares before it would obtain control. Up to the time of the commencement of the proceedings the Remsen Company had only taken 475,000 shares. If it were selling shares on the open market in Ontario, as apparently was the intention, that company would not necessarily have the control. There was nothing in the option agreement about vesting control in the Remsen company or anyone else. So that, although the resolution of the 18th of August provided that sufficient additional shares were to be made available so as to comply with the terms and conditions of the proposals and "vest control of the appellant in the new operators or underwriters," no provision was made for this ultimately.

There is, I think, a difference between reorganization of a company and reorganization of the capital of a company. The latter may be authorized by its memorandum or in the cases provided for in sections 55 to 66 of the Companies Act. We have not been referred to any authority in which an increase of capital has been styled a "reorganization of the company." At p. 80 of the *Hooper* case, Chitty, J. describes the usual mode of

reconstruction, namely, winding-up, the formation of a new company . . . the shareholders of the first company to be its shareholders . . . to take over the old undertaking, the old shareholders receiving shares in the new company. In that case he points out there is a sale to the members of the new corporation and the old company ceases to exist. See also *South African Supply* case, *supra,* at p. 286.

One of the meanings given of reorganization in Vol. 8 of the Oxford Dictionary, at p. 455, is a "fresh" organization. The conclusion I have come to is that what took place in this case was merely an increase in capital. It was not something done "in the course of reorganization of the company" and therefore not within subsection (*g*) of section 3. But it was a trade in its own securities for the purpose of securing additional capital or funds, and therefore within section 3, subsection (*f*); and as no notice had been given to the superintendent the company was guilty of an offence under the Act.

The appeal must be dismissed.

SIDNEY SMITH, J.A.: I agree with LENNOX, Co. J. that this is a border-line case. I also agree that the crux of the matter is whether the transactions outlined in the evidence amounted to a reorganization of the company. I agree, too, that the word "reorganization," when applied to company affairs, has substantially the same meaning as "reconstruction," the word mostly used in the English authorities.

The charge made against the company is that, contrary to section 4 (1) of the Securities Act, R.S.B.C. 1936, Cap. 254, it acted as a broker without holding a certificate of registration under the Act. The learned judge found that the company admittedly sold a large block of its own shares without being so registered. But the company contends that these sales represent "a trade in its own securities by a company in the course of the reorganization of the company" within section 3 (*g*) of the Act, and that it is accordingly exempt from the provisions of section 4 (1), and so not obligated to become the holder of a certificate as above mentioned. The sole issue therefore, as already indi-

C. A.
1946

REX
v.
SANTIAGO
MINES
LIMITED

Sidney Smith,
J.A.

cated, is whether the transactions in the course of which the sales took place were in the nature of a reorganization of the company.

What were these transactions? They have been outlined by my brother ROBERTSON and were avowedly designed for the purpose of resuscitating the then bankrupt company, and putting it into a position of solvency, so that it could carry on its business as a going concern. Prior to the initiation of the transactions, the company was in debt and had lost all of its properties, with the exception of one Crown-granted mining lease and one located fractional claim held under record. Upon their completion the company held about six different groups of mining properties. In a word, therefore, the result of these various matters, according to the evidence, was to put the company into a healthy position, with new directors, new properties, increased capitalization and a listing on the Toronto Stock Exchange.

"Reorganization" is a word of vague import. It is not a word of art and has no technical meaning in law. It is a commercial rather than a legal term (*Hooper* v. *Western Counties, &c., Telephone Company* (1892), 68 L.T. 78, at p. 80; *In re South African Supply and Cold Storage Company. Wild* v. *Same Company,* [1904] 2 Ch. 268, at p. 281). I can find nothing in the context in which it is employed in the Act to help me in its interpretation. The company in its own resolutions made before any of these questions arose, referred to its activities as being a "reorganization," and for my part I think upon the evidence that this is not an inapt word to express in a commercial sense what took place here. Moreover, it seems to me that this conclusion is borne out by the passage relied upon by the Crown from the language of Buckley, J., as he then was, in the *South African* case, *supra,* at p. 286, in which he considers the meaning to be attributed to the equivalent word there used—"reconstruction."

It was urged upon us that we should have regard to the mischief which the Act under review was intended to remedy. This is true enough, and it is a most important consideration; but there are opposing considerations and I do not think the argument sufficient to outweigh them. For one thing, the learned magistrate (His Worship, W. W. B. McInnes) who heard the

first trial in the police court, came to a conclusion different from that of the learned judge who heard the second trial; and the learned judge, as I read his reasons, arrived at his conclusion with some hesitation. The point is therefore not free from doubt. Then one must bear in mind that this is a penal statute which must be strictly construed, and the party charged brought strictly within its terms—(*Parry* v. *Croydon Gas Co.* (1863), 15 C.B. (N.S.) 568, at pp. 575-76); and that as in all criminal proceedings, the charge must be driven home beyond reasonable doubt. Using the best judgment I can in such a matter, I am not persuaded that the *onus* of proving its case has been discharged by the Crown. Moreover, if the *onus* of proving that these various matters amounted to a reorganization falls upon the appellant under section 30 (2) of the Summary Convictions Act, such *onus* would be discharged by the appellant proving the probability that this was so. (*Rex* v. *Carr-Braint,* [1943] 2 All E.R. 156). And this, I think, it has done. I would therefore allow the appeal and quash the conviction.

BIRD, J.A.: The appellant, a mining company, incorporated as a specially limited company under the Companies Act, R.S.B.C. 1936, Cap. 42, was convicted before LENNOX, Co. J. in the County Court of Vancouver, upon an appeal to that Court by the Crown, taken under the Summary Convictions Act, R.S.B.C. 1936, Cap. 271, from the dismissal by W. W. B. McInnes, Esq., deputy police magistrate in and for the city of Vancouver of an information that: [already set out in the judgment of ROBERTSON, J.A.].

The appellant now appeals to this Court under the provisions of the Court of Appeal Act, R.S.B.C. 1936, Cap. 57, Sec. 6 (*d*) (vi) upon a point of law raised in the Court below, namely, that the impugned acts of the appellant, *i.e.*, the allotment to Robert Crowe-Swords on June 19th, 1945, and to Remsen Financial Corporation Limited on January 22nd, 1945, of 500,000 and 2,000,000 shares respectively of its capital stock, do not constitute an offence under the Securities Act, since each such act was done in the course of the reorganization of the company, and

C. A.
1946
REX
v.
SANTIAGO
MINES
LIMITED
Bird, J.A.

therefore by section 3 (*g*) of the Act are expressly excepted from the operation of section 4 of the Act.

The question for determination turns upon the true construction of several sections of the Securities Act, the relevant parts of which read as follows:

PART I.

REGISTRATION OF BROKERS AND SALESMEN.

4. (1.) No person shall directly or indirectly act as a broker . . . . unless he holds a certificate of registration therefor under this Act which is in full force and effect.

INTERPRETATION.

2. In this Act unless the context otherwise requires:—

"Broker" means a person who trades in securities, ...

"Trade" and "trading" include . . . . , any sale or disposition of a security, ... , and, in the case of a company, include any allotment, issue, or disposition of any of its own securities by option, agreement, sale, resolution, ... , or otherwise, ...

3. (*f*) and (*g*). [Already set out in the judgment of ROBERTSON, J.A.]

Counsel for the appellant submits that each of the allotments of its capital stock was a trade in securities so made in the course of the reorganization of the company and consequently section 4 of the Act does not apply to those transactions, alternatively, there was reasonable doubt whether those transactions were or were not made in the course of the reorganization of the company within the meaning of section 3 (*g*) of the Act, the benefit of which doubt was not given to the appellant.

It is common ground that on the 19th and 22nd days of January, 1945, the appellant company, which did not then hold a certificate of registration under the Securities Act, allotted to Robert Crowe-Swords, its president, and to Remsen Financial Corporation, Limited, financial agents of Toronto, Ontario, 500,000 and 2,000,000 shares respectively.

The learned judge below rejected the submission made by defence counsel that the allotments were made in the course of the reorganization of the company. The conviction was entered accordingly.

The submission of defence counsel here as well as below was based upon evidence which established that in August, 1944, the appellant company "was broke," having no cash assets and being "in debt to a considerable degree," that all of its existing authorized capital had been exhausted by allotment, and all of its

mining properties with the exception of one mineral claim and a fractional mineral claim had been lost due to non-payment of taxes or non-performance of other obligations.

In that state of the company's affairs, on August 18th, 1944, the following resolutions were passed by the directors: [Already set out in the judgment of ROBERTSON, J.A.].

On September 5th, 1944, the shareholders by resolution passed at an extraordinary general meeting authorized and confirmed the proposed increase in the authorized capital of the company, which resolution reads in part as follows: [already set out in the judgment of ROBERTSON, J.A.].

Subsequently the authorized capital of the company was duly increased from $750,000 to $2,000,000, divided into four million shares of 50 cents each. The entire increased capital was then allotted as noted above, the respective allotments being expressed by resolutions of the directors to be made to president Crowe-Swords as consideration for past services rendered and cash advanced to the company and to the Remsen Corporation "in accordance with the terms of an option agreement" whereby the latter acquired the right to purchase blocks of shares within limited periods and at varying prices. Prior to the commencement of this prosecution the Remsen Corporation had taken delivery and paid for 475,000 shares. From the proceeds of sale of shares delivered to the Remsen Corporation and as a result of deals for the acquisition by the company of additional mining properties negotiated by Crowe-Swords which involved the transfer of part, if not all, of the 500,000 shares so allotted to him, the financial position of the company was substantially improved and it acquired rights to purchase several mining properties, subject, however, to the performance of various obligations, financial and otherwise.

I think it clearly appears from the evidence of Crowe-Swords that the principal purpose of the company in initiating and carrying out of these transactions was to secure additional capital. To accomplish that purpose it became necessary to increase the authorized capital, but before a market could be found for shares brought into the treasury by the increase of

C. A.
1946

REX
v.
SANTIAGO
MINES
LIMITED

Bird, J.A.

capital, the company found it necessary to obtain additional mining properties. Upon completing these preliminary steps the company then proceeded with what I consider to have been its principal purpose to raise new capital by allotment of the whole of the increased capital to Crowe-Swords and the Remsen Financial Corporation.

To determine the meaning and intent of section 3 (*g*) of the Act I think requires that the subsection be construed with reference to the Act as a whole and to the context of the several subsections of section 3 in accordance with the principles expressed in *Canada Sugar Refining Company* v. *Reg.*, [1898] A.C. 735, wherein Lord Davey, speaking for their Lordships of the Judicial Committee, said at p. 741:

> . . . Every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute . . . . relating to the subject-matter.

For that purpose, furthermore

> it is, ... , legitimate to consider the state of the law at the time the [statute] was passed, and the changes it was passed to effect:

Attorney-General v. *Brown,* [1920] 1 K.B. 773, at p. 791, that is to say, that the intent of the Legislature is to be collected from the cause and necessity of the enactment of the Act and from a comparison of its several parts as well as from extraneous circumstances, so far as they can justly be considered to throw light upon the subject. *Stradling* v. *Morgan* (1560), 1 Plowd. 199; *Hawkins* v. *Gathercole* (1855), 6 De G. M. & G. 1.

Considered in the light of these principles, I think it clearly appears from examination of the statute as a whole that the Act was passed with the intention to provide protection for the public by restricting the sale or other disposal of securities within the controls laid down by the Act. To that end the Act restricts the freedom of trading in securities which existed prior to its enactment by forbidding all persons to trade in securities unless registered under the Act, subject however to exemption from the necessity for such prior registration in regard to trades of the nature enumerated in section 3 of the Act.

Comparison of subsections (*f*) and (*g*) of section 3 discloses that under section 3 (*f*) trades by a company in its own securi-

ties "for the purpose of securing additional capital" are exempted upon the express condition, *inter alia,* that prior notice thereof is given to the superintendent, who is empowered to impose further requirements; whereas under section 3 (*g*) trades by a company in its own securities, if made "in the course of the reorganization of the company, are exempted unconditionally."

Upon the application of the principles mentioned I think section 3 (*g*) must be construed with reference to the Act as a whole and particularly to section 3 (*f*). If section 3 (*g*) is so construed, it must be taken to relate to and to be limited to trades of the nature therein mentioned, which do not involve "the purpose of securing additional capital."

If section 3 (*g*) is not so construed, then in my opinion it necessarily follows that there is conflict between the provisions of the two subsections 3 (*f*) and 3 (*g*). I am unable to read into the latter subsection the intent to exempt from the controls imposed by the Act a trade which involves "securing additional capital" when it is made "in the course of the reorganization of a company," or otherwise falls within the provisions of section 3 (*g*) when at the same time the statute imposes restrictions upon trades which involve "securing additional capital" *simpliciter* as under 3 (*f*).

I am therefore of opinion that where a trade involves the securing of additional capital, before it can be said to be exempt under section 3 from the operation of Part I. of the Act, there must be compliance with the provisions of section 3 (*f*).

Here it has been shown, as I think conclusively, that the principal purpose of the appellant company was to secure additional capital. In those circumstances I consider that the transactions, which are the subject-matter of the offence charged (assuming that the impugned allotments were made "in the course of the reorganization of the company"), do not fall within the exemption created by section 3 (*g*), but can only be found to be exempted from the operation of Part I. of the Act if there has been due compliance with the provisions of section 3 (*f*). Here it is conceded that the conditions imposed by that section were not fulfilled.

C. A.
1946
REX
v.
SANTIAGO
MINES
LIMITED
Bird, J.A.

I entertain considerable doubt whether the transactions carried out by the company between August 18th, 1944, and January 22nd, 1945, can be said to constitute "the reorganization of the company" within the meaning of that phrase in section 3 (*g*), but do not find it necessary to determine that question since I have reached the conclusion expressed on the assumption for present purposes that the allotments were made in the course of the reorganization of the company.

Therefore, with deference to contrary opinion, I would dismiss the appeal.

Appeal allowed, Robertson and Bird, JJ.A. dissenting.

C. A.
1946
April 16, 25.

REX v. CRUICKSHANKS *ET AL.*

Criminal law — Conviction — Appeal from sentence — Probation officer— Suspension of sentence—Jurisdiction—Criminal Code, Secs. 1015, 1026 and 1081.

The Court of Appeal has no jurisdiction to suspend the passing of sentence on an appeal from conviction (O'HALLORAN, J.A. dissenting).

APPEAL from concurrent sentences of five and two years respectively passed upon accused Cruickshanks by H. S. Wood, Esquire, police magistrate for Vancouver following pleas of guilty to two charges of possession of an automatic pistol and ammunition and of retaining an automatic pistol over the value of $25 laid under code sections 115 and 399 respectively. On the hearing of this appeal there were pending before the Court ten other appeals taken, with one exception, by teen-age offenders from sentences passed upon each of them by trial Courts for various offences. The number and serious nature of these offences provoked consideration of the Court not only of the punishment imposed upon them, but also of possible means for reclamation of the offenders. The Court directed the Provincial probation officer to investigate the history and family

background of each of the appellants with a view to furnishing information at a subsequent hearing on the possibilities for and practicability of the application of remedial treatment, if available in the case of any such offender. The Court adjourned the hearing of the several appeals and directed that Crown counsel then submit argument on the jurisdiction of the Court of Appeal on appeals from sentence under Code section 1015 to suspend sentence and to direct release of the offender on probation.

The appeal was then argued at Victoria on the 16th of April, 1946, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Wismer, K.C., A.-G., for the Crown: Dealing only with the question as to whether the Court has power to grant suspended sentence. On the definition of the word "Court" see Code sections 2, subsection 38 and 1026. Next, section 1015 says "diminish, increase or modify." It is submitted this includes "suspended sentence." Section 1015 is wide enough for this Court: see *Rex* v. *Herron* (1922), 36 Can. C.C. 398.

Cur. adv. vult.

25th April, 1946.

SLOAN, C.J.B.C.: I agree with my brothers that this Court cannot suspend the passing of sentence on an appeal from conviction.

O'HALLORAN, J.A.: The point for determination is the jurisdiction of the British Columbia Court of Appeal to direct "suspended sentence" in these 11 sentence appeals by boys and young men who have been convicted of various and serious offences. With one or two exceptions they pleaded guilty. They are between the ages of 16 and 22 and few have not juvenile records.

A statute authorizing appointment of probation officers and prescribing their duties was passed at the recent session of the Provincial Legislature intituled the "Probation Act," Cap. 60, B.C. Stats. 1946. While it does not add to our jurisdiction, it provides opportunities for supervised probation under Code section 1081. This Court has been concerned whether it might be

C. A.
1946
REX
v.
CRUICKSHANKS
ET AL.
O'Halloran, J.A.

utilized to redeem any of these youthful offenders from the life of crime in which they seem to have made a firm beginning. To this end we directed that the appeals be adjourned to enable a probation officer under the Probation Act to investigate these young men and give evidence before this Court. He has now done so, and his evidence justifies suspended sentences on probation (and he so recommended when asked) for six of the appellants, *viz.,* Wakeham, Clark, Clarkson, Volk, Anderson and Laming. The other five appellants appear to require disciplined training in a place like a Borstal Institute, if any headway is to be made in their reclamation. But there is no such place in this Province.

Immediately arising is our jurisdiction to set aside the sentences of imprisonment imposed by the trial Courts and to substitute suspended sentences instead. By suspended sentence is meant, of course, not suspension of execution of a sentence already imposed, but suspension of the imposition of sentence, and *cf.* Code sections 1081 to 1083 and *Rex* v. *Hirsch* (1924), 42 Can. C.C. 153, in which the Court of Appeal for Saskatchewan noted the distinction. Upon our invitation the Attorney-General for the Province (the Honourable *G. S. Wismer, K.C.*) appeared and presented argument. For convenience this argument took place during the hearing of the Cruickshanks appeal, but it was directed to include the ten other sentence appeals as well. The Attorney-General's submissions supported our jurisdiction to set aside the sentences for imprisonment, and to substitute in lieu thereof orders suspending imposition of sentence in accordance with Code sections 1081 to 1083, to which our Provincial Probation Act relates.

In my judgment our jurisdiction is found in that part of the Criminal Code which confers appellate jurisdiction upon this Court in criminal matters, in particular Code sections 1012 (*e*), 1013, subsection 2 and 1015, subsections 1 and 2 when read as they must be with Code section 1021, subsections 1 and 7. This is mentioned at the outset in case it might be thought our jurisdiction must depend upon whether the Court of Appeal could be regarded in these cases as a "convicting Court" within the meaning of section 1081, and *cf.* Code section 1026, *Rex* v. *Herron*

(1922), 36 Can. C.C. 398, at p. 400, and also the valuable annotation by Mr. Eric Armour, K.C., then Crown Attorney, Toronto, found in 46 Can. C.C. 98, at pp. 99 and 105. But whatever might be the case in different circumstances, I concede *in limine* that this Court cannot be so regarded in the 11 sentence appeals now under review. The appellants did not appeal against their convictions but confined themselves to appeal against sentence. None of the convictions have been under review by this Court.

It is my conclusion our jurisdiction to suspend imposition of sentence (and "suspend sentence" will be used herein only in that sense), must rest upon a power to impose any sentence the trial Court could and ought to have imposed. Since the trial Courts have jurisdiction to suspend sentence under section 1081, then I think the correct test of our jurisdiction must lie in the answer to the enquiry can this Court make the order the trial Courts ought to have made? As I view it, the answer must be found in Code sections 1012 (*e*), 1013, subsection 2, 1015, subsections 1 and 2 and 1021, subsections 1 and 7. In 1923, the appellate jurisdiction of the Courts of Appeal was broadened considerably and the changes were enacted in Code sections 1012 to 1022 both inclusive as general overriding provisions applicable to the Criminal law contained in the Criminal Code. When it is desired to ascertain the jurisdiction of the Court of Appeal that is where one must look.

Although the question whether the Court of Appeal has power to make the order the trial Court could and ought to have made is the paramount issue for determination, prior consideration appears to be demanded of two questions which have been allowed to interject themselves. I do not think either of them can affect the decisive nature of the paramount issue. They concern (a) whether the context of section 1081 includes the Court of Appeal, and (b) whether section 1051 prevents the Court of Appeal imposing suspended sentence. Sections 1081 to 1083 form that part of the Criminal Code which confers the jurisdiction to grant suspended sentence and prescribes how and when it may be done. They originated in 1889 in "An Act to permit the Conditional Release of First offenders in certain cases" as Cap. 44 Can.

C. A.
1946
REX
v.
CRUICKSHANKS
ET AL.
O'Halloran,
J.A.

Stats. of that year, and upon the first enactment of the Criminal Code in 1892, they appeared as Code sections 971 to 973 in their then form.

Examination of sections 1081 to 1083 makes it plain that the jurisdiction there conferred is purely an original jurisdiction to Courts of first instance, or to Courts exercising the powers of Courts of first instance. There is no indication of a purpose to confer original jurisdiction on a Court of Appeal, or to enlarge upon or detract from the appellate jurisdiction a Court of Appeal possesses as a Court of Appeal. But Courts of Appeal find it necessary on occasion to exercise original jurisdiction as incidental to and part of the exercise of their appellate powers, *cf.* *Rex* v. *Blanchard* (1941), 56 B.C. 378, as when it is essential in the interests of justice that the Court of Appeal should do what the Court of first instance ought to have done but did not do.

When it is desired to ascertain the limits of the appellate jurisdiction in this latter respect, the place to find it is naturally in that part of the Criminal Code which confers appellate jurisdiction. Once it appears that power has not been taken away from the appellate jurisdiction, it becomes necessary to scan the original jurisdiction the Code gives the Court of first instance in the particular case, in order to ascertain what the latter Court could have done, if it so happens the Court of Appeal finds it necessary to do that which it failed to do. In the final analysis, the matter must come back to the paramount issue, can the Court of Appeal make the order the trial Court ought to have made?

If what has just been said is correct, it is difficult to apprehend how section 1051 can affect the power of the Court of Appeal to suspend sentence. That section provides

> Everyone . . . not punishable with death, shall be punished in the manner, if any, prescribed by the statute especially relating to such offence.

Code section 447 provides that

> Everyone who commits robbery is . . . liable to fourteen years' imprisonment and to be whipped.

It is sought to be said that because section 447 does not in itself provide for suspended sentence, therefore section 1051 prohibits granting suspended sentence under section 1081, subsection 2.

If that reasoning were sound, then the trial Courts would be without jurisdiction to grant suspended sentence in these cases, and sections 1081 to 1083 would be deprived of general application to the criminal law as codified in the Criminal Code. The latter sections could then be invoked by a trial Court only in cases where the sentence for the offence is not found in the section or sections of the Code which describe the offence.

But no one has questioned the jurisdiction of the trial Courts to grant suspended sentence in these cases. Nor in my judgment can it be questioned, for sections 1081 to 1083 (as their history shows) are overriding sections of general application to the criminal law as found in the Criminal Code, and give trial Courts jurisdiction to suspend sentence, when it is not mentioned in the particular section describing the offence. Other examples are section 1035, subsection 1 containing the general power to impose a fine in lieu of imprisonment in certain cases, and also section 1055 which gives the power to direct that sentences shall run consecutively. By section 46 (passed in 1916) of the Prisons and Reformatories Act, Cap. 163, R.S.C. 1927, the Courts of Ontario receive jurisdiction to impose indeterminate sentences in certain cases, *cf. Rex* v. *Bond* (1937), 68 Can. C.C. 1, at p. 3 and *Rex* v. *Oldaker* (1929), 52 Can. C.C. 318, a power lacking in this Province. In my judgment section 1081 is no more limited by section 1051, than section 46 of the Prisons and Reformatories Act is limited by the Code section mentioned in *Rex* v. *Oldaker*.

Section 1051 appeared in the Code in 1892 as section 950, having been absorbed from section 23 of Cap. 181, R.S.C. 1886, "An Act respecting Punishments, Pardons and the Commutations of Sentences" which was repealed by the 1892 Code and *cf.* pp. 789-790 1st Ed. (1894) Crankshaw's Criminal Code. There was no conflict before the enactment of the Code in 1892, between Cap. 44 of the statutes of 1889 and Cap. 181, R.S.C. 1886, from which sections 1081 and 1051 were respectively drawn, and I see no reason for conflict now that the two sections are incorporated in the same statute. But if a conflict cannot be avoided section 1081 must prevail in my judgment since it deals in comprehensive terms with the specific subject-matter of sus-

C. A.
1946
REX
v.
CRUICKSHANKS
ET AL.
O'Halloran, J.A.

pended sentence as it affects all convictions in the Code which may come within the three divisions it describes in its subsections 1, 2, and 4 and *cf. Garnett* v. *Bradley* (1878), 48 L.J. Ex. 186, *Barker* v. *Edger* (1898), 67 L.J.P.C. 115 and *Grand Trunk Ry. Co.* v. *Robertson* (1907), 39 S.C.R. 506 and 531.

In the result it matters little that the Court to which section 1081 refers may not include a Court of Appeal. The important point for the moment is that the trial Courts' jurisdiction to grant suspended sentence exists by virtue of sections 1081 to 1083, and that such jurisdiction is in no wise limited by section 1051. If any particular section of the Code describing an offence and prescribing a sentence of imprisonment was intended to exclude suspended sentence and the operation of section 1081, then undoubtedly it would be so provided in the particular section, as is done in Code section 285, subsection 4 which relates to driving a motor-car while intoxicated. Having satisfied ourselves of the competency of the trial Courts to suspend sentence, the way is now clear to consider the paramount issue, *viz.*, the Court of Appeal's jurisdiction to set aside the sentences of imprisonment and to substitute suspended sentence, that is to say in other words, to make the order the Court below could and ought to have made.

The right to appeal against sentence is found in section 1013, subsection 2. It reads:

> A person convicted on indictment [under section 1012 (*c*.) this includes information etc.] . . . . , may with leave of the court of appeal or a judge thereof, appeal to that court against the sentence passed by the trial court, unless that sentence is one fixed by law.

"Sentence" is defined in section 1012 (*e*), the latter part of which it will be observed confers a specific jurisdiction upon the Court of Appeal, as I think MARTIN, J.A., later C.J.B.C., noted in *Rex* v. *Kirkham* (1935), 50 B.C. 197, at p. 198 in his reference to "review and rectification." Section 1012 (*e*) reads:

> "sentence" includes any order of the trial court made on conviction with reference to the person convicted or his wife or children; and the power of the court of appeal to pass a sentence includes a power to make any such order of the court of appeal.

It is noted that "sentence" is not confined to fine or imprisonment. It is amplified to include any order of the trial Court

"with reference to the person convicted or his wife or children" and see section 1081, subsection 6. Hence it must include suspended sentence under section 1081, and *cf. Rex* v. *Silverstone* (1925), 44 Can. C.C. 335. The embracing phraseology

and the power of the Court of Appeal to pass a sentence includes a power to make any such order of the court of appeal,

in my judgment necessarily includes the power to make any order the trial Court could have made. If it had been the intention to restrict that power in any way (for example to restrict it to a case where the Court of Appeal under section 1016, subsection 2 may substitute a conviction for another offence) one would expect the statute to have said so.

Section 1015 reads:

On an appeal against sentence, unless the sentence is one fixed by law, the court of appeal shall consider the fitness of the sentence appealed against, and may upon such evidence, if any, as it thinks fit to require or to receive,

(*a*) refuse to alter that sentence; or

(*b*) diminish or increase the punishment imposed by that sentence, but always so that the diminution or increase be within the limits of the punishment prescribed by law for the offence of which the offender has been convicted; or

(*c*) otherwise, but within such limits, modify the punishment imposed by that sentence; and

(*d*) in any other case shall dismiss the appeal.

2. A judgment whereby the court of appeal so diminishes, increases or modifies the punishment of an offender shall have the same force and effect as if it were a sentence passed by the trial court.

The words "diminish," "increase," or "modify," are noted. Diminution and increase are degrees in modification. But as "modify" appears in (*c*) in the form of a distinct and separate category, it manifestly relates to some change in the "sentence" quite different in essence from the diminution or increase as such to which (*b*) refers. That signifies recognition of a change in the form or substance of the "sentence," such as for example substituting a fine for imprisonment, or a fine and a shorter term of imprisonment for imprisonment *solus,* or as in the case at Bar suspending imposition of sentence in substitution for imprisonment.

So regarded section 1015 (*c*) confers upon the term "modify" a wide and flexible meaning which reflects its definition in Web-

C. A.
1946
REX
v.
CRUICKSHANKS
ET AL.
O'Halloran, J.A.

ster's New International Dictionary "to change somewhat the form or qualities of." In other words, when occasion arises, "modify" may include changes in sentence amounting to substitution of an entirely new sentence which contains few if any elements of the sentence under appeal. I find that conclusion in harmony not only with the governing provision in section 1015, subsection 2 that when the Court of Appeal diminishes, increases or modifies the punishment, its judgment

shall have the same force and effect as if passed by the trial Court,

but also in harmony with what has been said of section 1012 (*e*).

There is no room in my opinion for a construction that section 1012 (*e*) or section 1015 do not empower the Court of Appeal to pass a sentence except in the specific case of a substituted conviction under section 1016, subsection 2. The latter section contains in itself the specific power to pass sentence in the special case to which it relates, and hence need no support from sections 1012 (*e*) or 1015 in this respect. Moreover, section 1021, subsection 7 expressly indicates section 1015 confers the power to pass sentence. It reads:

The power of the court of appeal to pass any sentence under section one thousand and fifteen of this Act may be exercised notwithstanding that the appellant is for any reason not present.

But if doubt remained whether the Code sections which have been discussed confer power upon this Court to set aside a sentence of the trial Court and pass another sentence in substitution therefor, that is to say, to make the order the trial Court could and ought to have made, *viz.*, in this case suspended sentence, that doubt is conspicuously removed in my opinion at least by the significant powers given by Code section 1021, subsection 1, *viz.*:

For the purposes of an appeal under this Part, the court of appeal may if it thinks it necessary or expedient in the interest of justice [here follow (*a*), (*b*), (*c*), (*d*), and (*e*) and exercise in relation to the proceedings of the court of appeal any other powers which may for the time being be exercised by the court of appeal on appeals in civil matters, and issue any warrants necessary for enforcing the orders or sentences of the court of appeal.

The relevant powers of the British Columbia Court of Appeal in civil matters for present purposes, are found in sections 6, 7, 8, and 12 of the Court of Appeal Act which support rule 5 of

the Court of Appeal Rules, 1943 (Civil) reading in material part:

> . . . The Court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require.

Code section 1021, subsection 1 and rule 5 of the Court of Appeal Civil Rules thus combine to give this Court express power in these cases to make the order for suspension of imposition of sentence under section 1081 which ought to have been made by the trial Court in six out of the 11 sentence appeals under review.

The relevant part of Civil Rule 5 (then rule 674 of the 1890 British Columbia Supreme Court Rules) was considered by the old Full Court in *Foot* v. *Mason* (1894), 3 B.C. 146. That the powers there expressed are not confined to cases where fresh evidence is admitted on appeal, appears from what Duff, J., later C.J., said in *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43, at p. 53. In *Canada Rice Mills, Ld.* v. *Union Marine and General Insurance Co.*, [1941] A.C. 55 (an appeal from this Court) Lord Wright at p. 65 said that the object of the rule was to enable the Court of Appeal to give the judgment which ought to have been given below and to make such further or other order as the case may require. *Jardine* v. *Northern Co-operative Timber and Mill Association* (1945), 61 B.C. 86, at p. 93 is a recent example of its application. Civil Rule 5 was also applied in the case of provincial crimes in *Rex* v. *Caskie* (1922), 31 B.C. 368 and *Rex* v. *Zarelli* (1931), 43 B.C. 502.

Section 1021, subsection 1 includes sentence appeals. It is directed to appeals under Part XIX. of the Code, and thus relates to sections 1012 (*a*) and 1013, subsection 2 and *cf.* *Rex* v. *Cavasin* (1944), 60 B.C. 497, at p. 499, and also rule 26 of the British Columbia Criminal Appeal Rules, 1943. In *Rex* v. *Cumyow* (1925), 36 B.C. 435 (motion to postpone hearing of an appeal to enable fresh evidence to be obtained and then to permit a motion for its admission to be made), MACDONALD, C.J.A. said at p. 438:

> . . . , we have exactly the same discretion in civil cases as is given by the statutes of 1923 in criminal cases.

While that was directed to the question of the admission of fresh

C. A.
1946
REX
v.
CRUICKSHANKS
ET AL.
O'Halloran, J.A.

evidence on appeal, I think it must have been founded on the power in Civil Rule 5 made available by section 1021, subsection 1. The latter section seems to be a re-enactment of section 9 of the Criminal Appeal Act, 1907. The English Courts of Appeal in civil matters possess the identical powers contained in our Court of Appeal Rule 5 as Lord Wright pointed out at p. 65 in the *Canada Rice* case, *supra.*

Quite apart from what I must regard as the conclusive nature of the Code sections above examined, powers to set aside judgment or sentence in whole or in part, and powers to give another judgment or sentence in substitution therefor, whether they are expressed to be done by amendment, rectification, variation, or by generalized language, are essential constituent elements of a Court of Appeal. For a Court of Appeal to be a Court of Appeal in the legal sense of that term in my judgment it requires to possess as its essential and distinguishing function the power to do that which the trial Court could and ought to have done. It appears to be a negation in terms to describe a Court as a Court of Appeal and at the same time deny its essential functions. Strange results would appear otherwise. If a magistrate should suspend sentence in a case where he has no jurisdiction to do so, or if he should impose imprisonment where a fine was the only penalty permitted, the Court of Appeal could not interfere. For it could not rectify these errors unless it had power to set aside what the magistrate had done, and also had power to substitute the proper sentence in each case.

This touches upon the distinction between an "appeal" and a "motion for a new trial," which was of importance in this Province before the introduction of the provisions of the Judicature Act and section 14 (4) of our Court of Appeal Act. Observations in *Attorney-General* v. *Sillem* (1864), 10 H.L. Cas. 704; 11 E.R. 1200 indicate that a statutory appeal to the Court of Error differed from a common law motion for a new trial in that an "appeal" enabled the Court to do that which the trial Court ought to have done. From what Lord Westbury, L.C. and Lord Cranworth said at pp. 1209 and 1213, an "appeal" was regarded as a substantive right of a litigant given by statute to enter a superior Court with power to correct the mistake in the Court of

first instance by rendering the judgment according to law, which the Court of first instance ought to have rendered but failed to render.

In my judgment the foregoing conclusions are in harmony with the Canadian decisions now cited. In *Rex* v. *Hirsch* (1924), 42 Can. C.C. 153, the Court of Appeal for Saskatchewan (Haultain, C.J.S., Lamont, McKay and Martin, JJ.A.) exercised the jurisdiction in question here for it imposed suspended sentence under section 1081. The same Court decided *Rex* v. *England* (1924), 43 Can. C.C. 11, where the convicted person had been sentenced to a fine of $25 which was directed to be paid to the owner of the bull killed. The Court of Appeal held the sentence was imposed without jurisdiction as the offence was punishable by imprisonment plus fine, and not be fine alone, and also that the magistrate had no jurisdiction to make the fine payable to the owner of the bull. The Court of Appeal then imposed a sentence of one day's imprisonment plus a fine of $25 and awarded the owner of the bull $25 compensation for the loss of the bull. That was a clear case of substitution, and passing a new sentence. The Court of Appeal gave the judgment and imposed the sentence which the trial Court ought to have imposed.

In *Rex* v. *Chow Duck Yuet* (1930), 43 B.C. 152, the trial Court failed to direct imprisonment in default of payment of the fine as the statute mandatorily required. The Crown appealed. The report discloses that the argument turned upon whether the Court of Appeal could rectify an illegal sentence. The Court (MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.) held it had power to "amend" the sentence and did so without finding it necessary to examine its jurisdiction. In *Rex* v. *Blackman and Smith* (1931), 44 B.C. 115, before the same Court (MARTIN, J.A. dissenting on the conviction appeal) a sentence of three years had been imposed by the trial Court when two and a half years was the statutory maximum. The Court "reduced" the sentence to the legal maximum.

In *Rex* v. *Jung Quon Chong* (1937), 52 B.C. 316, the trial Court imposed a sentence less than the statutory minimum. The

C. A.
1946
REX
v.
CRUICKSHANKS
ET AL.
O'Halloran, J.A.

Court (MARTIN, C.J.B.C., MCPHILLIPS and SLOAN, JJ.A.) directed that the sentence be "amended." In *Rex* v. *Mackie* (1944), 60 B.C. 293, this Court revised the sentence by "reducing" the term of imprisonment to the time spent in gaol and by imposing a fine in addition. The Court did not regard the offence as sufficiently serious to justify the term of imprisonment which had been imposed. This Court adopted the same course in *Rex* v. *Ross* an unreported judgment delivered on 17th January, 1945. It was reduction of sentence in a wide sense, but it imposed an additional and different kind of sentence. In true legal effect it set aside the sentence of the trial Court and substituted a new sentence. That occurred also in the six previously cited decisions, as I read and understand them.

In *Rex* v. *Silverstone* (1925), 44 Can. C.C. 335, the convicted person was given suspended sentence after conviction by speedy trial. The Quebec Court of King's Bench (Allard, Bernier and Hall, JJ.) held the trial Court had no jurisdiction to order suspended sentence for the particular type of offence. The Court allowed the Crown's appeal against sentence, and sentenced the respondent to 24 hours' imprisonment. The Court *per* Hall, J. said at p. 337:

> Under s. 1015 . . . , the Court of Appeal, on an appeal against sentence, may diminish the punishment imposed by the sentence, and the judgment of this Court which so diminishes the punishment of an offender has the same force and effect as if it were a sentence passed by the trial Court. In these circumstances it is our duty forthwith to impose a sentence.

In *Rex* v. *McCathern* (1927), 48 Can. C.C. 54, the Ontario Court of Appeal changed a death sentence for rape to 20 years' imprisonment and twenty lashes. It was a "diminution" in one sense, but the modified sentence contained no element to be found in the death sentence. The sentence was completely changed both in form and in substance. In *Rex* v. *Weedmark* (1928), 50 Can. C.C. 443, the Ontario Court of Appeal quashed an illegal sentence. In *Rex* v. *Soanes* (1927), 33 O.W.N. 207, the Court of Appeal substituted a legal sentence for one which was illegal.

In *Rex* v. *McKecknie* (1945), 83 Can. C.C. 189, the Ontario Court of Appeal (Robertson, C.J.O., Gillanders and Roach, JJ.A.) employed language which ought to dispel any doubt

regarding the jurisdiction to substitute sentences. The trial Court had acted without jurisdiction in imposing a fine in lieu of imprisonment. The Court *per* Roach, J.A. said at p. 191:

> . . . This Court should vary the sentence in each case by imposing the term of imprisonment which the magistrate should have imposed.

And further in conclusion at p. 192:

> The appeal must be allowed, and in substitution for the sentence imposed by the magistrate he should be sentenced to imprisonment for a term of two months on each charge.

It will be observed the Court of Appeal (a) allowed the appeal; (b) substituted a sentence for the one imposed by the trial Court, and (c) ordered done that which the Court below ought to have done.

The English Court of Criminal Appeal frequently revises sentences of imprisonment by itself ordering suspended sentence and directing the terms thereof, and *cf. Rex* v. *Gore* (1929), 21 Cr. App. R. 175, where probation was described as "revising" and "reducing" the sentence; *Rex* v. *Armstrong* (1929), *ib.* 115, where probation was described as "revising," "reducing" and "varying" the sentence; and also *Rex* v. *Wood* (1930), 22 Cr. App. R. 53 and 128, *Rex* v. *Brombilla* (1930), *ib.* 74, and *Rex* v. *Morgan* (1931), *ib.* 177. In *Rex* v. *Adams* (1921), 36 Can. C.C. 180, Stuart, J.A. for the Alberta Appellate Division at p. 181 remarked upon the similar powers possessed by that Division and the English Court of Criminal Appeal. Martin, J.A., now C.J.S., did likewise in respect to the Saskatchewan Court of Appeal in *Rex* v. *Finlay* (1924), 43 Can. C.C. 62, at p. 63, as did also Sir Frederick Haultain, C.J.S. in *Rex* v. *Hicks* (1925), 44 Can. C.C. 13, at p. 14.

Rex v. *Finlay* and *Rex* v. *Adams* were cited without divergent comment by MARTIN, J.A., later C.J.B.C., when giving the judgment of the Court in *Rex* v. *Zimmerman* (1925), 37 B.C. 277, therein described as the first sentence appeal to come before this Court of Appeal after the 1923 amendment. I am satisfied to conclude this Court has no less jurisdiction in sentence appeals than that conferred upon the English Court of Criminal Appeal by the Criminal Appeal Act, 1907 (Cap. 23 of 7 Edw. 7). Our sections 1012 (*e*) and 1021, subsection 1 are similar in relevant aspects to their English counterparts sections 21 and 9. It is

C. A.
1946
REX
v.
CRUICKSHANKS
ET AL.
O'Halloran, J.A.

true that our section 1015 uses the words "diminish," "increase," or "modify" instead of the words "quash" and "substitute" found in the English section 4 (3). This might be important if those two sections stood alone. But in the light of all the Code sections relating to appellate powers discussed previously, and the construction placed upon them by the uniform trend of Canadian decisions above cited, I am unable, with respect, to regard that difference in language as effective in itself to deprive this Court of the jurisdiction section 1021, subsection 1 confers so unequivocably.

It is not overlooked that the English section 4 (3) uses the word "sentence" in contrast with the words "punishment imposed by the sentence" in our section 1015. I am led to believe that uncovers a *lapsus* in the language of section 1015, for the Court of Appeal cannot "modify" the punishment without also modifying the sentence. The appeal given by section 1013, subsection 2 is not against "punishment imposed by the sentence," but against "sentence" as defined in section 1012 (*e*) which does not use the word punishment. I cannot regard "punishment" as necessarily confined to detention behind bars, a fine or corporal chastisement. Suspended sentence is granted (*cf.* section 1081, subsection 5) upon terms and conditions which the offender is required to perform under supervision. It is true the restraint to which the offender is thereby subjected is not of the absolute and disciplined kind which characterizes imprisonment. But suspended sentence after conviction may be fittingly described as a form of corrective punishment. It imposes a restraint which is quite real even if it is not physical restraint. It is observed that Robertson, C.J.O. in *Rex* v. *MacKenzie* (1945), 85 Can. C.C. 233, when considering the requirement in Code section 1058 regarding the giving of recognizances, or giving security to keep the peace, referred to that requirement at p. 242 as being,

> . . . by way of punishment for an offence actually committed.

However distinction between "punishment" and "sentence" may acquire reality in section 1081 because it provides that the Court may

instead of sentencing him at once to any punishment, direct that he be released on his entering into a recognizance, . . .

which strongly implies that "suspended sentence" is not "punishment." But in my judgment "punishment" in section 1081 is used in a different sense than it is in section 1015. The two sections are not related, and the words in each are subject to shades and differences in meaning peculiar to the context in which they are found. But even if it were not so, the comprehensive powers conferred by section 1021, subsection 1 as examined *supra* would lead me to conclude that it is of no present jurisdictional consequence.

For the foregoing reasons, I have reached the conclusion with deference that the Court of Appeal for British Columbia has jurisdiction to set aside the sentences of imprisonment imposed by the trial Courts and may suspend imposition of sentence upon appropriate terms and conditions. Whether that jurisdiction shall in fact be exercised must depend on the circumstances which appear in each case.

ROBERTSON, J.A.: Upon the hearing of this appeal it was submitted this Court had power to quash the sentence and give "suspended sentence," meaning by that the release of the accused upon his entering into a recognizance as provided in section 1081. For the sake of brevity I shall refer to the release under section 1081 as "suspended sentence." The Attorney-General, at our request, appeared and submitted the Court had this power under subsection (*c*) of section 1015. He did not support the power under section 1081. The expression "a superior Court of criminal jurisdiction" includes the Court of Appeal of this Province (section 2 (38)). Section 1026 (which applies to section 1081) says that

unless the context otherwise requires, "court" means and includes any superior court of criminal jurisdiction.

The context of section 1081 does so require because it refers only to "the court before which he is so convicted," thereby excluding this Court. Thus the power, if it exists, must be found in section 1015.

Section 1012 (*e*) of the Code, which applies to section 1015, reads as follows:

C. A.
1946
REX
v.
CRUICKSHANKS
ET AL.
Robertson, J.A.

"Sentence" includes any order of the trial court made on conviction with reference to the person convicted or his wife or children; and the power of the court of appeal to pass a sentence includes a power to make any such order of the court of appeal.

It is submitted that this definition so expands the meaning of the word "sentence" in section 1015 that this Court has power to substitute "suspended sentence" for a sentence imposed by the trial judge.

It seems to me that the purpose of this definition was to give this Court the power to make an order which the trial Court could have made in passing sentence after conviction, and which was not part of the sentence for the crime, but an additional power conferred upon the trial Court when passing sentence.

The English Criminal Appeal Act, 1907, Sec. 21 provides in part:

. . unless the context otherwise requires,—

. . . .

The expression "sentence" includes any order of the court made on conviction with reference to the person convicted or his wife or children, [and any recommendation of the court as to the making of an expulsion order in the case of a person convicted,] and the power of the Court of Criminal Appeal to pass a sentence includes a power to make any such order of the Court [or recommendation, and a recommendation so made by the Court of Criminal Appeal shall have the same effect for the purposes of section three of the Aliens Act, 1905, as the certificate and recommendation of the convicting Court.]

It is (with the exception of the part in brackets) almost the same as the definition of "sentence" in section 1012 (*e*).

Russell on Crimes, Vol. 1, 8th Ed., p. 860 sets out the terms of the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict., c. 39), under which a woman whose husband has been convicted summarily of an assault and sentenced to pay a fine or to a term of imprisonment exceeding two months, may apply to a court of summary jurisdiction for an order under the Act, (a) releasing her from obligation to co-habit with her husband, (b) giving her custody of the children of the marriage, and (c) providing for maintenance. The Act then provides that where a married woman is entitled to apply for an order or orders under the section mentioned, on the ground of the conviction of her husband upon indictment, she may apply to the Court before whom her husband was convicted, and that Court shall for the

purpose of the section become a court of summary jurisdiction and shall have power to hear an application and make the order or orders applied for.

It is pointed out in the note at p. 1875 of Vol. 2 of Russell on Crimes, that this is the sort of order which the definition of "sentence" includes. Obviously it also applies to an expulsion order which would be a punishment consequent on being sentenced for a crime. See also *Rex* v. *William Jones,* [1929] 1 K.B. 211, in which case it was held an order made under section 4 of the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), for compensation after a conviction for felony being enforceable as a judgment was an order "with reference to" the accused and therefore within the meaning of the word "sentence" in section 21, *supra.* The words also include an order as to costs made on conviction of obtaining money by false pretences. *Rex* v. *Howard* (1910), 6 Cr. App. R. 17.

Under section 1015 the Court has power to "pass any sentence"—see subsection 7 of section 1021. Under the expanded meaning of "sentence" (section 1012 (*e*)) I am of the opinion the Court in passing sentence is empowered to make "any such order" collateral to the sentence for the crime as the trial judge might have made with reference to the person convicted, his wife and children.

Sections 1081 and 1082 provide for matters which are to be considered by the trial judge when considering the whole question of suspended sentence. The matters there to be considered would be much more conveniently investigated by a trial judge than by the judges of this Court. It seems to me that this is of some weight to show that if it had been intended that this Court should have the power to pass suspended sentence, the necessary words would have been inserted in section 1081. Section 1015 says nothing about suspended sentence. Section 1015 reads in part as follows:

1015. (*b*) diminish or increase the punishment imposed by that sentence, but always so that the diminution or increase be within the limits of the punishment prescribed by law for the offence of which the offender has been convicted; or

(*c*) otherwise, but within such limits, modify the punishment imposed by that sentence;

C. A.
1946
REX
v.
CRUICKSHANKS
ET AL.
Robertson, J.A.

Under that section the Court has power only to deal with sentences. It may diminish or increase or modify the "punishment" but when it has pronounced its judgment, that judgment must provide for a

> punishment . . . within the limits of the punishment prescribed by law for the offence of which [he] has been convicted.

Section 1051 provides that:

> Every one who is convicted of an offence . . . , shall be punished in the manner, if any, prescribed by the statute especially relating to such offence.

The punishment "especially relating to such offence" for which the accused was convicted is imprisonment. No mention is made of release under recognizance. In my view, this excludes the application of section 1081 because it is not prescribed by the statute especially relating to such offence. It is said release under section 1081 is punishment. With respect, I do not think so. Section 1081 says that the Court "instead of sentencing him at once to any punishment" may direct that he be released on entering into a recognizance; so that, in my opinion, when diminishing or increasing or modifying the punishment, in the result, the diminution or increase or modification must be within the limits of the punishment especially relating to such offence.

Then it is said that section 4 (3) in the Criminal Appeal Act, 1907, with reference to appeals against sentence and section 1015 are much the same and that in England the authorities show that it has been the practice of the Court to quash appeals and substitute suspended sentences. Section 4 (3) is as follows:

> 4. (3) On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence, warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal.

It is to be noticed that express power to substitute sentences in certain cases is given to the Court by section 1016.

In my opinion the English subsection, *supra,* and section 1015 are radically different. Assuming the word "sentence" in section 4 (3) includes "suspended sentence" the power of the English Court is not restricted, whereas under section 1015 the Court is limited, as I have mentioned, to a sentence within the

limit of the "punishment prescribed by law." With respect, therefore to all contrary opinion, I think the English decisions do not apply because of the statutory difference mentioned.

It was further submitted that the three Canadian cases, *infra,* could only have been decided in the way they were because the Court was of the opinion that it had "power" to give "suspended sentence." The first is *Rex* v. *Hirsch* (1924), 42 Can. C.C. 153. It was apparent there that the trial judge intended to exercise his powers under section 1081, as the agent for the Attorney-General had consented, but instead he allowed the accused "to go on suspended sentence to two years' imprisonment in the penitentiary and to lashes." The Court of Appeal held the judge had no power to impose a sentence and then suspend the execution of that sentence. However, the Court gave effect to the evident intention of the trial judge and gave "suspended sentence."

The next case is *Rex* v. *Silverstone* (1925), 44 Can. C.C. 335. In that case the magistrate released the accused on "suspended sentence" after conviction on a charge of receiving, without recognizance as required by section 1081. The Court was of the opinion that the charge was not one in respect of which the magistrate had authority to suspend sentence. If there had been any direct authority for suspending sentence, the Court would have concurred in the discretion exercised by the magistrate, but in the absence of that authority, punishment had to be imposed and accordingly the accused was sentenced to 24 hours' imprisonment.

The remaining case is *Rex* v. *McKecknie* (1945), 83 Can. C.C. 189. In that case the Court of Appeal did not give suspended sentence but substituted a term of imprisonment for that imposed by the police magistrate. The point in question was not raised in any of these decisions.

For these reasons I think this Court has no power to release the accused upon recognizance.

SIDNEY SMITH, J.A.: I agree with the views of the majority of the Court, but on account of the importance of the subject-matter I think it well to say a few words of my own to indicate

C. A.
1946
REX
v.
CRUICKSHANKS
ET AL.
Sidney Smith, J.A.

the considerations which have more especially influenced my own judgment.

The single question here is whether this Court has jurisdiction to "suspend sentence." These words mean the suspending of the passing of the sentence; they indicate that no sentence will be passed unless the accused violates the condition of his recognizance by bad behaviour and is thereupon called upon to appear and receive sentence for the offence for which he was found guilty (*Rex* v. *Hirsch* (1924), 42 Can. C.C. 153; *Rex* v. *Switzki* (1930), 54 Can. C.C. 332).

Such jurisdiction must be found in the Criminal Code. In considering the matter, I think little or no help can be had from the English cases, for the jurisdiction of the English Court of Criminal Appeal is contained in statutes whose language differs substantially from the corresponding language of the Code.

The question of suspended sentence is dealt with in sections 1081, 1082 and 1083 of the Code. The object of these sections is plain. It is "the release of offenders on probation of good conduct." In the circumstances outlined in the sections the Court "before which he [the offender] is so convicted" may,

> instead of sentencing him at once to any punishment, direct that he be released on his entering into a recognizance, . . . to keep the peace and be of good behaviour

for "such period as the court directs." The words of the section are quite clear and unambiguous. The jurisdiction is given to the convicting Court. It is not given to the Court of Appeal.

This view is confirmed rather than shaken by a consideration of section 1026, which for this purpose should be read with section 1081. There the word "Court" means (*inter alia*) any superior Court of criminal jurisdiction "unless the context otherwise requires." This I think points to the circumstance that the context of section 1081 limits the jurisdiction to the convicting Court, thus excluding the Court of Appeal.

And I think this view is further strengthened by a consideration of the fact that in the year 1936 section 1026 was amended to give jurisdiction to a magistrate, when trying a summary conviction case under the Code, to suspend the sentence of the Court. Formerly he had no such power. There thus came, so

recently, squarely before Parliament the consideration of the various Courts exercising this peculiar jurisdiction. Nevertheless, the jurisdiction, or rather the lack of jurisdiction, of the Court of Appeal in this respect was left untouched.

In view of the clear and intractable language of section 1081, it would in my opinion require at least as clear and intractable language in some other section of the Code to confer any similar jurisdiction on the Court of Appeal. Such language is certainly not to be found in section 1015, which provides for the powers of the Court of Appeal on appeals against sentence. Under the provisions of this section the Court may refuse to alter the sentence, may diminish or increase the punishment, may modify the punishment, and in any other case may dismiss the appeal. The only word here that might include "suspend" is "modify," but it seems to me that it would be straining language to hold that it does so. There would appear to be a definite distinction between the "suspending" of the passing of a "sentence" of punishment and "modifying" the "punishment." The former contemplates the contingency of there being no punishment at all; the latter deals with the alteration of the form of punishment.

The only other section of the Code which could be considered as expressly touching upon this question is 1012 (*e*). But I think that this section has reference to a sentence originally passed by the Court of Appeal, and deals with orders incidental to such sentence. Certainly it would seem to me that, according to established rules for the interpretation of statutes, much more specific words than any that are to be found in this section would have been necessary to confer jurisdiction, such as that suggested, on the Court of Appeal.

We are indebted to our brother O'HALLORAN for his most helpful assembly and review of the Canadian authorities. But I think, with great respect, that consideration of the cases indicates that in none of them was the attention of the Court specifically drawn to the question now under consideration. I think it is true to say that this is the first occasion on which this precise point has received judicial consideration in Canada.

C. A.
1946

REX
v.
CRUICKSHANKS
ET AL.

It follows that in my opinion this Court does not possess the jurisdiction to suspend the passing of sentence.

BIRD, J.A.: The appellant, a youth 19 years of age, appeals to this Court from concurrent sentences of five and two years respectively, passed upon him by H. S. Wood, Esquire, police magistrate in and for the city of Vancouver, following pleas of guilty to two charges of possession of an automatic pistol and ammunition, and of retaining an automatic pistol over the value of $25, laid under Code sections 115 and 399 respectively.

When this appeal came on for hearing in Vancouver there were pending before the Court ten other appeals taken, with one exception, by teen-age offenders from sentences passed upon each of them by trial Courts for various offences. The number and serious nature of these offences in which very young men were concerned, provoked consideration by the Court not only of the punishment imposed upon them but also of possible means for reclamation of the offenders. Consequently the Court directed the Provincial probation officer to investigate the history and family background of each of the appellants with a view to furnishing information at a subsequent hearing, on the possibilities for and the practicability of the application of, remedial treatment, if available, in the case of any such offender. The Court adjourned the hearing of the several appeals and directed that Crown counsel then submit argument on the jurisdiction of this Court, on appeals from sentence under Code section 1015, to suspend sentence and to direct release of the offender on probation.

We have now had the benefit of argument by the Attorney-General supporting the power of this Court to impose suspended sentence on such appeals.

He submits that this Court has power under Code section 1015 in a proper case, to suspend sentence and thus to invoke the facilities for probation provided by the recently enacted Probation Act, Cap. 60, B.C. Stats. 1946.

He relies upon the power given under section 1015 (*c*) to "modify the punishment imposed by [a] sentence," and urges that an order directing suspension of sentence is a modification

of the punishment imposed by a sentence of imprisonment, since release on suspended sentence of a person convicted of an offence involves punishment.

The dictionary definition of "punishment" (Murray's New English Dictionary, p. 1604), "a penalty imposed to ensure the application of the law" is no doubt wide enough to include that limited degree of restraint on behaviour which is involved in an order of suspended sentence, but I think that a narrower interpretatioun must be given the word "punishment" as used in section 1015 (*c*) in view of the provisions of Code section 1051, which reads:

> Every one who is convicted of any offence not punishable with death, shall be punished in the manner, if any, prescribed by the statute especially relating to such offence.

Sections 115 and 399, under which the sentences here under review were passed upon the appellant, provide for punishment by imprisonment for maximum terms of 5 and 14 years respectively. No reference is made therein to any other form of punishment. Moreover the following language found in section 1081 appears significant:

> . . . the court may, instead of sentencing him at once to any punishment, direct that he be released on . . . recognizance, . . .

There I think a distinction is made between "a sentence of punishment" and "release on suspended sentence," which shows an intention to exclude the latter from the term "punishment."

Consequently I think that "punishment" under section 1015 must be taken to mean punishment as prescribed by the statute, *i.e.*, by imprisonment.

Power to suspend sentence is conferred upon certain Courts by Code section 1081, but in my opinion the language of that section which gives power to suspend sentence, *i.e.*,

> if it appears to the court before which he is so convicted, . . . may, . . . , direct that he be released

on suspended sentence, clearly limits the exercise of such jurisdiction to the Court wherein the conviction is entered, in this instance the Court from which this appeal is taken. That language necessarily excludes the Court of Appeal exercising jurisdiction under section 1015.

Turning then to consideration of the definition of "sentence"

C. A.
1946

REX
v.
CRUICKSHANKS
ET AL.

Bird, J.A.

in Code section 1012 (*e*) which is applicable to Part XIX. of the Code, of which section 1015 is part: "Sentence" is there defined to include

> any order of the trial court made on conviction with reference to the person convicted or his wife or children; and the power of the court of appeal to pass a sentence includes a power to make any such order.

Can it be said that the Court of Appeal, having modified the sentence imposed by the trial Court pursuant to the powers conferred by section 1015, is thereby exercising "the power to pass a sentence" within the meaning of that phrase in section 1012 (*e*)? If so, then under the latter section the power would, I think, include a power to make an order suspending sentence under section 1081, such as a convicting Court, as defined by section 1026, has power to make. The definition of Court under section 1026 as including "any superior court of criminal jurisdiction" would include the Court of Appeal.

I think, with the greatest respect to contrary opinion, that the exercise of a power to modify a sentence of a trial Court is an act wholly separate and distinct from the exercise of a power "to pass sentence." Under Part XIX. of the Code a marked distinction I think is made between the power under section 1015 to diminish, increase or modify "the punishment imposed by that sentence," *i.e.,* the sentence passed by the trial Court, and a power to pass a sentence, which latter phrase in my opinion must be taken to mean a sentence passed for the first time, a power which is given to the Court of Appeal under Code section 1016 in the special circumstances there mentioned. In my opinion the exercise under section 1015 of the power to "modify" relates to modification of the existing sentence and does not include power to pass another sentence.

However, it is said that in various decisions of this Court and of appellate Courts of other Provinces, language has been used which may be read as indicative of the exercise by appellate Courts of a power to quash a sentence of a trial Court and to substitute another sentence.

I refer to *Rex* v. *Hirsch* (1924), 42 Can. C.C. 153; *Rex* v. *Finlay* (1924), 43 Can. C.C. 62; *Rex* v. *Chow Duck Yuet* (1930), 43 B.C. 152; *Rex* v. *Blackman and Smith* (1931), 44

B.C. 115; *Rex* v. *Jung Quon Chong* (1937), 52 B.C. 316; *Rex* v. *Mackie* (1944), 60 B.C. 293; *Rex* v. *Silverstone* (1925), 44 Can. C.C. 335 and *Rex* v. *McKecknie* (1945), 83 Can. C.C. 189.

In certain of the decisions reviewed the appellate Court was of opinion that the punishment imposed by the sentence appealed from was either too light or too severe. In others that an illegal sentence had been imposed, *i.e.,* the punishment did not fall within the limits of the punishment prescribed by the "statute especially relating to such offence," *vide* section 1051.

I conclude from perusal of the several judgments that in the related circumstances the Court in each case assumed to exercise jurisdiction under section 1015 and thereby to increase, diminish or modify the punishment imposed by that sentence.

Regardless of the language used in some of the decisions cited, in none of those cases in my opinion did the Court assume to exercise a jurisdiction to quash the sentence of the trial Court and in substitution therefor to pass a sentence.

But we find that the Court of Criminal Appeal in England in numerous appeals from sentences imposed by trial Courts, has quashed the sentence and ordered the release of the appellant on probation under the Probation of Offenders Act, 1907, *vide Rex* v. *Francis* (1908), 1 Cr. App. R. 259; *Rex* v. *Wood* (1930), 22 Cr. App. R. 53; *Rex* v. *Gore* (1929), 21 Cr. App. R. 175 and (1930), 22 Cr. App. R. 129.

Comparison of the relevant sections of the Criminal Appeal Act, 1907, with Part XX. of the Criminal Code in my opinion discloses marked differences in the powers conferred on the respective Courts of Appeal, though it is apparent that the English Act was used as a precedent in many respects by the draftsman of the Code sections, first enacted in relation to appeals from sentence in 1921 and subsequently as to criminal appeals generally in 1923—Tremeear, p. 1291. Code section 1012 (*e*) has been taken almost *verbatim* from section 21 of the Criminal Appeal Act, 1907, but there are material differences both in language and effect in the corresponding sections which confer jurisdiction on the respective Courts in sentence appeals.

C. A.
1946

REX
v.
CRUICKSHANKS
ET AL.

Bird, J.A.

Section 4 (3) and section 21 of the Criminal Appeal Act, 1907, read in part:

4. (3) On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence . . . in substitution therefor as they think ought to have been passed, . . .

21. The expression "sentence" includes any order of the court made on conviction with reference to the person convicted or . . . , and the power of the Court of Criminal Appeal to pass a sentence includes a power to make any such order of the Court. . . .

Power is thereby given to "quash a sentence passed at the trial" and to substitute another sentence. I think there can be no doubt that section 4 (3) read with the definition of "sentence" in section 21, gives ample power to quash a sentence and to substitute an order suspending sentence, but by comparison the power given by Code section 1015 is as follows: (a) Refuse to alter that sentence; (b) diminish or increase the punishment imposed by that sentence; (c) otherwise . . . modify the punishment imposed by that sentence.

Then Code section 1051 prescribes that the person convicted shall be punished in the manner, . . . , prescribed by the statute especially relating to [the] offence.

It is noteworthy that power to quash and pass another sentence in substitution therefor is not given under Code section 1015 and the power given by the Code to diminish, increase or modify is related to the "punishment" imposed by the sentence from which the appeal is taken, which is a punishment prescribed by the statute relating to the offence.

In those circumstances the decisions of the Court of Criminal Appeal before cited cannot in my opinion be taken as a guide in considering the power of Courts of Appeal in Canada to suspend sentence on appeals under Code section 1015.

Moreover, marked differences of language in the corresponding sections of the two Acts giving jurisdiction on appeals from sentence considered in the light of the fact that many other sections of the Criminal Appeal Act, 1907, have been transplanted in Part XIX. of the Code, lead one to the conclusion that Parliament did not intend to confer upon Courts of Appeal the wide powers to quash and substitute sentences which are given to the Court of Criminal Appeal.

And, by section 1051 Parliament made it very clear that the punishment imposed by a sentence should be as prescribed by the statute relating to the offence, subject to the qualification in section 1081.

I have therefore and for the reasons here outlined, reached the conclusion that this Court has not power to suspend sentence on an appeal from sentence under Code section 1015.

It is in my opinion a matter for regret that this Court has not in appropriate cases power to quash a sentence and to substitute an order for suspended sentence, then to invoke procedure for probation, more particularly since in so many appeals from sentence to this Court young men and teen-age boys are concerned, many of whom appear to have become involved in the commission of that criminal offence through lack of adequate parental or other control and guidance, bad associations or other conditions beyond their control.

The lack of such power frequently makes it necessary that such offender serve a term of imprisonment in an institution where the Court recognizes that desirable facilities and surroundings for his rehabilitation may not be available.

The report of the learned magistrate on this appeal, made under Code section 1020, discloses that the appellant was found by police officers on a Vancouver street in midafternoon in possession of a nine-millimetre automatic pistol, together with 37 rounds of ammunition which fitted the pistol. The weapon was unloaded and was carried in the appellant's pocket along with the ammunition. The appellant was then in company of two men who had police records. The weapon had been stolen in a house burglary four days earlier. At the time of arrest the appellant admitted his previous participation in a recent holdup. One month prior to his arrest on this occasion the appellant had been charged under Code section 118 (*a*) with possession of a loaded revolver. On that occasion he was discharged on suspended sentence.

This Court has had the benefit of hearing the evidence of a Provincial probation officer, who has most helpfully reported in great detail on the history, conduct and individual propensities

C. A.
1946
REX
v.
CRUICKSHANKS
ET AL.
Bird, J.A.

of the appellant. From this evidence it clearly appears that the appellant has grown up under severe handicaps. We are told that "he has had no home or parental security since his birth." His record discloses several convictions by juvenile courts for theft and related offences for which he was placed on probation. In my opinion this is essentially a case for application of restraint coupled with adequate measures directed to the education and rehabilitation of this young man.

The appellant has not shown himself responsive to leniency nor to the assistance which appears to have been given him by the probation officers, though the probation officer expressed before us the belief that he is not beyond redemption.

Unfortunately there is not now available in this Province any institution where facilities and treatment designed to the rehabilitation of a youthful offender is provided, such as that furnished in Borstal institutions in England.

Consequently, in view of the recent frequent repetition of serious offences by the appellant, I see no alternative but imprisonment in the penitentiary. In view of his unfortunate background, his youth, and more particularly the probation officer's expressed belief in the possibility of redemption, I think and hope that some further leniency shown him may serve to assist in his reclamation. I would therefore reduce the sentence of five years' imprisonment to three years' imprisonment and would refuse to alter the concurrent sentence of two years' imprisonment imposed in respect of the second offence; and to that extent would allow the appeal.

The Court of Appeal has no jurisdiction to suspend passing of sentence.

REX v. FEENEY

C. A.
1946
April 23, 25.

Criminal law—Breaking and entering a dwelling-house with intent to steal —A room in an hotel—Not a dwelling-house—Lesser offence—Criminal Code, Secs. 335 (g), 459 and 1016, Subsec. 2.

At about 8 o'clock in the morning the complainant woke up in his room in an hotel and saw the accused standing close to his bed. After telling complainant that he had better see if anything is missing, the accused walked out and downstairs. Complainant then telephoned for the police. Accused was convicted on a charge of "breaking and entering a dwelling-house with intent to steal."

Held, on appeal, reversing the decision of police magistrate H. S. Wood, Vancouver (O'HALLORAN and BIRD, JJ.A. dissenting), that the hotel room occupied by the complainant even though it be his permanent residence is not a dwelling-house within the definition for it is not a permanent building, being only one room within a permanent building. *Rex* v. *George Eldridge* (1944), 60 B.C. 315, applied.

APPEAL by accused from his conviction by H. S. Wood, Esquire, police magistrate at Vancouver on December 31st, 1945, on a charge of breaking and entering by day the dwelling-house of Arthur Mitchell, room 50, Corona Hotel, 1212 Granville Street, Vancouver.

The appeal was argued at Victoria on the 23rd of April, 1946, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Pelton, for accused: Complainant woke up in his bedroom, room 50 of the Corona Hotel in Vancouver at about 8 o'clock on the morning of December 23rd, 1945, and saw accused standing close to his bed. After telling complainant that he had better see if anything is missing he walked out of the room and downstairs. Accused was charged with breaking and entering a dwelling-house. That a room in an hotel is not a "dwelling-house" see *Rex* v. *George Eldridge* (1944), 60 B.C. 315; *Rex* v. *Charles T. Orford*, [1943] S.C.R. 103, at pp. 110-11.

Castillou, K.C., for the Crown: There was evidence to cover a charge of attempted theft: see *Rex* v. *Rossignol and Roy* (1923), 40 Can. C.C. 253; *Rex* v. *Orford* (1942), 58 B.C. 51.

Cur. adv. vult.

C. A.
1946

REX
v.
FEENEY

25th, April, 1946.

SLOAN, C.J.B.C. I agree with my brother ROBERTSON.

O'HALLORAN, J.A.: The appellant was convicted under Code section 459, and his appeal turns upon whether an hotel room occupied permanently by the complainant night clerk of that hotel, with his wife, is a "dwelling-house" within the meaning of Code section 335 (*g*) which reads:

"Dwelling-house" means a permanent building, the whole or any part of which is kept by the owner or occupier for the residence therein of himself, his family or servants, or any of them, although it may at intervals be unoccupied.

The learned magistrate explained the charge to the appellant in this manner. (Mitchell was the night clerk).

THE COURT: Feeney; There is a charge against you, that at the city of Vancouver, on the 23rd day of December, 1945 this month, you broke into a dwelling-house, the so-called dwelling-house is a room in an hotel, a room belonging to Arthur Mitchell, room 50 in the Corona Hotel, 1212 Granville Street. You are charged with breaking into that room with the intention of stealing the goods and chattels of this man Mitchell. Now, that was alleged to have occurred in the day time; it is alleged that this dwelling-house, sometimes a room is not a dwelling-house; however, that is what the charge is, you understand that, do you?

The accused. Yes.

The learned magistrate found the appellant had broken and entered the room with intent to steal. Counsel for the appellant submitted that the room was not a "dwelling-house" within the meaning of Code section 335 (*g*), because, he urged, the language of that subsection implies (a) that a dwelling-house must be a "permanent building" which one room is not, and also alternatively as I understand him (b) that the hotel itself and not the room in question was the residence of the night clerk and his wife.

Neither of these points arose in *Rex* v. *George Eldridge* (1944), 60 B.C. 315, wherein this Court did not find it necessary to the decision to go further than to hold that an hotel room occupied by a transient guest was not a "dwelling-house" within section 335 (*g*), because the occupancy lacked essential characteristics of permanency which the subsection plainly requires. Apart from *Rex* v. *George Eldridge, supra,* no decision was cited upon the construction of section 335 (*g*). In this case, however, there is evidence of permanency in the occupancy of the room

which was lacking in *Rex* v. *George Eldridge*. It is observed in passing that Code sections 458, 459, and 460 concern dwelling-houses, and while section 460 refers to a variety of buildings, it does not mention hotels, apartment-houses, or individual rooms or suites therein.

After careful examination of the definition of "dwelling-house" in section 335 (*g*) I am unable to discover a grammatical construction to support the first point made on behalf of the appellant, *viz.*, that since "dwelling-house" is described as a "permanent building" that must exclude an individual room. The term "permanent building" is qualified by the words "the whole or any part of which" (see definition *supra*). To me the language

> "Dwelling-house" means a permanent building, the whole or any part of which is kept by . . .

is another way of saying that

> "Dwelling-house" means the whole or any part of a permanent building which is kept by . . .

Rationalizing the objective sense of these words it seems inescapable that part of a permanent building may be a "dwelling-house." Since the room in question is part of a permanent building, it follows the room may be a "dwelling-house" within the meaning of section 335 (*g*). While the second of the two modes of expression is more conventional and less unwieldy, it is not difficult to believe that it was departed from in favour of the form in the statute, in an effort to make it thoroughly clear that the word "which" relates not alone to permanent building, but to any part thereof as well. It is noted that *In re Hecquard. Ex parte Hecquard* (1889), 24 Q.B.D. 71, where the Court of Appeal considered the meaning of "dwelling-house" unhampered by statutory definition, it was held a dwelling-house need not be an entire or separate building.

In support of the second objection, that the hotel and not the room, was the residence of the complainant and his wife, counsel for the appellant urged (but without evidence in support) that they utilized other parts of the hotel, *viz.*, lavatories, lobbies and other hotel facilities, in short, that the room itself did not possess the essentials of a residence. If the complainant and his wife had permanently occupied a suite containing a bedroom, bath,

C. A.
1946

REX
v.
FEENEY

O'Halloran, J.A.

kitchenette and living room-dining room as a self-contained establishment rendering them independent (if they wished to be) of the common rooms and facilities which an hotel necessarily provides to a greater or lesser extent for the convenience and use of its guests and their visitors, it would be plain I think that they came within the essential of "residence therein" specified in the definition of "dwelling-house" in section 335 (*g*), and *cf. In re Hecquard. Ex parte Hecquard, supra,* and also *Welch* v. *Kracovsky* (1919), 27 B.C. 170 wherein the reasoning in *Swain* v. *Mizner* (1857), 74 Mass. 182 was applied as more appropriate to modern conditions than *Lee* v. *Gansel* (1774), Lofft, 374, 1 Cowp. 1. While that is so, it does not follow that living in a single room may not also constitute residence in part of a permanent building as contemplated by section 335 (*g*).

Obstacles to acceptance of the second objection, (*viz.*, that the hotel and not the room was the residence) are (a) there is no evidence upon which it may be based, and (b) it means restricting "residence" in section 335 (*g*) to a place where a person "cooks, eats and sleeps." The evidence on the point is brief:

Is this your home, this room? Yes.

Your wife and you were living there? Yes.

What have you got in the room? I have a bed, dresser, a few chairs, some hot-plate.

A hot-plate? Yes.

For cooking in there? To eat, a cup of coffee.

There is no evidence that other portions of the hotel were used to a degree inconsistent with the room being kept by the night clerk for the "residence therein" of himself and his wife.

But assuming (considering that the appellant did not have counsel at the trial), that the room was used only for resting and sleeping purposes and to make a cup of tea or coffee, I do not think that is inconsistent with the term "residence" as it is found in section 335 (*g*). Residence in one sense may denote a mansion, or in lesser degree any self-contained establishment. But I do not read it in that sense in section 335 (*g*). The expression "kept by the owner or occupier for the residence therein of himself," etc., signifies that it must be "kept" for the purpose of living therein. The context permits "residence therein" and "living therein" to be read interchangeably without appreciable

deviation in meaning. While "residence" is not defined in the statute, the context in which it is found tells us the larger meaning it is designed to express. The statute does not by remotest implication restrict "residence" to "cooking, eating and sleeping" as the statute in *Rex* v. *Kerr* (1921), 29 B.C. 522 did in the definition of "private dwelling-house."

In my judgment "residence" in section 335 (*g*) is employed as a term of general signification and is not deprived by context or statutory definition of its natural flexibility and its inherent adaptability to reflect the various modes of residence, and living prevailing under modern conditions. Hence in my view, it means the place where one lives, that is, where one's home is permanently for the time being, whether it be a mansion or a rented room in a cottage. Many people in these days of acute housing shortage, for example, have to content themselves with one room. In a large city a person's room may be his only home, although he may have his meals elsewhere. It is his little corner of the earth where he is certain of privacy. Privacy is an element which was considered in *Swain* v. *Mizner, supra,* at p. 184 and in *Barnett* v. *Hickmott,* [1895] 1 Q.B. 691, at p. 694.

I conclude that a person may have his residence (*viz.,* where he lives), within the meaning of section 335 (*g*), in the place where he sleeps. The mere fact that he does not eat where he sleeps is not sufficient in itself to deny that proposition, and *cf. Martin's Case* (1806), R. & R. 108. In *Rex* v. *Smith* (1833), 1 M. & Rob. 256, emphasis was placed upon the fact that the complainant and his wife had slept in the building every night of their occupancy; no mention was made of cooking or eating. In *In re Williams* (1873), 8 Chy. App. 690, Sir G. Mellish, L.J. said (but without the aid of any statutory definition I can find) that for bankruptcy purposes, if a debtor has no other residence, the place where he was actually sleeping would be his residence. In *Martin's Case, supra,* although the prosecutor had his meals in a house which he owned, it was held not to be his dwelling-house, because he slept in his mother's house a short distance away.

I find nothing to hinder the foregoing views in the critical examination of *Stribling* v. *Halse* (1885), 16 Q.B.D. 246, ap-

C. A.
1946

REX
v.
FEENEY

O'Halloran, J.A.

pearing in *Barnett v. Hickmott, supra.* The two latter decisions were founded on the special language of a section of a statute which did not contain the words "residence" or "reside," and which moreover concerned the right to vote there surrounded by limitations which do not comparably appear in section 335 (*g*). If the expression "kept for the residence therein" in section 335 (*g*) was designed to restrict itself to a place where a person "cooks, eats and sleeps" then the subsection would have been phrased accordingly, or the context would have forced that implication.

For the foregoing reasons, with respect, I was of opinion that the appeal ought to be dismissed.

However the majority of the Court having reached the conclusion the conviction could not be supported, the Court so announced on 9th April last and expressed the desire to hear counsel upon the question of substituting a conviction of attempted theft under Code section 1016, subsection 2, as was done in *Rex* v. *George Eldridge* (1944), 60 B.C. 315.

This argument took place on 23rd April when counsel for appellant also moved for leave to introduce fresh evidence, the privilege of so moving having been reserved to him on 18th March when the Court reserved judgment on the main appeal. The affidavit material disclosed that the fresh evidence sought to be introduced was the evidence of one Bishop which if believed would point to the truth of the evidence given by the appellant. The Court being of opinion that the motion complied with the requirements surrounding applications to introduce fresh evidence in a criminal case as recently restated in *Rex* v. *Martin* (1944), 60 B.C. 554, at pp. 556-7, then (according to my notes) granted leave to introduce the fresh evidence and directed it to be heard on 25th April.

On the latter day Bishop appeared as a witness before the Court of Appeal and was subjected to examination and cross-examination. The Court adjourned after hearing argument, and in the course of the afternoon gave judgment substituting a verdict of attempted theft and imposed a sentence of six months' imprisonment.

In my judgment this Court in exercise of the jurisdiction

conferred by Code section 1021, subsection 1 and Civil Appeal Rule 5 therein referred to, could not, at this stage, do otherwise than find the appellant guilty of attempted theft and *cf.* section 1016, subsection 2 as was done in *Rex* v. *George Eldridge* (1944), 60 B.C. 315 where the matter was examined at pp. 319-20. But a question arose whether the order made on the motion for leave to introduce fresh evidence on the 23rd of April actually did give leave to admit that evidence, or was limited to bringing it forward and hearing it for the purpose of determining whether it ought to be admitted as evidence.

If the evidence was ordered to be admitted at the outset then this Court could pass upon it under the powers contained in Code section 1021, subsection 1 and Court of Appeal Rule 5 (Civil) to which the former refers, and could make the order the Court below ought to have made, and also "make such further or other order as the case may require" *cf. Foot* v. *Mason* (1894), 3 B.C. 146; *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43, at p. 53. *Canada Rice Mills, Ltd.* v. *Union Marine and General Insurance Co.* [1941] A.C. 55, to which reference is made in my judgment in *Rex* v. *Cruickshanks et al.* delivered on 25th April, 1946 [reported, *ante*, p. 102].

The above is to say that if the evidence was ordered to be admitted on 23rd April, then when it was heard on 25th April, the Court could examine it as part of the record of the appeal as to credibility and weight. If it believed that evidence, it could quash the conviction. If it did not believe that evidence, or regarded it as inconsistent with or contradictory to the appellant's evidence it could then substitute a conviction for attempted theft under Code section 1016, subsection 2. On the other hand, if on 23rd April the order made did not admit the evidence, but only allowed it to be brought forward and heard for the purpose of determining whether it ought to be admitted, then confusion may arise between its admissibility as fresh evidence under the rule restated in *Rex* v. *Martin, supra,* and what to do with that evidence once the rule in *Rex* v. *Martin* permitted it to be regarded as fresh evidence which the Court could accept. Where the Court decides the evidence has met the conditions for the admission of fresh evidence an order of the Court would

C. A.
1946
REX
v.
FEENEY
O'Halloran, J.A.

still be required for its admission as evidence for until it is admitted it cannot be looked at to determine its effect upon the case. Assuming such an order to be made, then the Court would have to consider that evidence and decide (a) whether it would exercise the powers given it by Code section 1021, subsection 1 and Civil Appeal Rule 5 mentioned *supra* or (b) whether it would not exercise the powers under (a) but send the case back for a new trial.

Whether an order is to be made that the evidence be actually admitted, or that it be allowed to be heard for the purpose of determining if it is to be admitted, must depend on the circumstances of each case. In the present case as in this Court's decision in *Rex* v. *Shumarin,* [1928], 1 W.W.R. 300 I saw no difficulty in admitting it at once. In another case the circumstances might be such that a conclusion could not be reached without first hearing the evidence. That would of course concern the admissibility of the evidence as fresh evidence.

But once it is acceptable as fresh evidence and admitted as such it does not follow that the case must be sent back for a new trial. There are no doubt cases in which the circumstances may be such that the Court of Appeal would conclude that the interests of justice would be better served by directing a new trial, than by exercising its powers under Code section 1021, subsection 1 and Civil Appeal Rule 5. But the Court's jurisdiction under that Code section and Civil Appeal Rule is not to be overlooked, and in a case like the present where the fresh evidence was inconsistent with and contradictory to the evidence it was advanced to support, in my opinion a proper case was disclosed in which to exercise that jurisdiction and substitute a conviction of attempted theft.

I think the difficulty vanishes if *Rex* v. *Martin, supra,* is read in the light of the jurisdiction given by Code section 1021, subsection 1 and Civil Appeal Rule 5 to which there was no occasion for that decision to refer. One of the tests of the admissibility of fresh evidence in a criminal case, that

> it might reasonably have induced the jury or the tribunal of fact to change its view regarding the guilt of the accused

(pp. 556-57), visualizes a condition existing if the fresh evi-

dence had been in fact adduced in the Court below. It is not to be read as if that test cannot be complied with unless the fresh evidence is sent back with the case for a new trial, for that would deny the jurisdiction conferred by Code sections 1015 and 1021, subsection 1.

In this case, I think the proper course was to give leave on 23rd April to admit the fresh evidence as was done in *Rex* v. *Shumarin, supra,* and after hearing it on 25th April to dispose of the appeal finally under Code section 1021, subsection 1 and Civil Appeal Rule 5, as was in fact actually done with the aid of section 1016, subsection 2.

ROBERTSON, J.A.: The appellant was charged under section 459 of the Code with breaking and entering by day the dwelling-house of one, Arthur Mitchell, room 50, Corona Hotel, with intent to commit an indictable offence. Mitchell was a night clerk in the hotel and he and his wife occupied the room as their permanent residence. "Dwelling-house" is defined in section 335 of the Code to mean

> a permanent building, the whole or any part of which is kept by the owner or occupier for the residence therein of himself, his family or servants, or any of them.

The Corona Hotel is a permanent building. The question to be decided is whether or not the room could be described as the dwelling-house of the Mitchells within the meaning of the definition.

It was submitted by the appellant that the section should be read as if the word "thereof" appeared after the word "owner" and also after the word "occupier"; and by the respondent as if the section read:

> Any part of said permanent building kept by the owner of such part or any part of the said permanent building kept by the occupier of such part.

I prefer the appellant's interpretation. No doubt a person may own only part of a building, but this is a very unusual form of ownership in Canada. On the other hand, it is very often the case that the tenant of a building occupies part of that building as a residence for himself and his family, and the balance for a store or other business purposes.

I think that the definition "means" this sort of occupation. If this construction, as suggested, is not the proper one, it would

C. A.
1946

REX
v.
FEENEY

Robertson, J.A.

not be necessary to distinguish in the definition between an owner and an occupier. It would be sufficient to say

"dwelling-house" means a permanent building the whole or any part of which is kept by a person for the residence therein. . . .

In any case, I have grave doubts as to whether or not the word "dwelling-house" in the section under consideration could be held to include an hotel. I do not think anyone in ordinary language would describe an hotel as a dwelling-house, nor does the definition of the word indicate that it does. I would point out that the words "hotel," "inn" and "lodging-house" are used in the Code—see subsection 3 of section 407. Accordingly I reserve for future consideration the question as to whether or not an hotel is a dwelling-house within the meaning of the section.

In *Rex* v. *George Eldridge* (1944), 60 B.C. 315, it was held that a room in an hotel which a guest occupied temporarily in the course of his travels was not a dwelling-house within the meaning of section 335 (*g*). That case has no bearing on the point at issue, the difference being that in this case Mitchell occupied room 50 as his permanent residence.

I think the conviction should be quashed. I agree that counsel should be heard on the question as to whether or not a conviction for attempted theft may be substituted by this Court.

SIDNEY SMITH, J.A.: The complainant, Arthur Mitchell, was a night clerk in an hotel and with his wife occupied one of the rooms in the hotel as his permanent residence. The appellant was charged with breaking and entering by day the dwelling-house of the said Arthur Mitchell, room 50, Corona Hotel, 1212 Granville Street, there situate. The charge was laid under section 459 of the Code, which reads as follows:

Everyone is guilty of an indictable offence . . . who, by day, breaks and enters any dwelling-house with intent to commit any indictable offence therein.

I am assuming for the purpose of this judgment that the appellant did in fact break and enter the complainant's room with the aforesaid intent. The question is whether such room is comprehended within the meaning of the words "dwelling-house" as defined in section 335 (*g*) as follows: [already fully set out in the judgment of O'HALLORAN, J.A.]

It is surprising that a question of so fundamental a nature in the administration of the criminal law in urban districts should at this date still remain in doubt. But so it would seem, for the only case under the Code to which we were referred was *Rex* v. *George Eldridge* (1944), 60 B.C. 315. The issue decided there however was that a room in an hotel, occupied temporarily by a guest in the course of travelling, was not a dwelling-house within the meaning of section 335 (*g*). That case therefore is not in point, because here, as stated, the room in question was the permanent residence of Arthur Mitchell, the night clerk.

As a mere matter of grammar I think there can be no doubt that the question must be answered in the negative. The difficulty I think may in part arise in consequence of the late position of the relative pronoun "which," but it is clear that this pronoun can only relate to "permanent building" and that it cannot relate to "dwelling-house." If the position of the pronoun were advanced to follow "building," so that the phrase would read "dwelling-house means a permanent building of which the whole or any part," etc., I think the matter would be clearer. But be that as it may, and whether in the one position or the other, the word "which" can only, in my opinion, relate to the words "permanent building." It follows that the hotel room occupied by the complainant, even though it be his permanent residence, is not a dwelling-house within the definition, for it is not a permanent building; it is only one room in a permanent building. I expressly leave open for future consideration the question whether the hotel itself and as a whole would fall within the definition of a dwelling-house under section 335 (*g*) aforesaid.

Upon the application of the appellant we heard new evidence which had been discovered after the trial. But as to this, it will be sufficient to say that in my opinion it was not of such a nature as "might reasonably" induce the trial judge "to change [his] view regarding the guilt of the accused" as stated by O'HALLORAN, J.A. in *Rex* v. *Martin* (1944), 60 B.C. 554, at pp. 556-57, quoting from the language of the late Chief Justice MARTIN in *Rex* v. *Cumyow* (1925), 36 B.C. 435, at p. 440.

As was done in the *Eldridge* case, *supra,* so here I would set aside the conviction, but in substitution find the appellant guilty

C. A.
1946

REX
v.
FEENEY

of attempted theft and impose a sentence of six months' imprisonment with hard labour.

BIRD, J.A.: I would have dismissed the appeal from conviction. There was ample evidence to support the magistrate's finding that the accused broke and entered the room with intent to steal. The substantial ground of appeal was directed to the question whether the room occupied by Mitchell, then permanently employed as a desk clerk of the hotel, and his wife, was a dwelling-house within the meaning of Code section 335 (*g*).

I consider that the hotel room so occupied falls within the definition, substantially for the reasons expressed by my brother O'HALLORAN, which I have been privileged to examine.

Since the majority of the Court have reached a contrary conclusion and would allow the appeal, I concur in the substitution of a verdict of attempted theft and the imposition of a sentence of six months' imprisonment.

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

S. C.
In Chambers
1946

June 14;
July 30.

BULMAN AND BULMAN v. ANDERSON, BOOTH AND GEEN.

Lands—Improvement district—Letters patent under the Water Act, 1939—First trustees named in letters patent—Whether power given under the Water Act to name first trustees—Injunction—B.C. Stats. 1939, Cap. 63.

The plaintiffs are owners of more than one-half of the area which the owners thereof constituted an improvement district under the name of Ellison Irrigation District by letters patent issued under the provisions of the Water Act, 1939. The defendants were named as the first trustees of the district in the letters patent providing for their holding office for certain periods. The plaintiffs contend there is no power given by the Water Act, 1939, to the Lieutenant-Governor, in Council to name the first trustees and the board of trustees must be elected by the owners of the land. The plaintiffs ask for an order restraining the defendants from exercising any powers with respect to said lands. They claim there is no affirmative substantive power in any part of the Act to appoint trustees. The defendants contend that although the

order in council authorizing the issue of letters patent and the letters patent themselves cannot go beyond the powers given by the Act, the power to name the first trustees exists by necessary implication.

Held, that the only place where can be found an affirmative substantive power of appointment is in the words of section 49 (1) of the Water Act, 1939. Two portions of it bear some significance (1) "with such powers as are necessary to carry out the said objects," and (2) he may in the letters patent provide "that other specified provisions shall apply thereto." In one or other of these portions of section 49 (1) there is power to make provision for the appointment of first trustees such as is made here.

ACTION by the owners of lands comprising a little more than half of the area which and the owners thereof constituted an improvement district under the name of "Ellison Irrigation District" by letters patent issued under the provisions of the Water Act, 1939, against the first trustees of the improvement district named in the letters patent, contending that there is no power given by the Water Act, 1939, to the Lieutenant-Governor in Council to name the first trustees. The facts are set out in the reasons for judgment. Tried by MACFARLANE, J. in Chambers at Vancouver on the 14th of June, 1946.

Norris, K.C., for plaintiffs.
Bull, K.C., for defendants.

Cur. adv. vult.

30th July, 1946.

MACFARLANE, J.: This is a motion for an injunction, and counsel have agreed that the result of the motion shall be treated as judgment in the action. The action is brought by the plaintiffs who are owners of lands, comprising it is alleged a little more than half of the area, which and the owners thereof were constituted an improvement district under the name of "Ellison Irrigation District" by letters patent issued under the provisions of the Water Act, 1939 (B.C. Stats. 1939, Cap. 63), and dated the 30th of January, 1946. The defendants were named as the first trustees of the improvement district in the letters patent which provided that they should hold office until the annual general meetings of 1949, 1948, and 1947 respectively, one retiring each year on a successor being elected by the owners of land in the improvement district. The plantiffs contend that

S. C.
In Chambers
1946

BULMAN AND BULMAN v. ANDERSON, BOOTH AND GEEN

Macfarlane, J.

there is no power given by the Water Act, 1939, to the Lieutenant-Governor in Council to name the first trustees and say that if there is to be a board of trustees, to exercise the powers of the district and manage its property, the board of trustees must be elected by the owners of the land in the improvement district. In these circumstances, the plaintiffs ask for an order restraining the defendants their and each of their agents, servants and workmen from exercising the powers of the Ellison Irrigation District with respect to the supply of irrigation water to the lands of the plaintiffs and the storage of the same, and with respect to the levying of taxes on the said lands and the fixing of tolls to be paid by the plaintiffs for the said services and also for an order restraining the trustees from acting as trustees of the said improvement district generally.

Although it may have no bearing on what I have to decide, the plaintiffs are the principal shareholders in a company, Okanagan Development and Orchard Company Limited, which since about 1914 has supplied irrigation water to the same area as is now included in the improvement district, latterly under control as to rates of the Public Utilities Commission. As such they claim that their rights are being taken away under the provisions of the legislation under consideration here and that therefore its wording must be strictly construed.

In November, 1945, the water users in the district other than the plaintiffs petitioned the Comptroller of Water Rights for the formation of an improvement district and the comptroller in January, 1946, requested that a meeting of the water users be called for the purpose of choosing the persons to be named as the first trustees of the proposed improvement district should the Lieutenant-Governor in Council see fit to approve the incorporation of such a district. On the 21st of January, 1946, a meeting was held for this purpose attended by all the water users, the plaintiffs attending only to object to the proceedings, and the three defendants were chosen. The three defendants were subsequently named in the letters patent issued as I have stated under date of the 30th of January, 1946. It is not I think contended by any one that this meeting could do any more than recommend names to the Lieutenant-Governor in Council.

Before discussing the relevant sections of the Water Act, 1939, it may be pertinent here to say that the Water Act, 1939 (Cap. 63), is a revision and consolidation of legislation that has long been on the statute books of this Province, which counsel for the plaintiff characterizes as a radical and confiscatory interference with common-law rights. While 50 years ago that view may have prevailed and offended our ideas of rights of ownership the fact that this legislation has remained so long now on our statute books and that most of the land in this Province has been acquired by its present owners with full knowledge of the fact that

> the property in and the right to the use and flow of all the water at any time in any stream in the Province are for all purposes vested in the Crown in the right of the Province,

and that similarly legislation has been long in existence for the formation of irrigation districts, I do not think its radical and confiscatory character need much disturb us. What is important about the Act of 1939 is that it is an attempt apparently at simplification of the statute in which a great many administrative details have been eliminated and an attempt made to retain by general words the powers formerly specifically given. The Act as it stood in the Revised Statutes of 1936, Cap. 305, contained 352 sections. It has been reduced to 81. While a perusal of the legislation makes it clear that the exclusion of many of these sections is due to the fact that some of the administrative area formerly covered by the operations of the Water Board now falls within the administrative powers exercised by the Public Utilities Commission yet there is an obvious endeavour to simplify. Section 53 of the present Act with which we have to deal replaces sections 204 to 207 inclusive. Section 207 of Cap. 305 (*supra*), specifically refers to the appointment of first trustees. In the present Act there is no such specific reference to first trustees. The former Act contains numerous sections affirmatively dealing with various features of what I might call the organization period which are not found in the Act now.

The power to incorporate an improvement district is found in section 49 (1) which reads as follows:

> 49. (1.) The Lieutenant-Governor in Council may at any time by Letters Patent incorporate any tract of land and the owners thereof into

S. C.
In Chambers.
1946

BULMAN AND BULMAN v. ANDERSON, BOOTH AND GEEN

Macfarlane, J.

an improvement district, under such name and with such objects as appear advisable and with such powers as are deemed necessary to carry out the said objects, and he may in the Letters Patent provide that some provisions of this Act shall not apply to the improvement district and that other specified provisions shall apply thereto.

The letters patent issued incorporating the Ellison Irrigation District recite as follows:

Whereas by section 49 of the "Water Act, 1939" it is provided that the Lieutenant-Governor in Council may incorporate a tract of land and the owners thereof into an improvement district:

And whereas the Lieutenant-Governor in Council has by Order-in-Council made pursuant to the said Act been pleased to order that the tract of land hereinafter described and the owners thereof be incorporated into an improvement district under the said Act and has made further provisions to the tenor and effect hereinafter appearing:—

The operative parts of the Letters Patent then order and proclaim the incorporation of the lands and the owners thereof into an improvement district under the Water Act, 1939 and subject to the provisions thereof—and to the conditions thereinafter contained. After declaring the name and object the following two sections appear as 4 and 5 and it is in respect of these that the plaintiffs claim the Lieutenant-Governor in Council has exceeded his powers.

4. There shall be three trustees of the said improvement district.

5. Messrs. James Fraser Anderson, Robert Dufton Booth and Alva Howard Geen shall be the first Trustees of the improvement district and the said Anderson shall hold office until the annual general meeting of 1949. The said Booth shall hold office until the annual general meeting of 1948 and the said Geen shall hold office until the annual general meeting of 1947.

Then follow directions to the trustees as to annual meetings and other general meetings, the duties of the secretary, qualifications of candidates and voters and other administrative details.

As I have said earlier, the plaintiffs contend that there is no power in the Act to name the first trustees, to put it more exactly Mr. *Norris* says that there is no affirmative substantive power in any part of the Act to appoint first trustees. He refers to the first part of section 53 which reads as follows:

53. (1.) Unless otherwise provided in the Letters Patent, the powers of every improvement district shall be exercised and its property managed by a Board of Trustees who shall be elected by the owners of the land in the improvement district.

Subsection (3) of the same section deals with the term of office and reads as follows:

Except as otherwise provided in the Letters Patent and except as to . . . [not applicable], the term of office of every Trustee of an improvement district shall be three years.

Mr. *Norris* contends that the words "Unless otherwise provided in the Letters Patent" constitute a conditional adverbial phrase, modifying the verbal clauses "shall be exercised" and "shall be managed" and have no application to the clause "who shall be elected" which he describes as an adjectival clause modifying trustees.

I do not follow the distinction. In my opinion the words "Unless otherwise provided in the Letters Patent" standing as they do at the beginning of the section and separated from what follows by a comma, and the only comma in that part of the section, are effective to modify the whole of that part of the section which I have first above quoted. I think these words modify not only the words "shall be exercised and its property managed" but also the words "who shall be elected."

That alone, however, does not answer Mr. *Norris'* argument that the Act contains no affirmative substantive power in the Lieutenant-Governor in Council to name the first trustees. The words I have been discussing do not give that power. They are in the nature of an exception and it is I think well settled that exceptions are strictly construed and affirmative rights cannot be based upon them except by necessary implication. You cannot raise out of an exception in a statute any affirmative enactment. *Vide* Lord Brougham in *Lord Advocate for Scotland* v. *Hamilton* (1852), 1 Macq. H.L. 46, at p. 55.

Mr. *Bull,* as I understand his argument agrees that the order in council authorizing the issue of the letters patent and the letters patent themselves cannot go beyond the powers given by the Act but he contends that the power to name the first trustees exists by necessary implication. That must mean I suppose that where there is a power to incorporate a body there is an implied power to appoint officers. I have had some difficulty in persuading myself that the matter is as simply as that, and I proceed therefore to see what assistance I can gather from the specific wording of the Act itself. In this case I am faced also with the difficulty that the letters patent do not in the words of section 49 in express words provide that some provisions of this Act shall not apply to the improvement district, though they do provide otherwise (albeit only by way of modification) than that the

S. C.
In Chambers.
1946

BULMAN AND BULMAN v. ANDERSON, BOOTH AND GEEN

Macfarlane, J.

powers of every improvement district shall be exercised and its property managed by a board of trustees who shall be elected by the owners of the land. The only place where I can find an affirmative substantive power of appointment, if at all, is in the words of section 49 (1). Two portions of that section may bear some significance (1) "with such powers as are . . . necessary to carry out the said objects"; and (2) "he may in the Letters Patent provide that . . . other specified provisions shall apply thereto." The former, though I would think the words would refer more aptly to powers incidental to the operation of the works themselves, may be intended to confer the powers necessary to setting up the administration of the body corporate and in so far as that may be so, the power required may be said to be there by necessary implication. The latter portion appears to be the clause under which the Lieutenant-Governor in Council has acted ---for the words used in the recital are

> and has made further provisions to the tenor and effect hereinafter appearing.

It may be thought on first reading that the words "other specified provisions" refer to provisions or sections of the Act. The word "specified" unless it applies to provisions other than those in the Act has no meaning for all the provisions of the Act except where extended or altered do apply. It is to be remembered that effect must, if possible, be given to every word of a statute and that words not there should not be read into a statute. Lord Brougham once said:

> A statute is never supposed to use words without a meaning.

It is a

> settled canon of construction that a statute ought to be so construed that if it can be prevented, no clause, sentence or word shall be superfluous void or insignificant.

I think that in one or other of these portions of section 49 (1) there is power to make provision for the appointment of first trustees such as is made here. I do not think I should insist on finding an express power in so many words; otherwise there would be no need for the effort at construction which I am required to make.

I confess on the other hand that in adopting this construction I am influenced also by the principle that where a power to incor-

porate is given by the statute, I should look for the provisions necessary to make the incorporation a workable entity. I do not see, if the power is not included as one of those necessary for carrying out an object or if some meaning is not given to this word, specified, how the powers given by the legislation can otherwise be reasonably and effectively exercised. I do not say that the Lieutenant-Governor in Council could not have made other provisions, *e.g.*, the appointment of a returning officer to hold an election but if he has power to appoint a returning officer why has he not power to appoint first trustees? I am dealing with the existence of the power given by this provision and while the wording of the statute is not what I think it might well be, I think if the power is given there that is all I have to find.

I think I should say that I have not reached this conclusion without much difficulty and need only mention that in this very clause the words some and other, being correlative would if I could attach in so doing any significance to the word "specified" indicate that both the provisions of the Act which are declared not to apply and the other "specified" provisions are of the same kind, that is, taken from the Act.

The situation is further unsatisfactory because, in the Act itself, in section 72 (2) the Legislature has seen fit to provide in express words for the appointment by the comptroller of the first manager of the water users community on its formation and of the "choosing" of subsequent managers by the members of the water users community.

I have not seen fit to attach any importance to the fact that in the Act as it stood before the revision there were specific provisions for the appointment of first trustees. In *Bradlaugh* v. *Clarke* (1883), 8 App. Cas. 354, at p. 380 Lord Watson says:

> . . . It appears to me to be an extremely hazardous proceeding to refer to provisions which have been absolutely repealed, in order to ascertain what the Legislature meant to enact in their room and stead.

It may be said, however, that when express provisions are repealed for the purpose of simplification that it would be the part of wisdom in the Legislature to see that the general powers inserted do not call for the amount of searching required here to find the power proposed to be used in their stead.

S. C.
In Chambers.
1946

BULMAN AND BULMAN v. ANDERSON, BOOTH AND GEEN

In the result I think I must dismiss the motion for the continuance of the injunction. This will in the circumstances operate as a dismissal of the action.

Costs follow the event.

Action dismissed.

C. A.
1946
May 21, 22, 23; *Sept.* 10.

NANAIMO ICE AND COLD STORAGE LIMITED v. BLYTH.

Constitutional law — Public harbour — Foreshore—Dominion or Provincial ownership — Claim of possessory title — British North America Act, 1867 (30 & 31 Vict. c. 3), Sec. 108—R.S.B.C. 1936, Cap. 140, Sec. 37 (2) and (3).

The plaintiff brought action to recover possession of lots 13 and 13-A in block 61 of section 1 in Nanaimo District. The defendant denies being on the plaintiff's lands and claims that the building he occupies and known as the Anderson boat-house is situate below high-water mark of Nanaimo Harbour and is the property of the Crown in the right of the Dominion, and alternatively, that if the plaintiff does own any part of lots 13 and 13-A, such parts are above high-water mark and do not include any of the foreshore occupied by the defendant, that the defendant and his predecessors in title have been in uninterrupted possession and occupation for more than 40 years and pleads the Statute of Limitations. The boat-house in question was built on piles on the foreshore by one Shaw in 1888 and acquired by one Anderson in 1914 who lived there until 1944, when it was transferred to the defendant who is still in possession. Said lot 13 as shown on official plan 584 (later amended as 13 and 13-A) was conveyed to John Hirst in 1874 and in 1919 the lot was conveyed to the Hirst Estate Land Co., said company obtaining a certificate of indefeasible title for said lot in 1920. By *mesne* conveyances the lot became the property of the plaintiff company holding a certificate of indefeasible title of January 28th, 1946. It was held on the evidence that lots 13 and 13-A, according to official map 584, lie almost wholly between high and low-water marks and includes within its area the Anderson boat-house. As to defendant's claim that the area being foreshore belongs to the Crown, the official map 584 and the plaintiff's certificate of indefeasible title based on the map is conclusive against him and subsection (3) of section 37 of the Land Registry Act and said certificate of title are conclusive against him as to his claim for possessory title.

Held, on appeal, affirming the decision of HARRISON, Co. J., that the plaintiff relies upon its certificate of indefeasible title issued under chapter 140 of the Revised Statutes of British Columbia, 1936. Sub-

section (3) of section 37 provides that after the issuance of a certificate of indefeasible title no title adversely shall be acquired by length of possession merely. This subsection was the same in 1920, so that no possession after the issue of the certificate of indefeasible title in 1920 can affect the title. As to the defendant's claim to continual possession since one Shaw built and occupied the boat-house in 1888; there is not sufficient evidence to warrant a finding that Shaw was in actual undisturbed possession of the land. The *onus* is on the defendant and the *onus* is not satisfied.

APPEAL by defendant from the decision of HARRISON, Co. J. of the 25th of April, 1946, in an action for the recovery of possession of lots 13 and 13-A in block 61, of section 1, situate in Nanaimo District, county of Nanaimo. The defendant denies that he occupies the plaintiff's lands and alleges that the land he occupies is situated below high-tide mark of Nanaimo Harbour and is the property of His Majesty the King in the right of the Dominion of Canada. That the area which lots 13 and 13-A purport to cover consists of tide-water the property of the Crown Dominion and that the plaintiff does not own the same. Alternatively, defendant says that if the plaintiff does own any part of lots 13 and 13-A, such parts are above high-water mark and do not include any of the foreshore occupied by the defendant; that the defendant and his predecessors in title have been in uninterrupted possession and occupation of such lands which defendant occupies for more than 40 years and he pleads the Statute of Limitations. Judgment was given in favour of the plaintiff.

The appeal was argued at Vancouver on the 21st, 22nd and 23rd of May, 1946, before O'HALLORAN, ROBERTSON and BIRD, JJ.A.

Arthur Leighton, for appellant: The learned judge found that all our building is below high-water mark. The defendant pleads the Statute of Limitations. There are two sketches, one of the plaintiff and the other of the defendant and we have the high-water mark from actual observation. Our building is on piles and we have been in possession for 58 years: *In re Quieting Titles Act and In re The Hirst Estate Land Co.* (1943), 59 B.C. 321; *Asher* v. *Whitlock* (1865), L.R. 1 Q.B. 1, at p. 5. They must first show good title. Hirst died in 1920 and he had

C. A.
1946
NANAIMO ICE AND COLD STORAGE LIMITED v. BLYTH

nothing below high-water mark: see *Attorney-General of Canada* v. *Higbie et al. and Attorney-General for British Columbia,* [1945] S.C.R. 385. Our boat-house was built on foreshore by one Shaw in 1888. Shaw died in 1914. His son gave evidence and the boat-house was then transferred to Anderson and Mrs. Anderson transferred it to the defendant. It is conceded it is below high-water mark and built on piles. They got indefeasible title by failing to tell where high-water mark was. Crown Provincial cannot give title to property below high-water mark: see *Holman* v. *Green* (1881), 6 S.C.R. 707; *Mellor* v. *Walmesley,* [1905] 2 Ch. 164; Halsbury's Laws of England, 2nd Ed., Vol. 3, p. 162, par. 281. It was never intended to go below high-water mark: see *Morrell* v. *Fisher* (1849), 4 Ex. 591; *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. 711; *In re Provincial Fisheries* (1896), 26 S.C.R. 444, at p. 515; Halsbury's Laws of England, 2nd Ed., Vol. 27, p. 146 and Vol. 20, p. 682; *Blackwood* v. *The Queen* (1882), 8 App. Cas. 82; *Curtis* v. *Stovin* (1889), 22 Q.B.D. 513, at p. 517. High-water mark may vary and he relies on the ambiguity in plan 584; he did not get indefeasible title until 1920: see *In re Alison. Johnson* v. *Mounsey* (1879), 11 Ch. D. 284, at pp. 295-6; *Sanders* v. *Sanders* (1881), 19 Ch. D. 373; Halsbury's Laws of England, 2nd Ed., Vol. 20, p. 745. On title by possession see Armour on Titles, 3rd Ed., 299.

Cunliffe, for respondent: We have a certificate of indefeasible title for lots 13 and 13-A of the 28th of January, 1946. Plan 584 is conclusive evidence of the boundaries and the old wooden building on piles is entirely within lots 13 and 13-A. By Cap. 64, B.C. Stats. 1895, plan 584 was made valid and binding on official map or survey of the city of Nanaimo: see *In re Hadleigh Castle Gold Mining Co.* (1900), 69 L.J. Ch. 631; *Arnot* v. *United African Land Co.* (1901), 70 L.J. Ch. 306; *Kerr* v. *John Mottram, Ltd.* (1940), 109 L.J. Ch. 243. All the evidence put in as to wrong description of high-water mark in plan 584 is inadmissible. The first indefeasible title we had was May 31st, 1920, and there must be proof of adverse

possession before that. The 20-year period must have been acquired prior to May 31st, 1920. As to the right to bring the action see Halsbury's Laws of England, 2nd Ed., Vol. 33, p. 18, par. 29; *Nicholls* v. *Ely Beet Sugar Factory,* [1931] 2 Ch. 84, at p. 86; *Attorney-General of Canada* v. *Western Higbie et al.* [1945] 3 D.L.R. 1, at p. 44; *Attorney-General for the Dominion of Canada* v. *Ritchie Contracting and Supply Company,* [1919] A.C. 999. On the question of possession see *In re Quieting Titles Act and In re The Hirst Estate Land Co.* (1943), 59 B.C. 321, at p. 326; *Asher* v. *Whitlock* (1865), L.R. 1 Q.B. 1. The case of *Holman* v. *Green* (1881), 6 S.C.R. 707 does not apply as it was a public harbour at the time of possession.

Leighton, in reply: They were continually in possession. Shaw still holds the property and we hold under him: see *Zachariah* v. *Morrow and Wilson* (1915), 34 N.Z.L.R. 885, at p. 893.

Cur. adv. vult.

10th September, 1946.

O'HALLORAN, J.A.: This appeal lies from a judgment which declares that the respondent plaintiff is entitled to possession of certain lands in Nanaimo Harbour, which are situate between high and low-water marks and which are included in the lands described in a certificate of indefeasible title issued to the respondent by the Crown Provincial under the Provincial Land Registry Act.

The learned trial judge held that the defendant appellant failed to establish the possessory title he had asserted. That conclusion is founded largely upon findings of fact, and I am not prepared to hold that the learned trial judge misconceived the evidence or misapprehended its weight.

Counsel for the appellant submitted further, however, that the tidal lands in question passed to the Crown Dominion under section 108 of the British North America Act, 1867, as part of the public harbour of Nanaimo, when this Province entered Confederation on 20th July, 1871, *cf., inter alia, Attorney-General for Canada* v. *Attorneys-General for Ontario, Quebec, and Nova Scotia* (1898), 67 L.J.P.C. 90, at pp. 92-3, and

C. A.
1946

NANAIMO ICE AND COLD STORAGE LIMITED v. BLYTH

O'Halloran, J.A.

Attorney-General for Canada v. *Ritchie* (1919), 88 L.J.P.C. 189.

From this premise counsel for the appellant argued, that since the respondent held no title or right of possession from the Crown Dominion, it must fail in its claim for possession, and he relied on *Holman* v. *Green* (1881), 6 S.C.R. 707, wherein the defendant without disclosing any right or title to the foreshore rested successfully upon his submission that a Provincial grant thereof to the plaintiff was incompetent and inoperative, and *cf.* also *Attorney-General of Canada* v. *Keefer* (1889), 1 B.C. (Pt. 2) 368.

However, if one were to accept the appellant's premise as above stated, the submission founded thereon is fully answered, in my opinion at least, by the agreement between the Dominion and the Province as explained in the minutes of the Provincial order in council of 6th May, 1924, which after reciting that it is in the public interest to remove doubts whether any harbour or any particular part thereof is included in the expression "public harbour" within the meaning of section 108, and reciting further (*inter alia*) it was mutually agreed that the harbours of Nanaimo, Victoria (and others therein named), "became" at the time this Province entered Confederation, and are now, the property of Canada, then provided (in relevant part):

> 11. That any foreshore or land covered with water within the boundaries of the six harbours mentioned, [my note, Nanaimo being one] as defined by the said descriptions and plans, which have heretofore been granted, quitclaimed, leased or otherwise dealt with by the Province shall be confirmed by the Dominion Government, subject to such terms and conditions as the Dominion may prescribe, . . .

That agreement is examined in the judgment of the Chief Justice of Canada in *Attorney-General of Canada* v. *Western Higbie et al.*, [1945] 3 D.L.R. 1, at pp. 11-14; for other references therein see pp. 32 and 43. The confirmation in par. 11 quoted *supra* is not confined to Crown grants issued by the Province. The words are "granted, quit-claimed, leased or otherwise dealt with." That I interpret to include the issuance of a certificate of title to foreshore or lands covered by water in public harbours within the meaning of section 108 of the British North America Act, 1867, as well as the passing of an Act of

the Provincial Legislature to confirm a survey of the city of Nanaimo which included the tidal lands in question here, as was done by the "city of Nanaimo Official Map Act, 1895 (Cap. 64, B.C. Stats. 1895).

The appellant disputed the respondent's right to possession under its certificate of indefeasible title on the two grounds, *viz.*, possessory title, and that the tidal lands had passed to the Dominion under section 108 of the British North America Act, 1867. Coming to the conclusion as I have, that both grounds must fail, I find no occasion to trace the respondent's title back to the grant of Vancouver Island by the Crown Imperial on 13th January, 1849, to the Hudson's Bay Company and their successors as "the true and absolute lords and proprietors" of the same, nor to deliberate the consequential *status* when the colony of British Columbia entered Confederation on 20th July, 1871, of those parts of its "lordship and proprietorship" which the Hudson's Bay Company had granted to other persons before it reconveyed Vancouver Island to the Crown Imperial on 3rd April, 1867 (and see *Dorrell* v. *Campbell* (1916), 23 B.C. 500, MARTIN, J.A. at p. 508, and the judgment of our brother BIRD in *In re quieting Titles Act and In re The Hirst Estate Land Co.* (1943), 59 B.C. 321.

I would dismiss the appeal.

ROBERTSON, J.A.: The finding of the learned trial judge that the land in dispute formed part of the foreshore of Nanaimo Harbour is not attacked in this appeal. There was no evidence to show that any part of the foreshore of Nanaimo Harbour or of that part of the foreshore in dispute was in use in 1871 so as to vest it in the Dominion by virtue or section 108 of the British North America Act, 1867. See *Attorney-General for the Dominion of Canada* v. *Ritchie Contracting and Supply Company,* [1919] A.C. 999 and *Attorney-General of Canada* v. *Western Higbie et al.,* [1945] 3 D.L.R. 1, at p. 8. The defendant alleges ownership in the Dominion by virtue of an order in council passed in 1924 by the Province, to be later mentioned.

There was nothing to show that the land in question might not have been granted prior to 1871 either by the Crown or by the

C. A.
1946
NANAIMO ICE AND COLD STORAGE LIMITED v. BLYTH
Robertson, J.A.

Hudson's Bay Company. This company obtained title to the whole of Vancouver Island, including the foreshore, by virtue of a conveyance of the 13th of January, 1849, to it by Her Majesty Queen Victoria. See Appendix to R.S.B.C., 1871; and *In re Quieting Titles Act and In re The Hirst Estate Land Co.* (1943), 59 B.C. 321; and on the 3rd of April, 1867, reconveyed Vancouver Island, with certain exceptions, to the Crown —see R.S.B.C. 1911, Vol. 4, p. 276.

There is no assumption, then, as there is no evidence of who was the registered owner prior to the Union with the Dominion, that the Crown must be the owner. See *Dorrell* v. *Campbell* (1916), 23 B.C. 500, at p. 508, where MARTIN, J.A., as he then was, said:

> It must not be overlooked (and I make this observation because of the submission made during the argument, that in cases where there is no registered owner, the Crown would be assumed to be the owner) that, in regard to that large portion of this Province which comprises the old Colony of Vancouver Island, there can be no such assumption, because of the fact that said Island, with all the royalties of the seas upon its coasts and all mining royalties, was granted by the Crown to the Hudson's Bay Company on the 13th of January, 1849, as "the true and absolute lord and proprietor of the same," and was not reconveyed by the company to the Crown (saving a number of reservations) till the 3rd of April, 1867.

If it had been shown that the land in question still belonged to the Crown at the time British Columbia entered Confederation, then in my opinion, in view of the decision of the Supreme Court of Canada in the *Higbie* case, the foreshore would have passed to the Dominion. That decision is founded on the admission by the Province contained in the 1924 order in council, but as Rand, J. says in the *Higbie* case at p. 44:

> As between the two jurisdictions, such an acknowledgment concludes the question but as to private rights, different considerations arise. Ordinarily third persons would not be concerned with either Crown right in ownership or legislative jurisdiction.

In that case the Crown grant dated 20th May, 1867, which was the stem of the defendant's title, did not grant the foreshore, only the uplands. In this case, for the reasons which I shall later mention, I think the *Higbie* decision does not apply because of the difference in facts.

The foreshore in dispute is part of lot 13 (later divided into lots 13 and 13-A). In 1920 a certificate of indefeasible title

to lot 13, on an application dated 31st May, 1920, was issued to the plaintiff's predecessor in title. At that time section 22, Cap. 127 of the 1911 statutes, as amended by section 8 of Cap. 36 of the 1913 statutes read in part as follows:

22. (1.) Every certificate of indefeasible title issued under this Act shall, so long as same remains in force and uncancelled, be conclusive evidence at law and in equity as against His Majesty and all persons whomsoever, that the person named in such certificate is seised of an estate in fee-simple in the land therein described against the whole world, subject to—

(i.) The right of any person to show that any portion of the land is by wrong description of boundaries or parcels improperly included in such certificate;

(2.) Any certificate of indefeasible title issued under the provisions of this Act shall be void as against the title of any person adversely in actual possession of and rightly entitled to the hereditaments included in such certificate at the time of the application upon which such certificate was granted under this Act.

(3.) After the issuance of a certificate of indefeasible title no title adverse or in derogation to the title of the registered owner shall be acquired by any length of possession merely.

In 1921 the Land Registry Act was consolidated. Section 22 became section 37. Subsection (1) of section 37 and subsection (*i*) of subsection (1) and subsections (2) and (3) read as follows:

37. (1.) Every certificate of indefeasible title issued under this Act shall be received in evidence in all Courts of justice in the Province without proof of the seal or signature thereon, and, so long as it remains in force and uncancelled, shall be conclusive evidence at law and in equity, as against His Majesty and all persons whomsoever, that the person named in the certificate is seised of an estate in fee-simple in the land therein described against the whole world, subject to:—

(i.) [Same as (*i*), *supra*].

(2.) Every certificate of indefeasible title issued under this Act shall be void as against the title of any person adversely in actual possession of and rightly entitled to the land included in the certificate at the time of the application upon which the certificate was granted under this Act, and who continues in possession.

(3.) [Same as (3), *supra*].

The Land Registry Act now and in 1944 and 1945 in force is Cap. 140, R.S.B.C. 1936, and the provisions of section 37 thereof are the same as those of section 37 of the 1921 Act.

The plaintiff relied upon its certificate of indefeasible title covering, *inter alia,* lots 13 and 13-A, according to plan 584, which it obtained, on the 24th of December, 1945. It sued for possession and *mesne* profits. The defendant set up two defences.

C. A.
1946
NANAIMO ICE AND COLD STORAGE LIMITED v. BLYTH
Robertson, J.A.

The first is based upon subsection (*i*) of subsection (1) of section 37, *supra*. In support of this the defendant put in evidence the British Columbia order in council of 1924, which is set out, so far as is necessary, in the *Higbie* case; and submitted that the lands in question passed to the Dominion in 1871 by virtue of section 108 of the British North America Act, 1867. The second, based upon section 37, subsection (2), *supra*, was that he was "adversely in actual possession of and rightly entitled to the hereditaments" included in the certificates at the time of the applications upon which the certificates were granted under the Act, and continued in possession.

I think the *Higbie* case is distinguishable upon the facts. In that case there was no certificate of indefeasible title to the foreshore; and further although the Crown grant to the defendant in that case was made prior to 1871 it did not purport to grant the foreshore. In the case at Bar there is first of all the certificate of indefeasible title. Under the statutory provision, *supra*, from the date of the application for the indefeasible title the plaintiff's certificate, in evidence, is conclusive evidence at law and in equity as against Her Majesty and all persons whomsoever that the plaintiff is seized of an estate in fee simple in the land described in the certificates against the whole world, subject, in this case, to the exceptions, *supra*. Again it appears from the City of Nanaimo Official Map Act, 1895 (Cap. 64, B.C. Stats. 1895) that in 1866 there had been a survey made of the city of Nanaimo and a map or plan thereof deposited in the office of the Registrar General of Titles at Victoria, and that this map was at the time of the passage of the Act, 21st February, 1895, regarded as the official map of the city of Nanaimo. This map included lot 13, and is the official map mentioned in the deed now to be referred to. The plaintiff's Land Registry title, put in evidence, commenced with an indenture of the 9th of July, 1874, made between the Vancouver Coal Mining and Land Company Limited and one John Hirst, whereby the company granted to Hirst, *inter alia*,

> All that . . . lot of land situate in the Town of Nanaimo . . . and named lots 13 . . . on the official plan or survey of the said town. All of which land is delineated in the map drawn in the margin of these presents and is herein coloured red.

The dimensions of the lot are not shown, nor is there any scale on the map. There is a wavy line along the seaward boundary of lot 13, but there is nothing to show whether it is high or low-water mark. One of the reasons set out in the recitals for the passage of the Nanaimo Act in 1895 was that the "said official map or plan" is in such a damaged state that measurements and angles cannot be obtained from it with accuracy. Section 2 of the said Act provided:

> The said map or plan of the City of Nanaimo, after the same shall have been deposited in the hands of the Registrar-General of Titles aforesaid, shall be deemed to be the official map of the said City of Nanaimo, and shall be taken as final and conclusive evidence of the boundaries of all streets, lots, and blocks in the said City of Nanaimo, and all street, lot, and block boundaries shall thereafter be ascertained and defined in accordance with the said map or plan, . . .

Section 1 of the Act provided the map should be filed within one month from its passing. The map was filed and was given the number 584. Lot 13 as shown on this map (584) included the foreshore in question. So that it would appear that prior to 1871 the official map showed lot 13 as part of a subdivision. So that there is evidence to show that the foreshore had been dealt with long before 1871, and no assumption can be made that at that time it belonged to the Crown, nor is there any evidence to support this. In my opinion, therefore, it is not shown that the order in council in 1924 did in any way affect the title to the foreshore in question. Further, in view of section 2 of the Nanaimo Act, *supra,* can it be said that the foreshore in question is by wrong description of boundaries or parcels improperly included in such certificate?

As I have said, the plaintiff is relying upon its certificate of indefeasible title issued under Cap. 140 of the Revised Statutes of 1936. There is a difference to be noted between subsection (2) and subsection (3). Subsection (2) refers only to certificates issued "under this Act," whereas subsection (3) provides generally that after the issuance of a certificate of indefeasible title no title adversely, etc. shall be acquired by length of possession merely. This subsection was the same in the Land Registry Acts as they were in 1920, 1921 and 1936; so that no possession after the issue of the certificate of indefeasible title in 1920 can affect the title. The evidence shows that on the foreshore

C. A.
1946
NANAIMO ICE AND COLD STORAGE LIMITED v. BLYTH
Robertson, J.A.

claimed by the defendant is a building resting upon piles; that this building was put up by one Shaw in 1888 and occupied by him until 1914. During this period Shaw carried on a boat-building business until his death in 1914. Then "the business was disposed of to Mr. Anderson." Anderson occupied the building from November, 1914, until March, 1944, when it was "turned over" to the defendant, who occupied it then and is still in occupation. The occupation by the Andersons and the defendant after the date of the application for registration of the certificate of indefeasible title issued in 1920 could have no effect.

In my opinion there was not sufficient evidence to warrant a finding that Shaw was in actual, open, visible, exclusive, continuous and undisturbed possession of the land. The *onus* is on the defendant. See *McConaghy* v. *Denmark* (1880), 4 S.C.R. 609; *The Washington and Great Northern Townsite Co.* v. *Holbrook* (1924), 33 B.C. 388. Possession must be strictly proved—*Burch* v. *Towder,* [1923] 1 W.W.R. 180.

There was no evidence to show the terms under which Shaw or Anderson occupied the land. It is clear from the evidence that Shaw and Anderson as well as the defendant, paid rent, but it is not clear in respect of what land the rent was paid. Mrs. Anderson says that Shaw told her rental was payable for an approach to the property in question. This of course is hearsay. On the other hand, Miss Busby who collected the rent from Anderson for many years, says it was paid as "ground rent," that is, rent for the land in question. She however did not know what arrangement, if any, was originally made with Shaw. Accordingly, I take the view that the defendant has not satisfied the *onus.*

For these reasons I think the appeal must be dismissed.

BIRD, J.A.: I concur.

Appeal dismissed.

Solicitor for appellant: *V. G. Meakin.*
Solicitor for respondent: *F. S. Cunliffe.*

MOORE v. DEWOLF.

C. A.

1945

May 16; *July* 20; *Sept.* 10.

Claim for use and occupation—Counterclaim for continuing damages—Application to amend counterclaim to include further continuing damages—Appeal—Jurisdiction of county court to award damages after date of issuance of plaint—R.S.B.C. 1936, Cap. 58, Sec. 22; Cap. 148, Sec. 2 (7).

The appellant agreed to lease premises from the respondent, the tenancy "commencing as hereinafter specified." The agreement provided that the respondent would make certain alterations and installations as required by the city of Vancouver, at the completion of which the tenancy would commence at a rental of $80 per month. Some months later, the appellant commenced an action against the respondent in the Supreme Court for specific performance of the agreement or, in the alternative, damages, and was awarded $100 damages by WILSON, J. On May 15th, 1945, the appellant, having been in occupation of the premises since September 1st, 1944, without payment of compensation and WILSON, J. having found, *inter alia*, that there was no lease in existence, the respondent commenced action in the county court claiming for use and occupation of the premises by the appellant. The appellant filed a dispute note setting up the defence of *res judicata* and counterclaiming for continuing damages for the period since the judgment of WILSON, J. to the date of the issuance of the plaint. The respondent filed a reply to the counterclaim alleging that the counterclaim was *res judicata* having been determined finally by the judgment of WILSON, J. The appellant applied to strike out the plaint as being *res judicata* and the respondent applied to strike out the counterclaim on the same grounds. LENNOX, Co. J. held that the plaint was not *res judicata* but that the counterclaim was. The appellant appealed and the Court of Appeal found that neither claim was *res judicata* (*vide* (1945), 61 B.C. 81). The appellant applied to the county court to amend the counterclaim to include further alleged continuing damages since the plaint was issued. LENNOX, Co. J. dismissed the application. The appellant appealed.

Held, on appeal, affirming the decision of LENNOX, Co. J. (O'HALLORAN, J.A. dissenting), that the county court lacks jurisdiction to award continuing damages from the date of the issuance of the plaint down to the date of assessment. There is no provision or rule in either the County Courts Act or County Court Rules similar to rule 482 of the Supreme Court Rules. Section 77 of the County Courts Act cannot be interpreted as extending jurisdiction but only applies to "practice or procedure." Section 22 of the County Courts Act and section 2 (7) of the Laws Declaratory Act do not extend or enlarge the jurisdiction of the county court but, by the express words of each respective section, are confined to causes of action within the jurisdiction of the county court.

C. A.
1945

MOORE
v.
DEWOLF

APPEAL by defendant from the order of LENNOX, Co. J. of the 13th of April, 1945, dismissing the defendant's application for leave to amend his counterclaim. The plaintiff, who is the owner of a rooming-house premises at 433 Alexander Street in Vancouver, agreed with the defendant in writing on the 18th of August, 1943, that he would cause certain alterations and repairs to be done on said premises and the defendant was to take possession of the premises in the *interim* until the said work and labour and material were supplied, completed and furnished and duly passed by the city. The plaintiff, not having made the repairs in accordance with the terms of the agreement, the defendant on the 15th of February, 1944, brought action against the plaintiff claiming damages for breach of contract and specific performance and the plaintiff in his defence pleaded that $20 per month was due him for rent, and on April 19th, 1944, judgment was given by WILSON, J. for the defendant for $100 for breach of contract, being for non-usage of the premises for two months at the rate of $50 per month as of the 15th of February, 1944. On the 15th of May, 1944, the plaintiff brought this action for use and occupation of the said premises for eight months at $20 per month from September 1st, 1943, to April 30th, 1944. The defendant counterclaimed for continuing damages at the rate of $50 per month in accordance with the judgment of WILSON, J. for $150 up to and including the 15th of May, 1944. On the 20th of February, 1945, the plaintiff's action was dismissed. On the 24th of March, 1945, the defendant moved to amend his dispute note and counterclaim by adding thereto a claim for additional damages as from the date of the filing of the counterclaim and the dispute note to the 24th of March, 1945. On the 13th of April, 1945, this application was dismissed.

The appeal was argued at Vancouver on the 16th of May, and the 20th of July, 1945, before SLOAN, C.J.B.C., O'HALLORAN and BIRD, JJ.A.

Fleishman, for appellant: The appellant received $100 for damages for two months and we are entitled to continuing damages: see *Symonds* v. *Clark Fruit and Produce Co.* (1919),

26 B.C. 548, at p. 550; *Woods* v. *Forsyth* (1918), 25 B.C. 427. We are entitled to amend under Order VII., r. 4 of the County Court Rules.

Schultz, for respondent: The county court has no jurisdiction as the appellant is setting up a cause of action subsequent to the issuance of the plaint. As to what is a "cause of action" see *Trower & Sons Ltd* v. *Ripstein,* [1944] 4 D.L.R. 497, at p. 504; *Cooke* v. *Gill* (1873), L.R. 8 C.P. 107, at p. 116; *Read* v. *Brown* (1888), 22 Q.B.D. 128, at p. 131. As a matter of law, the Court will not allow an amendment which sets up a new cause of action which has arisen since the plaint was issued: see *Eshelby* v. *Federated European Bank, Ld.,* [1932] 1 K.B. 254, at p. 262; *The Tottenham Local Board of Health* v. *The Lea Conservancy Board* (1886), 2 T.L.R. 410; *Allison* v. *Standard Lumber Co.* (1924), 34 B.C. 257, at p. 261; *Speton* v. *Gilmour* (1904), 14 Man. L.R. 706, at p. 711; *Hargreaves* v. *Security Investment Co.* (1914), 7 W.W.R. 1, at p. 4; *Dominion of Canada Inv. & Debenture Co. Ltd.* v. *Carstens et al.* (1916), 10 W.W.R. 469. As a matter of discretion, the Court of Appeal will not interfere with the exercise of a judge's discretion unless he has proceeded upon some wrong principle: see *Royal Bank* v. *Fullerton* (1912), 17 B.C. 11; *Goddard* v. *Bainbridge Lumber Co.* (1933), 47 B.C. 390, at p. 398; *Bailey* v. *Granite Quarries* (1913), 18 B.C. 149. Section 22 of the County Courts Act does not extend the jurisdiction of the county court: see *Smith* v. *Smith,* [1925] 2 K.B. 144; *Rex* v. *Cheshire County Court Judge and United Society of Boilermakers. Ex parte Malone,* [1921] 2 K.B. 694; *De Vries* v. *Smallridge,* [1928] 1 K.B. 482. Despite section 22, it has been held that the county court has no jurisdiction other than conferred by the County Courts Act: see *Granger* v. *Brydon-Jack* (1918), 25 B.C. 531, at pp. 533-34; *Parsons Produce Co.* v. *Given* (1896), 5 B.C. 58. In absence of extending rule, damages can only be assessed down to date of issuance of writ: see *Wheeler* v. *Keeble (1914), Ld.,* [1920] 1 Ch. 57, at p. 66; *Hole* v. *Chard Union,* [1894] 1 Ch. 293, at pp. 295-6.

Fleishman, in reply, referred to *Snyder* v. *Minnedosa* (1913), 5 W.W.R. 151; *Wilson* v. *Rastall* (1792), 4 Term Rep. 753,

C. A.
1945
MOORE
v.
DEWOLF

at p. 756. It is a continuing damage: see *Garesche, Green & Co.* v. *Holladay* (1884), 1 B.C. (Pt. 2) 83, at p. 87; *Rex* v. *H.*, [1931] 2 W.W.R. 917, at p. 923; *Sharpe* v. *Wakefield* (1891), 60 L.J.M.C. 73; *Evans* v. *Bartlam*, [1937] A.C. 473, at p. 479.

Cur. adv. vult.

10th September, 1945.

SLOAN, C.J.B.C.: I agree with my brother BIRD.

O'HALLORAN, J.A.: This appeal involves the jurisdiction of a judge of a county court to grant an amendment. In his counterclaim the appellant claims continuing damages for breach of a subsisting contract up to the date of the issuance of the plaint. He was refused an amendment claiming the further continuing damages to the date of the trial. Hence this appeal.

It ought to be said at once that the following reasons are based upon the conclusion that the subject-matter of the counterclaim and of the proposed amendment form a continuing cause of action as described in *Hole* v. *Chard Union* (1893), 63 L.J. Ch. 469 and *James* v. *Joseph Evans and Co.* (1897), 66 L.J.Q.B. 742. It is true there is no provision in our County Courts Act or Rules, similar to Supreme Court Rule 482 (Order XXXVI., r. 58) which reads:

> Where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of the assessment.

But section 22 of the County Courts Act provides:

> The jurisdiction conferred on the County Courts by this Act, . . . shall in every case be concurrent with the jurisdiction of the Supreme Court in the like case, and every County Court shall, as regards all causes of action within its jurisdiction for the time being, have power to grant . . . such relief, redress, or remedy, or combination of remedies, . . . , and shall in every proceeding give effect to every ground of defence or counterclaim, equitable or legal . . . , in as full and ample a manner as might and ought to be done in the like case by the Supreme Court.

Counsel for the appellant submitted that section 22 as quoted is sufficiently embracing to include the relief in Supreme Court Rule 482, *supra,* in a case, where as here, the counterclaim and the proposed amendment thereto relate to a type of action of which the county courts have cognizance, and where as here, it is plain that the amount involved in the counterclaim plus the amount involved in the proposed amendment remains within the

jurisdictional limit of the county court. Counsel for the respondent emphasized in answer, that section 22 is limited to

causes of action within its [county court] jurisdiction for the time being.

And he submitted that limitation excluded the jurisdiction of the county court to entertain any cause of action arising after the issuance of the plaint and this lack of jurisdiction denied the right to invoke the Supreme Court powers (including r. 482) given in section 22. *Smith* v. *Smith* (1925), 94 L.J.K.B. 813 was cited in support.

The result of the objection in practice is, that if it should take two months to get down to trial after the issuance of the plaint, the plaintiff may in no way include or be awarded the intervening two months' continuing damages, but is forced to issue a new plaint and go to trial again on what is really the same dispute between the same parties involving the same continuing breach of the same subsisting contract. One would think that it was to anomalous situations of this kind that section 2 (7) of the Laws Declaratory Act, Cap. 148, R.S.B.C. 1936 was directed, and *cf.* generally *Tobin* v. *Commercial Investment Co.* (1916), 22 B.C. 481, at p. 489. That subsection empowers every Court in the Province, in the exercise of its jurisdiction, to grant effectual remedies

so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.

But it is said that the reasoning in *Smith* v. *Smith* compels the conclusion that the Laws Declaratory Act is ancillary to the County Courts Act, in the sense that it confers no additional jurisdiction upon the County Court. *Smith* v. *Smith* was a decision of Bankes and Scrutton, LL.J. sitting together as additional judges of the King's Bench Division on an appeal from the Mayor's and City of London Court. The plaintiff had obtained judgment for £40 and also a declaration that he was entitled to a pension of £240 per annum. On appeal the Court set aside the declaration because it exceeded the sum of £100 which was the limit of the inferior court's jurisdiction.

An examination of the case discloses that in reaching that conclusion, all the Court could decide, and all it did decide (see Scrutton, L.J. in particular) was, that section 89 of the Judica-

C. A.
1945
MOORE
v.
DEWOLF
O'Halloran, J.A.

ture Act, 1873 (the partial equivalent of section 22 of our County Courts Act), did not empower the inferior court to give a judgment in an amount exceeding the sum of £100 to which it was limited by section 56 of the County Courts Act, 1888. But that is not the situation here, for the subject-matter of the proposed amendment is well within the sum of $1,000, the pertinent limit of the county court's jurisdiction when added to the amount claimed up to the date of the plaint. When it is noted further that *Smith* v. *Smith* did not concern an amendment, nor relate to a continuing cause of action, the danger of extending its reasoning to the totally different facts of the case at Bar becomes more apparent.

An important distinction between *Smith* v. *Smith* and the case at Bar lies in the fact that section 89 of the Judicature Act, 1873 (upon the similarity whereof to section 22 of our County Courts Act the present applicability of *Smith* v. *Smith* is grounded), did not contain (a) that significant portion of section 2 (7) of our Laws Declaratory Act quoted above relating to the complete and final determination of all matters in controversy between the parties and the avoidance of multiplicity of legal proceedings; nor did it contain (b) the opening words of section 22, *supra,* of our County Courts Act providing that:

> The jurisdiction conferred on the County Courts by this Act, . . . shall in every case be concurrent with the jurisdiction of the Supreme Court in the like case, . . .

These preliminary words were added to section 22 after the decision in *Tait* v. *B.C. Electric Rway. Co.* (1916), 54 S.C.R. 76 (and see section 2, Cap. 19, B.C. Stats. 1918).

The word "concurrent" may have several meanings. But when directed to concurrent jurisdiction of Courts, as it is in section 22, it conveys the meaning, "joint and equal in authority; taking cognizance of, and having authority over the same subject-matters": *per* Webster's New International Dictionary; a dictionary, which it is noted was quoted authoritatively by the Judicial Committee in *Victoria City (Corporation)* v. *Vancouver (Bishop)* (1921), 90 L.J.P.C. 213, at p. 217. In my judgment the appropriate reasonable interpretation of the opening lines of section 22 is, that in all types of action in which the county court has jurisdiction, that jurisdiction is joint and equal

in authority with the Supreme Court up to the jurisdictional limit of the county court. And hence the ensuing phrase in section 22 "causes of action within its jurisdiction" does not reasonably respond to the restricted construction urged by counsel for the respondent.

The point would be more obvious perhaps if we were construing a statute which directed that the jurisdiction of the Supreme Court should be concurrent with that of the county court "in the like case." It follows therefore that if the Supreme Court has jurisdiction to give damages up to the date of assessment in a continuing cause of action (as it undoubtedly has under rule 482, quite apart from any question of its inherent jurisdiction), then the county court is given like jurisdiction within the amount of its statutory limit by section 22 of the County Courts Act. It follows then that the words "causes of action within its jurisdiction" upon which counsel for the respondent relies, relate in this case to a subject-matter which is included in and is not excluded from the jurisdiction of the county court. I find nothing in the *ratio* of *De Soysa (Lady)* v. *Stanislaus de Pless Pol* (1911), 81 L.J.P.C. 126 to conflict with the foregoing.

In *Prat* v. *Hitchcock* (1925), 36 B.C. 142 the point was taken (see p. 150) that the county court judge had no jurisdiction to make a charging order. The majority of the Court held the jurisdiction existed by virtue of section 22 of the County Courts Act, *supra,* and adopted the reasoning of McPHILLIPS, J.A. in *King* v. *Lanchick. Safety Storage and Warehousing Co.* v. *Lanchick* (1922), 31 B.C. 193, at p. 197. To my mind, the meaning the Court there gave section 22 (even when citing the section without the 1918 amendment, *supra*) does not support the construction counsel for the respondent now asks us to place upon it.

It may be in point to add that in *Smith* v. *Smith* the Court held the judgment covered two separate and different causes of action. It was said specifically that the claim for a declaration that the plaintiff was entitled to a pension of £240 per annum, was not an additional remedy or relief in respect of the claim for £40. The claim for the declaration was described as asking

C.A.
1945
MOORE
v.
DEWOLF
O'Halloran, J.A.

for something essentially different and in respect of which the cause of action was quite different from the money claim for £40 (p. 816). That the claim for the continuing damages in this case cannot be regarded in that way is made clear by what was said in *Hole* v. *Chard Union, supra*, and *James* v. *Joseph Evans and Co., supra*. In this case the proposed amendment forms part of the cause of action. Each successive daily breach after the issuance of the plaint up to the date of the trial, becomes incorporated with the breaches preceding the issuance of the plaint, and they unite to form a continuing breach of the one subsisting contract.

In the next place it was submitted that if the county court has jurisdiction in the subject-matter, the discretion of the county court judge in granting or refusing the amendment was not reviewable by this Court because section 77 of the County Courts Act provides:

> As to any matters of practice or procedure (including costs) not specifically provided for by this Act or the Rules of Court, the rules, procedure, and practice of the Supreme Court from time to time in force shall apply, so far as, in the opinion of the Judge, the same are applicable, and the exercise of the Judge's direction hereunder shall be final and without appeal.

The relevant part of this section seems to have been involved in *Bailey* v. *Granite Quarries* (1913), 18 B.C. 149, but I am unable to read it as a clear-cut decision that the appeal was incompetent under section 77 although the majority did refuse to interfere with the learned judge's discretion. In my view the section is inapplicable in this case, as I am of opinion, provision for the amendment is "specifically provided for" in section 22 of the County Courts Act. Furthermore the finality which section 77 attaches to the exercise of the learned judge's discretion necessarily refers to a discretion judicially exercised, and *cf. Rex* v. *Board of Education* (1910), 79 L.J.K.B. 595, in the Court of Appeal affirmed (*sub nom. Board of Education* v. *Rice* (1911), 80 L.J.K.B. 796).

If, as I must hold, the county court has in this case the powers of relief contained in Supreme Court Rule 482, there is room to argue that the amendment is unnecessary. But this point was not argued. However, because of the way the plead-

ings read and the manner in which the argument developed concerning the jurisdiction of the learned judge to grant the amendment, I am of the present view that the most effective way of defining the jurisdiction impugned, is to grant the amendment. That may not be so in another case.

I would allow the appeal and give the appellant leave to amend his counterclaim by including a claim in a continuing cause of action for continuing damages upon the subsisting contract up to the date of trial or assessment, but with the precautionary direction that the total amount of damages claimed for breaches before and after the date of the issuance of the plaint shall be limited, in any circumstances to the statutory jurisdictional amount of $1,000.

BIRD, J.A.: A question of some importance relating to the jurisdiction of the county court is raised for determination in this appeal.

Counsel for the appellant submits that where there is a continuing cause of action which gives rise to continuing damages, the county court has jurisdiction to assess damages sustained subsequent to the date of the issue of the plaint and down to the date of assessment.

In the pending action the appellant by his counterclaim sought to recover damages alleged to have been sustained between April 15th, 1944, and the date of the plaint, arising from the respondent's continued failure to remedy the breach of contract found, by WILSON, J. in an action between the same parties in the Supreme Court of British Columbia, to have been committed by the respondent herein.

Subsequently the appellant moved in the pending action for leave to amend the counterclaim by adding additional claims for damages arising after the date of the issue of the plaint. LENNOX, Co. J. by order made April 29th, 1945, dismissed the application in respect of all of the proposed amendments.

This appeal is taken from that order in so far as the learned judge refused the appellant's application to amend by adding a claim for continuing damages sustained, between the issue of the plaint and the date of assessment, by reason of the respondent's continued failure to perform the contract.

C. A.
1945
MOORE
v.
DEWOLF
Bird, J.A.

It is not apparent upon what grounds the learned judge below dismissed the application, since reasons were not given; but counsel for the respondent seeks to uphold the order upon three grounds:

1. That the learned judge had not jurisdiction to grant an amendment whereby DeWolf sets up a new cause of action which did not exist at the date of the issue of the plaint. 2. That if the damages claimed under the amendment constitute continuing damages arising from one cause of action, that is to say, the breach of the contract on February 15th, 1944, then the damages proposed to be claimed under the amendment have been sustained since the issue of the plaint and the county court has not jurisdiction to entertain such a claim. 3. That this Court must assume from the dismissal of the application that the learned judge below held that Order XXXVI., r. 58 (r. 482) of the Supreme Court is not made applicable to the county court by section 77 of the County Courts Act and under that section his decision is "final and without appeal."

The position taken under ground (1) above is no longer open in this action, in view of the decision of this Court hereafter mentioned, in an earlier interlocutory appeal in the pending action.

I take it to be established that, apart from express legislation, recovery of damages for breach of contract is limited to damages sustained at or prior to the date of the issue of the writ. *Jones* v. *Simes* (1890), 43 Ch.D. 607, wherein Chitty, J. said at p. 612:

> . . . Formerly the damages in a common law action were only damages down to the date of the writ, ...

In *In re Keystone Knitting Mills' Trade Mark,* [1929] 1 Ch. 92 Lord Hanworth, M.R. said (pp. 103-4):

> . . . , the cause of action in respect of which a litigant approaches the Court of justice must be complete at the time when he issues his process . . . There is no opportunity allowed for the cause of action to ripen in its course before hearing.

and *cf. Montreal Street Ry. Co.* v. *Boudreau* (1905), 36 S.C.R. 329 *per* Idington, J. at p. 345.

In the *Keystone* case Lord Hanworth went on to say (p. 104):

> If matters subsequent to the date of the commencement of the action or

proceeding are to be taken into account, it must be by virtue of some special provision or rule, such as Order XXXVI., r. 58.

That rule, which is our Supreme Court Rule 482, reads as follows:

Where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of the assessment.

The rule was invoked in *Hole* v. *Chard Union,* [1894] 1 Ch. 293, wherein Lindley, L.J. said at p. 296:

. . . In my opinion, that is a continuing cause of action within the meaning of the rule. The cause of action complained of and existing in the present case appears to be precisely the kind of mischief at which rule 58 was aimed, its object being to prevent the necessity of bringing repeated actions in respect of repeated nuisances of the same kind.

In an earlier interlocutory appeal in the pending action, to which reference was made previously, it was held by this Court that the cause of action here is a continuing cause of action. My brother, the Chief Justice, delivering the judgment of the Court, there said:

. . . The contract still subsists and any continuing breach during its life or until rescission gives rise to a claim for continuing damages:

Moore v. *DeWolf* (1945), 61 B.C. 81, at p. 85.

It follows then that recovery of damages in this action is confined to such damages as may be proved to have been suffered as at the date of the issue of the plaint, unless the jurisdiction of the county court is found to have been extended by some such provision or rule as rule 482. No such rule is found in the County Court Rules.

But it was submitted by counsel for the appellant that rule 482 is made applicable in the county court by section 77 of the County Courts Act, which reads as follows: [already set out in the judgment of O'HALLORAN, J.A.].

In my opinion rule 482 relates not only to matters of practice and procedure, but includes also matters of substantive law, that is to say, the right to recover in an action damages sustained subsequent to the date of the issue of the writ in that action.

Then is section 77 which relates specifically to "any matters of practice or procedure not specifically provided for" by the County Courts Act or Rules of Court to be taken as conferring upon the judge discretionary power to enlarge the Court's jurisdiction by granting the substantive right to recover such damages in respect of a continuing cause of action? I think not. In my

C. A.
1945
MOORE
v.
DEWOLF
Bird, J.A.

opinion the section relates only to practice and procedure in the county court. A discretionary power is thereby conferred upon "the Judge" to supplement the practice or procedure of the Court in matters not specifically provided for by the County Courts Act or Rules of Court.

To paraphrase the language of Lord Westbury, L.C. in *The Attorney-General* v. *Sillem and Others* (1864), 10 H.L. Cas. 704, at p. 721, it does not appear reasonable to suppose that the Legislature would abdicate its functions and delegate to the judge of the county court power to determine at his discretion whether or not the jurisdiction of the Court should be enlarged by granting in respect of a continuing cause of action the right to recover damages sustained subsequent to the issue of the plaint.

The further point was taken by counsel for the appellant when the Court granted a rehearing for further argument in July last, that the county court has jurisdiction to award such damages by virtue of section 22 of the County Courts Act and of the Laws Declaratory Act, R.S.B.C. 1936, Cap. 148, Sec. 7.

The governing words of each of these sections must be taken to be, in my opinion, those found in the opening lines of each section which, for all practical purposes, are identical. The former reads in part:

> . . . as regards all causes of action within its jurisdiction.

The latter:

> . . . , in the exercise of its jurisdiction in any case or matter pending before it, . . .

I am unable to draw from the language of either section anything to suggest that the existing jurisdiction of the Court is thereby enlarged or extended. Rather does it appear to me that the intent and purpose of each of the sections is confined to providing a more effective exercise of the existing jurisdiction of the Court.

This Court observed in *Prat* v. *Hitchcock* (1925), 36 B.C. 142 that section 22 of the County Courts Act was in effect the same as section 89 of the Judicature Act, 1873.

In *Smith* v. *Smith* (1925), 94 L.J.K.B. 813, a not dissimilar question of jurisdiction was under consideration. There it was submitted that the jurisdiction of the county court as defined by

section 56 of the County Courts Act, 1888 was extended under the provisions of section 89 of the Judicature Act, 1873 to give jurisdiction to entertain a claim for a declaration.

Bankes, L.J. there said (p. 814):

> . . . In my opinion the governing words [of section 89] are those which indicate that the operation of the section is directed to causes of action within the jurisdiction of the inferior Court for the time being; and that the relief which the section contemplates may be given is not relief extending the jurisdiction of the inferior Court, but relief to complete and make more effective any jurisdiction which it may otherwise have.

In *Rex* v. *Cheshire County Court Judge* (1921), 90 L.J.K.B. 772 Lord Sterndale, M.R., referred to the right which the county court has in section 89 as "ancillary," *i.e.,* the making more effective a remedy for the one cause of action.

I do not find in section 22 of the County Courts Act or subsection (7) of section 2 of the Laws Declaratory Act anything which provides for an extension of the existing jurisdiction.

Since I have reached the conclusion that the county court has not jurisdiction to entertain the claim covered by the proposed amendment, I am of opinion that the order made below was right. I would therefore dismiss the appeal with costs.

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

Solicitor for appellant: *A. H. Fleishman.*
Solicitor for respondent: *William A. Schultz.*

REX v. CAREY AND MUNROE.

C. A.
1946
Sept. 12, 26.

Criminal law—Retaining stolen goods knowing the same to have been stolen —Evidence—Proof of identity of goods found with those stolen—Criminal Code, Sec. 399.

The two accused were convicted for unlawfully retaining in their possession stolen goods knowing the same to have been stolen, to wit, two ladies' wrist watches, one man's wrist watch, one wrist-watch strap, four Parker fountain pens and one lady's Parker fountain pen, the property of one Edwards. Edwards deposed to the loss by theft from his premises in New Westminster on the night of June 9th, 1946, of two ladies' wrist watches, a watch having a leather strap, a watch bracelet

C. A.
1946

REX
v.
CAREY AND
MUNROE

as well as six fountain pens of which one was a lady's pen, the value of the watches and bracelets being $75. The value of the pens was not proved. One Herd saw the two accused on the 13th of June, 1946, near the Beacon Theatre with the articles in question and he bought the articles from them for $40. The only evidence adduced by the Crown to identify the articles as those stolen from Edwards' premises was that of Edwards himself. He swore the ladies' watches were exactly similar to those stolen from his premises and he had only two such watches, that the other articles as well as the bracelet were similar to the articles stolen, though the watch when stolen had a different bracelet thereon, and the 5 pens stolen, including the lady's pen, were very similar to those stolen, but on cross-examination he admitted he would not identify them as the articles that were stolen, only that they were similar.

Held, on appeal, reversing the decision of police magistrate Wood of Vancouver, that the Crown has failed to adduce sufficient evidence here upon which the learned magistrate could reasonably find identification of the goods proven to have been in the possession of the accused men as the stolen goods. There being no sufficient identification, it follows that there is no proof that the goods were stolen and the convictions are set aside.

Rex v. *Fitzpatrick* (1923), 32 B.C. 289 and *Rex* v. *Davis* (1940), 55 B.C. 552, applied; *Rex* v. *Pomeroy* (1936), 51 B.C. 161 and *Rex* v. *Kolberg* (1935), *ib.* 535, distinguished.

APPEAL by accused from their conviction by police magistrate H. S. Wood, Esquire, of Vancouver, on the 3rd of September, 1946, on a charge of unlawfully retaining in their possession stolen goods knowing the same to have been stolen. The facts are set out in the reasons for judgment.

The appeal was argued at Victoria on the 12th of September, 1946, before O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

Accused, in person.
Jackson, K.C., and *G. F. Gregory*, for the Crown.

Cur. adv. vult.

26th September, 1946.

O'HALLORAN, J.A.: I would allow the appeals for the reasons given by my brother BIRD.

SIDNEY SMITH, J.A.: Had the learned magistrate felt justified in drawing an inference from the evidence as a whole that the articles in question were the goods that had been stolen from

the witness Edwards, I should not have thought it proper to disturb his conclusion. But he was not prepared to do this except by calling in aid the decisions in *Rex* v. *Kolberg* (1935) and *Rex* v. *Pomeroy* (1936), 51 B.C. at pp. 535 and 161 respectively.

I think, with respect, that the special facts of these two cases do not assist him in reaching an inference of identification on the facts of the present case, and I therefore agree that the appeals should be allowed.

BIRD, J.A.: The accused men were convicted before police magistrate H. S. Wood, for that, at the city of Vancouver, between the 8th and 24th days of June, 1946, they did unlawfully retain in their possession stolen goods, knowing the same to have been stolen, to wit, two ladies' wrist watches, one man's wrist watch, one wrist-watch strap, four Parker fountain pens and one lady's Parker fountain pen, of the total value of over $25, the property of S. E. Edwards, contrary to Code section 399. They now appeal in person from their convictions upon the sole ground that there was no evidence adduced in the Court below whereby the goods found to have been in their possession on June 13th, 1946, were identified as the stolen goods.

The learned magistrate in his supplementary report furnished at the request of this Court, says

> the quantity and similarity of the articles stolen indicated that they were one and the same,

i.e., as the goods described in his evidence by the witness Edwards,

> even though the witness under cross-examination by Mr. *Hurley* stated he could not exactly do so. I was satisfied the watches and other articles were stolen from somewhere, the only question that remained was whether they were stolen from the jewellery store in New Westminster. In view of the decisions of our Court of Appeal in *Rex* v. *Kolberg* and *Rex* v. *Pomeroy*, both of which were affirmed by the Supreme Court of Canada, I took the view that I was entitled to draw the inference that they were the stolen goods.

Consequently the question presented for determination by this Court, in view of the accused's submission, is whether there was evidence from which that inference could be drawn.

One, Herd, swore that on June 13th, 1946, near the Beacon Theatre, Vancouver, B.C., the two accused had in their posses-

C. A.
1946
REX
v.
CAREY AND
MUNROE
Bird, J.A.

sion the articles in question, then contained in a paper bag. Herd then bought the articles from them for the sum of $40, which he paid to Munroe.

Edwards deposed to the loss by theft from his premises in New Westminster, B.C., on the night of June 9th, 1946, of two ladies' wrist watches, a watch having a leather strap thereon, a watch bracelet, as well as six fountain pens, of which one was a lady's pen. The retail price of the several watches was $21 each; the total value of watches and bracelets being $76. The value of the fountain pens was not proved.

The only evidence adduced by the Crown to identify the goods as articles stolen from Edwards' premises in New Westminster is found in the evidence of Edwards. He swore that the ladies' watches were exactly similar to those stolen from his premises and he had only two such watches; that the other watches, as well as the bracelet were similar to the articles stolen, though the watch, when stolen, had a different bracelet thereon; that the five pens, including the lady's pen, were very similar to those stolen.

The cross-examination was as follows:

Mr. Edwards, I take it that you could not definitely swear that any of the articles which had been put in as exhibits here belonged to you? Well, I could not identify them.

No? You know, not exactly. They are similar.

In *Rex* v. *Pomeroy* (1936), 51 B.C. 161 as well as in *Rex* v. *Kolberg* (1935), *ib.* 535, both of which decisions were affirmed in the Supreme Court of Canada (unreported), upon which the learned magistrate relied, there was direct and positive evidence of identification of the stolen goods by one witness, in addition to evidence of circumstances no less suspicious than those found in this case.

Here, however, there is no positive identification and the case falls to be determined solely on circumstantial evidence. The circumstances disclosed here, while highly suspicious, in my opinion fall short of satisfying the test laid down by Baron Alderson in *Hodge's Case* (1838), 2 Lewin, C.C. 227 that they be consistent with guilt and also inconsistent with any other rational conclusion.

I do not think that the Crown has adduced any sufficient

C. A.
1946
REX
v.
CAREY AND
MUNROE
Bird, J.A.

evidence here upon which the learned magistrate could reasonably find identification of the goods proven to have been in the possession of the accused men as the stolen goods. See *Rex* v. *Fitzpatrick* (1923), 32 B.C. 289; 40 Can. C.C. 75 and *Rex* v. *Davis* (1940), 55 B.C. 552; 75 Can. C.C. 224. There being no sufficient identification, it follows that there is no proof that the goods were stolen.

I would therefore allow the appeals and set aside the convictions.

Appeals allowed; convictions set aside.

C. C.
1946
Sept. 20, 23; Oct. 8.

IN THE MATTER OF THE LAND REGISTRY ACT AND AMENDMENTS AND IN THE MATTER OF AN APPLICATION BY H. L. COVILLE AND ANNIE T. COVILLE UNDER SECTION 105 AS AMENDED OF SAID ACT AND IN THE MATTER OF A PORTION OF DISTRICT LOT 816 AND THE WESTERLY 80 ACRES OF DISTRICT LOT 793, GROUP 1, NEW WESTMINSTER DISTRICT, PLAN 1598 AND IN THE MATTER OF AN APPEAL BY THE MUNICIPALITY OF THE DISTRICT OF WEST VANCOUVER TO THE COUNTY COURT OF THE COUNTY OF VANCOUVER.

Land Registry Act—Registration of conveyance—Allowing registration by metes and bounds — Access required — Necessary and reasonable—R.S.B.C. 1936, Cap. 140, Sec. 105, Subsec. (1) (a) and (e); B.C. Stats. 1945, Cap. 42, Sec. 4.

Application was made to the Registrar of the Land Registry office at Vancouver on behalf of H. L. Coville and Annie T. Coville to register a conveyance to them from T. P. Crowther and Dora A. S. Crowther of a parcel of acreage in West Vancouver known as lot 20 as described in the judgment of LENNOX, Co. J., save and except the westerly 176½ feet thereof, and to register a conveyance from the Crowthers to John L. Loveseth and Margaret Loveseth of the said westerly 176½ feet. No subdivision plans were submitted to the approving officer of the Municipality of West Vancouver but the applicants sought to have the registrar divide the said parcel under section 105 (1) of the Land Registry Act by accepting a metes and bounds or abbreviated description.

C. C.

1946

IN RE LAND REGISTRY ACT AND AMENDMENTS AND IN RE COVILLE

Notices of the applications under section 105 were given to the municipality and a hearing was held by the registrar at which evidence was called and counsel heard on behalf of the applicants and municipality. The registrar ruled that he had the right to split the lot by dividing the frontage and if he approved of that and ordered a conveyance, automatically the remaining portion became a lot and would be shown on the Land Registry books as such, therefore he proposed to deal only with the application of the Covilles.

Counsel for the municipality objected to acceptance of the application on the ground that the land as at present subdivided is a division of a district lot into blocks or parcels of acreage and shows no division of blocks into lots; that the subdivision plan showing said lot 20 was filed in 1908 before it was necessary to have a municipal approving officer approve of the location of roads and that the road shown on the map as fronting lot 20 was impractical to build as it ran along a river bottom, therefore there was no sufficient access by public highway and there had not been previous legal establishment of such sufficient highways as may be required to be provided under section 85 of the Land Registry Act as mentioned in section 105 (1) (*e*).

The registrar found the said lot 20 was a lot under subclause (*a*) of section 105 (1); that there was a practice in the Vancouver and other Land Registry offices of treating dedicated roads as access and where access is shown by a dedicated road drawn on a registered plan same would have to be accepted as giving sufficient access under the Land Registry Act. He also found that it made no difference to his finding whether the application was treated as coming under subclause (*a*) or (*e*) of section 105 (1). The municipality appealed to the county court as permitted by the 1945 amendment to the Land Registry Act and the appeal was argued before LENNOX, Co. J.

Held, on appeal, reversing the Registrar of the Vancouver Land Registry office that subclause (*a*) of section 105 (1) deals with a subdivision plan creating "blocks of lots" not just lots. The only subdivision plan existing in relation to the property dealt with is one showing D.L. 816 and the westerly 80 acres of D.L. 793, containing 20 parcels, of which the so-called lot 20 is one. To come within subclause (*a*) of section 105 (1) there must be a subdivision plan showing "blocks of lots" and there is no such plan.

Held, before the registrar can permit a metes and bounds or abbreviated description under subclause (*e*) of section 105 (1) it is not sufficient that there be designated roads shown on the registered subdivision plan; there must be shown necessary and reasonable access to all new parcels by the previous legal establishment of such sufficient public highways as are or may be provided by or under section 85 of the Land Registry Act. This was not done here and therefore the acceptance of the description by the registrar would be against the public interest as mentioned in subclause (*e*) of section 105 (1).

APPEAL by the Municipality of West Vancouver from the order of W. C. Brown, Registrar of the Land Registry office at

the city of Vancouver allowing registration of a conveyance to H. L. Coville and Annie T. Coville, of part of a parcel of land described as lot 20, district lot 816 and the westerly 80 acres of district lot 793, group 1, New Westminster District, under section 105, subsection (1) (*a*) and (*e*) of the Land Registry Act, R.S.B.C. 1936, Cap. 140 which are set out in the judgment of LENNOX, Co. J.

The appeal was argued at Vancouver on the 20th and 23rd of September, 1946, before LENNOX, Co. J. sitting as a Court of Appeal under subsection (2) of section 105 as amended by the Land Registry Act Amendment Act, 1945.

Sears, for appellant: The subdivision plan was filed in 1908 before it was necessary to have a municipality approve location and feasibility of roads. The registrar, in allowing registration by a metes and bounds description, has decided that access required by subclause (*e*) need only be a road allowance drawn on a registered plan, whereas appellant contends the road allowance drawn on the map must be shown to give "necessary and reasonable access by a sufficient public highway" as required by section 85 of the Act. The parcel of land sought to be registered by metes and bounds or by a division of its frontage is a portion of a block and is not a lot shown on a subdivision plan creating blocks of lots as required by subclause (*a*) of 105 (1). When the blocks of lots are created roads will have to be contoured through the area giving access to the lands beyond. The road shown on the map as fronting on lot 20 is impractical to build as it runs along a river bottom which is a 60 per cent. grade from the middle of the so-called road to lot 20. The registrar in exercising his discretion must act in the spirit of the statute otherwise the Act would not be within the statute: see Interpretation Act, R.S.B.C. 1924, Cap. 1, Sec. 23 (*b*); Stroud's Judicial Dictionary, 2nd Ed., Vol. 1, p. 541, definition of discretion.

Braidwood, for respondent: The registrar was right in holding the parcel of land was a lot fronting on a dedicated road and this is all the Act requires in order to give the registrar discretion to divide its frontage by metes and bounds. This land is in an area not yet developed by the building of roads and to prevent the respondent from dividing it by metes and

C. C.
1946

IN RE LAND REGISTRY ACT AND AMENDMENTS AND IN RE COVILLE

bounds means holding up any dealing with it until the municipal authorities decide to develop the area.

Sears, in reply: The respondent can deal with the property by submitting a subdivision plan providing for proper roads and securing approval of the municipal approving officer.

Cur. adv. vult.

8th October, 1946.

LENNOX, Co. J.: An application was made by H. L. Coville and Annie T. Coville to the Registrar of the Land Registry office at Vancouver to register a conveyance to them from T. G. Crowther and Dora A. S. Crowther of a parcel of land described as lot 20, district lot 816 and the westerly 80 acres of district lot 793, group 1, New Westminster District, plan No. 1598, except the westerly 176½ feet thereof. These district lots overlap and are referred to herein as district lot 816. The Municipality of the District of West Vancouver, having received notice of the above application according to the requirements of the Land Registry Act appeared before the said registrar and opposed the said application. After hearing counsel for both parties the registrar allowed the application as coming under section 105 (1) (*a*) of the said Act, and also under subclause (*e*) and the matter is now before the County Court of Vancouver on appeal from that decision. This appeal is provided for by Cap. 42, Sec. 4, B.C. Stats. 1945, amending section 105 of the said Land Registry Act, being Cap. 140, R.S.B.C. 1936.

It is to be noted that under that amendment the determination of the appeal by the county court shall be final and not subject to appeal, and this is (I understand) the first adjudication under the amending section.

I find in the first place that the appeal is properly before me.

Section 105 (1) of the said Land Registry Act so far as it affects the matter in dispute is as follows:

105. (1.) The Registrar, in his discretion, may accept a full metes and bounds description or abbreviated description, with or without a reference plan or an explanatory plan, in any of the following cases:—

(*a.*) When a subdivision plan creating blocks of lots has been duly registered and the new parcel is created by dividing the frontage of a lot:

(*e.*) Where the Registrar is satisfied that the new parcel is created to provide for an isolated transaction, and that the creation thereof is not a

step in a progressive subdivision, and that, owing to the previous legal establishment of such sufficient public highways as are or may be required to be provided by or under section 86, the acceptance of the description or the deposit of the plan is not against the public interest.

Subclauses (*b*), (*c*) and (*d*) do not apply.

There is nowhere in the Act a definition of what is meant when the word "lot" is used, but by custom it seems to be used indiscriminately as applying to parcels of land; for instance, a district lot which is a large parcel of land and a city lot which is a portion of a city block.

District lot 816 is over half a mile from north to south, and three-quarters of a mile from east to west.

The said district lot 816 is subdivided into 20 parcels and the registrar has found that these parcels are lots within the meaning of a lot in said section 105 (1) (*a*). I cannot agree with him.

Section 105 (1) (*a*), *supra,* deals with a subdivision plan creating "blocks of lots," not just lots, so that if the plan creating district lot 816 created all the parcels as lots it would not create blocks of lots, and if parcel 20 were a "lot" it would not be a "block of lots" created by a subdivision plan thereof; there is no such plan.

The only subdivision plan existing in relation to the property being dealt with is one showing district lot 816 containing 20 parcels. Now if district lot 816 is a lot which could be divided into parcels by dividing its frontage (which was not done in this case, such parcels into which it is divided, having no relation to any frontage of such district lot) then to come under section 105 (1) (*a*), *supra,* it must be one on a subdivision plan showing "blocks of lots."

It is argued, however, that district lot 816 is not being dealt with as a lot which is being divided in its frontage, but is a "block of lots," the 20 parcels now being called lots, and that it is one of these latter lots which is being frontally divided. On that argument it would seem that district "lot" is a misnomer and so we are again confronted with the ambiguous word "lot," so far as land registration is affected.

A subdivision of land is defined by the Land Registry Act, *supra,* Sec. 2 (2) as

C. C.
1946
IN RE LAND REGISTRY ACT AND AMENDMENTS AND IN RE COVILLE
Lennox, Co. J.

the division of land into two or more parcels, whether by plan or by metes and bounds description or otherwise.

It will be noted that the word here is "parcels," not "lots," and in section 105 (1) (*a*) the same word "parcel" appears.

It is the parcel numbered 20 on the district lot plan which is sought to be subdivided by dividing its frontage under section 105 (1) (*a*), *supra*. In order to do so, however, there must be a subdivision plan registered creating "blocks [plural] of lots" and the plan registered (the D.L. plan), it is contended by the applicant and so found by the registrar, is one creating 20 "lots," not "blocks of lots." It is the only plan.

It seems to me that the only sensible way to express what the D.L. plan shows is to say that it provides 20 parcels, each of the 20 parcels being a block which could be subdivided into lots, any one of which lots (if shown on a registered plan) could be subdivided by dividing its frontage into new parcels. But there must be a lot in one of a number of blocks of lots created by a registered subdivision plan in order to come under section 105 (1) (*a*), *supra*.

At the risk of reiteration: the only subdivision plan registered is D.L. 816 and if that shows "lots" then it is one block of lots and does not show blocks of lots, but if each parcel (20 of them) is a block which can be subdivided into lots then there are blocks of lots. But there must then be a registered plan showing blocks and lots, one of which lots so shown is to be divided by dividing its frontage; and there is no such plan.

I disallow the application as falling under section 105 (1) (*a*), *supra*.

It is then necessary to consider whether the application should be allowed as coming under section 105 (1) (*e*).

That subsection has three requirements: (1) That the application is for an isolated transaction and (2) that it does not create a step in a progressive subdivision and (3) that it is not against the public interest owing to (because of) the previous legal establishment of such sufficient public highways as are or may be provided by or under section 85 (of the Land Registry Act). If any one of these three requirements is wanting, then the application does not qualify under this subsection.

I find that it is not an isolated transaction; in fact it is agreed that there is another application awaiting the decision of this application, to register an adjoining parcel.

I do not find that the creation of this parcel would be a step in a progressive subdivision.

With regard to the third requirement it is not sufficient that there be designated roads shown on the plan; there must be shown on all subdivision plans that there is necessary and reasonable access to all new parcels, etc. (section 85 of the Act). That has not been done here and therefore it is against the public interest.

I find therefore that the application does not come within section 105 (1) (*e*).

The appeal is allowed. Costs to be spoken to.

Appeal allowed.

REX. v. WELCH AND ACKERMAN.

C. A.
1946
Mar. 26, 27.

Criminal law—Conspiracy to libel—Evidence—Accomplice—Corroboration—Charge—Warning to jury.

In the case of an appeal from a conviction on the ground that, although there was evidence that a witness was an accomplice, the trial judge did not warn the jury of the danger of convicting on his uncorroborated testimony, but it is clear to the Court of Appeal that the judge was of the opinion that there was no evidence from which he could reasonably infer that the witness was an accomplice and that there is no doubt that this conclusion was correct, the appeal should be dismissed.

On the assumption that the jury found the witness to have been an accomplice the absence of the warning does not necessarily invalidate the conviction since the Court of Appeal, if satisfied that the jury properly directed must have found the accused guilty, can under the saving provisions of section 1014, subsection 2 of the Criminal Code dismiss the appeal.

Rex v. *Nowell* (1938), 54 B.C. 165, applied.

Section 1014, subsection 2 is by no means confined to cases of misreception of evidence. It embraces a principle of general application extending also to cases of misdirection and of non-direction amounting to misdirection, where the appellate Court is satisfied from the record as a whole that on any view of the evidence, no jury properly instructed could reasonably have found any verdict other than the one which was actually found.

C. A.
1946

REX
v.
WELCH AND
ACKERMAN

APPEALS by accused from their conviction before HARPER, J. and the verdict of a jury at Vancouver on a charge of conspiring to extort money by threatening to publish a libel.

The appeals were argued at Vancouver on the 26th of March, 1946, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Bray, K.C., for appellant Welch: Welch and Pritchard with two women went to a room in the Georgia Hotel where they had indecent pictures taken. Welch with Ackerman then put up a game to extort money from Pritchard by Welch pretending he lost his wallet containing the pictures and Ackerman pretending he found it. Welch then explained the scheme to *Denis Murphy* and offered him 25 per cent. of what they could get from Pritchard and he fixed a meeting of himself and Pritchard at *Murphy's* office the next day but previously *Murphy* told the police of the meeting in his office and the police caught them there the next day (July 19th) when they were all taken to the police station. We say there was evidence on which it could be found that *Murphy* was an accomplice and it was not dealt with by the judge: see *Vigeant* v. *Regem,* [1930] S.C.R. 396. On this ground the conviction should be quashed: see also *Rex* v. *Whitehouse* (1940), 55 B.C. 420; *Rex* v. *MacDonald,* [1939] 4 D.L.R. 60. There is the inherent right to have the jury properly instructed: see *Rex* v. *Davies* (1930), 22 Cr. App. R. 33; *Rex* v. *Lewis* (1937), 26 Cr. App. R. 110; *Rex* v. *Mohamed Farid* (1945), 30 Cr. App. R. 168, at p. 174; Tremeear's Criminal Code, 5th Ed., authorities on accomplice at p. 1266; *Brunet* v. *Regem,* [1928] 3 D.L.R. 822; *Brooks* v. *Regem,* [1928] 1 D.L.R. 268; *Gouin* v. *Regem,* [1926] 3 D.L.R. 649, at p. 653; *Schmidt* v. *Regem,* [1945] S.C.R. 438, at p. 444. A more liberal construction can be given to section 1014, subsection 2 because the Court can grant a new trial. In 1923 the *onus* shifted and the Crown must show no miscarriage occurred.

Richmond, for appellant Ackerman, adopted *Bray's* argument.

Norris, K.C., for the Crown: The case of *Rex* v. *Williams* (1934), 49 B.C. 379 is a complete answer to the contention that *Murphy* was an accomplice. *Murphy* got in touch with the

police the day after he was first approached by Welch. His mind was not in the conspiracy at all. Without Pritchard's evidence they could not convict. The conspiracy was proved without *Murphy's* evidence. The defence was obsessed with the idea that *Murphy* was an accomplice, but there was no evidence to support it. There was no objection to the charge and neither defendant gave evidence: see *Rex* v. *Nowell* (1938), 54 B.C. 165; *Rex* v. *Hall (No. 1)* (1943), 81 Can. C.C. 31.

Bray, in reply, referred to *Schmidt* v. *Regem,* [1945] S.C.R. 438.

Cur. adv. vult.

27th March, 1946.

SLOAN, C.J.B.C.: I agree with my brother SIDNEY SMITH.

O'HALLORAN, J.A.: The relevant facts are contained in the judgment of my brother SIDNEY SMITH with whom I agree.

It was the function of the learned trial judge to determine as a matter of law, if there was "some evidence" to go to the jury (*cf. Rex* v. *Flett* (1943), 59 B.C. 25, at p. 35) on the point whether the solicitor who gave the information to the police, was an accomplice of the accused. It is in this sense that I understand *Rex* v. *Williams* (1934), 49 B.C. 379.

The learned judge did not charge the jury upon that question. Nor was he asked to do so by counsel for the accused. Examination of the record before us satisfies me he did not do so, because he must have decided as a matter of law, that there was no evidence to go to the jury in that respect. In my judgment he was correct in that decision and *cf. Rex* v. *Bush* (1938), 53 B.C. 252 and *Rex* v. *James* (1945), 61 B.C. 161, at p. 164.

In view of the argument addressed to the Court upon Code section 1014, subsection 2 (although I find no occasion to consider its application to this case), I think it is in point to say that section is by no means confined to cases of misreception of evidence, illustrated by *Rex* v. *Dillabough* (1944), 60 B.C. 534 applying *Rex* v. *Haddy,* [1944] K.B. 442, which was approved in *Stirland* v. *Director of Public Prosecutions,* [1944] A.C. 315, at pp. 320-1, and see also our recent decision in *Rex* v. *Logan and Inglee* [62 B.C. 357]; [1946] 1 W.W.R. 431.

C. A.
1946
REX
v.
WELCH AND ACKERMAN
O'Halloran, J.A.

Section 1014, subsection 2 embraces a principle of general application extending also to cases of misdirection and of non-direction amounting to misdirection, where the appellate Court is satisfied from the record as a whole that on any view of the evidence, no jury properly instructed could reasonably have found any verdict other than the one which was actually found; *cf. Boulianne* v. *Regem,* [1931] S.C.R. 621; *Rex* v. *Nowell* (1938), 54 B.C. 165, at p. 171; *Rex* v. *O'Leary* (1943), 59 B.C. 440 and *Rex* v. *James* (1945), 61 B.C. 161, at p. 164.

In *Schmidt* v. *Regem,* [1945] S.C.R. 438, which involved non-direction, Kerwin, J., in delivering the judgment of the Court, applied the *Stirland* case, *supra,* and said of section 1014, subsection 2 at p. 440:

> . . . the *onus* rests on the Crown to satisfy the Court that the verdict would necessarily have been the same if the charge had been correct or if no evidence had been improperly admitted.

The appeals must be dismissed.

ROBERTSON, J.A.: I agree with my brother SIDNEY SMITH in dismissing the appeals, for the reasons given by him.

SIDNEY SMITH, J.A.: The appellants were charged with conspiring to commit an indictable offence, to wit, the extortion of money from one Pritchard by threatening to publish a defamatory libel. Welch had inveigled Pritchard, a married man, into a series of compromising positions with a woman and had then taken photographs of the two of them. He had conspired with Ackerman to extort money from Pritchard by threatening to publish these photographs. Their *modus operandi* was this: Welch pretended to have lost his wallet containing the pictures and Ackerman, pretending to have found it, avowed his intention of printing and distributing the photographs in large numbers unless paid so much money by Pritchard, and by Welch who was also, of set purpose, shown compromised in some of the photographs. Various sums were mentioned, ranging from $18,000 down to $5,000. To lend colour to this plot Welch saw a solicitor, told him of the scheme and bespoke his assistance with a promise to pay him 25 per cent. of all moneys gouged from Pritchard. The solicitor professed acquiescence and arranged a meeting the next evening with Pritchard and Welch. Mean-

while he telephoned the police. They interrupted the meeting and in due course laid charges against Welch and Ackerman, both of whom came to trial before HARPER, J. and a jury at the recent Vancouver Assize, were found guilty on overwhelming evidence, and sentenced to imprisonment for four years and three years respectively. Neither of the accused gave evidence.

Upon the hearing before this Court one point only was raised on behalf of the appellants. It was pointed out to us (as the fact was) that the learned judge in his charge to the jury made no mention of the possibility of the solicitor's having been an accomplice. It was then argued that there was evidence of his complicity, that this evidence should have been placed before the jury, and that it ought to have been accompanied by the usual judicial warning, namely, that should they conclude that he was an accomplice, there would be danger in convicting the two accused men upon his evidence standing alone and uncorroborated; that the law does not preclude their doing so—indeed they are at liberty to do so—but that there is danger in basing a conviction on such uncorroborated evidence. None of this was put to the jury and the omission (so it was argued) was fatal to a valid conviction. But it is plain that the learned judge was of opinion that there was no evidence from which the jury could reasonably infer that the solicitor came within the category of an accomplice and therefore nothing in this regard to put to the jury. There can be no doubt that he was correct in this conclusion. See the decision of this Court in *Rex* v. *Williams* (1934), 49 B.C. 379, where the circumstances closely resembled those in the present case.

But it may be well to notice the further submission made by the appellants on the assumption that the jury had found the solicitor to be an accomplice. They contended that in this event the failure of the learned judge to give the warning would be an absolute bar to a valid conviction, and moreover would be an absolute bar, in Canada at least, to the application of the provisions of section 1014, subsection 2 of the Code. That this is not so, is shown by the case of *Rex* v. *Nowell* (1938), 54 B.C. 165, in which the present Chief Justice reviewed the authorities, and having found misdirection in the circumstances there men-

C. A.
1946
REX
v.
WELCH AND ACKERMAN
Sidney Smith, J.A.

tioned, and being satisfied that the jury, properly directed, must have reached the same conclusion as that actually reached in the case then under consideration, applied the saving provisions of section 1014, subsection 2 of the Criminal Code, affirmed the conviction and dismissed the appeal. And it is shown, too, by the later case of *Rex* v. *O'Leary* (1943), 59 B.C. 440, an unsuccessful Crown appeal, in which O'HALLORAN, J.A. in his consideration of the authorities, gave special attention to the application of section 1014, subsection 2 to cases where there had been misdirection in the matter of corroboration. See in particular on this topic in the Supreme Court of Canada the cases of *Boulianne* v. *Regem*, [1931] S.C.R. 621 and *Chapdelaine* v. *Regem*, [1935] S.C.R. 53, at p. 68.

The appeals must be dismissed.

BIRD, J.A.: I would dismiss the appeals for the reasons given by my brother SIDNEY SMITH, in which I concur.

Appeals dismissed.

C. A.
1946
April 9; *May* 21.

HORMIDGE v. MAGUR.

Landlord and tenant—Suite in apartment-building—Covenant for quiet enjoyment—What constitutes breach.

The tenant of a suite in an apartment-building sued the landlord for damages for breach of an implied covenant for quiet enjoyment alleging that on August 24th, 1943, the landlord slapped one of her children on the face near the entrance to her apartment and threatened to cut the tenant's throat, and on July 31st, 1945, she slapped one of the tenant's children on the back at the front steps of the tenant's apartment and threatened to wring the children's necks. The learned trial judge found in the plaintiff's favour and fined the landlord $250.

Held, on appeal, reversing the decision of BOYD, Co. J., that it was not suggested by the plaintiff that the actions of the defendant in any way affected her enjoyment of the premises in question. None of the matters complained of took place on the demised premises. To constitute a breach of a covenant for quiet enjoyment there must be some physical interference with the enjoyment of the demised premises.

APPEAL by defendant from the decision of BOYD, Co. J. of the 25th of November, 1945. The defendant is the owner and operator of an apartment-block at the corner of Blenheim Street and Sixth Avenue in Vancouver. In 1941 the defendant demised to the plaintiff a suite in said block. The plaintiff brings action for damages in that by the unlawful acts of the defendant, her servants and agents she has suffered damage to her health and has not had quiet and peaceable occupation of said premises; that the defendant, her servants and agents have interfered with the comfort and convenience of the plaintiff as follows: (a) By assaulting the plaintiff, her infant children and her guests; (b) by threatening physical violence to the plaintiff and her infant children; (c) by making noise and causing damage to the demised premises for the special purpose of annoying and interfering with the plaintiff.

The appeal was argued at Victoria on the 9th of April, 1946, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Bull, K.C., for appellant: We say the action is entirely misconceived: see Halsbury's Laws of England, 2nd Ed., Vol. 20, p. 243, par. 271; *Jenkins* v. *Jackson* (1888), 40 Ch. D. 71, at p. 73; *Hudson* v. *Cripps,* [1896] 1 Ch. 265; *Tebb* v. *Cave,* [1900] 1 Ch. 642; *Browne* v. *Flower,* [1911] 1 Ch. 219; *Phelps* v. *City of London Corporation,* [1916] 2 Ch. 255; *Robinson* v. *Kilvert* (1889), 41 Ch. D. 88, at p. 96; *Geary* v. *Clifton Co. Ltd.* (1928), 62 O.L.R. 257 at p. 261. We say that what she claims has nothing to do with quiet enjoyment of the demised premises. There is a remedy for such a claim.

Bradshaw, for respondent: The plaintiff's husband was on active service. The trouble started between the parties in 1943. There was a deliberate attempt to drive the tenants from the premises. There was a breach of the covenant for quiet enjoyment: see *Lavender* v. *Betts,* [1942] 2 All E.R. 72; Halsbury's Laws of England, 2nd Ed., Vol. 20, p. 242, par. 268; *Sanderson* v. *Mayor of Berwick on Tweed* (1884), 13 Q.B.D. 547, at p. 551; *Walton* v. *Biggs* (1912), 19 W.L.R. 895; Woodfall on

C. A.
1946
HORMIDGE
v.
MAGUR

Landlord and Tenant, 24th Ed., 632; *Spicer* v. *Martin* (1888), 14 App. Cas. 12.

Bull, in reply: There is no evidence of premeditated attempt to drive the tenants out.

Cur. adv. vult.

21st May, 1946.

SLOAN, C.J.B.C.: I agree with my brother ROBERTSON.

O'HALLORAN, J.A.: This appeal turns upon a narrow point. The plaintiff's action was formulated in the pleadings and developed at the trial as a case of damages for breach of an implied covenant for quiet enjoyment of a rented apartment. The guiding decisions make it necessary to hold that the judgment rendered cannot be supported upon that form of action.

I would allow the appeal.

ROBERTSON, J.A.: The appellant was the owner and operator of an apartment-building in Vancouver. One of the suites in the apartment-building was rented by the respondent and occupied by her and her husband and their children. The respondent sued the appellant for damages for breach of an implied covenant for quiet enjoyment. The learned trial judge found there had been a breach of the covenant and gave judgment to the respondent for $250. *Inter alia,* the respondent alleged as breaches of the covenant: (1) That the appellant slapped one of her children on the face, on the 24th of August, 1943, "near the rear entrance of her apartment"—(the apartment of the respondent); (2) On the same date "on the back porch" of the appellant's apartment "the appellant threatened to cut the respondent's throat"; (3) Shortly before the 31st of July, 1945, the appellant slapped one of the respondent's children on the back, at the front steps of the respondent's apartment; (4) On the 31st of July, 1945, while in front of the respondent's apartment, the appellant threatened to wring the necks of the respondent's children. The learned judge found these as facts.

The respondent also claimed that she had suffered damage to her health. The learned judge made no finding as to this. There is no cross-appeal.

The appellant does not challenge the finding of facts, but submits that the learned judge had misdirected himself as to the effect of a covenant for quiet enjoyment.

It is not suggested by the respondent that the actions of the appellant in any way affected her enjoyment of the premises in question. None of the matters complained of took place on the demised premises. To constitute a breach of a covenant for quiet enjoyment there must be some physical interference with the enjoyment of the demised premises.—Woodfall's Landlord and Tenant, 24th Ed., 632; *Woods* v. *Opsal,* [1918] 1 W.W.R. 985, at pp. 991-2; *Geary* v. *Clifton Co. Ltd.* (1928), 62 O.L.R. 257, at p. 261; *Browne* v. *Flower,* [1911] 1 Ch. 219, at pp. 227-8.

I think the appeal must be allowed.

SIDNEY SMITH, J.A.: I feel bound to allow this appeal, although I do so with regret.

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

Appeal allowed.

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

Solicitor for respondent: *H. E. M. Bradshaw.*

MARK WONG v. QUON YUEN HAN.

C.A.
1946
June 6, 18.

Landlord and tenant—Wartime Rentals Regulations—Action by tenant to recover back excessive rent—Whether rent illegally increased—One cannot take advantage of his own wrong.

In an action to recover back the amount of rental paid in excess of the amount which the tenant alleged the landlord could legally charge for the premises which were leased to the plaintiff on July 30th, 1941, it was held that the premises in question do not fall within the definition of housing accommodation as set out in order No. 7 of the Wartime Prices and Trade Board and the action was dismissed.

Held, on appeal, affirming the decision of MACFARLANE, J., that that part of the rented premises referred to as a "storehouse," etc., had not been

C.A.
1946

MARK WONG
v.
QUON YUEN
HAN

included in the tenancy which existed prior to the passing of the rent-freezing orders under the Wartime Rentals Regulations which were in force when the lease now in question (which the plaintiff alleged called for an illegal increase in the rent) was entered into.

Per SIDNEY SMITH, J.A.: Even if there was an attempt to evade the regulations by including in the demised premises a store-room of little consequence for the purpose of founding an excuse for increasing the rent above the basic rent fixed by the regulations, yet since the appellant was a party to the scheme, he cannot take advantage of a state of things which he produced.

APPEAL by plaintiff from the decision of MACFARLANE, J. of the 18th of February, 1946, in an action for the repayment of rental paid between the 1st of August, 1941, and the 30th of November, 1943, in excess of the amount which the plaintiff alleges the owner could properly charge for the premises described in a lease of the 30th of July, 1941.

The appeal was argued at Vancouver on the 6th of June, 1946, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

Maguire (*Harman,* with him), for appellant: The Jubilee Hotel is on lot 174 and the "storehouse" or "wood-shed" is across the lane from the hotel on lot 175. They say the plaintiff was to pay $70 if the lease included the storehouse and this would justify the increase in rent: see *Law* v. *Smith* (1944), 60 B.C. 437; *Maxine, Limited* v. *Cuillerier* (1945), 61 B.C. 345, at p. 347; *Salayka and Hains* v. *Wilby* (1944), 60 B.C. 407, at p. 427. In fact the storehouse across the lane on lot 175 was used as a wood-shed and was of little value. There was an unwarranted increase in the rental: see *Thompson* v. *Lacy* (1820), 3 B. & Ald. 283; *Browne* v. *Brandt,* [1902] 1 K.B. 696.

Higgins, K.C., for respondent, referred to Woodfall's Landlord and Tenant, 24th Ed., 198; *Cohen* v. *Sellar* (1926), 95 L.J.K.B. 629, at p. 634.

Cur. adv. vult.

18th June, 1946.

O'HALLORAN, J.A.: While several points have been argued, the appeal, as appellant's counsel conceded in opening, really turns upon a pure question of fact, *viz.,* whether that part of Victoria City lot 175 variously described as a "storehouse,"

"wood-shed," "store," "1319 Oriental Alley," etc., was included in the tenancy of the Jubilee Hotel (also described as the Jubilee Rooms) on lot 174, at $40 per month, prior to the passing of the rent-freezing orders (Wartime Prices and Trade Board regulations) which were in force when the lease of 30th July, 1941, was entered into at the rental of $70 per month.

The action (which the learned trial judge dismissed) was brought to recover the excess of $30 per month between 1st August, 1941, and 30th November, 1943, on the ground that the rental of $70 per month was a violation of the rent-freezing orders as an unwarranted increase in the rental of the premises, its services and facilities, which the tenancy comprised when the rent-freezing orders came into force.

When the negotiations for the renewal of the tenancy were concluded on 30th July, 1941, they were reduced to written form in the lease of that date which included specific mention of "the store known as 1319 Oriental Alley at the side thereof." That store is on lot 175 and is not physically connected with the Jubilee Hotel on lot 174. An eight-foot lane on lot 174 separates the buildings on that lot from the buildings on lot 175.

There was some testimony to bear out the submission of the plaintiff-appellant but it was vague and indefinite at best. The testimony to the contrary, *viz.,* that 1319 Oriental Alley had not been included in the tenancy prior to the lease of 30th July, 1941, was much more definite and specific. The learned trial judge accepted the latter testimony and gave it credence.

The learned judge also found (and there is evidence to support it) that when the respondent had refused to continue renting the Jubilee Hotel at $40 per month, the appellant offered to pay $70 per month provided the store at 1319 Oriental Alley was included in the lease. The rent-freezing orders prevented increase in rentals in existence when they came into force, but that did not apply to rentals charged upon premises constructed after they came into force, or to premises in a neglected state which had not been rented for some time prior to the orders coming into force.

Regarding the case as a whole I am unable to conclude that

C.A.
1946

MARK WONG
v.
QUON YUEN
HAN

the learned judge misconceived the evidence or misapprehended its weight.

I would dismiss the appeal.

ROBERTSON, J.A.: I concur in dismissing the appeal for the reasons given by my brother O'HALLORAN.

SIDNEY SMITH, J.A.: I agree with my brother O'HALLORAN that in view of the findings of fact of the learned trial judge this appeal cannot succeed and must be dismissed.

It may be that there was here an attempt to evade the rental regulations by professedly including in the demised premises a store-room of little consequence for the purpose of founding an excuse for increasing the rent above the basic rent fixed by the regulations. But, if so, the appellant was a party to the scheme and cannot now claim a refund of the illegitimate excess of rent paid by him, for

> [he cannot] in such case take advantage of the existence of a state of things which he himself produced,

as was said by Lord Finlay in *New Zealand Shipping Company* v. *Societe des Ateliers et Chantiers de France,* [1919] A.C. 1, at p. 6. That principle is applicable to the present case.

Appeal dismissed.

Solicitor for appellant: *J. Howard Harman.*
Solicitor for respondent: *Frank Higgins.*

S. C.
1946
May 27, 28, 29; *June* 12; *Aug.* 5.

SUTHERLAND v. SUTHERLAND.

Contracts—Delivery business—Terminable contract—Goodwill—Sale on threat to terminate contract—Undue influence—Inquiry into motive—Whether tortious act.

A. was the owner of a delivery business, the goodwill of which consisted of a contract, terminable at will, for the delivery of beer for a brewer's delivery agency of which B., A.'s brother, was the manager. A. sold his business to a company controlled by B. as a result of threats by B. to terminate the beer delivery contract unless he did so. The price paid was more than adequate for the physical assets of the business but inadequate if the beer delivery contract was of value. On the evidence

it appeared that B. had an untrammelled discretion to exercise the right of the brewers' delivery agency to terminate the contract with A. In an action by A. to set aside the sale on the ground of undue influence:—

Held, that since B. was entitled to terminate the beer delivery contract, he was entitled to threaten to terminate it, and so long as he acted as servant or agent of his principal in so doing, his motive was not open to inquiry. The evidence indicated that B.'s principal did not repudiate or complain of his actions and hence no finding could be made that in making his threats to A. he was acting for himself. In the circumstances the price paid to A. was not grossly inadequate since the goodwill had no value and the action was dismissed.

ACTION to set aside an agreement between Regent Transfer and Pacific Brewers' Agents Limited in regard to the delivery of beer as having been induced by undue influence brought to bear on the plaintiff by the defendant Thomas Sutherland. The facts are set out in the reasons for judgment. Tried by WILSON, J. at Vancouver on the 27th, 28th and 29th of May and the 12th of June, 1946.

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

Cur. adv. vult.

5th August, 1946.

WILSON, J.: The plaintiff and the defendant are brothers. The plaintiff Donald Sutherland operated in the city of Vancouver a business known as Regent Transfer. The chief source of revenue of this business and, indeed, its cause of being, was an arrangement whereby it delivered beer for Pacific Brewers' Agents Limited to consumers in the city of Vancouver and in the Fraser Valley. This arrangement was entered into in the year 1924 and subsisted until 1945, when the plaintiff sold certain of the assets of Regent Transfer to Pacific Delivery Service Ltd. Thomas Sutherland is and has been at all relevant times secretary-manager of Pacific Brewers' Agents Limited. This corporation, a creature of the companies which manufacture beer on the lower mainland of this Province, is owned by those companies and exists for the purpose of distributing and delivering the beer manufactured by the brewers and sold through the Provincial Government liquor vendors. The system allows a

S. C.
1946
SUTHERLAND
v.
SUTHERLAND
Wilson, J.

person who has been found by the Provincial Government to be a fit person to possess beer, and has been issued a permit certifying his fitness, to go to a Government liquor store and order beer to be delivered to his home. The delivery, however, is not provided for by the Provincial Government, but is supplied by the breweries, operating through Pacific Brewers' Agents Limited their chosen agents.

Thomas Sutherland, in 1924, engaged a man called Barron to do a great part of this delivery work. Subsequently, perhaps as an act of nepotism, the plaintiff Donald Sutherland, a brother of the defendant Thomas Sutherland, was introduced into Barron's business as a partner. Eventually in 1941, Donald Sutherland bought out Barron's half interest in the business for $4,500. Thereafter he was sole owner of the business, now known as Regent Transfer, until 1943, when he sold to his son, the plaintiff Gerald Sutherland, a one-third interest in the business for $2,300. In 1944 he sold his son a further one-third interest for $4,000.

The nature of the agreement between Regent Transfer and Pacific Brewers' Agents Limited in regard to the delivery of beer is of great importance, and, in my opinion, which differs from that of counsel for the plaintiff, the arrangement could have been terminated by either party overnight. So long as Pacific Brewers' Agents Limited chose to employ Regent Transfer Regent Transfer was to be paid stipulated amounts, which were varied from time to time, for the delivery of beer. But this arrangement, as is shown by a letter written by Pacific Brewers' Agents Limited to Regent Transfer on February 20th, 1942 (Exhibit 2), was subject to arbitrary cancellation; and in the event of its cancellation, the only redress open to Regent Transfer was to call upon Pacific Brewers' Agents Limited to carry out its agreement, set out in the said letter, to buy the equipment of Regent Transfer at an independent valuation.

On September 17th, 1945, Regent Transfer, G. A. Sutherland and Donald Sutherland joined in selling to Pacific Delivery Service Ltd. the following property for a consideration of $12,000:

All of the eight (8) trucks owned by the grantors, a schedule whereof is annexed hereto, and the accessories thereto and all licences relating thereto.

Together with the goodwill of the said business known as Regent Transfer in so far as it relates to the delivery of beer and the purchase and resale of bottles in and about Vancouver and adjacent municipalities and cities, and the tenancy of the garage situate at rear 238 E. Hastings St., Vancouver, B.C., presently used by the grantors at the said address, subject to the consent of the landlord, and of the B.C. Telephone Co. Ltd. respectively, which said consent the purchaser takes full responsibility for obtaining; it being clearly understood and agreed that the title to all other assets of the said business, including the name of the said business, shall remain in and belong to the grantors.

Pacific Delivery Service Limited is a private company the control of which is vested in the defendant, Thomas Sutherland.

The present action is to set aside this transaction as having been induced by undue influence brought to bear on the plaintiff by the defendant Thomas Sutherland. The main allegation of undue influence as set out in paragraph 7 of the statement of claim is as follows:

The consent of the plaintiffs to the execution and delivery of the said agreement referred to in paragraph 4 hereof and of the said bill of sale referred to in paragraph 5 hereof, and to the taking of possession of the said assets and goodwill, as aforesaid, was obtained by the said defendant Pacific Delivery Service Limited by the undue influence exercised on the said plaintiffs by the defendant Thomas Sutherland and the plaintiffs were induced to enter into the said agreement, and the said bill of sale, by the said undue influence.

Particulars of the undue influence alleged are as follows:

The Pacific Brewers' Agents Limited is owned and controlled by various breweries carrying on business on the lower mainland of British Columbia and amongst other things has the complete charge of arranging and making provision for the deliveries of beer from the brewer to the vendors and customers thereof, and the defendant Thomas Sutherland, as secretary or manager thereof had, or held himself out to have the authority to determine who should from time to time make such deliveries. The plaintiff Donald Sutherland, carrying on a transfer business under the name of Regent Transfer held and enjoyed the right to make all deliveries on the lower mainland of British Columbia, except to residential districts in the east end of the city of Vancouver, for a period of twenty years prior to the 17th day of September, 1945, and during that time built up a large and profitable business. In the Spring of 1945 at a time when the plaintiff Donald Sutherland was recovering from a serious illness, to the knowledge of the defendant Thomas Sutherland, the said Thomas Sutherland demanded that the plaintiff Donald Sutherland should transfer to him a one-half interest in the business of Regent Transfer for the sum of Six Thousand ($6,000) dollars, and that the plaintiff Gerald Asquith Sutherland be eliminated from the partnership. The said business was then earning $19,000 per year after providing a salary of $4,000 per year to the plaintiff Donald Sutherland, and a salary of $2,400 per year to the plaintiff Gerald Asquith Sutherland. The said

S. C.
1946
SUTHERLAND
v.
SUTHERLAND
Wilson, J.

Thomas Sutherland stated, or alternatively inferred, that if he was not taken into the business upon such terms the Regent Transfer would lose the said right to make deliveries for the Pacific Brewers' Agents Limited. Upon the plaintiff Donald Sutherland refusing to comply with such demand, the said defendant Thomas Sutherland then demanded that the plaintiffs sell the whole of the business of Regent Transfer to him by means of a sale of the assets and goodwill of the plaintiffs' partnership. Upon the plaintiffs refusing to comply with such demand the said defendant Thomas Sutherland, through an agent, represented to the plaintiffs that if the plaintiffs persisted in such refusal they would lose their said right to make deliveries for Pacific Brewers' Agents Limited. The plaintiffs, in the belief that the defendant Thomas Sutherland by reason of his position with Pacific Brewers' Agents Limited could and would carry out such threat and at a time when the plaintiff Donald Sutherland was in a very poor state of health, and, without any legal advice, finally consented to the sale of such assets and goodwill for an inadequate consideration, which is set out in the agreement referred to in paragraph 4 of this statement of claim.

The defence pleaded to this allegation is, first, a denial that Thomas Sutherland or his agent, whose name, as disclosed on the trial, is Russell, made such threats as are alleged, and secondly, a plea that the statement of claim is bad in law and discloses no cause of action. In support of this latter defence evidence was led to attempt to prove that the plaintiffs had, during the period immediately prior to the sale in question, carried on their business of delivering beer so negligently and incapably that Thomas Sutherland as manager of Pacific Brewers' Agents Limited was bound, in conscience, to determine their employment; and that the alleged threats must be related to this condition; that he did not threaten them as a means of securing to himself ownership of the assets sold him, but did represent to them that they must, by reason of their inefficiency, lose their employment and that, such being the case, they would be well advised to sell to him for the price he offered, said price being, as he says, a generous one if it was meant to cover only the physical assets transferred, that is, the trucks.

It is further contended that even if the plaintiffs made the sale under pressure of the sort alleged they were not damnified because the consideration paid them was more than adequate to the value of the assets sold.

Regent Transfer had other assets than those conveyed to Pacific Delivery Service Limited by the bill of sale of October 3rd, 1945, but those assets were offset by a liability for excess

profits tax, so that the sale may be said to have covered the net assets of the firm. Its business connection, apart from the arrangement for the delivery of beer, was negligible.

Extraneous to the main issue, certain evidence was adduced to show that Thomas Sutherland had, during the currency of the arrangement between Pacific Brewers' Agents Limited and Regent Transfer, extracted from Regent Transfer certain gratuities in the nature of tribute for the continuance of the beer delivery arrangement. Parts of these alleged exactions were repaid to the plaintiffs at the time of the sale to Pacific Delivery Service Limited. Despite the denials of Thomas Sutherland, I have no doubt that this was the case, and that these levies were made and would never have been repaid save as part of the consideration for the sale (additional to the $12,000).

Coming now to the main allegation, I must again say that I feel that the plaintiff Donald Sutherland made this sale to Pacific Delivery Service Limited against his will and entirely because of threats made by Thomas Sutherland and Thomas Sutherland's agent, Archie Russell. These threats were to the effect that if he did not sell to Thomas Sutherland, or his nominee Pacific Delivery Service Limited, he would lose his beer delivery contract with Pacific Brewers' Agents Limited.

In October, 1945, when the sale was completed, Gerald Sutherland, Donald Sutherland's son, was nominal owner of a two-thirds interest in the business of Regent Transfer. No influence, proper or undue, was applied to Gerald Sutherland to induce him to sell his interest to Thomas Sutherland. He acted in the final negotiations for his father and for himself and actually concluded the transaction of sale. But, prior to this time he had, at the insistence of Thomas Sutherland, retired from any active interest in the business, and I find that he was acting only on the instructions of his father in concluding the sale. This being the case, I feel that if undue influence was applied to Donald Sutherland the transaction would be vitiated, despite the fact that Gerald Sutherland nominally owned two-thirds of the business and signed the actual deeds of transfer.

It has been shown that at the time of the sale Regent Transfer was, by virtue of its beer delivery contract, an extremely

S. C.
1946
SUTHERLAND
v.
SUTHERLAND
Wilson, J.

profitable concern. It had only become so in recent years, and there may be some significance in the fact that Thomas Sutherland's interest in the acquisition of this business coincided in time with the new prosperity of the firm. Without going into figures, it may be said that, granted the continuance of the beer delivery contract, the consideration paid was, on the basis of recent earnings, entirely inadequate. On the other hand, if the beer delivery contract is to be regarded as an evanescent thing, having no value because of its liability to summary cancellation, then the price was, in relation to the physical assets transferred, more than adequate.

This latter statement requires this qualification,—the trucks had a value under ceiling prices fixed by the Wartime Prices and Trade Board substantially less than the amount paid. But it is somewhat doubtful whether, under the conditions of shortage prevailing at the time of sale, Thomas Sutherland could have bought a sufficient equipment of trucks at the ceiling price from any other source. That is, if he had, with the intention of taking over the delivery service himself, cancelled the contract without buying the Regent Transfer trucks, he might have found himself confronted with a situation where he could not secure equipment, since sellers of trucks at ceiling or any prices were hard to find.

It has been argued that the plaintiffs are better off than they would have been if Pacific Brewers' Agents Limited had cancelled the contract and then carried out its promise stated in its letter of February 20th, 1942, to buy the trucks at an independent valuation, which must necessarily, under prevailing conditions, have meant ceiling prices. This is true. If Pacific Brewers' Agents Limited had said to the plaintiffs that they proposed to cancel the contract and made good its offer to buy the trucks at a fair valuation, there could be no cause of action against Pacific Brewers' Agents Limited. And it should be added that in such an event an inquiry into the motives of Pacific Brewers' Agents Limited in proposing, or threatening, to cancel the contract would not be permissible. Their right to determine the arrangement for the delivery of beer was an absolute one, not dependent on the satisfactoriness of Regent Transfer's delivery service. They might properly have withdrawn from it

without alleging any reason, and the fact that such a withdrawal might be based on considerations entirely separate from any dissatisfaction with the service would not affect the validity of their conclusion of the agreement. It would be perfectly proper for them to conclude it because they thought they could make a profit out of doing so.

The plaintiff does not contest this proposition but argues that the same considerations do not apply to Thomas Sutherland, because he was an agent, not a principal, and because he was actuated by an improper motive, not a desire to assist his employer, Pacific Brewers' Agents Limited by improving the service or saving them money, but a desire to enrich himself by acquiring a profitable business. This may very well be true, but I first have to decide whether or not I have any right to inquire into the motives of Thomas Sutherland in acting as he did.

A line of cases, generally based on *Allen* v. *Flood,* [1898] A.C. 1 are authority for this proposition, which I cite from the judgment of Lord Watson at p. 98:

> . . . According to my opinion, coercion, whatever be its nature, must, in order to infer the legal liability of the person who employs it, be intrinsically and irrespectively of its motive a wrongful act.

Hardie and Lane, Ld. v. *Chilton,* [1928] 2 K.B. 306 is a case following logically along the line laid down in *Allen* v. *Flood.* I quote the head-note:

> A trade association, which by its constitution is entitled to put on a stop list the name of a person who has infringed its rule forbidding the sale of articles at other than fixed prices, may, instead of doing this, lawfully adopt the more lenient course of asking the person to make, and for it to accept, a money payment by way of compromise. Money so paid to the association is not paid under duress and cannot therefore be recovered back. *Rex* v. *Denyer,* [1926] 2 K.B. 258 disapproved.

I further refer to the judgment of Scrutton, L.J. at p. 314:

> I adopt the language of Holmes, J. in *Vegelahn* v. *Guntner* (1896), 167 Mass. 92, that the unlawfulness of "threats" depends on what you threaten, and of "compulsion" on how you compel. Atkin, L.J. expresses the same point in *Ware and De Freville's* case [1921] 3 K.B. 40, 81, where he says: "What is meant by coercion? If it means no more than procuring a person to do what he does not want to do, it covers many cases where no cause of action can be suggested to exist. The use of parental rights, the use of rights of property, the deprivation of social advantages, may be so applied as to make it plain to the person affected that he must yield or be ruined. A necessary servant or agent may compel advantages to himself or herself

S. C.
1946
SUTHERLAND v. SUTHERLAND
Wilson, J.

by offering as an alternative the withdrawal of his or her services; and in the same way may compel disadvantageous treatment of third parties. I conceive that the logical mind of Cave, J. on his view of the law was working on lines of necessity in accepting the view that if the cook says to the master: "Discharge the butler or I leave you," and the butler is consequently discharged, the cook is liable to an action. Yet the decision in *Allen* v. *Flood,* [1898] A.C. 1 repudiates this view. In my opinion the wrongfulness of the inducement applied to the third person cannot depend upon its weight. Coercion therefore cannot simply mean successful or even inevitably successful inducement. I am satisfied myself that it means nothing at all on a question of tort except in reference to the means employed." There is also an excellent passage in the judgment of Peterson, J. in *Hodges* v. *Webb,* [1920] 2 Ch. 70, 87-90 to the same effect."

From *Ware and De Freville Ld.* v. *Motor Trade Association,* [1921] 3 K.B. 40, at p. 90 I quote these words of Atkin, L.J.:

. . . It appears to me to be beyond dispute that the effect of the two decisions in *Allen* v. *Flood,* [1898] A.C. 1 and *Quinn* v. *Leathem,* [1901] A.C. 495 is this: that on the one hand a lawful act done by one does not become unlawful if done with an intent to injure another.

If this is correct I would say that, *a fortiori,* such a lawful act does not become unlawful if done with the intent to profit the doer of the act, rather than to injure another and indeed the decision in *Hardie and Lane, Ld.* v. *Chilton,* [1928] 2 K.B. 306, supports this conclusion.

As an illustration of the different rule that prevails where the threat is one to do an unlawful act, I might cite *Maskell* v. *Horner,* [1915] 3 K.B. 106. There it was held that levies collected by the owner of a market from a merchant under threat of seizure, or under actual seizure, are recoverable by the merchant if it is shown that the owner of the market had no right to make the levies or the seizure. In that case, since the act threatened, seizure, was illegal, the threat was illegal, and the money was paid under coercion and could be recovered. A comparison of that case with *Hardie and Lane, Ld.* v. *Chilton* already cited shows where the line is to be drawn.

Pacific Brewers' Agents Limited had an undoubted right, irrespective of motive, to cancel Regent Transfer's contract and, since they had such a right, they had, flowing from it, a right to threaten to cancel the contract. I quote Lord Dunedin, in *Sorrell* v. *Smith,* [1925] A.C. 700, at p. 730:

. . . a threat is a pre-intimation of proposed action of some sort. That action must be either *per se* a legal action or an illegal, *i.e.,* a tortious action. If the threat used to effect some purpose is of the first kind, it

gives no ground for legal proceeding; if of the second, it falls within the description of illegal means, and the right to sue of the person injured is established.

Granted that Pacific Brewers' Agents Limited could legally make this threat, what is the position when the threat is made by Thomas Sutherland? As shown by the evidence of Robert Fiddes, president of Pacific Brewers' Agents Limited, it was Thomas Sutherland's duty to see that proper delivery service was maintained. Pacific Brewers' Agents Limited was not, he says, satisfied with the service. He also says:

I never took much interest in the business. I was leaving it to Mr. Sutherland.

Again when asked:

Did you take any steps to terminate it? [the arrangement for beer delivery]

he said:

That was left to Mr. Sutherland.

It would therefore appear that Mr. Sutherland had an untrammelled discretion to exercise the right of Pacific Brewers' Agents Limited to cancel the beer delivery contract, and had therefore the same right as Pacific Brewers' Agents Limited to threaten to cancel the contract. This right, of course, could only be exercised by him as the servant or agent of Pacific Brewers' Agents Limited. But so long as he exercised it as their servant or agent, an inquiry into his motives for exercising it is not open to me.

Finally, can it be held that the circumstances here show that he was not acting as agent for Pacific Brewers' Agents Limited in making the threat complained of, but was acting for himself, using his authority from Pacific Brewers' Agents Limited as a mask? The fact that the result of the threats was to gain him a profitable business supports this view, but again, I am faced with these facts: Robert Fiddes, the president of Pacific Brewers' Agents Limited says that the delivery service was unsatisfactory. He also says that the decision as to cancellation was left to the judgment of Thomas Sutherland. And finally, Pacific Brewers' Agents Limited had an absolute right to cancel, irrespective of whether or not the service was adequate, and hence a right to threaten to cancel. Pacific Brewers' Agents Limited, Thomas Sutherland's principal, has not repudiated or complained of his

S. C.
1946
SUTHERLAND v. SUTHERLAND
Wilson, J.

actions. I do not see how I can, under the circumstances, hold that Thomas Sutherland was not acting as the agent of Pacific Brewers' Agents Limited in threatening to cancel. And, if he has this right to threaten to cancel, I cannot see how Donald Sutherland was injured, because there was coupled with the threat an offer to buy at a more advantageous price than could be obtained from Pacific Brewers' Agents Limited.

Having made this threat, Thomas Sutherland proceeded to take advantage of it by buying Donald Sutherland's equipment. Pacific Brewers' Agents Limited apparently agreed to this since they have allowed him to carry on the business of beer delivery without protest.

The price paid was adequate for the equipment. The only other asset conveyed by the bill of sale was the goodwill of Regent Transfer in so far as it related to the delivery of beer. I cannot feel that this asset had, under the circumstances already related, any value. Therefore the price cannot be held to be grossly inadequate.

In addition to the point I have dealt with, plaintiff's counsel urged on me certain further arguments. I shall deal with these briefly. In the first place I do not think that the relationship of brotherhood between two adult business men is such as to enable me to hold that one of them could unduly influence the other solely because of that relationship. I do not think Donald Sutherland's health was such as to prevent his exercising his will or forming a free judgment. It has also been argued that he had no legal advice. This is true, in the sense that he did not lay before a solicitor the facts as to the compulsion applied to him. I see no reason why he could not have done so if he wanted to, and further, it is dubious whether, if he had done so, the result would have been different. The solicitor might well have advised the plaintiff that he need not sell the business to Thomas Sutherland, but in that event the plaintiff would still be faced with the probable cancellation of his contract and might well have elected to proceed with the sale despite his solicitor's advice.

I have kept in mind the pronouncement of Lindley, L.J. in *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, at p. 183, cited in Pollock on Contracts, 11th Ed., 493:

As no Court has ever attempted to define fraud so no Court has ever attempted to define undue influence, which includes one of its many varieties. Therefore my failure to find that this case could be brought within one of the more usual categories of undue influence, *i.e.*, fiduciary relationships, catching bargains, and the like, has not affected my judgment here. But, despite my finding in favour of the plaintiff on the main facts in controversy, I am still, reluctantly I may say, impelled to the conclusion that they have no cause of action.

The action is dismissed with costs.

Action dismissed.

IN RE ESTATE OF WALTER C. NICHOL, DECEASED. THE ROYAL TRUST COMPANY v. Q. J. M. NICHOL, *ET AL.*

S. C.
1946
Sept. 20;
Oct. 3.

Will—Interpretation — Executor and trustee — Residuary estate—Vested interests subject to charges.

The testator devised his estate to The Royal Trust Company as executor and trustee first upon trust to sell and convert, etc., then to hold the residuary estate upon trust first to apply the income thereof in payment to his sister during her life the annual sum of $2,400 and subject thereto to pay one equal third part of said income to his wife during her life; to pay one other equal third part of said income during the life of the wife and after her death one equal half part of such income to his son for life and to pay the remaining third part of said income to his daughter in the same manner as to his son. The son died in 1941 leaving one son only who reached 21 years of age on January 7th, 1945, and the testator's sister had previously died. On originating summons for interpretation of the will, it was held that since the death of the testator's son, the income of the residuary estate should be first charged with payment of the two annuities, one in favour of the widow, the other in favour of the daughter, each amounting to one-third of the total income, and the remaining one-third of the income to be divided in equal shares among the grandson for whom one moiety is held in trust and the children of the daughter of deceased for whom the other moiety is held in trust. In answer to questions submitted for decision it was

Held, (1) That the grandson was entitled, after reaching the age of 21 years, to one-sixth of the income of the residuary estate; (2) that the grandson

S. C.
1946

IN RE ESTATE OF WALTER C. NICHOL, DECEASED.

THE ROYAL TRUST COMPANY v. Q. J. M. NICHOL ET AL.

on attaining the age of 21 years became entitled to a vested interest in one equal moiety of the residuary estate, but not a vested interest in possession; (3) the moiety of the grandson and the income therefrom is subject to the charge of one-half of the income payable to the life tenants or annuitants from time to time to continue to be so charged until the death of the last surviving annuitant; (4) the accumulated income during the period between the death of the son and when the grandson attained the age of 21 years is divisible among the grandchildren as follows: to the grandson John L. Nichol a one-half portion thereof and to the children of the daughter of the deceased a one-half portion thereof.

ORIGINATING summons for answers to certain questions relating to the will of Walter Cameron Nichol, deceased. The facts are set out in the reasons for judgment. Heard by COADY, J. at Vancouver on the 20th of September, 1946.

Lundell, for plaintiff The Royal Trust Co.
Locke, K.C., for defendant J. L. Nichol.
Manzer, for other defendants.

Cur. adv. vult.

3rd October, 1946.

COADY, J.: This is an originating summons in which answers are required to certain questions relating to the will of Walter Cameron Nichol, deceased. The will is dated the 31st day of December, 1923. The testator devised his estate to The Royal Trust Company as the executor and trustee first upon trust to sell and convert, etc., then to hold the residuary estate upon trust as follows:

In the first place to apply the income thereof in payment to my sister HELEN WARD NICHOL during her life of the clear annual sum of $2,400 by equal monthly payments of $200 each, and subject thereto as follows:

(a) To pay one equal third part of the said income to my wife Quita Josephine March Nichol during her life etc.

(b) To pay one other equal third part of the said income during the life of my said wife and after her death one equal half part of such income to my son John Moore Nichol during his life etc.;

(c) To pay the remaining equal third part of the said income during the life of my said wife and after her decease the other equal half part of such income to my daughter Maraquita Frances Cynthia Nichol during her life etc.

The will then provides in paragraph 3 as follows:

Subject to the aforesaid trusts as to the income of my residuary estate or such of them as shall for the time being be subsisting, I direct my Trustees to stand possessed of my residuary estate,—

(a) as to one equal moiety or half part thereof

(i) upon trust as to both capital and income for all the children or any child of my said son who being male shall attain the age of twenty-one years or being female shall attain such age or marry under that age and if more than one in equal shares as tenants in common.

(ii) If there shall be no child of my said son who under the trust last hereinbefore contained shall attain a vested interest in such moiety then such moiety of my residuary estate and the income thereof and any accumulations of income or so much thereof as shall not have been applied under any of the trusts or powers in this my will contained or implied shall be held etc.

(Here follows the creation of other trusts by the testator.)

This latter, however, has significance on this application only in so far as reference is made therein to a vested interest. The same paragraph 3 contains a similar provision as to the other equal moiety or half part of the residuary estate which is directed to be held upon trust for the child or children of the deceased's daughter hereinbefore referred to.

Sub-paragraphs (c) and (d) of paragraph 4 of the will reads as follows:

(c) During the minority or minority and spinsterhood as the case may be of any grandchild of mine to apply the whole or such part as my trustees shall think fit of the income available for such purpose of the expectant share of such grandchild for or towards his or her maintenance or education with power to pay the same to the guardian or guardians of such grandchild for the purpose aforesaid without seeing to the application thereof and I direct that the surplus income (if any) shall be accumulated at compound interest and such accumulations shall be added to the original share and devolve therewith but shall always be liable to be applied for the purposes aforesaid as if the same were income arising in the then current year.

(d) To raise any part or parts not exceeding one fourth of the presumptive or vested capital of any grandchild of mine under this my will and apply the same for his or her benefit or advantage but during the existence or contingency of any prior life interest or interests only with the consent in writing of the person or persons entitled to such interest or interests.

These are the only portions of the will to which specific reference need be made.

The son, John Moore Nichol, died on the 29th of January, 1941, leaving one child, John Lang Nichol who attained the age of 21 years on the 7th of January, 1945. The sister to whom an annuity of $2,400 was payable is also dead. The remaining life annuitants are the widow of the deceased and the daughter. The questions submitted for decision are:

1. John Moore Nichol (hereinafter called "the son") son of Walter

S. C.

1946

IN RE ESTATE OF WALTER C. NICHOL, DECEASED.

THE ROYAL TRUST COMPANY v. Q. J. M. NICHOL ET AL.

Coady, J.

Cameron Nichol (hereinafter called "the testator") having had one child only, namely John Lang Nichol (hereinafter called "the grandson") who attained the age of 21 years on the 7th day of January, 1945, whether or not the grandson from and after that date has been entitled to receive any, and if so, what, share of the income of the "residuary estate" of the testator in his will described as "MY RESIDUARY ESTATE"?

2. Whether or not the grandson on attaining the age of 21 years as aforesaid became entitled to a vested interest in one equal moiety or half part of the said residuary estate of the testator?

3. In case the answer to the last question is in the affirmative, to what charges, if any, is such moiety and/or the income from such moiety subject?

4. The trustees having, during the period between the death of the son and the date when the grandson attained 21 years as aforesaid, accumulated the income which under clause 2 (b) of the will would have passed to the son, if living during the said period, who, and, if more than one, in what shares or proportions, is entitled thereto and when should the same be paid to such person or persons so entitled?

Counsel for the grandson John Lang Nichol submits as I understand that as the testator provided in his will that his son and daughter should share equally in the income of the residuary estate, and as he created a trust as to one equal moiety of the residuary estate both as to capital and income for the children of the testator's son, John Moore Nichol, and another similar trust as to one equal moiety for the children of the daughter of the deceased, though the said trusts were made subject to the primary trusts as to the payment of the income of the residuary estate, the paramount intention of the testator was that each family should receive equal benefits under the will. But he submits that if the income from the one-half share of the residuary estate to which the grandson is entitled under the trust aforesaid is to bear the burden of the payment of any part of the income of the residuary estate payable to the daughter, then the two families are not sharing equally. To support the submission importance is attached to the provisions of the will relating to vesting above referred to. If this submission is given effect to, then the moiety held in trust for the children of the daughter would bear the burden of paying that portion of the income of the residuary estate payable to their mother and in addition would be charged with one-half of the one-third share of the whole income payable to the widow under the will, and consequently the grandson becomes entitled to one-half of the whole income of the residuary estate, less one half of the one-

third share of the whole income payable to the widow. To hold otherwise would be, counsel submits, contrary to the paramount intention of the testator.

I cannot agree with this submission. It seems clear to me that the testator specifically charged the payment of these annuities or such of them as are subsisting from time to time against the whole income of his residuary estate, without intending that the payment of any annuity should fall upon the income arising from any particular part of the residuary estate. This, it seems to me, is the clearly expressed intention of the testator, and I cannot read into it any other intention.

Since the death of John Moore Nichol therefore, the total income of the residuary estate should be first charged with the payment of the two annuities, one in favour of the widow, the other in favour of the daughter, each amounting to one-third of the total income, and the remaining one-third of the income is divisible in equal shares between the grandson John Lang Nichol for whom one moiety is held in trust, and the children of the daughter of the deceased for whom the other moiety is held in trust. This would seem to be so, notwithstanding the vesting of any part of the residuary estate. While this interpretation of the will, it may be contended, gives to the daughter of the deceased and her children considered as a family, a greater share of the income of the estate than the grandson, although entitled to a vested interest in a moiety of the estate, yet it seems to me that is what the testator intended. There is nothing in the will that I can discover to show a general or paramount intention in conflict with this specially expressed intention. The *cy pres* doctrine which I am asked to apply has therefore no application.

It is agreed that the grandson on reaching the age of 21 years was entitled to a vested interest but it is not an interest in possession—it is subject to a prior trust, and until the death of the last annuitant the whole income must be chargeable with the payment of the annuity, and therefore any remaining income is divisible between the parties entitled to the moieties.

Question 1 will therefore be answered as follows: The grandson, John Lang Nichol was entitled to receive after he reached

S. C.
1946

IN RE ESTATE OF WALTER C. NICHOL, DECEASED.

THE ROYAL TRUST COMPANY v. Q. J. M. NICHOL ET AL.

Coady, J.

the age of 21 years one-sixth of the income of the residuary estate of the testator.

The answer to question 2 is that the grandson on attaining the age of 21 years became entitled to a vested interest in one equal moiety or one half part of the residuary estate of the testator, but this is not a vested interest in possession.

The answer to question 3 is as follows: The moiety to which the grandson John Lang Nichol is entitled and the income therefrom is subject to the charge of one-half of the income payable to the life tenants or annuitants from time to time to continue to be so charged until the death of the last surviving annuitant.

The answer to question 4 is as follows: The accumulated income referred to here is divisible among the grandchildren in the following proportions: To John Lang Nichol a one-half portion thereof, and to the children of the daughter of the deceased a one-half portion thereof. John Lang Nichol is entitled to be paid his share now. The share of the children of the daughter of the deceased is held by the trustees with liberty to make such advances to the said children as are authorized under paragraph 4 (c) of the will.

Costs of all parties will be paid out of the estate.

Order accordingly.

C. A.
1946
Sept. 23, 24; *Oct.* 22.

MORROW v. GREEN AND GREEN.

Landlord and tenant—Order 294 Wartime Prices and Trade Board—Rental regulations—"Housing accommodation"—"Multiple-family building"—"Single-family house."

In September, 1940, the then owners demised the premises in question to the appellants for use and occupation as a dwelling and rooming-house. The respondent purchased the property in 1944. The appellants lived in the premises and let out a number of the rooms to lodgers. On February 12th, 1945, the respondent gave the appellants notice to vacate pursuant to section 15B of order 294 of the Wartime Prices and Trade Board. The appellants say they rented the house as a private dwelling-house intending to use it for themselves. They made no structural alterations, no partitions were put in. The appellants shared one of

the bathrooms with a lodger. There were five doors; they called one of these the front door. The appellants did not put in any of these doors. One door entered directly into the dining-room; another into a billiard room; another entered into a "huge front hall" and another into a "panelled hall that goes into a large hall." It is not shown that they were separate entrances into the alleged suites, nor is there any evidence to show that the lodgers had separate entrances. The arrangement of the rooms lent itself to several of them being rented together in a group or a suite. They were not "individual self-contained suites." There was only one kitchen in the house. These separate groups of rooms had no private kitchens or private toilets. There was no evidence to show who supplied the water, gas, electric light or heating. The appellants lived in two rooms. There were 15 persons living in the house. An order was made for possession.

Held, on appeal, affirming the decision of LENNOX, Co. J. (O'HALLORAN, J.A. dissenting), that on the submission that the premises in question were in a "multiple-family building" and therefore section 15B did not apply, the definition of "multiple-family building" indicates the housing accommodations must be separate. The heading of 15B is "single-family house." The appellants say the premises are not a "single-family house," as the evidence shows there are several families living in it. The test is not how many families live in a house, but whether or not it is a house designed for the occupation of a single family. It is clear that the notice to vacate in question put an end to the tenancy.

APPEAL by the tenants of the premises in question from the order for possession of LENNOX, Co. J. of the 21st of February, 1946, whereby the application of the landlord for an order of possession of the premises situate at 1960 Robson Street in the city of Vancouver was allowed.

The appeal was argued at Victoria on the 23rd and 24th of September, 1946, before O'HALLORAN, ROBERTSON and BIRD, JJ.A.

MacInnes, K.C., for appellants: Mrs. Green was the active party. On the first application by the landlord the learned judge found that she was taking it over as a going concern and not to take possession solely for herself. He should have adhered to this on the second application: see *Law* v. *Smith* (1944), 60 B.C. 437. Next the matter was *res judicata* because of the previous proceeding in 1944 between the same parties in which the landlord tried to get possession of the same premises: see *Re Doty and Marks* (1925), 57 O.L.R. 623; *Barber* v. *McCuaig* (1900), 31 Ont. 593. The same point arose in both cases.

C. A.
1946

MORROW
v.
GREEN

Maguire, for respondent: The premises in question were in a multiple-family building and therefore section 15B of order 294 of the Wartime Prices and Trade Board has no application. The premises are not a "single-family house" as several families were living in it. Upon the facts the notice to vacate in question put an end to the tenancy upon the date therein mentioned.

MacInnes, replied.

Cur. adv. vult.

22nd October, 1946.

O'HALLORAN, J.A.: The appellant tenants seek reversal of an order dispossessing them, made under section 19 *et seq.* of the Landlord and Tenant Act, Cap. 143, R.S.B.C. 1936. The appeal turns upon whether the notice to vacate was authorized by order No. 294 (as amended and consolidated to 28th February, 1945) of the War Time Prices and Trade Board. If that notice was invalid the order for dispossession cannot stand.

The building No. 1960 Robson Street, is an old rambling residence in Vancouver with five entrances and the equivalent of some 21 rooms, so designed and constructed that it was comparatively easy for the appellants, by installing kitchen and bath appliances, to change it into what the uncontradicted testimony declares were used as five or six private suites of two to five rooms each, *viz.*, one suite of five rooms, two of four rooms, one of three rooms, and two of two rooms. The appellants have rented the house since September, 1939, living in one of the two room suites and renting the other suites. As later shown, I am driven to conclude that the building comes within the definition of "multiple-family building" in section 15A (1) of amended order 294, as

> a building containing two or more housing accommodations but shall not include any semi-detached or attached house not containing more than one housing accommodation.

The respondent bought the premises in November, 1943, and immediately gave notice under order 294 (as it then stood) requiring the appellants to vacate on 14th May, 1944. By reason of an amendment to order 294 (see present section 15A (3), the respondent had to serve another notice to vacate, which she did on 14th March, 1944, describing it therein as

landlord's second notice to vacate housing accommodation in a multiple-family building for purpose of personal residence by the landlord.

When appellants did not vacate the respondent moved for an order for possession under section 19 *et seq.* of the Landlord and Tenant Act, *supra.* The Court on 7th August, 1944, refused to grant the order, on the main ground it seems, that while the notice to vacate alleged the respondent required the house for her personal residence, the evidence which the Court accepted, indicated she intended to continue it as an apartment-house.

On 12th February, 1945, the respondent gave the notice to vacate which is now before this Court. Amended order 294 in suspending the operation of Provincial law, provides in section 12 that no tenant of any housing accommodation shall be dispossessed except under sections 13, 14, 15A, 15B and 16. Under section 13 (*k*) the landlord may recover possession under Provincial law if a notice to vacate has been given under section 15A, section 15B, or section 16. The notice to vacate in this case professes to have been given under section 15B, thus hoping no doubt to provide a foundation for the jurisdiction of the learned judge to make an order for possession under the Provincial Landlord and Tenant Act, *supra.* Section 15A, as its heading denotes, is confined to housing accommodation in "multiple-family buildings," while section 15B is directed exclusively to "single-family houses" (*viz.,* housing accommodation not situated in a "multiple-family building"). Both sections provide that the notice to vacate shall be given "on a form provided by the Board" (*viz.,* Wartime Prices and Trade Board). We are not concerned with section 16, which I am unable to see has any application to the facts here.

The notice in this case was given on a form provided by the Board. It is headed in large letters:

Notice to vacate housing accommodation not in a multiple family building for purpose of personal residence by the landlord.

The respondent stated therein:

I desire the accommodation as my personal residence for a period of at least one year

which she verified by affidavit as part of the notice. The notice was drawn to express compliance with section 15B, which reads in material part:

C. A.
1946
MORROW
v.
GREEN
O'Halloran, J.A.

15B. A landlord of any housing accommodation not situated in a multiple-family building as defined in section 15A may give to the tenant of that accommodation a notice to vacate, on a form provided by the Board, if the landlord

(*a*) desires the accommodation as a residence for himself for a period of at least one year from the date on which the notice directs the tenant to vacate.

I must hold, with respect, that the notice to vacate is invalid on two grounds; first it concerns in fact a "multiple-family building" under section 15A, whereas it is expressed to relate to a "single-family house" under section 15B; and secondly or alternatively, as I read the testimony the respondent did not desire that large house for her personal residence as such, but wished to have the right to live in one suite and the right to collect the rentals from the tenants of the other suites. "Personal residence" is the expression used in the notice to vacate approved by the Board.

The first of three reasons which constrain me to hold that 1960 Robson Street is a "multiple-family building" as above defined, is found in the evidence of the appellant Mrs. Green that the design of the house lent itself to division into private suites which were accepted and used by the tenants as "places of dwelling." This was not weakened on her cross-examination, for when she was asked "Now did you subdivide the place" [into suites], her answer was "Yes." The learned judge found:

This house had been to a certain extent altered by the tenants into several suites or rooms sub-rented.

The respondent admitted an imperfect knowledge of the house.

"Housing accommodation" is defined in section 1 (*g*) of amended order 294 to mean

any place of dwelling and any land upon which a place of dwelling is situated, but shall not include commercial accommodation, shared accommodation or any room in a hotel or clubhouse.

The definition is important for what it does not say as well as for what it does say. It does not say that the place of dwelling or the dwelling itself must be a separate dwelling. It does not say the dwelling must be a self-contained establishment. It does not say it must have a kitchen. People may have their place of dwelling in one building, and take their meals elsewhere, and in this connection see *Rex* v. *Feeney,* [*ante,* p. 131]; [1946] 3 W.W.R. 163, at pp. 166-68. It does not say it must have a sep-

arate bath and toilet. I fail to find any semblance of analogy in the statute considered in *Cole* v. *Harris,* [1945] K.B. 474, for it has nothing in common with the purposes of amended order 294.

It is apparent from what the definition does not say that "housing accommodation" was intended to have the widest possible meaning, with no limitations whatever beyond the specific exceptions contained in the definition. That is naturally to be expected in a regulation designed in time of war emergency and housing shortage to prevent people being put out of whatever kind of living accommodation they might have.

Turning then to what the definition does say, the expression "any place of dwelling" is the most expansive that could be chosen to express negation of any kind of restriction or limitation in the character of the living accommodation. Certain exceptions are specifically mentioned, but a suite of rooms in a building conducted as an apartment-hotel, or an apartment rooming-house is not among them. "Shared accommodation" is one of the named exceptions, but if that could apply to an individual suite in 1960 Robson Street as between the appellants and their tenant thereof, it obviously cannot apply as between the appellants and the non-resident respondent. That is clear from the definition of "shared accommodation" in section 1 (*o*) as

> any room or rooms forming part of the residence of the landlord or of his agent and of which the entrance and any facility are used in common by the landlord or agent and the occupant or occupants of the room or rooms.

If the private suites in 1960 Robson Street are not "shared accommodation," then I fail to find anything to deny their proper description as "places of dwelling" as that generic term is employed in the definition of "housing accommodation." Since there are several such "places of dwelling" in 1960 Robson Street it must be a "multiple-family building" under section 15A, which automatically denies it is a "single-family house" under section 15B.

Perhaps it should be added that counsel for the respondent did not submit that section 16 circumscribed the wide definition of "housing accommodation" in section 1 (*g*). Section 16 provides an additional ground for a landlord to recover possession, if he desires by means of structural alterations to divide the rented premises into two or more accommodations each having

C. A.
1946
MORROW
v.
GREEN
O'Halloran, J.A.

not less than 500 square feet floor area and not less than two rooms with a kitchenette, private bath and private toilet. In my judgment amended order 294 never intended that "housing accommodation" in general should be restricted by the specifications in section 16, and that section 16 should supplant section 1 (*g*) as the definition of "housing accommodation."

As I read it, section 16 is confined to a special situation, *viz.*, it enables a landlord to recover possession of his premises for the purpose of making more "housing accommodations," provided he agrees to construct them according to a certain standard. The section relates purely to future "housing accommodation" encouraged to be constructed in certain circumstances. It refrains from any *ex post facto* pretensions. If the requirements in section 16 were intended to apply to all "housing accommodation" past, present, and future, they would have been included in its definition in section 1 (*g*) or that definition would have been limited in some way to permit their inclusion by necessary implication.

The second reason which constrains me to hold 1960 Robson Street is a "multiple-family building," is that the respondent was fully aware in March, 1944, that the building was not a "single-family building" but was a "multiple-family building." This is abundantly clear from the notice to vacate she gave the appellants at that time wherein she described the building as a "multiple-family building." In the affidavit attached to that notice she swore that the "statements and representations" therein were true. The form of the notice, and its description of the premises to comply with the requirements for its issuance would be hard to understand, if it did not "represent" that 1960 Robson Street was then a "multiple-family building." The testimony discloses no change since in the character of the rented premises.

The third reason is that the correspondence between the solicitors for the parties is inexplicable, if it is not based upon mutual acceptance of the house as a "multiple-family building." In a letter from appellants' solicitors to respondent's solicitor on 17th October, 1945, reference is made to a suggestion by the Morrows

> that if they could get a suite [in the house] they would have no desire to interfere with the tenants.

The respondent's solicitor replied thereto on 29th October, 1945:

If there should be a suite vacant and if the Greens have no other accommodation, the Morrows would consider allowing them to remain as their tenants.

From the foregoing I feel it must have been evident to everyone concerned, that the house was not a "single-family house" within the meaning of section 15B under which the notice to vacate was given, but that it was in fact a "multiple-family building" within the meaning of section 15A. The definition of "multiple-family building" (previously quoted) in section 15A (1) excludes a "single-family house." From the correspondence between the solicitors, it is apparent the Greens and Morrows could not have been bargaining to live together in a "single-family house," but that they had in mind occupying separate private suites in 1960 Robson Street as a "multiple-family building."

In my judgment the notice to vacate must fail also on the second or alternative ground. The stipulation in section 15B (1) (*a*) enables the landlord to give notice to vacate if he desires the accommodation as a residence for himself for the period of one year. It is made a condition precedent to the right to give a notice to vacate under section 15B. In writing the appellants' solicitors on 29th October, 1945, the respondent's solicitor said the Morrows desired

to get a suite in the premises and to obtain control of the same—that is, to collect the rent from the various tenants.

That means the respondent did not desire 1960 Robson Street for a "personal residence," as she said in the notice to vacate which had been approved by the Board. Her solicitor said in plain words she wanted possession of one suite therein and the right to collect the rentals from the tenants of the other suites, for she could not obtain the right to collect those rentals without control of the whole building. She wanted possession of the whole of the building it is true, but not for a personal residence, since one suite therein would suffice for the latter purpose. This statement by her solicitor is confirmed by the respondent's evidence on the hearing in reply to a question whether she intended to occupy the whole of the building:

No, I said I would keep what I needed of the building and with the consent of the Rental Board I will rent out any rooms that are vacant or over.

C. A.
1946
MORROW
v.
GREEN
O'Halloran, J.A.

For the foregoing reasons I hold the notice to vacate is invalid. It follows the learned judge could not acquire the jurisdiction essential under section 13 (*k*) of amended order 294 to enable him to make the order under appeal. In my judgment, with respect, he ought to have found, in the words of one of the stated grounds in the notice of appeal, that the appellant tenants were entitled under the Wartime Prices and Trade Board regulations to remain in possession of the premises.

I would set aside the order for possession and allow the appeal accordingly..

ROBERTSON, J.A.: On the 14th of September, 1940, the then owners of lot 13, *inter alia,* in Vancouver, demised it to the appellants "together with the two-storey frame building situate thereon," "for use and occupation as a dwelling and rooming-house." The respondent purchased the property in 1944. The appellants at all material times lived in the premises and let out a number of the rooms to lodgers. On or about the 12th of February, 1945, the respondent gave to the appellants a notice to vacate pursuant to section 15B of order 294 of the Wartime Prices and Trade Board, which reads: [already set out in the judgment of O'HALLORAN, J.A.].

Section 15A provides:

A. Multiple-Family Building

15A. (1) For the purposes of this Section, "multiple-family building" means a building containing two or more housing accommodations but shall not include any semi-detached or attached house not containing more than one housing accommodation.

It was submitted that it was decided in *Law* v. *Smith* (1944), 60 B.C. 437, that a rooming-house is a multiple-family building. A perusal of that case shows that the point considered was whether the premises there in question were a "place of dwelling" or a "place of business."

The evidence shows that at the time the respondent purchased the house it was empty. It was then called a nine-roomed house, much of it being still unfinished. The appellants say they rented it as a private dwelling-house, intending to use it for themselves. They made no structural alterations; no partitions were put in. The appellants shared one of the bathrooms with a lodger. There were five doors "which could be considered front doors because

they were not back doors." They called one of these the front door. The appellants did not put in any of these doors. One door entered directly into the dining-room; another into a billiard-room; another entered into the "huge front hall" and another into a "panelled hall that goes into a large hall." It is not shown that they were separate entrances into the alleged suites to be later mentioned, nor is there any evidence to show that the lodgers had separate entrances. The arrangement of the rooms lent itself to several of them being rented together in a group as a suite. They were not "individual self-contained suites." There was only one kitchen in the house. These separate groups of rooms had no private kitchens or private toilets. There was no evidence to show who supplied the water, gas, electric light or heating. The appellants lived in two of the rooms. There were 15 persons living in the house.

It was further submitted that the premises in question were in a multiple-family building and therefore section 15B did not apply. In my opinion the definition of multiple-family building indicates the housing accommodations must be separate. The heading of 15B is "Single-Family House." The appellants argued that the premises are not a single-family house, as the evidence shows there were several families living in it. It is quite true that some houses are built each of which would only be large enough for one family. On the other hand, there are houses, each of which the owner designs entirely for the use of himself and his family, but which because of its size, might be divided up into groups of rooms, in each one of which a family might live. It seems to me the test is not how many families live in a house, but whether or not it is a house designed for the occupation of a single family.

"Housing accommodation" is defined to mean

any place of dwelling and any land upon which a dwelling is situate.

This appears to indicate a separate place of dwelling.

Section 16 (1) reads as follows:

16. (1) If the landlord of any housing accommodation desires possession of the accommodation for the purpose of dividing it by means of structural alteration into two or more accommodations, each having a floor area of not less than 500 square feet and each consisting of at least two rooms in addition to a kitchen or kitchenette, private bath and private toilet, he may

C. A.
1946
MORROW
v.
GREEN
Robertson, J.A.

make an application to the Rentals Appraiser for a permit to give a notice to vacate to the tenant.

That section really describes what is meant by a "place of dwelling"—in other words, a place of dwelling is self-contained; one in which a family would have their own rooms and in addition kitchen, private bath and private toilet. The premises are not a multiple-family building unless they contain two or more separate places of dwelling.

In *Cole* v. *Harris,* [1945] K.B. 474 the facts were that the defendant let to the plaintiff three rooms consisting of a bedroom, living-room and kitchen on the first floor of a dwelling-house, together with the joint use with the plaintiff and the tenant of the second floor (who also had a living-room, bedroom and kitchen) of a bathroom and w.c. The question to be decided was whether the letting to the plaintiff was "of part of a house let as a separate dwelling" within the meaning of section 12, subsection (2) of chapter 17 of the statutes of 1920.

MacKinnon, L.J. said at p. 479:

. . . It is, I think, difficult to formulate any principle of law which separates what I have called the contrasted conceptions of (1.) a demise of part of a house as a separate dwelling, and (2.) an agreement to share the use and occupation of a house. But I think Morton, L.J. provides the best formula by saying that to create (1.) there must be an agreement by which the occupier has the exclusive use of the essential living rooms of a separate dwelling-house. After all, a dwelling-house is that in which a person dwells or lives, and it seems reasonable that a separate dwelling should be one containing essential living rooms. A w.c. may be essential in modern days, but I do not think it is a living room, whereas a kitchen, I think, is.

Morton, L.J. said at p. 485:

. . . I think that the true test, where the tenant has the exclusive use of some rooms and shares certain accommodation with others, is as follows: there is a letting of part of a house as a separate dwelling, within the meaning of the relevant Acts if, and only if, the accommodation which is shared with others does not comprise any of the rooms which may fairly be described as "living rooms" or "dwelling rooms." To my mind a kitchen is fairly described as a "living room," and thus nobody who shares a kitchen can be said to be tenant of a part of a house let as a separate dwelling. In many households the kitchen is the principal living room, where the occupants spend the greater part of the day. Very often it is the warmest part of the house and the family tend to congregate there for that reason.

I think, however, it would appear from section 16 (1), *supra,* that under order 294 a kitchen, private bath and toilet were considered as essentials. Lawrence, L.J., who dissented, said at p. 480:

. . . . If an essential part of the house let is by the tenancy agreement to be shared, it is not, in my view, let as a separate dwelling. It does not appear to me to be an answer to say that people can dwell in a building without baths or lavatory accommodation. They can, of course, live without baths and they can make use of lavatories outside their dwelling, but if they choose to include in the tenancy agreement of what they contend is a separate dwelling the right to share a bathroom and lavatory, it appears to me that the premises let are not let as a separate dwelling. A single room can, of course, be let as a separate dwelling, but if the tenancy agreement includes for one rent a right to share other essential rooms it appears to me impossible to say that the letting is of a separate dwelling.

There are two further grounds of appeal: The first is that the matter was *res judicata* because of some previous proceedings in 1944 between the same parties, in which the respondent tried to obtain possession of the same premises. It is clear that the merits were not gone into because under an arrangement that the respondent had made which came under section 15D the notice to vacate in that case was held null and void. The other defence is that there was no jurisdiction to entertain the application because the case was not "clearly one coming under the true intent and meaning of section 19," or under the circumstances the matter should not have been disposed of summarily. See section 22, Landlord and Tenant Act. As at present advised, I would think this was not a question of jurisdiction at all; but assuming that it is, I think the case comes clearly within section 22 because section 19 provides for an application to a judge of the county court where the tenancy has been determined by "a notice to quit" or "by any other act whereby a tenancy may be determined or put an end to." Appellants' counsel rely upon *Kruciak* v. *Antoniuk,* [1946] 3 W.W.R 252. In that case there was a dispute as to the facts. In this case there is really no dispute as to the facts. The question is purely one of law. Upon the facts it seems clear that the notice to vacate in question put an end to the tenancy on the date mentioned in it.

It was also suggested that there was no proper description of the property. There is no legal description, but I have no doubt the description of the location of the property by street and number is sufficient to identify it.

It is further said that the learned judge in any event should not have dealt with the matter because the question of the

C. A.
1946

MORROW
v.
GREEN

Robertson, J.A.

fixtures could not be dealt with and there was no right to apply for relief against forfeiture. The question of the fixtures was not an issue; and further the order for eviction does not in any way interfere with the appellants' claim to the fixtures under the agreement of the 25th of May, 1940.

Further, no question of forfeiture can arise. The appellants were not evicted because of anything they had done. The lease had long expired. The appellants had no rights whatever to the premises except by reason of the regulations of the Wartime Prices and Trade Board, under which the respondent was entitled to exercise the right which she did in this case.

For these reasons I think the appeal should be dismissed.

BIRD, J.A.: I would dismiss the appeal for the reasons given by my brother ROBERTSON, in which I concur, but desire to make some further observations upon the point taken for the appellants that the order under review was made without jurisdiction. Counsel submits that by order 294, section 12 of the Wartime Prices and Trade Board the landlord's right under Provincial law to dispossess the tenant of housing accommodation of the type under consideration here is taken away. That consequently the learned judge below had not jurisdiction to order the eviction of the tenant from these premises. That section reads as follows:

> 12. Except as provided in Sections 13, 14, 15A, 15B and 16, no tenant of any housing accommodation shall be dispossessed of such accommodation or be evicted therefrom and no landlord shall demand that any tenant vacate or deliver up possession of any housing accommodation.

This submission is founded on the premise that the housing accommodation here under consideration comprises housing accommodation in a multiple-family building as defined by section 15A of the same order.

It is contended on behalf of the appellants that since order 294 contains no provision for termination of a tenancy of a multiple-family building, and section 12 prohibits termination of all leases of housing accommodation except as provided in the sections of the order above noted, there was no jurisdiction in the Court below to make the order. Counsel for the respondent supports the order upon the ground that the premises constitute housing accommodation, as defined by the order, situate in a

single-family dwelling. He contends that in respect of such accommodation there is jurisdiction under the provisions of section 15B of the order to determine a tenancy.

It becomes necessary therefore to examine the following definitions in the light of these submissions. A multiple-family building is defined under section 15A of order 294 as

a building containing two or more housing accommodations but shall not include any semi-detached or attached house not containing more than one housing accommodation.

The order contains no definition of a single-family dwelling but provides under the head "Single-Family House" by section 15B as follows: [already set out in the judgment of O'HALLORAN, J.A.].

"Housing accommodation" is defined under section (1) (*g*) to mean

any place of dwelling and any land upon which a place of dwelling is situated, but shall not include commercial accommodation, shared accommodation or any room in a hotel or clubhouse.

In my opinion the premises with which we are here concerned do not fall within the definition of multiple-family dwelling.

It appears from the evidence adduced that these premises comprise a building under one roof originally constructed as a single-family dwelling, having one main entrance and four other entrances, of which only the main entrance provides access to the entire premises; the other four entrances being entrances from the surrounding garden to particular rooms. Some changes have been made by the appellants since they became tenants of the premises, but it was not shown that these changes included provision of entrances to particular suites. Moreover, the lavatory, bathroom and kitchen facilities in the building are such as are normally found in a single-family dwelling. It is not shown that any such lavatory and bathroom facilities are limited to particular suites or apartments, nor is it shown that there is more than one kitchen.

In these circumstances I consider the premises comprise but one self-contained establishment.

The definition of multiple-family building refers to a building "containing two or more housing accommodations." That definition, read in relation to the entire order, appears to me to relate

C. A.
1946

MORROW
v.
GREEN

Bird, J.A.

to a building which contains two or more self-contained establishments, that is to say, two or more places of dwelling, each of which is self-contained. And *cf. Cole* v. *Harris,* [1945] K.B. 474, which is considered in some detail by my brother ROBERTSON in his opinion.

On the other hand, the premises so described in my opinion do fall within the definition of housing accommodation in a single-family dwelling, since the premises comprise a place of dwelling which is not situate in a multiple-family building as defined by section 15A and is neither commercial accommodation, shared accommodation, nor a room in an hotel or clubhouse, these latter types of accommodation being separately defined in the order.

But counsel for the appellants does not contend that these premises fall in the excluded categories, nor do I think that it could be successfully contended that they are so included.

In these circumstances, since in my opinion the premises comprise "housing accommodation not situate in a multiple-family dwelling as defined in section 15A" the jurisdiction of the Court below under the Landlord and Tenant Act is preserved by section 12 of the order, subject to compliance with the provisions of section 15B.

I take it from the reasons for judgment of the learned trial judge that he has found there was due compliance with the provisions of section 15B and there was evidence upon which the finding could be based. Consequently the objection fails.

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

Solicitors for appellants: *MacInnes & Arnold.*
Solicitor for respondent: *J. S. Maguire.*

BROWN v. STOROSCHUK.

C. A.

1946

Sept. 26, 27; Oct. 22.

Trusts and trustees—Farmer and his employee—Farmer buying land at employee's request—Agreement for continuance of employee and payments for property by employee—Repudiation of agreement by farmer—Whether farmer a trustee or relationship of vendor and purchaser.

The plaintiff (appellant) was a well to do farmer near Abbotsford and from 1936 to 1939 the defendant (respondent) was in his employ. The defendant then went to Saskatchewan where his wife had a farm but they came back to British Columbia in 1941 when he was again hired by the plaintiff who wished to retain him for at least three years. The defendant, who was of foreign birth and illiterate, then told the plaintiff that he wanted to buy a nearby property which was for sale but feared it might be sold before he could obtain the money for it which was coming to him for a pending sale of the property in Saskatchewan. The plaintiff made the purchase for $1,600 cash, the property was conveyed to him and the defendant entered into possession and remained in possession since 1941. The defendant claimed that the agreement between himself and the plaintiff was that the latter was to buy the property on defendant's behalf and the defendant was to remain in the plaintiff's employ for at least three years and to pay the plaintiff in part from the money coming from Saskatchewan and the remainder by permitting the plaintiff to retain the ten cents per hour by which the defendant's wages were to be increased and that the plaintiff was not to charge any interest. The plaintiff's story was that he was to buy the property for his own benefit for $1,600, the defendant was to occupy it as his tenant and when the defendant paid him the $800 the defendant was to receive from Saskatchewan, a "sales contract" was to be entered into. The plaintiff further said that in October, 1942, he learned that the defendant had received the Saskatchewan money in the previous July and that as it had not been paid over to him (the plaintiff) he told the defendant that the agreement was off and that the defendant was to occupy the land as his tenant for the rental of the ten cents per hour increase in wages. The defendant said that he had told the plaintiff that the Saskatchewan money had been received and that the defendant told him to use it on the property and that he did so. By an amendment allowed at the conclusion of the trial, the defendant pleaded that the price paid by the plaintiff was a loan repayable as mentioned, that the land was conveyed to the plaintiff as security and that he thereby constituted himself a trustee for the defendant. The trial judge accepted the defendant's version.

Held, on appeal, affirming the decision of MANSON, J. (SIDNEY SMITH, J.A. dissenting), that the appeal should be dismissed.

Per ROBERTSON, J.A.: There is nothing to show that the trial judge misapprehended any material part of the evidence or drew unreasonable inferences. Upon the authorities the plaintiff was a trustee for the defendant. The land was the defendant's and he was entitled to a con-

C. A.
1946

BROWN
v.
STOROSCHUK

veyance of it upon payment of the moneys which the plaintiff had paid in respect of it. When the plaintiff repudiated the contract with the defendant he relieved the defendant from continuing to work for him and the defendant was entitled to specific performance.

Per BIRD, J.A.: The trial judge's reasons taken as a whole show that notwithstanding his statement that "he took the title in his own name by way of security," he found in effect that the plaintiff acquired and held the land, not for himself, but in trust for the defendant, subject to the conditions that the latter pay the purchase price and remain in his employ for three years. There is ample evidence to support this finding. The plaintiff's repudiation of the trust was in fact and in result a refusal to continue to keep the defendant in his employment upon the terms agreed on when the trust arose.

APPEAL by plaintiff from the decision of MANSON, J. of the 2nd of April, 1946, whereby it was declared that the plaintiff purchased the lands in question for and on behalf of the defendant and that upon payment by the defendant to the plaintiff of the balance of the moneys found in an account therein directed, the defendant was entitled to a proper deed conveying the said lands to the defendant.

The appeal was argued at Victoria on the 26th and 27th of September, 1946, before ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Sheppard (*Cassady, K.C.,* with him), for appellant: This is an action for ejectment and defendant sets up an oral transaction on an interest in land, a farm near Abbotsford. That the judgment is against the weight of evidence see *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43, at p. 50; *Pope Appliance Corporation* v. *Spanish River Mills, Ltd.* (1928), 98 L.J.P.C. 50, at p. 52; *Zellinsky* v. *Rant* (1926), 37 B.C. 119, at p. 122; *Beal* v. *Michigan Central R.R. Co.* (1909), 19 O.L.R. 502; *Cities Service Oil Co. Ltd.* v. *Rubel* (1930), 66 O.L.R. 475, at p. 479. The learned judge held that the plaintiff bought the farm for the defendant. The trial judge is mistaken on the effect of the evidence and the *onus* is on the defendant: see Roscoe's Evidence in Civil Actions, 20th Ed., Vol. I., p. 243; *Doe dem. Smith* v. *Smart* (1835), 1 M. & Rob. 476; *In re Jones' Settlement. Stunt* v. *Jones,* [1915] 1 Ch. 373. The facts as found are not in law consistent with a security transaction: see *G. and C. Kreglinger* v. *New Patagonia Meat and*

Cold Storage Company, Limited, [1914] A.C. 25, at p. 38; Falconbridge on Mortgages, 2nd Ed., 346, secs. 211 and 213; *Booth* v. *Booth* (1742), 2 Atk. 343; 26 E.R. 609; *Central Trust &c. Co.* v. *Snider and Carleton* (1915), 85 L.J.P.C. 87, at p. 92; *Landes* v. *Kusch* (1915), 7 W.W.R. 1076. The defendant by his counterclaim asks specific performance thereby assuming the burden: see *Murphy* v. *McSorley,* [1929] S.C.R. 542, at p. 546; *Kelly* v. *Watson,* [1920] 1 W.W.R. 939; (1921), 61 S.C.R. 482; *Bickford* v. *The Corporation of the Town of Chatham* (1889), 16 S.C.R. 235; *In re Fickus. Farina* v. *Fickus,* [1900] 1 Ch. 331; *Spottiswoode, Ballantyne & Co.* v. *Doreen Appliances, Ld.,* [1942] 2 K.B. 32; *May and Butcher, Limited* v. *The King,* [1934] 2 K.B. 17; *Scammell* v. *Ouston,* [1941] 1 All E.R. 14. If there were a concluded agreement, he must show he was ready and willing to complete: see *Landes* v. *Kusch* (1915), 7 W.W.R. 1076; *Shaw* v. *Masson,* [1923] S.C.R. 187, at p. 195; *Wallace* v. *Hesslein* (1898), 29 S.C.R. 171, at pp. 174 and 176. The alleged contract includes personal service on the part of the defendant and as specific performance will not be decreed against the defendant, it will not be decreed against the plaintiff: see *Hills* v. *Croll* (1845), 2 Ph. 60; 41 E.R. 864; *O'Regan* v. *White,* [1919] 2 I.R. 339; *Howard* v. *Miller and Nicholson* (1912), 20 B.C. 227, at p. 232. If the Court will not decree specific performance, then part performance does not apply and the Statute of Frauds is a defence: see *Lavery* v. *Purssell* (1888), 57 L.J. Ch. 570; *Britain* v. *Rossiter* (1879), 48 L.J.Q.B. 362.

Edith L. Paterson, for respondent: The position appears from the findings of fact of the trial judge. The appellant bought the farm for the respondent and advanced the money to purchase it because he wanted the respondent to continue working for him. The learned judge accepted the respondent's evidence and found in his favour. The appellant repudiated the agreement and the respondent was then entitled to repay the balance of the loan and receive a conveyance of the land. In an appeal from the decision of the judge below based on the trustworthiness of the witness he has seen, the Court of Appeal, in order to reverse, must be clearly convinced that it is wrong. Next, the Court of

C. A.
1946
BROWN
v.
STOROSCHUK

Appeal has no right to disregard what facts the judge has found on his impression of the credulity of the witnesses: see *Powell and Wife* v. *Streatham Manor Nursing Home,* [1935] A.C. 243; *S.S. Hontestroom* v. *S.S. Sagaporack. S.S. Hontestroom* v. *S.S. Durham Castle,* [1927] A.C. 37; *Caldeira* v. *Gray,* [1936] 1 All E.R. 540; *Flower* v. *Ebbw Vale Steel, Iron and Coal Co.,* [1936] A.C. 206; *Lawrence* v. *Tew,* [1939] 3 D.L.R. 273; *Claridge* v. *British Columbia Electric Railway Co. Ltd.* (1940), 55 B.C. 462; *L.* v. *L.,* [1943] 2 W.W.R. 308, at p. 310-1. The arrangement was to a great extent performed and the Court must find some means for completing its execution. On the contention that the arrangement between the parties did not amount to a contract binding in law see *Hillas and Co. Limited* v. *Arcos Limited* (1932), 147 L.T. 503; *Martin* v. *Jarvis* (1916), 37 O.L.R. 269; *Thomson Groceries Ltd.* v. *Scott,* [1943] 3 D.L.R. 25; *Jaremy* v. *Vita Co-op. Ltd.,* [1943] 1 D.L.R. 391; *De Laval Co. Ltd.* v. *Bloomfield,* [1938] O.R. 294.

Cur. adv. vult.

22nd October, 1946.

ROBERTSON, J.A.: This is an appeal by the plaintiff in the action from the judgment at the trial, dismissing his action for ejectment and allowing the defendant's counterclaim. In my opinion, unless the appellant can succeed in setting aside the learned trial judge's findings of fact, the appeal must be dismissed. To do so he must convince the Court that these findings are "clearly wrong"—see *Claridge* v. *British Columbia Electric Railway Co. Ltd.* (1940), 55 B.C. 462. It is therefore necessary to consider the facts: The appellant was a successful farmer and for some years prior to September, 1941, had employed the respondent who is a skilled workman. The appellant was desirous of retaining the respondent's services for at least three years, as labour was very scarce. The respondent learned of a property near the appellant's farm and the price at which it could be bought and told the appellant he was very anxious to buy it, but feared it might be sold before he could get the money, which was to come from a pending sale of property in Saskatchewan belonging to himself and his wife, to apply on the purchase price.

The appellant then got in touch with the agent; saw the property and made an offer of $1,600 cash for it. The offer was accepted and the property conveyed to the appellant. The respondent gave notice to the then tenant and shortly afterwards entered into and has remained in possession ever since. So far there is no difference between the evidence of the parties.

The difference now emerges. The respondent said the appellant agreed before the purchase to buy the property for and on his, the respondent's behalf; he, the respondent, was to remain in the appellant's employ for three years and was to pay the appellant in part by the money to come from the pending sale of the Saskatchewan property and by the appellant retaining ten cents per hour by which the respondent's wages were to be increased. The appellant agreed not to charge any interest. There was no mention made of a "sales contract." He did ask the appellant for an agreement at the time when he offered to pay to the appellant moneys received from the Saskatchewan sale. The appellant says that the agreement was that he was to purchase the property for $1,600 for his own benefit and the respondent was to occupy the same as his tenant, and that if and when the respondent paid to him $800 of the moneys that he was to receive from the sale of the Saskatchewan farm, he was to enter into a "sales contract" to sell the land to him; that the respondent received the Saskatchewan moneys in July, 1942, and did not pay them to the appellant. The appellant learned of this in October, 1942, and then told the respondent the agreement was off and thereafter the respondent was to occupy the lands in question as a tenant, the rental being the raise in wages, namely, ten cents per hour. The respondent said that he told the appellant that he had received the Saskatchewan moneys and the appellant told him to use them in connection with the property and that he did so.

As the action went to trial the respondent's statement of defence set up the agreement above mentioned, and he counterclaimed for specific performance. He alleged the tender to the appellant of the moneys received from the Saskatchewan lands and the appellant's direction to use the money to improve the lands; and his entry into possession of the lands and the im-

C. A.
1946
BROWN
v.
STOROSCHUK
Robertson, J.A.

provements he made. He also set up that in November, 1943, the appellant told him what the balance of the purchase price was and the respondent then verbally offered to pay the balance, which the appellant refused. In January, 1944, the respondent says the appellant refused to carry out the agreement to transfer, or in the alternative, to sell the said lands to the respondent. He then demanded an accounting of moneys which the appellant had received by way of the deduction from the respondent's wages and also for certain stumpage which the appellant had refused to give him. Then the respondent tendered the amount which he thought was due and a conveyance. The appellant refused to accept the moneys and to execute the conveyance. No question has been raised on the appeal as to the tender. Subsequent to the conclusion of the hearing of the action leave was granted to the respondent "to amend to make his pleadings conform with the evidence"; and leave was likewise granted to the appellant to make consequential amendments. After this was done counsel indicated they did not desire to lead further evidence. The respondent's amendment set up that the purchase price paid by the appellant was a loan repayable as mentioned; and that the lands were conveyed to the appellant as security for the loan, and the appellant thereby constituted himself a trustee for the respondent upon trust to convey them to the respondent upon payment of the loan.

The learned trial judge found throughout in favour of the respondent. He found it was clear that the appellant did not buy the farm for himself, but for the defendant on the understanding that the respondent would take possession, which he did, and remain in the appellant's employ for three years, at the end of which time the appellant anticipated selling his own farm; that the appellant did deduct from the respondent's wages the sum of $341.85. He found that the respondent was not at any time a tenant of the appellant and that the accumulated wage increase was to go against the appellant's advance. He accepted the respondent's version as to what took place with reference to the Saskatchewan moneys. He said that

The true interpretation of the relationship between the plaintiff and the defendant seems to me on the evidence to be this: The plaintiff was anxious to retain the services of a good workman at a time when good workmen

were extremely scarce. He was a successful farmer apparently with ready cash in the bank. For his own advantage he bought the farm which his workman wanted for the workman and not for himself, and he made an arrangement that the workman was to remain in his employ for three years at an increased wage, the increase to be applied in reduction of the moneys advanced. He was to receive at least some portion of the moneys obtained from the sale of the farm on the Prairies, but later told the defendant to spend the money on improvements and not to worry about the advances. He took the title in his own name by way of security, and he didn't trouble to put anything in writing. At a later date, to wit, in the Fall of 1943, at a time when farm lands had sharply increased in price, he decided to retain the land and refused to accept from the defendant the balance of the moneys advanced. The defendant says the moneys were advanced without interest. The plaintiff says that he was to have the popular rate, as he says, about 7 per cent. He does not claim that he mentioned 7 per cent. While the defendant's allegation of no interest seems to suggest an unusually generous contract, in view of the conclusion I have arrived at, upon a review of the whole of the evidence on both sides as to where the truth lies, I must accept the defendant's evidence with respect to the matter of interest.

There was no one to support the appellant's evidence. On the other hand, the respondent's evidence was supported by several witnesses, to whom the appellant said he had bought the property for the respondent. One of these witnesses was the respondent's sister, the other Meda, an independent witness. It is true that the respondent said that shortly after the time he received the Saskatchewan money he offered to pay it to him and told the appellant "he wanted the agreement drawn up" to which the appellant replied it was not necessary "I would not take advantage of you so long as you work for me." In another part of his evidence the respondent said of this occasion "I told him I wanted to make the payment on that farm and get the agreement drawn up." This evidence tends to support the appellant's evidence; but it may equally show that the respondent when he was about to pay a substantial sum on account of the purchase price, thought it was time to get something in writing showing what the agreement was. The strongest piece of evidence against the judge's finding was a letter dated January 21st, 1944, from the respondent's solicitors to the appellant. It is clear in that letter that the position which his solicitors were taking was that the property was being bought by the appellant, who was then to sell the same to the respondent. This letter was put in by counsel for the respondent, who said that he was not tendering it

C. A.
1946
BROWN
v.
STOROSCHUK
Robertson, J.A.

as evidence as to the proof of the statements in connection with the contract, but as demand for possession had been made on the respondent, they had a right to answer that demand. The learned trial judge has this to say about the respondent:

> The defendant is of foreign birth or extraction. He has little education. Plaintiff on the other hand is a prosperous Canadian farmer with a good average education. There are some seeming discrepancies in the defendant's evidence, but when the whole of his evidence is reviewed the seeming discrepancies are pretty well resolved. Furthermore, his evidence is supported by the evidence of other witnesses. I accept the defendant's evidence on all material points.

It is quite possible the solicitors misunderstood the instructions of their client, who, as stated, was of foreign birth or extraction and had little education, but in the statement of defence and counterclaim the respondent set up that the appellant bought the property for and on behalf of him. The learned judge, after taking all matters into consideration, accepted the respondent's version as the correct one. The learned judge says that the appellant

> for his own advantage bought the farm which his workman wanted, for the workman, and not for himself, and that the appellant took the title in his own name by way of security.

I have not been able to discover anything which shows that the learned trial judge misapprehended any material part of the evidence or drew unreasonable and unjustifiable inferences from the facts. It was plain he did not believe the appellant and thought he was trying to take advantage of the respondent.

Then upon the authorities it would appear that the appellant was a trustee for the respondent. See *Rochefoucauld* v. *Boustead,* [1897] 1 Ch. 196, at p. 206; Halsbury's Laws of England, 2nd Ed., Vol. 33, p. 93, note (*x*); *Hardoon* v. *Belilios,* [1901] A.C. 118, at p. 123; *Wells* v. *Petty* (1897), 5 B.C. 353-4 and *Rose* v. *Peterkin* (1885), 13 S.C.R. 677. If so, the property was the respondent's and he was entitled to a conveyance of it upon payment of the moneys which the appellant had paid in respect of it. In that sense the appellant held the property in trust and as a security for the payment to him of the moneys expended by him.

It was submitted that in any event the respondent was not entitled to specific performance as he had only worked 27

months for the appellant. In my opinion, when the appellant repudiated the contract which the learned trial judge has found he did make with the respondent, he relieved the respondent from continuing to work for him.

The appeal should be dismissed.

SIDNEY SMITH, J.A.: This is a dispute between the plaintiff Brown, a berry farmer of Huntingdon, British Columbia, and one of his workmen, the defendant Storoschuk, as to the ownership of a farm. The former brought an action for possession and the latter counterclaimed for specific performance of an agreement for sale. Judgment went in favour of the workman and the plaintiff now appeals. For brevity I may be allowed to refer to them merely by their surnames.

The learned judge in a written judgment accepted the evidence of the defendant and his witnesses. For my part I accept this finding. *Tremblay* v. *Beaumont,* [1946] 3 D.L.R. 514. I do not stop to consider whether I should have come to the same conclusion on the issue of credibility, for in the circumstances that question is irrelevant. On the other hand, it is well within the province of a Court of Appeal to draw inferences from the accepted evidence differing from those reached by the trial judge. *Annable* v. *Coventry* (1912), 46 S.C.R. 573; *Tremblay* v. *Beaumont, supra.*

I proceed therefore to deal with the evidence of the defendant. He said that his wife owned a farm in Saskatchewan which was for sale, and that with the moneys that would soon be forthcoming from this sale he wished to purchase a local farm, which was then on the market; but that he feared that this farm would be disposed of before any money from Saskatchewan came to hand. He said that in the month of August or September, 1941, he so informed Brown and that Brown said "I will buy the farm for you." Had these words stood alone I might infer that Brown intended to buy the farm and present it as a gift to the defendant, but other words followed. Brown, continuing, said that he wanted the defendant to work for him for three years; that he would raise his wages from 50 cents to 60 cents per hour; that he would retain the increase of ten cents and apply it to the

C. A.
1946

BROWN
v.
STOROSCHUK

Sidney Smith, J.A.

credit of the defendant with respect to payments on the farm; and that the defendant could take possession when the present occupier vacated the premises. The defendant on his part said that when he received the expected moneys from Saskatchewan he would make a payment on the farm; but the amount of the payment was not fixed, nor was there any mention of the time within which it was to be made. It remains to add that Brown, after enquiry and personal inspection, bought the farm for $1,600 cash, and had the title duly registered in his own name; that the defendant went into possession some month or so later and remained in possession until November, 1943.

It may be convenient for narrative purposes to observe that Brown's case was that he agreed to sell the lands to Storoschuk on the condition that Storoschuk paid him $800 out of the Saskatchewan moneys, and that this condition was never fulfilled. As against this, Storoschuk said that he did offer these moneys or part of them to Brown who told him to keep them as he (Storoschuk) had more need of the money than had Brown. It was established that Brown obtained nothing on account of the purchase price save what he himself retained, *viz.*, $341, being the total of the ten-cent increase in Storoschuk's wages, and $149.25 for stumpage on certain wood sold from the lands. It seems clear, too, that Brown paid or incurred liability for $536.49 for some electrical wiring done on the farm. He also paid all taxes. Storoschuk meanwhile carried out certain improvements to the farm at an outlay (apart from his own labour) of approximately $175. We were referred to these matters, or at least to some of them, as being acts of ownership and as showing that Storoschuk was treated throughout as owner of the lands; but in my opinion the circumstances were quite as consistent with inferences in the opposite sense.

There was nothing in writing and there was no finding on the question of part performance.

The learned judge in a written judgment came to the following conclusion: [already set out in the judgment of ROBERTSON, J.A.].

I take this to mean that Brown became the registered owner of the property merely as security for the purchase price he had

paid for the lands and which he treated as an advance made by him to Brown. But with great respect, it seems to me that no view of the accepted testimony read as a whole will support this inference. I have formed quite the contrary opinion. I think that the only proper inference is that neither of the parties nor any of the witnesses regarded the transaction as other than that presented at the trial, namely, one of purchase of the lands by Brown with the intention of later selling them to Storoschuk.

The conclusion I have reached therefore is that the relationship of the parties was that of vendor and purchaser and this view derives very considerable encouragement from the letter written by the defendant's solicitors to Brown on 21st January, 1944. This letter states emphatically that the defendant was "always a purchaser from" Brown; and again that Brown offered "to buy the land and sell the same to our client." This was the case presented by the defendant in his statement of defence, as I read that pleading. And it was the case presented by the defendant in his counterclaim wherein he claimed specific performance of the aforesaid agreement. And it was the case presented and argued by defendant's counsel at the trial. In these circumstances one would expect the evidence to point (as I think it conclusively did) to the relationship between the parties as being that of vendor and purchaser. But this view of the matter did not find favour with the learned trial judge. He came to a different opinion and, subsequent to the conclusion of the hearing, invited the parties to amend their pleadings to conform thereto. These amendments were accordingly made and set out by the defendant in his statement of defence in this language:

4A. The defendant further says that the sum paid by the plaintiff to obtain the said title to said lands constituted and was a loan by plaintiff to defendant repayable as before mentioned.

4B. The defendant further says that the plaintiff caused the said lands to be conveyed to him as security for the said loan and thereby constituted himself a trustee for the defendant of the said lands upon the trust to hold the said lands on behalf of the defendant and to permit defendant to occupy the same and upon the further trust to convey the said lands to defendant upon payment to plaintiff of the said loan.

And the counterclaim also was correspondingly amended.

It was under the foregoing amendments that the learned judge

C. A.
1946
BROWN
v.
STOROSCHUK
Sidney Smith, J.A.

made the finding already quoted. I do not understand him to have made any finding that Brown held the lands as trustee in trust for Storoschuk. Indeed it seems to me that such finding was not open to him, for the Statute of Frauds by section 7 requires writing for the proof of a trust of land. Fraud, and fraud alone, will take such a trust out of the operation of this section of the statute (*Rochefoucauld* v. *Boustead,* [1897] 1 Ch. 196). And there is present here neither pleading nor proof of fraud.

Counsel for respondent Storoschuk stated the case thus in her factum:

> It is submitted that the appellant purchased the farm with moneys advanced by him as a loan to respondent.

She founded her argument wholly on the findings of the learned judge. As I have said, I am unable to draw the appropriate inferences from the evidence to sustain his finding on the legal relationship of the parties. In my judgment the appeal must therefore be allowed.

BIRD, J.A.: It is common ground that in September, 1941, some understanding relative to the farm lands in question was reached between Brown and Storoschuk in consequence of which Brown bought the farm. At the time of the purchase and for some time prior thereto Brown was engaged in the operation of a large berry farm in the same vicinity, where he then employed Storoschuk as a farm labourer.

It is also common ground that when Brown learned from Storoschuk that the farm in question was available for sale, Storoschuk expressed to Brown his desire to buy the farm and his fear that it might be sold before he could realize the proceeds of sale of certain farm property on the prairie owned by his wife, and so finance the purchase. Brown then proposed that he would buy the farm and hold it on terms then stipulated by Brown and accepted by Storoschuk. Brown bought the farm immediately after this conversation.

Brown's version of the understanding reached between the parties was that he should buy the farm for his own account, and resell it to Storoschuk at the same price, under terms of a sales contract to be made between them upon receipt by Storos-

chuk of the proceeds of sale of the prairie farm; that the sales contract would provide for payment of $800 cash; and that Storoschuk remain in Brown's employ for a minimum of three years, the latter to receive a bonus of ten cents per hour over his then current wages; Storoschuk to be free to move on the place when the occupant vacated; the bonus to apply as rent until the sales contract was made and thereafter to be retained by Brown and applied against deferred payments of the purchase price; Brown to convey to Storoschuk at the expiration of the three years' service and upon payment of the price paid by him.

The substantial difference between the respective versions of the understanding lies in the contention of Storoschuk that Brown was to buy and did in fact buy the farm for Storoschuk, subject to conditions for repayment by Storoschuk of the price paid, and for performance by Storoschuk of the obligation to continue as a labourer on Brown's farm at the existing rate of wages, plus a bonus of ten cents per hour, the bonus to be retained by Brown and applied in reduction of the price paid for the farm.

The learned trial judge in his reasons for judgment said that he accepted the evidence led on behalf of the defendant on all material points, in preference to that of Brown. He holds that [already set out in the judgment of ROBERTSON, J.A., *ante*, pp. 230-31].

It is submitted by counsel for the appellant that the effect of the language so used by the learned judge was a finding that Brown held a mere security title, which is inconsistent with the further finding that Storoschuk agreed to work for three years. He submits on the authority of *G. and C. Kreglinger* v. *New Patagonia Meat and Cold Storage Company, Limited,* [1914] A.C. 25, that if Brown be regarded as holding a mere security title the employment provision could not be an essential term, but either a collateral term or void as a clog on the equity of redemption.

Upon consideration of the learned judge's remarks taken as a whole and, notwithstanding the use of the phrase "he took the title in his own name by way of security," I take the language so used to be a finding that Brown acquired and held the

C. A.
1946
BROWN
v.
STOROSCHUK
Bird, J.A.

land, not for himself, but in trust for Storoschuk, subject to the conditions that Storoschuk pay the purchase price and agree to remain in Brown's employ as a farm labourer for three years. Trust is pleaded by clause 4B of the statement of defence and a declaration of trust is sought under clause 3 of the prayer to the counterclaim.

It is true that the learned judge does not in terms find that a trust was created by the transaction as found by him, but in my opinion such is the true effect of the finding, and a trust is declared under paragraph numbered (1) one of the formal judgment.

No technical expressions are needed to create an express trust. Any expression will suffice from which it is clear that the party using it considers himself a trustee and adopts that character—*Dipple* v. *Corles* (1853), 11 Hare 183.

> . . . , it is competent for a person claiming land conveyed to another, to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute, [of frauds] in order to keep the land himself:

Lewin on Trusts, 14th Ed., 42, wherein the learned author cites in support of that proposition *Rochefoucauld* v. *Boustead,* [1897] 1 Ch. 196, at p. 206, in which case the Court of Appeal had under consideration a transaction parallel to that found here.

There Lord Lindley, L.J., speaking for the Court of Appeal, Lord Halsbury, L.C. and A. L. Smith, L.J., said at p. 205:

> We come, therefore, to the conclusion that the plaintiff has proved that the estates in question were conveyed to the defendant on May 27, 1873, upon trust for her, but subject to a charge in his favour in respect of all sums advanced by him in order to obtain the estates from the Dutch company in the first instance, and of all sums advanced by him in order to work them as coffee plantations after he had acquired them.

It was there held, p. 206:

> . . . it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, [of frauds] it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute, in order to keep the land himself.

And *cf. Wells* v. *Petty* (1896), 5 B.C. 353.

Ample confirmation of the fact that Brown acquired and held the farm in trust for Storoschuk, quite apart from the latter's evidence, is to be found in Brown's conduct over the ensuing two years. The evidence discloses that without protest he permitted Storoschuk to enter into possession of the farm and to make material repairs and alterations to the farm buildings, to cut down and sell standing timber on the lands, the proceeds of which were received by Brown and credited to the account of Storoschuk; that Brown credited the bonus wages to Storoschuk from the date of his purchase of the farm not *qua* rent but on account of the price paid, notwithstanding that he said on direct examination "that ten cents an hour bonus would be applied as rent until he received his money and a sales contract was drawn up." I think that each of these factors can only be taken as recognition or acknowledgment by Brown that the farm was the property of Storoschuk, held by Brown in trust.

Further confirmation of the relation of trustee and *cestui que trust* is found in the testimony of two witnesses, Catherine Storoschuk, and Meda, which shews that Brown said to each of them on different occasions subsequent to his purchase of the farm—"I have bought a place for Fred," or used language of like effect in reference to Storoschuk.

If I am right in the foregoing interpretation of the language quoted from the reasons for judgment, then there was ample evidence in my opinion to support the conclusion reached by the learned trial judge that Brown bought and held the lands in trust for Storoschuk subject to the conditions mentioned.

In the present circumstances I find no good or special reason to throw doubt upon the soundness of that conclusion. Consequently this Court should not interfere—*Dominion Iron and Steel Co.* v. *Burt* (1917), 86 L.J.P.C. 97.

The question then arises as to whether the Court will declare the trust when the conditions attached thereto have not been fully discharged.

No difficulty arises in regard to the conditions as to payment, since tender was made of the balance of the price paid by Brown prior to the issue of the writ. Here the trust may be declared subject to a charge in favour of Brown of the balance of the

C. A.
1946

BROWN
v.
STOROSCHUK

Bird, J.A.

purchase price paid by him, as was done in the *Rochefoucauld* case.

Then as to the question of non-performance by Storoschuk of the condition that he remain in Brown's employ for three years: It was shown that Storoschuk continued in his employ from September, 1941, when the understanding was reached, until November, 1943, a period of 26 months. Then Brown repudiated the understanding and Storoschuk left his employ but continued to reside on and to operate the farm in assertion of his right thereto.

If Brown did not actually refuse to retain Storoschuk in his employment for the full period of three years, nevertheless his repudiation of the trust was in fact and in result a refusal further to keep Storoschuk in his employment upon the terms of employment settled between them when the trust arose. If Storoschuk had continued in Brown's employ without protest after the latter had repudiated the trust, it would have been cogent evidence that Storoschuk had accepted the view of the transaction upon which Brown has relied, but which the learned judge has rejected.

Consequently it must be declared that Brown bought the farm as a trustee for the plaintiff and now holds title thereto in that capacity, subject, however, to a charge for the sum paid by Brown less the credits to which Storoschuk is entitled for payments made on account.

I would confirm the directions for accounting made by the learned trial judge, the account to be an account as been a trustee and his *cestui que trust* and not an account between mortgagor and mortgagee; and would dismiss the appeal.

Appeal dismissed, Sidney Smith, J.A. dissenting.

Solicitor for appellant: *Geo. L. Cassady.*
Solicitors for respondent: *Hamilton Read & Paterson.*

HARE AND THE GROLIER SOCIETY LIMITED v. BETTER BUSINESS BUREAU OF VANCOUVER.

C. A.
1946
Sept. 13, 16, 17, 18, 19, 20; *Nov.* 5.

Defamation — Defence of justification — Evidence of similar acts to show method—Pleading of justification.

The plaintiff H. recovered damages in consolidated actions for libel alleged to have been contained in a statement in the defendant's bulletin as to the method employed by the plaintiff H. in selling a book published by the other plaintiff by whom she was employed.

Held, reversing the decision of COADY, J., because he should not have excluded the testimony of four or five witnesses whom the defendant sought to call to prove the method of approach to prospective buyers used by the plaintiff H. The excluded testimony was admissible because there was admittedly a systematic method pursued aimed at the making of the same type of contract with each buyer. The fact that the excluded testimony concerned events after and not prior to the event in issue was not a ground for its exclusion for where it is shown as it was here, that the system or method was the same before and after, there can be no good ground for admitting evidence of the former and excluding evidence of the latter.

APPEAL by defendant from the decision of COADY, J. of the 10th of July, 1946 (reported, *ante,* p. 24), in an action for damages for libel contained in the issue of a periodical publication known as the "Bulletin" and circulated by the defendant in the city of Vancouver and elsewhere in British Columbia. The plaintiff society published a literary work known as the "Book of Knowledge" and the plaintiff Hare is a saleslady in the society's employ. The defendant is incorporated under the Societies Act of British Columbia and its objects are, *inter alia,*

> To further and promote honesty, truthfulness and reliability in merchandising. . . . To investigate, give publicity to, and aid in procuring proper legal action against vendors offering securities, commodities, or services of doubftul value by fraudulent or deceptive methods.

In the issue of the said bulletin published and circulated in the month of October, 1945, the defendant printed and published in the way of its said business the following article:

> Grolier Society.
>
> A woman giving the name "Miss Hare" has a new method of selling the "Book of Knowledge." She states she represents the Vancouver School Board, and is attached to the Family Allowance Department of the Government and interested in the Children's Aid. Her proposition is that the women on whom she calls make a down payment of ten dollars by signing

C. A.
1946

HARE AND THE GROLIER SOCIETY LTD. v. BETTER BUSINESS BUREAU OF VANCOUVER

over their Family Allowance for one year. She claims to be operating all across Canada. She is about thirty-five years of age, well dressed, blonde and drives a cream-coloured coupe, number of same not known. A report to the police or the bureau should be made if she calls.

The plaintiff claims that by the said article the defendant meant and it was understood to mean that the plaintiff was carrying on a fraudulent and dishonest business and was employing a woman known as Miss Hare for the purpose of selling the plaintiff's publication the "Book of Knowledge" on the basis of fraudulent misrepresentations and was obtaining, through the employment of the said Miss Hare, and had in fact obtained large sums of money from divers members of the public by deception and false pretences and had been guilty of a criminal offence, and by reason of this the plaintiff society has been greatly injured in its credit and reputation and in the way of its business and has been brought into public scandal, hatred and contempt.

The appeal was argued at Victoria on the 13th and the 16th to the 20th of September, 1946, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Farris, K.C. (*G. L. Murray,* with him), for appellant: The alleged libel was sent to about 300 members of the defendant association and about 50 outsiders. There is no profit in the business of the defendant association. So far as Mrs. Hare is concerned there is an implication of dishonesty. There are two defences we rely on: first, justification, and secondly, qualified privilege. As to the first, the statements as therein contained were true in substance and in fact or alternatively, substantially true in substance and in fact. As to the justification, there should be a new trial and as to the second defence, the action should be dismissed. There was justification on the words in their ordinary sense and on the innuendo. They have a standard system of approach to sales: see *Maisel* v. *Financial Times, Lim. (No. 1)* (1915), 84 L.J.K.B. 2145; *Maisel* v. *Financial Times, Lim. (No. 2)* (1915), *ib.* 2148. The words were justified on the innuendo as well: see *Sutherland* v. *Stopes* (1924), 94 L.J.K.B. 166, at p. 170; *Digby* v. *Financial News, Lim.* (1906), 76 L.J.K.B. 321, at p. 327; Gatley on Libel and

Slander, 3rd Ed., 522. Mrs. Hare was practising a systematic fraud: see English and Empire Digest, Vol. 22, p. 75, par. 438; *Barnes* v. *Merritt and Co.* (1899), 15 T.L.R. 419; *Hales* v. *Kerr* (1908), 77 L.J.K.B. 870; *Kidd* v. *Henderson* (1889), 22 N.S.R. 138; *Cook* v. *School Commissioners, Halifax* (1902), 35 N.S.R. 405. Next that there was qualified privilege see Gatley on Libel and Slander, 3rd Ed., 521. The words are justified in their natural and ordinary meaning: Gatley, p. 822, note 14. Where system or conduct is involved, the witnesses say that she said "I represent the School Board." On the question of intent see *Rex* v. *Penney* (1944), 60 B.C. 348; *Rex* v. *Anderson* (1935), 50 B.C. 225, at p. 228; *Bruck* v. *Regem* (1942), 80 Can. C.C. 52, at p. 68; *The Queen* v. *Geering* (1849), 18 L.J.M.C. 215; *Rex* v. *Armstrong* (1922), 91 L.J.K.B. 904. That there should be a new trial, cross-examination of Mrs. Hare was excluded wrongfully: see Gatley on Libel and Slander, 3rd Ed., 672; Odgers on Libel and Slander, 12th Ed., 308. On qualified privilege see *Sapiro* v. *Leader Pub. Co. Ltd., Sapiro* v. *Star Pub. Co. (Saskatoon) Ltd.,* [1926] 2 W.W.R. 268; *London Association for Protection of Trade* v. *Greenlands, Limited,* [1916] 2 A.C. 15; *Lawrence* v. *Finch,* [1931] 1 D.L.R. 689, at p. 693. As to whether there was malice and whether due care was taken to ascertain the facts see *London Trade Protection Association* v. *Greenlands* (1916), 85 L.J.K.B. 698, at p. 708; *Barr* v. *Musselburgh Merchants Association,* [1912] S.C. 174, at p. 179; *Halls* v. *Mitchell,* [1928] S.C.R. 125. On the question of how far negligence alone would have to go to take the case out of privilege, we took as much care as they did in the *Greenlands* case. The privilege was not lost.

Gilbert Hogg, for respondents: There are the two defences only (a) justification (b) qualified privilege. Whether privilege is destroyed is a matter of fact and we say it was destroyed: see Gatley on Libel and Slander, 3rd Ed., 214 and 230; *Macintosh* v. *Dun,* [1908] A.C. 390.

Cur. adv. vult.

5th November, 1946.

Per curiam (SIDNEY SMITH, J.A.): We are concerned in

C. A.
1946

HARE AND THE GROLIER SOCIETY LTD. v. BETTER BUSINESS BUREAU OF VANCOUVER

this appeal with an action for damages for libel. As we have reached the conclusion that there should be a new trial, and having regard to the view which we have formed of the issues which require decision, we think it well simply to state our reasons for this conclusion and leave to some future occasion the consideration of the other interesting points raised in argument before us. The action was brought by the plaintiff The Grolier Society Limited, the publishers of the Book of Knowledge, and by one Mrs. Margaret M. Hare, who is one of their saleswomen, against an organization known as the Better Business Bureau, incorporated under the Societies Act by a number of businessmen for the purpose of promoting better business in an ethical sense. The action came to trial before COADY, J. and resulted in judgment for the plaintiffs and in damages being awarded in the sum of $100 to the publishers and in the sum of $1,000 to Mrs. Hare. The Better Business Bureau (which we shall now call the bureau) appeals from this judgment.

The libel complained of was contained in a monthly bulletin issued by the bureau, which, amongst other items of information, contained the following:

Grolier Society.

A woman giving the name "Miss Hare" has a new method of selling the "Book of Knowledge." She states she represents the Vancouver School Board, and is attached to the Family Allowance Department of the Government and interested in the Children's Aid. Her proposition is that the women on whom she calls make a down payment of ten dollars by signing over their Family Allowance for one year. She claims to be operating all across Canada. She is about thirty-five years of age, well dressed, blonde and drives a cream-coloured coupe, number of same not known. A report to the police or the bureau should be made if she calls.

This resulted in the commencement of two actions and the filing of two statements of claim, one on behalf of each plaintiff. The actions were afterwards consolidated. In both statements of claim the libel was set out and this was followed in the Grolier action by the following paragraph:

7. By the said article the defendant meant and it was understood to mean that the plaintiff was carrying on a fraudulent and dishonest business and was employing a woman known as Miss Hare for the purpose of selling the plaintiff's publication the "Book of Knowledge" on the basis of fraudulent misrepresentations and was obtaining through the employment of the said Miss Hare and had in fact obtained large sums of money from divers mem-

bers of the public by deception and false pretences and had been guilty of a criminal offence.

In the action of Mrs. Hare the corresponding paragraph of the statement of claim was as follows:

6. By the said article the defendant meant and was understood to mean that the plaintiff was acting in a fraudulent and dishonest manner in attempting to sell the "Book of Knowledge" and was attempting to sell the said "Book of Knowledge" by making fraudulent misrepresentations and was attempting to obtain and had in fact obtained large sums of money from divers members of the public by deception and false pretences and had been guilty of a criminal offence.

It appeared from the evidence that the plaintiff Mrs. Hare had contacted a Mrs. Geddes and, pursuing a settled method of procedure, had endeavoured to sell the Book of Knowledge and the incidental services that went therewith. Mrs. Geddes, rightly or wrongly, had formed the impression that Mrs. Hare had said that she represented (amongst other organizations) the Vancouver School Board and, upon the departure of that lady, had telephoned the School Board for confirmation of this statement, and found that such was not the case. Mrs. Geddes then telephoned the bureau and reported the matter. The bureau through its manager, Mr. Templeton, thereupon, in its next monthly bulletin, published the alleged libellous paragraph set out above. To what extent Mr. Templeton satisfied himself of the truth of Mrs. Geddes' statements, whether he had other like incidents in mind, what other enquiries he made, whether he used all the machinery at his disposal to check the facts, and whether in the result he formulated charges which the material before him did not warrant, are all matters which do not require decision for the purposes of this judgment. But it is right to state that his good faith was not impugned.

And this much is true and undisputed. Mrs. Hare in her approach to prospective customers used a system or method of procedure which was the same in every case. It was an approach, the details of which are set out in Exhibit 5 filed at the trial. On this point Mr. Sykes, sales supervisor for the Grolier Society, gave evidence and said that he had trained Mrs. Hare as to the manner in which she should conduct negotiations with a prospective customer. It would appear to be a method universally used by the selling representatives of the publishers; and

C. A.
1946

HARE AND THE GROLIER SOCIETY LTD. v. BETTER BUSINESS BUREAU OF VANCOUVER

it is common ground that Mrs. Hare used this method (which she referred to as a standardized sales talk) during her interview with Mrs. Geddes and, both before and after that interview, in her contacts with prospective purchasers. We have examined Exhibit 5 with some care. The method would appear to be one which is not specially to be commended. It was referred to by counsel for the defendant, perhaps not without warrant, as "high pressure salesmanship."

It is important to notice exactly what were the learned judge's findings. He states [*ante,* 24, at p. 26]:

> I have no hesitation in finding that the words are defamatory in their natural and primary sense, that is, their plain and popular meaning. I likewise have no hesitation in finding that the defence of justification clearly fails. The burden of proving the truth of the statement published falls on the defendant, and this burden has not been discharged. On the contrary, I am not greatly impressed by the evidence of Mrs. Geddes as to the statements which she says were made to her by Mrs. Hare. I think she rather hastily drew conclusions that were not warranted. I prefer to accept the evidence of Mrs. Hare on that. The same applied to the evidence of Mrs. Witty.

And later as follows [*ante,* p. 27]:

> . . . The meaning assigned by the plaintiffs to the defamatory statement as set out in paragraph 6 of the statement of claim to the effect "that by this publication the defendant meant and was understood to mean that the plaintiff was acting in a fraudulent and dishonest manner in attempting to sell the "Book of Knowledge," and was attempting to sell the said "Book of Knowledge" by making fraudulent misrepresentations, and was attempting to obtain and had in fact obtained large sums of money from divers members of the public by deception and false pretences, and had been guilty of a criminal offence" would in substance seem to be an almost obvious conclusion in the public mind from the published statement.

Except to this limited extent, the learned judge does not anywhere in his reasons deal with either innuendo and we respectfully agree with his view that to this extent the innuendo he quotes is nothing more than the plain and natural meaning of the words used in the alleged libel.

The importance of that is this: Upon the trial and before us, it was urged that as the statement of defence, while justifying the libel, did not expressly justify the innuendo, but rested content with traversing the innuendo, it followed that if the published words were in fact defamatory (in the sense of the innuendo), the defence of justification (of the innuendo) is not open to the defendant because not pleaded. "You denied that

the published words were capable of bearing the meaning assigned to them in the innuendo. You did not say that if they in fact bore that meaning, that such meaning was true. Therefore if they are held to be defamatory the plaintiffs must have judgment." So ran the argument of the plaintiffs (now the respondents) both at the trial and before us. We would be averse to dealing with this appeal on what is no more than a point of pleading. But if that became necessary we would be inclined to conclude that paragraph 8 of the amended statement of defence when using the language

> In answer to the statement of claim as a whole the defendant says that . . . the statements as therein contained were true in substance and in fact

did, as a matter of pleading, justify the statements in the statement of claim as to the innuendo, as well as the statements as to the libel in its natural meaning. We were referred to no clear authority to the contrary, and certainly if this pleading were lacking in clarity it was the duty of the plaintiffs to demand particulars as was done, *e.g.*, in *Hennessy* v. *Wright* (1888), 57 L.J.Q.B. 594 and as referred to in Gatley on Libel and Slander, 3rd Ed., 548. No such demand was forthcoming.

Moreover, it would seem to be clear on the authorities that a plea of justification goes to the libel, plus any imputation it may reasonably bear. The point is stated thus in *Digby* v. *Financial News Limited,* [1907] 1 K.B. 502, at p. 507:

> When a plea of justification is pleaded, it involves the justification of every injurious imputation which a jury may think is to be found in the alleged libel.

And this proposition is quoted with approval by Lord Shaw in the House of Lords in the case of *Sutherland* v. *Stopes,* [1925] A.C. 47, at p. 77. We would take that language to mean that in the present case the plea of justification justified the libel both in its ordinary meaning and in whatever extra defamatory meaning may be attached to it by the innuendo. We take it such was the effect in the *Stopes* case, where an innuendo had also been pleaded (see pp. 57 and 61).

But it is not necessary to express a concluded opinion on this point because, as we see it, the learned judge did not decide the case on the innuendo at all. He decided it upon the words of the libel "in their natural and primary sense, that is, their plain

C. A.
1946

HARE AND THE GROLIER SOCIETY LTD. v. BETTER BUSINESS BUREAU OF VANCOUVER

and popular meaning." In so doing he was, in our opinion, and with respect, quite correct for "the sting of the charge" is to be found in the plain words of the libel itself.

But, with equal respect, we think the learned judge was in error in excluding the evidence of four or five witnesses whom the defendant sought to call to prove the method of approach employed by Mrs. Hare. These witnesses were all housewives whom Mrs. Hare in her selling capacity had contacted subsequent to her call upon Mrs. Geddes. As already stated, her method was the same in each case, and such method was to be found (so it was contended by the defendant) not so much by the actual words used by Mrs. Hare, but by the impression she intended to convey and did convey to prospective purchasers by her general words (and perhaps also by her actions). One would scarcely expect them to remember the exact words used, but it may be (so it was argued) that the words did convey to each of them the same definite meaning that they were intended to convey. If that were so, this volume of evidence would be very material in the consideration of the whole case, and might easily have resulted in a decision in favour of the defendant.

Mr. *Murray,* on behalf of the defendant, offered this evidence and argued that it was admissible in justification of the innuendo. The learned judge declined to so admit it as in his opinion, as a matter of pleading, the innuendo had not been justified. Thereupon Mr. *Murray* submitted the evidence as justifying the libel in its plain ordinary meaning, as follows:

> *Murray*: Now, my Lord, where there is a specific allegation, followed by an innuendo, I submit the law is that evidence of subsequent acts which justify it—we have a plea of justification—which would justify the plea set out in the innuendo is admissible.

Then upon the Court ruling against this view, Mr. *Murray* continued:

> I submit the evidence of subsequent acts directly relating to the libel in itself—I submit the same principle applies there. . . .

And later on he said:

> As your Lordship says, if we have not justified the innuendo we cannot call evidence to show they have acted fraudulently and dishonestly as alleged in the innuendo, but we can still call evidence to show the allegation was true in its primary sense as alleged in paragraph 5 of the statement of claim.

But this evidence the learned judge refused to hear upon the

authority of *Maisel* v. *Financial Times, Lim. (No. 1)* (1915), 84 L.J.K.B. 2145. With respect, that case is no authority for its exclusion. There it was admitted because it was evidence of character and here the judge held that the question of character was not involved. That is true. But character is only one of several grounds upon which such evidence may be admissible, *e.g.*, as facts showing system, method, negativing innocence, etc. *Hales* v. *Kerr* (1908), 77 L.J.K.B. 870; *Rex* v. *Armstrong*, [1922] 2 K.B. 555; *Rex* v. *Penney* (1944), 60 B.C. 348; *Rex* v. *Sims* (1946), 62 T.L.R. 431, at p. 432. An apt passage on this point is to be found in *Spenceley* v. *De Willott* (1806), 7 East 108, at p. 110, and is as follows:

> . . . That in this case, whatever contracts the witness might have entered into with other persons for other loans, they could not be evidence of the contract made with the defendant, unless the witness had first said that he had made the same contract with the defendant as he had made with those persons; which he had not said.

See also Phipson on Evidence, 7th Ed., 159.

In the present case there was admittedly a systematic method pursued throughout, aimed at the making of the same type of contract. On that ground we think the evidence was admissible.

Nor could it be excluded upon the further ground that it concerned events after and not prior to the event in issue (*viz.*, here the call upon Mrs. Geddes). For where it is shown, as here, that the system or method was the same before and after, there can be no good ground for admitting evidence of the former and excluding evidence of the latter. *Maizel* v. *Financial Times, Lim. (No. 2)* (1915), as reported in 84 L.J.K.B. 2148, is a good example of this principle.

We are of opinion therefore that this was relevant evidence and that it was improperly excluded on the issue of whether the words of the libel were defamatory in their plain and ordinary meaning; and that consequently there must be a new trial. The appellant will have the costs of this appeal; the costs of the first trial to abide the event of the second trial.

Appeal allowed; new trial ordered.

Solicitors for appellant: *Campbell, Murray & Company.*
Solicitor for respondents: *Gilbert Hogg.*

C. A.
1946
Nov. 8, 13.

THE BRITISH COLUMBIA SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS v. BARR *ET AL.*

Practice—Injunction, interlocutory—Order continuing—Discretion—Affidavit in support—Sufficiency—Information and belief—Appeal—Duty of appellate Court.

The British Columbia Society for the Prevention of Cruelty to Animals was incorporated by special Act of the Provincial Legislature in 1895 and pursuant to its corporate powers the society formed the Victoria branch by issue of a "warrant" or charter. Under its constitution the society may suspend the charter of a branch until the annual or specially called meeting of the society when it may cancel the charter of the branch. On October 1st, 1946, the executive of the society, by resolution, suspended the Victoria branch on the ground that it was operating in a manner likely to affect the good name of the society and alienate the goodwill of the public. On the next day W. R. T. Chetwynd, president of the society, served a copy of the resolution with explanatory letter on James Barr, president of the Victoria branch. Chetwynd then asked Barr if he would allow him to execute the terms of the resolution of the executive to which Barr replied that he would not. On October 4th, 1946, the society issued a writ claiming an injunction restraining from carrying on the Victoria branch and for a declaration that the property and assets held or controlled by the Victoria branch belonged to the society, and on the same day the society obtained an *ex parte* injunction restraining the branch office from dealing with the property and assets in any way. On motion, on the 22nd of October, the Chief Justice of the Supreme Court ordered the continuance of the injunction until the trial.

Held, on appeal, affirming the decision of FARRIS, C.J.S.C., that he was fully justified in the order he made with respect to the continuance of the injunction and applying *Wheatley* v. *Ellis and Hendrickson* (1944), 61 B.C. 55 and *Taylor* v. *The Vancouver General Hospital et al.* (1945), 62 B.C. 42 the appeal must be dismissed.

APPEAL by defendants from the order of FARRIS, C.J.S.C. of the 22nd of October, 1946, continuing an *interim* injunction until the trial of the action. The respondent society was incorporated in 1895 and pursuant to its corporate powers the society formed the Victoria branch in 1896. On the 1st of October, 1946, the executive committee of the British Columbia Society for the Prevention of Cruelty to Animals passed a resolution that the warrant of the Victoria branch of the society be suspended, that the Victoria branch of the society be notified of the suspen-

sion and that the officers of said branch be instructed to transfer and hand over to the president of the society all its bonds, securities, cash and bank accounts. Upon the president of the branch office being served with a letter and copy of said resolution, he refused to comply with the resolution of the executive committee of the main branch. On October 4th, 1946, the society issued a writ against the Victoria branch claiming an injunction restraining the carrying on of the Victoria branch and that the assets held or controlled by the Victoria branch belonged to the society. On the same day the society obtained an *ex parte* injunction restraining the appellants from dealing with the property and assets in any way. On October 22nd it was ordered by FARRIS, C.J.S.C. that the injunction be continued until the trial of the action.

The appeal was argued at Vancouver on the 8th of November, 1946, before O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

Harvey, K.C., for appellants: The two Barrs were elected officers in the Victoria branch in 1944. The branch office in Victoria came into being in 1896. The Barrs were active workers. Bequests were made from time to time to the Victoria branch. One Chetwynd, the president of the Society, investigated complaints as to the activities of the Victoria branch. The affidavit of Chetwynd should not have been received as it does not set out any grounds of information and belief offending rule 523. Next it is defective as it fails to set out any good cause of action. The affidavit does not show that irreparable damage would ensue if an injunction be not granted. An injunction should not be granted as the property of the branch office was administered for years in a proper manner. The affidavit failed to disclose material facts and that the assets of the Victoria branch consisted of gifts specifically made to the Victoria branch. There was an alternative remedy available under the constitution of the society. Chetwynd's affidavit offends rule 523 and does not give source of information: see *Tate* v. *Hennessey* (1901), 8 B.C. 220; *Bain* v. *Bank of Canada and Woodward* (1935), 50 B.C. 138, at p. 146; *Northern Counties* v. *Nathan* (1900), 7 B.C. 136; Kerr on Injunc-

C. A.
1946

THE BRITISH COLUMBIA SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS v. BARR ET AL.

tions, 6th Ed., 641; *Skinner's Company* v. *Irish Society* (1835), 1 Myl. & Cr. 162. When an interlocutory injunction is granted see *Jones* v. *Victoria* (1890), 2 B.C. 8; *Coffin* v. *Coffin* (1821), Jacob 70, at p. 72.

Twining, on the same side, referred to *Wall* v. *London and Northern Assets Corporation, Lim.* (1898), 67 L.J. Ch. 596.

John L. Farris, for respondent: As to the Chetwynd affidavit, the grounds for his statements are shown clearly on his cross-examination. The injury resulting would be irreparable. The Court must be satisfied there is a good cause of action: see Kerr on Injunctions, 6th Ed., 637. A fair question to argue is all that is required: see *Wheatley* v. *Ellis and Hendrickson* (1944), 61 B.C. 55. The action is for a declaration that the property is the property of the parent body: see *Rex* v. *The Army and Navy Veterans in Canada* (1921), 30 B.C. 248; *Knights of St. John* v. *Goldkie* (1921), 20 O.W.N. 320. We have to show there is a fair question to be argued and the plaintiff would suffer irreparable injury. Numerous complaints were received by the parent body that the Victoria branch made unwarranted charges against citizens in Victoria and trespassed on the property of private persons: see *Evans* v. *Bartlam,* [1937] A.C. 473, at pp. 480-1; *Murdoch* v. *The Attorney-General of British Columbia* (1939), 54 B.C. 496, at p. 501; *Taylor* v. *The Vancouver General Hospital et al.* (1945), 62 B.C. 42.

Harvey, in reply: When there is another remedy there should be no injunction.

Cur. adv. vult.

13th November, 1946.

O'HALLORAN, J.A.: This is an appeal from an order continuing an injunction until trial. The appeal was heard on 8th November, and judgment then reserved until today. The appellants are the officers of the Victoria branch of the British Columbia Society for the Prevention of Cruelty to Animals. The respondent is the parent body of that society.

The respondent society was incorporated by special Act of the Provincial Legislature in 1895 (Cap. 14 of that year and see Cap. 266, R.S.B.C. 1936). Pursuant to its corporate powers the society "formed" the Victoria branch in 1896 by issue of a

"warrant" or charter. Under its constitution the society may suspend the charter of a branch (there are 12 branches at present) until the annual or a specially called general meeting of the society, when it may cancel the charter of the branch and terminate the membership of the branch and its members in the society.

On 1st October, 1946, the executive of the society (by resolution) suspended the Victoria branch, on the ground it was operating in a manner likely to affect the good name of the society and to alienate the goodwill of the public. The executive then directed that a special general meeting of the society be called for 12th November (later changed to 15th November by arrangement between the solicitors for the parties) to consider the suspension. The next day (2nd October) W. R. T. Chetwynd, president of the society, personally served a certified copy of the resolution with an explanatory letter upon the appellant James Barr, president of the Victoria branch.

In his affidavit sworn two days later Mr. Chetwynd describes what then took place:

> . . . the defendant, James Barr, read the said Exhibits "C" and "D" [resolution and letter] in my presence and in the presence of A. J. Edwards, and stated that he would not even discuss the matter until he had taken it up with his executive. I then asked him if he would allow me to execute the terms of the resolution, exhibit "C." He said he definitely would not. I then asked him if I insisted in taking over would he have me thrown out. He replied that he certainly would and he said, "You are going to have a big fight on your hands." I then left the office.

Chetwynd was cross-examined on his affidavit on 8th October, but he was not then cross-examined upon this quoted paragraph. Chetwynd's statement of what took place on 2nd October as above quoted is not denied by the appellant Barr in his lengthy affidavit sworn on 12th October.

On 4th October the society issued a writ against the appellant officers of the Victoria branch claiming an injunction restraining them from carrying on the Victoria branch of the society, and for a declaration with consequential injunction and remedies that all the property and assets held or controlled by the Victoria branch belonged to the society. On the same day the society obtained an *ex parte* injunction restraining the appellants from dealing with the property and assets in any way. The

C. A.
1946

THE BRITISH COLUMBIA SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS v. BARR ET AL.

O'Halloran, J.A.

motion to continue the injunction was heard on 16th October before the learned Chief Justice of the Supreme Court, who, on 22nd October ordered it continued, giving comprehensive reasons for his decision. The order then made and now under appeal restrained the appellants from dealing with the property or assets under the control of the Victoria branch (some $32,500 in value) and from carrying on the Victoria branch, until the trial, or earlier date, if the suspension were earlier withdrawn.

Summarizing his main arguments, counsel for the appellants submitted the injunction ought not to be granted, first because it would have the effect of granting the whole relief claimed in the action. But that cannot be so, since the order makes no declaration regarding ownership of the property held by the Victoria branch. Secondly it was submitted this was not a case for an injunction because the Victoria branch had carried on for many years under a uniform policy. Joined therewith were submissions regarding the balance of convenience, and that no plain case had been made out. Reliance was placed on *Skinner's Company* v. *Irish Society* (1835), 1 Myl. & Cr. 162; 40 E.R. 338. That principle does not apply here because there is substantive evidence of a change in policy. The society objected to that change. The merits of the change of policy will no doubt be determined at the general meeting on 15th November. But in the meantime the society made out a fair case to be argued—irrespective of its ultimate result, and that is enough—see *Wheatley* v. *Ellis and Hendrickson* (1944), 61 B.C. 55.

In the third place, it was said there was an alternative remedy, *viz.*, suspension and expulsion of the branch under the society's corporate powers. But in view of the defiant if not bellicose attitude of the appellant Barr, when served with the resolution of suspension as quoted *supra*, the society was given reason to believe and the Court below had cause to conclude, that an order of Court was required to preserve the subject-matter, and to restrain the appellants until the trial or the general meeting from flouting the society's suspension order.

In the fourth place, it was said that the society did not disclose material facts to the Court, *viz.*, that a substantial portion of the assets of the Victoria branch were specifically bequeathed to that

branch. Exhibit "B" attached to Chetwynd's affidavit sworn on 4th October is a copy of the last balance sheet of the Victoria branch. While it is by no means a detailed statement it cannot fairly be described as non-disclosure. In any event, the learned Chief Justice was fully informed on the hearing to continue the injunction of the special bequests to the Victoria branch. But the society raises the important question that although it may establish a branch, it cannot give that branch a corporate *status*, and hence it submits that a branch cannot itself legally acquire and hold property but can do so only in the right and name of the society. The branch derives all its *status* from the society which also may cancel that *status*. Whatever the ultimate decision a fair question to be argued is presented in that respect, and see *Wheatley* v. *Ellis and Hendrickson, supra.*

The evidence before the learned Chief Justice amply answers the fifth objection that irreparable damage was not shown. The society is dependent on the public for support, and if any branch carries on its activities in such a way as to antagonize the public and alienate its sympathy the society as a whole will suffer incalculable injury unless it takes prompt action to see that its good name is maintained.

In the sixth place it is objected that paragraphs 12 and 13 of the affidavit of Chetwynd sworn 4th October did not set forth the grounds or source of his belief (a) that the property in the control of the Victoria branch is the property of the society, and (b) that irreparable injury would result if the injunction were not granted. Appellants' counsel submitted accordingly under *Tate* v. *Hennessey* (1901), 8 B.C. 220, at p. 222 that said paragraphs were worthless and ought not to be looked at. But as I read *The King* v. *Licence Commissioners of Point Grey* (1913), 18 B.C. 648 and interpret the observations therein quoted of Lord Alverstone, C.J. in *In re J. L. Young Manufacturing Company, Limited* (1900), 69 L.J. Ch. 868 an affidavit which neglects to set forth grounds of information and belief is not worthless if the Court can otherwise ascertain the source of that unstated information and belief.

In this case Chetwynd was cross-examined upon his belief that irreparable injury would occur and stated his reasons fully.

C. A.
1946
THE BRITISH COLUMBIA SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS v. BARR ET AL.
O'Halloran, J.A.

While he was not cross-examined directly upon his grounds for stating the assets held by the Victoria branch are the property of the society, it seems implicit from his cross-examination that he regarded the society as the custodian of those assets; he said an application by the Victoria branch to acquire a separate corporate *status* had been refused previously by the society, on the ground the Victoria branch could then take away all its assets from the society which is "the custodian of these assets." Throughout the hearing it was manifest that the question of who owned the assets in the control of the Victoria branch was largely a question of law to be determined at the trial. In the circumstances Chetwynd's grounds for believing what the ultimate decision of the Court might be, could be of little value to any one.

The final objection was that Chetwynd did not depose the society had a good cause of action. Reliance was placed on *Tate* v. *Hennessey* (1901), 8 B.C. 220 and *Northern Counties* v. *Nathan* (1900), 7 B.C. 136. But both these decisions related to applications for service *ex juris* under rule 67 which specifically requires the affidavit to state that in the belief of the deponent the plaintiff has a good cause of action. Counsel for the respondent submitted that there is no such specific rule in the case of applications for injunctions. It is observed that the form of affidavit in support of an application for an injunction given at pp. 290-1 of Chitty's K.B. Forms, 16th Ed., does not require it. What the applicant must show is that he has a fair question to argue (*Wheatley* v. *Ellis and Hendrickson* (1944), 61 B.C. 55) and that will appear from all the material in support of the application which must disclose the nature of the plaintiff's right and the infringement alleged.

I am satisfied the learned Chief Justice had before him a sufficient statement of the nature of the rights claimed by the society and of the particulars of the infringement thereof, and of the danger of a continuance of that infringement, and of the irreparable nature of the damage occurring. The charter of the Victoria branch was then and still is suspended by the society acting under its statutory powers. That suspension has not been attacked in the Courts. It remains to be dealt with in the general meeting of the society on 15th November. So far as the learned Chief

Justice below was concerned, and so far as this Court is concerned, that suspension must be regarded as a valid exercise of the society's statutory powers. It was and is binding on the appellants.

It became clear to the learned Chief Justice, as it is also clear to this Court, particularly from what the appellant Barr said when served with the suspension resolution on 2nd October, that there was reasonable ground to conclude that the appellants had no intention of recognizing or accepting the suspension. Barr's language as quoted clearly implies if it does not explicitly state, that he would not comply with the terms of the suspension in the interval which would necessarily elapse between 2nd October and the general meeting on 15th November. In these circumstances it seems inevitable the society should apply and obtain at once an order to restrain the appellants from functioning as a branch of the society until the general meeting of the society had an opportunity to review the suspension and decide whether or not the charter of the Victoria branch ought to be cancelled. By taking that course the substantial assets held by the Victoria branch would be preserved *in statu quo* and the suspension order respected.

I agree with the reasons for judgment of the learned Chief Justice in the Court of first instance. He has, with respect, correctly applied the principles restated by this Court in *Wheatley* v. *Ellis and Hendrickson* (1944), 61 B.C. 55. It is noted also that decision quotes Cottenham, L.C. to this effect, at p. 58:

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

To paraphrase the language of Viscount Simon, L.C. cited in *Taylor* v. *The Vancouver General Hospital et al.* (1945), 62 B.C. 79, at p. 80, the learned Chief Justice in exercising his discretion, did not fail to give full weight to all relevant considerations.

The appeal must therefore be dismissed. If the parties are unable to bridge their differences at the general meeting to be held two days hence, then in my opinion application ought to be

C. A.
1946

THE BRITISH COLUMBIA SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS v. BARR ET AL.

made immediately to the Court below for necessary directions to expedite the trial of the action.

SIDNEY SMITH, J.A.: This appeal arises in consequence of a difference of opinion between the plaintiff, the parent body in British Columbia of the Society for the Prevention of Cruelty to Animals, and its Victoria branch. The opening words of the preamble to the plaintiff's Act of incorporation, B.C. Stats. 1895, Cap. 14 (now R.S.B.C. 1936, Cap. 266) are these:

> Whereas it is desirable to provide means for enforcing the laws for the protection of, and preventing cruelty to, dumb animals, and to secure the prosecution of persons violating such laws; . . .

In considering this language it may not be unimportant to recall the elevated view of the objects of this and kindred societies expressed by Swinfen-Eady, L.J. in a notable passage in *In re Wedgwood. Allen* v. *Wedgwood,* [1915] 1 Ch. 113, at p. 122, as follows:

> . . . A gift for the benefit and protection of animals tends to promote and encourage kindness towards them, to discourage cruelty, and to ameliorate the condition of the brute creation, and thus to stimulate humane and generous sentiments in man towards the lower animals, and by these means promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race.

The dispute that has occurred herein, having regard to the view which I individually have formed, is one concerning means rather than ends; is one concerning steps for the better advancement of the society rather than any wrong-doing on the part of any of the officers concerned. The two principal officers, indeed, differed only about the methods of thoroughness by which their praiseworthy ends could be pursued. The defendant James Barr is a retired master mariner. In November, 1944, he was elected president of the Victoria branch. The other defendants are the secretary and the treasurer of the branch. The president of the parent body is one William R. T. Chetwynd, who is by occupation a live-stock feeder, and who was elected president in March, 1946.

The material shows that since the election of Capt. Barr to the presidency of the Victoria branch, that branch has met with very considerable advancement. Its membership increased from 209 to 762 paid-up members; for the year 1944 there was a deficit of

$1,266.70, whereas for the year 1945 the deficit was only $21.42, and it is reasonably expected that the current year will show a profit; that the present assets amount to over $32,000, these and all such matters of accountancy are set out in the affidavit of Capt. Barr with meticulous particularity. But during this period president Chetwynd had received reports that all was not well at Victoria in the operation of the branch; that the branch was carrying on much too vigorous a campaign; that there were an undue number of prosecutions for cruelty to animals; that a libel action had been commenced against the society and that perhaps another was pending; that what was being done at Victoria amounted sometimes almost to persecution of those having the control and charge of animals. On the other hand, the inspectors' reports which were filed show what would appear to be good ground for the steps taken by the Victoria officers. But however that may be, the parent body, fearing that the good name of the society was in jeopardy, and fearing too that its funds might be diminished by actions for damages, on the 1st of October, 1946, took the rather extreme step of suspending the warrant of the Victoria branch. *Prima facie* it had the necessary power to do this, for section 7 of its incorporating Act is as follows:

> 7. The Society may form and establish branch Societies at or in all or any of the cities, towns, municipalities, or electoral districts of the Province, from time to time, and subject to or under such regulations as may be deemed necessary or expedient.

And article VI. of the constitution under which it works states expressly that

> . . . The Executive Committee may suspend the warrant of any branch society, after which such branch society shall cease to function as a branch of this Society. Such suspension shall operate until the next following annual meeting of the Society or of any special general meeting called to deal with such suspension. Such branch shall be notified through its officers of the suspension and the reasons therefor. . . .

The president personally handed the appropriate resolution and the reasons therefor to Capt. Barr. This was the first intimation Capt. Barr had had that any such movement was on foot. He resented the action taken and presented to him so summarily, and intimated that, notwithstanding what had transpired, the branch would carry on as theretofore. In this, I think, he

C. A.
1946

THE BRITISH COLUMBIA SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS v. BARR ET AL.

Sidney Smith, J.A.

adopted quite the wrong attitude. On the other hand, the president was perhaps lacking in tact (to put it no stronger) in taking these measures without previous consultation or conference with Capt. Barr. I take the view that Capt. Barr and his branch were condemned upon grounds never previously brought to their notice, and I make no further comment, in this interlocutory appeal, upon the propriety of that course. In any event these two honourable men now stand apart; and it is the pity of it that they should at this time, and on this matter, find themselves unable to march together. These circumstances are part of the material filed, and so part of the history of the case, and I have thought it desirable to set them forth. I note with satisfaction that the whole matter will be discussed at a general meeting of the society on the 15th of this month.

The parent body applied for and obtained from the Chief Justice of the Supreme Court an interlocutory injunction enjoining the defendants from continuing the operation of the branch till the date of trial, or until the earlier withdrawal of the suspension by the plaintiff. It is from this order that the present appeal is brought.

The relevant principle has been recently examined by this Court. It is stated by O'HALLORAN, J.A. (speaking for the Court) in *Wheatley* v. *Ellis and Hendrickson* (1944), 61 B.C. 55, at p. 58 in this way:

> . . . To put it shortly, a person who comes to the Court for an interlocutory injunction of this nature is not required to make out a case which will entitle him at all events to relief at the trial. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges, and can satisfy the Court that the property should be preserved in its present actual condition until the question can be disposed of.

Applying this principle to the present case, I do not see that the learned Chief Justice could have done otherwise than he did. The material indicated that if the interlocutory injunction were not granted the Victoria branch would continue its activities despite the suspension, and that damage to the plaintiff, which might well be irreparable, might ensue. But this, in my opinion, was not due to any contumacious or wanton spirit on the part of Capt. Barr; for there is not the slightest doubt of his *bona fides*, any more than there is of the *bona fides* of the president. It was,

I think, due to a misconception on his part of the legal position of the branch and of his responsibility thereto. He viewed the branch as a separate entity, capable of a separate existence, and competent to hold property in its own right. As to that I do not know. The question, like the other questions involved, will not be ripe for decision till the trial of the action.

Several other points of a more or less technical nature were debated before us. But they were likewise argued in the Court below, and I concur in the disposition there made of them, and in the reasoning therefor.

As I have said, I think the learned Chief Justice was fully justified in the order he made with respect to the continuance of the injunction; and perhaps, respectfully, it is not too late to repeat his wise words in the concluding paragraph of his judgment:

> What seems to be [the case] is that the dispute is only a difference in view between the executive of the parent society and the Victoria branch as to policy, and as the association is conducted for the benefit of society at large these groups should recognize their responsibilities and get together, forgetting any personal animosities that may have arisen, and between themselves find a proper solution of their difficulties.

For the foregoing reasons I would dismiss the appeal.

BIRD, J.A.: It is I think apparent from an examination of the reasons for judgment filed below that full and careful consideration to all relevant matters was given by the learned Chief Justice when, in the exercise of his discretion, he made the order from which this appeal is taken.

His discretion, in my opinion, was correctly exercised upon the principles applied in *Taylor* v. *The Vancouver General Hospital et al.* (1945), 62 B.C. 42 and 79.

Consequently, and as well for the reasons given by my brother O'HALLORAN, in which I concur, I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellants: *Robert D. Harvey.*
Solicitor for respondent: *John L. Farris.*

In Admiralty
1947
Jan. 7, 8, 9, 12, 13, 14, 15, 18.

CANADIAN TRANSPORT COMPANY LIMITED, OWNERS OF THE SCHOONER "CITY OF ALBERNI" v. HUNT, LEUCHARS, HEPBURN, LIMITED. "CITY OF ALBERNI."

Ship—Seaworthiness—General average—Onus of proof—Due diligence—"Actual fault or privity of owners"—R.S.C. 1927, Caps. 186, Sec. 649 and 207.

The five-masted schooner "City of Alberni" built in 1920 of fir, gross tonnage 1590 tons, was purchased by the plaintiff in 1940. In that year she made a voyage to Australia with lumber and returned to Vancouver with sugar from the Fiji Islands. In 1941 she made a similar voyage to Australia arriving back at Vancouver with hardwood and copra from New South Wales in November, 1941. On November 10th, 1942, she sailed on the voyage in question with a million and one-half feet of lumber for carriage to Durban, South Africa. When four days out of Vancouver the vessel was leaking so badly that it was decided to go into San Francisco for repairs, arriving there on November 24th, 1942. After repairs the voyage was continued on December 12th, 1942. From February 20th to 24th, 1943, she encountered bad weather and leaked so badly that it was decided to put into Valparaiso for further repairs, arriving there March 12th, 1943. After various inspections, the owners decided to abandon the voyage. The shipowners sold the ship and the cargo interests sold the cargo for what they respectively would bring. Heavy losses were incurred by both. In an action by the shipowners to recover a general average contribution from the cargo interests for loss caused by a sacrifice in time of peril at sea and counterclaim by the cargo interests that the ship was initially unseaworthy and that the owners failed to use due diligence to make her seaworthy and that they must pay the cargo interests the amount of their losses.

Held, that the issue of seaworthiness and the issue of due diligence are here both questions of fact, depending on the evidence adduced and the proper inferences to be drawn from such evidence, the definition of seaworthiness being that the ship should be in a condition to encounter whatever perils of the sea a ship of that kind and laden in that way, may be fairly expected to encounter in crossing the Atlantic or in performing whatever is the voyage to be performed; that measured by this standard, the "City of Alberni" was not seaworthy when she sailed from Vancouver. The vessel was unseaworthy when she left San Francisco in that no proper repairs had been effected to the underwater portion of the stern and hood ends of the hull planking. In the circumstances, on the authorities, the shipowner did not exercise due diligence to make the ship seaworthy at Vancouver.

Held, further, that the owners are entitled to limit their liability under the provisions of section 649 of the Canada Shipping Act as they have satisfactorily discharged the *onus* of proving that the loss was occasioned without their actual fault or privity.

In Admiralty
1947

CANADIAN TRANSPORT CO. LTD. OWNERS OF THE SCHOONER "CITY OF ALBERNI" *v.* HUNT, LEUCHARS, HEPBURN, LTD.

"CITY OF ALBERNI"

ACTION by the owners of the five-masted schooner "City of Alberni" to recover a general average contribution from the cargo interests of some $55,000 and counterclaim by the cargo interests for payment of the amount of their losses claiming the ship was initially unseaworthy and the owners failed to use due diligence to make her seaworthy.

Tried by SIDNEY SMITH, D.J.A., at Vancouver on the 7th, 8th, 9th and the 12th to the 15th of January, 1947.

Clyne, and *John I. Bird,* for plaintiff.
Guild, and *Sheppard,* for defendant.

Cur. adv. vult.

18th January, 1947.

SIDNEY SMITH, D.J.A.: The plaintiff in this case was the owner of the schooner "City of Alberni" and the defendant was the owner of a cargo of lumber laden therein at Vancouver, British Columbia, for carriage to Durban in South Africa. I shall call the former the "shipowners" and the latter the "cargo interests."

The "City of Alberni" is a five-masted schooner, built in 1920 of fir at Hoquiam, Washington, U.S.A., length 242 feet; beam 44 feet; loaded draft 23 feet; gross tonnage 1590 tons; registered (at all material times) at Vancouver, B.C.; official number 172,324; registered owner, Canadian Transport Company Limited. In 1940 she was purchased by the shipowners and in that year made a voyage to Australia with lumber and returned to Vancouver with sugar from the Fiji Islands. In 1941 she made a similar voyage to Australia arriving back in Vancouver in November, 1941, with hardwood and copra from Sydney, New South Wales, and Samoa, respectively. She was then laid up until the following October, when she was again laden with lumber to the extent of one million feet below decks and a half million feet on deck, and on 10th November, 1942, with a crew of 18 men all told, sailed upon the voyage with which we are concerned in this action. When four days out of Vancouver the vessel was found to be leaking so badly that the master decided two days later to put into San Francisco for repairs and

In Admiralty
1947

CANADIAN TRANSPORT CO. LTD. OWNERS OF THE SCHOONER "CITY OF ALBERNI" v. HUNT, LEUCHARS, HEPBURN, LTD.

"CITY OF ALBERNI"

Sidney Smith, D.J.A.

did so, arriving in that port on the 24th of November, 1942. There certain repairs were made around the stem, and on 12th December, 1942, she continued upon her voyage. From the 20th to the 24th of February, 1943, she encountered heavy weather and again leaked so badly that on the 25th the master decided to put into Valparaiso for further repairs. The ship arrived there on the 12th of March, 1943. After various inspections it was decided by the owners to abandon the voyage and thereupon the ship and cargo parted company. The shipowners sold the ship and the cargo interests sold the cargo for what they respectively would bring. Heavy losses were incurred by both. Hence this action.

This action is brought by the shipowners to recover a general average contribution from the cargo interests of some $55,000. The equity of the underlying principle of general average has been recognized throughout the centuries, and every maritime state has adopted the rule that a loss caused by a sacrifice in time of peril at sea shall not be borne by one but by all interests involved in the adventure. A general average act is defined in the Marine Insurance Act, R.S.B.C. 1936, Cap. 134, Sec. 68 (2) (and in section 66 (2) of the English Marine Insurance Act, 1906) as follows:

(2.) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.

Here the loss was not by way of sacrifice but by way of expenditures made by the owners at San Francisco and at Valparaiso and, assuming such expenditures were properly and reasonably made, the shipowners would be entitled to contribution from the cargo interests. But the cargo interests resist the claim upon the footing that the ship was initially unseaworthy, and that the owners failed to use due diligence to make her seaworthy. They say that the legal consequence is that the shipowners cannot recover; but that on the other hand they must pay to the cargo interests the amount of their losses, which they (the cargo interests) now make the subject of a counterclaim in this action.

The bills of lading contained a clause which is known as the

"New Jason Clause," under which it was argued that the *onus* of proving seaworthiness fell upon the shipowners if they were to succeed in their claim for a general average contribution. This may or may not be true, but in the view I take of the matter the question of *onus* is not material.

The bills of lading also contained an overriding clause making them subject to all the terms and provisions of and all the exemptions from liability contained in the Canadian Water Carriage of Goods Act, 1936. The relevant parts of this Act are as follows:

3. There shall not be implied in any contract for the carriage of goods by water to which the Rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

ARTICLE III.

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to,

(*a*) make the ship seaworthy:

ARTICLE IV.

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, . . .

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,

. . . .

(*p*) latent defects not discoverable by due diligence;

Finally, under the bills of lading general average was made payable according to York Antwerp Rules, 1924 or 1890 at the option of Canadian Transport Company Limited.

In *Paterson Steamships Ld.* v. *Canadian Co-operative Wheat Producers, Ld.*, [1934] A.C. 538 at pp. 544 *et seq.* Lord Wright deals with the shipowner's absolute warranty of seaworthiness which formerly prevailed at common law, and shows how the British Carriage of Goods by Sea Act, 1924 (which is the same as the aforesaid Canadian Act of 1936), and kindred Acts, imposed restrictions upon the shipowner's freedom to contract out of his liability as carrier at common law, and at the same time gave him the benefit of certain statutory provisions in his favour. One such provision was the statutory removal of his absolute warranty of seaworthiness and its replacement by a

In Admiralty
1947

CANADIAN TRANSPORT CO. LTD. OWNERS OF THE SCHOONER "CITY OF ALBERNI" v. HUNT, LEUCHARS, HEPBURN, LTD.

"CITY OF ALBERNI"

Sidney Smith, D.J.A.

provision requiring only due diligence on his part to make his ship seaworthy.

So that in the present case the legal position envisaged in the bills of lading is this: The shipowners are entitled to recover provided their vessel was seaworthy; or even if she were not seaworthy, provided they used due diligence to make her so. But if both provisoes are found against them, they fail, the cargo interests succeed on their counterclaim, and the only remaining question is whether the shipowners are entitled to limitation of their liability under section 649 of the Canada Shipping Act, 1934.

The issue of seaworthiness and the issue of due (which means "reasonable") diligence are here both questions of fact, depending on the evidence adduced and the proper inferences to be drawn from such evidence. The well known definition of seaworthiness given by Lord Cairns and approved by Lord Herschell, L.C., in *Gilroy, Sons, & Co.* v. *Price & Co.*, [1893] A.C. 56, at p. 63 is as follows:

> "That the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter in crossing the Atlantic," or in performing whatever is the voyage to be performed.

Measured by this standard, I am of opinion that the "City of Alberni" was not seaworthy when she sailed from Vancouver. These are my reasons for thinking so:

First, the weather: The vessel sailed from Vancouver on November 10th, 1942. Her log entries show that she was "making considerable water throughout night" of the 13th and 14th of November and at 9.30 a.m. on the 14th a "leak was discovered at stem in vicinity of water-line." This leak was of such gravity that at noon on the 16th the master, quite rightly, decided to "run for San Francisco for repairs." The weather, up until the morning of the 14th, was not abnormal for a November day in the North Pacific. The Beaufort Scale affords a useful method for recording the velocity of the wind, running as it does from 0, signifying a dead calm, to 12, signifying winds of hurricane force. On this scale, until then, as depicted in the log, there was no wind over force 5, except for two hours from 6 to 8 a.m. on the 14th, when it was logged as being at South-West, force 6.

But at 8 a.m. it backed to the South-South-East and moderated to force 2. This was by no means unusual weather for the time and place, and certainly not weather such as *per se* should cause a seaworthy vessel to take water. I adopt as appropriate to the case a passage from the judgment of Lord Loreburn, L.C. in *Lindsay* v. *Klein. The Tatjana,* [1911] A.C. 194, at p. 197:

> If this ship was seaworthy, what occurred to her almost immediately after she left port is quite unaccountable, and it is the shipowner's business to account for it if he can in some way which shall displace the natural inference.

And the further passage at p. 205 from the judgment of Lord Shaw:

> . . . In short, the whole evidence in the case must be weighed, and when those alleging unseaworthiness prove a mass of facts such as I have mentioned, and such as appear in this case bearing upon the record of a vessel which founders or breaks down shortly after setting sail, they start with a body of evidence raising a natural presumption against seaworthiness, which presumption, however, may of course be overborne by proof that the loss or damage to the vessel occurred from a cause or causes of a different character.

But the master says that the log-book does not show the true nature of the weather—that it was much more severe than the log entries indicate. I am satisfied that the master is a brave and capable officer, but on this point I think he is mistaken, and that the memory of the second mate is also at fault. I have not overlooked the evidence from the United States Weather Bureau as to the winds prevailing at that time along the coast of the State of Washington. But it does not follow that winds of a similar velocity were also prevailing at a point two hundred miles to the Westward. The captain himself signed each page of the log-book in the calm of San Francisco harbour, when he had ample time for reflection. In my opinion the log-book correctly reflects the weather experienced at this and other times on the voyage.

Next, the condition of the vessel at San Francisco:

It may first be useful to notice that the stem or stem post is the foremost perpendicular timber of a vessel, and that it is united to the keel inside by the deadwood, and outside by the stem band, while at its head the breast-hook binds the upper strakes (the planking) of the vessel firmly to it. Behind or abaft

In Admiralty
1947

CANADIAN TRANSPORT CO. LTD. OWNERS OF THE SCHOONER "CITY OF ALBERNI" v. HUNT, LEUCHARS, HEPBURN, LTD.

"CITY OF ALBERNI"

Sidney Smith, D.J.A.

the stem another timber is secured called the apron, which gives to it additional support, and which also secures the forward end of the strakes, thus rendering the bow, as it needs to be, a powerful construction. The fore ends of the horizontal outside planking of the vessel (known as the hood ends) are fitted into a groove or channel incised along the after outer edge of the stem post. This groove is known as the rabbet of the stem and is expressly made to receive the edge (ends) of the side planking.

The master said there was a leak on each side of the stem between the hood ends of the planking and the rabbet of the stem: that there was a wide seam there but that he could not recall its width. It needed caulking. John Tarabochia, the shipwright foreman, who carried out the repairs, gave evidence before me. He is an Austrian and was at times a little difficult to follow. But I think he spoke the truth, as he saw it, and I accept his evidence. He said the hood ends of the planks had pulled away from the stem, that the spikes had drawn from the stem and apron, and that this was due to dry rot in both stem and apron. The evidence of Robert Martinolich was taken on commission at San Francisco. He is the supervisor of repairs for the Martinolich Shipbuilding Company who executed the repairs. His testimony was substantially the same as that of Tarabochia, and I see no reason to doubt it. These two witnesses were called by the cargo interests. For the shipowners (apart from the master) evidence was given on commission by captain Jory at San Francisco. He is a surveyor with the Board of Marine Underwriters of San Francisco and was called in to survey the stowage of the cargo. He said he knew nothing about the conditions of the stem and apron when the vessel arrived, but knew

she was leaking water forward because you could hear the water running in.

He gave no opinion in his survey report that the vessel was seaworthy. His report states that the vessel was making about 24 inches of water per day while at anchor and that the leaking appeared to be caused by started and opened seams in way of plank ends at stem and apron; that the vessel was raised approximately 26 inches at the bow when temporary repairs were made by refastening the plank ends and caulking the open seams; that

shaped steel plates were then fitted to each side of the stem in way of the bow plank ends and secured in place by through bolting; that a diver was employed to caulk the seam below the water-line; that upon completion of repairs the leaking had apparently been reduced to normal.

The only other evidence on this point was a certificate from Edward Hough, surveyor to the Bureau Veritas at San Francisco, and therefore the opposite number of Mr. Louden at Vancouver. It may be well to set out his certificate in full.

THIS IS TO CERTIFY that at the request of the British Ministry of Shipping, Agents for the Wooden Schooner, "CITY OF ALBERNI," the undersigned Marine Surveyor to Bureau Veritas, did on November 24th, 1942, and subsequent dates, hold survey on the above vessel as she lay afloat in San Francisco Bay for the purpose of determining the extent and nature of a leak reported to have been sustained while the vessel was *en ruote* from Vancouver, B.C., to South Africa.

As the vessel was diverted from her voyage she entered San Francisco Bay where repairs were effected and the vessel is now on this date, in my opinion, in fit and seaworthy condition to carry lumber cargoes on trans-ocean voyages.

Mr. Hough although a resident of San Francisco was not called, and so gave no evidence in support of his certificate. It appeared that the matter was in charge of another surveyor, a Mr. Dixon, now deceased. But it also appeared that Hough had been down at the vessel during repairs and his certificate so states. I did not have the benefit of his opinion on the "extent and nature of a leak" for which he says, he held survey; nor upon what facts he based his opinion that the vessel was "in fit and seaworthy condition"; nor what he means by "trans-ocean voyages"; nor whether that expression includes a voyage round Cape Horn. This was not very satisfactory. But I must take the evidence as I find it and considering it as a whole, with respect to the state of affairs at San Francisco, I find that there was dry rot in the stem and apron of such a nature and to such an extent as to afford no sufficient fastening for the hood ends of the planking which consequently started and opened in the first moderate weather encountered.

Next, the position at Vancouver: There was much evidence given as to the vessel's condition and as to the surveys she underwent and the repairs that were made. The shipowners were

In Admiralty
1947

CANADIAN TRANSPORT CO. LTD. OWNERS OF THE SCHOONER "CITY OF ALBERNI" v. HUNT, LEUCHARS, HEPBURN, LTD.

"CITY OF ALBERNI"

Sidney Smith, D.J.A.

generous with regard to surveys, and as to the general upkeep of the vessel. A survey was held on purchase and another at the end of each voyage. After her return in November, 1941, the vessel was dry-docked and repairs continued afloat, off and on, until February, 1942. She was then laid up till October, 1942, when she loaded the aforesaid cargo. Prior to loading she was dry-docked again for hull painting and examination. But the master and surveyors all agree that this was merely a superficial examination. They, however, all knew that the pending voyage was one round the Horn, and I think they also knew that it was her first voyage round the Horn. While in her previous ownership she had been employed in the carriage of lumber cargoes to the Hawaiian Islands. The surveyors were Mr. Louden (who succeeded Mr. Lockhart, present at the first survey) of the Bureau Veritas and Captain Clarke of the Board of Marine Underwriters of San Francisco, both of whom are men of experience. After the ship returned from the second voyage she was as already stated dry-docked in November, 1941, and repairs and survey continued afloat. Amongst other matters attended to then were the planks in the way of the hawse-pipes on each bow. These were found decayed. They were removed and replaced. The evidence of Captain Clarke on this repair is as follows:

Clyne: Several planks in way of hawse-pipes on both port and starboard sides more or less decayed? That is a different matter.

What is the occasion of that decay? Dry, plain rot.

What was the occasion of the decay? Moisture getting in there through damaged portions of the planking, through the anchor. The bows were sheathed around the hawse-pipes with metal and we do find with the anchor —that metal had been punctured. Water had got through the punctured places, and was possibly running through the seams above and down behind; and in the packing around there we found some deterioration with the result we decided to take those off and give it a thorough examination. On pulling this off we found deteriorated planks, just plain rot in pockets and places and I think Mr. Louden was the chief man who took the matter into his hands there—I was in attendance with him and the shipyards cut those planks off. I do not recall how many but it extended from a position above the flanges of the hawse-pipe to a position below the flanges.

How many planks were removed, could you tell, captain? No, I cannot recall but it was almost to my own depth as I stood on the planking there near the whole aperture on the starboard side. It was pretty near as tall as myself.

What members of the ship were exposed when you removed the planking? The knightheads, a small portion of the apron, the aft part of the stem, about three or four frames and all the filling troughs.

Did you have occasion to observe the work? Yes.

What was the condition of the wood in those members? In the filling troughs they were quite seriously affected by rot, just plain rot. Some of the frames were affected with pockets, with rot adjacent to the filling troughs. It woud appear the filling troughs were not of the same wood as the frames had been and they became deteriorated and were cut off, all out. The troughs are not very long. We were able to pull them out in their entirety. The defective portions of the frames were cut off and replaced with new sections.

What was your opinion of that work after it had been completed? I considered it a very satisfactory repair.

I am of opinion that the dry rot referred to by captain Clarke had spread, undetected, to the apron and stem; and I find as a fact that the extent of dry rot existing in that area, when she broke ground at Vancouver on 10th November, 1942, was such as to render insecure the hood end fastenings; and that as a consequence the ship was plainly unseaworthy for the intended voyage. In my view the evidence is quite sufficient for the purpose of this finding, let the *onus* lie where it may.

I also think that the vessel was unseaworthy when she left San Francisco in that no proper repairs had been effected to the underwater portion of the stem and hood ends of the hull planking; that the caulking of these seams below water by a diver could at best be only considered an improvised repair and totally inadequate for a vessel making a long voyage round Cape Horn; that this caused further leaking whenever the ship met with anything but fine weather, and that in the sequel the initial unseaworthiness was a co-operating cause, if not the main cause, of the vessel having to put into Valparaiso in distress. There can be no doubt that the ship went through a very heavy gale from 20th to 24th February, 1943, when in lat. 51 S., in a position South-East of Pitcairn Island and about 1,000 miles from Cape Horn. But she was then in the region of the Westerlies (as the captain stated) and such weather is to be expected there. After the gale she was leaking at such an alarming rate that the master had no recourse but to again seek shelter. He observed on the way, amongst other damage, that the seams in the bows between stem and hood ends worked badly. Captain Pewsey surveyed the

In Admiralty
1947

CANADIAN TRANSPORT CO. LTD. OWNERS OF THE SCHOONER "CITY OF ALBERNI" v. HUNT, LEUCHARS, HEPBURN, LTD.

"CITY OF ALBERNI"

Sidney Smith, D.J.A.

vessel at Valparaiso and in his report dated 9th April, 1943, he details the damage as follows:

It was found that, the butts of hull planking at stem rabbet having moved, plank sheer seams on each side of bow opened out, waterway seam on both sides of weather deck opened out and beam across fore part of poop moved, diagonal tie rods, one through each side of hull, leading up to after part of forecastle head, slackened up. The cause of this is severe racking strain suffered during very bad weather.

In these circumstances I am, on the authorities, unable to find that the shipowner exercised due diligence to make the ship seaworthy at Vancouver, B.C. The carrier's obligation under The Water Carriage of Goods by Sea Act, 1936, to exercise due diligence to see that his vessel is seaworthy, is not limited to his personal diligence and so does not confer upon him as great a benefit as would at first appear; for his responsibility extends to the acts or defaults of his agents or servants.

It is thus expressed in Scrutton on Charterparties and Bills of Lading, 14th Ed., 494-5:

In appearance the undertaking to use diligence to make the ship seaworthy is less onerous than the old common law undertaking that the ship is in fact seaworthy. In reality there is no great gain to the shipowner by the substitution. For the dilemma indicated on p. 110, *ante,* must constantly arise, and the relief to the shipowner by the substitution will occur only in cases where the unseaworthiness is due to some cause which the due diligence of all his servants and agents could not discover.

The dilemma mentioned is concisely stated at p. 111, as being this:

In most cases if the vessel is unseaworthy due diligence cannot have been used by the owner, his servants, or agents; if due diligence has been used the vessel in fact will be seaworthy. The circumstances in which the dilemma does not arise (*e.g.*, a defect causing unseaworthiness but of so latent a nature that due diligence could not have discovered it) are not likely to occur often.

What is meant by due diligence was discussed by Wright, J., as he then was, in *W. Angliss & Co. (Australia) Proprietary* v. *Peninsular and Oriental Steam Navigation Co.,* [1927] 2 K.B. 456. I quote two short passages from p. 462:

. . . In the same way, if he buys a ship he may be required to show that he has taken appropriate steps to satisfy himself by appropriate surveys and inspections that the ship is fit for the service in which he puts her.

Again, the need of repairing a ship may cast on the carrier a special duty to see, as far as reasonably possible, by special advisers for whom he is personally responsible, that the repairs adequately make good the defects.

Lord Wright, as he became, returns to the subject in the

House of Lords in *Smith, Hogg & Co.* v. *Black Sea and Baltic General Insurance Co.,* [1940] A.C. 997, at p. 1001. Dealing with the facts of that case he says:

> . . . The unseaworthiness, constituted as it was by loading an excessive deck cargo, was obviously only consistent with want of due diligence on the part of the shipowner to make her seaworthy. Hence the qualified exception of unseaworthiness does not protect the shipowner. In effect such an exception can only excuse against latent defects. The overloading was the result of overt acts.

The case made here was not one of latent defects. It was one of a seaworthy ship damaged by a peril of the sea. The defect here was in truth not a latent one. Dry rot was known to have existed (and remedied) in different parts of the ship, notably in the area of the hawse-pipes. The only factor that was latent was the extent and nature of its development. But with the details of the vessel before them, her age, her history, her record, that was for the surveyors.

The remaining question is whether the shipowners are entitled to limit their liability under the provisions of section 649 of the Canada Shipping Act, 1934. The limited liability is stated in the pleadings as amounting to $32,307.52. They are so entitled provided they prove that the loss was occasioned without their actual fault or privity. Mr. H. A. Stevenson was the directing will and mind, the *alter ego,* of the plaintiff company. He is a man of very considerable experience and ability. It must be shown that he personally was without fault and privity, for parties who plead the section must bring themselves within its terms. I think that this has been done. Indeed, the defendants did not press the point very strongly. The main contention advanced was as to a peculiar mix-up in the vessel's classification. She was originally classified with the Bureau Veritas,

> a well-known agency which issues certificates and keeps a list for the purpose of showing the condition of ships:

Lord Haldane in *Lennard's Carrying Company, Limited* v. *Asiatic Petroleum Company, Limited,* [1915] A.C. 705, at p. 710. The previous owners dropped the entry but she was restored to classification by Mr. Stevenson when purchased. She was then (as appears from her classification certificate) put under class "A," which in this Agency means that her navigation limits are restricted. Mr. Louden first said that under

In Admiralty
1947

CANADIAN TRANSPORT CO. LTD. OWNERS OF THE SCHOONER "CITY OF ALBERNI" v. HUNT, LEUCHARS, HEPBURN, LTD.

"CITY OF ALBERNI"

Sidney Smith, D.J.A.

"A" she was prohibited from going round Cape Horn, but later he was not so sure of this. In any event, "A" means a restriction. The letter "L" is the appropriate one for unrestricted navigation and the vessel appeared under "L" in the official register of the agency, though the certificate gave "A" only. I think it was suggested that the letter "A" on the certificate, which was always in the keeping of the ship and so of the shipowner, should have put Mr. Stevenson upon inquiry to make sure that she was not thereby prohibited from a round-the-Horn voyage: that there being no evidence of any such inquiry upon his part he was not without "actual fault" as stated in the section and so not protected by its terms. I do not agree. This is only one circumstance among the many comprising his activities regarding this vessel, and viewing the matter as a whole, I think he was entitled to look upon Mr. Louden, the society's representative at Vancouver, for guidance in this respect. I hold, therefore, that the shipowner has discharged this *onus*.

It should perhaps be mentioned that the matter of the classification certificate also entered into the issue of "due diligence." But there, too, it was only a circumstance for consideration. A vessel may be seaworthy regardless of whether classified or not; and, if classified, regardless of whether she may be entered in the wrong division. It is seaworthiness that is the paramount consideration, not classification. The important point, as I see it, is that Mr. Louden in his survey report of 24th February, 1942, recommended a lower class because, as he says, "the woodwork generally throughout the hull does not warrant the vessel to retain her original class." This goes to the general question of seaworthiness, as to which I have found adversely to the ship.

I accordingly dismiss the plaintiff's claim and give judgment in favour of the defendant on its counterclaim for the amount of its limited liability under section 649 of the Canada Shipping Act, 1934. I understand the defendant's losses amount to very much more than this and that a reference will not therefore be necessary. But if I am wrong on this point the matter may be spoken to.

The defendant will have its costs.

Judgment for defendant.

REX v. OLSEN.

C. A.
1946
Nov. 9, 29.

Criminal law—The Opium and Narcotic Drug Act, 1929—Possession of drug —Evidence—Dismissed—Appeal by Crown—Whether new trial—Can. Stats. 1929, Cap. 49, Sec. 4 (1) (d)—Criminal Code, Secs. 1013 and 1014.

On the trial of a charge under section 4 (1) (*d*) of The Opium and Narcotic Drug Act, 1929, of the unlawful possession of a narcotic drug, the Crown called a policeman who testified that he had found in the accused's room eye-droppers and some Kleenex which he had handed to the analyst. The Crown produced the analyst's certificate. The analyst was not called nor was the drug produced in Court. The magistrate dismissed the charge without calling upon the defence. On appeal by the Crown:—

Held, that the appeal should be allowed and the acquittal set aside, O'HALLORAN and SIDNEY SMITH, JJ.A. declining to direct a new trial, O'HALLORAN, J.A. saying that section 1013, subsection 5 of the Code enacted by 1930, Cap. 11, Sec. 28 does not mean that a direction for a new trial is mandatory in such a case and that under all the circumstances he would not give the direction especially as the Crown had not asked for it, and SIDNEY SMITH, J.A. saying that since the Crown had not asked for a new trial, he was content to set aside the acquittal, ROBERTSON, J.A. dissenting as to the new trial and that a new verdict of guilty could not be directed because the accused had not had an opportunity of presenting his defence, therefore the only alternative was to direct a new trial.

APPEAL by the Crown from the dismissal of a charge under section 4 (1) (*d*) of The Opium and Narcotic Drug Act, 1929, Cap. 49, Can. Stats. 1929, of the unlawful possession of a narcotic drug.

The appeal was argued at Vancouver on the 9th of November, 1946, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

D. McK. Brown, for appellant.
Murdock, for respondent.

Cur. adv. vult.

29th November, 1946.

O'HALLORAN, J.A.: The Crown appeals from a dismissal of a charge against the respondent for possession of a narcotic drug under section 4 (1) (*d*) of The Opium and Narcotic Drug Act, 1929, and amendments. The appeal rests upon a point of law

C. A.
1946

REX
v.
OLSEN

O'Halloran, J.A.

(see Code section 1013, subsection 4) involving the degree of proof essential in such a case.

At the trial the Crown called the police officer who had found in the respondent's room four eye-droppers and some kleenex and then handed the same to the analyst. The Crown produced the analyst's certificate as proof under section 18 of The Opium and Narcotic Drug Act, 1929, of the presence of a narcotic drug in the articles the officer had seized. These articles were produced to the Court. The Crown rested its case upon that evidence. The analyst was not called. The drug itself was not produced in Court; it was doubtful if there was any left after the analyst's examination had been completed.

The learned magistrate thereupon dismissed the case without calling upon the defence, observing according to the transcript before this Court:

> I think if you are going to rely upon this extraordinary way of proving the fact instead of calling the witnesses I should think—I should think you ought to comply strictly with the terms of the statute. This is most unusual you see, otherwise, no doubt one of the reasons why samples are taken is so that the balance would be available in Court if there is a dispute about the result of the analysis, the accused might want to have his own analyst examine it. No doubt that is one reason why they always say "sample," so the rest can be produced here. We have nothing produced here, it was not a sample, it was the whole thing. Of course, the Act does not say anything about "sample." I am afraid I have to dismiss it. If I am wrong there is a remedy; the Crown can appeal.

In the course of the argument counsel for the respondent was asked what witness was not called who ought to have been called, and what statute was not "strictly complied with," but he was unable to enlighten us. I am of opinion, with respect, that the Crown in the circumstances here made out a case warranting conviction in the absence of any defence which might have been disclosed if the defence had been called upon. But the learned magistrate dismissed the case without calling upon the defence. With respect the case ought not to have been dismissed as it was. I must conclude there was no proper trial in the true legal sense.

There is no provision in The Opium and Narcotic Drug Act, 1929, which requires the drug itself to be produced to the Court. Section 18 of the statute constitutes the analyst's certificate "*prima facie* evidence" of what it certifies; and see *Woolming-*

ton v. *Director of Public Prosecutions* (1935), 104 L.J.K.B. 433, at p. 438, regarding the meaning of the expression "*prima facie* evidence" when it is unfortunately used in the criminal law. Counsel for the defence did not ask that the analyst be produced for cross-examination. If he had and the request was refused or the analyst was not available, the case would take on a different complexion.

It is possible, I think, for a case to develop in such a way that production of the drug in Court might become essential to justify a conviction. But no circumstances appeared in this case to weaken the proof simply because the drug itself was not produced. Even in a case of murder, it was held in *Rex* v. *Charles King* (1905), 9 Can. C.C. 426, that if the death is established by direct proof, and the remains of the dead man have been so destroyed by fire that direct identification is impossible, circumstantial evidence is admissible to prove the identity of the remains and also the identity of the person who caused the death; and see also *Rex* v. *Davidson* (1934), 25 Cr. App. R. 21, at p. 26, and *Rex* v. *Bahrey,* [1934] 1 W.W.R. 376, at p. 387.

I would set aside the dismissal on the ground that a mistrial occurred. In all the circumstances I would not direct a new trial; moreover Crown counsel did not press for that direction. I would leave it to the law officers of the Crown to decide whether the respondent ought to be proceeded against further in the light of what has occurred. The respondent has been at liberty since his dismissal (now set aside) on 9th September last. I do not interpret Code section 1013, subsection 5 to mean that a direction for a new trial is mandatory in a case of this kind.

I would allow the appeal accordingly.

ROBERTSON, J.A.: I agree that the appeal should be allowed. I have the misfortune to differ from the other members of the Court in thinking that a new trial should be ordered. The result of section 1013, subsections 4 and 5 is that the Attorney-General has the right to appeal to this Court against any verdict of acquittal of a trial Court in respect of an indictable offence on any ground of appeal which involves a question of law alone and the procedure upon such an appeal, and the powers of this Court,

C. A.
1946
REX
v.
OLSEN
Robertson, J.A.

including the power to grant a new trial, are *mutatis mutandis*, and so far as the same are applicable to appeals upon questions of law alone, to be similar to the procedure prescribed and the powers given by sections 1012 to 1021 of the Act inclusive, and the Rules of Court passed pursuant thereto. There are no rules of Court bearing upon this matter.

Section 1014 (*b*) empowers this Court to set aside a judgment of the trial Court on the ground of a wrong decision on any question of law. We applied this power in setting aside the acquittal.

Applying the "*mutatis mutandis*" provision, the effect then is that subsection 3 of section 1014 would read as follows:

Where the Court of Appeal allows an appeal against acquittal it may

(*a*) Quash the acquittal and direct a judgment and verdict of guilty to be entered, or

(*b*) Direct a new trial;

and in either case may make such other order as justice requires.

We could not direct a verdict of guilty because the accused has not had an opportunity of presenting his defence. The only alternative then is to direct a new trial. For these reasons I think there should be a new trial.

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

The Crown proved possession of a substance on the part of the accused; it then produced *prima facie* proof that this substance was opium; it did so by production of a certificate by a Provincial analyst to that effect, as set forth in section 18 of The Opium and Narcotic Drug Act, 1929. This was all that the Crown was required to do, and, in the absence of defence evidence, must result in a conviction. The circumstance that there may or may not have been any opium left after the completion of the analysis is, in my view, irrelevant and casts no further burden on the Crown.

There was no submission on the part of the Crown that we direct a new trial. I am therefore content to simply set aside the acquittal.

Appeal allowed and acquittal set aside; Robertson, J. A. would direct a new trial.

REX v. CAMPBELL.

C. A.
1946
April 11, 12; *May* 21.

Criminal law—Abortion—Evidence of previous convictions—Conviction—Sole defence of accused that "he was not the man"—Question of "intent" not in issue—Appeal.

Accused was convicted when charged with unlawfully using an instrument upon the person of a certain woman with intent to procure her miscarriage. The Crown put in evidence as part of its case a previous conviction against the accused for a similar offence and adduced evidence of similar acts indicating that on numerous occasions he had carried out similar operations upon other women, further that he equipped a nursing-home for carrying on this business. On appeal that the evidence was wrongfully admitted:—

Held, reversing the decision of HARPER, J. (O'HALLORAN and BIRD, JJ.A. dissenting), that the appellant gave evidence at the trial and the defence was "a categorical denial" that he was the man who had committed this crime. This statement of the defence displaced any need on the part of the Crown to prove "intent" by adducing evidence of similar acts. By his defence of "I am not the man" the Crown was left with the sole duty of establishing that the accused was in fact the man who performed the illegal operation. Here the defence and the only defence was made manifest in the clearest terms and was known from the commencement of the trial. It did not concern the issue of intent and therefore the impeached evidence was inadmissible. The appeal is allowed and there must be a new trial.

APPEAL by accused from his conviction by SARGENT, Co. J. on the 15th of January, 1946, on a charge of unlawfully using an instrument upon the person of a certain woman with intent thereby to procure her miscarriage. He appealed on the ground that certain evidence was wrongly admitted.

The appeal was argued at Victoria on the 11th and 12th of April, 1946, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Crux, for appellant: Inadmissible evidence is the main ground of appeal. Accused was charged with four offences. The evidence of the women was most unsatisfactory, especially Mrs. Gibb who could not remember any dates: see *Rex* v. *Harris* (1927), 20 Cr. App. R. 144; *Rex* v. *Smith* (1929), 52 Can. C.C. 193. The defence was made clear to the Court in the previous case. The case of *Rex* v. *Anderson* (1935), 50 B.C. 225 can be distinguished. The case of *Brunet* v. *Regem,* [1928]

C. A.
1946

REX
v.
CAMPBELL

S.C.R. 375 is substantially the same. In this case the Crown was advised what the defence was. The Crown brought in evidence of a previous conviction which was inadmissible at the time. The learned judge overruled my objection and allowed in evidence of other acts to prove a system. This is a substantial miscarriage of justice.

Bray, K.C., for the Crown: On a charge under section 303, evidence of previous acts may be given. This man claimed he cured by natural means or instrumentless means. We must do what we can to prove intent. There must be *mens rea* but an attempt is inferred. Mrs. Gibb gave evidence of an operation and there is ample evidence of corroboration of her story: see *Rex* v. *Steele* (1923), 33 B.C. 197. As to evidence of former acts, if it be entirely eliminated even then the Crown has made out a case. Accused charged $80 which Mrs. Gibb paid him.

Crux, in reply, referred to *Allen* v. *Regem* (1911), 18 Can. C.C. 1.

Cur. adv. vult.

21st May, 1946.

SLOAN, C.J.B.C.: I agree with my brother SIDNEY SMITH.

O'HALLORAN, J.A.: The appellant was convicted under Code section 303 by SARGENT, Co. J. of unlawfully using an instrument on Grace Virginia Gibb with intent to procure her miscarriage. He is a registered naturopathic physician with an office in the city of Vancouver. The appeal hinges upon the admissibility in the special circumstances of certain testimony of similar acts given by Shirley Patricia Chubb and Aurelia Eavarts. Counsel for the defence objected to its introduction during the case for the prosecution, because his defence as he then stated (and as counsel for the prosecution had acknowledged in opening the case at the trial) was that the accused "had nothing to do with this woman."

Miss Chubb testified the appellant performed a similar operation upon her and then directed her to a nursing-home on Yew Street, where she saw Mrs. Gibb in bed as a patient. Miss Chubb was there for six hours only but during that time she saw the accused at the nursing-home, although she did not see

him attend Mrs. Gibb. The Gibb and Chubb operations took place in July, 1944. Mrs. Eavarts testified that she had been receiving abortion patients from the accused for treatment in her own home on West Seventh Street since 1941. In October, 1944, she rented a house on the same street which the accused equipped as a nursing-home. Between October, 1944, and March, 1945, the accused directed 50 to 75 abortion cases to her there for treatment.

For better appreciation of the precise point raised by appellant's counsel, I subjoin prosecution counsel's opening statement at the trial:

Bray: I desire to go on with the case. The appeal is on a question of law, and that does not arise here, as I understand the defence in this case is already indicated in that former case that it is he simply denied he had anything to do with this woman, so that no question of law is involved, in this matter that arose in the other

followed by what occurred subsequently when the evidence of Miss Chubb and Mrs. Eavarts was tendered:

Crux: I object to that evidence. In this case I submit the evidence might be tendered, I should say in other cases as to system. The defence here is that we had nothing to do with this woman Gibb. My friend mentioned that in opening and that is the fact.

Bray: Learned counsel may always change his defence. I do not want to close my case without exhausting any possibilities, and I submit I may give evidence of previous acts. We have that fairly threshed out, I thought.

THE COURT: I thought so. Objection overruled.

As I understand the argument of appellant's counsel in this Court, it is that his statement in the trial Court that the accused "had nothing to do with this woman" narrowed the defence to a denial that the accused performed the operation, and that absolved the prosecution from proving anything else. Consequently, he submitted, the impugned testimony which he described as evidence of system or intent, became irrelevant, because it did not lead to proof that the accused performed the operation, and also because for that reason it could not be corroborative of Mrs. Gibb's evidence that he did perform it. Examination of these submissions centres the decision of the appeal upon whether the accused or his counsel did "admit any fact alleged against the accused so as to dispense with proof thereof," within the meaning of Code section 978.

It seems clear that the statement "we had nothing to do with

C. A.
1946
REX
v.
CAMPBELL
O'Halloran, J.A.

this woman," cannot by any mode of interpretation, be regarded as an admission of a fact which dispensed with proof thereof under Code section 978. In the first place, it is not an admission of any fact whatever. Instead it is a straight denial. The prosecution had to prove two factual essentials, *viz.*, the act and the intent. After a plea of "not guilty" a more express denial of the act cannot in itself be an admission of the intent. If counsel for the appellant had said "our defence is a denial of the act, but we concede that if the act is proven then the intent must be inferred," there would have been an admission, which it might be argued perhaps, would render the calling of evidence of intent unnecessary under section 978. But no admission of that nature took place here.

In the absence of an admission of intent I fail to apprehend how the prosecution could be relieved of the *onus* to prove all essentials of the crime. The *onus* remains upon the prosecution to the end of the case and upon the whole case, *cf. Woolmington* v. *The Director of Public Prosecutions,* [1935] A.C. 462, at p. 481. Nor is it at all clear how an admission of intent could have been made here. Counsel for the defence could not very well have made such an admission before he had heard all the prosecution evidence in proof of the act. Quite apart from that, and as distinguished from a civil case, if counsel for the defence had made such an admission in anticipation of the prosecution evidence, the trial judge might still conclude that while the act was proved the evidence in support of the act did not prove intent beyond reasonable doubt.

The question is touched upon in *Rex* v. *Anderson* (1935), 50 B.C. 225, also an abortion case. In order to prove intent (p. 228) the prosecution sought to introduce in chief the evidence of three other persons upon whom the accused had performed similar operations. The trial judge rejected that testimony on the ground such evidence was admissible only "if the act is admitted" (p. 228). The Court of Appeal allowed the appeal and held the evidence admissible according to the true interpretation of *Brunet* v. *Regem* (1918), 57 S.C.R. 83, pointing out as well that the act was admitted in the *Brunet* case but denied in the *Anderson* case. The *Anderson* judgment was concerned largely

with the problem of whether such evidence was admissible in chief or in rebuttal, an aspect which does not arise here. But the observations therein regarding what amounts to an admission dispensing with the necessity of proof are pertinent to the question now under review.

In the *Anderson* case the only defence put forward was that the accused "denies that she did it at all" (p. 232). Here counsel for the appellant interprets "we had nothing to do with this woman" as a categorical denial—in other words, the same defence as in the *Anderson* case. MARTIN, J.A. (with whom McPHILLIPS and McQUARRIE, JJ.A. agreed) said at p. 232 that was not an admission within section 978 and added pp. 232-3 that it was

> nothing more or less than persisting in the general issue raised by her plea of "not guilty" which entitles her to raise any one of at least half a dozen defences, . . . , beginning with an *alibi*, as in *Thompson* v. *Regem*, [1818] A.C. 221, . . .

At p. 233 MARTIN, J.A. reiterated that the defence was not an admission at all, but a denial

> at large of all culpability and connexion with the matter.

Again at p. 234 MARTIN, J.A. characterized the "denial that she did it at all" as

> not even an "intimation," of any definite or practical value, that the prosecution could "rely" on.

Observations in a second Brunet case, *viz.*, *Brunet* v. *Regem*, [1928] S.C.R. 375, at p. 380, were relied upon as if they supported the proposition that a defence "I did not do it" rule out proof of intent as irrelevant to the proof of guilt under section 303. In that case the accused was convicted of manslaughter, the girl having died from the abortion operation. Evidence that the accused had performed a similar operation upon her a year previously was introduced as corroborative and as evidence of intent. The Court held such evidence was inadmissible because

> . . . In the present case there was no question of proving the intent of the accused in performing an operation, the sole question being as to whether he was the party who did perform it.

That language was appropriate to a manslaughter case where intent is not an essential element. If Brunet had been charged with murder, then evidence of intent as well as the actual performance of the operation would have been essential, as it would

C. A.
1946
REX
v.
CAMPBELL
O'Halloran, J.A.

also have been essential if the girl had lived and Brunet had been charged under Code section 303. With respect, the *Brunet* manslaughter case has no application to this case.

For the foregoing reasons I remain unconvinced that anything took place at the trial which dispensed with the necessity of proving intent. Hence in my judgment the evidence of Miss Chubb and Mrs. Eavarts was admissible as evidence of both system and intent, and the appeal ought to be dismissed. Before parting with the case however I thing the nature of the argument addressed to us by counsel for the appellant invites consideration of two other aspects.

First, it will be observed that defence counsel's statement was "we had nothing to do with this woman Gibb." That obviously covers a wider range than if he had said simply that the accused did not perform the operation. For quite apart from the actual act of the operation, it denies Mrs. Gibb's evidence that the accused directed her to the Yew Street nursing-home and visited her and treated her there. Any evidence tending to support Mrs. Gibb upon either or both of these circumstances is evidence so closely connected with the actual operation that it could not be regarded as inadmissible. Miss Chubb's evidence that she saw Mrs. Gibb at the Yew Street home in bed as a patient and also saw the accused in the same nursing-home (although she did not actually see him treat Mrs. Gibb there) strengthens the links in the chain of Mrs. Gibb's evidence that the accused did the act. The credibility of that evidence and its weight would be a matter for the trial judge.

The credibility and weight of Miss Chubb's evidence in that respect would naturally be enhanced by the circumstances that she was herself an abortion patient at that nursing-home and had been sent there by the accused for post-operative treatment. Those circumstances thus became an integral part of her evidence. Her evidence of her operation and treatment by the accused thus provided a *nexus* in method and circumstance to constitute evidence of the system engaged in by the accused, and if which the offence in the Gibb case formed part. Compare *Rex* v. *Bond,* [1906] 2 K.B. 389, at pp. 403, 415 and 417 and *Rex* v. *Penney* (1944), 60 B.C. 348.

Secondly it was part of the submission of counsel for the appellant that evidence of system did not lead to proof of the act, *viz.*, the performance of the operation. In my judgment, with respect, this is a case where it is difficult to avoid the conclusion that proof of a systematic course of conduct is an element which leads primarily to proof of the act, although it leads also to proof of intent. The evidence of Miss Chubb and Mrs. Eavarts read together conclusively establishes that the accused was engaged in an active practice as an abortionist. With deference, that evidence was relevant to the issues to be decided by the fact-finding tribunal, *viz.*, whether the accused did the act and whether he did it with intent.

In *Makin* v. *Attorney-General for New South Wales,* [1894] A.C. 57 (the baby-farm case) the Makins pleaded not guilty to a charge of murder of an infant. They had agreed to care for an infant for a sum wholly inadequate for its support. Shortly afterwards the infant disappeared and later the body of a child resembling the infant was found buried in the garden of premises occupied by them. Evidence was adduced of other infants being placed with the Makins under similar circumstances and bodies of other infants were found buried in the garden. Lord Herschell, L.C. said (p. 68) that such evidence "was not irrelevant to the issue to be tried by the jury." The Lord Chancellor did not enlarge upon that statement. It is difficult to escape the implication however that such evidence was admissible because it showed the Makins were engaged in the practice of murdering infant children under similar circumstances, and because such practice or systematic course of conduct formed one of the elements from which it could be legitimately inferred that they had murdered the child, the subject of the indictment.

In *Rex* v. *Bond,* [1906] 2 K.B. 389 a medical man was convicted of abortion. He admitted the act, but said it was done for a lawful purpose (p. 394). Evidence was admitted he had performed a similar operation upon another woman nine months before, and had then used expressions tending to show he was in the practice of performing such illegal operations. Although that evidence, owing to the admission of the act, was

C. A.
1946
REX
v.
CAMPBELL
O'Halloran, J.A.

plainly directed to intent, there are observations in the case as at pp. 401, 403, 405, 415, 417 and 419 which are informative in the present aspect. It is noted also that in his dissenting judgment Lord Alverstone, C.J. at p. 395 gives as an illustration which is interesting in this case:

> . . . It is easy to give illustrations of cases in which such evidence would clearly be admissible, as, for instance, if the prosecution alleged that the accused was carrying on the business of an abortionist, and had with that object, and with that object only, on several occasions used instruments . . . for reward or remuneration to himself, . . .

In *Rex* v. *William Henry Ball. Rex* v. *Edith Lilian Ball,* [1911] A.C. 47 Scrutton, J. as trial judge in an incest case, admitted evidence of previous acts of incest. The Court of Criminal Appeal reversed his decision but the House of Lords upheld it. In discussing the evidence in the *Makin* case Scrutton, J. said at p. 52:

> I do not think that evidence was given to shew intent, because the first thing to shew was not intent, but that the prisoners had done the act at all, that they had actually killed the child; it was not till they killed the child that the question of the intent with which they did it arose, and I think that that evidence must have been given to enable the jury to draw the proper inference as to the sort of business or transaction that the prisoners were carrying on, of which the disappearance of this particular child was one incident. From proving the sort of business carried on to proving the relation of the parties seems to me a very small step.

I interpret that to mean that the evidence was introduced in the *Makin* case as an element in proof of the doing of the act.

While the House of Lords made no direct comment upon Scrutton, J.'s analysis of the *Makin* case, there is much to infer its implicit approval. Lord Loreburn, L.C. said of the evidence in the *Ball case* at p. 71:

> . . . , I consider that this evidence was clearly admissible on the issue that this crime was committed—not to prove the *mens rea,* as Darling J. [in the Court of Criminal Appeal] considered, but to establish the guilty relations between the parties and the existence of a sexual passion between them as elements in proving that they had illicit connection in fact on or between the dates charged.

The Lord Chancellor concluded with this sentence (p. 71):

> . . . ; but here I think the evidence went directly to prove the actual crime for which these parties were indicted.

In the case at Bar there was of course no factor of guilty passion as there was in the *Ball* case, but no more was there in the *Makin* case, upon the authority and implicit reasoning whereof both

Scrutton, J. and the House of Lords held in the *Ball* case that in appropriate circumstances (such as I think exist here) evidence of other similar acts or crimes may be received as an element in proof of the actual act of the crime, and *cf.* also *Rex* v. *Shellaker,* [1914] 1 K.B. 414; and *Rex* v. *George Joseph Smith* (1915), 84 L.J.K.B. 2153 (The brides in the bath case).

In my opinion *Rex* v. *Barbour,* [1938] S.C.R. 465; *Koufis* v. *Regem,* [1941] S.C.R. 481 and *Maxwell* v. *The Director of Public Prosecutions,* [1935] A.C. 309, deal with questions which do not arise in this case. The *Koufis* and *Maxwell* decisions relate to questions regarding similar acts asked by prosecution counsel during his cross-examination of the accused. In the *Barbour* case the oral argument of counsel was expressly confined to intent, which in the pertinent circumstances the Court regarded as logically inconsistent with a contention that the evidence tended to establish feelings of hostility or malignity (p 468).

In conclusion, if the appellant's case had been that he admitted the act was done but denied that he was the one who did it, the question of identity would have arisen, and as I view it, the evidence would have been admissible under the principles applied in *Thompson* v. *Regem,* [1918] A.C. 221 and *Rex* v. *Lyons* (1944), 60 B.C. 250.

I would dismiss the appeal.

ROBERTSON, J.A.: I agree with my brother SIDNEY SMITH.

SIDNEY SMITH, J.A.: The appellant was charged with unlawfully using an instrument upon the person of a certain woman with intent thereby to procure her miscarriage. He was tried before SARGENT, Co. J., found guilty, and sentenced to 18 months' hard labour. He now appeals upon the ground that certain evidence was wrongfully admitted.

What happened here was that the Crown put in evidence as part of its case a previous conviction against the appellant for a similar offence; and further adduced evidence of similar acts indicating that on numerous occasions the appellant had carried out similar operations upon other women, and had in fact equipped a nursing-home for the purpose of carrying on this

C. A.
1946
REX
v.
CAMPBELL
Sidney Smith, J.A.

illegal business in rather a wholesale way. The introduction of this evidence was objected to by counsel for the appellant who stated as follows:

> The defence here is that we had nothing to do with this woman. My friend mentioned that in opening and that is the fact.

That part of the opening address of Crown counsel so referred to was in these words:

> The appeal is on a question of law, and that does not arise here, as I understand the defence in this case is already indicated in that former case that it is he simply denied he had anything to do with this woman, so that no question of law is involved, in this matter that arose in the other.

(The former case thus referred to was one against the appellant for a similar offence which had just been concluded before the same judge and dismissed by him.) The learned judge overruled this objection and allowed the evidence to go in. He did not state upon what ground he did so, but it was no doubt under the rule that the evidence in question showed a system of conduct, and thus went to the proof of intent, and that such proof was part of the Crown's case. This is a rule of evidence which, in one form or another, has been constantly before the Courts. It is stated in the well-known passage of Lord Herschell in *Makin* v. *Attorney-General for New South Wales,* [1894] A.C. 57, at p. 65, as follows:

> . . . It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused.

But in my opinion the circumstances of this case preclude the application of this rule.

The appellant gave evidence at the trial; and, as had been previously mentioned in opening, and as was later stated by counsel for the appellant, and as was subsequently referred to by the learned trial judge in his report, the defence was "a categorical denial" that he was the man who had committed this crime. It seems to me that this statement of the defence dis-

ed any need on the part of the Crown to prove "intent" by ucing evidence of similar acts, for the Crown could rest tent upon the uncontradicted evidence of the complainant as he acts performed and the proof of intent which she gave. his defence of "I am not the man," the Crown was left with sole duty (after bringing forward the evidence of the com- nant) of establishing that the accused was in fact the man performed the illegal operation. Upon proof of this single e the appellant must have been found guilty.

t seems to me that the question is really concluded by bind- authority which leaves little doubt in relation to the matter. as so decided in *Brunet* v. *Regem,* [1928] S.C.R. 375. In case the fact of an illegal operation having been performed clearly established, and the further question remaining for jury was as to whether or not the evidence showed that the sed was the person who had performed it. Evidence was in of a similar illegal operation performed by the accused e same woman the previous year. The Supreme Court held this evidence was improperly admitted. Smith, J., deliv- the majority judgment of the Court (Newcombe, J. con- ing in the result but not touching upon this point) said as ws at p. 380:

> . . . In the present case there was no question of proving the intent of the accused in performing an operation, the sole question being as to whether he was the party who did perform it. All the evidence, therefore, [as to the previous operation] . . . was inadmissible.

Our attention was directed to another case of the same name in the Supreme Court, *viz., Brunet* v. *Regem,* [1918] 57 S.C.R. 83. There such evidence was admitted, but that was because the question of intent was relevant to the issue. Anglin, J., as he then was, makes this very clear at p. 96 in these words:

> . . . The defence of innocent intent was thus set up. To relate this defence—to aid the court in determining the true intent of the accused, thus made the vital issue—the Crown maintains that evidence of the use by him of similar instruments in two other cases for the purpose of procuring miscarriage was admissible.

In the present case the question of intent was not in any sense in issue, and therefore it is distinguishable from *Rex* v. *Anderson* (1935), 50 B.C. 225, pressed upon us by the Crown, for in that case there was a plea of "not guilty" and nothing more. As

C. A.
1946

REX
v.
CAMPBELL

Sidney Smith, J.A.

MARTIN, J.A., as he then was, pointed out at p. 234 in review of the authorities:

> But in the present case not even an "intimation," [*i.e.*, of the def of any definite or practical value, that the prosecution could "rely was given.

And again at p. 235 he says:

> . . . we still do not know what the defence was.

Here the defence, and the only defence, was made man in the clearest terms and was known from the commencer of the trial. It did not concern the issue of intent, and there I think that the impeached evidence was inadmissible and the appeal must be allowed.

This is not a case in which, in my view, it would be prop apply the provisions of section 1014, subsection 2 of the C inal Code. The evidence wrongly admitted must have influe the mind of the learned judge for it was most damaging, indeed he dwells upon it in his report. It was pointed out i the *Brunet* case firstly above mentioned, that "it cannot be said the accused suffered no substantial wrong." In my opinion remark applies with equal force to the present case. The acc must therefore have a new trial and in the circumstances I w direct that the new trial be held with a jury.

BIRD, J.A.: The appellant, a practitioner, duly registered and licensed under the Naturopathic Physicians Act, appeals from his conviction before SARGENT, Co. J., in the county court judge's criminal court, of an offence under Code section 303, in having unlawfully used an instrument upon the person of the complainant Gibb with intent to procure a miscarriage.

The case put forward by the Crown was that the accused in the course of carrying on the business of an abortioner performed the alleged operation upon the complainant. Her evidence, if believed, establishes that in the month of July, 1944, the accused undertook to perform, for remuneration, an operation upon her person, designed to produce a miscarriage; that he performed the operation at his down town office by the use of an instrument and subsequently attended the complainant in a nursing-home on Yew Street, to which she had been directed by him, where the miscarriage took place.

Evidence was admitted in chief of two witnesses Chubb and Eavarts, who deposed to the commission of similar acts by the accused at or about the date of the alleged offence, as well as prior and subsequent thereto. The testimony of the witness Chubb disclosed that the accused performed upon her a like operation, also in the month of July, 1944; that she received post-operative treatment at the hands of the accused in the Yew Street nursing-home, to which she also had been directed by him. She then saw the complainant, who was likewise a patient in the same place. The witness Eavarts swore that over a period of several years preceding the alleged offence and continuing for several months thereafter, she had, in her own home, cared for abortion cases sent to her for post-operative care by the accused, at which place the accused attended those patients. Further, that, commencing about three months after the alleged offence, *i.e.*, in the month of October, 1944, continuing until March, 1945, she had conducted another nursing-home equipped in part by the accused, and to which the accused sent many patients for post-operative treatment following abortion operations. There, under the direction of the accused, she cared for from 50 to 75 abortion cases sent to the home by the accused.

I conclude that the evidence of these witnesses was admitted for the purpose of corroborating the complainant's story of the commission of the alleged offence by the accused, in that Campbell, in his performance of the alleged operation and subsequent treatment of the complainant, adopted the same system of treatment as was adopted by him in the instances referred to by these witnesses, and that the system so adopted was designed to procure miscarriage of the patients said by these witnesses to have been operated on and treated by the accused.

The substantial ground of appeal from the conviction is founded on the admission of the evidence of Chubb and Eavarts relating to such prior similar acts of the accused.

Counsel for the appellant submits that the evidence was wrongly admitted, since it is disclosed on the record of the proceedings in the Court below that the defence was known to the Crown to be that the accused "simply denied that he had anything to do with this woman." Therefore it is submitted that the

C. A.
1946
REX
v.
CAMPBELL
Bird, J.A.

evidence was wrongly admitted within the rule in *Makin* v. *Attorney-General for New South Wales,* [1894] A.C. 57, as it merely tends to prove that the accused is of such evil character or disposition that he is likely to have committed the offence charged against him. He contends that "no question of intent was involved" in its introduction, since the defence of innocent purpose was excluded by the defence so disclosed.

In the view I take of the question, and with deference to contrary opinion, the evidence was admissible.

Proof of unlawfulness as well as the intent in the commission of the act are essential elements of an offence under Code section 303, which reads:

> Every one is guilty of an indictable offence . . . who, with intent to procure the miscarriage of any woman, . . . unlawfully uses on her any instrument . . . with the like intent.

The mere fact that counsel for the accused early in the course of the trial had declared that the defence relied upon was that the accused had nothing to do with the woman, in my opinion did not relieve the Crown from the necessity to prove all the essential elements of the alleged offence, among which were the elements of unlawfulness in the commission of the act as well as the intent with which it was done. Counsel's declaration did not include the admission "of any fact alleged against the accused so as to dispense with proof thereof" under Code section 978. The declaration

> is nothing more or less than persisting in the general issue raised by her plea of "not guilty" which entitles [the accused] to raise any one of at least half a dozen defences

as was said by MARTIN, J.A., later C.J.B.C., in *Rex* v. *Anderson* (1935), 50 B.C. 225, at pp. 232-33. The late Chief Justice there said at p. 233, referring to a similar declaration as to the accused's defence that

> In the face of such an indefinite situation, and under the particular circumstances (which it has been laid down repeatedly govern the proper action to be taken by the trial judge) Crown counsel was justified in tendering the evidence in chief and the judge could and should in the proper exercise of his discretion have admitted it when so offered, or at least, in his discretion, reserved the question of its admission for later consideration when the defence had been clearly set up or developed to such an extent that it had become apparent what it precisely was, thereby leaving no openings for misunderstanding and confusion . . . or loopholes for escape.

The majority of the Court there held that a miscarriage of justice occurred under Code section 1013, subsections 4 and 5 by reason of the improper rejection of evidence as to prior similar acts, allowed the appeal and directed a new trial, but MACDONALD, J.A., later C.J.B.C., was of opinion that:

> . . . It is part of the Crown's case, whatever may be the attitude of the accused when called upon to defend, to show "intent" and the "unlawful" use of an instrument. Any evidence, therefore, bearing on intent, design or unlawfulness is part of the *res gestæ*. . . .

"It is always," as pointed out by Idington, J. in *Brunet* v. *Regem* (1918), 57 S.C.R. 83, at p. 85, "the particular circumstances of each case" that determines

> whether such proof should in all cases be tendered in support of the case for the prosecution or only be given by way of rebuttal.

In the circumstances of this case, as disclosed on the evidence of the complainant, the accused in his treatment of her adopted a particular course of conduct. The impugned evidence I think served to show that the course then adopted was systematic with the accused in the conduct of the business of an abortioner.

In my opinion the defence so declared did not relieve the Crown from the *onus* which was upon it to prove unlawfulness or intent; nor did that declaration debar the defence from raising a defence of want of proof of those elements.

The learned trial judge in the exercise of his discretion admitted the evidence when tendered in chief by Crown counsel rather than to adopt the alternative suggested by MARTIN, J.A. in the *Anderson* case. Consequently I am unable to say that in so doing his discretion was wrongly exercised, more particularly since the trial took place before a judge alone.

This Court will assume that in his consideration of the impugned evidence the learned judge will have had due regard to the limited purpose for which such evidence is admitted, as expressed by Lord Reading, C.J. in *Rex* v. *Thompson,* [1917] 2 K.B. 630, at p. 632.

In the circumstances of this case I think that the evidence of both witnesses was relevant to the charge, in that it tended to prove "intent" in the unlawful use of an instrument upon the person of the complainant, the burden of proof of which was upon the Crown, as well as to corroborate the evidence of the

C. A.
1946
REX
v.
CAMPBELL
Bird, J.A.

complainant as to the commission of the offence charged, in that the same course of conduct was adopted by the accused in the treatment of the complainant as was shown by the evidence of Eavarts, and to a degree by that of Chubb, to have been systematically adopted by him in the conduct of the business of an abortioner. *Rex* v. *William Henry Ball. Rex* v. *Edith Lilian Ball,* [1911] A.C. 47; *Reg.* v. *Rhodes,* [1899] 1 Q.B. 77, at p. 81; *Rex* v. *Wyatt,* [1904] 1 K.B. 188, at p. 191.

The decision of the Supreme Court of Canada in *Brunet* v. *Regem* (1928), 50 Can. C.C. 1, relied on by counsel for the appellant, in my opinion does not support his submission. There the charge was manslaughter arising out of an operation to procure abortion. As was said by Smith, J. at p. 5:

> . . . In the present case there was no question of proving the intent of the accused in performing an operation, the sole question being as to whether he was the party who did perform it.

Here "intent" was an essential element, the *onus* of proof of which was upon the Crown.

I would therefore dismiss the appeal.

Appeal allowed; new trial ordered, O'Halloran and Bird, JJ.A. dissenting.

C. A.
1946
Oct. 23;
Nov. 18.

REX v. ANGELUCCI.

Criminal law—Theft of watches—Found in accused's possession—Absence of explanation—Confession—Definition—Accused takes watches from his pocket when questioned by police.

All statements made by an accused to a policeman are not confessions; they are only such when they are inculpatory not when they are exculpatory or otherwise.

Where a person under arrest is asked by a policeman what he has in his pocket and in answer thereto produces articles which are afterwards proven to have been stolen, his act in producing them is not a confession.

Where an accused is charged with stealing goods from a store which were found in his possession, the Crown makes out a *prima facie* case when it shows that the goods were exposed for sale at the time of the alleged theft and that the owner had not sold them.

C. A.
1946
REX
v.
ANGELUCCI

APPEALS by accused from his conviction and sentence by W. W. B. McInnes, Esquire, deputy police magistrate, Vancouver, on a charge of stealing three watches from the Erwin Jewellery Store at 783 Granville Street, Vancouver. The facts are sufficiently set out in the reasons for judgment.

The appeals were argued at Victoria on the 23rd of October, 1946, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

Castillou, K.C., for accused.
H. W. R. Moore, for the Crown.

Cur. adv. vult.

18th November, 1946.

Per curiam (ROBERTSON, J.A.): The accused appeals from his conviction for stealing three watches, and sentence of 12 months. It was strongly objected that the confession made by the accused was not admissible. For the purpose of my judgment I shall assume that part of the accused's statement which I think was a confession, to be so. In my opinion there was ample evidence, apart from the confession, to convict the accused in the absence of any explanation by him. He did not go into the witness box. The evidence, apart from the confession, shows that about 4.30 in the afternoon of the 5th of August, the accused, accompanied by one Lyons, entered the Erwin Jewellery Store. At that time the three watches in question were in a show-case in front of which the accused and Lyons stood. The show-case was within the accused's reach. Lyons said he wished to buy a watch. The accused's only part was to make suggestions to Lyons. The two of them left the shop saying they would return later on. The shop closed at 5.30 p.m. The watches were found to be missing between the time Angelucci and Lyons were there and closing time. About 8 p.m. the accused was being questioned by the police, who had, at that time, information that the watches had been stolen and "who had them." It may be conceded he was then under arrest. He was asked what he had in his pocket and as a result he produced three watches which proved to be the stolen watches. It was objected that this was a confession and was not admissible without a trial within a trial

C. A.
1946

REX
v.
ANGELUCCI

first being held, and the learned magistrate being satisfied that the "confession" was free and voluntary.

Some misunderstanding appears to arise in connection with statements made by an accused to a policeman. All statements are not confessions. They are only such when they are inculpatory, not when they are exculpatory, or otherwise. See *Rex* v. *Mandzuk* (1945), 62 B.C. 16.

In my opinion the policeman would have been entitled at the time he asked the question of the accused, to search him, and the watches could then have been used in evidence against him. See *Adair* v. *M'Garry,* [1933] J.C. 72, at pp. 78, 80, 88 and 89.

I do not think that what took place was a confession. The accused was only doing willingly, in answer to the officer's request, what the officer could have found out, without the accused's consent, by searching him.

It was suggested that the facts above mentioned do not necessarily show theft by the accused, as someone else might have entered the store, after the accused left, and, before its closing, stolen the watches and then sold or given them to the accused. I think this objection is met by *Rex* v. *Theriault* (1904), 11 B.C. 117, at p. 121. There the accused was charged with theft of goods exposed for sale in a store and which were found in his possession. HUNTER, C.J., in delivering the judgment of the Full Court, said at p. 121, in order to make out a *prima-facie* case it was quite sufficient for the Crown to have shown that the goods were in a place exposed for sale at the time of the theft and that the owner had not sold them, and it was not necessary for the Crown to negative such hypotheses as that the owner had not given them away or that some child might have taken them, etc.

To summarize the facts then, the goods were stolen from Erwin's store between 4.30 p.m. and 5.30 p.m. on the 5th of August. The accused was standing there at 4.30 p.m. on the same date in front of a show-case in which the watches were. The watches were found in his possession at 8 p.m. He made no explanation. I think the Crown's case was proved. See *Rex* v. *Logan and Inglee* (1946), 62 B.C. 357.

The appeal from conviction should be dismissed.

I would also dismiss the appeal from sentence. The accused stole the watches while the question of whether or not he should be given suspended sentence on another charge of theft at Haney, B.C., was under consideration.

Appeals dismissed.

BULMAN AND BULMAN v. ANDERSON, BOOTH AND GEEN.

C. A.
1946
Oct. 2, 3; Dec. 20.

Irrigation—Water Act, 1939—Incorporation of improvement district—Lieutenant-Governor in Council—Power to appoint trustees in letters patent—B.C. Stats. 1939, Cap. 63, Secs. 49 (1) and 53 (1).

By the letters patent, which incorporated an improvement district under the Water Act, the Lieutenant-Governor in Council named the three respondents as the trustees.

A motion by the plaintiff for an order that the defendants be restrained and an injunction be granted restraining them from exercising the powers of the Ellison Irrigation District with respect to the supply of irrigation water to the lands of the plaintiffs and the storage of the same and with respect to the levying of taxes on the said lands and the fixing of tolls to be paid by the plaintiffs for the said services and for an order restraining the defendants from acting as trustees of the Ellison Irrigation District and Improvement District under the Water Act until the trial of this action, was dismissed.

Held, on appeal, reversing the decision of MACFARLANE, J. (BIRD, J.A. dissenting), that in view of section 53 (1) of said Act, it was not competent for the Lieutenant-Governor in Council to appoint the trustees since where the letters patent provide for a board of trustees, they must be elected in the manner prescribed by the Act.

The words in section 53 (1) "Unless otherwise provided in the Letters Patent" and the words in section 49 (1) "other specified provisions" explained.

APPEAL by plaintiffs from the decision of MACFARLANE, J. of the 30th of July, 1946, dismissing a motion for an injunction, the result of the motion by agreement to be treated as judgment in the action. The action was brought by the plaintiffs who were owners of lands, comprising a little more than half the area, which and the owners thereof were constituted an improvement

C. A.
1946

BULMAN
v.
ANDERSON
BOOTH AND
GEEN

district under the name of "Ellison Irrigation District," by letters patent issued under the provisions of the Water Act, 1939, dated the 30th of January, 1946. The defendants were named the first trustees of the district in the letters patent which provided that they should hold office until the annual general meetings of 1949, 1948, and 1947 respectively, one retiring each year on a successor being elected by the owners of the land in the improvement district. The plaintiffs contended that there was no power given by the Water Act, 1939, to the Lieutenant-Governor in Council to make the first trustees and said that if there was to be a board of trustees to exercise the powers of the district and manage its property, the board of trustees must be elected by the owners of the land in the improvement district. In these circumstances the plaintiffs asked for an order restraining the defendants their and each of their agents, servants and workmen from exercising the powers of the Ellison Irrigation District with respect to the supply of irrigation water to the land of the plaintiffs and the storage of the same and with respect to the levying of taxes on the said lands and the fixing of tolls to be paid by the plaintiffs for the said services and also for an order restraining the trustees from acting as trustees of the said improvement district generally. The plaintiffs are the principal shareholders in a company, Okanagan Development and Orchard Company Limited, which since about 1914 has supplied irrigation water to the same area as is now included in the improvement district, latterly under control as to the rates of the Public Utilities Commission. As such they claimed that their rights were being taken away under the provisions of the legislation under consideration here and that therefore its wording must be strictly construed. In November, 1945, the water users in the district, other than the plaintiffs, petitioned the Comptroller of Water Rights for the formation of an improvement district and in January, 1946, the comptroller requested that a meeting of the water users be called to choose persons to be named as the first trustees of the proposed improvement district should the Lieutenant-Governor in Council approve the incorporation of such a district. A meeting was held on January 21st, 1946, attended by the water users, the plaintiffs attending only to object

to the proceedings and the three defendants were chosen. The three defendants were subsequently named in the letters patent of January 30th, 1946.

The appeal was argued at Victoria on the 2nd and 3rd of October, 1946, before O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

Norris, K.C., for appellant: Section 31 of the Water Act, 1939, must be strictly construed: see *Bell* v. *Grand Trunk Rway. Co.* (1913), 48 S.C.R. 561, at pp. 564 and 574; Halsbury's Laws of England, 2nd Ed., Vol. 31, p. 485, pars. 607 and 645; *New Plymouth Borough Council* v. *Taranaki Electric Power Board,* [1933] A.C. 680, at p. 682; *Burrard Inlet Tunnel & Bridge Co.* v. *The "Eurana,"* [1931] 1 W.W.R. 325, at p. 330; *In re Brockelbank. Ex parte Dunn & Raeburn* (1889), 23 Q.B.D. 461, at p. 462. The Legislature shall not be considered to give more power than required for the purpose of the Act: see *Baroness Wenlock* v. *River Dee Company* (1885), 10 App. Cas. 354, at pp. 362-3; *Canadian Pacific Railway* v. *Parke,* [1899] A.C. 535, at p. 545. Where people are to be deprived of what they had, an interpretation to relieve them should be given: see *In re Grey,* [1918] 3 W.W.R. 111, at p. 127; *In re The Initiative and Referendum Act,* [1919] A.C. 935, at p. 945; *Rex* v. *Caskie* (1922), 35 B.C. 78, at p. 79; *Belanger* v. *Regem* (1916), 54 S.C.R. 265, at p. 276. We say they are not trustees and we want them stopped: see *Morris* v. *Kanssen,* [1946] 1 All E.R. 586.

Bull, K.C., for respondent: We say there was power by necessary implication. There was express power in sections 49 and 53 together and there was power in section 53 alone. As to the words "Unless otherwise provided in letters patent" see Craies on Statute Law, 4th Ed., p. 99, par. 5. There must have been intention to give power: see *Legh* v. *Lillie* (1860), 6 H. & N. 164, at p. 168; *Attorney-General* v. *Hanwell Urban Council,* [1900] 2 Ch. 377, at p. 387.

Norris, replied. *Cur. adv. vult.*

20th December, 1946.

O'HALLORAN, J.A.: The Lieutenant-Governor in Council

C. A.
1946

BULMAN
v.
ANDERSON
BOOTH AND
GEEN

O'Halloran,
J.A.

named the three respondents as trustees of the "Ellison Irrigation District" when it was incorporated as an "improvement district" on 30th January, 1946, by letters patent under the Water Act, 1939 (Cap. 63, B.C. Stats. 1939 and amendments).

Counsel for the appellants submitted that the Water Act, 1939, requires such trustees to be elected by the owners of the land in the improvement district after it is incorporated, and hence they cannot be named or appointed as was done in the letters patent. Counsel seeks an injunction—which was refused in the Court below—to restrain the respondents acting as trustees of the "Ellison Irrigation District."

It is my conclusion, with respect, that the objection is sustained by section 53 (1) of the Water Act, 1939, *supra,* which reads in material part:

> Unless otherwise provided in the Letters Patent, the powers of every improvement district shall be exercised and its property managed by a Board of Trustees who shall be elected by the owners of land in the improvement district. . . . .

I read the phrase "who shall be elected," etc., to relate adjectivally and solely to "Board of Trustees." Hence I am led to conclude the section means and intended to say that the powers of every improvement district and the management of its property shall be vested in a board of trustees "unless otherwise provided in the letters patent"; and that if the letters patent provide for a board of trustees, then such trustees must be elected in the manner the Water Act, 1939 prescribes.

In the result, the exceptive clause "unless otherwise provided in the letters patent" in section 53 (1) does not relate to the election of the board of trustees. It relates only to powers which elected trustees could otherwise exercise under the Water Act, 1939. But they must be trustees who are elected. I think this construction is in harmony with the clearly implied purpose of the statute to encourage self-government in the management and operation of improvement districts. Election of trustees of an improvement district by the owners of the lands affected tends to assure that object. The Water Act, 1939 confers corporate *status* upon improvement districts, and gives them wide powers including it is to be noted, the power to levy taxes (section 58).

Counsel for the respondents sought comfort in section 49 (1).

It is a general section authorizing the incorporation of improvement districts by letters patent and, *inter alia,* empowers the Lieutenant-Governor in Council that

he may in the Letters Patent provide that some provisions of this Act shall not apply to the improvement district and that other specified provisions shall apply thereto.

But section 53 is a particular and subsequent section. If section 49 (1) has any application at all to the narrow point emerging in this appeal, its generality is circumscribed if not excluded entirely by the particularity with which section 53 has surrounded its own special subject-matter.

Moreover it is to be observed that section 49 (1) stipulates in express language, that if any of the provisions of the Water Act, 1939, are not intended to apply to an improvement district, the Lieutenant-Governor in Council "may" so provide in the letters patent. I construe "may" in the contextual circumstances to mean "shall," in the sense, that while the Lieutenant-Governor in Council "may" (in the permissive sense) exclude the operation of certain sections of the Water Act, 1939, yet, once he decides to do, he "shall" then so provide in the letters patent that such sections shall not apply to the particular improvement district.

When a statute confers an authority to do an act, the power is for the benefit not of him who is invested with it, but for those for whom it is to be exercised, and it is imperative that the authority be exercised when the case arises; and see *Cameron et ux.* v. *Wait* (1878), 3 A.R. 175, Harrison, C.J.O. at pp. 193-4 following *Macdougall* v. *Paterson* (1851), 11 C.B. 755; 138 E.R. 672 approved in *Julius* v. *Bishop of Oxford* (1880), 49 L.J.Q.B. 577, Earl Cairns, L.C. at p. 580; see also *Fenson* v. *City of New Westminster* (1897), 5 B.C. 624, and *Shannon* v. *Corporation of Point Grey* (1921), 30 B.C. 136, affirmed (1922), 63 S.C.R. 557.

Finally the Lieutenant-Governor in Council did not in this case "in the Letters Patent provide" (as section 49 (1) requires if such was the purpose) that section 53 (1) "shall not apply to the improvement district." In the absence of that specific provision in the letters patent, I find it difficult to appreciate upon what ground it may be said that the exceptive clause in section

C. A.
1946

BULMAN
v.
ANDERSON
BOOTH AND
GEEN

53 (1), *viz.*, "unless otherwise provided in the Letters Patent," can have any application to the present case.

I conclude the objection taken by the appellants is well founded and that the injunction should be granted.

I would allow the appeal.

SIDNEY SMITH, J.A.: The Lieutenant-Governor in Council by letters patent dated the 30th of January, 1946, and issued under the provisions of the Water Act, 1939, incorporated certain lands and the owners thereof (including the plaintiffs) into an improvement district under the name of "Ellison Irrigation District." The letters patent expressly named three trustees (the defendants herein) as the first trustees of the improvement district. These three trustees had professedly been elected as such, despite the protest of the plaintiffs, at an informal meeting of the landowners concerned, held in the month of January, 1946, before the issue of the letters patent. I do not think that the irregularity of this procedure was contested before us, nor that it was contested before the learned trial judge.

The only question therefore with which we are concerned is whether it is competent to nominate the first trustees in the letters patent, or whether such trustees must be elected as provided in section 53 (1) of the Water Act, 1939. The answer involves two short points of statutory construction, or perhaps only one. The subsection referred to is in the following terms:

53. (1.) Unless otherwise provided in the Letters Patent, the powers of every improvement district shall be exercised and its property managed by a Board of Trustees who shall be elected by the owners of land in the improvement district who are British subjects, twenty-one years old or older, and are not disqualified from voting in an election held under the "Provincial Elections Act."

It was submitted by the defendants that in the present case it was not requisite that the "trustees . . . . shall be elected," and that this was so because it had been "otherwise provided in the Letters Patent," for there the trustees had been expressly nominated and appointed; in other words, that by virtue of the opening words of section 51 (3) the letters patent could, and in this case did in fact, modify the provisions with respect to the election of the board of trustees, and that this was accomplished by the mere expedient of naming the first trustees who were to

form the board. The plaintiffs said that the wording of the subsection did not go that far. On this point the learned judge expressed himself as follows [*ante*, p. 147]:

> . . . In my opinion the words "Unless otherwise provided in the Letters Patent" standing as they do at the beginning of the section and separated from what follows by a comma, and the only comma in that part of the section, are effective to modify the whole of that part of the section which I have first above quoted. I think these words modify not only the words "shall be exercised and its property managed" but also the words "who shall be elected."

With respect, I agree with the learned judge. The words modify both phrases, but I think both phrases must be read together. If the powers are to be exercised and the property to be managed by a board of trustees at all, then such trustees must "be elected by the owners of land in the improvement district," which necessarily means after the formation of the improvement district. Here we have a statutory requirement in express terms. It cannot, in my view, be made the subject of waiver or of informal modification. As stated by Lord Atkin in the Judicial Committee in *S.S. Eurana* v. *Burrard Inlet Tunnel and Bridge Co.*, [1931] A.C. 300, at p. 308,

> there is excellent authority for requiring statutory conditions to be strictly fulfilled if interference with public rights is to be justified.

And here there is interference with the plaintiffs' rights.

A further point of construction was debated before us, and I think it right to deal with that also. The learned judge in his carefully considered judgment pointed out that the first words of section 53 (1) are in the nature of an exception and that "you cannot raise out of an exception in a statute any affirmative enactment." He referred to the passage from Lord Brougham in *Lord Advocate for Scotland* v. *Hamilton* (1852), 1 Macq. H.L. 46, at p. 52. I think this finding is sound and that effect must be given to it.

The learned judge, however, in his examination of the Act, was of opinion that such affirmative power, namely, the power to nominate the board of trustees in the letters patent, was to be found in section 49 (1) which is in these terms:

> 49. (1.) The Lieutenant-Governor in Council may at any time by Letters Patent incorporate any tract of land and the owners thereof into an improvement district, under such name and with such objects as appear advisable and with such powers as are deemed necessary to carry out the said objects,

C. A.
1946

BULMAN
v.
ANDERSON
BOOTH AND
GEEN

Sidney Smith,
J.A.

and he may in the Letters Patent provide that some provisions of this Act shall not apply to the improvement district and that other specified provisions shall apply thereto.

He thought that the words "other specified provisions" referred to "other specified provisions" of the letters patent, and in the present case one such specified provision was the nomination of the trustees. His view was that if "other specified provisions" referred to provisions of the Act, the word "specified" would be otiose since all provisions of the Act were applicable without any "specified" reference thereto. This view of the terms of the Act was challenged before us and, as I thought, challenged successfully. But be that as it may, I find myself, with great respect, unable to accept it as the proper view. As a mere matter of language "specified" would seem to refer to the provisions of the Act. This seems markedly so when one considers the two words "some" and "other." They are correlatives and have mutual reference to each other. Moreover, if the above view were the true sense of the language it would mean that the provisions of the letters patent could override any relevant provision of the Act inconsistent with them, and could in effect throw the Act over. I should not willingly attribute to section 49 (1) a meaning that led to such a result unless the language was so clear and definite as to be quite intractable. And here it is anything but that.

In my view then on both points the appeal must be allowed.

BIRD, J.A.: The Lieutenant-Governor in Council, assuming to act under powers conferred by the Water Act, 1939, Cap. 63, by letters patent, dated January 30th, 1946, and published in the British Columbia Gazette, March 28th, 1946, caused certain lands in the Osoyoos Division of Yale District and the owners thereof to be incorporated under that Act into an improvement district to be known as the Ellison Irrigation District. A term of the letters patent provided for the appointment of the respondents as the first trustees of the district.

The appellants question the power of the Executive Council to appoint trustees, and submit that the Act prescribes that the trustees shall be elected. They seek a declaration that the trustees so appointed have not been duly elected trustees of the district and are not authorized to act as such, as well as an

injunction to restrain the trustees so nominated from acting as such trustees.

The order in council was passed subsequent to a meeting of owners of the lands held upon notice to all owners affected, at which meeting all such owners were present or represented. A proposal for incorporation of the district and nomination of the respondents as the first trustees was then approved by all persons present, with the exception of the appellants and one other owner. These latter voiced objection to the holding of the meeting, but refrained from other participation in the proceedings. A petition signed by all the owners other than the dissentients noted above, was later presented to the Lieutenant-Governor in Council, wherein request was made for incorporation of the district, and the appointment of the persons so nominated as first trustees.

Subsequently representations in opposition to the incorporation of the district were made by counsel on behalf of the appellants before two meetings of the Executive Council. The record before this Court discloses that the letters patent had then been approved and signed, but had not been published in the Gazette, although the record does not disclose whether objection was taken on either occasion to the proposal to appoint trustees in lieu of their election. However, it is abundantly clear that the appellants had ample opportunity to present to the Executive Council their objections to the incorporation of the proposed district, and did so prior to the publication of the letters patent.

It is apparent from this recital of the developments which occurred prior to the incorporation of the district, that the objection now taken is more technical than meritorious, since it appears obvious that an election of trustees would have produced the same result as their appointment by letters patent.

Determination of the question so raised therefore depends solely upon whether the Lieutenant-Governor in Council has power under the Water Act to appoint trustees by letters patent.

The relevant sections of the Act are as follows: [sections 49 (1) and 53 (1) already set out in the judgment of SIDNEY SMITH, J.A.].

53. (2.) Improvement district elections may be held at the annual general meetings of the improvement districts or otherwise and the voting may be done by secret ballot or otherwise.

C. A.
1946
BULMAN
v.
ANDERSON
BOOTH AND
GEEN
Bird, J.A.

(3.) Except as otherwise provided in the Letters Patent and except as to Trustees elected to fill vacancies resulting from death, resignation, or disqualification, the term of office of every Trustee of an improvement district shall be three years.

In my opinion there is power under section 49 to do that which was done by sections 4 and 5 of the letters patent, *i.e.*, to fix the number of trustees and to appoint the first trustees. I attach significance to the qualification of the word "provisions" in line 6 by the addition of the words "of this Act," and the absence of a like qualification of the same word in line 8. The phrase "other specified provisions" found in line 8 I think must relate to specified provisions incorporated in the letters patent in substitution for some existing provision of the Act. The power to render inapplicable some provisions of the Act is found in the phrase "and he may in the letters patent provide that some provisions of this Act shall not apply." The power to substitute is found in the phrase "and that other specified provisions shall apply thereto."

The word "provisions" as last used in the section I think cannot be read as relating to provisions of the Act, for not only are the qualifying words as first used in line 6, omitted in line 8, but if the phrase in line 8 was intended to relate to another provision of the Act the entire latter phrase would I think be redundant, since other specific provisions of the Act would apply in any event.

If I am right in this conclusion there is power in section 49 to render inapplicable the provision for election of trustees which is found in section 53. In my opinion the power has here been exercised in a limited way by the appointment of first trustees made by the letters patent; thereby the Executive Council under the power conferred by section 49 indirectly has made inapplicable to this limited extent the provision for election of trustees under section 53.

Therefore, and with deference to contrary opinion, I would have dismissed the appeal.

Appeal allowed, Bird, J.A. dissenting.

Solicitor for appellants: *J. A. MacLennan.*
Solicitor for respondents: *H. V. Craig.*

REX v. CAMPBELL. (No. 2).

C. A.
1946
Oct. 24;
Nov. 5.

Criminal law—Abortion—Criminal Code, Sec. 303—Charge—Unlawfully using instrument with intent to procure miscarriage—Necessity of proving use of instrument—Reasonable doubt.

The accused was convicted on a charge under section 303 of the Criminal Code with using an instrument with intent to procure a miscarriage.

Held, on appeal, reversing the decision of WILSON, J. (O'HALLORAN, J.A. dissenting), that his conviction must be quashed since there was no evidence upon which a jury, acting reasonably and giving him the benefit of the doubt, could find that he had used an instrument.

APPEAL by accused from his conviction before WILSON, J. and the verdict of a jury at Vancouver on the 10th of September, 1946, on a charge that

at the city of Vancouver on or about the 17th day of July, A.D. 1944, with intent thereby to procure the miscarriage of a certain woman, to wit . . . . unlawfully did use upon the person of the said . . . . an instrument, contrary to the form of the statute in such case made and provided.

The appeal was argued at Victoria on the 24th of October, 1946, before SLOAN, C.J.B.C., O'HALLORAN and SIDNEY SMITH, JJ.A.

Hurley, for appellant.
H. W. R. Moore, for the Crown.

Cur. adv. vult.

5th November, 1946.

SLOAN, C.J.B.C.: The appellant was convicted for that he

with intent thereby to procure the miscarriage of a certain woman, to wit, ... unlawfully did use upon the person of the said . . . . an instrument, contrary to the form of the statute in such case made and provided.

The charge was laid under section 303 of the Criminal Code, which provides punishment for the unlawful use of drugs or noxious things, instruments, or other means whatsoever with intent to procure an abortion. This section defines three means at least of procuring an abortion. The Crown, once having elected to try the accused for the unlawful use of one means specifically described in the indictment, must establish the use of that means, *i.e.*, in this case an instrument. *Rex* v. *Dale* (1940), 54 B.C. 134.

The only evidence the Crown adduced to support the charge as

C. A.
1946

REX
v.
CAMPBELL

Sloan, C.J.B.C.

laid is to be found in the following excerpts from the testimony of the woman named in the indictment:

What else happened on that occasion? He took me into his inner office and he gave me what he called the preliminary.

. . . . .

You say he gave you what he called a preliminary. Were you fully clothed on that occasion? No.

What part of your clothing did you remove? Part of my underwear.

This preliminary process—what part of your anatomy was that done on? The vagina.

Your vagina. You see there a table, do you not [indicating]? Yes.

Did that table figure in any way in the events of which you are speaking? Yes, it was a table like that that I laid down on.

You laid down on your back on that table, did you? Yes.

And I think you have already told us your underwear was off? Yes.

Was removed. Something was done, you say, to your vagina? Yes.

Do you know what was done? No, I don't know what was done.

What did it feel like? I just felt as if something were pushing inside.

Inside your vagina? Yes.

What did that something feel like? Well it felt like some sort of instrument. I didn't see it though.

It felt like some sort of instrument. Did it feel like a wooden instrument? No, it felt metal.

. . . . .

When that had taken place, what happened to you? What did you do? I got up from the table and Dr. Campbell gave me a glass of water and I left—oh, he put me into his office, the part where the desk was, and he gave me an address.

He gave you an address? Yes.

. . . .

Did he make any statement to you when he gave you that address? He told me to go there if I did not feel well.

Did you then leave the office, leave Dr. Campbell's premises? Yes.

Where did you go from there? A friend of mine was waiting for me and showed me around for awhile.

How were you feeling? I felt all right.

This address that you are speaking of, did you ever see that address later? I went there the next morning about 6 o'clock.

What happened to you there? There was a woman answered the door and I told her I was—

Never mind what you told her. She put me to bed.

How long were you there? I was there two or three days, I believe. It may have been longer.

What happened to you while you were there? The second or third day I was there I had a miscarriage.

In cross-examination the following question was asked and answer elicited:

. . . , is it not possible that the insertion that you talk about at the

preliminary was just the fingers of whoever did it to you, the cold fingers, . . . ? It could have been, could it not? Yes, it could have been.

Can it be said on this evidence that the Crown has established to any degree of certainty the accused used an instrument on this woman? With deference, I think not, especially when the only Crown witness called on this aspect of the case frankly says that what was inserted felt like an instrument but could have been the cold fingers of the accused.

A medical doctor called by the Crown to identify certain instruments found in the office of the accused—a naturopathic practitioner—when asked about the use of fingers as a means of procuring an abortion, said in effect, if the neck of the womb is dilated, as it might be before a natural miscarriage occurs, a finger could be inserted in the uterus for the purpose of expelling its contents. There was no evidence before the jury as to whether or not this woman was on the verge of a natural miscarriage. It follows therefore that it is quite possible that she was and that the accused did insert his finger and not an instrument for the purpose and with the intent of procuring the abortion. But no matter how that may be and apart from it, there is in my opinion nothing in the evidence of the doctor which would support the Crown's theory as to the use of an instrument as opposed to the woman's admission that what she felt could have been the fingers of the appellant.

It was urged upon us by Crown counsel that there was some evidence for the jury and that as the jury had found the appellant guilty of the use of an instrument as charged, we should not interfere with the verdict.

If the conclusion I have reached in this case was merely a substitution of my view of the evidence for that of the jury, then I agree the argument of Crown counsel would be very much in point, but I do not regard this principle as applicable herein.

In my opinion there is no evidence upon which a jury, acting reasonably and giving the benefit of the doubt to the accused, could find him guilty of the offence charged. As was said by MACDONALD, J.A., as he then was, later C.J.B.C., in *Rex* v. *Wah Sing Chow* (1927), 38 B.C. 491, at p. 497,

Guilt should be brought home by evidence reasonably conclusive.

In my opinion the verdict of the jury must be set aside upon

C. A.
1946
REX
v.
CAMPBELL

the ground that it is unreasonable and cannot be supported by the evidence.

I would therefore allow the appeal and quash the conviction.

O'HALLORAN, J.A.: At the Vancouver September Assize the appellant was convicted under the abortion section, Code section 303. He was charged with the unlawful use of an instrument with intent to procure a miscarriage.

In *Rex* v. *Dale* (1939), 54 B.C. 134 it was said that the "other means whatsoever" included in section 303 cannot sustain a charge which is confined to the use of an instrument. Section 303 is so unfortunately phrased that even if the crime of abortion is conclusively established by the testimony as it is here, nevertheless the accused may be acquitted if the technical evidence of actual method employed is weak. The phraseology of section 303 as examined in *Rex* v. *Dale, supra,* seems to permit confusion between a charge which is imperfectly stated and a charge wherein an averment of an essential circumstance is wholly omitted; and see *Brodie* v. *Regem,* [1936] S.C.R. 188 and *Rex* v. *McNab* (1945), 61 B.C. 74, at pp. 76-7.

Counsel for the appellant submitted the learned judge erred in holding there was evidence to go to the jury that the appellant used an instrument. That is the point on which the appeal turns.

The complainant, who did not actually see what was done to her, testified that what was inserted into her

> felt like some sort of an instrument . . . it felt like metal and not wood.

In cross-examination she was asked:

> Is it not possible that the insertion . . . was just the fingers of whoever did it to you, the cold fingers, [possibly]? It could have been, could it not?

to which she replied,

> Yes, it could have been.

A medical practitioner called by the prosecution testified that under special conditions he described, it was possible to cause miscarriage by manipulation of the fingers, but he considered it "most unlikely" that happened in this case. He was not cross-examined thereon by appellant's counsel.

Appellant's counsel argued the foregoing evidence necessitated reasonable doubt whether the miscarriage was caused by an

instrument or by finger manipulation. Counsel argued also that it supplied a rational hypothesis distinct from the use of an instrument to which the charge was confined. In these circumstances counsel submitted there was no competent evidence upon which a properly instructed jury could convict the appellant of using an instrument, and hence that there was no evidence to go to the jury; and see *Rex* v. *Findlay* (1944), 60 B.C. 481, at p. 486.

In this case there is no doubt that the appellant performed an abortion on the complainant. The evidence is conclusive in that respect. The appellant a practising naturopath and known as Dr. Campbell, contracted with the complainant to perform an abortion upon her. She went to his office where he had an operating-table and equipment (suitable instruments were later found there) and he performed the operation. The complainant then went to a nursing-home for abortion patients to which the appellant directed her. Her miscarriage took place there. The appellant treated her there for the after-effects of the miscarriage. This evidence remained uncontradicted, and was corroborated in substantial particulars. The appellant did not go into the witness-box.

One's reasoned approach to the subject would be quite different if any doubt existed as to whether the appellant did perform the operation. But once it is clear, as it is, that the appellant did perform an abortion on the complainant that conclusive evidence that the crime was committed provides a foundation for legitimate inferences which would not exist otherwise. From the foundational fact that the abortion was performed by the appellant the jury could infer how he did it; and see note (*b*) to *Regina* v. *Exall* as reported in (1866) [4 F. & F. 922]; 176 E.R. 850, at foot of p. 851. It was for the jury to decide whether the probative weight of the evidence regarding finger manipulation pointed to a mere possibility, or went further and amounted to a reasonable likelihood that the miscarriage was caused in that way without the use of an instrument. It is to be borne in mind that the medical evidence was not that it was probable or likely, but that it was "most unlikely" the miscarriage was caused by finger manipulation alone.

C. A.
1946
REX
v.
CAMPBELL
O'Halloran, J.A.

Mere possibility is not enough in itself to justify a reasonable doubt or to found a rational hypothesis. Unless it can be said that the evidence points to a likelihood that the miscarriage was actually caused by finger manipulation alone instead of by an instrument, then in my view there was evidence to go to the jury, and evidence upon which a properly instructed jury not only could convict but ought to convict.

Testimony that an act may possibly be done in a certain way under certain conditions is purely fanciful or speculative, unless it is founded on some objective evidence (as distinguished from subjective reasoning), which points to a reasonable likelihood it was done in that way. Since legal proof is relative (see Anglin, J. at p. 625 in *Clark* v. *Regem* (1921), 61 S.C.R. 608), objective evidence is not inconclusive merely because it may leave room for subjective doubt. In my judgment, with respect, a doubt is not reasonable, and an hypothesis is not rational, unless it is supportad by testimony which when viewed objectively in the particular circumstances, presents an explanation which arises reasonably, necessarily or probably from the facts proved; and see *Rex* v. *Burdett* (1820), 4 B. & Ald. 94; 106 E.R. 873 and Duff, J. in *Picariello et al.* v. *Regem* (1923), 39 Can. C.C. 229, at p. 237 and *Rex* v. *McQuarrie,* [1944] 1 W.W.R. 33, Mackenzie, J.A. (*per curiam*) at p. 37.

On the whole of the evidence I am satisfied the jury could reasonably conclude that an instrument was used. That evidence indicates to me that the likelihood of procuring the miscarriage without the aid of any instrument whatever, while possible in some cases, was so remote in the circumstances of this case, that objectively viewed it could not be regarded as a reasonable probability. That leads to the conclusion, with respect, that the learned judge could not hold that no evidence existed from which the use of an instrument could reasonably be inferred. But it was for the jury to say whether that ought to be inferred, and see *Metropolitan Railway Co.* v. *Jackson* (1877), 3 App. Cas. 193, at pp. 197 and 207-8, and *Rex* v. *Flett* (1943), 59 B.C. 25, at p. 35.

In *Rex* v. *Smart* (1945), 61 B.C. 321, at p. 322 it was said:

Proof of guilt is not insufficient because it may not be demonstrated with

mathematical precision. It is enough (with the principle in *Hodge's Case* (1838), 2 Lewin, C.C. 227 in mind), if it may be legitimately inferred from the proven facts. And it meets that requirement, if it is a natural inference which reasonable men with everyday practical knowledge of human habits and affairs would unhesitatingly draw from the cumulative effect of the proven facts.

The jury acting upon proper directions from the learned judge, found the appellant guilty upon the cumulative effect of legitimate inferences from the proven facts. In my judgment, with respect, the appellant was enveloped by such a strong network of inculpatory inferences arising from the foundational fact that he did perform the abortion operation, that no jury acting rationally could reach any other conclusion than that he was guilty as charged; and see *Rex* v. *Jenkins* (1908), 14 B.C. 61 and *Rex* v. *McKinnon* (1941), 56 B.C. 186, at p. 192.

I would dismiss the appeal.

SIDNEY SMITH, J.A.: I agree with the Chief Justice.

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

SADLER AND PERRY v. SCOTT *ET AL.*

C. A.
1946
Nov. 22;
Dec. 20.

Conversion—Judgment for damages—Effect of on right of property—Costs—Divided success—Apportionment.

Mere recovery without satisfaction of a judgment for damages for conversion has not the effect of changing the ownership of the property. When the judgment is paid, the plaintiff is divested of his right to the property.

On appeal from a judgment holding that the defendants had converted the plaintiffs' launch to their own use, the main argument was upon the question of liability, there being little said as to damages.

Held, per ROBERTSON and BIRD, JJ.A. (SIDNEY SMITH, J.A. dissenting and would allow the appeal), that the damages be reduced from $899 to $449.

On the question of costs it was

Held, that the defendant was entitled to general costs of the appeal, but that the respondents were entitled to the costs of the issue on which they succeeded, namely, that of liability.

Held, further, that both parties should tax their costs as if successful, the appellant to receive one-fourth of his taxed costs and the respondents three-fourths of their taxed costs with proper set-off.

C. A.
1946

SADLER AND PERRY
v.
SCOTT

APPEAL by defendant Scott from the decision of SARGENT, Co. J. of the 20th of December, 1946, in an action for damages for removing the plaintiffs' gasoline launch Toivo from the Steveston Government wharf on the 11th of September, 1943, and retaining possession thereof. The defendant subsequently loaded a heavy engine on the launch damaging its hull so that it sank in the Fraser River and the launch thereby suffered considerable damage.

The appeal was argued at Vancouver on the 22nd of November, 1946, before ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Ginn, for appellant: The boat was bought by the plaintiffs in 1943 for $75 and taken to Steveston where it was on the beach for two years when the defendants took it to Mitchell Island where Scott operated a boat-building business. The defendant David then claimed the boat was his and was named the Vivian. The defendants then put an engine in the boat and while towing it to Steveston it sank in seven feet of water. The defendants claim the identity of the boat Toivo was not proven: see *Haley* v. *S.S. "Comox"* (1920), 30 B.C. 104; *Stone* v. *S.S. "Rochepoint"* (1921), *ib.* 113. On the right to possession see *Cotton Co., Ltd.* v. *Coast Quarries Ltd.* (1913), 4 W.W.R. 142; *In re Tiderington* (1912), 17 B.C. 81; *Hoffar Ltd* v. *Canadian Credit Men's Trust Association* (1929), 40 B.C. 454.

T. G. McLelan, for respondents: The official administrator's bill of sale of November 4th, 1943, gives title to the plaintiffs, also certificates of British registry of November 5th, 1943, gives title of "Toivo" to them. They were three months repairing the boat; it was in good condition and they bought an engine from Scott: see *Galt* v. *Frank Waterhouse & Co. of Canada Ltd.* (1927), 39 B.C. 241; Mayne on Damages, 10th Ed., 387.

Ginn, in reply, referred to *In re Dominion Trust Co., Boyce and MacPherson* (1918), 26 B.C. 302.

Cur. adv. vult.

20th December, 1946.

ROBERTSON, J.A.: The learned judge below found the launch in question was the property of the plaintiffs and that the defend-

ants Scott and David had converted it to their own use. In my opinion there was ample evidence to support these findings of fact.

There remains to be considered the question of damages. Scott alone appeals. The learned judge awarded the plaintiffs against both defendants $550 special damages, less a set-off of $151 (being the balance owing to Scott in respect of an engine installed by him in the boat), and for certain work done, and $500 general damages.

Before dealing with this, in view of the argument, it is necessary to say that in my opinion this judgment did not vest the property in the launch in the defendants. Mere recovery without satisfaction has not the effect of changing the ownership of the property. When the judgment is paid the plaintiffs will be divested of their right in the property. See *Brinsmead* v. *Harrison* (1871), L.R. 6 C.P. 584; *Ex parte Drake. In re Ware* (1877), 5 Ch. D. 866 and *Ellis* v. *John Stenning & Son,* [1932] 2 Ch. 81.

The plaintiffs claimed as special damages loss of profits amounting to $250 on an alleged charter and $300 damage to the hull and engine. I would disallow any loss of profits as the launch was entirely unseaworthy at the time of conversion and was not capable of earning any charter-money. I would fix the value of the launch in this way: Scott says that a man named Strickland wanted to buy the boat for $400. Sadler says that the price he discussed with Strickland was $800 if the engine was in good shape. I think it would be fair to place the value of the boat at $500 and I would allow this amount as special damages. As to the general damages, in view of the high-handed action of the defendants I would allow $100 in respect to this. The sum of $151 is to be deducted from the $500, leaving for special damages the sum of $349 and for general damages $100, a total of $449. The damages will therefore be reduced to that amount.

The main issue discussed in the appeal was the question of liability. There was very little said on the question of damages. Scott is entitled to the general costs of the appeal, but the respondents are entitled to the costs of the issue on which they succeeded,

C. A.
1946

SADLER AND PERRY v. SCOTT

Robertson, J.A.

namely, the question of liability. See *Seattle Construction and Dry Dock Co.* v. *Grant Smith & Co.* (1919), 26 B.C. 560.

I would direct that both parties tax their costs as if successful; the appellant to receive one-fourth of his taxed costs and the respondents to receive three-fourths of their taxed costs, with a proper set-off. See *Triangle Storage Ltd.* v. *Porter* (1941), 56 B.C. 422.

SIDNEY SMITH, J.A.: This is an appeal by the defendant Scott from a judgment of SARGENT, Co. J. in an action for damages for the unlawful seizure of the plaintiffs' vessel (the gasoline launch "Toivo"—length 32 feet; breadth 9 feet; depth 4 feet) and the wrongful taking possession and removal of same. I see no reason for disturbing the learned judge's findings of fact on the question of liability, but I am unable, with respect, to agree with his determination of the *quantum* of damages.

The plaintiffs Sadler and Perry (*alias* Burke) gave their occupation as being that of shipyard workers. The defendant Scott is a certificated marine engineer and a shipbuilder of 54 years' experience. He is the owner of a machine shop and marine yard at Mitchell Island, in the North Arm of the Fraser River. There was another defendant to the action, one David, who was also found liable, but who is not a party to this appeal. The evidence upon the trial was voluminous, conflicting and confused, but so far as material for the purposes of this judgment, the following are the salient facts: The plaintiffs purchased the hull of the launch, then about 25 years old, in the month of May, 1943, for the sum of $75. The hull had then been lying on the beach at Sunbury on the Fraser River, for a period of two years, and at the time of purchase was admittedly in bad shape, each high tide invading its interior. The plaintiffs had the hull towed to Scott's yard at Mitchell Island, did some work on it, and installed an engine which they had purchased from Scott for the sum of $200, paying $100 in cash, the balance being secured by conditional sale agreement. They also purchased from Scott certain engine and other parts for which they agreed to pay $48. The plaintiffs then, about 1st August, removed the launch to the

Government float at Steveston on the Fraser River where they offered her for sale, and where she remained for some six weeks.

Meanwhile David appears to have represented to Scott that the boat belonged to David's wife and not to the plaintiffs. On David's instructions Scott and one Hudson, and another, Van Norman, about the middle of September, proceeded to Steveston to move the vessel back to Scott's yard at Mitchell Island, either under her own power, or, that failing, under tow. Scott's part seems to have been to start the engine, and this he tried to do (after effecting entry by unscrewing the hasp of the padlock on the cabin door) but without success. He then left and took no further part in the proceedings. The launch was thereupon taken in tow by another launch owned by Van Norman. On the way to Mitchell Island she sank in six to seven feet of water, some six miles up the river from Steveston. Her sinking in the sheltered waters of the river was not due to any negligence on the part of Hudson or Van Norman, but on account of the inherent frailty of the hull, the water finding its way in through the seams. Some time later, and upon further instructions from David, Scott with his employees raised the vessel and towed her to his yard at Mitchell Island, where she has remained pending the outcome of these disputes.

The learned judge appears to have found that Scott acted honestly, but mistakenly. It would seem that his fundamental error was in allowing David to delude him into believing that the plaintiffs may have been the real owners of the launch. David's story that his wife was the lawful owner, that David was her lawful agent, that the launch was lost to them both some 12 years before, and that his wife subsequently disappeared, was one that in the circumstances bordered on the ludicrous. The learned judge regarded David as being "something of a knave and considerable of a fool." He had good reason for this view. But there can be no question here (and none was found) of aggravation of damages against Scott by reason of malicious, violent, or otherwise reprehensible conduct, on his part.

The plaintiffs having suffered wrong are entitled to damages, namely, such a sum as would put them financially in the position in which they would have been if the wrong had not been done

C. A.
1946
SADLER AND PERRY v. SCOTT
Sidney Smith, J.A.

to them. But just as it was the business of the plaintiffs to establish that they had suffered wrong (and as to this the learned judge found in their favour), so also it was their business to prove whatever pecuniary loss was occasioned to them, and to supply the means for ascertaining its amount. *"The Clarence"* (1850), 3 Wm. Rob. 283. Only one passage in the reasons for judgment of the learned judge deals with damages, and it is as follows:

> Accordingly the plaintiffs will recover against the defendants the sum of $550 special damages, less a set-off of $151, making a net amount of $399, and general damages in the sum of $500 making a total of $899 with costs.

The learned judge gave no indication of what he meant by "general damages" nor of how he arrived at these amounts. They are challenged: and so it becomes our duty to see whether they are justified by the evidence, unassisted and unembarrassed by any reasons of the learned judge therefor. It should be noted, however, that in their plaint, the plaintiffs claimed $250 for loss of profits, $300 for damage to hull and engine (less $100 owing to Scott) and "general damages $550." In the alternative to the said "general" damages they asked for "delivery up of possession of said launch."

Assuming that the launch at the time of the wrongful acts was of commercial value and capable of making commercial profit, there are four possible heads of damage: (1) The cost of the operations raising the vessel and towing it to the Scott yard; (2) the cost of repairs with incidental expenses; (3) the loss of profit during the period of repairs; (4) the shifting of the vessel back to Steveston. As to (1), these operations were carried out by Scott and may now be regarded by him as an item in diminution of his damages. They are not a charge against the plaintiffs. As to (2) and (3), the plaintiffs could scarcely complain if they had been refused relief altogether for they brought practically no evidence to substantiate the claims advanced. It is true that with respect to the cost of repairs there is this brief remark from the plaintiff Perry, namely, that he would "figure cost $300 to put boat back in shape"; but I take this to be merely a guess on his part, and certainly there is nothing to show that he was qualified to give an estimate in this regard. It was the sole

evidence of the plaintiffs on the point. What would seem to be more reliable testimony was that given by Johnson called by the defendant Scott. Johnson, a boat-builder of experience, gave particulars of the damage he found, which he estimated could be repaired for $50. His evidence is borne out by the testimony of Scott. This, however, is a net figure and from a consideration of the whole of the evidence I think it fair to allow $130 on this head. This sum, in my view, would be sufficient to cover all incidental expenses, such as examination and cleaning of the engine. It is significant that there is no evidence of any damage having been caused to the engine. What evidence there is on the subject, is to the effect that it was "not hurt." As to (3), "loss of profits," Sadler said that while the launch was up for sale at Steveston, whither the plaintiffs went from time to time to look her over and pump her out, they had had an offer to charter the vessel for 100 days at $8 "per day clear." Perry said "loss of profits $250 at least." There are several answers to this type of testimony, but one will suffice. There is no evidence whatever that this vessel was ever in a condition in which she could make any profit for anyone; such as it is, the testimony is all to the contrary; for example, that when Scott tried to start the engine it would not go; that when they had towed her a few miles from Steveston she sank. In the face of these facts and of the vessel's history, there is no need to dwell further on this head. Finally, there is the matter of returning the vessel to the wharf at Steveston, whence she had been removed. The evidence shows that an item of $20 will be ample for this charge. These amounts total $150, against which must be set off a sum allowed by the learned judge at $151 (being the balance due to Scott on the engine and parts, plus interest under the terms of the agreement) which was not disputed before us, or upon the trial.

This leaves $1 in favour of the defendant Scott. I would therefore allow this appeal and dismiss the action as against him, both with costs. The launch remains, of course, the property of the plaintiffs and they are entitled to its immediate possession.

BIRD, J.A.: I would dispose of this appeal in the manner

C. A.
1946

SADLER AND PERRY
v.
SCOTT

proposed by my brother ROBERTSON in his reasons for judgment, in which I concur.

Appeal allowed in part, Sidney Smith, J.A. dissenting, who would allow the appeal.

Solicitor for appellant: *R. W. Ginn.*
Solicitor for respondents: *T. G. McLelan.*

THE TORONTO GENERAL TRUSTS CORPORATION, EXECUTORS OF THE ESTATE OF ALICE GRANT MacKAY, Deceased v. THE CONGREGATION OF ST. ANDREW'S-WESLEY CHURCH AT VANCOUVER, A CONGREGATION OF THE UNITED CHURCH OF CANADA *ET AL.*

C. A.
1946
Sept. 10;
Nov. 5.

Wills—Charitable gifts—Gift to church to be added to the endowment fund —No endowment fund—Uncertainty—Cy-pres doctrine—Costs.

The testatrix left all her estate to a trustee upon trust to pay certain legacies and thereafter "to pay or transfer all the rest, residue and remainder of my estate to the St. Andrew & Wesley Church, Vancouver, B.C. to be added to the endowment fund." The church had no endowment fund and no general charitable intention was expressed in the will. It was, therefore, contended that the gift was not necessarily for charitable purposes and failed for uncertainty. On the other hand, it was argued that since the church was a religious institution, therefore the gift must have been for the purposes of religion and so for a good charitable object. It was held that the direction as to the endowment fund was merely a provision as to the mode of employment of the gift and applying the *cy-pres* doctrine, the gift was valid as a charitable gift to the church.

Held, on appeal, reversing the decision of Wilson, J. (O'Halloran and Bird, JJ.A. dissenting), that for a gift to be a valid charitable gift, the application of the fund for charitable purposes must be obligatory. Therefore, where a gift may consistently with the will be applied to other than strictly charitable objects, it is too indefinite for the Court to execute and will fail.

Per Sidney Smith, J.A., Sloan, C.J.B.C. concurring: If the gift had been one to the church *simpliciter*, it would be held to be a gift to the trustees in trust for the religious purposes of the church and the judge below has so found, but it was a gift to the trustees to be added to the endowment fund of the church which may not be the same thing. A charitable intention cannot be deduced from the mere fact that the trustee of the gift is a church officer or incumbent. Even on the assumption that the sole object of an endowment fund of a church is to provide a permanent income, there is nothing to show here that such income must necessarily be applied to charitable objects.

Per Robertson, J.A.: A church has many activities. Some of them are charitable within the legal meaning of that word, others although benevolent or conducive to the interests of the parishioners or to the public interest, are not within that meaning. An endowment fund without any trusts might be used for any of those purposes. Since the testatrix expressed no trust, the bequest cannot be said to be charitable within the legal meaning. It is impossible to find in the will the expression of a general charitable intention.

C. A.
1946

THE TORONTO GENERAL TRUSTS CORPORATION v. CONGREGATION OF ST. ANDREW'S-WESLEY CHURCH

APPEAL by the next of kin of Alice Grant MacKay, deceased, from the decision of WILSON, J. of the 24th of April, 1946 (reported, 62 B.C. 463). The testatrix died on September 15th, 1944. She made her will on April 25th, 1940, in which she named The Toronto General Trusts Corporation executor and trustee. There were two codicils, but the changes made are not in question herein. Probate was granted October 16th, 1944, and with the exception of the payment of the residuary bequest the estate was fully administered on July 16th, 1945, the amount remaining in the hands of the executor being about $16,620. The residuary bequest directed the trustee

To pay or transfer all the rest, residue and remainder of my estate to the St. Andrew & Wesley Church, Vancouver, B.C. to be added to the endowment fund.

Upon being advised that there was no endowment fund an application by way of originating summons was made to the Court for a direction as to whom the residue should be paid and it was directed by WILSON, J. that W. H. O. Stobie as representative of the class who would take if the gift to St. Andrew's-Wesley Church should fail. The originating summons was amended and questions submitted to the Court:

(1) Is the provision contained in . . . the will [cited above] . . . a valid gift of the residuary estate of the deceased to The Congregation of the St. Andrew's-Wesley Church at Vancouver, a Congregation of the United Church of Canada, to its own use?

(1A) In the provision in the will of the said Alice Grant MacKay, deceased, [cited above] . . . do the words "St. Andrew & Wesley Church, Vancouver, B.C." mean and refer to "The Congregation of St. Andrew's-Wesley Church at Vancouver, a Congregation of the United Church of Canada"?

(2) If the answers to questions Nos. 1 and 1A above are in the affirmative, then,

(a) What committee, board, trustee, body or official of the . . . church . . . has authority to receive on behalf of the . . . church . . . from the said executor the payment and transfer by the said executor of all the rest, residue and remainder of the said estate above referred to?

(b) What committee, board, trustee, body or official of the . . . church . . . is . . . competent to execute and deliver to the said executor . . . a proper and sufficient release and discharge in respect thereof?

The church supported the bequest and the next of kin contended that the bequest was void for uncertainty. It was held that the testatrix wanted to give the residue to the St. Andrew's-

Wesley Church at Vancouver and that it was a charitable gift. That the words "to be added to the endowment fund" were words of limitation only, indicating that the capital should be held intact, that the *cy-pres* doctrine should be invoked, and a proper endowment fund set up under which the interest only would be used.

The appeal was argued at Victoria on the 10th of September, 1946, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Norris, K.C., for appellant: As there was no endowment fund and no trust was declared in the will with respect thereto, the gift is void: see *Hunter* v. *Attorney-General,* [1899] A.C. 309, at pp. 315-324; *In re Diplock. Wintle* v. *Diplock,* [1941] Ch. 253, at p. 259; *Re McCauley* (1897), 28 Ont. 610. The words "to be added" are governing words and as the purpose fails so the gift must fail and is not applicable *cy-pres* to other charitable gifts: see Halsbury's Laws of England, 2nd Ed., Vol. 4, p. 182, par. 247; *Farley* v. *Westminster Bank,* [1939] 3 All E.R. 491, at pp. 492 and 494; *Re Young* (1907), 9 O.W.R. 566, at p. 567. The words "endowment fund" must be taken in their ordinary meaning and do not necessarily import a charitable intention: see *Cocks* v. *Manners* (1871), L.R. 12 Eq. 574, at p. 585; Halsbury's Laws of England, 2nd Ed., Vol. 4, p. 109, pars. 146 and 222; *Dunne* v. *Byrne,* [1912] A.C. 407, at p. 410; *In re Morton Estate,* [1941] 1 W.W.R. 310, at p. 320. There being no "endowment fund," the gift fails for uncertainty; Halsbury's Laws of England, 2nd Ed., Vol. 33, p. 101, par. 166; *Cameron* v. *Church of Christ, Scientist* (1918), 57 S.C.R. 298, at pp. 304 and 306-7. The Court cannot compel the trustee to apply the funds to purposes which are charitable in the legal sense: see Ashburner's Equity, 2nd Ed., 114-5; *Morice* v. *The Bishop of Durham* (1805), 10 Ves. 522, at pp. 539 and 542; *James* v. *Allen* (1817), 3 Mer. 17, at p. 18; *Re Wright,* [1938] O.W.N. 136, at p. 138. Matters have been stretched in favour of charities to bursting point: see *Re Air-Raid Distress Fund's Trusts,* [1946] 1 All E.R. 501, at p. 510. The Court will not speculate as to the testator's intention: see *In re Morton Estate,* [1941]

C. A.
1946

THE TORONTO GENERAL TRUSTS CORPORATION v. CONGREGATION OF ST. ANDREW'S-WESLEY CHURCH

1 W.W.R. 310, at pp. 321-2; *In re Davies. Lloyd* v. *Cardigan County Council,* [1915] 1 Ch. 543, at p. 548. The learned judge found it was the intention of the testatrix to benefit the church and created income for it rather than making an outright gift. There is nothing to warrant this speculation. The attempt to set up an endowment fund making the church the beneficiary cannot be of any avail as the will must be construed as of the date of the death of the testatrix: see Halsbury's Laws of England, 2nd Ed., Vol. 4, p. 168, par. 221; *In re Jarman's Estate. Leavers* v. *Clayton* (1878), 8 Ch. D. 584, at p. 587. The purported gift in clause 30 of the will is not a valid charitable gift and must fail.

Donaghy, K.C., for respondent congregation: The testator meant St. Andrew's-Wesley Church at Vancouver, which is the only church of that name in Vancouver. There is no contest as to this. As to the words "to be added to the endowment fund," the church had no such fund, but the intention to make a gift to the church is clear. A gift to the church is a charitable gift: see *In re Schoales. Schoales* v. *Schoales,* [1930] 2 Ch. 75; *In re Barnes. Simpson* v. *Barnes* (1922), *ib.* 80*n.* The gift reveals a clear charitable intention which the Court should not permit to fail simply because of the non-existence of an endowment fund. The intention should be executed in some other manner *cy-pres*: see Halsbury's Laws of England, 2nd Ed., Vol. 4, p. 221, par. 323, which is as near as possible to the mode specified by the donor. The gift to the church is absolute. The trust to be carried by the trustee is to pay or transfer the residue to the church.

Norris, replied.

Cur. adv. vult.

5th November, 1946.

SLOAN, C.J.B.C.: I would allow the appeal for the reasons given by my brother SIDNEY SMITH.

O'HALLORAN, J.A.: A bequest to

"the St. Andrew & Wesley Church, Vancouver, B.C. to be added to the endowment fund"

is questioned because the church had no endowment fund at the time. On behalf of the appellant it was submitted that the

gift is not necessarily for charitable purposes and fails for uncertainty.

In my judgment, the words "to be added to the endowment fund," are to be interpreted in the same way as if the testatrix had directed her bequest to the church to be "added" to its account in a bank wherein the church had no account at the time.

As I see it, there is an unambiguous gift to the church, and that plain intention and master provision ought not to be defeated by a factual error occurring in a direction incidental to the gift. A direction or wish which the testatrix saw fit to express regarding the business or financial method which the church should adopt in receiving or holding the gift, assumes the prior existence of a valid gift, and hence is necessarily consequential or incidental thereto.

I regard this approach to the question as of great importance since a vast distinction lies between what the Courts may do in the case of an uncertain gift as such, when contrasted with a case involving only a confused or uncertain direction concerning a gift which in itself is not uncertain.

If this reasoning is correct as I think it is, the appeal loses its complexity. In the first place, the bequest being a gift to a church, it is *per se* a gift for charitable purposes. In the next place, being an immediate gift for charitable purposes, the bequest cannot be defeated by the circumstance that strict compliance with an incidental direction of the testatrix happened to be impracticable at the very moment the church became entitled to receive the gift; and in this respect see *Wallis* v. *Solicitor-General for New Zealand* (1903), 72 L.J.P.C. 37 and *Power* v. *Attorney-General for Nova Scotia* (1903), 35 S.C.R. 182.

If this case is regarded in what I am constrained to view as its true perspective, and if at the same time, it is divorced from the influence of the peculiar facts and circumstances affecting some of the decisions to which we were referred, I am unable to resist the conclusion that the testatrix, "seated in her arm-chair," plainly intended a charitable gift to the church, and plainly intended also that it should be unhampered by any conditions which could destroy that plain intention. That leads me to the further conclusion that her plain intention ought not to be

C. A.
1946

THE TORONTO GENERAL TRUSTS CORPORATION v. CONGREGATION OF ST. ANDREW'S-WESLEY CHURCH

defeated by the obviously factual mistake she had made in a direction incidental only to the carrying into effect of that plain charitable intention.

I agree with the disposition of the matter made by the learned judge of first instance. I would dismiss the appeal.

ROBERTSON, J.A.: By her will the testatrix directed her trustees

> 30. To pay or transfer all the rest, residue and remainder of my estate to the St. Andrew & Wesley Church, Vancouver, B.C. to be added to the endowment fund.

The primary question to be decided is whether or not this clause contains a valid gift of the residuary estate to the church, to its own use. The remainder of the will does not assist in its interpretation. There was no endowment fund; nor is there any institution as mentioned, but there is "St. Andrew's-Wesley Church, a Congregation of the United Church of Canada." There is no dispute that this is the church mentioned by the testatrix. The appellant submits that as there is no endowment fund and no general charitable intention is expressed in the will the bequest fails and goes to the next of kin. The respondent submits that the gift is really to the church, to be put in the endowment fund and that as a gift to a church is *prima facie* charitable, the gift is valid, subject to its being added to the endowment fund; and in the absence of an endowment fund, the Court will apply the *cy-pres* doctrine and direct a scheme.

There is no doubt that a gift to a church, *simpliciter,* is a valid charitable gift. *In re White. White* v. *White,* [1893] 2 Ch. 41; *In re Barnes. Simpson* v. *Barnes* (1922), [1930] 2 Ch. 80*n.* A gift to a church "for the use thereof" is likewise a good charitable bequest. *In re Schoales. Schoales* v. *Schoales,* [1930] 2 Ch. 75. This is so because the bequest is intended by the testator as a gift to the operative institution which ministers religion and gives spiritual edification to its members. See *In re Barnes, supra,* p. 81.

The mode in which the testatrix desires to exercise her generosity having failed, the gift lapses unless a clear general charitable intention is expressed in the will. Halsbury's Laws of England, 2nd Ed., Vol. 4, p. 175; *Attorney-General* v. *Price,*

[1912] 1 Ch. 667, at p. 678. The charitable intention must be found in the use to be made of the property. *Per* Lord Davey in *Hunter* v. *Attorney-General,* [1899] A.C. 309, at p. 320.

The primary duty of a court of construction in the interpretation of wills is to give to each word employed in the will, if it can with propriety receive it, the natural ordinary meaning which it has in the vocabulary of ordinary life and not to give to words employed in the vocabulary of ordinary life an artificial, secondary and technical meaning. See *Young, et al.* v. *Robertson, et al.* (1862), 4 Macq. H.L. 314, at p. 325.

The question is not whether the trustees may not apply the legacy upon purposes strictly charitable, but whether he is bound so to apply it. See *Morice* v. *The Bishop of Durham* (1804), 9 Ves. 399, at p. 406; and *Hunter* v. *Attorney-General, supra,* at p. 320.

It is difficult to see on what principle a trust expressed in plain language, whether the words used be sufficient or insufficient to satisfy the requirements of the law, can be modified or limited in its scope by reference to the position or character of the trustee:

per Lord Macnaghten in *Dunne* v. *Byrne,* [1912] A.C. 407, at p. 410.

In *Clark* v. *Taylor* (1853), 1 Drew. 642, at p. 644, the Vice-Chancellor said:

. . . Now, there is a distinction well settled by the authorities. There is one class of cases, in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect; if that mode fails, the Court says the general purpose of charity shall be carried out. There is another class, in which the testator shows an intention, not of general charity, but to give to some particular institution; and then if it fails, because there is no such institution, the gift does not go to charity generally: that distinction is clearly recognised; and it cannot be said that wherever a gift for any charitable purpose fails, it is nevertheless to go to charity.

Kay, J. said in *Biscoe* v. *Jackson* (1887), 35 Ch. D. 460, at p. 463 as follows:

. . . I quite agree that if the mode of application is such an essential part of the gift that you cannot distinguish any general purpose of charity, but are obliged to say that that mode of doing a charitable act was the only one the testator intended, or at all contemplated, and that he had no general intention of giving his money to charity, then the Court cannot, if the particular mode of doing it fails, apply the money *cy-pres.*

His judgment was approved by the Court of Appeal. In *In re*

C. A.
1946

THE TORONTO GENERAL TRUSTS CORPORATION v. CONGREGATION OF ST. ANDREW'S-WESLEY CHURCH

Robertson, J.A.

Wilson. Twentyman v. *Simpson,* [1913] 1 Ch. 314, at p. 320, Parker J. said:

For the purposes of this case I think the authorities must be divided into two classes. First of all, we have a class of cases where, in form, the gift if given for a particular charitable purpose, but it is possible, taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention, according to the true construction of the will, is to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect. In that case, though it is impossible to carry out the precise directions, on ordinary principles the gift for the general charitable purpose will remain and be perfectly good, and the Court, by virtue of its administrative jurisdiction, can direct a scheme as to how it is to be carried out. In fact the will will be read as though the particular direction had not been in the will at all, but there had been simply a general direction as to the application of the fund for the general charitable purpose in question.

Then there is the second class of cases, where, on the true construction of the will, no such paramount general intention can be inferred, and where the gift, being in form a particular gift,—a gift for a particular purpose—and it being impossible to carry out that particular purpose, the whole gift is held to fail. In my opinion, the question whether a particular case falls within one of those classes of cases or within the other is simply a question of the construction of a particular instrument.

If the legacy might consistently with the will be applied to other than strictly charitable purposes the trust is too indefinite for the Court to execute, and will fail. See *Dunne* v. *Byrne, supra,* p. 411, and *Farley* v. *Westminster Bank,* [1939] A.C. 430, at p. 434.

The question then is: What is the meaning of the words "to be added to the endowment fund"?

In *Farley's* case the facts were that a testatrix directed her trustees to stand possessed of the residue of her estate upon trust, *inter alia,* of a part for the Vicar and Churchwardens of St. Columba's Church, Hoxton (for parish work); and likewise a gift to the Vicar and Churchwardens of St. Cuthbert's Church (for parish work). The question was whether these two gifts were valid or whether they were too vague as going beyond what is within the meaning of the law a charitable gift. Lord Atkin said at p. 433 if they go beyond a legal definition of a charitable gift they are too vague. He then refers to the principle expressed "as well as it could be expressed" by Lord Macnaghten

in delivering the judgment of the Privy Council in *Dunne* v. *Byrne,* to which reference has been made. The Court held that as the words in their ordinary meaning would include objects which were not charitable in a legal sense the gifts were not charitable and consequently failed.

I am of the view that the words "to be added to the endowment fund" are, as Lord Atkin says at p. 435, "quite plainly enlarging words," and words of definition used for the very purpose of defining what the testatrix meant as the purpose for which the money was to be applied.

An endowment fund may be for one purpose only, or may be for many purposes. There may be only one donation to the endowment fund with or without special trusts in connection therewith; or there may be in the endowment fund many sums of money given by different benefactors, each with a different trust, or without any trusts. Consequently there may be no trusts, or the trusts of an endowment fund may be entirely charitable or entirely non-charitable within the legal meaning of these words, or partly charitable and partly non-charitable. If the church mentioned in clause 30 had had an endowment fund it might have consisted of moneys subject to various trusts; and if in such case the money in question had been paid into the fund it is difficult to see how it could have been administered.

A church has many activities, some of which are charitable within the legal meaning of that word; and others which are benevolent or conducive to the interest of the parishioners or to the public interest and yet are not charitable. An endowment fund without any trusts might be used for any one of these purposes. The testatrix then in directing the bequest should be added to the endowment fund, as she expressed no trust, must have intended that it should be used for some purpose of the church and accordingly the bequest cannot be said to be charitable within the legal meaning. The result is that in my opinion it is impossible to find a general charitable intention expressed in the will. For these reasons I think the gift fails and the next of kin take.

The appeal should be allowed. Costs of all parties upon a solicitor and client basis to be paid out of the estate.

C. A.
1946

THE TORONTO GENERAL TRUSTS CORPORATION v. CONGREGATION OF ST. ANDREW'S-WESLEY CHURCH

SIDNEY SMITH, J.A.: We have before us for review in this appeal the question whether the testatrix made a valid disposition of the residue of her estate. By her will, after giving certain legacies, she directed her trustees

> to pay or transfer all the rest, residue and remainder of my estate to the St. Andrew & Wesley Church, Vancouver, B.C. to be added to the endowment fund.

The name of the church was not quite correctly stated, but that is now immaterial. There is nothing in any context to assist us in the interpretation of the words used.

At the date of the death of the testatrix the church possessed no endowment fund and the learned trial judge held that *prima facie* the gift was therefore void for uncertainty unless it could be saved by being destined for a charitable purpose. Such therefore is the issue here, *viz.*, whether this residuary bequest is good, or whether it is couched in terms so vague as to go beyond what, in the eye of the law, is deemed to be a gift for charitable purposes, and so bad.

The will of the deceased was duly proved and in due course the respondent trust corporation appeared by way of originating summons before WILSON, J. for determination of the question of interpretation of the aforesaid residuary bequest. The learned judge upon the hearing directed that such of the next of kin who might benefit under an intestacy be served with the summons. This was done and in due course they appointed as their representative one of their number, the respondent Stobie, who appeared by counsel at the subsequent hearing before the learned judge (see (1946), 62 B.C. 463).

Subject to certain statutory restrictions, it was the policy of Courts of Equity to sustain gifts made with a charitable intention. So that, provided such intention was sufficiently clearly expressed, the Courts would not allow the gift to fail because of the uncertainty of the objects, but would remedy the defect by directing a scheme to give effect to the general intention that the estate should be disposed of for charitable purposes. Moreover, the Courts would not allow a gift to fail because the directions of the donor as to the mode of executing it could not be carried out. There was thus evolved the doctrine known as

cy-pres, that is, as near as possible to the mode specified by the donor.

The word "charity," with its derivatives, has a meaning in law which does not at all coincide with its ordinary or popular meaning. Lord Herschell defines the last named in the leading case of *Commissioners for Special Purposes of Income Tax* v. *Pemsel,* [1891] A.C. 531, at p. 572, in this way:

> . . . the popular conception of a charitable purpose covers the relief of any form of necessity, destitution, or helplessness which excites the compassion or sympathy of men, and so appeals to their benevolence for relief.

But to ascertain what is the meaning of charity in law one must first go to the Statute of Elizabeth (1601) 43 Eliz. c. 4, and then to the *Pemsel* case, *supra,* which has been treated as authoritative in all subsequent cases, and which contains a classification of charities enunciated by Lord Macnaghten which remains today the only such enumeration.

The preamble to the Statute of Elizabeth contains a comprehensive and varied list of charities and it is the practice of the Courts to refer to this list, as to an index or chart, in order to decide whether a purpose is charitable in law. The statute itself was repealed by Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42) except as regards the preamble which is expressly reserved by section 13 (2). According to the law of England a charity is an object within the spirit or intendment of this preamble. Such objects may be stated broadly as being the relief of the poor and other persons in distress, education and public works. The only reference to religious objects are the words "the repair . . . of churches" and the Courts have extended these words into a new head, *viz.,* the advancement of religion.

This was definitely established by *Pemsel's* case, *supra.* There Lord Macnaghten set down his well-known comprehensive definition of charity in these terms:

> "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

By this definition a trust for the advancement of religion is charitable, and we are thus concerned to ascertain what is meant

C. A.
1946

THE TORONTO GENERAL TRUSTS CORPORATION v. CONGREGATION OF ST. ANDREW'S-WESLEY CHURCH

Sidney Smith, J.A.

by the phrase the "advancement of religion." It may be first observed that the Courts recognize indifferently all creeds and sects, even down to the writings of Joanna Southcote (*Thornton* v. *Howe*, (1862), 31 Beav. 14).

The conception of what is charitable, from the point of view of religion, has been elaborately worked out, and Halsbury's Laws of England, 2nd Ed., Vol. 4, pp. 118-19 deals with the subject in these terms:

155. The words "advancement of religion," as used to denote one class of legally charitable objects, mean the promotion of spiritual teaching in a wide sense and the maintenance of the doctrines on which it rests and of the observances that serve to promote and manifest it.

156. Gifts for religious purposes are *prima facie* charitable. Such purposes must, however, tend directly or indirectly to the instruction or edification of the public.

Accordingly, gifts for "promoting religion," for the "worship of God," for the "spread of the Gospel" or of Christianity, or to be used "in the service of my Lord and Master," or for the distribution of Bibles or of other religious books, or to "the Church of England" or "the Church of Rome" for the use thereof, or for the maintenance of institutions formed for the promotion of religion, . . . , are charitable.

Therefore, it would seem that, in any given case, one must go to the authorities to determine whether the object in question has been held, directly or by analogy, to be one contributing to the advancement of religion, in any of the above senses.

Turning now to the present will, it may be noted that there are only two points to be considered in its interpretation, one, the gift to a church, and the other, the direction that it be added to the endowment fund. Do these words, taken as a whole and judicially construed, indicate a charitable object in the legal sense? It does not lessen the difficulty of decision that one's first thought is almost inevitably an answer in the affirmative, "yes, of course." But the authorities, I think, show otherwise, and to see what the law recognizes one can only look at the decisions of the Courts.

The church in question is a member church of the United Church of Canada. I think it is true to say that "religious purposes" or "religious societies or institutions" are objects of charity in the legal sense. (*In re White. White* v. *White*, [1893] 2 Ch. 41; *In re Barnes. Simpson* v. *Barnes* (1922), [1930] 2 Ch. 80*n.*; *Farley* v. *Westminster Bank*, [1939]

3 All E.R. 491, Lord Atkin, at p. 492). But this fair simplicity is often marred, as here, by the addition of words of a general nature which give rise to the question whether such words embrace religious charitable purposes only, or whether they include purposes which may be indirectly religious, but which fall outside the definition of charitable in the sense given to it by the Courts in their construction of the words "advancement of religion."

In the consideration of the added words here, and in the decision of the question whether they do or do not indicate objects exclusively charitable, one must endeavour to ascertain the intention of the testatrix as expressed in the will. Her intention will not avail unless it is so expressed. This is made very clear in the case of *Hunter* v. *Attorney-General,* [1899] A.C. 309, which is very similar to the present case. There a testator bequeathed the residue of his estate to trustees upon certain trusts, one of which was the purchase of advowsons and presentations. In the House of Lords it was held that although the testator's general intention appeared to be to advance evangelical principles, and so charitable, no valid trust for this purpose had been declared of the advowsons, and the gift failed because it was open to the trustees to devote the fund to objects which were not necessarily charitable. Dealing with the matter of expressed intention, Lord Halsbury says this at p. 315:

> . . . I have no doubt whatever that his general intention was to aid the particular school of religious thought in the Church of England to which he was himself attached; but it would be a strange canon of construction for a will to say that wherever you can discover what a testator's desires and wishes were, although you cannot find express words in the will which give the authority sought for, nevertheless you can supply words and declare trusts which are not to be found in the will itself—that, to put it plainly, the testator's intention is to be judged by the general desire that he has expressed to have his money devoted to such a purpose. To create a trust by such a process of argumentation as that appears to my mind to be not interpreting the will, but making a will for the testator.

And Lord Davey deals with the same point at p. 321 as follows:

> . . . You must construe the words of the will fairly, and if you can find a charitable purpose sufficiently clearly expressed the Court will give effect to it. If you do not find any such definite expression, you are not at liberty to supply it from more or less well-founded speculation of what the

C. A.
1946

THE TORONTO GENERAL TRUSTS CORPORATION v. CONGREGATION OF ST. ANDREW'S-WESLEY CHURCH

Sidney Smith, J.A.

testator would probably have wished or intended if his attention had been drawn to the omission.

The House of Lords in the recent case of *Chichester Diocesan Fund* v. *Simpson,* [1944] 2 All E.R. 60, held that while a gift for "charitable and benevolent" purposes was valid, a gift for charitable or benevolent" purposes was invalid. In his dissenting judgment Lord Wright at p. 64 says:

> . . . There was no suggestion that the testator did not mean to leave the residue to charities. The objection was that the bequest was invalid because the words "or benevolent" introduced a different category from "charitable" which preceded them.

And Lord Porter at p. 70 pointed out that

> . . . , it is common ground and undoubted law that in construing a will the object of the court is to try to ascertain the intention of the testator. But it is the expressed intention which must govern.

In the present case the first expressed intention of the testatrix is that the gift is for the church: the second, that it be added to the endowment fund. The church holds its property in the names of trustees. If it were a gift to the church *simpliciter* therefore it would be held to be a gift to the trustees in trust for the religious purposes of the church, and the learned judge has so found. But it is here a gift to the trustees to be added to the endowment fund of the church which may not be the same thing.

It was argued that since the church is a religious institution therefore its endowment fund must be for purposes of religion and so a good charitable object. But it has been held many times that it is not legitimate to cut down the purposes for which the gift is donated by reference to the trustees; in other words, a charitable intention cannot be deduced from the mere fact that the trustee of the gift is a church officer or incumbent. We were referred to the following authorities in which gifts of this nature have been held invalid: To a Roman Catholic Archbishop

> "to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese":

Dunne v. *Byrne,* [1912] A.C. 407. To the Archbishop of Wales

> to be paid and applied by him . . . in any manner as he might think best for helping to carry on the work of the Church in Wales:

In re Jackson. Midland Bank Executor and Trustee Co. v.

Archbishop of Wales, [1930] 2 Ch. 389. To a vicar and churchwardens

"for parish work":

Farley v. *Westminster Bank,* [1939] A.C. 430 and in an Irish case, a gift to the Pope

"to use and apply at his sole and absolute discretion in the carrying out of the sacred office":

Moore v. *The Pope,* [1919] 1 I.R. 316.

In all of these cases the gift was in the first place to the holder of an ecclesiastical office, yet it was held bad because it might have been expended in objects which, while indirectly religious, were nevertheless not charitable in the legal sense. For it is most important to observe that the application of funds for charitable purposes must be obligatory, so that gifts which may be expended in charitable objects, but need not necessarily be so, are not upheld. In the present case, therefore, if the endowment fund or any part of it might have been applied to objects not strictly charitable in the legal sense, the whole gift in my opinion becomes invalid (Halsbury's Laws of England, 2nd Ed., Vol. 4, p. 167; *Cameron* v. *Church of Christ, Scientist* (1918), 57 S.C.R. 298).

. . . The question is, not, whether he [the trustee] may not apply it upon purposes strictly charitable, but whether he is bound so to apply it?

Sir William Grant, M.R. in *Morice* v. *The Bishop of Durham* (1804), 9 Ves. 399, at p. 406;

. . . A trust to be valid must be for the benefit of individuals, which this is certainly not, or must be in that class of gifts for the benefit of the public which the Courts in this country recognize as charitable in the legal as opposed to the popular sense of that term. Moreover, if a trustee is given a discretion to apply trust property for purposes some of which are and some are not charitable, the trust is void for uncertainty:

per Lord Parker of Waddington in *Bowman* v. *Secular Society, Limited,* [1917] A.C. 406, at p. 441.

The issue is therefore narrowed down to this—What is the purpose and scope of an endowment fund? The expression has no specific meaning in law; we must seek its plain ordinary meaning. The learned judge points out that the word "endowment" is defined by Wharton thus:

Endowment, wealth ensured in perpetuity to any person or use . . . ; the creation of a perpetual provision out of lands or money for any institution or person.

C. A.
1946

THE TORONTO GENERAL TRUSTS CORPORATION v. CONGREGATION OF ST. ANDREW'S-WESLEY CHURCH

Sidney Smith, J.A.

The learned judge accordingly held the direction with respect to the endowment fund was merely a provision as to the mode of employment of the gift, *viz.,* that the capital should be used for the permanent endowment of the church and the income expended for church purposes. But even if we assume that the sole object of an endowment fund of a church is to provide a permanent income, there is nothing to show here that such income must necessarily be applied to charitable objects. Moreover all standard dictionaries give a secondary meaning to the word "endow," *viz.,* to enrich with money or property. I did not understand counsel for the church to contest this. Indeed it was part of his argument on the second branch of his case, namely, that the church had in fact an endowment fund composed of certain legacies theretofore made by certain testators, which were afterwards (and subsequent to the death of the testatrix herein) sought to be woven into one fund by resolution of the church members. But this contention did not appeal to the learned judge, and that his opinion was right sufficiently appears, I think, from a consideration of *In re Jarman's Estate. Leavers* v. *Clayton* (1878), 8 Ch. D. 584, at p. 587. Perhaps it should also be noticed that the learned judge's concluding remarks about the "hazy idea" with respect to endowment funds, are not without significance in a case where the strict expenditure thereof in charitable objects is under discussion.

Reverting to the secondary meaning of the word "endow," it seems clear that such meaning might include gifts of money that might be expended upon non-charitable objects. The learned judge so finds. He says (and I agree with him) [*ante,* p. 467]:

> . . . It is quite true that if there had been an endowment fund, previously created by the church or some benefactor, it might have embraced objects other than those immediately pertaining to ministering religion and giving spiritual edification to its members.

If that is true (and I believe it is) then it would seem to be conclusive of this appeal; for then the fund might have been used for purposes which were not charitable in the legal sense, and the gift is void for uncertainty. It follows that in my opinion the next of kin are entitled to the residue, and that the

appeal must be allowed. Costs of all parties on a solicitor and client basis to be paid out of the estate.

BIRD, J.A.: The question raised for determination on this appeal from the judgment of WILSON, J., pronounced April 24th, 1946, relates to the validity of a bequest made by the will of the testatrix Alice Grant MacKay, deceased, dated April 24th, 1940.

Directions are thereby given to the trustees, the respondent corporation, to distribute various gifts of personal property, then to convert the remainder of the estate, and to pay thereout numerous specific legacies to relatives, friends and charitable organizations, and finally:

30. To pay or transfer all the rest, residue and remainder of my estate to the St. Andrew & Wesley Church, Vancouver, B. C. to be added to the endowment fund.

The testatrix, at the time of her death on September 15th, 1944, was a member of the congregation of the respondent St. Andrew's-Wesley Church at Vancouver, B.C., a Congregation of the United Church of Canada.

The respondent church did not have any fund known as the endowment fund, at or prior to the death of the testatrix.

The learned trial judge held that the bequest of the residue was a valid, charitable gift to the respondent church, and that the words "to be added to the endowment fund" were words of limitation only, indicating that the capital of the gift be kept intact and the income therefrom be used for charitable purposes. He therefore invoked the *cy-pres* doctrine. By the formal judgment the Court appointed the trustees of the congregation of St. Andrew's-Wesley Church at Vancouver and their successors in office to receive, invest and administer the residuary estate, and thereby directed a reference to the registrar to settle the form of trust under which the funds referred to in clause 30 of the will of the said Alice Grant MacKay, deceased will be administered by the said trustees.

No question now arises as to the identity of the church named in the bequest since counsel for the appellant in this Court conceded that the respondent church is the church therein mentioned.

C. A.
1946

THE TORONTO GENERAL TRUSTS CORPORATION v. CONGREGATION OF ST. ANDREW'S-WESLEY CHURCH

Bird, J.A.

The appeal is founded substantially upon these grounds: (1) That the bequest is void for uncertainty, since the beneficiary thereunder is the endowment fund of the church and there is no such fund with appropriate trusts, nor is a trust declared in the will in respect to an endowment fund. (2) That the bequest is not a gift for charitable purposes *solus,* as it may include other than charitable purposes. Consequently the *cy-pres* doctrine may not be applied.

Upon the plain grammatical construction of the language used, the bequest can only be read, in my opinion, as a gift to the church to be applied by the church in a particular manner, that is to say, by addition to the endowment fund. The duty thereby cast upon the respondent trustee is

> to pay . . . the residue . . . of my estate to the . . . church.

The particular application of the money so paid, as I think clearly appears from that language, is an act to be performed by the church and not by the trustee. That being so, I think it necessarily follows that the bequest is a gift to the church and not to the endowment fund of the church.

That a bequest to a religious society or institution is *prima facie* a bequest for a charitable purpose, appears to be settled by long-established decisions. In *In re White. White* v. *White,* [1893] 2 Ch. 41, Lindley, L.J. at p. 52, speaking for the Court, consisting of Bowen and A. L. Smith, L.JJ., said:

> But the authorities show that a bequest to a religious institution, or for a religious purpose, is *prima facie* a bequest for a "charitable" purpose, and that the law applicable to "charitable" bequests, as distinguished from the law applicable to ordinary bequests, ought to be applied to a bequest to a religious institution, or for a religious purpose.

In *In re Bain. Public Trustee* v. *Ross,* [1930] 1 Ch. 224 the principle so expressed by Lindley, L.J., was considered and applied by Lord Hanworth, M.R., as well as by Lawrence, L.J., being the majority of the Court. Russell, L.J., dissenting, considered that the *White* case had "no relevance here at all."

Then it is said in *In re Barnes. Simpson* v. *Barnes* (1922), [1930] 2 Ch. 80*n.* at p. 81, followed in *In re Schoales. Schoales* v. *Schoales,* [1930] 2 Ch. 75, being the decisions upon which the learned trial judge founded the judgment from which this appeal is taken, that a bequest *simpliciter* to a church or to the vicar

for the time being of a church is a charitable gift for religious purposes, since such a bequest is intended by the testator as a gift to

> the operative institution which ministers to religion and gives spiritual edification to its members.

It is, I think, open to question whether the bequest here under consideration can be treated as a bequest to a church *simpliciter,* for effect must be given to the words "to be added to the endowment fund." Consequently this bequest must be examined in the light of the principle expressed by Lindley, L.J. in the *White* case as a gift to a religious institution which, though *prima facie* for charitable purposes, nevertheless in view of the direction as to its application, may be found to include other than charitable purposes.

Considered in that light, does the direction "to be added to the endowment fund" extend or enlarge the *prima facie* charitable object so as to include objects which are not charitable, that is to say,

> if the estate might consistently with the will be applied to other than strictly charitable purposes:

per Sir William Grant, M.R. in *James* v. *Allen* (1817), 3 Mer. 17, referred to by Lord Macnaghten in *Dunne* v. *Byrne,* [1912] A.C. 407, "then the trust is too indefinite for the Court to execute" and the gift must fail.

The act of endowing or creating an endowment fund for an institution I think implies primarily the provision of a permanent fund of which the revenue only is made available for the purposes of the institution, that is to say, to endow is to create a perpetual provision.

In *Edwards* v. *Hall* (1855), 6 De G. M. & G. 74, Lord Cranworth, L.C. said (p. 87):

> . . . By the endowment of a chapel, . . . is commonly understood, not the building or purchasing a site for . . . a chapel, but the providing of a fixed revenue for the support of those [by whom the] institutions [are conducted].

Again Wharton, 14th Ed., at p. 369 in his definition of the term "endowment" stresses the perpetual feature, *i.e.,* "wealth ensured in perpetuity. "The creation of a perpetual provision." Likewise Murray's New English Dictionary, Vol. 3, p. 163, defines "endow" as

C. A.
1946

THE TORONTO GENERAL TRUSTS CORPORATION v. CONGREGATION OF ST. ANDREW'S-WESLEY CHURCH

Bird, J.A.

to provide (by bequest . . .) a permanent income for (a person, . . . , or institution).

Consequently I conclude that when the testatrix directed that the bequest here under review "be added to the endowment fund," she was thereby expressing an intention or desire to benefit the church in perpetuity by a gift of money, the revenue from which only would be available for the purposes of the church.

Counsel for the appellant submits that an endowment fund, even one connected with a church, may include objects which are other than charitable, and that the words "to be added to the endowment fund" must be taken here to have an enlarging effect on the bequest, such as were held in *Re Ashton's Estate,* [1938] 1 All E.R. 707 to extend the purposes of the bequest to other than religious, *i.e.,* charitable purposes. The term "endowment" in its usual and ordinary meaning, as appears above, imports a gift which is to be available in perpetuity. I do not think that the Court should be astute to find means to render the gift invalid. Rather do I think that, where possible, the terms of a will should be so construed that it may be upheld. As was said by Lord Chelmsford, L.C. in *Bruce* v. *The Presbytery of Deer* (1867), L.R. 1 H.L. Sc. 96, at p. 97:

> . . . when it is said that charitable bequests must receive benignant construction, the meaning is, that when the bequest is capable of two constructions, one which would make it void, and the other which would render it effectual, the latter must be adopted.

And see *In re Bain. Public Trustee* v. *Ross, supra.*

Since no endowment fund existed in connection with St. Andrew's-Wesley Church prior to the death of the testatrix and in the absence of evidence that the testatrix intended by the gift in question to provide for any particular purpose of the church, which is other than charitable, and here there is none, I think the Court must give effect to what I conceive to be an intention to benefit the church in perpetuity, or as the learned trial judge expressed it in his reasons for judgment (62 B.C. at p. 467):

> the words "to be added to the endowment fund" are only words of limitation indicating her wish that the capital of the gift be kept intact, while the interest was used for charitable purposes.

In view of the fact that no endowment fund existed in connection with the church and the bequest in my opinion con-

stituted an immediate gift to the church, *i.e.*, a religions institution, therefore I take it that the Court may here apply the *cy-pres* doctrine, as strict compliance with the wishes of the testatrix is impracticable. *Vide Wallis* v. *Solicitor General for New Zealand,* [1903] A.C. 173, where Lord Macnaghten at p. 186 says:

> . . . where there is an immediate gift for charitable purposes, the gift is not rendered invalid by the fact that the particular application directed cannot take effect, or will not of necessity take effect within any definite limit of time and may never take effect at all.

Reference is there made, in support of that proposition to the words of Lord Selborne, L.C. in *Chamberlayne* v. *Brockett* (1872), 8 Chy. App. 206, at p. 211, as follows:

> . . . if strict compliance with the wishes and directions of the author of the trust should turn out to be impracticable, this Court has power to apply . . . the whole . . . , to such other purposes as it may deem proper, upon what is called the *cy-pres* principle.

For these reasons I would confirm the judgment of the trial judge and dismiss the appeal; costs of all parties to be taxed as between solicitor and client, payable out of the estate.

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

Solicitors for appellant: *Norris & MacLennan.*

Solicitor for respondent The Toronto General Trusts Corporation: *A. J. Cowan.*

Solicitor for respondent congregation: *Dugald Donaghy.*

HARE AND THE GROLIER SOCIETY LIMITED v. BETTER BUSINESS BUREAU OF VANCOUVER. (No. 2).

C. A.
1946
Nov. 18; *Dec.* 20.

Costs—Taxation — Appeal — Appendix N—When higher scale of fees are allowed.

Appendix N permits this Court to order the costs to be taxed on a higher scale than that which would otherwise be applicable where some difficult point of law or construction is involved; where the question litigated is of importance to some class or body of persons; where the question litigated is of general or public interest or in any other cases for special reason.

C. A.
1946

HARE AND THE GROLIER SOCIETY LTD. *v.* BETTER BUSINESS BUREAU OF VANCOUVER

On the application by the successful defendant appellant for an order that its costs be taxed under Column 4, the Court held the points involved were not difficult questions of law or more difficult than we meet in most appeals, that the decision cannot be said to be a "question litigated" of importance to some class or body of persons; that the question litigated is not of general public interest nor is there any special reason for allowing taxation on a higher scale.

MOTION to the Court of Appeal by the successful defendant appellant (see *ante*, p. 241) for an order that its costs be taxed under Column 4. Heard at Vancouver on the 18th of November, 1946, by SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Farris, K.C., for the motion.
G. P. Hogg, contra.

Cur. adv. vult.

20th December, 1946.

Per curiam (ROBERTSON, J.A.): The successful defendant appellant applies for an order that its costs be taxed under Column 4. Normally its costs would be taxed under Column 2. Appendix N permits this Court to order the costs to be taxed on a higher scale than that which would otherwise be applicable in, *inter alia*, the following cases: where some difficult point of law or construction is involved; where the question litigated is of importance to some class or body of persons; where the question litigated is of general or public interest, or in any other cases for special reason. I think the points involved were not difficult questions of law, or rather were not more difficult than we meet in most appeals. Neither do I think that the decision made in this case can be said to be a "question litigated" of importance to some class or body of persons. The ultimate decision may be, but the matter disposed of is not. Neither do I think the question litigated is of general public interest. The evidence was admitted because of the special peculiar circumstances of the case. I see no other special reason for allowing taxation on a higher scale.

In *Canada Rice Mills Ltd.* v. *The Union Marine and General Insurance Co. Ltd.* (1939), 54 B.C. 10 this Court refused to order taxation of the costs on a higher scale (the application being made under Appendix N, *supra*). In that case a very important

question as to whether or not a verdict of the jury should be set aside because a question which the Court of Appeal had decided should have been submitted to the jury, had not been. In one sense that may have been said to be a question of public interest because it would affect many jury trials.

The *Canada Rice Mills* case was considered in *National Trust Company Ltd.* v. *The Christian Community of Universal Brotherhood Ltd.* (1940), 56 B.C. 102. The Court held there that on a general view of the case and more particularly on account of conflicting decisions and a somewhat unsettled state of the law it ought to be regarded as one where difficult points of law were involved, and directed that costs be taxed under Column 3 as requested.

In my opinon the matter must be decided on the facts in each case, and other decisions upon other facts, unless they lay down principles, that are not of any assistance. I might point out further that in the *National Trust Co.* case, *supra,* there was a very large amount of money involved.

For these reasons I think the motion should be refused.

Motion refused.

CLARE v. CLARE.

S. C.
1946
Dec. 18.

Divorce — Evidence — Wife's adultery — Miscarriage or birth of still-born child—Evidence of husband of non-access—Admissibility.

The rule of law that neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to bastardize a child of the marriage applies only where the effect of the evidence either directly or indirectly is to bastardize a child born during wedlock. The rule therefore does not apply where the respondent had a miscarriage or gave birth to a still-born child in which case the evidence of the petitioner, the husband, of non-access is therefore admissible.

Holland v. Holland (1925), 41 T.L.R. 431, followed.

Russell v. *Russell,* [1924] A.C. 687, distinguished.

S. C.
1946
CLARE
v.
CLARE

PETITION by Leonard Frank Clare for the dissolution of his marriage with the respondent Ruth Olivine Clare with a man unknown in consequence of which adultery the respondent had a miscarriage or gave birth to a still-born child. Heard by FARRIS, C.J.S.C. at Vancouver on the 18th of December, 1946.

Sigler, for petitioner.

FARRIS, C.J.S.C.: Whether or not the matter has come up in our Courts before, I do not know, but there appears to be no reported case in respect thereto. In this case counsel has proved that the respondent on or about the 19th or 20th of February, 1945, had a miscarriage, or gave birth to a still-born child, the terms being for the purpose of this matter, synonymous. Counsel now seeks to introduce evidence by the husband proving non-access, as at the time and for years prior thereto, he had been overseas on duty.

Counsel has referred to the case of *Holland* v. *Holland* (1925), 41 T.L.R. 431. The judgment in that case of Swift, J. is most helpful. He deals with the case of *Russell* v. *Russell,* [1924] A.C. 687 and distinguishes between the *Russell* v. *Russell* case where a child had been born and the case before me where it was a still-born child. The learned judge in that case found that the principle underlying the decision of the House of Lords in the *Russell* v. *Russell* case was that a parent should not give evidence of non-access when the effect of the same was to bastardize the child born during the marriage. Swift, J. found in the *Holland* v. *Holland* case that where the child was still-born, or as would be in this case there was a miscarriage, that any evidence given by the parents as to non-access, could not have the effect of bastardizing the child because in fact there was no child, and he accordingly held that in such a case evidence of non-access could be properly given by the husband or wife. He says (p. 432):

> The question I have to decide is, therefore: Was there in this case a child which might be bastardized by the petitioner's evidence of "non-access" to his wife? If there were, his evidence was not admissible; if there were not, his evidence is admissible. I am of opinion that there was no such child.

In this case, I adopt the reasoning of the learned justice in the *Holland* v. *Holland* case, and as the evidence has now been

furnished me that the respondent was for a period of three or four months in a pregnant state and at the end of that time had a miscarriage, I now find that the evidence of the petitioner, the husband, of non-access is therefore admissible.

Petition granted.

BARRE v. McMANUS.

C. A.
1946
April 23;
May 21.

Landlord and tenant — Right of possession — Wartime Prices and Trade Board, orders 294, secs. 13 (a), 15B and 15C, 537, and 571, sec. 6 (2)— "To the Sheriff"—Res judicata—Misdescription of premises—Effect of County Court Rules, 1932, Order VII., r. 6—Court of Appeal Rule 5 —R.S.B.C. 1936, Cap. 143, Secs. 19 and 22.

In proceedings under section 19 of the Landlord and Tenant Act where an order is made "in the County Court of Victoria" directing that a writ to place the landlord in possession shall issue "to the Sheriff" it must mean the sheriff of the county of Victoria. Section 22 of the Act provides that the judge may order a writ to issue to the sheriff. This must be to the sheriff for the county in which the land lies.

Where proceedings leading to an order declaring that the tenant wrongfully held possession against the right of the landlord were based on a six-months' notice to vacate given under sections 15B and 15C of order 294 of the Wartime Prices and Trade Board, the question of the right to possession is not thereby rendered *res judicata* in subsequent proceedings taken under section 13 of said order 294 for default in payment of rent for 15 days or longer.

APPEAL by defendants from the order of SHANDLEY, Co. J. of the 5th of February, 1946, whereby he ordered that a writ should issue to the sheriff commanding him forthwith to place the landlord in possession of the premises at 99 Sims Avenue, Victoria, British Columbia, and that said order be set aside.

The appeal was argued at Victoria on the 23rd of April, 1946, before ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

McKenna, for appellant: Application under section 19 of the Landlord and Tenant Act. [He referred to the following cases: *Minchau* v. *Busse,* [1938] 4 D.L.R. 744, at p. 751; *In re Nor-*

C. A.
1946
BARRE
v.
McMANUS

man. Ex parte Board of Trade, [1893] 2 Q.B. 369; *Sunder Singh* v. *McRae* (1922), 31 B.C. 67; *Quilter* v. *Mapleson* (1882), 9 Q.B.D. 672; *Dixie* v. *Royal Columbian Hospital* (1940), 56 B.C. 74; *West* v. *Gwynne,* [1911] 2 Ch. 1; *The Mortgage Corporation of Nova Scotia* v. *Walsh, et al.* (1925), 57 N.S.R. 547, at p. 563; *Creighton* v. *United Oils Ltd.,* [1927] 3 D.L.R. 804, at p. 807; *Stone* v. *Brooks* (1904), 3 O.W.R. 527, at pp. 532-3; *Rural Municipality of Dundurn* v. *Short,* [1939] 3 W.W.R. 523; *Dominion Trust Co.* v. *Masterton* (1914), 20 B.C. 389, at p. 392; *Rex* v. *Lewis* (1941), 57 B.C. 83; *Burns* v. *Hodgson,* [1946] 1 D.L.R. 510, at pp. 511 and 514.].

D. M. Gordon, for respondent: As to authority of solicitor to compromise see Halsbury's Laws of England, 2nd Ed., Vol. 33, p. 110, par. 153; see also *Maxine, Limited* v. *Cuillerier* (1945), 61 B.C. 345; Halsbury's Laws of England, 2nd Ed., Vol. 14, p. 90, par. 146; *Connor* v. *West* (1770), 5 Burr. 2672.

McKenna, in reply, referred to *Welsh* v. *Roe* (1918), 87 L.J.K.B. 520; *In re Newen. Carruthers* v. *Newen,* [1903] 1 Ch. 812.

Cur. adv. vult.

21st May, 1946.

Per curiam (ROBERTSON, J.A.): The respondent bought the premises in question on the 8th of August, 1944, at which time the appellants were in occupation as monthly tenants at a rental of $20 per month, payable in advance. The respondent desiring the premises as a residence for himself, pursuant to the powers contained in sections 15B and 15C of the Wartime Prices and Trade Board order No. 294, gave a six-months' notice to vacate on the 30th April, 1945, and the tenancy was thereby determined as of that date. The appellants did not go out. They were therefore in the position of overholding tenants. The respondent then obtained an order under date of June 5th, 1945, from the learned county court judge declaring the tenancy had been determined on the 30th of April, 1945, and that the appellants wrongfully held possession against the right of the landlord. It was ordered, however, that the said order should not be taken out by the respondent until the 5th of July, 1945.

On the 12th of June, 1945, Mr. *E. L. Tait,* solicitor for the respondent, wrote a letter to Mr. *McKenna,* solicitor for the appellants, as follows:

Re: Barre vs. *McManus*

In the above case, there is the matter of compensation that a tenant should pay for an overholding and in addition, the costs of the action.

I am aware of the unfortunate circumstances of your client and I would suggest that he should provide an amount say $60.00 to be accepted in full for all accounts.

Will you please let me know as to this.

On the 30th of June, 1945, Mr. *McKenna* replied to the said letter of 12th June, 1945 (in part), as follows:

. . . . .

My client accepts the offer made in your letter of the 12th instant; payable by instalments, $10.00 down, cheque for which is herewith enclosed, $10.00 on the 14th of July, and $10.00 each two weeks thereafter until the said sum of $60.00 is paid in full.

. . . . .

On the 4th of July, 1945, *Tait* replied to the letter of the 30th of June, 1945, from *McKenna* (in part) as follows:

. . . . .

If Mr. McManus will comply with the terms of payment, that will be quite satisfactory.

. . . . .

Although obviously the arrangement was based upon the understanding that the appellants would vacate, they remained in possession.

On the 20th of July, 1945, *Tait* wrote to *McKenna* as follows:

In connection with the above, I am now taking out warrant for execution. I feel that I should return the sum of $10.00 which was paid on account of costs. I enclose my cheque for this amount.

I am very sorry that McManus did not comply with the undertaking you gave me.

In any case, all proceedings under the order of June 5th, were suspended by section 3 of the Wartime Prices and Trade Board order No. 337, which came into force on the 25th of July, 1945, and provides as follows:

3. Subject to the provisions of Section 4 following, every notice to vacate given before July 25, 1945, under the provisions of Section 15A or Section 15B of said Order No. 294, by the landlord of any housing accommodation to the tenant thereof is hereby suspended and every pending proceeding taken and every order or writ of possession issued to enforce the vacating of the accommodation by the tenant is hereby stayed, if the tenant is still in occupation of the accommodation on July 25, 1945.

C. A.
1946
BARRE
v.
McMANUS

The appellants were still in occupation of the premises on the 25th of July, 1945, and as the notice to vacate and order were suspended, they were monthly tenants.

Under section 4 the landlord was entitled to apply to the court of rental appeals for an order removing the suspension or stay. An application was made and was refused.

On the 22nd of September, 1945, the solicitor for the respondent wrote to the appellant McManus as follows:

We are advised by the Board that Mr. Barre's application for possession was not granted, which means that you are confirmed as tenant of the property until the Rental Regulations are changed.

We therefore require you to bring your rent up to date, and to keep it up in future. Please let us have all arrears of rent including the month of September by the end of this month. If we do not receive it from you by then, we shall treat you as being in arrears of rent and proceed accordingly.

On the 12th of October, 1945, the following notice was served on the appellants:

Victoria, B.C.,
October 11th, 1945.

Mr. & Mrs. J. H. McManus,
99 Sims Avenue,
Victoria, B.C.

TAKE NOTICE that as you are in default in payment of rent for 15 days or longer you are hereby required to quit and deliver up possession of 99 Sims Avenue to me on the 30th day of November, 1945.

J. E. BARRE,
Landlord
Per: J. Alan Baker
Agent.

Order No. 571 (which came into effect on the 22nd of October, 1945) added section 6 (1) to order 537. This provided, *inter alia*, that where an order to remove the suspension has been declined

the tenant may remain in possession of the accommodation; but from and after the date on which the notice to vacate directed the tenant to vacate, the tenant shall, unless he and the landlord otherwise agree, be deemed to be a tenant from month to month and all the terms and conditions of the lease in respect of which the notice to vacate was given shall continue to apply in so far as they are consistent with a tenancy from month to month.

The result of this was that the appellants were tenants from month to month from the 30th of April, 1945.

On the 27th of November, 1945, the appellants were served with a notice in writing stating that the tenancy had been determined by the notice to quit of the 11th of October, 1945, and

demanding that the appellants go out of possession of the premises not later than midnight of Monday, the 31st of December, 1945; and that if they refused to do so proceedings would be taken under the provisions of the Landlord and Tenant Act. The appellants remained in possession. On the 10th of January, 1946, the respondent obtained an appointment, pursuant to sections 19 and 20 of the Landlord and Tenant Act. At the hearing the appellants offered to pay all rent. The learned judge ordered a writ to issue to place the respondent in possession of the premises in question. From that order this appeal is taken.

No rent was paid or tendered for the month of July. On May 11th, 1945, the appellants forwarded to the Island Farms, who apparently acted for the respondent, a money order for the rent for the month of May, 1945, and received a receipt for it. On the 16th of May, 1945, evidently upon the instructions of the respondent, the Island Farms Dairy returned the money order. The appellants also tendered in each of the months of September, October, November and December, the rent for such month, but did not tender or pay the arrears.

It was first objected that the order and writ of possession are defective in that in them the situation of the premises is misstated as being situate in Victoria. The appointment correctly describes the premises as being at 99 Sims Avenue, Saanich, B.C. In his evidence the respondent swore that he was the landlord of these premises, of which the appellants were tenants. It is obvious then that the misdescription is merely a slip. The order could be corrected by the county court judge at any time—County Court Rules, 1932, Order VII., r. 6. We also have power under Court of Appeal Rule 5 to amend the order, and I think the amendment should be made. The rule does not cover the defect in the writ, but once the order is amended, a new writ may be issued. In any event, the appellants are not affected by the writ, which, as it stands, gives no power to interfere with the premises occupied by them.

It is next said that there was no rent in arrear for the months of May and June because of the arrangement made between *Tait* and *McKenna* as disclosed in the correspondence, *supra*. It is clear that nothing except the amount of $10 was paid in respect

C. A.
1946

BARRE
v.
McMANUS

of this alleged settlement. So that there was rent in arrears for these two months. Further than this, there was clearly rent in arrear for the month of July, as it was never paid or tendered.

Subsection (2) of order 571 provided as follows:

If the tenant of any housing accommodation by reason of the provisions of this Order is entitled to remain and does remain in possession of the accommodation after the date on which the notice to vacate directs him to vacate, and the tenant has offered to pay all rental accrued after that date which the landlord has declined to accept, such tenant shall not be deemed to be in default in payment of such rental for the purposes of clause (*a*) of Section 13 of Order No. 294 of the Board, until the landlord has, by demand in writing, required payment thereof and the fifteen days referred to in such clause shall be computed from the date on which such demand requires payment to be made.

If therefore the appellants had offered to pay all rental accrued after the 30th of April, 1945, which the respondent had declined to accept, they would not be deemed to be in default in payment of rental for the purpose of clause (*a*) section 13 of order 294.

It seems clear that the appellants did not at any time prior to the commencement of these proceedings, "offer to pay all rental accrued" after the 30th of April, 1945. They were therefore in default.

Alternatively, the respondent did demand payment of the accrued rental by the letter of September 22nd, 1945, *supra,* and the appellants failed to pay. The result of this demand was that the appellants were then in default and subsection (2) of section 6 of order 571 ceased to protect them. Consequently subsection (*a*) of section 13 of order 294 applied, under which the respondent was entitled to recover possession in accordance with the law of the Province if the appellants were in default in payment of rent for 15 days or longer; and as provided by subsection (2) of section 6, *supra,* the 15 days referred to in subsection (*a*) are to be computed from the date on which such demand requires payment to be made. The date fixed in the letter of September 22nd was the 30th of September, and therefore the 15-day period would be computed from that date.

It was submitted that the respondent could not legally give the notice to quit contained in the letter of October 11th, 1945, until the expiration of the 15 days from the 30th of September, that is the 16th of October, 1945, but subsection (2) of section 6

does not so provide. It only says the rental accrued shall not be in default if the tenant has offered to pay all rental accrued which has been refused, and a demand has been made. There was default under section 13 (*a*) of order 294 and this default was not affected by section 6 (2) of order 571 as there was no offer to pay the rental accrued, and in addition a demand was made, which was not complied with. The respondent was therefore entitled to give a notice to quit.

It was further submitted that there was no right to give the notice to quit as order 571 which came into effect on the 22nd of October, 1945, was retrospective. But, as I have attempted to show, order 571 has no application under the circumstances.

It was also submitted these proceedings were taken under section 29 of the Landlord and Tenant Act and that there was the right to relief from forfeiture under the terms of the Laws Declaratory Act. It is clear from the notice of appointment and the order that was made that the proceedings were taken under section 19 of the Landlord and Tenant Act.

Then it was submitted that the matter was *res judicata*. I think not, because the proceedings which led to the order of June 5th, 1945, were based upon the six-months' notice to vacate, given under sections 15B and 15C of order 294; whereas the proceedings in this case were taken under section 13 of order 294, for default in payment of rent for 15 days or longer.

It is next submitted that the order is defective in that it directs "that a writ shall issue to the sheriff in the King's name" without specifying to what sheriff. The writ of possession is addressed to the sheriff for Victoria, which is in accordance with the form in the schedule to the Act. The combined effect of sections 3, 6 and 7 of the County Courts Act is that the County Court of Victoria has and exercises its powers and jurisdiction vested in it, in the county of Victoria, and a judge appointed for that county presides over that court and has all the powers, rights and duties within such county conferred upon him by such Act. Under the Sheriffs Act, a sheriff is appointed for each county.

Under section 19 of the Landlord and Tenant Act the application is made

C. A.
1946
BARRE
v.
McMANUS

to the judge of the County Court within the territorial limits of which the land lies.

The land in this case is in the county of Victoria.

In my opinion therefore the order made "in the County Court of Victoria," directing that a writ shall issue "to the sheriff," must be to the sheriff for the county of Victoria.

Section 22 of the Landlord and Tenant Act provides that

the judge, . . . , may order a writ to issue to the Sheriff.

Obviously this must be to the sheriff for the county in which the land lies.

In my opinion the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellants: *Joseph McKenna.*
Solicitors for respondent: *Crease, Davey & Company.*

C. A.
1946
Sept. 23; Oct. 22.

CARMICHAEL v. DOLMAGE AND MacINNES.

Landlord and tenant—Covenant not to assign or sublet without leave—Giving occupancy to third person—Whether evasion of covenant—R.S.B.C. 1936, Cap. 143, Sec. 19.

The defendant D. leased a premises from the plaintiff in which she covenanted not to assign or sublet without leave. D. then entered into a written agreement with the defendant I. whereby I. became the exclusive occupant of the premises, the agreement expressly denying any right in the occupant to legal possession. On an application under section 19 of the Landlord and Tenant Act to the county court, it was ordered that possession of the premises in question be delivered up to the landlord.

Held, on appeal, reversing the decision of LENNOX, Co. J., that the mere act of the lessee in letting other persons into possession and permitting them to use the premises for their own purposes is not, so long as the lessee himself retains the legal possession thereof, a breach of the covenant not to assign or sublet or part with possession. A lessee can retain possession although he gives exclusive occupation to another.

Chaplin v. *Smith*, [1926] 1 K.B. 198, applied.

APPEAL by the tenants from the order of LENNOX, Co. J. of the 4th of July, 1946, whereby an order for possession of the

leasehold premises in question was granted as against the above-named tenants. The facts are set out in the reasons for judgment.

The appeal was argued at Victoria on the 20th and 23rd of September, 1946, before O'HALLORAN, ROBERTSON and BIRD, JJ.A.

MacInnes, K.C., for appellants: The question is whether the short form of lease was breached by the tenants; whether there was a subletting. There was not evidence of subletting or of an assignment. The tenant brother obtained from his sister a mere right to occupy. There was no intention to assign or sublet. A licence is not a lease. He paid the rent as agent for the tenant. Possession is not evidence of subletting: see Woodfall's Landlord and Tenant, 24th Ed., 590; *Doe* v. *Payne* (1815), 1 Stark. 86; *Herschorn* v. *St. Mary's Young Men's Society et al.* (1915), 49 N.S.R. 260; *Russell* v. *Beecham,* [1924] 1 K.B. 525. To find forfeiture is directly in the teeth of authority. There was a change of occupation, not a parting of possession: see *McCallum, Hill & Co.* v. *Imperial Bank, et al.* (1914), 30 W.L.R. 343. There must be a legal assignment to constitute a lease: see *Brown* v. *Draper,* [1944] 1 All E.R. 246; *Leys et al.* v. *Fiskin et al.* (1855), 12 U.C.Q.B. 604; *Peebles* v. *Crosthwaite* (1897), 13 T.L.R. 198; *Jackson* v. *Simons,* [1923] 1 Ch. 373, at p. 382; *LaJeffries* v. *Roberts,* [1946] O.R. 10; *Chaplin* v. *Smith,* [1926] 1 K.B. 198, at p. 208. It must be clear there is no possible answer to landlord's claim: see *M'Nab* v. *Dunlop and M'Keever* (1846), 3 U.C.Q.B. 135; *Ray* v. *Ruby Hou* (1927), 39 B.C. 128.

Maguire, for respondent: The lessee has taken all her possessions away and left her brother in possession of the suite. She says there was no parting with possession, but we say there was in fact a subletting. The brother is in possession with his own effects. That there was a parting with possession see *Stening* v. *Abrahams,* [1931] 1 Ch. 470, at p. 473; *Daly* v. *Edwardes* (1900), 83 L.T. 548, at p. 550; *Edwardes* v. *Barrington* (1901), 85 L.T. 650. The lessee stayed in control: see *Chaplin* v. *Smith,* [1926] 1 K.B. 198, at p. 210; *Young & Co.* v. *Liverpool Assess-*

C. A.
1946
CARMICHAEL v. DOLMAGE AND MACINNES

ment Committee, [1911] 2 K.B. 195; *Town of Brockville* v. *Dobbie and Ritchie* (1929), 64 O.L.R. 75. MacInnes paid rent only as a sublessee would pay. He paid it for himself: see *Hamilton* v. *Killick* (1920), 28 B.C. 418.

MacInnes, replied.

Cur. adv. vult.

22nd October, 1946.

O'HALLORAN, J.A.: The question to be decided in the events which occurred, is whether the appellant Mary S. Dolmage broke the covenant not to assign or sublet without leave contained in her lease of an apartment-suite from the respondent lessor Grace Ann Carmichael. This appeal lies from an order forfeiting the lease on that ground.

Mrs. Dolmage applied to the respondent for leave to assign the lease to her brother the appellant W. E. MacInnes. The respondent refused because she wanted the apartment for her own use. It appears there is no provision in this Province similar to the 1927 English legislation referred to in Woodfall on Landlord and Tenant, 24th Ed., 579 which attaches to such a covenant an implied condition that leave shall not be unreasonably withheld. Mrs. Dolmage then consulted her solicitor. After perusing the lease, he advised her that if she assigned or sublet without the respondent's consent the lease would be subject to forfeiture, and that in order to avoid a forfeiture she must remain the actual tenant and maintain her rights as such.

Acting under her solicitor's advice Mrs. Dolmage so informed her brother in writing (Exhibit 7) adding:

Under the circumstances, therefore I must refuse to assign or sublet to you or anyone else. Your problem is to find temporary living quarters until you can arrange for some kind of permanency. As Bill and I will, for some time at least, be busy with our West Vancouver venture, I can give you temporary shelter in the Cambie Street suite, but such accommodation can only be given upon the following terms:

1. I will give you leave and licence to move in and occupy the premises as my agent or representative on the distinct understanding that you do not, under this arrangement, or otherwise, acquire any rights in any way derogatory to or conflicting with, or endangering my position as tenant of said premises.

2. This licence is terminable at my will without notice.

3. I shall at all times during your occupancy have the right to use the premises as I may wish.

4. You will so long as you occupy the premises pay the rent accruing thereon promptly on each gale date, and such payments shall be made as my agent and representative and shall be for my account.

5. You will observe all the provisions of the lease under which I hold the premises, and will do nothing which could bring about a breach or forfeiture of my lease.

6. You will safeguard at all times of your occupancy and safely keep all furniture, furnishings and equipment left by me in the said premises, and will upon termination of your occupation leave the same in the same good order and condition as when received by you.

7. Neither this document nor anything done by either you or me in the premises shall in any way constitute you or be construed as constituting you as my tenant, or in any way, create the relationship of landlord and tenant as between us.

The Dolmages then moved out, and her brother moved in. Mrs. Dolmage's solicitor wrote the respondent's solicitor to that effect stating his opinion that what was done did not amount to a breach of the covenant not to assign or sublet (Exhibit 4) and quoted in support *Peebles* v. *Crosthwaite* (1897), 13 T.L.R. 198; *Jackson* v. *Simons* (1922), 92 L.J. Ch. 161; [1923] 1 Ch. 373; and *Chaplin* v. *Smith* (1925), 95 L.J.K.B. 449; [1926] 1 K.B. 198. These decisions did not cause the respondent's solicitor to alter his view that a breach had occurred, for the respondent served notice demanding possession on the ground the lease had been forfeited (Exhibit 2). LENNOX, Co. J., acting under section 19 *et seq.* of the Landlord and Tenant Act, Cap. 143, R.S.B.C. 1936, held against the appellants. The learned judge said:

There is little or no dispute on the facts and it all turns on the question if under all the circumstances there was in fact a subletting. I find that there was, and therefore there will be an order for possession forthwith. . . .

It is to be observed that the learned judge found there was a "subletting." He did not find an assignment nor its synonymous equivalent a "setting over," and see the Short Form of Leases Act, Cap. 263, R.S.B.C. 1936, and also *Crusoe* v. *Bugby* (1771), 2 W. Bl. 766; 96 E.R. 448 and *Doe* v. *Hogg* (1824), 4 D. & R. 226, at pp. 228-9. It is noted also the covenant in the lease "not to assign or sublet," remains unaccompanied by a further distinctive covenant not to part with possession which in *Chaplin* v. *Smith* (1925), 95 L.J.K.B. 449 and cases therein referred to, is found to mean something different from assigning or subletting. Nor does the amplification of the terms "assignment" and "sub-

C. A.
1946
CARMICHAEL
v.
DOLMAGE
AND
MACINNES
O'Halloran,
J.A.

letting" in our Short Form of Leases Act, *supra,* include the term "part with possession." This is mentioned now to emphasize that the terms "assigning" and "subletting" by no means include every transaction by which a lessee may put a third person in legal possession or in apparent legal possession or in occupancy of the leased premises, and see *Jackson* v. *Simons* (1922), 92 L.J. Ch. 161, at p. 167.

The covenant "will not sublet without leave" is amplified by our Short Form of Leases Act, *supra,* to mean that the lessee his executors, etc.,

> shall not, nor will, during the said term, sublet the said premises hereby granted, or any part thereof, to any person or persons without the consent in writing of the said lessor, . . .

In comparison the covenant "will not assign without leave" is amplified by the same statute to mean

> . . . shall not, nor will, during the said term, assign, transfer, or set over, or otherwise, by any act or deed, procure the said premises, or any of them, or the term hereby granted, to be assigned, transferred, or set over, unto any person or persons whomsoever, without the consent in writing of the said lessor, . . . , first had and obtained.

The conventional distinction between assigning and subletting (*viz.,* that the former includes the full remaining term of the lease, while the latter relates to a term less than the remaining term of the lease) is preserved in the statutory amplification.

I think the learned judge must have concluded that Mrs. Dolmage was letting the premises to her brother for some period less than her full remaining term. We have not the benefit of the reasons which led to his decision, but it seems not unlikely that the learned judge interpreted the restricted right to occupancy given by Exhibit 7 as a "letting" for a period, less than the full remaining term of the lease. That may be the turning point of this case. Is that the true interpretation of Exhibit 7, bearing in mind that the Courts lean against forfeitures and require the person seeking to enforce a forfeiture to prove his case strictly (*per* Scrutton, L.J. in *Chaplin* v. *Smith, supra,* at p. 455)?

One looks for some basic test by which transactions bearing the outward *indicia* of assignments, subletting, parting with possession, or letting, may be determined to fall within or without those terms as used in their legal sense. That test seems to

be the right to exclusive possession. And by that is meant in my judgment legal possession which may or may not include actual occupancy. That proposition is extracted from *Taylor* v. *Caldwell* (1863), 32 L.J.Q.B. 164; and from what was decided by the Court of Appeal in *Chaplin* v. *Smith* (1925), 95 L.J.K.B. 449, and *Pincott* v. *Moorstons Limited* (1936), 156 L.T. 139, and see also Woodfall's Landlord and Tenant, 24th Ed., pp. 8 and 10-11.

I think it is self-evident that actual occupancy cannot confer legal possession against the lessee where the occupant, as in this case, cannot legally refuse to vacate at any moment the lessee, who has permitted his occupancy, may choose to cancel that permission. But *Taylor* v. *Caldwell* appears to go even further. It was a case where, notwithstanding that the occupant paid a substantial sum for the use of premises for a specific period, and where it may be assumed therefore that the owner or lessee had no legal right to cancel that occupancy, yet the Court held the owner or lessee had retained possession of the premises. The defendants let a music hall and gardens to the plaintiff for four non-consecutive days at £100 per day for the purpose of giving a series of four grand concerts and day and night fetes therein. Blackburn, J. said (p. 165):

> . . . The parties inaccurately call this a "letting," and the money to be paid a "rent"; but the whole agreement is such as to show that the defendants were to retain possession of the hall and gardens; so that there was to be no demise of them; and that the contract was merely to give the plaintiff the use of them on those days.

In the present case the appellant MacInnes (although he attempted to pay the rent to the lessor who refused to accept it) did not pay, and was not required to pay any consideration to his sister for his use of the suite.

In *Chaplin* v. *Smith* (where the covenant was not to assign or underlet or part with possession) Scrutton, L.J. at p. 455, approved this excerpt from Foa on Landlord and Tenant that:

> The mere act of letting other persons into possession by the tenant, and permitting them to use the premises for their own purposes, is not, so long as he retains the legal possession himself, a breach of the covenant.

That language brings out in clear relief again as in *Taylor* v. *Caldwell,* the distinction which may exist between actual occupancy of premises and the right to their legal possession.

C. A.
1946
CARMICHAEL
v.
DOLMAGE
AND
MACINNES
O'Halloran,
J.A.

The facts in *Chaplin* v. *Smith* bear repeating. Smith, having been refused leave to assign or sublet to the "one man" company he had formed and of which he was managing director and largest shareholder, verbally entered into an arrangement with the company whereby it carried on a garage business on the premises (having its registered office there) and agreed to indemnify him against payment of the rent, rates and taxes. Smith retained a key to the premises and made use of the company office for his private correspondence. After three years this company assigned its goodwill to a second company of which Smith was also managing director, and which agreed to pay him rent for use of the same premises at which it would continue the garage business.

Before making this last agreement Smith consulted his solicitors, and under their advice wrote a letter to the second company, stating that he must remain in law the actual tenant, and subject to that, if the company wished to enter into the agreement:

> . . . , the company may have the use of these premises. I am retaining my position as lessee and remaining in possession.

It is true that Smith retained a key to the premises and used the company office for his private correspondence. But apart from the fact that such privileges were quite consistent with his duties as managing director of the company which was carrying on business there, his possession of the key could give him no greater right to immediate legal possession than the express stipulations to be found in Exhibit 7 in this case. Smith claimed that in the circumstances he retained the legal possession of the premises notwithstanding the company paid him rent to carry on its business there and was listed as the occupant thereof for taxation purposes. The trial judge held Smith had committed a breach of his covenant not to part with possession and declared the lease forfeited. The Court of Appeal reversed that judgment. Bankes, L.J. at p. 451 said he attached great importance to the fact that throughout, Smith

> continued to be in a position in which he could retain possession.

The learned Lord Justice did not say Smith remained in possession throughout. The carefully chosen quoted language conveys the meaning in the circumstances that although the company occupied the premises, and paid Smith a rent for that occupation, it could not acquire any legal possession, because Smith at all

times retained a right to immediate legal possession, which he could enforce at any time.

That both Bankes, L.J. and Warrington, L.J. held that view is confirmed I think by what the former said at p. 452 and the latter developed at p. 454 regarding the trial judge's opinion that a man could not retain possession in law and at the same time give exclusive occupation to another. Bankes, L.J. said:

> . . . , I think it is quite possible in law, but of course you do not ordinarily find it, and you would only find it where both persons were quite aware of the position in law, and were careful to keep themselves within the law.

Chaplin v. *Smith* was a case in which that occurred. In my judgment it has also occurred in the case at Bar.

In *Pincott* v. *Moorstons Limited, supra,* Greer, L.J. (with whom Scott, L.J. agreed) said (p. 140) the law must be accepted as correctly laid down by Romer, J. in *Jackson* v. *Simons,* [1923] 1 Ch. 373, at p. 380 (also approved in *Chaplin* v. *Smith,* at pp. 452 and 454) that

> The defendant moreover retained the legal possession of the whole of the premises at all material times and, as pointed out by Romer, J. [*pere*] in *Peebles* v. *Crosthwaite* (1897), 13 T.L.R. at p. 37 and 198), a lessee who retains such possession does not commit a breach of a covenant against parting with possession by allowing other people to use the premises.

It is to be noted that in *Jackson* v. *Simons* the covenant was much wider than in this case and wider even than in *Chaplin* v. *Smith* for it read

> not to assign or underlet or part with the said demised premises or any part thereof or part with or share the possession or occupation thereof or of any part thereof.

In *Chaplin* v. *Smith* and *Jackson* v. *Simons* rental was paid for use of the premises. No rental was paid or required in the case at Bar. The test of under-letting Romer, J. laid down in *Jackson* v. *Simons* at p. 165, is that it must confer upon the third party some estate or interest in land. If this is the correct principle, then it is equally applicable if the third person has entire occupation instead of only part occupation as in *Jackson* v. *Simons,* for his right to legal possession must depend upon the agreement. If there is no agreement, then entire occupation may be evidence of legal possession, but if as here, there is an admitted or proven agreement or understanding denying any right to legal

C. A.
1946
CARMICHAEL
v.
DOLMAGE
AND
MACINNES
O'Halloran,
J.A.

possession, the circumstance of entire occupation loses its significance since as Bankes, L.J. put it (quoted above):

> both persons were quite aware of the position in law and were careful to keep themselves within the law.

See also Woodfall's Landlord and Tenant, 24th Ed., at p. 8, and further at pp. 10-11, regarding the distinction between "lodger" as such and "tenant" as such in its bearing upon the right to distrain for rent.

Perusal of Exhibit 7 makes it clear that the relationship of landlord and tenant was never established between the two appellants. It also makes clear that Mrs. Dolmage retained at all times the legal possession and right to occupancy. At no time did she put her brother in the position where he could assert any right to occupancy against her. She did not part with the whole or any portion of her interest in the lease or in the premises. She permitted her brother to use the suite but on revocable licence only, being careful to retain legal possession at all times, and her brother availed himself of the use of the suite upon those conditions.

For these reasons, I must conclude with respect that the learned judge erred in holding the transaction amounted to a subletting. If a lessor intends to prohibit a transaction of this kind his remedy is to provide against it in the lease. But the lessor has not done so in this case by words which admit of no other meaning. As stated before, the Courts lean against forfeitures and have always held a strict hand over covenants which are invoked to defeat leases. These covenants have always been construed with the utmost jealousy to prevent their restraint exceeding the express stipulation.

Counsel for the respondent also sought to uphold the order for possession on the ground that Exhibit 7 is a colourable document. But I am unable to so regard it in the recited circumstances. The nature of the transaction was fully disclosed to the respondent's solicitor and the point directly and openly taken that the lease in its proper construction did not provide against it. Both appellants acted throughout under solicitor's advice. They were aware of the position in law and were careful to keep within it. I think the remarks of Bankes, L.J. at p. 452 in *Chaplin* v. *Smith* are directly applicable:

. . . here is an arrangement entered into by a man who knows what his position is, who is advised by his solicitors what he can do and what he cannot do. The person with whom he has come to this arrangement is also told what the legal position is and what the defendant [landlord here] can and cannot do.

In my judgment neither in law nor in fact do the circumstances disclosed constitute a breach of any covenant in the lease. I would set aside the order for possession and allow the appeal with costs here and in the Court below.

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

BIRD, J.A.: Counsel for the respondent on this appeal strongly pressed the submission that the right of occupancy given by the tenant Dolmage to MacInnes was a mere subterfuge to evade the covenant "not to assign or sublet." The question with which this Court is concerned is whether or not the right so given to MacInnes constituted a breach of the covenant. If the covenant extends to prohibit the giving of such a right of occupancy then a breach of the covenant will be declared. On the other hand, if it be found that the covenant did not so extend, then the tenant was acting within her legal rights and no imputation of evasion or the adoption of a subterfuge applies to the conduct of the appellants.

As was said relative to the alleged evasion of a tax statute by Chitty, L.J. in *Attorney-General* v. *Beech,* [1898] 2 Q.B. 147, at p. 157:

. . . , the whole argument on evasion of the Act is fallacious. The case either falls within the Act or it does not. If it does not, there is no such thing as an evasion.

And *cf. per* Lord Macnaghten in *Attorney-General* v. *Richmond and Gordon (Duke),* [1909] A.C. 466, at pp. 470, 473 and 474.

I have reached the conclusion that the limited right of occupancy of the premises given by Dolmage to MacInnes did not constitute an assignment or subletting. The restriction under the covenant being limited to a promise not to assign or sublet, does not extend to prohibit the right of occupancy given here. Such a prohibition by the use of apt language could have been incorporated in the lease, but was not.

I am therefore of opinion that no breach of the covenant has

C. A.
1946
CARMICHAEL DOLMAGE AND MACINNES

occurred. Consequently, and as well for the reasons given by my brother O'HALLORAN, in which I concur, I would set aside the order for possession and allow the appeal.

Appeal allowed.

Solicitors for appellants: *MacInnes & Arnold.*
Solicitor for respondent: *J. S. Maguire.*

C. A.
1946
Oct. 2, 22.

FENCHURCH EXPORT CORPORATION v. SITKA SPRUCE LUMBER COMPANY LIMITED *ET AL.*

Practice—Discovery—Examination of past officer of company—Whether more than one past officer can be examined—Rule 370c (1).

Rule 370c (1) confers jurisdiction upon the Court or a judge thereof to order the examination for discovery of more than one past officer of a company, if the Court or judge in their respective discretion should see fit to so order.

APPEAL by plaintiff from the order of COADY, J. of the 3rd of July, 1946, whereby he refused the plaintiff's application for an order to examine one J. A. MacEachern, a past officer of the defendant company.

The appeal was argued at Victoria on the 2nd of October, 1946, before SLOAN, C.J.B.C., O'HALLORAN and SIDNEY SMITH, JJ.A.

Bull, K.C., for appellant: One Matthew Sutton was examined by an officer of the defendant company, but during the examination it was found that he was not an officer, but that he was a past officer. The plaintiff then applied for an order to examine J. E. MacEachern, a past officer of the defendant company and it was held that as one past officer has already been examined and rule 370c provides for the examination of one past officer only, the application was refused. The question is can you examine more than one past officer? See *Gardiner* v. *Colyer* (1864), 10 L.T. 715; *Dill* v. *Dominion Bank* (1897), 17 Pr. 488; *Elliott* v.

Holmwood & Holmwood (1915), 22 B.C. 335; *Harvie* v. *C.P.R. and Hurst Engineering & Construction Co., Ltd.*, [1928] 1 W.W.R. 187.

Guild, for respondent, referred to Holmested & Langton's Ontario Judicature Act, 3rd Ed., 668 and *Harrison Mills Ltd.* v. *Abbotsford Lumber Co. Ltd.* (1934), 49 B.C. 301.

Bull, in reply, referred to *Des Brisay* v. *Canadian Government Merchant Marine Ltd.* (1936), 51 B.C. 57 and *McFall* v. *Vancouver Exhibition Association* (1942), 58 B.C. 290.

Cur. adv. vult.

22nd October, 1946.

SLOAN, C.J.B.C.: I agree with my brother O'HALLORAN.

O'HALLORAN, J.A.: The question raised in this appeal is whether the Court or the judge has jurisdiction under rule 370c (1) to direct that more than one past officer of a corporation may be examined upon discovery before trial.

The respondent company produced one Sutton for discovery examination as a present officer of the company. After the examination had proceeded some time and Sutton had disclaimed personal knowledge of the matters at issue, counsel for the respondent company announced it had come to his knowledge that Sutton was no longer an officer of the company. As Sutton had indicated that J. A. MacEachern, another past officer of the respondent company likely had that knowledge, the appellant then applied for an order to examine MacEachern.

COADY, J. held that the mutual mistake concerning Sutton as a present officer of the company could not change his actual *status* from that of a past officer. The learned judge held the examination must be regarded as the examination of a past officer (upon which point it is not essential to express an opinion), and then refused to order the examination of MacEachern on the ground, rule 370c (1) did not permit him to order the examination of more than one past officer. The appeal was founded on this refusal.

Rule 370c (1) and (2) reads in relevant part:

(1.) In the case of a corporation, any officer or servant of such corpora-

C. A.
1946
FENCHURCH EXPORT CORPORATION v. SITKA SPRUCE LUMBER CO. LTD.
O'Halloran, J.A.

tion may, without any special order, and any one who has been one of the officers of such corporation may, by order of a Court or a Judge, be orally examined before the trial touching the matters in question by any party adverse in interest to the corporation, and may be compelled to attend. . . . Such examination or any part thereof, may be used as evidence at the trial if the trial Judge so orders.

(2.) After the examination of an officer or servant of a corporation, a party shall not be at liberty to examine any other officer or servant without an order of the Court or a Judge.

It is observed that while rule 370c (1) provides that any present officer may be examined without an order, but stipulates a past officer may not be examined without an order, nevertheless rule 370c (2) which directs that no additional present officer shall be examined without an order, is silent respecting past officers. The appeal turns upon the meaning of "any one" in the phrase "any one who has been one of the officers of such corporation." Does it mean only one, as the learned judge held, or has it a plural distributive sense to include any persons who have been past officers?

I read rule 370c (1) to place no limit upon the number of past officers which the Court in its discretion may order to be examined. In the case of a present officer, "any officer" in rule 370c (1) (compare with "any one" who is a past officer) obviously was not restricted to one person, for rule 370c (2) was inserted to provide expressly that another present officer could not be examined without an order. Without rule 370c (2) which does not apply to past officers, there could be no more reason to confine "any officer" to one present officer than to confine "any one" to one past officer.

I think governing importance must be attached to this contextual interpretation. "Any" is constantly used as an adjective, but it may also be used in a pronominal sense, as may "any one" sometimes appearing as one word "anyone." But the context of rule 370c (1) denies that "any" or "any one" is employed in the pronominal sense. "Any officer" (relating to present officers) as found therein clearly implies that "any" is used as an adjective. I think it follows that "any" in "any one" (relating to past officers) is so used also since there is nothing to express a contrary intention. As Blackburn, J. said in *Allgood and others* v. *Blake* (1873), 42 L.J. Ex. 101, at pp. 103-4, the meaning of

words varies according to the circumstances of and concerning which they are used, and see also *River Weir Commissioners* v. *Adamson* (1877), 47 L.J.Q.B. 193, at p. 203. Words are not *formulæ* or self-contained things, but are vehicles of meaning. They are bent and shaded in the none too precise English language, in an effort to reflect a true picture of what is intended by that which is said or written; and see also *Galt* v. *Frank Waterhouse & Company of Canada Ltd.* (1944), 60 B.C. 81, at pp. 96-9.

Accepting, as I think we must, that "any" in "any one" (relating to past officers) is used adjectivally, we find, on turning to a standard dictionary such as Webster's New International Dictionary (consulted by the Judicial Committee in *Victoria City* v. *Bishop of Vancouver Island,* [1921] 2 A.C. 384, at p. 392), that "any" has a variety of meanings and shades of meaning. That compels us to resort again to the context of rule 370c (1) to ascertain the particular meaning which is appropriate. The most apt in the contextual circumstances appear to be "one or more," "every" or "all, in a distributive sense." Illustrations are "any cat will scratch," "any schoolboy would know that"; "any one who has served in the armed forces," etc.

In thus extracting the meaning of "any one" from the context in which it appears, it is not overlooked that the phrase in which "any one" is found reads: "and any one who has been one of the officers." At first reading, it might seem that "one" denies the contextual meaning of "any one" as found above, and restricts it to one person only. But closer examination discloses that "one" is there used, according to common practice, as a substitute for the indefinite article "an," so that the expression "one of the officers" means "an officer." So understood it does not add to or take away from the contextual meaning of "any one" as found above.

In the result therefore, the phrase "any one who has been one of the officers" means simply "any person who has been an officer," *viz.,* "any past officer." This contextual interpretation receives other support. If rule 370c (1) intended that one past officer only, could be examined for discovery, nothing would have been easier than for it to say so in language which would deny

C. A.
1946

FENCHURCH EXPORT CORPORATION v. SITKA SPRUCE LUMBER CO. LTD.

O'Halloran, J.A.

more than one meaning. But the rule has carefully avoided that easy course, and instead has adopted the understandable course, even if it is done in awkward English, of leaving it to the discretion of the Court or the judge in the particular case.

Thus the contextual interpretation is supported by a rule of reason. One of the aids to construction is the common sense or reasonableness of the favoured interpretation, and see *Victoria City* v. *Bishop of Vancouver Island,* [1921] 2 A.C. 384, at p. 388, and *Johnson and Stockdill* v. *Grossman* (1943), 59 B.C. 88, at p. 98. If it is asked why should not two or more past officers be examined for discovery if the judge is satisfied it is in the interests of justice, I think reason forbids any answer which would deny the judge's discretion, in the absence of a rule to the contrary couched in clear and unbending language such as is not found in rule 370c (1). Rules of Court are the servants and not the masters of the Court, whose faculty it is to interpret those rules in the manner most likely to do justice between the parties, and see *British American Timber Co. Ltd.* v. *Jones* (1944), 60 B.C. 174, at p. 196.

Counsel were unable to supply any decision dealing directly with the point in question here, although some decisions were cited regarding present officers. In *Dill* v. *Dominion Bank* (1897), 17 Pr. 488 it was held a second present officer could be examined without an order of Court, but it would appear there was then no rule in Ontario similar to our present rule 370c (2). A Manitoba referee in Chambers refused to follow this decision in *Brown* v. *London Fence Limited* (1909), 11 W.L.R. 411, holding that it was for the Court to decide. But another Manitoba referee in *Houghton* v. *C.N.R.* (1914), 6 W.W.R. 160, preferred *Dill* v. *Dominion Bank* to *Brown* v. *London Fence Limited.* In *Czernewicz* v. *Winnipeg Wholesale Grocery and Confectionery Ltd.* (1940), 48 Man. L.R. 76, at p. 80, the Manitoba Court of Appeal followed *Brown* v. *London Fence Limited* in preference to the *Dill* and *Houghton* decisions, but as I read the case solely on the ground (in circumstances peculiarly apt in the *Czernewicz* case) that the *Brown* case held a second present officer could be examined only if the desired information could not be obtained from the first present officer examined.

I cannot find that any of the foregoing decisions upon present officers were governed by a rule similar to our own rule 370c (2) respecting present officers. They do not deny the jurisdiction of the judge to order the examination of a second present officer in a proper case. They leave it to the discretion of the Court or a judge to decide in the circumstances of the particular case. So interpreted those decisions support in principle the foregoing contextual interpretation in respect to past officers, which makes the question of the examination of a second past officer not one of jurisdiction, but dependent solely upon the discretion of the Court or a judge judicially exercised in the particular circumstances. In this case the learned judge never reached the point at which he could exercise his discretion, since, in holding that rule 370c (1) did not permit him to order the examination of a second past officer he denied himself the jurisdiction which was a prerequisite to the exercise of his discretion.

It is my conclusion that rule 370c (1) confers jurisdiction upon the Court or a judge thereof to order the examination for discovery of more than one past officer of a company, if the Court or a judge in their respective discretion should see fit to so order. The appeal is allowed accordingly.

SIDNEY SMITH, J.A.: I agree in the result with my brother O'HALLORAN that this appeal be allowed.

Appeal allowed.

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

Solicitor for respondent Sitka Spruce Lumber Company Limited: *C. J. White.*

Solicitor for respondents Charles C. Barrie Limited and Charles C. Barrie: *J. W. deB. Farris.*

C. A.
In Chambers
1946
Nov. 22;
Dec. 11.

FENCHURCH EXPORT CORPORATION v. SITKA SPRUCE LUMBER COMPANY LIMITED *ET AL.*

Costs—Scale of—Interlocutory appeal—"Amount involved"—Order LXV., rr. 10 and 10A.

The plaintiff sued for an accounting and for judgment for the amount found due thereon and for unstated damages for breach of a contract to pay commissions. There was no claim for any specific amount in the endorsement on the writ, the statement of claim or elsewhere. An appeal from the refusal of an order for the examination on discovery of a second past officer of the defendant company was allowed with costs. The plaintiff proceeded before the trial of the action to tax its costs of that appeal. The registrar allowed the costs to be taxed under Column 4 of Appendix N on the strength of an affidavit that the plaintiff "would if successful" be entitled to recover more than $50,000. On motion to review the taxation:—

Held, reading rules 10 and 10A of Order LXV. together, that under the circumstances the "amount involved" within the meaning thereof could not be ascertained until after the trial, but that if the plaintiff elected, as it was open to it to do, to tax its costs of the interlocutory appeal prior to the trial then Column 2 of Appendix N would apply. The "evidence for the purpose of determining the amount involved" which the registrar purported to "receive" in the form of said affidavit was premature.

MOTION to review the taxation of costs of an interlocutory appeal. Heard by O'HALLORAN, J.A. in Chambers at Vancouver on the 22nd of November, 1946.

Guild, for the motion.
Bull, K.C., contra.

Cur. adv. vult.

11th December, 1946.

O'HALLORAN, J.A.: This motion to review the taxation of costs of an interlocutory appeal raises a point of some importance. In its statement of claim the appellant plaintiff claims against the respondent defendant for an account of all sales and shipments of spruce as therein specified, and for payment of all commissions found due on such accounting, together with unstated damages for breach of agreement to pay commissions. In its statement of defence the respondent defendant denies any liability whatever.

The appellant plaintiff applied for an order for the discovery examination of a second past officer of the respondent company. The learned judge refused to make the order but an appeal to this Court was allowed on 22nd October last with costs. The appellant proceeded to tax its costs of that interlocutory appeal before trial of the action. The learned registrar allowed the costs to be taxed under Column 4 of Appendix N on the strength of an affidavit as to the "amount involved," produced before him, paragraph 3 whereof reads:

That the tabulation of such sales from these records discloses that the plaintiff, on the basis of its claim as set forth in the statement of claim in this action would if successful, be entitled to recover from the defendant, Sitka Spruce Company Limited in excess of $50,000.00.

The respondent's main objection, which the learned registrar overruled, is, that the costs of the successful appellant plaintiff in the interlocutory appeal ought not to be taxed until after the trial of the action; but alternatively if taxed before trial, ought to be computed on Column 2 of Appendix N. These objections are based on the ground that the "amount involved" cannot be determined until the trial is held. The point is not touched in *Consolidated Tungsten-Tin Mines Ltd. et al.* v. *MacCulloch and The London & Western Trusts Co. Ltd.* (1942), 58 B.C. 396 or in *Re Companies Act and British American Timber Co.* (1942), *ib.* 49.

Rules 10 and 10A of Order LXV. of the Supreme Court Rules, 1943, *supra,* read: (and see sections 12 and 38 of the Court of Appeal Act, rule 2A of Order LXV. of the Supreme Court Rules, *supra,* and Court Rules of Practice Act, Cap. 249, R.S.B.C. 1936 with amendments):

10. "Amount involved," where used in this Order or in Appendix N, includes the value of the subject-matter in question in the cause or matter.

10A. Subject to the provision of Rules 10, 10B, and 10C, the amount involved shall in taxations under Appendix N be determined as against a plaintiff (including a plaintiff by counterclaim) by the claim made by him and as against a defendant (including a defendant by counterclaim) by the judgment given or decision rendered: Provided that the taxing officer shall, where necessary, receive evidence for the purpose of determining the amount involved.

Rules 10 and 10A, *supra,* came into force on 1st November, 1938 (at the same time as the recasted Appendix N as it now appears at pp. 272-76 of the Supreme Court Rules, 1943, and

C. A.
In Chambers
1946

FENCHURCH EXPORT CORPORATION v. SITKA SPRUCE LUMBER CO. LTD.

O'Halloran, J.A.

see 53 B.C. at pages before p. 1) replacing former rule 10 which had read:

10. The words "amount involved," as used in Appendix N, shall, if no other relief than the payment of a sum of money has been claimed or obtained, be determined as against a plaintiff by the amount claimed, or as against a defendant by the amount for which judgment is given.

As the rules stood prior to 1st November, 1938, if the "amount involved" was not indicated by the amount recovered by a successful plaintiff, or by the pecuniary amount claimed by an unsuccessful plaintiff, then regardless of the value of the subject-matter, the costs of the appeal had to be taxed under Column 2 of Appendix N, and see *Andler* v. *Duke* (1933), 47 B.C. 282 (which concerned the title to lands).

Reading rules 10 and 10A together in the circumstances of this particular case, I am led to uphold the objection that the "amount involved" cannot be ascertained until after trial. No specific claim for any amount is found in the endorsement on the writ, the statement of claim, or anywhere else that has been called to my notice in the proceedings to date. The claim is primarily for an accounting and then consequentially for judgment for the amount found due on such accounting. It seems plain that the "amount involved" cannot be ascertained until an accounting takes place; but that accounting cannot take place until it is decided at the trial whether or not the appellant plaintiff is entitled to an accounting.

I think it must follow that the "evidence for the purpose of determining the amount involved" which the learned registrar purported to "receive" (see rules 10 and 10A) in the form of the affidavit to which I have referred, is premature, for the appellant plaintiff has carefully limited its claim to whatever amount may be found due on the taking of accounts. It is true there is a claim for damages for breach of agreement to pay commissions. But if that claim is intended to exceed the amount which the accounting shall disclose, there is no hint of it in the pleadings or proceedings put before me, and it seems to be implicitly negatived by paragraph 3 of the affidavit quoted *supra*.

The affidavit quoted *supra* reads:

The tabulation of . . . sales from these records discloses that the plaintiff . . . on the basis of its claim as set forth in the statement of

claim . . . would, if successful, . . . be entitled to recover . . . in excess of $50,000.00.

It is noted that the affidavit does not verify a claim for any amount. It is premised "on the basis" of an unverified claim, conditioned upon that claim being "successful" at the trial. The phraseology employed reflects the draughtsman's difficulty in attempting to value a claim for relief which is incapable of valuation until an accounting is directed (if at all) at the trial.

The conclusion I have reached is not hindered by anything said in *Malkin Company Limited* v. *McGaghran* (1914), 20 B.C. 479 and in *Star* v. *White* (1902), 9 B.C. 9, regarding the general rule as to payment of costs of interlocutory appeals forthwith. Those decisions were not concerned with necessary exceptions to the general rule. Moreover, at that time no situation presented itself comparable to the condition which has now arisen under rules 10 and 10A as amended in 1938.

In the result I must hold in the special circumstances of this case that the "amount involved" cannot be determined until the trial takes place. If, however, the appellant elects to tax its costs of the interlocutory appeal prior to the trial (and I hold that course is open), then, because the "amount involved" cannot be determined until trial, Column 2 of Appendix N is applicable.

The motion is granted to the extent indicated above. The respondent is entitled to its costs of the motion. If the appellant does not elect to tax its costs of the interlocutory appeal before trial under Column 2 of Appendix N, but chooses instead to defer the taxation until after the trial, then the respondent shall be entitled to its costs incurred in what may be described in this latter event as the premature taxation which has taken place.

Motion granted.

C. A.
1946
Sept. 11;
Nov. 5.

REX v. ANTROBUS.

Criminal law—Evidence—Testimony of child under oath—Enquiry into—Whether sufficient—Conviction—Appeal—New trial ordered.

It is the duty of the presiding judge to satisfy himself whether a child of tender years is or is not capable of being sworn and he must first find that the child understands both the nature of an oath and the consequences thereof. The enquiry before the child is sworn, although brief, must cover both of said points.

On the trial of a charge of procuring, the girl in question, who was nine years old, was asked by the magistrate "Do you understand about swearing on the Bible to tell the truth?" She answered "Yes" and was then sworn by the magistrate. The accused's counsel made no objection to the competency of the child as a witness. The accused was convicted and he appealed.

Held, that since there was nothing in the enquiry to show that the child knew the consequences of an oath, the appeal should be allowed and a new trial ordered.

APPEAL by accused from his conviction by H. S. Wood, Esquire, police magistrate for the city of Vancouver on a charge of procuring a girl to unlawfully have carnal connection with another person. The facts are sufficiently set out in the reasons for judgment.

The appeal was argued at Victoria on the 11th of September, 1946, before SLOAN, C.J.B.C., ROBERTSON and SIDNEY SMITH, JJ.A.

Branca, for appellant: The learned magistrate did not ascertain whether the evidence of the child Alice Wright, a witness for the prosecution, understood the nature of an oath nor did the Court satisfy itself as to the intelligence of the child, nor as to the appreciation of duty in telling the truth. Directions of section 16 of the Canada Evidence Act were not followed: see *Sankey* v. *Regem* (1927), 48 Can. C.C. 97; *Rex* v. *Surgenor* (1940), 27 Cr. App. R. 175. The evidence of Forsyth was improperly accepted as corroboration of the child's evidence as he was an accomplice: see *Gach* v. *Regem* (1943), 79 Can. C.C. 221, at p. 225; *Rex* v. *Guilbault* (1939), 72 Can. C.C. 254.

L. H. Jackson, for the Crown: The evidence of the girld may be accepted and the question of corroboration does not arise in

this case. Section 16 of the Canada Evidence Act applies only to unsworn evidence. If the girl answers questions in a straightforward manner, that is all that is necessary: see *Sankey* v. *Regem,* [1927] S.C.R. 436, at p. 440; *Rex* v. *Moscovitch* (1924), 18 Cr. App. R. 37. The accused told the girl what to do and Forsyth is corroborated by the girl's evidence: see *Rex* v. *Bush* (1938), 53 B.C. 252. The Court may convict on the uncorroborative evidence of an accomplice.

Branca, replied.

Cur. adv. vult.

5th November, 1946.

Per curiam (ROBERTSON, J.A.): The accused was convicted on the 7th of May, 1946, on a charge that between the 1st and 15th days of April, 1946, he unlawfully procured a girl to have unlawful carnal connection, within Canada, with one Forsyth. The girl was nine years of age on the 17th of March, 1946. One of the grounds of appeal is that the learned magistrate did not make the necessary enquiry as to the child's competency to give evidence. It is the duty of the presiding judge to satisfy himself whether a child of tender years is or is not capable of being sworn. *Rex* v. *Harris* (1919), 34 Can. C.C. 129; *Rex* v. *Surgenor* (1940), 27 Cr. App. R. 175. The record is as follows:

THE COURT: How old are you? Nine.

Do you understand about swearing on the Bible to tell the truth? Yes.

THE COURT: All right, you take the Book in your right hand. Listen to me: you swear that the evidence you shall give—that is, what you tell us here today, shall be the truth, the whole truth and nothing but the truth. Now, kiss the Bible.

The accused was represented by counsel who made no objection to the competency of the witness.

The appellant's counsel relied upon *Sankey* v. *Regem,* [1927] S.C.R. 436. In that case at the trial a girl nine years of age was tendered as a witness and after examination the learned trial judge allowed her to give unsworn testimony, pursuant to section 16 of the Canada Evidence Act. The case at Bar is one where the child was sworn and therefore in my opinion the *Sankey* case does not apply.

One must then turn to the common law. The fundamental rule is that no evidence can be given in the absence of an oath—*Rex*

C. A.
1946
REX
v.
ANTROBUS

v. *Southern* (1930), 22 Cr. App. R. 6, at p. 10; but a child may give unsworn evidence if it does not understand the nature of an oath but is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. Section 16, Canada Evidence Act; but in that case corroboration is required. So that the determination of this question is vital to the accused.

An oath is a religious sanction that mankind have universally established. *Omichund* v. *Barker, infra,* at p. 46. The oath is a special test or security, superadded and applied to persons assumed to be otherwise qualified as witnesses; and because the oath cannot have sufficiency without the existence of a certain belief, the lack of that belief excludes the witness. Wigmore on Evidence, Can. Ed., Vol. 3, p. 2360.

Brasier's Case (1779), 1 Leach, C.C. 199, is said in Best on Evidence, 12th Ed., 141, to be the leading case on the subject as to the admissibility of the evidence of an infant of tender years; and at p. 142 it is stated that *Brasier's Case* settled the modern law and practice relative to the admissibility of the evidence of children. See also Phipson on Evidence, 8th Ed., 446; Taylor on Evidence, 12th Ed., 869; Cockle's Cases and Statutes on Evidence, 6th Ed., 276. Russell on Crimes, 8th Ed., Vol. 2, p. 2111. In *Brasier's Case* the 12 judges

> were unanimously of opinion, That no testimony whatever [could] be legally received except upon oath; and that an infant, though under the age of seven years, [might] be sworn in a criminal prosecution, provided such infant [appeared,] on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath . . . [that the] admissibility [of children to give evidence under oath depended] upon the sense and reason they [entertained] of the danger and impiety of falsehood, which [was] to be collected from their answers to questions propounded to them by the Court.

Before anyone may be a witness the requirements as to competency have been set down in the cases now about to be referred to. In the first, *Omichund* v. *Barker* (1744), Willes 538, at p. 545 (also reported in 1 Atk. 21, at p. 45) Willes, L.C.J. said:

> . . . nothing but the belief of a God and that he will reward and punish us according to our deserts is necessary to qualify a man to take the oath.

Lee, L.C.J. said at p. 46:

> An oath is a religious sanction that mankind have universally established.

. . . I agree . . . ; that where . . . the witness is of a religion, it is sufficient; for the foundation of all religion is the belief of a God.

Hardwicke, L.C. said at p. 48:

. . . All that is necessary to an oath is an appeal to the Supreme Being, as thinking him the rewarder of truth, the avenger of falsehood.

In *Miller* v. *Salomons* (1852), 7 Ex. 475, at p. 515, Martin, B. said:

The doctrine laid down [in *Omichund* v. *Barker*] was, that the essence of an oath was an appeal to a Supreme Being, in whose existence the person taking the oath believed, and whom he also believed to be a rewarder of truth and an avenger of falsehood.

In *Attorney-General* v. *Bradlaugh* (1885), 14 Q.B.D. 667 Brett, M.R. said at pp. 696-7:

Now the law has been accepted and acted upon with regard to that point in accordance with and as governed by the decision given in *Omychund* v. *Barker*, ever since that case was decided, and the law has been adopted by every judge who has had to speak of it, really and truly according to the judgment of Willes, C.J., in that case. His has always been taken to be the most prominent and most satisfactory judgment. . . . Therefore there is no necessity that the person taking the oath should believe that he will be liable to be punished in a future state. If there be any belief in a religion according to which it is supposed that a Supreme Being would punish a man in this world for doing wrong, that is enough; but if he does not believe in a God, or if believing in a God he does not think that God will either reward or punish him in this world or the next, in either case according to the law of England as here declared a man cannot be a witness in any case, or under any circumstances. "He cannot be a witness." It is true that those words are used, but they are used because the subject matter of inquiry was with regard to a witness. But that same principle, that same law, if there be anything in the reasons given, must apply to the case of any oath, whether the person is a witness or not. The question, whether he was a witness, was logically an accident: the question before the Court was whether the person, although he went through the form of it, could take an oath.

In *White's Case* (1786), 1 Leach, C.C. 430, a witness

Being examined on the *voir dire*, . . . said, that he had heard there was a God, and believed that those persons who tell lies would come to the gallows; but acknowledged that he had never learned THE CATECHISM, was altogether ignorant of the obligations of an oath, a future state of reward and punishment, the existence of another world, or what became of wicked people after death.

THE COURT rejected him, as being incompetent to be sworn; for that an OATH is a religious asseveration, by which a person renounces the mercy, and imprecates the vengeance of heaven, if he do not speak the truth; and therefore a person who has no idea of the sanction which this appeal to heaven creates, ought not to be sworn as a witness in any Court of Justice.

It is said in the note to *White's Case* at p. 431 that

C. A.
1946
REX
v.
ANTROBUS

the testimony of a witness was rejected . . . by Mr. Justice Grose at Bedford Spring Assizes 1789, on an indictment of murder,

because the witness did not believe in God or in a future state of rewards and punishments.

That the law as laid down in *Omichund's* case is the law is shown by reference to section 12 of the Evidence Act, R.S.B.C. 1936, Cap. 90 (and see also section 143, Cap. 98, R.S.C. 1927) relating to Indian testimony, which are practically the same. The Provincial section applies to matters over which the "Legislature has jurisdiction"; the Dominion section to, *inter alia,*

any matter involving a criminal charge, or [a] trial of any crime. . . .

It is there provided that it shall be lawful for any Court, etc., to receive the evidence of any aboriginal native and others therein mentioned, being an uncivilized person,

destitute of the knowledge of God or of any fixed and clear belief in religion, or in a future state of rewards and punishments without administering the usual form of oath

upon his taking the declaration therein specified.

In practice when an adult is tendered as a witness it is not customary to examine him as to his competency. It is presumed that if he is willing to take the oath he has the requisite degree of religious knowledge necessary to render him competent to take the oath. In a note at p. 143 of Best, *supra,* it is stated, speaking of the competency of a child, that

the requisite degree of religious knowledge should be presumed at the age of fourteen. But the court has a right to examine as to the religious knowledge even of an adult, if it suspects him to be deficient.

The fact of capacity is not presumed, but must be shown where the child is under 14 years of age. See Wigmore on Evidence, Can. Ed., Vol. 1, p. 640, referring to 1 Hale, P.C. at p. 302. Again in Wigmore on Evidence, Vol. 1, pp. 588, 634 and 640 it would appear that the capacity of an adult offered as a witness is presumed.

In *Rex* v. *Williams* (1835), 7 Car. & P. 320 a child eight years of age was called as a witness. Patteson, J. said at p. 321:

I must be satisfied that this child feels the binding obligation of an oath from the general course of her religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, . . .

Speaking of *Rex* v. *Williams,* Best, at p. 143, said:

. . . if indeed, Patteson, J., intended to lay it down—that the child

was incompetent to take an oath, because her sense of the binding obligation of the oath was not the result of her general religious education, was at variance with other authorities, and is indefensible on principle.

Wigmore says at p. 2357, Vol. 3, that in examining children as to their competency it is customary to employ simpler language and more concrete tests than are usual with adults.

In *Regina* v. *Holmes* (1861), 2 F. & F. 788, the evidence of a child of six years who was sworn, was given. It was objected by counsel for the defence that it was laid down in the books of authority that the witness must understand the nature and obligation of an oath. The learned judge remarked that this was a complicated question which nine out of ten children could not answer. Accordingly he did not make any enquiry as to whether she understood the nature and obligation of an oath. He asked questions as to whether or not the witness thought it was a good or a bad thing to tell a lie, and whether she said her prayers and what became of a person who told lies. Upon her answers he permitted the child to be sworn. So in *Rex* v. *Braddon and Speke* (1684), 9 St. Tri. 1127, at p. 1149, a boy 13 years of age was allowed to give evidence under oath after answering the following questions:

What age are you of?

W. Edwards. I am thirteen, my lord.

Att. Gen. Do you know what an oath is?

W. Edwards. No.

L.C.J. Suppose you should tell a lie, do you know who is the father of liars?

W. Edwards. Yes.

L.C.J. Who is it?

W. Edwards. The devil.

L.C.J. And if you should tell a lie, do you know what will become of you?

W. Edwards. Yes.

L.C.J. What if you should swear to a lie? If you should call God to witness a lie, what would become of you then?

W. Edwards. I should go to hell-fire.

Best, *supra,* at pp. 143 and 144 refers to cases where it has been found that a witness of tender years was devoid of religious knowledge and the Court postponed the trial, directing in the meantime that the infant receive due instruction on the subject. He also mentions a case where the learned trial judge refused to adjourn for the purpose of the infant being taught the nature of an oath, stating that all the judges were of opinion that it was

C. A.
1946
REX
v.
ANTROBUS

an incorrect proceeding; that it was like preparing or getting up a witness for a particular purpose, and on that ground was very objectionable. Best says if this case be correctly reported, that it is at variance with a series of previous authorities. However, all these cases go to show that before an infant was allowed to take an oath he was examined as to his religious belief and the different consequences which would arise between telling the truth and telling a falsehood.

It may be suggested that the sole qualification for a child of tender years being allowed to take an oath is that the child understands the nature of an oath, because section 16, *supra,* says that if the child does not understand the nature of an oath its evidence may be received if the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

I do not think this view can be accepted. The first thing necessary to show that a child of tender years is competent to give evidence under oath is that the child understands the nature of an oath. If it does not do this, then it is unnecessary to consider the further question as to whether or not the child understands the consequences of an oath. Even if it can be said, as the learned judge said in *Regina* v. *Holmes, supra,* that the question as to whether or not a child understood the nature of an oath was so complicated that nine out of ten children could not answer it, yet that question must be put to a child by a judge under section 16 of the Evidence Act, who, before he can allow the child to give unsworn evidence, must come to the conclusion that the child does not understand the nature of an oath. In coming to a conclusion one way or the other, he exercises his discretion judicially and upon reasonable grounds—see *Sankey* v. *Regem, supra,* at p. 440.

A child without any religious knowledge or belief, might understand the nature of an oath, but not the consequences. It seems to me therefore that before a child of tender years may be sworn the two requirements set out in *Brasier's Case, supra,* must be fulfilled, namely, that the child understands the nature and consequences of an oath.

As was said in *Sankey* v. *Regem, supra,* a very brief enquiry

may suffice to satisfy the judge on the point to be decided under section 16. So I think the enquiry before a child of tender years is sworn, may be very brief, but it must cover the two points above mentioned.

An appellate Court will be very loath to reverse the decision of a magistrate that a child was competent to be sworn because, in addition to the evidence in Court, he has the advantage of seeing the witness. Mr. Justice Brewer, delivering the opinion of the Supreme Court of the United States in *Wheeler* v. *United States* (1895), 159 U.S. 523, at pp. 524-5 said:

> . . . . This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous. These rules have been settled by many decisions, and there seems to be no dissent among the recent authorities.

He then referred to *Brasier's Case* with approval.

While it may be that the child knew the nature of an oath, there is nothing to show that she knew the consequences of an oath.

Regretfully, I think that the appeal must be allowed and a new trial directed.

Appeal allowed; new trial directed.

C. A.
1946
Nov. 6, 26.

REX v. O'HARA.

Criminal law—Carnal knowledge of girl under 16—Evidence of complainant—Offence requiring corroboration—Insufficiency of—Confession—Trial within a trial—Lesser offence substituted—Indecent assault—Criminal Code, Secs. 301, Subsec. 2, 835 and 1016, Subsec. 2.

The accused was convicted on a charge under section 301, subsection 2 of the Criminal Code of carnally knowing a girl of previous chaste character under the age of 16 years and above the age of 14. On the facts related by the complainant the accused and another boy took her in a car to an isolated spot near Ioco and there forcibly had sexual intercourse with her. The complainant was the only witness as to the offence and corroboration was necessary under said section in order to obtain a conviction. The learned trial judge found corroboration in the evidence as to the condition of the girl's clothes after the assault and her condition then as shown by her appearance and by medical examination, by the identification of the car, and by the finding of certain "prophylactic articles" and two "soiled handkerchiefs" at the place where the offence took place.

Held, on appeal, that none of this evidence implicated the accused. It was corroborative in the sense that it tended to affirm the credibility of the complainant, but it was not independent evidence and was therefore not corroborative within the statutory requirement.

The learned judge also found corroboration in a confession made by the accused after his arrest.

Held, on appeal, that there was not sufficient inquiry upon the trial within a trial to warrant the admission of the confession.

Held, further, that the result would have been a new trial were it not that the Court concluded a conviction for indecent assault should be substituted as the charge of indecent assault was included in the charge of carnal knowledge and the trial judge had no doubt whatever that the complainant's story was true, and that the accused indecently assaulted her.

APPEAL by accused from his conviction by SULLIVAN, Co. J. on the 8th of August, 1946, on a charge that he did unlawfully and carnally know Madeline June MacPherson, a girl of previously chaste character under the age of 16 years and above the age of 14 years, not being his wife. The facts are set out in the reasons for judgment.

The appeal was argued at Vancouver on the 6th of November, 1946, before ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

McGivern, for appellant: Under the section in question, *i.e.*,

section 301, subsection 2 there must be corroboration in some material particular by evidence implicating the accused. The learned judge was in error in finding corroboration in small matters such as the condition of her clothes, her appearance when she arrived home and medical examination, but the only material evidence that might be accepted was a statement by the accused. They should have produced accused's father when it was submitted. The father was at the first warning given accused but not at the second: see *Rex* v. *De Mesquito* (1915), 21 B.C. 524. Her complaints to her grandmother and her mother cannot be accepted as corroboration.

L. H. Jackson, for the Crown: She arrived home at 11.30 p.m., which is some corroboration. They took her in the auto at 8.30 p.m. and they were to drive her home: see *Steele* v. *Regem* (1924), 42 Can. C.C. 375; *Rex* v. *Bowes* (1909), 15 Can. C.C. 326, at p. 329; *Ibrahim* v. *Regem* [1914] A.C. 599, at pp. 608-9; *Rex* v. *Sankey* (1927), 38 B.C. 361. The Crown was not required to call the father as to the warning.

McGivern, replied.

Cur. adv. vult.

26th November, 1946.

ROBERTSON, J.A.: The accused appeals from his conviction under section 301, subsection 2 for carnally knowing a girl of previous chaste character, under the age of 16 years and above the age of 14 years, not being his wife. He was defended by experienced counsel.

The facts as related by the complainant are that on the 2nd of June she was just under 16 years of age; that the accused and another boy named Roderique Pigeau took her to an isolated spot near Ioco and there forcibly had sexual intercourse with her; that she was of previously chaste character. No evidence was called for the defence. Her evidence alone would have been sufficient to convict were it not for the provision in section 301, subsection 2 that no person accused of any offence under that subsection may be convicted upon the evidence of one witness unless such witness is corroborated in some material particular by evidence implicating the accused.

The complainant was the only witness as to the offence and

C. A.
1946
REX
v.
O'HARA
Robertson, J.A.

therefore corroboration was necessary if there was to be a conviction. The learned trial judge found corroboration in the evidence as to the condition of the girl's clothes after the assault, and her condition then as shown by her appearance and by medical examination, by the identification of the car, and by the finding of certain "prophylactic articles" and two "soiled handkerchiefs" at the place where the complainant says the offence took place.

In my opinion none of this evidence implicates the accused and is therefore not corroborative. As was said in *Rex* v. *Reardon,* [1945] O.R. 85, evidence of this nature is corroborative in the sense that it tends to affirm the credibility of the complainant, but it is not independent evidence and is therefore not corroborative within the statutory requirement.

The learned judge also found corroboration in a confession made by the accused after his arrest. There is no doubt that if the confession was admissible in evidence there was ample corroboration within the subsection. When a confession is sought to be put in evidence the trial judge should (unless there is a clear admission that it was free and voluntary—section 978) hold a trial within a trial—*Rex* v. *Pais* (1941), 56 B.C. 232, at p. 236; and *Rex* v. *Mandzuk* (1945), 62 B.C. 16, at pp. 22-3. There may be also cases where from the conduct of counsel, it may not be necessary to hold a trial within a trial. See O'HALLORAN, J.A. in *Mandzuk's* case at p. 165. This is not one of those cases.

The confession came about in this way: On the evening of the 2nd of June Provincial constable Saunders, who had been instructed to investigate the complaint made on that night, by the girl, went to the place where it was alleged the offence had taken place, and found the prophylactic articles and handkerchiefs above mentioned. On June 7th, he was called to the New Westminster city police station with regard to this same complaint. When he arrived at the police station he found that Roderique Pigeau was at the station, being held there. From certain other information that he had received he subsequently questioned Pigeau, when Pigeau "made a certain statement," and as a result of this statement he laid a charge against Pigeau

and O'Hara. A warrant was issued and served by Saunders on the accused on the 9th of June, 1946, at the accused's house. He gave him the usual warning in the presence of the accused's father. The accused made no reply. Then Saunders said:

I brought him to Port Coquitlam and on the way he asked about Rod Pigeau—asked where he was. And he was told. And when I arrived near Port Coquitlam he stated that he had been . . .

At this juncture the witness was cross-examined by counsel for the defence who brought out that the accused's father was present when the boy was arrested and the charge read and warning given to the accused, but not with the accused and Saunders on the way to Port Coquitlam. When they arrived at the police office at Port Coquitlam the evidence of Saunders is, he again warned the accused and then his evidence is:

Petapiece: And as a result of the last warning, did the accused make any statement? Yes.

What did he say? He wrote out a statement in his own handwriting.

Is this [indicating] the document to which you refer? Yes, this is the document.

You say he wrote that out, himself? That is correct.

There was no further cross-examination. No questions were asked by the Court or by Crown counsel. The boy's father was not called. The accused was not told of his right to testify as to the admissibility of the confession — see *Rex* v. *Seabrooke,* [1932] O.R. 575, at p. 579—although this may not have been necessary as he was represented by experienced counsel. See BIRD, J.A. in *Rex* v. *Mandzuk, supra,* at p. 172. There was no statement by Saunders that the statement was made freely and voluntarily. Of course a statement to that effect by Saunders would not have been sufficient of itself to justify the reception of the confession. *Thiffault* v. *Regem,* [1933] S.C.R. 509, at p. 515. Saunders was not examined as to the circumstances under which the confession was made—see *Rex* v. *Godwin,* [1924] 2 D.L.R. 362, at p. 371—or as to what he had told the accused about his talk with Pigeau.

I have come to the conclusion that there was not sufficient inquiry upon the trial within a trial to warrant the admission of the confession. The result would have been a new trial were it not that I think a conviction for indecent assault should be substituted for the following reasons:

C. A.
1946
REX
v.
O'HARA
Robertson, J.A.

The learned trial judge could have convicted the accused of indecent assault, as was done in *Rex* v. *Jing Foo* (1939), 54 B.C. 202, pursuant to section 835, under which he had the same power to convict of any other offence than that charged as a jury would have in case the prisoner were tried by a Court having jurisdiction to try the offence in the ordinary way, and might have rendered the verdict which might have been rendered by a jury upon a trial at the sitting of any such Court.

As provided in section 951 every count is to be deemed divisible and if the commission of the offence charged as described in the enactment creating the offence, includes the commission of any other crime, the accused may be convicted of any such included offence which is proved. The charge of indecent assault is included in the charge of carnal knowledge. See *Rex* v. *Cameron* (1901), 4 Can. C.C. 385; *Rex* v. *Stewart* (1938), 71 Can. C.C. 206, at p. 219 and *Regina* v. *Brice* (1891), 7 Man. L.R. 627.

Section 1016, subsection 2 provides that where an appellant has been convicted of an offence and the judge could, on the indictment, have found him guilty of some other offence, and on the actual finding it appears to this Court that the judge must have been satisfied of facts which proved him guilty of that other offence, this Court may, instead of allowing or dismissing the appeal, substitute for the verdict found, a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed by the trial Court as may be warranted in law for that other offence, not being a sentence of greater severity.

There is no statutory provision requiring a charge under section 292 to be corroborated. There is the common law requirement that in charges of sexual offences the judge should tell the jury that it is within their legal province to convict upon such uncorroborated evidence, but to warn the jury of the danger of convicting in such case. *Gouin* v. *Regem,* [1926] S.C.R. 539, at p. 542; *Rex* v. *Baskerville,* [1916] 2 K.B. 658; *Mahadeo* v. *Regem,* [1936] 2 All E.R. 813, at p. 817 and *Rex* v. *Jones* (1925), 19 Cr. App. R. 40; *Rex* v. *Reeves* (1941), 57 B.C. 90.

The learned trial judge had no doubt whatever that the

complainant's story was true, and that the accused indecently assaulted her, and accordingly could have convicted him of indecent assault.

I would substitute for the verdict found a verdict of guilty of indecent assault and in view of the very special and sordid circumstances of this case, which need not be set out, pass the same sentence, *viz.*, two years, in substitution of the sentence passed.

SIDNEY SMITH, J.A.: I agree with the disposition made of this appeal by my brother ROBERTSON.

BIRD, J.A.: I agree with my brother ROBERTSON.

Verdict of guilty of indecent assault substituted; same sentence imposed.

BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED v. BUCKERFIELD'S LIMITED.

C. A.
1946
Nov. 13.
1947
Feb. 7.

Negligence — Collision — Plank crossing on railway — Two-car train and motor-truck—Verdict against the evidence—Appeal.

Shortly after the noon hour on the 24th of November, 1945, a two-car train of the plaintiff company was travelling east on the Burnaby Lake line of the plaintiff company at about 30 miles an hour and approaching the intersection of Westminster Avenue. Regent Street runs east and west almost parallel with the railway track about 60 feet on its north side and at its west end where it reaches Westminster Avenue it takes a sharp turn south on Westminster Avenue and crosses the railway track on a plank crossing. When the motorman on the two-car train came into view of Regent Street and about 180 feet away from the plank crossing he saw the motor-truck of the defendant coming west on Regent. He sounded his whistle and a second time when about 120 feet away and again when getting close to the plank crossing. He thought they would stop and let them pass when he first sounded his whistle but he realized on the third sounding that they were not going to stop. He put on his emergency brakes but it was then too late to avoid the accident and the two vehicles collided on the plank crossing. The two men on the defendant's motor-truck stated they did not hear the whistle. There was a clear vision between the railway track approach and Regent Street except some brush about five and one-half feet high between Regent Street, close to the plank crossing, and the railway to the west, but not

C. A.

1946

BRITISH COLUMBIA ELECTRIC RY. CO. LTD. v. BUCKERFIELD'S LTD.

high enough to obscure the vision. After the collision, the train carried the motor-truck about 125 feet on the railway track. On the trial the jury found that the driver of the defendant's motor-truck was 75 per cent. to blame and the driver of the two-car train 25 per cent. to blame. *Held*, on appeal, reversing the decision of SARGENT, Co. J. (SIDNEY SMITH, J.A. dissenting), that the driver of the motor-truck was wholly to blame for the accident. There was no duty cast upon the train operator to take steps to reduce the speed of the train before he did so.

APPEAL by plaintiff and cross-appeal by defendant from the decision of SARGENT, Co. J. and the verdict of a jury in an action for damages resulting from a collision between a two-car train on the Burnaby Lake line of the plaintiff company and a motor-truck of the defendant at the intersection of Westminster Avenue crossing the tracks of the plaintiff company. In the result, the defendant was found to be three-quarters to blame for the accident and the plaintiff one-quarter to blame. The facts are set out in the head-note and reasons for judgment.

The appeal was argued at Vancouver on the 13th of November, 1946, before O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

John L. Farris, for appellant: The driver of the truck was found three-quarters to blame and we one-quarter. What was found against us did not constitute negligence and the defendant was guilty of ultimate negligence. We were entitled to assume they would stop the truck. The only witness for the defendant was a swamper: see *Andreas* v. *Canadian Pacific Ry. Co.* (1905), 37 S.C.R. 1. The so-called negligence held by this jury was not negligence in law: see *Morrison* v. *The Dominion Iron & Steel Co., Ltd.* (1911), 45 N.S.R. 466; *Leviten* v. *C.N.R.*, [1940] 1 D.L.R. 622; *B.C. Electric R. Co.* v. *Protopappas*, [1946] 4 D.L.R. 1, at p. 7; *Allen* v. *Esquimalt and Nanaimo Ry. Co.*, [1921] 1 W.W.R. 750; *Swartz* v. *Wills*, [1935] S.C.R. 628, at p. 633; *City of Verdun* v. *Yeoman*, [1925] 2 D.L.R. 448, at pp. 458-9. If the plaintiff is guilty of negligence then the defendant is guilty of ultimate negligence. There was nothing to obstruct the view. They refer to a bush five and one-half feet high between the road and the track but the driver of the truck could see well over that: see *Friedman* v. *Canadian National Railway Co.* (1924), 31 C.R.C. 401; *Sullivan et al.* v. *Dworchuk*, [1933] O.W.N. 186, at p. 187.

Bull, K.C., for respondent: The case was decided by a jury on a conflict of evidence on certain points: see *Rex* v. *Broad*, [1915] A.C. 1110, at p. 1114; *Grand Trunk Railway Co. of Canada* v. *McAlpine* (1913), 83 L.J.P.C. 44. A railway is in no higher position than anyone else.

Farris, replied.

Cur. adv. vult.

7th February, 1947.

O'HALLORAN, J.A.: I concur in the judgment of our brother BIRD. In the result the appellant railway company is freed from the 25 per cent. responsibility with which it was fixed below. Once that opinion prevails, the proper course for this Court to take in the circumstances of this case, in which view I am authorized to say our brother BIRD agrees, is to do what the Court below ought to have done, *viz.*, to increase the respondent's responsibility from 75 per cent. to 100 per cent.; and see *Jardine* v. *Northern Co-operative Timber and Mill Association* (1945), 61 B.C. 86, at pp. 92-3, and cases there cited. Judgment is directed to be entered for the appellant accordingly together with the costs in this Court and in the Court below.

SIDNEY SMITH, J.A.: At the conclusion of the hearing I felt inclined to agree with the view submitted by counsel for the appellant, but upon reading and rereading the evidence and the charge of the learned trial judge I find myself not sufficiently certain of the matter to justify disturbing the verdict of the jury and the judgment entered thereon. No doubt the jury's answer to question 4 was not very aptly framed, but I think we must interpret it by the evidence; and it must be remembered, too, that the jury had the benefit of a view of the *locus*. As was said by Anglin, J., as he then was, in *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263, at p. 271:

> . . . Meticulous criticisms of a jury's findings are not admissible and they must always be read with and construed in the light of the issues presented by the pleadings, the evidence and the charge of the trial judge. While it might have been more satisfactory had the second finding been more specific, if dealt with in the manner I have indicated it seems to be sufficiently certain what the jury meant by it.

I think on consideration that what the jury meant was that in

C. A.
1947

BRITISH COLUMBIA ELECTRIC RY. CO. LTD. v. BUCKERFIELD'S LTD.

the special circumstances of the present case, namely, obstruction by bushes and the type of crossing, the motorman should have taken special precautions when he saw the defendant's truck and that not having done so, he must be held partly at fault.

In the circumstances therefore I cannot say that the learned judge was clearly wrong in giving effect to the verdict of the jury, and I would dismiss the appeal.

BIRD, J.A.: The appellant railway company and the respondent, after trial before SARGENT, Co. J. and a jury, were respectively found guilty of negligence contributing to a collision between an interurban tram of the railway company and the respondent's motor-truck; the former being found at fault to the extent of 25 per cent., the latter 75 per cent. The accident occurred at a level highway crossing on Regent Street, which street lies north of and parallel to the railway track to the east of the crossing and turns south immediately before crossing the railway track. The tram approached the crossing from the west, the truck from the east by way of Regent Street. Operators of vehicles approaching the crossing had a clear field of vision between points on the railway track and Regent Street lying within 180 feet west and east of the crossing, with this exception that the view of the track to the west may have been obscured by bushes from that part of Regent Street between the track and the point where the street turns south.

There was evidence of various witnesses that the tram whistle was sounded on three separate occasions: first, at the trestle, 600 feet west of the crossing; again at the signal post 180 feet west thereof, and finally when the tram arrived within 40 feet of the crossing. Hopcraft, the operator of the tram, said that he first saw the truck at an undetermined point on Regent Street proceeding from the east towards the crossing at a moderate speed when the tram was about 180 feet west of the crossing, proceeding easterly at about 30 miles per hour. He then threw off the power and gave the second whistle signal. He says that he then assumed in the related circumstances that the truck driver would not attempt to cross the tracks in front of the approaching tram. When the tram reached a point approximately 40 feet west of

the crossing the continued onward movement of the truck then in close proximity to the crossing for the first time caused Hopcraft to realize that the truck might not stop before reaching the track. Consequently he immediately applied the emergency brakes, but too late to avoid the collision.

The driver of the respondent's truck was not available at the time of the trial, which took place some 18 months after the accident, but his assistant Mills, the swamper, testified that neither he nor the driver saw the tram until the truck was on the crossing and the tram but a few feet distant, nor did either of them hear any whistle or other signal. Mills stated that both the driver and himself were familiar with the crossing and knew it to be a place which required the exercise of great caution in crossing the tracks. He said that when coming down Regent Street one could see between 200 and 300 feet up the track west of the crossing, but the view of the track to the west was obscured by bushes after the truck turned south on Regent Street.

Questions were submitted to the jury and answers given as follows:

1. Was the driver of the defendant's truck guilty of any negligence causing or contributing to the accident? Yes.

2. If yes, in what did such negligence consist? Considering obstructions and considering at the time of the accident, Buckerfield's driver did not exercise proper caution before proceeding over the rail line.

3. Was Hopcraft, motorman of the B.C. Electric Railway Company, Limited, guilty of any negligence causing or contributing to the accident? Yes.

4. If yes, in what did such negligence consist? Hopcraft evidently depended too much on the discretion of Buckerfield's driver. We feel that the proper course should have been upon seeing the truck to cut his speed sooner to enable him to come to a full stop if Buckerfield's driver gave indication that he was going to proceed across the track.

5. If the driver of the defendant's truck was guilty of negligence, could Hopcraft, the B.C. Electric motorman, by exercise of reasonable care have avoided the accident notwithstanding such negligence? [No answer].

6. If so, how? [No answer].

7. If Hopcraft, the B.C. Electric motorman, was guilty of negligence, could the driver of the defendant's truck by the exercise of reasonable care have avoided the accident notwithstanding such negligence? [No answer].

8. If so, how? [No answer].

Objection was taken below by counsel for the railway company to the fact that the jury had failed to answer questions 5 and 6, whereupon the foreman of the jury stated to the Court that the

C. A.
1947

BRITISH COLUMBIA ELECTRIC RY. CO. LTD. v. BUCKERFIELD'S LTD.

Bird, J.A.

jury considered that the answers to questions 3 and 4 covered questions 5 and 6, an explanation which was accepted by the Court over counsel's objection.

Counsel for the appellant bases this appeal substantially upon the grounds that the negligence of the railway as found upon the answer to question 4, does not constitute negligence in law. Alternatively, the finding of negligence against the appellant was unreasonable and perverse and further that the respondent's driver was guilty of ultimate negligence.

The answers of the jury to questions 3 and 4 I think negative all other grounds of negligence charged against the railway company or its servant Hopcraft, including excessive speed and insufficient signals, by the fact that the finding limits the negligence to the failure of Hopcraft to "cut speed sooner": *Andreas* v. *Canadian Pacific Ry. Co.* (1905), 37 S.C.R. 1.

The question then arises upon the evidence earlier outlined as to whether in law the motorman committed a breach of duty in failing to

> cut his speed sooner to enable him to come to a full stop if Buckerfield's driver gave indication that he was going to proceed across the track.

The effect of the answer to question 4, as I interpret the language, is to find that although the statutory duty of the railway company had been duly performed, nevertheless it was also the duty of the tram-operator to reduce speed in anticipation that the truck might cross the track and that failure to do so constituted a breach of that duty contributing to the accident.

No such duty arises in my opinion unless some special circumstance is shown which creates the duty. If, when the truck first became visible to the tram-driver or subsequent thereto, anything had occurred in relation to the operation of the truck or otherwise in the circumstances disclosed on the evidence to cause the tram-operator reasonably to apprehend an accident, it would then have been his duty to take appropriate action to avoid a collision, for the railway company's statutory right of way at a highway crossing does not relieve it of the obligation to take due care.

In *Bronek* v. *Winnipeg, Selkirk and Lake Winnipeg Ry. Co.*, [1933] A.C. 61, at p. 69, Lord Wright, speaking for the Judicial

Committee, and interpreting the Board's decision in *Rex* v. *Broad,* [1915] A.C. 1110, said:

> . . . The statutes recognize as basic the travelling public's rights on the highways just as in the case of *Rex* v. *Broad,* [1915] A.C. 1110, where, though the railway company was given by statute a preferential, but not exclusive right of way at the highway crossing over the railway, this Board held that those using the highway had still "the right to have some appropriate measure of care observed by those directing the train."

And *cf. Columbia Bithulitic Limited* v. *British Columbia Electric Rway. Co.* (1917), 55 S.C.R. 1, *per* Duff, J. at p. 13.

Here I do not find in the evidence anything to create in the mind of the tram-operator a reasonable apprehension of danger. The approaching vehicles appear to have been in clear view of each other for a distance of 180 feet east as well as west of the crossing. The speed of the truck was moderate. There was nothing to indicate to him either that the truck-driver had not heard the signals or had failed to see the tram. He expected the truck would stop before crossing the track. Hopcraft says that he did not contemplate danger until, when 40 feet from the crossing, he observed the continued forward motion of the truck then in close proximity to the tracks.

In those circumstances I do not think he had reason earlier to anticipate that the truck-driver would attempt to cross in front of the oncoming train, and consequently was justified in his expressed assumption that the truck would stop at the crossing.

In *Hendrie* v. *Grand Trunk R.W. Co.* (1921), 51 O.L.R. 191 the Court of Appeal of Ontario sustained the judgment of Mulock, C.J. Ex. who had found there was no evidence to support the jury's findings of negligence, and had dismissed the action. The opinion there expressed by the learned trial judge is, I think, appropriate in the circumstances here. He said at p. 196:

> It is not the duty of the defendant company whenever their train is approaching a level highway crossing to give special warning, and to apply the brakes, which means to slow the train. The statute has declared what, under such circumstances, their duty is, and in this case the company had performed their statutory duty. Were there any exceptional circumstances which created a new duty? If, when the train was within 200 yards of the crossing, those in charge had reason to believe that a collision would take place unless they gave special warning and applied the brakes, it was their duty to have done these things, but not if they had no reason to apprehend

C. A.
1947
BRITISH COLUMBIA ELECTRIC RY. CO. LTD. v. BUCKERFIELD'S LTD.
Bird, J.A.

an accident. Were it otherwise it would mean that whenever a train was approaching a level crossing, and any one on the highway was also approaching it, under circumstances like those in this case, the company must give special warning and slow up the train. If such were law, the operation of steam railways would be impracticable.

I am unable to discover here any circumstances that made it the duty of the company to give such special warning and to apply the brakes. The whistle had been sounded and the bell was ringing, as required by the statute. The approaching train was visible to the occupants of the truck when it was in a place of safety, and where it could have remained, and the truck was proceeding at the readily controllable speed of about 6 miles an hour on a slightly up-grade road. There was nothing in any of these circumstances to cause a careful trainman to suppose that the driver of the truck intended to run the grave risk of an accident by endeavouring to cross the tracks in front of the train. On the contrary, they were justified in assuming that he would act with prudence and remain in a place of safety, and, therefore, they were not bound to give special warning and apply emergency brakes.

Two of the majority judges in the Court of Appeal there refer with approval to the opinion of Riddell, J. in *City of London* v. *Grand Trunk R.W. Co.* (1914), 32 O.L.R. 642, at p. 644; and *cf. Morrison* v. *The Dominion Iron & Steel Co., Ltd.* (1911), 45 N.S.R. 466; and *Jones* v. *Toronto and York Radial R.W. Co.* (1911), 25 O.L.R. 158, *per* Meredith, J.A. at p. 167.

I am therefore of opinion that the appellant was not guilty of the negligence imputed to the tram-operator by the jury's answer to question 4, since, in the absence of special circumstances, no duty was cast upon him to take steps to reduce the speed of the tram before he did so.

I would allow the appeal.

Appeal allowed, Sidney Smith, J.A. dissenting.

Solicitor for appellant: *C. L. McAlpine.*
Solicitor for respondent: *W. W. Walsh.*

REX v. JOHANSON.

C. A.
1946
Oct. 8, 22.

Criminal law—Selling "tags" on street without leave—Ordered by police officer to move on—Refusal by accused to move on—Obstruction—Criminal Code, Sec. 168—B.C. Stats. 1933, Cap. 79, Sec. 13.

The accused was convicted of obstructing a police officer in the execution of his duty. The accused was standing on a street corner with a box containing "tags" in one hand and a tin can in the other, rattling it to attract the attention of passers-by. He had on the lapel of his coat a placard reading, "Give to win the peace." An officer in uniform told him he was a police officer and asked him to move along. Accused said, "Well, I am not going to leave the corner." The constable then said, "Move along, please." Accused moved about three steps then came back and remained there. The officer then withdrew for further instructions. He then came back and found accused in the same place. He again asked accused to move along. Accused replied, "I have orders to stay here and I guess I will stay."

Held, on appeal, affirming the decision of deputy police magistrate MacInnes (BIRD, J.A. dissenting on the ground that the direction was not lawful since it was not given in the execution of any duty), that persistence in doing what a person is lawfully directed by a police officer in the execution of his duty to refrain from doing, is obstruction of the officer.

Rex v. *Golden* (1936), 51 B.C. 236, followed.

APPEAL by accused from his conviction by W. W. B. McInnes, Esquire, deputy police magistrate, Vancouver, on a charge of obstructing a police officer in the execution of his duty, contrary to section 168 of the Criminal Code.

The appeal was argued at Victoria on the 8th of October, 1946, before ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Stanton, for appellant.

H. W. R. Moore, for respondent.

Cur. adv. vult.

22nd October, 1946.

ROBERTSON, J.A.: The accused was convicted of obstructing a police officer in the execution of his duty. The evidence shows that the accused was "tagging," that is, soliciting donations from the public passing by, on a Saturday afternoon, in the downtown area of Vancouver. The accused was standing at the southwest corner of two busy streets—Main and Cordova. "There was quite a few people passing." At this point the sidewalk was about 12 feet wide and the space occupied by the accused was two to

C. A.
1946
REX
v.
JOHANSON
Robertson, J.A.

three feet wide. The accused had in his left hand a box 12 inches by 18 inches and was holding out in his right hand a tin can which he was "rattling," evidently to attract the attention of the public, and as an invitation to give. The box contained tags, one of which would be given to each person who contributed. The accused had on the lapel of his coat a placard reading "Give to win the peace." The officer in question was in uniform. He told the accused he was a police officer, and asked him to move along. The accused said "Well, I am not going to leave the corner." The constable then said "Move along, please." The accused moved "possibly three steps, and he came back and he stood there." The officer then withdrew for further instructions. Later he went back and he found the accused "still in the same position we had left him." He told him he had to move along and put the can away. The accused said "I have orders to stay here and I guess I will stay."

Section 253 (10) of the Vancouver City Charter (section 13, B.C. Stats. 1933, Cap. 79) imposes the obligation upon all constables of "preventing" infractions of by-laws of the city. Sections 67 and 79 of By-law No. 2849—Street and Traffic By-law —provide as follows:

67. No person shall stand or loiter on any street in such a manner as to obstruct or impede or interfere with traffic thereon.

79. No person shall carry any advertising device on or along any street without first having obtained permission therefor in writing from the Chief Constable.

It is not necessary to consider section 79. In my opinion, a person occupying permanently as much of the sidewalk as the accused did under the circumstances above mentioned was interfering with traffic. He was accosting members of the public to induce them to subscribe. The public were not accorded the use of all the sidewalk. Anyone walking along close to the kerb would have to turn to pass the accused. The officer's duty was to prevent an infraction of the by-law as well as to take action after the by-law had been broken. The facts in this case showing obstruction are in my opinion much stronger than those in *Rex* v. *Golden* (1936), 51 B.C. 236, in which this Court held persistence in doing what a person is told by a police officer in the execution of his duty, not to do, was obstruction of an officer.

The appeal is therefore dismissed.

SIDNEY SMITH, J.A.: I agree with my brother ROBERTSON.

BIRD, J.A.: The accused was convicted before W. W. B. McInnes, Esquire, deputy police magistrate at the city of Vancouver, of an offence under Code section 168

For that at the City of Vancouver, Province of British Columbia, on the 1st day of June, 1946, Elfred Johanson unlawfully did wilfully obstruct a peace officer, to wit, L. W. Cuthbert, police constable No. 4, in the execution of his duty.

The case for the Crown involved proof of three essential elements of the offence, that is to say: (1) That at the time of the commission of the offence the constable was engaged in the execution of a duty, *i.e.*, to enforce the provisions of a by-law of the city of Vancouver being No. 2849 Street and Traffic By-law; (2) that the accused obstructed the constable in the execution of that duty; (3) that the obstruction was wilful.

In the circumstances disclosed on the evidence later discussed I take it that the burden was upon the Crown to establish (1) Either that the accused had committed a breach of the by-law or that his actions furnished a reasonable cause for belief by the constable that he was about to do so; that is to say, that the accused had committed or there was reasonable belief that he was likely to commit an unlawful act. *Betts* v. *Stevens* (1909), 79 L.J.K.B. 17. (2) That the accused obstructed the constable in his efforts to prevent a breach or repetition of a breach of the by-law. (3) That the obstruction was wilful, a term which imports design,

implying as it does a deliberate purpose to accomplish something forbidden, a determination to execute one's will in spite of and in defiance of law.

to adopt the language of Grimmer, J. in speaking for the Appeal Division, New Brunswick Supreme Court, in *Rex* v. *Griffin* (1935), 63 Can. C.C. 286, at p. 290.

The following are the relevant sections of the by-law: [already set out in the judgment of ROBERTSON, J.A.].

The evidence discloses that on June 1st, 1946, numerous persons were engaged on downtown street corners of the city in soliciting subscriptions to support the then current strike of a lumbermen's union. These persons, of whom the accused was one, severally occupied positions on various street corners; each

C. A.
1946

REX
v.
JOHANSON

Bird, J.A.

carried a box and wore labels, upon which were inscriptions inviting donations to the strike fund.

The learned magistrate in his report to this Court made pursuant to section 1020 of the Criminal Code has said in part:

> The union officials in charge of the strike decided to hold a tag day on the streets of Vancouver without any municipal permission.

He then outlines the evidence adduced on the trial and concludes

> it was a clear case of organized lawlessness and the appellant definitely defied the authorities.

Had it been shown that the constable was engaged in the enforcement of a city by-law which forbade tagging without municipal permission it is perhaps not now open to question that persistence by the accused in tagging activities after he had been directed by the constable to cease such activities would constitute not only a breach of the by-law but also an obstruction of the constable in the execution of his duty, *i.e.*, an offence under Code section 168. This I take to be the effect of the decision of the majority of this Court in *Rex* v. *Golden* (1936), 51 B.C. 236, although I am much impressed by the view expressed by the late Chief Justice MARTIN, then J.A., in his dissenting opinion in that case when he said (p. 240)

> the minor charge which could, admittedly, have been properly laid for breach of the by-law under Provincial summary jurisdiction, has been translated and magnified into a National crime of a serious character, which magnification is in my opinion not only oppressive but illegal.

But no such evidence was adduced before the learned magistrate. Indeed, it was conceded on the hearing of this appeal by counsel for the Crown that no such by-law had been enacted by the Vancouver City Council at the date of the alleged offence. In other words, tagging on the streets without municipal permission was not *per se* unlawful.

Then was there before the Court below any evidence of a breach or anticipated breach by the accused of the related provisions of the Street Traffic By-law sufficient to justify the officer in requiring the accused to cease such activities? For if there was not, then the direction of the constable cannot be one given in the execution of any duty. *Rex* v. *Sutherland* (1943), 59 B.C. 159. And if a breach or reasonable anticipation thereof was proved, was there sufficient evidence of obstruction by the

accused of the constable in the execution of his duty to enforce those sections of the by-law?

Dealing first with the evidence of constable Cuthbert, which possibly may relate to breach by the accused of section 67 of the by-law, he said on examination in chief:

Come on down to this particular defendant—where was he stationed? This man I observed at 12.20 noon, twenty minutes past twelve, noon, at the southwest corner of Main and Cordova, that is just down the street from here; he was standing there with this box 12 x 18.

This particular box you have now? Yes, this very box. And this very tag fastened on to his lapel: "Give to win the peace," and a tin can. He had the box in his left hand and the tin can in his right hand.

Rattling it as you are? Yes, rattling the same. He was holding it out, in this position. Out in front of him.

On cross-examination he said:

We had this box as an exhibit; he would be holding it this way, the way you were holding it? Yes.

It is about 12 inches wide. Was he standing right on the corner? Yes, on my approach he was standing almost on the corner. That is, on the outside edge of the corner with the box out in front of him and the can to the right, rattling it.

You mentioned that you know other people going by had to go out of their way to get by; what do you mean by that, were they out on the road going past? Well, in this particular instance there was not such an awful lot of traffic, there was quite a few people passing but I didn't notice anybody have to get out of his way.

. . . . .

Can you estimate the general width of sidewalks in that section of Vancouver? I have found my estimates are not very accurate, but I would say at least 12 feet. He would maybe taking up two feet or perhaps three feet.

. . . .

You spoke of the general situation before; were there any untoward incidents of any kind happening? No, I never say any disorderly incidents. I saw those more flagrant cases of obstruction on the sidewalk.

You didn't find them flagrant enough to bring in? Yes, I brought some in from different sections but in this particular case he was, the defendant was the first one I saw, and I reported the incident to my superiors.

In general, the situation was fairly quiet throughout the city; you did not have occasion to bring in persons on any other charges? No, they were very orderly, they behaved themselves good, they were very polite to the police, they had their own ideas.

This evidence of the constable which substantially covers his testimony regarding the activities of the accused prior to arrest goes no farther in my opinion than to show that the accused stood on the street and solicited subscriptions to the fund. I

C. A.
1946
REX
v.
JOHANSON
Bird, J.A.

think it falls short of proof that he "stood or loitered in such a manner as to obstruct or impede or interfere with traffic." Moreover, it is apparent from the answer on cross-examination that the witness did not observe any instance wherein the accused interfered with, impeded or obstructed traffic. Nor do I find in the evidence that there was anything in the conduct of the accused which caused the constable to fear or anticipate that the accused would interfere with, obstruct or impede traffic, for he said:

> They were very orderly, they behaved themselves good, they were very polite to the police, they had their own ideas.

which latter answer does not exclude the conduct of the accused and as I read the evidence, was intended to include his actions.

In *American Foundries* v. *Tri-City Council* (1921), 257 U.S. 184, a "picketing case," Chief Justice Taft when delivering the majority opinion of the Supreme Court of the United States, in defining what constitutes obstruction, used language which to me appears appropriate to the situation here. He said at p. 204:

> . . . In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege. We are a social people and the accosting by one of another in an inoffensive way . . . are not regarded as . . . a violation of that other's rights. If, however, the offer is declined, . . . , then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction.

I am unable to find in that testimony any proof of breach or even reasonable contemplation by the constable of a probable breach by the accused of section 67 of the by-law. The evidence contains no suggestion of any offensive approach to other persons on the street nor any action which savours of a violation of the rights of others.

In those circumstances the constable had no duty to execute in relation to enforcement of that section of the by-law.

Then on the question of obstruction: The decisions show that physical interference is not an essential ingredient of an offence under Code section 168—a menacing attitude which entails particular vigilance and care on the part of the constable in the execution of his duty is sufficient. *Betts* v. *Stevens, supra, Rex* v. *McDonald* (1911), 16 B.C. 191, at p. 192, and refusal to

obey a lawful order given by one having lawful authority has been held to constitute obstruction. *Rex* v. *Mason* (1935), 63 Can. C.C. 97.

Here the acts relied upon to show obstruction consisted only in a polite refusal by the accused to observe the constable's direction "to move along and put the can away," a refusal which showed no more in my opinion than a belief that it was made within his legal rights and a determination to stand on those rights.

It appears from the constable's evidence that having found the accused conducting himself in the manner described in the evidence quoted, the constable on two occasions directed the accused to move along. The constable then says:

He said: "Well, I am not going to leave the corner." I said: "Move along, please"; so he moved possibly three steps, and he came back and he stood there, so police constable 155, Campbell and I withdrew from that situation and came back to headquarters, and after some instructions we went back there. He was still in the same position we had left him. I then approached him again, I told him he had to move along and put the can away. He said: "I have orders to stay here and I guess I will stay."

At this second visit was he still collecting? Yes, he was rattling the can. He stopped rattling it while we were talking but he was rattling the can on our approach.

The direction so given to the accused made it abundantly clear that the obstruction of the constable, if there was any, did not relate to the constable's duty to enforce the provisions of section 79 of the by-law since no comment was made at any time to the accused by the constable to indicate that the accused in breach of section 79 carried "any advertising device on the street." Moreover, no direction to refrain from carrying any such device was given by the constable. The direction "to move along and put the can away" can only be interpreted in my opinion and must have been understood by the accused to mean, cease "tagging." Since tagging is not *per se* unlawful, there being no legal prohibition against it, it follows that unless a breach of section 67 of the by-law is shown to have been committed by the accused, and I think that none has been proved, then the constable was not acting in the execution of any duty when he directed the accused to move along. Therefore I think the accused was acting within his legal right in refusing to observe that direction.

C. A.
1946
REX
v.
JOHANSON
Bird, J.A.

In these circumstances I have reached the conclusion that the case falls within the principle which I conclude was the basis of the unanimous decision of this Court in *Rex* v. *Sutherland, supra,* that is to say, that to support a conviction for an offence under Code section 168 in circumstances such as are found here, the Crown must prove that the constable was engaged in the execution of a duty, namely, to prevent a breach by the accused of the by-law, *i.e.,* the committing of an unlawful act, which the constable had reasonable cause to believe the accused would commit or repeat, notwithstanding the warning against it.

There this Court found "there was no evidence to justify any such finding" (*i.e.,* a finding that the accused was causing an obstruction of traffic on the street). Under such circumstances the Court held that the constable was not acting in the execution of any duty when he directed Sutherland to cease the activities upon which he was engaged. Consideration of the evidence in this case satisfies me that the same conditions prevail here as were found to exist in the *Sutherland* case.

In my opinion, more particularly in view of the widespread social unrest presently prevailing in Canada, and in this I speak generally, it is now as important, if not more important, than at any time in our national history that the law be strictly and impartially enforced to the end that due observance of the law be maintained, that upon sufficient proof of the commission of an unlawful act the offender shall be convicted of the offence which prohibits the act, and punished accordingly; but that no one shall be convicted in respect of any act which is not shown to lie strictly within the prohibition of the law.

Here I have reached the concluson, after careful thought notwithstanding and with the highest respect for contrary opinion, that the accused has been convicted in respect of an act which does not fall within the prohibition of the law.

I would therefore allow the appeal and quash the conviction.

Since the majority of the Court have reached a contrary opinion, I subscribe to the view of the majority in the matter of sentence and concur in dismissing the appeal from sentence.

Appeal dismissed, Bird, J.A. dissenting.

REX v. CLARK.

C. A.
In Chambers
1946
Aug. 22, 23.

Criminal law—Bail—Pending appeal from conviction—Previous good character—Exceptional circumstances.

The accused and a woman named Gough were joint owners of a boarding-house. On the night of July 18th, 1946, there was a drinking party at which accused objected to Gough drinking. She decided to go out, ordered and got into a taxi, the accused following her who ordered the taximan to stop. As he did not stop Clark fired a shot through the rear window of the car. Accused was convicted of unlawfully having in his possession a revolver for a purpose dangerous to the public peace and sentenced to 12 months' imprisonment. Since conviction the accused and Gough were again on good terms and she apprehended no further trouble with him. On application for bail pending the termination of the appeal:—

Held, that in view of the fact that Gough had nothing to fear from Clark if he was released and the previous good character of the accused, there were exceptional circumstances which warranted an order for bail being made.

APPLICATION for bail heard by ROBERTSON, J.A. in Chambers at Vancouver on the 22nd and 23rd of August, 1946.

Castillou, K.C., for the application.
A. W. Fisher, for the Crown.

ROBERTSON, J.A.: Application for bail. The accused was convicted of unlawfully having in his possession a revolver for a purpose dangerous to the public peace, and sentenced to 12 months' imprisonment. The facts, shortly, are: The accused had been living with a woman named Gough in a boarding-house which belonged to the two of them. On the night of the 18th of July there had been a drinking party. The accused objected to Gough drinking. She decided to go elsewhere and called a taxi. She got in the taxi. The accused followed the taxi and, alleges, ordered the taximan to stop. As he didn't, Clark fired a shot through the rear window of the car.

Since the conviction of the accused, Gough states she is on good terms with him and does not appear to apprehend any further trouble from him. The accused has never been convicted before. He has lived 43 years in the Province of British

C. A.
In Chambers
1946

REX
v.
CLARK

Robertson, J.A.

Columbia and he and Gough own the property in Vancouver which is operated as a boarding-house. The property is said to be worth $10,000, with a mortgage on it for about half that amount. The accused has been employed for 25 years in the Game Department by the Provincial Government. It is not disputed that his character hitherto has been respectable. No doubt he could not have kept his position with the Government had it been otherwise. The appeal is based upon a point of law which is that the possession of the revolver by Clark was not unlawful because it was said that as an official of the Game Department he had all the powers of a policeman and therefore was entitled to carry a revolver. I do not express any opinion as to this point except to say that, in view of the charge, the argument of counsel for the accused in support of it requires consideration.

In view of the fact that apparently Gough has nothing to fear from Clark if he is released and the previous good character of the accused, it seems to me there are exceptional circumstances in this case which warrant an order for bail being made. *Rex* v. *Duncan,* [1945] 3 D.L.R. 415. Bail is fixed at $1,500.

Application granted.

C. A.
1947
Jan. 16;
Feb. 7.

BROWNE v. WHITE.

Landlord and tenant—Payment of rent—Place of payment—Rule that debtor must seek creditor — From first landlord continued to go to rented premises for his rent—In circumstances by implication payment was to be made at rented premises—R.S.B.C. 1936, Cap. 143, Sec. 19.

A landlord appealed from the dismissal of his summons under section 19 of the Landlord and Tenant Act for possession of the premises occupied by the tenant under a verbal lease from month to month at a rental of $10 per month payable in advance on the 1st day of each month. Prior to May 1st the landlord went to the tenant's house or office to collect the rent. In May and June, as the landlord had not called for the rent, the tenant tendered it to the landlord who refused to accept it because he had a pending application to the Board for increase of rental. There was no further offer to pay the rental by the tenant although she was,

as the learned trial judge finds, always ready and willing to pay her rent. The landlord did not ask for the rent. On September 30th, 1946, he gave notice to quit on or before the 31st October, 1946. She did not give up possession, whereupon he took proceedings under section 19 of the Landlord and Tenant Act, alleging she was in default for her rent for 15 days. It was held on the trial that when no particular place of payment of rent is mentioned, it is incumbent on the part of the tenant to go to the landlord and pay or tender him the money, but in this case the landlord undertook to go to the tenant to collect rent each month and this he did until May 1st, 1946, when he failed to call so the tenant sent her son to the landlord in the middle of the month with her rent but the landlord refused to accept it and he again refused to accept the rent in the middle of June. The rent was increased to $15 per month on July 25th, 1946. The landlord never called for the rent again and he found the tenant was always ready to pay if he called. The application for a writ of possession to issue was dismissed.

Held, on appeal, affirming the decision of SHANDLEY, Co. J., that under these circumstances by implication the payment of the rent was to be made at the rented premises. The tenant was not in default and accordingly the appeal should be dismissed.

APPEAL by plaintiff from the decision of SHANDLEY, Co. J. of the 25th of November, 1946, dismissing the plaintiff's (landlord) application for a writ of possession to issue.

The appeal was argued at Victoria on the 16th of January, 1947, before SLOAN, C.J.B.C., O'HALLORAN and ROBERTSON, JJ.A.

Beckwith, for appellant: Notice to quit was served on September 30th, 1946. At that time rent was in arrears since April: see *Haldane* v. *Johnson* (1853), 8 Ex. 689, at p. 694; *North London and General Property Company, Limited* v. *Moy, Limited*, [1917] 2 K.B. 617; *N. B. Land & Inv. Co.* v. *Sime*, [1928] 4 D.L.R. 214, at p. 216; *Fenny* v. *Casson* (1908), 12 O.W.R. 404, at p. 405.

Brethour, for respondent: The rent was paid up to the time he received an increase from the Board. The landlord always called for his rent previously and was always paid. The tenant was always ready and willing to pay.

Beckwith, in reply, referred to *Millard* v. *MacEwan*, [1945] 1 W.W.R. 509.

Cur. adv. vult.

C. A.
1947

BROWNE
v.
WHITE

7th February, 1947.

Per curiam (ROBERTSON, J.A.): Browne, the landlord, appeals from the dismissal of his summons under section 19 of the Landlord and Tenant Act for possession of the premises occupied by Mrs. White, the tenant,

under a verbal lease from month to month at a rental of $10.00 a month, payable in advance on the 1st day of each and every month.

No evidence was given as to when the tenancy commenced.

Under sections 12 and 13 of order 294 of the Wartime Prices and Trade Board, a tenant may not be evicted except, *inter alia*, the tenant is

in default in payment of rent for fifteen days or longer.

The facts are the tenant had paid up the rent until the 1st of May. In that month and again in June, as the landlord had not called for the rent, she tendered it to the landlord, who refused to accept it because he had a pending application to the Board for increase of rental. On the 25th of June the Board made an order raising the rental to $15 a month. There was no further offer to pay the rental by the tenant, although she was, as the learned trial judge finds, always ready and willing to pay her rent. The landlord did not ask for the rent. On the 30th of September, 1946, he gave the tenant notice to quit on or before the 31st of October, 1946. She did not give up possession, whereupon he took proceedings under section 19 of the Landlord and Tenant Act, alleging that she was in default for her rent for 15 days.

The tenant submits that she is not in default because under the special circumstances of this case, the place of payment was at the rented premises and, as the learned judge has found, she was always willing and able to pay. The landlord did not demand payment of the rent there or at all. The general rule is that where no place of payment is specified, either expressly or by implication, the debtor must seek his creditor. See *The Eider*, [1893] P. 119, at p. 136; *Robey* v. *Snaefell Mining Company* (1887), 20 Q.B.D. 152; *Charles Duval & Co., Limited* v. *Gans*, [1904] 2 K.B. 685; Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 195.

The landlord said:

As a rule I went to her house or office to collect. I can't recollent any

time the rent was brought to me. When I didn't call she sent the boy with rent. She didn't refuse to pay rent at any time. I always called for rent.

Sending the boy with the rent refers to the tenders in May and June above mentioned.

It would therefore appear from the very first, the rent was paid to the landlord at the rented premises. It seems to me then that under these circumstances by implication the payment of the rent was to be made at the rented premises.

I am of opinion that the tenant was not in default and accordingly the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *Harold A. Beckwith.*
Solicitor for respondent: *W. A. Brethour.*

REX v. ARNETT.

C. A.
1946
Oct. 17;
Nov. 5.

Criminal law—"Theft" in section 773 (a), Criminal Code as inclusive of "theft from the person" in section 379 where value of subject-matter not over $25—Maximum sentence on summary trial—Criminal Code, Secs. 774, Subsec. 2 and 778.

Accused was convicted on a charge that he did unlawfully steal one billfold and one twenty-dollar bill from the person of one Kiena and was sentenced to one year's imprisonment. The accused appealed from sentence to imprisonment for one year on the ground that "theft" in Code section 773 (*a*) is employed as a term of generic import. The Court was of opinion that submission is supported by a study of sections 347 to 389 of the Code which embraces various forms of theft. Hence it must be

Held, that "theft" in section 773 (*a*) includes "theft from the person" as described in section 379 where, as here, the value of the subject-matter does not exceed $25. In these circumstances under existing Code sections 774, subsection 2 and 778 (as applied by this Court in *Rex* v. *Clifton*, [1945] 3 W.W.R. 480) the maximum sentence is six months. Accordingly the sentence to imprisonment for one year was set aside and a sentence of six months' imprisonment with hard labour was imposed to run from the date of conviction.

APPEAL by accused from his conviction and sentence by Mackenzie Matheson, Esquire, deputy police magistrate at

C. A.
1946
REX
v.
ARNETT

Vancouver on the 14th of June, 1946, on a charge that he did unlawfully steal one billfold and one twenty-dollar bill from the person of Konstantin Kiena. He was sentenced to one year's imprisonment.

The appeal was argued at Victoria on the 17th of October, 1946, before O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

Hurley, for appellant.
Jackson, K.C., for the Crown.

Cur. adv. vult.

5th November, 1946.

Per curiam (O'HALLORAN, J.A.): We are all of opinion that this appeal from conviction for theft from the person must be dismissed because the network of inculpatory circumstances excludes any rational hypothesis of innocence.

The appellant appeals also from his sentence to imprisonment for one year on the ground that "theft" in Code section 773 (*a*) is employed as a term of generic import (as Chancellor Boyd considered it in *Reg.* v. *Conlin* (1897), 1 Can. C.C. 41, at p. 45).

We are of opinion that submission is supported by a study of Code sections 347 to 389, which embrace various forms of theft. Hence it must be held that "theft" in section 773 (*a*) includes "theft from the person" as described in section 379, where, as here, the value of the subject-matter does not exceed $25.

In these circumstances under existing Code sections 774, subsection 2 and 778 as applied by this Court in *Rex* v. *Clifton,* [1945] 3 W.W.R. 480 the maximum sentence is six months. *Reg.* v. *Conlin, supra,* a decision of the High Court of Ontario was cited to support another view, but it is noted that aspect of the decision turned upon section 785 of the Criminal Code as it stood in 1897 and which moreover limited application of that section to the Province of Ontario.

Accordingly the sentence to imprisonment for one year is set aside and we impose a sentence of six months' imprisonment with hard labour, to run from the date of conviction.

Appeal dismissed; on appeal from sentence sentence reduced.

REX v. WATERFIELD AND GILMORE.

C. A.
1946
Nov. 12, 22.

Criminal law—Testimony as to identity—Evidence contrary to statements previously made—Prior statements admitted to be untrue—Weight of such evidence for jury—Judge's charge.

A witness made a statement prior to the trial which was contrary to that given by him in the witness box, and he admitted that the previous statement was untrue.

Held, that this is not a ground for rejecting his testimony as worthless but merely affects its weight and it is for the jury to say whether and to what extent the testimony is to be believed.

The appeals, heard together by consent, were from convictions of robbery with violence. The two accused were positively identified by two witnesses at the trial, and proof of identity depended upon the acceptance of their testimony. One of these witnesses had testified at a previous trial that he was unable to identify the appellants. His wife, the other witness, had told the police at a line-up that she could not identify them. Both gave reasons at the trial for not telling the truth on the previous occasions. The appellants contended that the trial judge should have told the jury to discard said testimony entirely, and, alternatively, that he should have warned the jury it was unsafe to convict on that testimony alone.

Held, that there was no substance in the objections taken on the appeal to the judge's charge to the jury and the appeals were dismissed.

APPEALS by accused from their conviction before WILSON, J. and the verdict of a jury at the Fall Assize at Vancouver on the 19th of September, 1946, on a charge

that at the University Endowment lands, in the county of Vancouver, . . . on the 3rd day of January, 1946, the said Lawrence Allan Gilmore and Harry Waterfield, then being armed with offensive weapons, to wit, automatic pistols, unlawfully with and by means of violence then and there used by them to and against the person of Joseph Garner to prevent resistance did violently steal in the presence of the said Joseph Garner and against [his] will moneys amounting to about Ninety ($90.00) Dollars, two shillings and sixpence, . . . the property of the said Joseph Garner.

The appeals were argued at Vancouver on the 12th of November, 1946, before O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

Pelton, for appellant Waterfield: The complainant was in the Navy and when discharged attended the University and was there when robbed. He and his wife gave evidence as to the identity of the two men. On this the whole case turns. Both the witnesses gave contradictory evidence. They could not

C. A.
1946

REX
v.
WATERFIELD
AND
GILMORE

identify accused when they first saw them but they did identify them on the trial. It is submitted that their evidence should be disregarded and the jury should be so instructed: see *Rex* v. *Dickman* (1910), 5 Cr. App. R. 135; *Rex* v. *Parker* (1911), 6 Cr. App. R. 285; *Rex* v. *Gilling* (1916), 12 Cr. App. R. 131; *Rex* v. *Millichamp* (1921), 16 Cr. App. R. 83; *Rex* v. *Tavener and Tobitt* (1928), 21 Cr. App. R. 63; *Rex* v. *J.* (1929), 52 Can. C.C. 72; *Rex* v. *Smith* (1929), *ib.* 193. In this case the witnesses themselves created the doubt by their evidence.

Gonzales, for appellant Gilmour, endorsed the argument of *Pelton.*

Tysoe, for the Crown: The hold-up took place before Mr. and Mrs. Garner were married. It is entirely a case for the jury to deal with on the evidence: see *Rex* v. *Lew* (1912), 17 B.C. 77, at pp. 78 and 80; *Rex* v. *Armstrong* (1933), 59 Can. C.C. 172; *Rex* v. *Frank MacTemple* (1935), 64 Can. C.C. 18.

Gonzales, in reply, referred to *Rex* v. *Lake* (1916), 28 Can. C.C. 138, at pp. 141-2.

Cur. adv. vult.

22nd November, 1946.

O'HALLORAN, J.A.: At the Vancouver September Assize the two appellants were convicted of robbery with violence. They were identified beyond dispute by two witnesses at the trial who had an excellent opportunity to see them clearly when the crime was committed. Proof of appellants' identity depends upon acceptance of that evidence.

One of these witnesses admitted on the witness stand he had testified at a previous trial that he was unable to identify the appellants. On two other occasions (at a line-up and later to a police officer) he made unsworn statements that he was unable to identify the appellants. His wife, the second witness, told the police at a line-up that she could not identify the appellants. The two witnesses gave reasons at the trial why they did not tell the truth on the previous occasions. The appellants did not testify in their own defence.

The convictions are attacked on the ground that the learned judge ought to have told the jury to disregard this evidence of identity at the trial as utterly unworthy of credit. Shortly put,

it comes to this, that the learned judge ought to have told the jury not to weigh the evidence of the two witnesses, but to discard it entirely. Alternatively, counsel submitted that the learned judge ought to have warned the jury it was unsafe to convict on that evidence alone.

In support of the first proposition, counsel for the appellants relied upon an observation made by Lord Chelmsford in examining the evidence in *Kierzkowski* v. *Dorion* (1868), 5 Moore, P.C. (N.S.) 397, at pp. 426-7, and also quoted copiously from Weight and Value of Evidence, an American work published in 1908 by Mr. Charles C. Moore. I do not read *Kierzkowski* v. *Dorion* (which was not a jury trial), to support appellants' proposition. Lord Chelmsford said at p. 427 (apparently contradictory evidence given by Dorion in a previous suit was admitted in evidence—see p. 426):

> But by thus proving the contradictory evidence as to the transaction given by Jean B. T. Dorion, the appellant could not call upon the Court to believe what he had formerly sworn, and to discard his testimony in the present suit as worthless. There were no means of determining upon which occasion he had sworn truly or falsely. All that could properly be done was to regard his evidence as utterly unworthy of credit, and to dismiss it without further consideration.

The passage refers to a trial before a judge alone, in his capacity as judge of both law and fact. Lord Chelmsford's language implies that such a judge cannot, as judge of the law, discard testimony before him because the witness has sworn to the contrary in a previous suit. But Lord Chelmsford added, that if there were no means of determining upon which occasion the witness had sworn truly or falsely, then as judge of the facts he ought to regard the sworn evidence before him as unworthy of credit. But the present case is distinguishable because there was evidence before the jury to enable them to determine whether the two witnesses were telling the truth. The two witnesses testified they did not tell the truth upon the former occasions and gave reasons why they did not.

However reprehensible their conduct was in not telling the truth upon previous occasions, the reasons the two witnesses gave for acting as they did, provided a means for the jury to determine whether they were telling the truth at the trial. If that were not so, a witness could not be heard at the trial to correct

C. A.
1946
REX
v.
WATERFIELD
AND
GILMORE
O'Halloran,
J.A.

even an unsworn statement of fact which he had made in error. *Skelding* v. *Daly* (1941), 57 B.C. 121 is an example of a case where a witness corrected his evidence thirteen months later upon a crucial point (and see p. 124 and pp. 128-9). Because a witness fails to tell the truth once it does not follow that he must be disbelieved forevermore. It is the jury's function to weigh the evidence, and see *Metropolitan Railway Co.* v. *Jackson* (1877), 3 App. Cas. 193, at pp. 197 and 207-8. It is for the jury to say whether and how far the evidence is to be believed.

It seems that appellants' proposition was accepted at one time. Lord Chief Justice Jeffreys in *Oates' Case* (1685), 10 St. Tri. 1079, at pp. 1185-6, ruled that the evidence of a witness who had forsworn himself was not receivable. That was followed in *Canning's Case* (1754), 19 St. Tri. 283, 450, 609 and 632. Observations in Wigmore on Evidence, Can. Ed., 1905, Vol. 1, at p. 755 upon some American decisions may perhaps explain statements in Moore's Weight and Value of Evidence upon which counsel for the appellants placed reliance.

But that doctrine was repudiated by Lord Ellenborough, C.J. in *Rex* v. *Teal and Others* (1809), 11 East 307; 103 E.R. 1022, when he said (p. 311):

> . . . though a person may be proved on his own showing, or by other evidence, to have forsworn himself as to a particular fact; it does not follow that he can never afterwards feel the obligation of an oath; though it may be good reason for the jury, if satisfied that he had sworn falsely on the particular point, to discredit his evidence altogether. But still that would not warrant the rejection of the evidence by the Judge; it only goes to the credit of the witness, on which the jury are to decide.

In *Jordaine* v. *Lashbrooke* (1798), 7 Term Rep. 601, in discussing the maxim *homo allegans turpitudinem suam non est audiendus,* Grose, J. at p. 609 said it "does not extend to shut the mouths of witnesses guilty of criminal actions"; for

> if it did, witnesses daily received in courts of justice, and whom the policy of the law invites to come forward, must be rejected; such as accomplices and others concerned in illegal transactions. This class of men, . . . , the policy of the law invites to disclose all they know, leaving their credit to the wisdom and discretion of a jury.

And see also Wigmore on Evidence, *supra,* par. 527 *et seq.* commencing at p. 656.

In *Rex* v. *Flett* (1943), 59 B.C. 25, it was said at p. 35 (see

cases there cited) that once the learned judge finds there is some evidence to go to the jury

> the credibility and weight of that evidence is for the jury. It is not for the judge in such circumstances, to say there is no reasonable evidence to enable a jury to convict. The reasonableness of that evidence, unsatisfactory and slight as it may perhaps appear to the judge, is a question of fact for decision by the jury as judges of fact. The jury are judges of all the facts, and not only of some of the facts.
>
> What seems reasonable to the judge may not seem reasonable to the jury. The jury may believe testimony which the judge may not, and *vice versa*. . . . Evidence carrying little weight in the mind of the judge may assume directing importance in the composite mind of the jury.

In *Rex* v. *Harris* (1927), 20 Cr. App. R. 144 a conviction for incest, the girl had signed an unsworn statement incriminating the appellant. At the trial she admitted signing the statement but denied its truth. The appeal was based upon an objection (p. 145) that the trial judge ought not to have allowed the gist of the signed statement to have been read to the jury, since it was asserted, that would have been permissible only, if the witness had denied making a statement inconsistent with her sworn evidence. The Court dismissed the appeal without calling upon counsel for the prosecution; there was ample other evidence in the case to convict. The judge had told the jury that the girl's impugned unsworn statement was not evidence (pp. 147-8) and had also told the jury that "the girl's evidence may be neglected" (p. 148).

The Court of Criminal Appeal then concluded with a statement that the jury had been properly directed, and (pp. 148-9)

> that the effect of the previous statement, taken together with the sworn statement, was to render the girl a negligible witness, and that the jury must consider whether the case was otherwise and by others made out.

I think it must be evident that the Court in this judgment given without calling upon the respondent, was not enunciating a principle of general application. It was directing itself not to the point raised in the present case, but to the argument of counsel for the appellant in the *Harris* case which the report shows related to the propriety of reading the unsworn statement to the jury.

Rex v. *Harris* must be badly reported since no Court in a considered judgment would declare that the judge may usurp the function of the jury by telling them they must discard the evi-

C. A.
1946
REX
v.
WATERFIELD
AND
GILMORE
O'Halloran,
J.A.

dence of a witness because in her sworn testimony she admits she had previously made an unsworn statement to the contrary. Despite what appear to be confusing statements of what the trial judge really did say to the jury in the *Harris* case, the Court of Criminal Appeal does quote his actual words at p. 148, *viz.*, "the girl's evidence may [my note—not "must"] be neglected."

In the *Harris* case the girl's credibility and the weight of her evidence were undermined by the strength of the other evidence and by the lack of any explanation for her change in story. The circumstances are quite different in the case at Bar, where the evidence of the two witnesses is the only sufficient evidence in proof of identity and reasons for the change in evidence were given. It was for the jury, and for the jury alone, to say how far those reasons assisted them in determining whether the witnesses were telling the truth at the trial. If there is any conflict between observations in *Rex* v. *Harris* on the one hand, and in *Rex* v. *Teal and Others, Jordaine* v. *Lashbrooke* and the *Kierzkowski* case on the other hand, I do not hesitate to adopt the latter as more in accord with reason and principle.

The same remarks apply to general observations found in *Rex* v. *Atkinson* (1934), 24 Cr. App. R. 123. That was a case under the Perjury Act which prohibited a conviction solely upon the evidence of one witness. The conviction was obtained upon the evidence of one witness who gave direct evidence of the perjury. There was other evidence of a corroborative nature. The appeal was allowed, because, while the learned judge told the jury that the one main witness was an accomplice, he failed to tell them she was a perjured accomplice. That is understandable since the judge failed to put the case to the jury in such a way that the considerations weighing in favour of the accused were brought out with full effect. Despite the language which appears in the report, it is hard to believe that it was really intended to mean that the judge ought to have directed the jury to ignore completely the evidence of the perjured accomplice and not to consider whether she was then telling the truth or not.

Rex v. *Harris* and *Rex* v. *Atkinson* have been criticized in Canada in respect to that aspect thereof which may seem to support the appellants' proposition. Riddell, J.A. in *Rex* v.

Kadishevitz (1934), 61 Can. C.C. 193 described the above cited excerpt from *Rex* v. *Harris* as "obviously erroneous," and said at p. 200:

> . . . If the word "negligible" was used it must have been in the sense that the jury might, if they thought it right, disbelieve the evidence given under oath, considering the witness wholly unreliable, not in the sense that they must disregard it whatever their own view. So, too, the word "must" cannot have been used, the word applicable being "may."

I quote the further apposite remarks of Riddell, J.A. at p. 200, with which I respectfully agree:

> If the law of England is correctly stated in this case, [*Rex* v. *Harris*] our law is different. The fact that a witness has, wittingly or unwittingly, voluntarily or under pressure, wilfully or mistakenly, with good or bad intent, made a statement under oath or otherwise, differing from that made in the witness box at the trial, does not prevent the jury from considering his testimony and giving it the effect they consider right; they are not to be instructed that they must disregard his testimony and decide the case on the other evidence only.

In *Rex* v. *Disano* (1944), 81 Can. C.C. 272 the Ontario Court of Appeal again refused to follow *Rex* v. *Harris*. Robertson, C.J.O. at p. 276 said the evidence of such a witness is not inadmissible, but its weight is a matter for consideration. To the same effect Gillanders, J.A. at p. 277 and Laidlaw, J.A. at pp. 279, 280. In *Rex* v. *McIntosh* (1937), 52 B.C. 249, MACDONALD, J.A. , later C.J.B.C., at p. 261 did not agree with the quoted excerpt from *Rex* v. *Harris* that such evidence was "negligible." He said its weight only was affected.

The other branch of the appellants' argument rests upon their second proposition that the learned judge ought to have warned the jury that it was unsafe to convict upon that evidence alone. But I am unable to accept that proposition as an applicable rule of practice at common law in a case like the present. There was no association between the two witnesses and the accused appellants in furtherance of the crime, and there is not the slightest evidence of any relation between them. It is difficult to apprehend any ground in support of the appellants' second proposition which ought not to be rejected for the same reasons which compel me to reject their first proposition.

The decisions which reject the first proposition are to the effect that the credibility of such witnesses and the weight of their evidence is for the jury to determine. In my judgment

C. A.
1946

REX
v.
WATERFIELD
AND
GILMORE

O'Halloran,
J.A.

the *ratio* of those decisions implicitly denies the second proposition as effectively as it expressly denies the first proposition. The jury were fully instructed upon the circumstance of the previous denial under oath of the facts sworn to at the trial, and also upon the circumstance of the previous contradictions by the two witnesses of their present evidence. It cannot be said in my judgment that the jury were insufficiently instructed to pass judicially upon the credibility of the witnesses and to weigh accurately the present testimony of the witnesses in all the relevant circumstances.

This case is primarily one of identity. The learned judge brought clearly to the attention of the jury that the weakness in the evidence of identity lay in the circumstances that one witness had said on two other occasions that he could not identify the appellants and had so sworn at a previous trial, while the other witness, his wife, also had said on a previous occasion that she could not identify the appellants. The learned judge's charge occupies eleven and a half pages of the transcript, of which more than three pages are devoted to the credibility of the two witnesses arising out of their previous denials in contradiction of their present testimony, and the reasons they gave for testifying at the trial that they did not tell the truth on the former occasions. The grounds upon which the defence relied to establish that the evidence of identity was unsatisfactory, were placed fully before the jury (see *Rex* v. *Hederson* (1944), 81 Can. C.C. 132 and *Rex* v. *Yates* (1946), 62 B.C. 307, at pp. 311-12).

The learned judge dealt with the evidence of the two witnesses individually and also discussed their separate denials individually and warned the jury "you must give your gravest consideration" thereto. The learned judge referred specifically to the seriousness of lying under oath. The previous contradictions of their present testimony were analyzed in a manner which could not fail to impress the jury with the gravity of what these witnesses had done, nor fail to make the jury fully aware of the adverse effect these contradictions must have upon the credibility of the two witnesses and the weight of their evidence. The learned judge discussed the reasons given by the two witnesses for their denials on the previous occasions in terms which did not

allow the jury to misapprehend their full duties and responsibilities as judges of the facts.

I quote from the learned judge's charge in this latter aspect:

The reasons assigned for the denials are for you as sensible men and as human beings to consider. The reasons are different in the case of either one of these young people. The young man says that his fiancee, as she was then, and his wife, as she is now, was—as she apparently is—crippled; that she was of a nervous temperament; that she was exercised over this affair, and that he wanted to keep her out of it. Well now, if you accept his statement on that, and you may do so if you see fit, it is obvious that what he was doing was a most deplorable thing. The administration of justice would become more difficult than it is for the police if all persons who were the victims of crimes felt so little regard for their fellow citizens, for the protection of the general public, that they felt justified in refusing or in adopting methods like this to keep out of Court. The fact that it is a deplorable viewpoint does not necessarily prove that it is not the viewpoint that this young man had. It may have been. It may have been that he was lying before and is telling the truth now; that is for you to decide, and it would be an impertinence, I think, since your experience of men and of facts is as great as mine, for me to go much farther in telling you how to decide it.

The young lady's story is that she and this young man were—she used the phrase "necking" in the back of this car, and she thought that if this case went to Court that fact would come out. She was afraid, ashamed. Once again I can only say that if she is telling the truth, it is a deplorable viewpoint because it is obvious that she has no recognition of her duty to society when she made that decision, if she did make it, that she would not identify these young men, but that is not the important thing for you to decide. That is a thing that is evident on the face of it, but what you have to decide is not whether she acted conscientiously, but whether she is now telling the truth here.

It may be added that the learned judge charged the jury fully upon reasonable doubt, devoting some two and a half pages thereto. Nearly one half of the learned judge's charge is taken up with the question of reasonable doubt, coupled with the credibility of the two witnesses upon whose evidence the proof of identity depended. In my judgment the jury were instructed adequately upon the evidence and correctly upon the law and accordingly no substantial wrong or miscarriage of justice can be said to have occurred within section 1014, subsection 2.

It is noted also that counsel for both appellants expressly stated at the conclusion of the learned judge's charge, that they had "nothing to suggest." While that is not conclusive in itself, it is a circumstance for consideration in the application of section 1014, subsection 2, and see *Rex* v. *Mandzuk* (1945), 62 B.C.

C. A.
1946
REX
v.
WATERFIELD
AND
GILMORE

16, at pp. 25-6 and cases there cited, to which may be added *Rex* v. *Lew* (1912), 17 B.C. 77, at pp. 78 and 80; and *Rex* v. *Armstrong* (1933), 59 Can. C.C. 172, at p. 177.

I would dismiss the appeals.

SIDNEY SMITH, J.A.: I would dismiss these appeals.

BIRD, J.A.: Separate appeals taken by the two accused were heard together by consent. Examination of the record of proceedings in the Court below, when the accused were jointly indicted on a charge of robbery with violence, and convicted, convinces me that careful and sufficient directions were given to the jury by the learned trial judge upon the impugned testimony of the two Crown witnesses. Adequate warning was then given in regard to the weaknesses in that testimony as well as upon questions raised as to the credibility of those witnesses.

In my judgment the learned judge has properly left it to the jury to pass upon the credibility of the witnesses and to determine the weight to be given to their evidence.

In my opinion there is no substance to the objections taken before this Court upon the grounds of misdirection.

I would dismiss the appeals.

Appeals dismissed.

C. A.
1946
Nov. 21, 26.

REX v. HAGGERTY.

Criminal law—Counterfeiting—Possessing mould—Mould found buried in accused's garden—Burden on Crown—Criminal Code, Sec. 550 (a)—New trial.

The defendant was convicted of having the unlawful possession of a mould capable of being used in the manufacture of counterfeit coins. The mould in question was found by police officers in an ice-cream freezer, buried in a rose garden of a house owned by the defendant and occupied by himself with his wife, his mother and his brother.

Held, on appeal, reversing the decision of MANSON, J., that the mere finding of an article buried in the garden of a householder does not, in itself, and in the absence of some evidence indicating his knowledge of its existence or consent to its remaining in that place or some other sur-

rounding circumstances from which a reasonable inference could be drawn inculpating the householder, discharge the burden of proof of possession resting upon the Crown. The conviction is quashed and a new trial ordered.

APPEAL by defendant from his conviction before MANSON, J. and the verdict of a jury at the Vancouver Fall Assize on the 16th of October, 1946, on a charge that he

unlawfully, without lawful authority or excuse did have in his possession a mould adopted and intended to make or impress the apparent resemblance of both sides of a current silver coin, to wit, a Canadian fifty-cent coin.

The appeal was argued at Vancouver on the 21st of November, 1946, before SLOAN, C.J.B.C., SIDNEY SMITH and BIRD, JJ.A.

Marsden, for appellant: If others living on the premises capable of stealing, evidence of his presence alone is insufficient: see Taylor on Evidence, 12th Ed., p. 134, par. 146; *Rex* v. *Pawlett* (1923), 40 Can. C.C. 312; *Rex* v. *Watson* (1817), 2 Stark. 116; Phipson on Evidence, 5th Ed., 138. This case is wholly on circumstantial evidence: see *Rex* v. *Dawley* (1943), 58 B.C. 525; *Rex* v. *Comba,* [1938] O.R. 200; [1938] S.C.R. 396. Each bit of circumstantial evidence must be scrutinized by itself. *Hodge's Case* (1838), 2 Lewin, C.C. 227, at p. 228 applies. There is no evidence the accused ever saw the freezer.

Tysoe, for the Crown: The accused and his wife were on the premises and there is the presumption he was in charge: see *Rex* v. *Lawson* (1944), 59 B.C. 536; Russell on Crime, 9th Ed., Vol. II., p. 1054. There was sufficient evidence for the jury to conclude there should be a conviction.

Cur. adv. vult.

26th November, 1946.

Per curiam (SLOAN, C.J.B.C.): The appellant was convicted at the Vancouver Fall Assize (*coram* MANSON, J.) of having the unlawful possession of a mould capable of being used in the manufacture of counterfeit coins.

The mould in question was found by police officers in an ice-cream freezer, buried in a rose garden of the home occupied by the appellant, his wife, his mother and his brother.

Counsel for the appellant submits that the learned trial judge

C. A.
1946

REX
v.
HAGGERTY

erred in his instructions to the jury in the following excerpt from his charge:

> The Crown must prove that it was in his possession or custody. It would be open to a jury to infer conclusively, I think, that a mould found on the premises of John Smith, as this mould was found, was there with his knowledge and that the custody was actually his. I say that conclusion would be open to a jury, unless there was some evidence to indicate innocence on the part of the accused. The defence may come forward with evidence in a case of this kind which would prevent a jury from arriving at a conclusion which it would otherwise arrive at.

The error assigned to this instruction is the jury were in effect charged that, as a matter of law, the mere finding of a mould buried in the garden of a house jointly occupied by four persons was in itself sufficient and conclusive proof of its possession by one of them—in this case the owner of the house.

In my opinion the charge is open to this construction and, with deference, cannot be supported. In my view the mere finding of an article buried in the garden of a householder does not, in itself, and in the absence of some evidence indicating his knowledge of its existence, or consent to its remaining in that place, or some other surrounding circumstances from which a reasonable inference could be drawn inculpating the householder, discharge the burden of proof of possession resting upon the Crown and thrust upon him the necessity of furnishing evidence of his own innocence.

In the result I would, with respect, allow the appeal, quash the conviction and order a new trial.

Appeal allowed; conviction quashed; new trial ordered.

ERICKSON v. FISHER AND FISHER AND THE ATTORNEY-GENERAL FOR BRITISH COLUMBIA.

C.A.
1946
Oct. 7, 8; Dec. 16.

Mines and minerals—Jumping of claims—Action for declarations of validity and invalidity of claims and damages—Fraud—Whether cause of action—Statutes—Whether Crown impliedly bound—R.S.B.C. 1936, Cap. 181, Secs. 18, 58, 61 and 85.

The power to dismiss an action on the ground that a statement of claim discloses no cause of action should not be exercised except where the case is perfectly clear.

The plaintiff sued for a declaration that the mineral claim as staked by him (a relocation of a pre-existing claim in which he had been interested) was at all material times a valid and subsisting claim; that the claim staked by the defendants was invalid and void because of their fraud; that the certificate of improvements and the Crown grant were issued in fraud of the plaintiff; and for an order for conveyance to the plaintiff of the defendant's claim, and for damages for fraud. When the action came on for trial and before any evidence was heard, WILSON, J., on the motion of the defendants, dismissed the action on the ground the statement of claim disclosed no cause of action. He applied *hesitante Hand* v. *Warren* (1899), 7 B.C. 42; 1 M.M.C. 376.

Held, on appeal, reversing the decision of WILSON, J., after referring to sections 18, 58, 61 and 85 of the Mineral Act, and distinguishing *Hand* v. *Warren, supra*, on the facts, that under the principles above stated the appeal should be allowed and a new trial ordered.

If it can be affirmed that at the time when a statute was enacted, it was apparent from its terms that its beneficent purpose would be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown had agreed to be bound.

Province of Bombay v. *Municipal Corporation of Bombay* (1946), 62 T.L.R. 643, applied.

APPEAL by plaintiff from the decision of WILSON, J. of the 4th of June, 1946, dismissing the plaintiff's action on the ground that the statement of claim disclosed no cause of action. On the 24th of May, 1945, the plaintiff discovered that the respondents Fisher had covertly "jumped" the east half of the Contract No. 1 mineral claim situate on Hall Creek south of the city of Nelson. The east half of the Contract No. 1 mineral claim was the portion whereon the plaintiff had been driving 110 feet of tunnel over the previous four years. The "jump" was accomplished by a colourable compliance with section 58 of the Mineral Act regarding notices and surveys so that when the plaintiff made his

C. A.
1946

ERICKSON
v.
FISHER
ET AL.

belated discovery, the defendants Fisher were in possession of a Crown grant in the name of Gold Coin Fraction covering the east half of Contract No. 1 mineral claim including the aforementioned tunnel. The frauds charged against the defendants Fisher had their inception in a false pretence that as of June, 1937, the record of H. B. mineral claim (as Contract No. 1 mineral claim was then called) showed the location line as westerly. This they claimed allowed them to stake a fraction known as Gold Queen Fraction right up to the actual location line of H. B. which the official records show was in fact given as south-westerly. By process of fusion the Gold Queen Fraction became the Gold Coin Fraction on the west. The plaintiff was unaware at all times that the defendants Fisher asserted any claims to the east half of H. B. on Contract No. 1 mineral claim and living close by permitted him to work four years on the tunnel. From the jump of 1937, all further efforts of the defendants were directed to perfecting the initial fraud by securing a Crown grant. Section 58 of the Mineral Act was employed as an engine of fraud by which they were enabled to conceal their activities from the plaintiff. The Attorney-General was joined as a party because of reserved rights possessed by the Crown in the disputed area, but does not appear on the argument.

The appeal was argued at Victoria on the 7th and 8th of October, 1946, before SLOAN, C.J.B.C., ROBERTSON and SIDNEY SMITH, JJ.A.

Donnenworth, for appellant: A certificate of improvements is a bar to those claiming adversely to the validity of a location in any right and on all grounds except fraud: see *Nelson and Fort Sheppard Ry. Co.* v. *Jerry et al.* (1897), 5 B.C. 396; 1 M.M.C. 161; *In re American Boy* (1899), 7 B.C. 268, 1 M.M.C. 304; *Fry et al.* v. *Botsford et al.* (1902), 9 B.C. 234; 1 M.M.C. 520. The case of *Hand* v. *Warren* (1899), 7 B.C. 42; 1 M.M.C. 376 pertaining to *scire facias* proceeding is erroneous and contrary to the authorities. The plaintiff properly framed his action: see *E. & N. Ry.* v. *Wilson. E. & N. Ry.* v. *Dunlop,* [1919] 3 W.W.R. 961; *Burrows* v. *Rhodes,* [1899] 1 Q.B. 816; *Anderson* v. *Midland Railway,* [1902] 1 Ch. 369,

at p. 374; *Dyson* v. *Attorney-General,* [1911] 1 K.B. 410. The cause of action is well founded in law: *Bulli Coal Mining Company* v. *Osborne,* [1899] A.C. 351, at p. 362. A mineral claim is an interest in land: see *McMeekin* v. *Furry* (1907), 13 B.C. 20; 2 M.M.C. 432 and 536; 39 S.C.R. 378; *Stussi* v. *Brown* (1897), 5 B.C. 380; 1 M.M.C. 195; *Fero* v. *Hall* (1898), 6 B.C. 421; 1 M.M.C. 238; *Chassy and Wolbert* v. *May and Gibson Mining Co.* (1920), 29 B.C. 83. On the competence of a person suing the grantee under a Crown grant which encroaches upon the rights of another see *North Pacific Lumber Co.* v. *Sayward* (1918), 25 B.C. 322; *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 412; *Eastern Trust Company* v. *McKenzie, Mann & Co., Limited,* [1915] A.C. 750; *Tuxedo Holding Co., Ltd.* v. *University of Manitoba,* [1930] 1 W.W.R. 464; *Electrical Development Company of Ontario* v. *Attorney-General for Ontario and Hydro-Electric Power Commission of Ontario,* [1919] A.C. 687; *McLean Gold Mines, Ltd.* v. *Attorney-General for Ontario,* [1926] 3 W.W.R. 193; *Attorney-General* v. *McGowan* (1904), 37 N.S.R. 35. The case is properly constituted and should be tried on the merits.

Green, K.C., for respondents: Section 85 of the Mineral Act provides the method for attacking another's mineral claim. The section is not confined to opposing certificates of improvement but gives a wide field of attack: see *Nelson and Fort Sheppard Railway Co.* v. *Dunlop* (1900), 7 B.C. 411, at p. 413. Failure to follow the section constitutes a waiver of the claim: see *Re Rogers and McFarland* (1909), 19 O.L.R. 622; *Hickey* v. *Stalker* (1923), 53 O.L.R. 414, at p. 418; *Re Duperreault,* [1941] 1 D.L.R. 38, at p. 42; *Shepheard* v. *Broome,* [1904] A.C. 342. The section sets a time limit for the attack: see *Re Township of York and Township of North York* (1925), 57 O.L.R. 644, at p. 648. Such legislation overrides general legislation in case of conflict. The plaintiff applied for an extension under section 85 of the Act making allegations of "claim-jumping" and "fraudulent concealment." His motion was dismissed. He then brought the present action for fraud. There is no provision in the law of British Columbia that gives an adverse

C. A.
1946
ERICKSON
v.
FISHER
ET AL.

claimant two chances to attack another's mineral claim: see *Hand* v. *Warren* (1899), 7 B.C. 42; *The Engineer Mining Co.* v. *Fraser* (1922), 31 B.C. 224 and on appeal, [1923] A.C. 228, at p. 234; *Attorney-General* v. *Dunlop* (1900), 7 B.C. 312. The dominant principles underlying the Mineral Act are certainty and simplicity of title: see *In re American Boy* (1899), *ib.* 268, at p. 276.

Donnenworth, replied.

Cur. adv. vult.

16th December, 1946.

Per curiam (ROBERTSON, J.A.): The plaintiff's action came on for trial and was dismissed, without any evidence having been called, upon the motion of counsel for the respondents, the Fishers, that the statement of claim disclosed no cause of action. It is hardly necessary to say that for the purpose of the motion all the facts set out in the statement of claim were taken to be admitted. They are as follows: The plaintiff located and recorded a mineral claim, "Contract No. 1" on the 18th of July, 1942, and thereafter did the requisite amount of assessment work during each of the years 1942 to 1945, both inclusive, and received a certificate of work from the mining recorder for each of such years. This was a relocation of a pre-existing mineral claim wherein the plaintiff "had been successively interested either alone or with others for many years previous." On the 24th of May, 1945, he discovered survey blazes on his claim and upon investigation alleges he found the defendants had "covertly and fraudulently jumped" the whole east half of his claim "in the name of the Gold Coin Fraction mineral claim," fraudulently obtained a certificate of improvements thereto in the name of Nettie H. Fisher by fraudulently concealing their application therefor from the plaintiff, and later a Crown grant dated 28th May, 1945, and had registered the same in the proper Land Registry office. Particulars of the fraud are set out in the statement of claim and it may be assumed for the purpose of this judgment that the facts do disclose a fraud upon the plaintiff.

The plaintiff asked for declarations that the claim as staked by him was at all material times a valid and subsisting mineral claim; that the claim staked by the defendants was invalid and

void by reason of the fraud of the defendants; and that the certificate of improvements and Crown grant were issued in fraud of the plaintiff; and for an order for conveyance to the plaintiff of the Gold Coin Fraction claim; and damages for fraud.

The plaintiff submits that as section 18 of the Mineral Act, R.S.B.C. 1936, Cap. 181 (later referred to as the Act) gave him a chattel interest equivalent to a lease for one year and thence from year to year, he became a "tenant of the Crown": see *Manley* v. *Collom* (1901) 8 B.C. 153; 1 M.M.C. 487, at p. 501; and entitled to all minerals which lie within his claim—section 17 of the Act; and that therefore he has a legal *status* to sue for the relief, *supra.*

Section 58 of the Act provides that where the lawful holder of a mineral claim has complied with certain requirements, which include posting on some conspicuous part of the land embraced in the survey of the claim a copy of the plat of the claim, a legible notice in writing, *inter alia,* of intention to apply for a certificate of improvements, posting a similar notice in the mining recorder's office, inserting a copy thereof in the Gazette and in a local newspaper published and circulating in the mining division in which the claim is situate, for 60 days prior to an application for a certificate of improvements, he shall be entitled to receive from the Gold Commissioner a certificate of improvements unless proceedings by a person claiming an adverse right under section 85 have been taken.

Section 85 (1) of the Act provides that:

> 85. (1.) In case any person claims an adverse right of any kind, either to possession of a mineral claim referred to in an application for a certificate of improvements or any part thereof, . . . , he shall, within sixty days after the first publication in the Gazette of the notice referred to in section 58, [*inter alia*] commence an action in the Supreme Court to determine the question of the right of possession or otherwise enforce his claim, . . . and . . . prosecute the action with reasonable diligence to final judgment; and a failure so to commence or so to prosecute shall be deemed to be a waiver of the plaintiff's claim.

If no action is commenced within the required time the applicant is entitled to a certificate of improvements, and upon application within three months from the date of the certificate (which he must first record) may apply for and obtain a Crown grant to the claim. (Sections 59 to 63, both inclusive).

C. A.
1946
ERICKSON
v.
FISHER
ET AL.

Section 61 of the Act provides:

61. Upon the receipt of a certificate of improvements, the holder thereof may record the same; and after the issuing and recording of a certificate of improvements, and while the certificate is in force, it shall not be impeached in any Court upon any ground whatsoever except that of fraud.

The plaintiff submits that section 61 gives him the right to attack the certificate of improvements on the ground of fraud. The defendants rely upon *Hand* v. *Warren* (1899), 7 B.C. 42; 1 M.M.C. 376 in which it was held a certificate of improvements cannot be attacked at any time by a person claiming an adverse right except by adverse proceedings; that the plaintiff not having taken such proceedings has waived his claim; that the reservation as to fraud in section 37 (2) of R.S.B.C. 1897, Cap. 135, which provided that a certificate of improvements " . . . shall not be impeached on any ground except that of fraud" was intended only to preserve the right of the Crown to take action for fraud.

The learned judge said that, with some hesitation, he was impelled to apply *Hand* v. *Warren, supra,* and therefore dismissed the action.

The facts in *Hand* v. *Warren* are quite different to those in the case at Bar, in that the statement of claim sets up that the location of the Gold Coin claim was made upon an existing claim, while in *Hand's* case it was not disputed that the defendant's locations were valid. The attack was based on the allegation that the certificates of work had been obtained by fraud.

Section 28 of Cap. 135, *supra* (which is the same as section 80 of the Act except there is a proviso to section 80 which is not relevant), provides as follows:

28. Upon any dispute as to the title to any mineral claim no irregularity happening previous to the date of the record of the last certificate of work shall affect the title thereto, and it shall be assumed that up to that date the title to such claim was perfect, except upon suit by the Attorney-General based upon fraud.

It has been held that the irregularities mentioned in this section only apply to irregularities since a valid location and recording of the claim, and previous to the date of the last record, and that any invalid location such as is alleged in the statement of claim herein, that is, a location on an existing claim, is a mere nullity. See *Callahan* v. *Coplen* (1899), 6 B.C. 523; 1 M.M.C. 348

(30 S.C.R. 555); *Manley* v. *Collom* (1901), 8 B.C. 153; 1 M.M.C. 487 ((1902), 32 S.C.R. 371) and *Cleary* v. *Boscowitz* (1901), 8 B.C. 225; 1 M.M.C. 506 ((1902), 32 S.C.R. 417) particularly at p. 512.

In *Hand* v. *Warren* IRVING, J. did note the difference between section 28 and section 37, which was that section 28 provided that an action for fraud could only be brought by the Attorney-General, whereas there was no such limitation in section 37. Perhaps the reason for this was that under section 37 (2) all persons claiming any adverse interest in the claim in respect of which a certificate of improvements was sought could set up in an adverse action fraud or any other ground as a reason why the certificate should not be given and that in such an action the rights of all parties would be determined. If there was no adverse action, then all who might have had a claim were deemed to have waived their rights. It may not have been the intention that a person who might have adversed and raised questions of fraud should, after a certificate of improvements had been granted, bring an action or another action based on fraud. It may be that the provision was inserted for this reason: the Mining Act is one which permits persons to acquire rights and grants of Crown property. If then there had been no provision in section 37 or section 61 for an action on account of fraud the Crown might not have been in a position to take action even for fraud because of the provisions in the statute that following issuance and recording of a certificate of improvements, the holder is entitled as a matter of course to a Crown grant. But it is said that the Crown is not bound by this statute because it is not expressly named therein or by necessary implication. As to this, I refer to what Lord du Parcq in delivering the judgment of the Judicial Committee in *Province of Bombay* v. *Municipal Corporation of Bombay* (1946), 62 T.L.R. 643, a case in which the Court was construing a statute in which the Crown was not expressly mentioned, said at p. 644:

> . . . If it can be affirmed that, at the time when the statute was passed and received the Royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it might be inferred that the Crown had agreed to be bound.

Assuming that the Crown grant cannot be set aside, it may be

C. A.
1946
ERICKSON
v.
FISHER
ET AL.

that the plaintiff would be entitled to an order "converting" the defendant into a trustee for the plaintiff because of the alleged fraud through which the defendant obtained the property. See Underhill on Trusts, 9th Ed., 194; *Booth* v. *Turle* (1873), L.R. 16 Eq. 182; *Rochefoucauld* v. *Boustead,* [1897] 1 Ch. 196.

Further, assuming the Crown grant cannot be set aside and the plaintiff is not entitled to a judgment that the defendant be declared to be a trustee, may he not be entitled to damages which he has suffered by reason of the fraudulent action of the defendant? He has lost the property of which he was tenant. He has lost the minerals in the claim which the statute declared he owned, and he has lost the claim which he might have acquired by doing one more year's assessment work, or by payment in lieu thereof, and by taking the necessary proceedings to obtain a certificate of improvements.

All these questions are important ones. The learned trial judge "hesitated" to apply *Hand* v. *Warren.* The power to dismiss on the ground that a statement of claim discloses no cause of action should not be exercised except where the case is perfectly clear. See the cases referred to in the dissenting judgment of MARTIN, C.J.B.C. in *May* v. *Hartin* (1938), 53 B.C. 411, at p. 415. After hearing counsel's opening, a trial judge dismissed the action without the consent of the plaintiff who wished to call evidence. It was held he had no power to do so. See *Fletcher* v. *London and North Western Railway Co.,* [1892] 1 Q.B. 122, followed in this Court in *Watson* v. *Girardi, Girardi and Calabrigo* (1946), 62 B.C. 406, and see also *Isaac* v. *Evans* (1900), 16 T.L.R. 480 and *Cross* v. *Rix* (1912), 29 T.L.R. 85.

In *Electrical Development Company of Ontario* v. *Attorney-General for Ontario and Hydro-Electric Power Commission of Ontario,* [1919] A.C. 687, the facts were that the appellants issued a writ against the Attorney-General for Ontario and the Hydro-Electric Commission, claiming a declaration that the Commission had no legal right to do certain acts which the Ontario Legislature had power to do. The Act constituting the Commission provided that no action should be brought against it without the consent of the Attorney-General for Ontario which had not been obtained. The writ of summons was set aside by

the Master, whose order was affirmed by a judge and by the Appellate Division. Upon appeal to the Privy Council the order of the Appellate Division was reversed. Viscount Finlay said at p. 694:

> Their Lordships think it undesirable to express any final opinion upon the construction of this section and its effect upon the present action until the precise nature of the claim of the plaintiffs in the action has been formulated. In their Lordships' opinion it is impossible to treat the appellants' contentions as to the section in question on this point as merely frivolous. They raise points of importance which ought not to be dealt with in this summary fashion, and which demand serious consideration in the ordinary course of law. The action must, therefore, proceed as against the Hydro-Electric Commission, but the present decision will not prejudice the right of the Commission to raise this point as a defence when the pleadings have disclosed the exact nature of the plaintiffs' claim and the facts, so far as necessary, have been ascertained.

And at p. 695:

> . . . , whatever difficulties there may be in the way of the ultimate success of the appellants' case, it is not, in the judgment of their Lordships, so clearly bad as to make it right that the appellants should by a summary order be prevented from having it tried in ordinary course.

I do not express any opinion upon any of the points in question. These are for the decision of the trial judge, particularly the reconsideration and application to the facts of the case of *Hand* v. *Warren*. In my opinion, under all the circumstances, the plaintiff was entitled to have a trial in the ordinary course and accordingly to submit his evidence in proof of the allegations in his statement of claim. I therefore think the appeal should be allowed and a new trial ordered.

Appeal allowed; new trial ordered.

Solicitor for appellant: *F. M. Donnenworth.*
Solicitor for respondents Fisher: *C. H. Hamilton.*
Solicitor for the Attorney-General: *H. Alan Maclean.*

C. A.
1946
Dec. 2, 3, 20.

REX v. DARLYN.

Criminal law—Evidence—Adverse witness—Undefended accused—Duty of judges as to—Judge taking large part in examination of witness—R.S.C. 1927, Cap. 59, Sec. 9.

The accused was convicted of conspiring with one Barrisove and Dorothy Walsh to defraud the Government of Canada by fraudulent withdrawal from the Postal Savings Bank of $300. He was tried separately and conducted his own defence. Dorothy Walsh, who had pleaded guilty, testified for the prosecution. The Crown's case depended substantially upon her evidence. Objection was taken that the presiding judge frequently participated in the examination by putting pressing questions and making comments unfavourable to the accused and calculated to impress upon the jury his conviction of the guilt of the accused. Objection was taken that in the course of pressing examination and without application by Crown counsel, under section 9 of the Canada Evidence Act, the learned judge ruled, "she is a hostile witness in law and I am giving the privilege to Crown counsel to put leading questions to her." Further, under pressure by judge and Crown counsel she was led to admit the truth of an unsworn statement she had made to the police in the absence of the appellant. It was put in as an exhibit and was read in substantial part to the jury.

Held, on appeal, reversing the decision of MANSON, J. (SIDNEY SMITH, J.A. dissenting), that it is the function of a judge to keep the scales of justice in even balance between Crown and accused. A judge's duty does not justify judicial participation in the examination of a witness of a nature which a jury could reasonably interpret as indicating a predisposition on the part of the judge toward one side or the other. The examination of this important witness was such as not only to deprive the accused of the assistance to which on the authorities he was entitled from the Court but was calculated to impress the jury against the accused. Whether the ruling as to hostility of the witness is open to question or not, the examination prior to the making of this ruling was contrary to proper procedure and highly prejudicial to the accused. In this case an actual injustice was done to the appellant by reason of the irregularities so prejudicial to the fair trial of the appellant that they combined to cause a mistrial. The conviction is quashed and a new trial ordered.

APPEAL by accused from his conviction before MANSON, J., and the verdict of a jury at the Summer Assize at Vancouver on the 24th of June, 1946, on a charge that

between the 5th and 30th days of March, A.D. 1946, [he] unlawfully did conspire, combine, confederate and agree with James John Barrisove and Dorothy Walsh to defraud the Government of the Dominion of Canada of the sum of $300 by fraudulent means.

The facts are set out in the reasons for judgment.

The appeal was argued at Vancouver on the 2nd and 3rd of December, 1946, before O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

Hodgson, for appellant: Mrs. Walsh, Barrisove and Darlyn were the three charged. Mrs. Walsh pleaded guilty and Darlyn was tried by himself. Mrs. Walsh was the main Crown witness against him. Barrisove induced Mrs. Walsh to impersonate one Anne Buzoway, the owner of a Postal Savings book that Barrisove had got possession of, and with Barrisove's assistance, obtained $100 on three occasions, twice at New Westminster and once at North Vancouver, in all $300. We submit that Darlyn had nothing to do with obtaining this money. Barrisove did not give evidence. On the first two occasions, Mrs. Walsh received $25, and on the third she got $30. She stated that Barrisove told her the balance on each occasion was divided between Barrisove and Darlyn. The conduct of the case by the learned judge and the charge were such that at least there should be a new trial.

Castillou, K.C., for the Crown referred to *Rex* v. *Stone and McLean* (1944), 81 Can. C.C. 237; *Rex* v. *Ledrew and Gouthro* (1944), 83 Can. C.C. 28; *Rex* v. *Newell* (1942), 77 Can. C.C. 81.

Hodgson, replied.

Cur. adv. vult.

20th December, 1946.

O'HALLORAN, J.A.: The accused appellant was without counsel at his trial when he was convicted at the May-June Vancouver Assize of conspiring wth another man and one Dorothy Walsh to defraud the Government of Canada of $300. He was tried separately. Dorothy Walsh, who had pleaded guilty, testified for the prosecution. The appellant did not testify in his own defence.

The cumulative impression yielded by re-examination of the whole of the transcript of what took place before the jury (including those portions of the testimony and of the judge's charge to the jury not originally in the appeal book, but which the Court directed to be included), confirms the opinion I formed at the conclusion of the argument, that the appeal must be allowed

C. A.
1946

REX
v.
DARLYN

O'Halloran, J.A.

under Code section 1014, subsection 1 (*c*) and a new trial directed accordingly.

If Dorothy Walsh was an adverse Crown witness within the meaning of section 9 of the Canada Evidence Act, who had told two conflicting stories on oath before the jury, then, in my opinion with respect, it was the duty of the learned judge, in fairness to the undefended accused, to instruct the jury clearly that it was for them to decide which, if either story ought to be believed, and also to call the jury's attention to the weakness in the case for the prosecution occasioned by that contradiction in the testimony of the main Crown witness. Instead as I read his summing-up the learned judge emphasized one of her conflicting stories by reading it to the jury as if it only were true, and as if her other conflicting story were to be disregarded.

I have read and reread the learned judge's summing-up, but with the same resultant conclusion, that the case for the undefended accused was put to the jury in such a manner that the considerations weighing most heavily in his favour were not brought out with their full force and effect. The mere fact that a judge may declare a witness hostile does not mean that the prior evidence of the witness thereby becomes worthless and must be ignored by the jury. It is for the jury to weigh all evidence the witness gives.

Having instructed the jury that if they found Dorothy Walsh was an accomplice it was not safe to convict on her evidence alone, the learned judge omitted to take the further step and instruct them that in such circumstances they must take into consideration also that she was an accomplice who had told two conflicting stories on oath before them. The necessity for that additional warning is pointed up by admissions of Dorothy Walsh in her cross-examination by the accused, that she had given the unsworn statement to the police (this statement crept into the proceedings and became the occasion of the conflict in her evidence), under "terrific mental and nervous strain," and that she had signed it "as the easiest and quickest way possible" before pleading guilty. In *Rex* v. *Atkinson* (1934), 24 Cr. App. R. 123, at pp. 126-7, a conviction was quashed wherein the learned judge in instructing the jury upon the accomplice ques-

tion failed to point out to them that the accomplice in question was a perjured accomplice; and see also *Rex* v. *Doblanko* (1946), 86 Can. C.C. 284.

The objections to the trial do not end here. Perusal of the transcript of what occurred during the examination of the witnesses at the trial, read with the learned judge's summing-up to the jury, conveys the unavoidable implication that the distinguished and able judge who presided at this trial unfortunately allowed his unconcealed belief in the certainty of the guilt of the accused appellant to influence him so strongly, that he unwittingly assumed part of the functions of prosecuting counsel, and to a degree also allowed the rules of evidence to be circumvented if not directly broken to the prejudice of the appellant. It is not without significance that the appellant himself gave voice to this very objection during the course of his trial; *cf. Rex* v. *Frampton* (1917), 12 Cr. App. R. 202 and *Rex* v. *McCarthy* (1940), 57 B.C. 155.

There are two traditional common-law rules which have become so firmly imbedded in our judicial system that a conviction is very difficult to sustain on appeal if they are not observed. The first is, that if the accused is without counsel, the Court shall extend its helping hand to guide him throughout the trial in such a way that his defence, or any defence the proceedings may disclose, is brought out to the jury with its full force and effect. The second is, that it is not enough that the verdict in itself appears to be correct, if the course of the trial has been unfair to the accused. An accused is deemed to be innocent, it is in point to emphasize, not until he is found guilty, but until he is found guilty according to law.

In *Maxwell* v. *Director of Public Prosecutions* (1934), 103 L.J.K.B. 501, the House of Lords quashed a conviction carrying 20 months' imprisonment on a charge of manslaughter and using an instrument with intent to procure miscarriage. The Lord Chancellor (Lord Sankey) spoke for the House which included Lord Blanesburgh, Lord Atkin, Lord Thankerton and Lord Wright. After observing "it was impossible to deny that the evidence was strong against" the appellant (p. 508) Lord Sankey concluded:

C. A.
1946
REX
v.
DARLYN
O'Halloran, J.A.

> If in any case the evidence against a prisoner . . . is very strong and is abundant to justify a jury in convicting, it may well seem unfortunate that a guilty man should go free because some rule of evidence has been infringed by the prosecutor. But it must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury trying the true issues.

A rule of evidence "broken" in this case which "prejudiced the chance of the jury fairly trying the true issues" was section 9 of the Canada Evidence Act relating to adverse witnesses. After some 48 pages of direct examination of Dorothy Walsh during which the witness did not say certain things he expected, Crown counsel suddenly plunged into a forceful cross-examination of her without leave of the Court. As a direct result Dorothy Walsh was led to contradict her previous testimony, and under pressure of judge and Crown counsel, was led to admit the truth of a previous unsworn statement she had made to the police in the absence of the appellant. It was then put in as an exhibit and was later read in substantial part to the jury by the learned judge as her evidence.

Several aspects of the matter, quite apart from the reading of the unsworn statement as evidence to the jury, were eminently unfair to the accused, who, although not represented by counsel, objected, but had his objection peremptorily brushed aside. Crown counsel's first cross-examining question ought to have been disallowed, because it was cross-examination by Crown counsel of his own witness without leave of the Court. In the next place, although the record discloses no answer from the witness to his first cross-examining question, Crown counsel asked his second cross-examining question on the assumption that the witness would answer or had answered the first question in the affirmative (which she had not). The learned judge unfortunately aided in these irregularities by not checking Crown counsel, and by himself interjecting another question in a manner to indicate he failed to grasp the real significance of what Crown counsel was then doing.

It is true the learned judge eventually declared the witness hostile, but at a time and in terms, which clearly satisfy me he came to that conclusion as a result of the improper cross-examination of his own witness by Crown counsel. That seems con-

clusive, since Crown counsel did not apply under section 9 of the Canada Evidence Act, nor did the learned judge come to the conclusion that the witness was adverse, during the 48 pages of direct examination. It was not until the improper cross-examination had occurred and brought out the contradictory statement from the Crown witness that the learned judge was prompted to declare the witness hostile. The subsequent course of the trial might easily have taken a different turn, if the improper cross-examination had not taken place.

Enough has been said, in my judgment, to justify a new trial. It seems unnecessary therefore to examine the *status* and evidential value of the unsworn statement of Dorothy Walsh made in the absence of the appellant, which got before the jury as evidence and played such an important part in the conviction of the appellant. In this aspect of the case reference may usefully be made to such decisions as *Rex* v. *Laurin (No. 5)* (1902), 6 Can. C.C. 135; *Rex* v. *White* (1922), 17 Cr. App. R. 60; *Rex* v. *Brown* (1927), 49 Can. C.C. 37; *Rex* v. *Harris* (1927), 20 Cr. App. R. 144, at pp. 147-8; *Rex* v. *Francis and Barber* (1929), 51 Can. C.C. 343, and *Rex* v. *Ledrew and Gouthro* (1944), 83 Can. C.C. 28.

Rex v. *Sussex Justices* (1923), 93 L.J.K.B. 129 (Lord Hewart, C.J., Lush and Sankey, JJ.) and *Rex* v. *Essex Justices* (1927), 96 L.J.K.B. 530 (Avory, Swift and Talbot, JJ.) are two decisions in which it appears that although no injustice actually occurred, as has happened here, nevertheless the conviction in one case and a maintenance order in the other case were quashed on *certiorari* because as Lord Hewart, C.J. put it in the *Sussex Justices* case at p. 131,

> . . . depends not on what actually was done, but on what might appear to be done. The rule is that nothing is to be done which so much as creates even a suspicion that there has been an improper interference with the course of justice.

Lord Chief Justice Hewart said also at p. 131, *supra,* that

> it is not merely of some importance, but of fundamental importance, that justice should not only be done, but be manifestly and undoubtedly seen to be done.

(my note—the words "be . . . seen" ought to be read "seem": *per* Avory, J. in the *Essex Justices* case, *supra,* at p. 532).

C. A.
1946

REX
v.
DARLYN

O'Halloran, J.A.

Swift, J. at p. 533, in the *Essex Justices* case in quoting Lord Hewart's cited observations in the *Sussex Justices* case, said:

> It is essential that justice should be so administered as to satisfy reasonable persons concerned that the tribunal is impartial . . .
>
> Might a reasonable man in the position of the applicant think that there was interference? I think he might, and I agree that the order . . . must . . . be quashed.

In this case an actual injustice was done to the appellant by reason of irregularities in my judgment so prejudicial to the fair trial of the appellant that they combined to cause a mistrial. In the *Sussex Justices* and *Essex Justices* cases injustice only appeared to be done, but had not actually occurred.

In my judgment, with respect, the foregoing considerations demand that the appeal be allowed. That does not mean that a guilty man (if he is guilty) will escape justice. All it means is that the appellant is granted a new trial with the consequent assurance that he will be tried according to firmly established principles of British and Canadian Criminal law.

I would direct a new trial and allow the appeal accordingly.

SIDNEY SMITH, J.A.: I have read the evidence and the proceedings at the trial and would dismiss the appeal. As the majority of the Court is in favour of a new trial I do not propose to deal with the case at any length. Objection was strenuously taken to the ruling of the learned trial judge that Crown witness, Mrs. Dorothy Walsh, could be treated as a "hostile" witness; and also to the leading questions put to her by Crown counsel before such ruling was made. But having regard to the principles discussed in such cases as *Rex* v. *Stone and McLean* (1944), 81 Can. C.C. 237, at p. 239 and *Rex* v. *Ledrew and Gouthro* (1944), 83 Can. C.C. 28, I cannot say that the learned judge was wrong or that there was any irregularity in this regard. Moreover, the question of whether a witness is or is not "hostile" is one which falls peculiarly within the discretion of the trial judge. I would not disturb it.

It was contended too that the judge imputed immorality to a number of young women who were defence witnesses and that in particular he referred to them as the "harem" of the accused. In my opinion the learned judge did not use this word in its literal sense. Regarding it in its context, I think he meant no

more than that their method of living was, to say the least, unconventional. I think the evidence bore this out. He referred to the fact that the accused, a man of 47 years of age, was married to a girl of 16 years, and that the defence witnesses were all young girls of 18 to 20 years or thereabouts. But I do not think that he gave these circumstances such undue weight in his charge as to justify a new trial. The appellant, himself, did not give evidence.

In this respect reference may be made to an excerpt from the well-known passage of Lord Alverstone, C.J. in *Rex* v. *Stoddart*, (1909), 2 Cr. App. R. 217, at p. 246:

> . . . This Court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed.

And also to *Rex* v. *Newell* (1942), 77 Can. C.C. 81, at p. 86 where Robertson, C.J.O., delivering the judgment of the Ontario Court of Appeal, said as follows:

> The issues to be tried were not obscure and the evidence was not difficult to understand. The appraisal of its value was for the jury. It is not required of a trial judge that in order to place the case for the defence fully and fairly before the jury, he shall speak well of it. There are cases where that would be well nigh impossible. The trial Judge in this case did nothing to take from the jury the full and free exercise of its right and duty to find a verdict upon the evidence.

I think both these passages are applicable to the matter in hand.

The appellant on his trial was not represented by counsel. In these circumstances, as pointed out by MARTIN, J.A., as he then was, in *Rex* v. *De Bortoli* (1927), 38 B.C. 388, at p. 392:

> . . . , 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.

In this respect I think the learned judge fulfilled his duty both to the appellant and to the Crown. One must take into account all the surrounding circumstances, one of which was that the appellant (in my view at least) showed himself wise in the ways of Courts and trials, and well able to look after his own interests.

The learned judge in his statutory report to this Court said, "I have no doubt the verdict is correct." After giving the whole case my best consideration, there is also no doubt in my mind of the correctness of the verdict, and of the essential fairness of the

C. A.
1946

REX
v.
DARLYN

Sidney Smith, J.A.

trial. Had I any doubt on any of the points raised, it would be disposed of by saying that "no substantial wrong or miscarriage of justice has actually occurred" within the meaning of section 1014, subsection 2 of the Criminal Code. I would dismiss the appeal.

BIRD, J.A.: Darlyn was convicted of an offence under Code section 444, *i.e.*, conspiring with James John Barrisove and Dorothy Walsh to defraud the Government of Canada by the fraudulent withdrawal from the Postal Savings Bank of the sum of $300. The accused appeared without counsel and conducted his own defence at the trial which took place at the Summer Assize at Vancouver, B.C., before MANSON, J. and a jury.

The nature of the objections now taken by counsel to the conduct of the trial in the Court below I think requires that this Court should consider the proceedings on the trial together with the submissions now made by counsel in the light of the fact that the accused had not the assistance of counsel at the trial. In such circumstances there was cast upon the learned judge presiding the added duty of protecting in every reasonable way the interest of the accused to the end that he should be assured a fair trial; the ancient theory of our jurisprudence being that the Court in such circumstances shall be vigilant to protect the interests of the accused and in effect to act as counsel for him. *Rex* v. *De Bortoli* (1927), 38 B.C. 388; *Rex* v. *Munroe* (1939), 44 B.C. 481.

The Crown's case against Darlyn depended substantially upon the evidence of Dorothy Walsh, one of the alleged co-conspirators, who, prior to the date of the trial, had been convicted of the same offence after she had entered a plea of guilty.

Objection is taken to the conduct of the examination-in-chief of Dorothy Walsh upon the ground that the presiding judge frequently participated in the examination by putting pressing questions to the witness and by making comments all of which it was urged was calculated to impress upon the jury his conviction of the guilt of the accused, and that by so adopting a partial attitude the learned judge prejudiced the minds of the jury against the accused.

The nature and extent of a judge's participation in the examination of a witness is no doubt a matter within his discretion, a discretion which must be exercised judicially. I conceive it to be the function of the judge to keep the scales of justice in even balance between the Crown and the accused. There can be no doubt in my opinion that a judge has not only the right, but also the duty to put questions to a witness in order to clarify an obscure answer or to resolve possible misunderstanding of any question by a witness, even to remedy an omission of counsel, by putting questions which the judge thinks ought to have been asked, in order to bring out or explain relevant matters. *Yuill* v. *Yuill,* [1945] 1 All E.R. 183. But neither that right or duty in my opinion extends to justify judicial participation in the examination of a witness of a nature which a jury could reasonably interpret as indicating a predisposition on the part of the judge toward one side or the other.

In *Rex* v. *Gilson and Cohen* (1944), 29 Cr. App. R. 174 Wrottesley, J., speaking for the Court of Criminal Appeal, said at p. 181:

> . . . It is undesirable that during the examination-in-chief the Judge should appear to be not so much assisting the defence as throwing his weight on the side of the prosecution.

I conclude that Lord Greene, M.R. indirectly expressed the same view upon the limitation of the judge's right to intervene in the examination of a witness when he said in the *Yuill* case, *supra,* at p. 185:

> . . . I can find no trace whatever of any tendency to take sides or to press a witness in any way which could be considered undesirable.

Moreover, although it is said that a judge when charging a jury is entitled to express his opinon on the facts so long as he leaves it to the jury to determine the issues of fact. *Rex* v. *O'Donnell* (1917), 12 Cr. App. R. 219. Yet while he has that right, it is one which a trial judge will exercise cautiously, and if he does so will warn himself against using his trained abilities and the prestige of his position in a manner likely to dominate the minds of the jury and so obscure the formal direction to the jury that they and they alone are the judges of the facts.

If the judge finds it necessary or desirable to intervene in the examination of a witness with observations or questions, I think

C. A.
1946

REX
v.
DARLYN

Bird, J.A.

he should not thereby disclose his conviction of the guilt of the accused and so convey to the jury the impression that there can be no question of his guilt. To do so is improperly to influence the jury in the exercise of its function to find the facts. *Rex* v. *McCarthy* (1940), 57 B.C. 155.

Careful examination of the transcript of the proceedings at the trial leads me to the conclusion, with great respect, that here the learned judge exceeded the desirable limits of judicial intervention during the examination of Dorothy Walsh. During her examination-in-chief the presiding judge frequently made comments unfavourable to the accused and, as I read the transcript, may have influenced the testimony adversely to him by intervening from time to time in the examination with pressing questions on matter relating to the suggested participation by the accused in the alleged conspiracy. I consider that these comments and questions were not only unfair to the accused, but may have led the jury to believe that there was no doubt of his guilt, since they must have been taken to indicate the judge's conviction that the accused had participated in the fraudulent scheme.

Consequently the conduct of the examination of this important witness was such in my opinion as not only to deprive the accused of the assistance to which, on the authorities he was entitled from the Court, but was calculated to prejudice the jury against the accused.

Then it is said that there was prejudice to the defence arising from the fact, as counsel submits, that Crown counsel was permitted to cross-examine Dorothy Walsh, a witness for the prosecution, upon prior unsworn statements said to have been made by her to the police as well as to Crown counsel. The fact that the examination-in-chief of this witness did develop into a cross-examination long before any question of her hostility had been raised, clearly appears from perusal of the transcript.

On numerous occasions leading questions were put to the witness. In two instances she was asked and required to answer pressing questions directed to show that she had made on former occasions statements differing from her evidence then given upon matters touching the participation by the accused in the fraudulent scheme. Subsequently the learned judge intervened and pursued the same line of examination.

Until this stage of her direct examination had been reached the question of the witness' hostility had not been raised, but upon protest by the accused following the last-mentioned intervention by the Court that it was not "right that the judge should be a prosecuting officer" the Court ruled *"ex mero motu"*

she is a hostile witness in law and I am giving the privilege to Crown counsel to put leading questions to her.

The record does not disclose with any degree of clarity upon what grounds the ruling was made. The fact that no application for a declaration of hostility under section 9 of the Canada Evidence Act had been made by Crown counsel, coupled with the fact that the ruling was made immediately following a series of pressing questions directed to show that on other occasions she had made statements different from her testimony, leads to the conclusion that the ruling was influenced by that fact, if not based solely upon it.

In *Rex* v. *May* (1915), 21 B.C. 23 this Court, pursuant to section 9 of the Canada Evidence Act,

Held, IRVING, J.A. dissenting, that the Court must find the witness is adverse before evidence is allowed to prove that the witness made at other times a statement inconsistent with his present testimony.

There MARTIN, J.A., as he then was, at p. 33, said, referring to *Price* v. *Manning* (1889), 42 Ch. D. 372,

all the Lord Justices agree that the witness must be shown to be "hostile" before he can be cross-examined by the party calling him, . . . the decision is one of great authority, including all the members of the Court of Appeal.

Whether the ruling as to the hostility of this witness is open to question or not, it is clear from examination of the transcript that the conduct of the examination prior to the making of the ruling was contrary to proper procedure upon examination-in-chief and highly prejudicial to the accused.

It is not possible for this Court to determine to what degree the verdict of the jury must have been influenced by those features of the trial here discussed. It may be that if the objectionable features had not occurred the jury may have been satisfied of the guilt of the accused; but I find it impossible to say that the jury was not thereby influenced adversely to him..

It has been said authoritatively that

justice should be so administered as to satisfy reasonable persons concerned that the tribunal is impartial . . . "Nothing is to be done which creates

C. A.
1946
REX
v.
DARLYN
Bird, J.A.

even a suspicion that there has been an improper interference with the course of justice":

Rex v. *Essex Justices* (1927), 96 L.J.K.B. 530, at p. 533.

The Court of Appeal did not there determine whether or not the order was right, but held that irrespective of the fact that no injustice had been done, the order should be quashed upon the expressed ground that it (p. 532)

"is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly [seem] to be done."

The fact that the accused conducted his own defence at the trial I think made it more than ever important that, in the words of Swift, J. in the *Essex Justices* case, *supra,*

"Nothing . . . be done which creates even a suspicion that there has been an improper interference with the course of justice."

Here, in my opinion, and with the greatest respect, the able and widely experienced judge presiding has inadvertently permitted the conduct of the trial relating to the objections discussed, to take a course which in my opinion resulted in a substantial miscarriage of justice.

I do not consider the case to be one for the application of Code section 1014, subsection 2. Consequently, and as well for the reasons expressed by my brother O'HALLORAN upon the questions of misdirection and non-direction in that part of the charge relating to the testimony of Dorothy Walsh in which I concur, I would allow the appeal and direct a new trial.

Appeal allowed; new trial ordered, Sidney Smith, J.A. dissenting.

CARMICHAEL v. DOLMAGE.

C. A.
1946
Dec. 17, 20.

Practice—Appeal—Application for leave to appeal to Supreme Court of Canada—No issue left to be decided between parties—Court declines to hear motion—R.S.C. 1927, Cap. 35, Sec. 41—R.S.B.C. 1936, Cap. 143, Sec. 19.

A landlord was successful on an application under section 19 of the Landlord and Tenant Act for possession of an apartment let to the defendant, Mrs. Dolmage, and at the time of the commencement of these proceedings was occupied by her brother, W. E. MacInnes, the other defendant. The order for possession obtained by the landlord was set aside by the Court of Appeal on October 22nd, 1946. The landlord now moves under section 41 of the Supreme Court Act for leave to appeal to the Supreme Court of Canada from the judgment of the 22nd of October, 1946. From the material, it appeared that the defendant MacInnes moved out of the apartment on the 30th of September, 1946. The keys of the apartment were with the caretaker of the building and the correspondence showed the tenants had surrendered possession of the apartment. The landlord was in the same position as she would have been upon a successful appeal.

Held, that under these circumstances the appeal is really academic in the sense that the true issue between the parties, namely, the right to possession of the apartment, is no longer in issue. The motion for leave to appeal should be refused.

Coca-Cola Company of Canada Ltd. v. *Florence Matthews,* [1944] S.C.R. 385, followed.

MOTION by plaintiff for an order for leave to appeal to the Supreme Court of Canada from the decision of the Court of Appeal of the 22nd of October, 1946, reported, *ante,* p. 352.

Heard at Vancouver on the 17th of December, 1946, by O'HALLORAN, ROBERTSON and BIRD, JJ.A.

Bull, K.C. (*Maguire,* with him), for the motion.
MacInnes, K.C., contra.

Cur. adv. vult.

20th December, 1946.

Per curiam (ROBERTSON, J.A.): This is a motion under section 41 of the Supreme Court Act for an order granting the respondent leave to appeal to the Supreme Court of Canada from the judgment of this Court pronounced on the 22nd of October, 1946, on the grounds that the decision in this appeal involves a matter of public interest and an important question of law.

C. A.
1946
CARMICHAEL
v.
DOLMAGE

The matter is entirely one within the discretion of this Court. The grounds upon which an order granting leave to appeal to the Supreme Court may be made are not only those set out in *Doane* v. *Thomas* (1922), 31 B.C. 457, but there may be other grounds upon which this Court may grant leave. Since *Doane* v. *Thomas* the Supreme Court of Canada has pointed out in five cases that the discretion conferred on this Court by section 41 of the Supreme Court Act is untrammelled and free from restriction save such as is implied in the term "special leave." See *Canadian National Railways* v. *Croteau,* [1925] S.C.R. 384; *Hand* v. *Hampstead Land & Construction Co.,* [1928] S.C.R. 428, at p. 430; *Fortier* v. *Longchamp,* [1941] S.C.R. 193; *L'Association Internationale des Debardeurs, Local 375* v. *Dussault,* [1945] S.C.R. 768; and *Campbell Auto Finance Co. Ltd.* v. *Bonin, ib.* 175.

The application was by the respondent, the landlord, under section 19 of the Landlord and Tenant Act, R.S.B.C. 1936, Cap. 143, for possession of an apartment which had been let to the appellant Mrs. Dolmage and at the time of the commencement of the proceedings was occupied by her brother W. E. MacInnes, the other appellant. The order for possession obtained by the applicant was set aside by this Court on the 22nd of October, 1946.

From the material it now appears that MacInnes moved out of the apartment on the 30th of September. The keys of the apartment are with the caretaker of the building, who is under the control of the applicant. It is clear from the correspondence, verified by affidavit, that the tenants have surrendered possession of the apartment, together with all claims thereto, and that the landlord is in sole possession thereof. If the applicant was to obtain leave and was successful upon the appeal the only order she would get would be for possession of the apartment. She is now in the same position as she would be upon a successful appeal. The respondent then no longer requires an order of a Court. A successful appeal would only affect the question of costs. It would not even affect the rental. Under these circumstances I am of the opinion that the appeal is really academic,

in the sense that the true issue between the parties, *viz.*, the right to possession of the apartment is no longer in issue.

The *Coca-Cola Company of Canada Ltd.* v. *Florence Matthews,* [1944] S.C.R. 385 it was held that that Court regarded as well settled that it would not decide abstract propositions of law even if to determine the liability as to costs and that this situation would not be affected by the fact that a Provincial Court of Appeal had granted leave to appeal to the Supreme Court.

See also *Oatway* v. *Canadian Wheat Board,* [1945] S.C.R. 204. In that case the appellant, a producer of wheat in Manitoba, who had sold wheat to the Canadian Wheat Board, brought an action against the Board asking, among other things, for an accounting of the operations of the Board for the crop years 1938 to 1942 both inclusive. The Board moved to dismiss the action on certain grounds. The motion was dismissed and the Board appealed to the Court of Appeal. While the matter was still before that Court an order in council was passed under the War Measures Act. On appeal being taken to the Supreme Court a motion was made to quash and dismiss the appeal from the judgment of the Court of Appeal of Manitoba on the ground that the appeal was wholly academic and futile because, amongst other reasons, of the passage of the order in council which it was alleged disposed of any issue which might exist between the parties. The Supreme Court granted the motion, following its decision in the *Coca-Cola* case and declined to hear the appeal because there was no issue left to be decided between the parties. The learned Chief Justice, who delivered the judgment of the Court, said that the Court was bound by its judgment in the *Coca-Cola* case to the effect that it would not decide abstract propositions of law, even if to determine the liability as to costs; and such a situation was not affected by the fact that the Provincial Court of Appeal had granted leave to appeal to this Court.

Decisions of our own Courts refusing to entertain appeals, the result whereof would be a futility, are *Dunlop* v. *Haney* (1900), 7 B.C. 455; *Fawcett* v. *C.P.R.* (1901), 8 B.C. 219 applied in *DeVoin* v. *DeVoin* (unreported) decided on 8th January, 1946;

C. A.
1946
CARMICHAEL
v.
DOLMAGE

also *James Thomson & Sons* v. *Denny* (1917), 25 B.C. 29 and *The King* v. *Lee Moon Koo* (1931), 43 B.C. 458.

In the exercise then of our discretion, I am of the opinion that leave should be refused.

Motion refused.

S. C.
1946
Dec. 3.
1947
Jan. 21.

LOGAN v. LOGAN AND ZAJAC.

Divorce — Practice — Decree absolute pronounced — Husband's claim for damages and costs against co-respondent — Measure of damages— Grounds for awarding costs—Effect of co-respondent's ignorance that respondent was a married woman.

The petitioner and respondent were married on June 7th, 1943, and three days later the petitioner left for overseas in His Majesty's forces. He did not return to Canada until July, 1945. There was no child of the marriage. A child was born to the respondent and co-respondent in November, 1944. On the husband's petition for divorce a decree absolute was pronounced and in the prayer of the petition he sought as against the co-respondent damages and costs. The petitioner testified that the co-respondent told him he did not know the respondent was married until their child was born and further told him he figured it was his duty to marry the girl for the sake of the child and he kept them.

Held, that the petitioner did not establish that the co-respondent well knew the respondent was married nor did he establish that the co-respondent should have known and was reckless. This is not a case where even nominal damages should be awarded by reason of the original and only adultery alleged. On the evidence it is clear the co-respondent continued to live with the respondent after learning she was a married woman and it was his duty to marry the girl for the sake of the child. The further intimacy in the circumstances is not a ground for awarding damages.

Held, further, that the law is clear that the co-respondent cannot be condemned in costs any more than he could be ordered to pay damages.

Butterworth v. *Butterworth and Englefield, &c.*, 89 L.J. P. 151; [1920] P. 126, applied.

PETITION by a husband for divorce. The facts are set out in the reasons for judgment.

Heard by MANSON, J. at Vancouver on the 3rd of December, 1946.

Howard, for petitioner.
Bartman, for respondent. *Cur. adv. vult.*

21st January, 1947.

MANSON, J.: The petitioner and the respondent were married on the 7th of June, 1943. They lived together "approximately" three days when the petitioner left for overseas as a member of His Majesty's Canadian Army. The petitioner did not return to Canada until July, 1945. There is no child of the marriage. A child was born to the respondent and the co-respondent on 17th November, 1944. The petitioner testified that the co-respondent, in the presence of the respondent, told him he did not know the respondent was married until their child was born, when the respondent broke down and confessed she had a husband overseas. The petitioner testified further that the co-respondent on the same occasion told him that

> he figured it was his duty to marry the girl for the sake of the child—that he couldn't very well figure it out, and didn't know what to do, so he just kept them.

The respondent was known to the petitioner four years prior to their marriage. The co-respondent apparently also knew the respondent from 1942 onwards. The petitioner in paragraph 9 of his petition alleges that the co-respondent well knew the respondent to be the wife of the petitioner at the time of the adultery of which the petitioner complains. In the prayer of his petition he seeks, as against the co-respondent, damages in the sum of $2,500 and costs. At the trial on the 4th of December, 1946, a decree absolute was pronounced. The question of damages and costs was reserved.

Counsel for the petitioner, in an able argument, submits that the fact that there is no evidence that the co-respondent knew when he committed adultery with the respondent that she was a married woman does not disentitle the petitioner to damages. With that submission there is no quarrel. But whether damages should be granted depends upon the facts of the particular case.

He contends that the co-respondent ought to have known that the respondent was a married woman, and asks that it be inferred that he knew (a) by reason of the fact that the respondent drew dependant's allowance while the petitioner was in the army, (b) by reason of the fact that the respondent received letters from the petitioner while he was overseas, and (c) by reason of the fact that the respondent was continually in funds. The fact

S. C.
1947

LOGAN
v.
LOGAN AND
ZAJAC

Manson, J.

is, however, that there is no evidence that the co-respondent knew that the respondent was in receipt of a dependant's allowance or that she was receiving letters from a husband overseas. Furthermore, the petitioner's letters from overseas were discontinued in 1944. He went overseas at the end of June, 1943. He last heard from his wife in May, 1944. He testifies that thereafter he wrote several times for explanations but received no answer. It well may be that the respondent was working and therefore in funds. She had no children and was free to work. The simple fact is that there is no evidence which warrants the inference that the co-respondent knew at the time of his first intimacy with the respondent that she was married. What relevant evidence there is points in the opposite direction.

Counsel cites in support of his submission *Lord* v. *Lord,* [1900] P. 297; *Venables* v. *Venables and Wheeler* (1916), 32 T.L.R. 330, and *Langrick* v. *Langrick and Funnell,* [1920] P. 90. In *Lord* v. *Lord, supra,* Gorell Barnes, J. laid it down as a matter of law, that damages are recoverable by a petitioner against a co-respondent though the co-respondent was unaware that the respondent was married at the time of his intimacy with her, because he took the risk of the woman being married. The learned editor of Rayden on Divorce, 4th Ed., at p. 338, note (*c*), says that the ruling of Gorell Barnes, J. is well established in England, and governs the present practice of the English Courts. McCardie, J., in *Butterworth* v. *Butterworth and Englefield, &c.,* 89 L.J. P. 151, at p. 164; [1920] P. 126, at p. 151, in an able and exhaustive judgment on the question of damages and costs in divorce cases, has this to say on the point:

> . . . Assuming then that, as a matter of strict law, damages other than nominal can be given against a co-respondent who is wholly without knowledge, the question arises whether, as a matter of sound practice and good sense, such damages ought to be given. In my opinion, the answer is "No."

The learned judge takes the view that no damages should be given against a co-respondent "wholly without knowledge of the circumstances." He not only gives cogent reasons in support of his view, but cites strong authority—*vide* (1920), 89 L.J. P. at p. 164. And he observes at p. 165:

> . . . I am not aware of any case in which a Judge sitting without a jury has given damages against a co-respondent wholly without knowledge.

Damages are compensatory only. The petitioner and the respondent cohabited approximately three days. There is no child of the marriage. The co-respondent was unaware of the fact that the respondent was married. The respondent apparently concealed the fact from him, a man whom she had known for some years. The petitioner did not establish his plea that the co-respondent well knew the respondent was married, nor did he establish that the co-respondent should have known or that he was reckless. I am in accord with the reasoning of McCardie, J. in *Butterworth* v. *Butterworth and Englefield, &c., supra.* This is not a case where even nominal damages should be awarded by reason of the original and only adultery alleged.

Upon the evidence it seems clear, though it was not alleged, that the co-respondent continued to live with the respondent after learning that she was a married woman. He

> figured it was his duty to marry the girl for the sake of the child—that he couldn't very well figure it out, and didn't know what to do, so he just kept them.

The further intimacy in the circumstances is not a ground for awarding damages to the petitioner.

As to costs. Costs are in the discretion of the Court (R.S.B.C. 1936, Cap. 76, Sec. 35). In *Darbishire* v. *Darbishire and Baird* (1890), 62 L.T. 664, Hannen, P. said:

> . . . this court never even gives costs against a co-respondent who is proved not to have known that the woman was married, because he is only the unconscious instrument with which the wife carries out her wrong against her husband.

In *Newby* v. *Newby and White* (1897), 77 L.T. 142, a co-respondent did not in his first intimacy, know that the woman was married, but afterwards acquired such knowledge and continued the adultery. Counsel for the petitioner admitted he could not get damages but asked for costs. Jeune, P. observed:

> The law is, to my mind, quite clear. The co-respondent cannot be condemned in costs any more than he could be ordered to pay damages. There will be a decree *nisi*, but no costs.

In *Lord* v. *Lord, supra,* while damages were awarded by a jury upon the offer of the co-respondent to pay £100 on account of any expenses to which the petitioner had been put, Gorell Barnes, J. refused costs: *vide etiam Teagle* v. *Teagle and Nottingham* (1858), 27 L.J.P. 55; *Norris* v. *Norris and Smith,* 87 L.J. P.

S. C.
1947

LOGAN
v.
LOGAN AND
ZAJAC

Manson, J.

119;; [1918] P. 128; *Priske* v. *Priske and Goldby* (1860), 29 L.J. P. 195; *Bilby* v. *Bilby* (1901), 71 L.J. P. 31; [1902] P. 8, at p. 9, where Jeune, P. said:

> The rule laid down by my predecessors is fair and proper enough, that where a co-respondent has found out, when too late to repair the wrong done, that the woman with whom he has taken up is a married woman, he ought not, because he does not then desert her, to be held liable for costs.

With this view McCardie, J. agrees, commenting, however, that each case depends on the special circumstances and must be dealt with on the merits. *Vide etiam Kleman* v. *Kleman and Wilson,* [1940] 1 W.W.R. 382, cited by counsel for the petitioner. In *Smith* v. *Smith and Reed,* [1922] P. 1, Duke, P. referred to the "inveterate practice" of the Courts in not awarding costs against a co-respondent who was not informed and did not ascertain that the respondent was a married woman. He there held (p. 4) that the co-respondent

> did not pause to consider whether [the respondent] was married or not.

The learned President cited no authorities in support of his decision, but he did distinguish the facts in the case before him from those in *Lord* v. *Lord, supra.* He made no reference to *Teagle* v. *Teagle and Nottingham, supra,* a decision of the Full Court, presided over by Cockburn, C.J. There is no evidence upon which to found an inference that the co-respondent in the case at Bar was reckless.

Counsel for the petitioner stresses the iniquity of the receipt by the respondent of dependant's allowance while disloyal to her husband. With counsel's attitude one readily agrees. More than once in other cases I have commented on the conduct of wives who have done this kind of thing. Were it within my power to direct repayment by unfaithful wives of money received by way of dependant's allowance, I would do so. One can scarcely imagine anything more shabby than for a wife to take the money of a husband who is offering his life for her and for his country while she is disloyal to him.

In the particular circumstances of the case at Bar there will be no costs.

Judgment accordingly.

REX *EX REL.* CAMERON v. H. AND H.

S. C.
1946
May 20;
Aug. 29.

Infants—The Juvenile Deliquents Act, 1929—Charge—Powers of judge—Trial "without publicity"—Rights of informant—Power to receive plea of accused.

There is only one offence known to The Juvenile Deliquents Act, 1929, Can. Stats. 1929, Cap. 46, and that is "a delinquency." The form of the charge should be that the accused child "did commit a delinquency in that he did unlawfully: (stating the act complained of). If said act is found to have been committed, the child should not be "convicted" but should be adjudged to have committed a delinquency and dealt with as provided in section 20 (1) of the Act. The only powers possessed by the Court in relation to a child adjudged to be a delinquent are those set forth in said section 20 and suspension of sentence is not one of them.

Meaning of "suspended sentence" explained.

To try a child on a charge not open to be laid under the Act and to "convict" him instead of proceeding in the manner provided by the Act amounts to more than an irregularity and the conviction must be quashed.

The Juvenile Court trial should be *in camera* except for members of the Juvenile Court Committee and such other persons as are entitled to be present at a trial *in camera.*

The informant is entitled to be present throughout the trial; but since juveniles are not to be dealt with as offenders but one to be helped and guided, an informant acting as private prosecutor will be well advised to retire once all the circumstances of the delinquency are fully before the Court.

It is open to the judge to receive in appropriate circumstances a "plea" from the accused child if he can do so with safety: otherwise he should resort to the method set forth in the reasons herein.

APPEAL by special leave from conviction and sentence of the respondents by Henry C. Hall, Esquire, judge of the juvenile court in and for the electoral district of Esquimalt. The information was laid by an inspector of the British Columbia Society for Prevention of Cruelty to Animals. The charge was

That they, the said H. and H. did, within the space of six months last past, to wit, on the 19th of March, 1946, at the Township of Esquimalt, unlawfully kill a cat, the property of A. C. Burgess, contrary to the Criminal Code.

The appeal was argued at Victoria before MANSON, J. on the 25th of May, 1946.

Harvey, K.C., for appellant.

No one, for respondents.

Cur. adv. vult.

S. C.
1946
REX
v.
H. AND H.

29th August, 1946.

MANSON, J.: An appeal by special leave granted pursuant to section 37 of The Juvenile Delinquents Act, 1929, Can. Stats. 1929, Cap. 46 (herein below referred to as "the Act"), from conviction and sentence of the respondents by Henry C. Hall, Esquire, judge of the juvenile court in and for the electoral district of Esquimalt.

The information was laid by Garth J. Cameron, an inspector of The British Columbia Society for Prevention of Cruelty to Animals, a peace officer duly sworn pursuant to section 8 of Cap. 266, R.S.B.C. 1936, under section 537 of the Criminal Code, which reads:

> Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding five hundred dollars over and above the amount of injury done, or to one year's imprisonment with or without hard labour, who
> (*a*) unlawfully kills, . . . any dog, bird, beast or other animal not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, or kept for any lawful purpose.

The wording of the charge was:

> That they, the said H. and H. did, within the space of six months last past, to wit, on the 19th of March, 1946, at the Township of Esquimalt, unlawfully kill a cat, the property of A. C. Burgess, contrary to the Criminal Code.

It appears that on 1st April last:

A. 1. That the two boys, each 15 years of age, were charged as above and pleaded guilty. 2. That the fathers of the boys and a representative of the Children's Aid Society were in Court during the proceedings. 3. That the boys were convicted for "that they did . . . unlawfully kill a cat contrary to the Criminal Code" and that they were not adjudged to have committed a delinquency. 4. That after the plea had been received the informant was called in by the learned judge to give an account of the circumstances surrounding the offence, and was then "excused" or asked to retire despite the fact that he claimed a right to be present until the trial was completed. The learned judge reports that Mr. Cameron claimed a right to be present in order that he might report to his society and that he was of the opinion that to grant the claim would be to violate the provisions of section 12 of the Act. 5. That the case was remanded until April 8th. And that on 8th April:

B. 1. That the fathers of the boys and the representative of the Children's Aid Society, but not the informant, were in Court during the proceedings. 2. That the judge was in possession of reports on each of the boys from the Children's Aid Society, in conformity, it is said, with the usual practice of the Juvenile Court. 3. That the boys were reprimanded, directed to apologize and to make reparation as desired by the owner. 4. That the case was remanded until 15th April. And that on 15th April:

C. 1. That the parents of the boys and the representative of the Children's Aid Society, but not the informant, were in Court during the proceedings. 2. That the boys reported that they had apologized and were making reparation. 3. That the judge, having good reports about the boys, being satisfied that they regretted their offence and that no repetition was likely, suspended sentence. 4. That no recognizance was entered into by the boys and that they were released unconditionally.

Before entering upon a consideration of the several submissions of counsel for the appellants, one or two general observations may not be amiss. Although the Act has been upon the statute book since 1908 its provisions seem to have been disregarded in many juvenile courts, and, oddly enough, in Courts presided over by learned and otherwise careful judges. The Act is not a lawyers' Act, not a model of perfection in the matter of draftsmanship, not one to which it is easy to apply the ordinary rules of construction. Nevertheless, we must take the Act as we find it and despite some anomalies, givt effect as best we can to its provisions.

For the sake of convenience certain sections of the Act to which particular reference will be made are set forth in whole or in part hereunder:

2. (*g*) "Juvenile delinquent" means any child who violates any provision of the Criminal Code or of any Dominion or provincial statute, or of any by-law or ordinance of any municipality, or who is guilty of sexual immorality or any similar form of vice, or who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under the provisions of any Dominion or provincial statute.

3. (1) The commission by a child of any of the acts enumerated in paragraph (*g*) of section two of this Act, shall constitute an offence to be known as a delinquency, and shall be dealt with as hereinafter provided.

S. C.
1946
REX
v.
H. AND H.
Manson, J.

(2) Where a child is adjudged to have committed a delinquency he shall be dealt with, not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision.

4. Save as provided in section nine of this Act, the Juvenile Court shall have exclusive jurisdiction in cases of delinquency including cases where, after the committing of the delinquency, the child has passed the age limit mentioned in paragraph (*a*) of section two of this Act.

5. Except as hereinafter provided, prosecutions and trials under this Act shall be summary and shall, *mutatis mutandis*, be governed by the provisions of the Criminal Code relating to summary convictions in so far as such provisions are applicable, whether or not the act constituting the offence charged would be in the case of an adult triable summarily.

Then follow certain provisoes enacting that certain sections of the Code shall not apply—some not at all, and some in certain circumstances—and, further, that section 1140 of the Code shall apply.

12. (1) The trials of children shall take place without publicity and separately and apart from the trials of other accused persons, . . .

(2) Such trials may be held in the private office of the judge or in some other private room in the court house or municipal building, or in the detention home, or if no such room or place is available, then in the ordinary court room: Provided that when held in the ordinary court room an interval of half an hour must be allowed to elapse between the close of the trial or examination of any adult and the beginning of the trial of a child.

(3) No report of a delinquency committed, or said to have been committed, by a child, or of the trial or other disposition of a charge against a child, or of a charge against an adult brought in the Juvenile Court under section thirty-three or under section thirty-five of this Act, in which the name of the child or of its parent or guardian or of any school or institution which the child is alleged to have been attending or of which it is alleged to have been an inmate is disclosed, or in which the identity of the child is otherwise indicated, shall without the special leave of the Court, be published in any newspaper or other publication.

16. The Court may postpone or adjourn the hearing of a charge of delinquency for such period or periods as the court may deem advisable, or may postpone or adjourn the hearing *sine die*.

17. (1) Proceedings under this Act with respect to a child, including the trial and disposition of the case, may be as informal as the circumstances will permit, consistently with a due regard for a proper administration of justice.

(2) No adjudication or other action of a juvenile court with respect to a child shall be quashed or set aside because of any informality or irregularity where it appears that the disposition of the case was in the best interests of the child.

20. (1) In the case of a child adjudged to be a juvenile delinquent the court may, in its discretion, take either one or more of the several courses

of action hereinafter in this section set out, as it may in its judgment deem proper in the circumstances of the cases,—

(*a*) suspend final disposition;

Then follow eight other courses which the court may follow.

24. (1) No child, other than an infant in arms, shall be permitted to be present in court during the trial of any person charged with an offence or during any proceedings preliminary thereto, and if so present it shall be ordered to be removed unless it is the person charged with the alleged offence, or unless its presence is required, as a witness or otherwise, for the purposes of justice.

(2) This section shall not apply to messengers, clerks and other persons required to attend at any court for the purposes connected with their employment.

28. (2) Representatives of the Juvenile Court Committee, who are members of that Committee, may be present at any session of the Juvenile Court.

For the constitution of the Committee see section 27.

It will be noted that a juvenile court has no power to convict a child. A child may be adjudged to have committed a delinquency, but he shall not be dealt with as an offender. *Vide* section 3 (2). The only powers possessed by the Court in relation to a child adjudged to be a delinquent are set forth in section 20.

The appellant submits that the informant should have been allowed to be present throughout the proceedings. Section 12 (1) of the Act says that the trials of children shall take place "without publicity" and subsection (2) that the trials may be held in the private office of the judge, etc.—*vide supra.* Nevertheless, a report of the proceedings may be made in newspapers or other publications so long as the identity of the child is not disclosed, unless with special leave of the Court. *Vide* section 12 (3). The phrase "without publicity" is used in section 644 of the Code—a section almost identical with section 12 (1) and dealing with the trial of young persons apparently under the age of 16 years. There is not to be found in the Act a specific power "to order that the public be excluded" as in section 645 of the Code. It is a well-recognized principle of our law that the public shall have access to trials both criminal and civil. There are a few exceptions to the rule which one finds fully discussed in the cases. There are certain statutory exceptions where it is specifically enacted that proceedings may be held *in camera,* and apart from statute there is in criminal cases an inherent power in the Court to exclude the public if the presiding judge is of the

S. C.
1946
REX
v.
H. AND H.
Manson, J.

opinion that it would be contrary to good morals to hold the trial (or some portion of it) in public. *Vide* Lord Fitzgerald in *Macdougall* v. *Knight* (1889), 14 App. Cas. 194, at p. 206. In *Scott* v. *Scott*, [1913] A.C. 417 there will be found an elaborate discussion of the whole subject-matter. Incidentally one is constrained to wonder why Lord Shaw of Dunfermline thought it worth while to quote from Bentham as he did at page 477. One finds it difficult to believe that the judges of Bentham's time were of such a character as to justify the statements made. If Bentham's statements were made today they would be regarded as something more than mere hyperbole—they would be regarded as wildly extravagant and in part quite untrue.

I can find no authority in which the phrase "without publicity" has been judicially interpreted. In Corpus Juris one finds reference to 75 or 100 "without" phrases which have been interpreted but "without publicity" is not one of them. Perhaps the phrase is so clear as not to require discussion. That might well be, but for two facts: (1) The rule that trials shall be held in public is so thoroughly ingrained in our practice—it has been one of the distinguishing features of our law from very earliest times—that departure from it is not to be countenanced unless in conformity with the well-recognized exceptions or as a result of clear and unmistakable statutory enactment. (2) Subsection (3) is clearly inconsistent with subsection (1); "some publicity" is inconsistent with "without publicity." Just how "a newspaper or other publication" is to get the data for the limited report authorized by subsection (3) does not appear. If a representative of a newspaper or other publication is to be allowed to attend in Court, then, *a fortiori*, the public must be given the same privilege. One finds some assistance by looking at section 28 (2). A fair inference therefrom is that the Court is to be held *in camera* except for members of the Juvenile Court Committee, and, of course, such other persons as are entitled to be present at a trial *in camera*. The presence of section 24 in the Act—prohibiting children in Court—is difficult of explanation. Its presence does not support the view that trials are to be held *in camera*. It probably crept into the statute through inadvertence or *ex abundanti cautela*. There does not seem to be any

legitimate excuse for its presence. The learned editor of the 6th edition of Crankshaw in his comment on section 644 of the Criminal Code at p. 708 says:

> It will be seen that by this section it is imperatively enacted that the trials of persons under the age of sixteen shall take place without publicity, ...

And he adds:

> It is contempt of Court to disclose the details of proceedings held *in comera*

quoting *Scott* v. *Scott* (1911), 28 T.L.R. 127 in support. It would seem to follow that subsection (3) must be read subject to the overriding provision of subsection (1) and that the newspapers and other publications must be left to their wits in getting even a limited report of juvenile court proceedings. Subsection (1) constitutes a statutory exception to the general rule that trials shall be held in public and it follows that had Mr. Cameron been no more than a member of the public or a representative of his society, the learned judge would have been quite right in excluding him. In his report he says that Mr. Cameron claimed the right to attend so that he might report to his society. Be that as it may, the fact remains that Mr. Cameron was the complainant and the private prosecutor, and as such he was entitled to be present throughout the trial. *Vide Re McMicken* (1912), 20 Can. C.C. 334. By section 5 of the Act section 715, subsection 2 of the Code (*inter alia*) is made applicable. That subsection reads:

> Every complainant or informant in any such case shall be at liberty to conduct the complaint or information, and to have the witnesses examined and cross-examined by counsel or attorney on his behalf.

While, having regard to the strict letter of the law, the learned judge erred in "excusing" Mr. Cameron, nevertheless the spirit of the statute is not to be overlooked. Juveniles are not to be dealt with as offenders but are to be helped and guided—*vide* section 3 (2), and once all the circumstances of a delinquency are fully before the Court a private prosecutor will be well advised to retire. The statute provides for other assistance for the judge in the matter of how best to help and guide a delinquent—*vide* sections 27 to 32 inclusive, which provide for Juvenile Court Committees and probation officers—*vide etiam* B.C. Stats. 1946, Cap. 60, the recently passed Probation Act.

S. C.
1946
REX
v.
H. AND H.
Manson, J.

Question is raised as to whether the learned judge was right in receiving a "plea" from the two accused boys. *Rex* v. *Wigman* (1918), 25 B.C. 350, was cited in support of the appellant's argument that he was not. Neglecting that case for the moment, let us look at the relevant statute law.

By virtue of section 5 of the Act section 721 of the Criminal Code is made applicable. It reads in part:

721. If the defendant is personally present at the hearing the substance of the information or complaint shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted, or why an order should not be made against him, as the case may be.

2. If the defendant thereupon admits the truth of the information or complaint, and shows no sufficient cause why he should not be convicted, or why an order should not be made against him, as the case may be, the justice present at the hearing shall convict him or make an order against him accordingly.

3. If the defendant does not admit the truth of the information or complaint, the justice shall proceed to inquire into the charge. . . .

With regard to section 721 Tremeear, 5th Ed., at p. 842 has this to say:

Technically speaking, there is no such thing as a plea of guilty or one of not guilty under Part XV. Section 721 provides that accused is to be asked "if he has any cause to show why he should not be convicted," and later subsections provide what is to be done if accused "admits the truth of the information and shows no sufficient cause," or if he "does not admit the truth," etc. The almost universal practice, however, is to take a plea, asking accused whether he is guilty or not guilty, and a plea of guilty is properly regarded as an admission, both of the truth of the information, and of an absence of sufficient cause why accused should not be convicted. *Rex* v. *O'Brien*, [1918] 3 W.W.R. 848.

Bearing in mind that section 721 is applicable, there seems no reason why the practice which prevails in summary-conviction proceedings should not be available in appropriate cases in a juvenile court. It does not follow that a child should always be asked to plead when charged with a delinquency. Regard must be had to the age of the child and to his mentality and to the nature of the delinquency charged. Obviously the Court may very properly ask a normal 16-year-old second-year high school boy charged with the delinquency of having stolen a bicycle (or other act of definitely illegal character) to plead, but just as obviously the Court ought not to ask a boy of eight or nine to plead, no matter what delinquency is charged. The proper procedure in the case of a boy of eight or nine, no matter what

deliquency is charged, is to follow, as closely as circumstances will permit, the language of section 721. The charge should be explained to the child in language which he will understand, and he should be asked, "Did you do this?" or words to like effect. Having regard to the fact that the proceedings are to be informal, the judge may perhaps depart somewhat from the language of section 721. In fact, in the case of a young child, to use the language of 721 would be to use language which the child would probably not understand. To say to a boy of eight or nine—"Have you any cause to show why you should not be convicted?" would not be sensible, and, furthermore, the word "convicted" is not the word to use because as pointed out above, the Court cannot convict a child. The question, "Did you do this?" is a much better way of putting things. If there is the least doubt as to what the child has to say, the only safe course to pursue is for the Court to enter upon an inquiry as under subsection 3 of section 721. The Court should always be cautious to satisfy itself that the accused understands the offence with which he is charged. *Vide Rex* v. *Johnson and Creanza* (1945), 62 B.C. 199, and *Rex* v. *Hand* (1946), *ib.* 359, as explained and clarified in *Rex* v. *Malina* (1946), *ib.* 532.

In my view it is open to a judge of a juvenile court to proceed by way of plea in appropriate circumstances, and if he can do so with safety, otherwise he should resort to the method indicated above. This view is shared by my colleagues COADY, WILSON and HARPER, JJ., with whom I have had the opportunity of conferring.

Now, returning to *Rex* v. *Wigman,* that case, if I may say so, is not adequately reported, and the result has been that it has been given an application which, upon the facts, is not justified. It has been understood to mean that under no circumstances can a plea of guilty be accepted by a judge of a juvenile court. Unfortunately, the file on the *habeas corpus* proceedings has been destroyed, but the registry has found for me a copy of the order made quashing the conviction, and thanks to the superintendent of the Industrial School for Girls, I have been able to peruse the warrant of commitment and through the courtesy of the clerk of the Vancouver juvenile court I have been able to get a copy of

S. C.
1946
REX
v.
H. AND H.
Manson, J.

the memorandum made by the late H. C. Shaw, Esquire, the judge of the juvenile court for Vancouver in 1918, in his day-book. In April, 1917, the brother of Mary Ann Wigman lodged a complaint in the juvenile court, complaining that his sister by reason of incorrigible or vicious conduct was beyond the control of her parents. Section 6 of the Industrial Home for Girls Act, B.C. Stats. 1912, Cap. 11, reads in part:

> 6. Upon complaint and due proof made to the Judge by a parent or guardian of any girl or by the Superintendent of Neglected Children or any agent appointed by him for that purpose, or by any Probation Officer that by reason of incorrigible or vicious conduct such girl is beyond the control of such parent or guardian, and upon satisfying himself that a due regard for the material and moral welfare of such girl manifestly requires that she should be committed to the Industrial Home for Girls, the Judge may order that such girl be committed . . .

The complaint was heard by the judge of the juvenile court for the city of Vancouver. According to the note made by the judge in his day-book the girl pleaded guilty. From the warrant of commitment I conclude that the learned judge of the juvenile court fell into some of the errors fallen into by the learned judge in the case at Bar. First he dealt with a complaint that did not charge a delinquency but charged an offence against section 6 of the Industrial Home for Girls Act. There is only one offence known to The Juvenile Delinquents Act, 1929, and that is a delinquency. Secondly, the learned judge entered a conviction which he ought not to have done. However, the particular point which resulted in the quashing of the conviction was that the juvenile court accepted a plea of guilty. The fact that there was an improper complaint and a conviction does not seem to have been argued on the *habeas corpus* proceedings. Assuming that the complaint was a proper one, one looks at the language used in section 6 of the Industrial Home for Girls Act—"Upon complaint and due proof." "Due proof" clearly means something more than an admission by the child. Parliament doubtless wittingly used the words "due proof" realizing that incorrigibility in its very nature was something to which a child should not be asked to plead. A child who had disobeyed its parents might think mistakenly that it was guilty of incorrigible or vicious conduct. *Ex statu* it was not a proper occasion for a plea to be accepted, nor was it, if one may use the phrase, *ex sensu com-*

muni. One finds no occasion therefore for disagreeing with the quashing of the conviction. With respect, and again my colleagues with whom I have had the opportunity of conferring, agree, the decision is sound upon the facts of the particular case.

The appellant further submits that the learned judge had no power to suspend sentence. As pointed out above, the powers of the Court in the case of a child adjudged to be a juvenile delinquent are set forth in section 20 of the Act. Suspension of sentence is not one of them. A juvenile court has no inherent power to suspend sentence as has a Superior Court of Record (*Rex* v. *Spratling,* [1911] 1 K.B. 77). The learned judge in his report intimates that what he intended to do was to "suspend final disposition" purusuant to section 20 (*a*). To "suspend sentence" pursuant to section 1081 of the Code does not mean to suspend the operation of a sentence after the passing of the same, but to suspend the passing of sentence. Sentence was not passed in this case. With respect may I say that the procedure was incorrect from the beginning. The charge should have been the only permissible one under the Act in so far as a child is concerned, namely, that the boys did commit a delinquency in that they did unlawfully kill, etc.: *vide* section 3. There should not have been a conviction but an adjudgment that the boys were juvenile delinquents: *vide* section 3 (*b*), *supra.* Then the Court should have proceeded under section 20.* Section 38 directs that the Act be liberally construed, and section 17 enacts that the trial and disposition of the case may be as informal as the circumstances will permit, and that no adjudication or other action of a juvenile court with respect to a child shall be quashed or set aside because of any informality or irregularity where it appears that the disposition of the case was in the best interests of the

* No forms are prescribed by the statute. H. S. Wood, Esquire, judge of the juvenile court for the city of Vancouver, has drafted forms of information and complaint, adjudication, warrant of commitment and other forms which are currently used in his court. They might well be used, with necessary alterations, in all juvenile courts.

For future reference, should occasion require, I have placed on file herein copy of the order of MORRISON, J., as he then was, of 31st May, 1918, in *Rex* v. *Wigman,* copy of the warrant of commitment and copy of notes in day-book of the late H. C. Shaw, Esquire, judge of the Vancouver juvenile court.

S. C.
1946
REX
v.
H. AND H.
Manson, J.

two boys. I was not convinced that the learned judge, who went to very considerable pains to ascertain all he could about the boys, did not act wisely throughout in so far as they were concerned. Nevertheless it is not possible to uphold the proceedings and the disposition of the case. To try a boy on a charge not open to be laid under the Act and to convict him when the Act does not permit of a conviction of juveniles is something more than an irregularity.

The appellant further submits that, no recognizance having been taken, there was really an acquittal, and cites *Rex* v. *Eveleigh* (1939), 54 B.C. 94 in support. It is unnecessary to consider the submission in view of what I have already said. The boys apologized to the owner of the cat and made reparation—the reports upon them apart from this incident were favourable. They have been sufficiently dealt with and nothing is to be gained by further proceedings. Technically, however, the appeal must be allowed and the conviction quashed.

Appeal allowed; conviction quashed.

S. C.
1947
April 14, 21.

HNATNICKY v. PACIFIC PINE COMPANY LTD.

Master and servant—Wrongful dismissal—Duty to seek other employment—Pending arbitration—Effect of.

The plaintiff, an employee, was found to be entitled to damages for wrongful dismissal. The question of the wrongfulness of his dismissal was at the time the subject of arbitration as provided by a collective bargaining agreement between the local union of the International Woodworkers of America as the collective bargaining agency of the employees and the defendant. This is no ground for holding that the employee was relieved of the duty of minimizing the damages by seeking other employment while the arbitration was pending.

ACTION for damages for wrongful dismissal as an employee of the defendant company and for the amount he would have earned had he been in the employ of the defendant company from the 21st of June until the 26th of September, 1946. The

facts are set out in the reasons for judgment. Tried by COADY, J., at Vancouver, on the 14th of April, 1947.

Stanton, for plaintiff.
John L. Farris, and *Wilfrid H. Heffernan,* for defendant.

Cur. adv. vult.

21st April, 1947.

COADY, J.: On the 26th of February, 1946, the plaintiff was injured while employed by the defendant as a lumber grader at the defendant's sawmill and from that date up to the 5th of May, 1946, was in receipt of compensation from the Workmen's Compensation Board. It was the plaintiff's intention, he says, to return to work on May 6th, but unfortunately, on May 3rd, he was injured while splitting wood in his own yard at home and consequently was unable by reason of the injuries then received to return to work. He was under doctor's care for these latter injuries but did not notify his employer or explain his reason for being absent from work and was dismissed for being absent without leave.

A strike of the defendant's employees took place on May 15th, and the defendant's mill was closed down until the termination of this strike on June 20th, 1946. The defendant's plant re-opened on June 21st. On that date the plaintiff presented himself for work but was advised that he had been dismissed and for the reason above stated.

A collective bargaining agreement was at the time in effect between the local union of the International Woodworkers of America (C.I.O.), as the collective bargaining agency of the employees and the defendant. Pursuant to the terms of this agreement, negotiations took place between the union and the defendant, the union contending that the dismissal was wrongful and requesting the reinstatement of the plaintiff. The defendant refused to reinstate him and the matter was eventually referred to arbitration as provided by the agreement. The Arbitration Board found that the dismissal was wrongful and recommended the reinstatement of the plaintiff. The decision of the Arbitration Board was handed down on the 17th of September, 1946.

S. C.
1947

HNATNICKY
v.
PACIFIC
PINE
COMPANY
LTD.

Coady, J.

The defendant was advised of the decision a few days later and on the 26th of September reinstated the plaintiff.

The plaintiff now brings action for damages for wrongful dismissal and claims for the amount he would have earned had he been in the employ of the defendant from the 21st of June until he returned on the 26th of September. The plaintiff did nothing during the ensuing period to minimize his loss by seeking other employment.

Counsel for the defendant submits that the tribunal for the determination of all matters in dispute between the plaintiff and the defendant was the Arbitration Board and the plaintiff, having sought and obtained his remedy before that tribunal, it is not open to him to now come to this Court seeking damages for wrongful dismissal. I do not agree with this submission. I have not before me the formal terms of reference to indicate what matter or matters were specifically referred to the Arbitration Board but I think that is not in dispute here. The matter for determination would appear to be whether or not the dismissal was wrongful. This is clear from the award of the Board where the chairman says in the opening paragraph:

> The dispute in this case as agreed to by representatives of the parties at the hearing herein, is that the employer claims, and the union denies that the dismissal of the employee, one Vince Hnatnicky, on the 21st day of June, 1946, was for proper cause and that such cause consisted in the said employee being absent from work from May 6th, 1946, without leave of absence.

On that submission the Arbitration Board made its finding and to that finding it added a recommendation, namely, reinstatement. This was accepted by the defendant. The determination of such other legal rights as accrued to either party incidental to, or following upon the dismissal was not before the Arbitration Board for consideration. The Board was not dealing with, and did not presume to deal with any claim for damages to which the plaintiff might be entitled as a matter of law should the Board decide that the dismissal was wrongful. I am of the opinion, therefore, that the plaintiff is entitled to take this proceeding notwithstanding the arbitration.

Counsel for the defendant further submits that assuming the dismissal to be wrongful, the plaintiff is entitled to recover only

nominal damages since he failed to take reasonable steps to minimize his loss. He contends that had the plaintiff sought, he could have secured other employment, and it was his duty to do so. The law in this matter is well settled and I need not refer to the cases.

In reply to this submission, counsel for the plaintiff contends that the plaintiff's position before the Arbitration Board, seeking reinstatement as he was, would have been prejudiced if he had taken other employment pending the hearing. Furthermore, he contends that it would be unreasonable to expect the plaintiff under the circumstances to seek other employment since to do so he would be obliged to obtain his Unemployment Insurance card and the "Notice of Separation" from the defendant and return these to the Unemployment Insurance office before securing a permit authorizing him to seek employment. He argues further that the plaintiff's rights of seniority resulting from some four years of service with the defendant would have been affected had the plaintiff taken other employment.

I do not agree with these submissions. It seems to me that the plaintiff ought to have proceeded to minimize his loss and it was his duty to call for his "Notice of Separation" and his Unemployment Insurance card and take the necessary steps through the Unemployment Insurance office to obtain a permit to secure other employment and to take that employment temporarily until the arbitration was concluded and the decision handed down. *Van Snellenberg, Jr.* v. *Cemco Electrical Manufacturing Co. Ltd.* (1945), 61 B.C. 507.

The evidence before me indicates clearly that other employment similar to the employment the plaintiff had with the defendant was available to him at the time, there being a great scarcity of employees in other mills in the vicinity. Moreover, it should be noted that by accepting this other employment temporarily, the plaintiff was not called upon to leave the ranks of organized labour and engage in the ranks of unorganized labour for as the evidence indicates, the union had the same type of agreement with other mills adjacent to the plaintiff's home.

The plaintiff, however, considered that he was entitled to remain idle and if the decision of the Arbitration Board was

S. C.
1947
HNATNICKY v. PACIFIC PINE COMPANY LTD.
Coady, J.

favourable, then make his claim for damages for loss of wages for wrongful dismissal. He is supported in this view by the union and this is, as stated by counsel, a test case to determine the legal position. Clearly, it seems to me, the plaintiff was wrong in the view he took.

That being so, the question is, what damages under the circumstances is the plaintiff entitled to? It seems to me that the only damages to which the plaintiff is entitled is the equivalent of one week's wages. That amount has been paid into Court with a denial of liability. The plaintiff is entitled to judgment in this amount of $51.52. The matter of costs can be spoken to.

Judgment accordingly.

C. A.
1946
Nov. 27, 28, 29.
1947
Feb. 7.

LUSK AND LUSK v. YE OLDE ENGLISH FISH AND CHIPS LTD.

Negligence—Invitee on premises—Closed stairway—Dangerous place when unlighted—Liability of owner—Finding of trial judge.

Richard Lusk and his wife went to the defendant restaurant for dinner at about 9 o'clock on the evening of the 16th of February, 1943. The wife asked the waitress where the wash-room was. It was on the mezzanine floor with a closed stairway leading thereto. There was a light almost immediately above the bottom of the stairway and also a light near the top but somewhat to the right. The light at the bottom was intended to light the stairway but if not lit it was quite dark. There was no appreciable light from the restaurant premises reaching the stairway. This light at the bottom was burnt out at the time of the accident. The wife, while noticing the stairway was dark, went up safely but when coming down fell and was injured. The light at the top did not throw any light on the stairway except on a portion of the first two steps cutting across at an angle. The manager of the defendant said the bottom light was on between 7 and 8 o'clock that evening. It was held on the trial that in face of the manager's evidence and the burden of showing negligence being on the plaintiff and that burden under the circumstances not being discharged, the action was dismissed.

Held, on appeal, affirming the decision of COADY, J. (O'HALLORAN, J.A. dissenting), that as it was found on the trial that the failure to observe that the light was burnt out during the critical period of time should not be held to be negligence, that the absence of a hand-rail on the

stairway did not contribute to the accident and the rise in the top step was not a contributing factor, the Court was unable to say that the learned judge was wrong in so finding and the appeal was dismissed.

APPEAL by plaintiffs from the decision of COADY, J. of the 12th of July, 1946 (reported, *ante,* p. 30), in an action for damages resulting from a fall on the stairs from the ground floor to the mezzanine floor in the defendant restaurant. The plaintiffs with their son went to the defendant restaurant for dinner at about 9 o'clock on the evening of the 16th of February, 1943. The wife asked a waitress where the wash-room was and she was directed to it on the mezzanine floor with a closed stairway leading to it from the ground floor of the restaurant. There was a light almost immediately above the bottom of the stairway, also a light near the top but somewhat to the right. The light at the bottom was intended to light the stairway which particularly at that time of night would otherwise be quite dark. No appreciable amount of light from the restaurant premises reached the stairway. This light at the bottom of the stairway was unfortunately burnt out at the time. The wife, while noticing the stairway was dark, went up safely but when coming down she fell and was injured. The light at the top did not, situated at the right, throw any light on the stairway except on a portion of the first two steps at the top where the light cuts across at an angle. There was no hand-rail on either side and the appellants were invitees.

The appeal was argued at Vancouver on the 27th, 28th and 29th of November, 1946, before SLOAN, C.J.B.C., O'HALLORAN and ROBERTSON, JJ.A.

D. McK. Brown, for appellants: The learned judge misdirected himself on the *onus* of proof: see *Pickup* v. *Thames Insurance Co.* (1878), 3 Q.B.D. 594; *Wakelin* v. *London and South Western Railway Co.* (1886), 12 App. Cas. 41; Phipson on Evidence, 8th Ed., 27; *Soward* v. *Leggatt* (1836), 7 Car. & P. 613; Bullen & Leake's Precedents of Pleadings, 8th Ed., 549; *Winnipeg Electric Co.* v. *Geel,* [1932] 4 D.L.R. 51, at pp. 55-6; *Campbell* v. *Shelbourne Hotel,* [1939] 2 All E.R. 351. Next, there was lack of reasonable care: see *Lennie* v. *The*

C. A.
1946
LUSK
v.
YE OLDE
ENGLISH
FISH AND
CHIPS LTD.

Township of Etobicoke, [1943] O.W.N. 622; *Borrowman* v. *The Permutit Co.,* [1925] 3 D.L.R. 113; *Simons* v. *Winslade,* [1938] 3 All E.R. 774; *Wingfield and Wife* v. *Jenkinson* (1884), 1 T.L.R. 102; *McCallum* v. *Hemphill Trade Schools Ltd.,* [1920] 1 W.W.R. 114; *Edglie* v. *Woodward Stores Ltd.* (1934), 50 B.C. 403; *Gordon* v. *The Canadian Bank of Commerce* (1931), 44 B.C. 213, at pp. 223-4; *Kester* v. *Hamilton,* [1936] 4 D.L.R. 76, at p. 79; *Booth* v. *Ford and Shaw* (1927), 38 B.C. 279; *Rudlen* v. *Bridgeman,* [1930] 3 D.L.R. 224. The learned judge's findings were against the weight of evidence: see *Kester* v. *Hamilton,* [1937] 2 D.L.R. 330.

Tysoe, for respondent: The sole cause of the accident was lack of care by plaintiff. She assumed the risk and in any event was guilty of contributory negligence. The stairway was in good order, the only criticism being that there was no railing and the upper stair was longer than the rest. The rule in *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274 is still good law: *Gordon* v. *The Canadian Bank of Commerce* (1931), 44 B.C. 213; *Whitehead* v. *City of North Vancouver* (1937), 53 B.C. 512; *Haseldine* v. *Daw,* [1941] 3 All E.R. 156, at p. 180; *Hudson's Bay Company* v. *Wyrzykowski,* [1938] S.C.R. 278; *Hanes* v. *Kennedy,* [1941] S.C.R. 384; 8 Can. Bar Rev. 344, at p. 350; *Robert Addie & Sons (Collieries)* v. *Dumbreck,* [1929] A.C. 358; *Caswell* v. *Powell Duffryn Associated Collieries, Ld.,* [1940] A.C. 152, at p. 175; *McMillan* v. *Murray,* [1935] S.C.R. 572; *Witt* v. *David Spencer Ltd.* (1935), 50 B.C. 35. When the light goes out there is an obvious danger. A reasonable time must be allowed to refurnish a light: see *Edglie* v. *Woodward Stores Ltd.* (1934), 50 B.C. 403; *Ledwith* v. *Roberts,* [1936] W.N. 281.

Brown, replied. *Cur. adv. vult.*

7th February, 1947.

SLOAN, C.J.B.C.: In my opinion the learned trial judge reached the right conclusion, and I would, in consequence, dismiss the appeal.

O'HALLORAN, J.A.: The appellant plaintiffs appeal from the dismissal of their action for damages arising out of the following

facts as found and stated by the learned trial judge [*ante*, p. 31]:

The plaintiffs, together with their son, went to the restaurant premises of the defendant at 44 Hastings Street West, city of Vancouver, on the 16th of February, 1943, at about 9 o'clock in the evening, for the purpose of having a meal. The plaintiff Frances Lusk asked the waitress where the wash-room was and she was directed to it. The wash-room is situated on a mezzanine floor with a closed stairway leading thereto from the restaurant. There is a light almost immediately above the bottom of the stairway and also a light near the top but somewhat to the right. The light at the bottom is intended to light the stairway which particularly at this time of night would otherwise be quite dark. No appreciable amount of light from the restaurant premises reaches the stairway. This light at the bottom was unfortunately burned out at the time. The plaintiff Frances Lusk, while noticing the stairway was dark, went up safely, but when coming down fell and was injured. I accept her evidence that the stairway was very dark. The light at the top of the stairway, situated as it is some distance to the right, would not throw any light on the stairway itself, except as to a portion of the first two steps at the top where the light cuts across at an angle.

It is common ground moreover that (a) there were 13 steps in the stairway; (b) there was no hand-rail on either wall or elsewhere; (c) the stairway was maintained by the respondent for the use of his customers; and (d) the appellants were invitees. The learned trial judge held that the absence of a light at the bottom of the stairway "created a situation of danger." Nevertheless he dismissed the action on the ground the appellants had not shown the respondent was negligent. He said in material part [*ante*, p. 32]:

. . . it is quite clear on the evidence that the defendant did not know, and it cannot be held that it ought to have known, that the light was out at the time the plaintiff went to the wash-room. Mr. Rogers, the manager of the defendant company, says that this light at the bottom of the stairway was on at between 7 and 8 o'clock that evening. It burned out, apparently, some time between that hour and the time when the plaintiff went to the wash-room at about 9 o'clock. [My note—the evidence is between 9 and 10 o'clock.] The failure to observe that it was burned out during that period of time I cannot hold to be negligence on the part of the defendant. The danger that was created by the absence of this light was not a danger that the defendant knew or ought to have known under the circumstances.

With respect I am driven to conclude that the significance of certain aspects of the evidence was overlooked and that a much too narrow construction was placed upon the duty owing by an invitor to an invitee in this kind of a case.

There are features of the evidence, which if given the weight

C. A.
1947

LUSK
v.
YE OLDE
ENGLISH
FISH AND
CHIPS LTD.

O'Halloran,
J.A.

their importance deserves in my judgment lead to a quite different view of the legal responsibility for what happened. It is plain there was a vast difference between going up and coming down the stairs. Going up, a 60-watt wash-room light lay to the general front of the appellant wife Frances Lusk, and although it lighted obliquely only part of the two top steps, it did give her a degree of direction and guidance in mounting the stairs. Moreover, if she slipped, tripped, or stumbled on the way up, and fell naturally forward, the risk of injury would be small compared to the same thing happening to her coming down the stairs. It illustrates the difference between falling upstairs and falling downstairs. Coming down the stairs was a very different matter. There was no light or directing point in front of her. What reflected light there was from the wash-room tended to be blocked by her body, creating another hazard which did not exist on the way up; in this respect see *Lennie* v. *The Township of Etobicoke,* [1943] O.W.N. 622. The learned judge accepted her evidence that "the stairway was very dark." What she actually testified was that the bottom of the stairway "looked like a dark pit." Moreover, there was no hand-rail for her to hold on to for safety and guidance. In *Letang* v. *Ottawa Electric Railway* (1926), 95 L.J.P.C. 153, the plaintiff had hold of the hand-rail, at the time she slipped on the icy steps. (Although the judgment in her favour was set aside in the Supreme Court of Canada it was restored in the Judicial Committee).

In the combined circumstances the absence of a light, at the bottom of the stairway, made it a "trap" for the appellant wife coming down the stairs by exposing her to an unexpected danger. It became a concealed and unusual danger in the sense, that the danger in coming down, would not reasonably be apparent to or be appreciated by a person going up the stairway intent upon obeying a call of nature. The appearance of safety when going up the stairs served as a cloak to hide or obscure the reality of the danger to be encountered in later coming down the stairs. (See *Latham* v. *Johnson & Nephew, Lim.* (1912), 82 L.J.K.B. 258, at p. 267, *re* meaning of "trap"); and see Lord Buckmaster's statement of the law applied by the whole House (although he and Lord Carson dissented on the facts) in *Fairman* v. *Per-*

petual Investment Building Society (1922), 92 L.J.K.B. 50, at p. 54 as examined by *Gregson* v. *City of Vancouver* (1939), 55 B.C. 40, at p. 47.

The respondent knew that the lights in the restaurant premises frequently burned out; he kept an average of two dozen reserve lights in stock for replacements. It must be plain he knew of the chance of the stair light in question burning out. But it is equally plain from his own evidence that he failed to recognize, as he ought to have done, that if the stairway was not kept lighted, it would provide an unexpected and unusual danger to a customer coming down the stairs in the conditions confronting the injured appellant wife. The respondent maintained on cross-examination that when the light was out "it wasn't dark . . . you could see alright." The learned judge refused to accept his evidence in that respect, preferring the evidence of the appellant wife already referred to that "the stairway was very dark."

But with respect the learned judge overlooked the treble significance of this part of the testimony. First he did not attach due weight to the plain fact that the respondent negligently did not foresee what he ought to have foreseen; and secondly having found the place was "very dark" and that it "created a situation of danger," the learned judge ought to have found, in all the circumstances, that it was an unusual danger to the appellant wife coming down the stairs; and thirdly, flowing from the relation of these two considerations, he ought to have found the respondent was guilty of negligence and liable in damages unless the respondent (defendant) could show the injured appellant wife did not exercise reasonable care for her own safety. With deference, if these three considerations had been given the weight the evidence and the law demands, the decision as reflected in the reasons for judgment would never have been given.

The test in this action of negligence (of which an invitee action may be described as a sub-head, *per* Lord Wright in *Glasgow Corporation* v. *Muir and Others* (1943), 112 L.J.P.C. 1, at p. 7) is, ought the respondent (defendant) as a reasonable man, to have foreseen that omission to keep the light on might cause damage. If that omission directly caused the injury, then

C. A.
1947
LUSK
v.
YE OLDE ENGLISH FISH AND CHIPS LTD.
O'Halloran, J.A.

the respondent is responsible even though he could not have been expected to foresee the exact kind or "type" of damage which resulted; and see *Aldham* v. *United Dairies (London) Ltd.* (1939), 109 L.J.K.B. 323, du Parcq, L.J. at p. 326 and *Edwards* v. *Smith* (1940), 56 B.C. 53, at p. 65. In *Wagner* v. *International Ry. Co.* (1921), 232 N.Y. 176; 133 N.E. 437, Cardozo, J. adhered to the principle that anticipation of harm, and not the proximity in point of space or time, or the number of intervening events, is of governing importance. And in this aspect see *Brown* v. *Walton et al.* (1943), 58 B.C. 498, at pp. 518-9, and decisions there mentioned.

In *Glasgow Corporation* v. *Muir and Others* (1943), 112 L.J.P.C. 1 (the tea-urn case) the children were invitees. The law-lords stressed the governing importance of anticipation of harm. Lord Thankerton at p. 4; Lord Romer and Lord Clauson at pp. 11 and 12; Lord Macmillan at p. 5, and also at p. 7:

> . . . No special point arises from the circumstance that the injured children were invitees. . . . They were entitled to rely on not being exposed while on the premises to any risk occasioned by the negligence of the defenders or their servants.

Lord Wright said at p. 7 (see p. 9 also):

> . . . It is not a question of what Mrs. Alexander actually foresaw, but what the hypothetical reasonable person in Mrs. Alexander's situation would have foreseen: the test is what she ought to have foreseen.

The respondent failed to anticipate what he ought to have foreseen. He is assumed by law as a reasonable man to have been aware that danger would arise immediately if the stair light was allowed to go out. It follows that the respondent must be held to have known, or which in law is the same thing in principle, to have been negligent in failing to know, that if the light went out, the stairway would present an unusual danger to a customer coming down the stairway. Nor was there any notice or warning of the danger. The waitress who directed the appellant wife to the wash-room did not warn her of the danger. The very circumstance that she was directed to the stairway by a servant of the respondent would lead her to regard it as free from danger, and tend to lull any sense of risk she might have otherwise.

It is to be noted in *Glasgow Corporation* v. *Muir and Others,* at pp. 7 and 8, Lord Wright held that the principles laid down in

Heaven v. *Pender* (1883), 11 Q.B.D. 503, and *M'Alister (Pauper)* v. *Stevenson*, 101 L.J.P.C. 119; [1932] A.C. 562 were applicable to an invitee case even though the duty of the invitor is thereby postulated on a broader base than in *Indermaur* v. *Dames*. In support of this view Lord Wright cited *Excelsior Wire Rope Co.* v. *Callan* (1930), 99 L.J.K.B. 380 which was decided by the House of Lords almost one year after the Scottish appeal of *Robert Addie & Sons (Collieries)* v. *Dumbreck* (1929), 98 L.J.P.C. 119; and see also *Kennedy* v. *Union Estates Ltd.* (1940), 55 B.C. 1, at pp. 17-18.

This case is not far in principle from this Court's decision in the escalator case of *Cameron* v. *David Spencer Ltd.* (1940), 55 B.C. 167. That was an invitee case also founded on *Indermaur* v. *Dames* (1866), 35 L.J.C.P. 184. What was said in the *Cameron* case at p. 174 is equally apt here:

> . . . The appellant's duty here was to maintain its escalator [here the stairway] in such condition that the persons using it would not be exposed to dangers which they could avoid by the exercise of reasonable care for their own safety. It failed in that duty. The truth appears to be that accidents of this nature have been so rare, that the appellant has not troubled to guard against them. It has taken the chance.

The learned judge seems to have concluded that the respondent was not responsible once his evidence was accepted that the light was on between one and two hours before the injury occurred. Why that circumstance should have led him to absolve the respondent is not made plain, although it is associated with implications that to hold the respondent liable in such circumstances would make him an "insurer" against all accidents which might befall an invitee on the premises, and thus exceed his duty of taking reasonable care that the premises were safe. If that reasoning motivated the conclusion, I am of opinion with respect it is founded upon a much too narrow conception of *Indermaur* v. *Dames* (1866), 35 L.J.C.P. 184, affirmed (1867), 36 L.J.C.P. 181, and what must rationally flow from that familiar decision.

The duty of an invitor to take care that the premises are safe, includes safeguarding invitees from risks of injury which they cannot avoid by taking reasonable care for their own safety. That in turn, upon the authorities I have cited above, includes

C. A.
1947
LUSK
v.
YE OLDE
ENGLISH
FISH AND
CHIPS LTD.
O'Halloran,
J.A.

anticipating or foreseeing risks of the kind they cannot so avoid. As I see it the duty of the respondent invitor in this case was to anticipate the risk of unusual danger (which his own evidence shows he did not) which would immediately arise and continue if the stair light burned out. That cast upon him the duty of protecting his customers against that foreseeable risk. The respondent's failure to foresee what any reasonable man in his situation ought naturally to have foreseen, constituted a breach of duty to the injured appellant, which, if her injury is attributable to that breach (as it is later found to be) constitutes negligence and imposes liability on the respondent under *Indermaur* v. *Dames*.

This description of the duties of the invitor in the present case implies no departure from what Riddell, J.A. said in *Rudlen* v. *Bridgeman*, [1930] 3 D.L.R. 224 (falling through an open trap-door in a store during the daytime) at p. 225:

> Since *Indermaur* v. *Dames* . . . , it has always been recognized that when one person comes upon the premises of another for the purpose of transacting any business with him, which implies an inducement held out from the owner to him, the law presumes a right on the part of the stranger to all reasonable and proper precautions for his safety, that is, that the right of the owner of property to use it as he pleases is limited by the right of the other that the property owner shall take reasonable care of his safety while on the premises. The obligation on the owner has been well put by Beven on Negligence in Law, 4th Ed., p. 50, in the negative form, that he is liable for "neglect to take some step to make their condition" (*i.e.*, the condition of his premises) "with regard to strangers lawfully doing business there, of such safety that no greater than ordinary care would be required to avoid accident."

The reasonable care to which Willes, J. referred and which Riddell, J. A. discussed in the foregoing excerpt, necessarily means continuing care while the invitee is on the premises. To interpret it, as sporadic, or intermittent care or as sufficient by custom or practice if exercised over periodic intervals, would defeat completely the common sense and objective purpose of the principle in a multitude of cases of which the present is one example. The unusual danger created on the stairway by the light going out was not a matter which could be met by periodic inspections whether made every half hour or every five minutes. If the light went out a moment or two after an inspection it would immediately constitute a danger to customers and would

remain so until it was replaced. It seems demonstrably clear that the risk of injury from the unusual danger thus created could not be met effectively by periodic inspection alone.

Hence the frequency of the inspections, or the lapse of time since the last inspection, cannot be an appropriate test as to whether the invitor took reasonable care to keep his premises safe. Continuing risk can only be met by continuing care. That does not mean an "absolute" duty to safeguard customers at all costs against any harm which might befall them. It means that the degree of reasonable care demanded must correspond to the degree of the risk which arises (see *Caswell* v. *Powell Duffryn Associated Collieries, Ld.,* [1940] A.C. 152, at pp. 175-6). No doubt there are situations in which frequency of inspections and their adequacy may largely determine whether reasonable care has been taken of the premises. But we are not concerned with a case involving structural defects in a building. We are dealing with a situation which the respondent ought to have foreseen could happen at any moment and expose the customers to instant and continuing unusual danger without warning (and see Lord Wright at p. 10, *Glasgow Corporation* v. *Muir and Others, supra*). In a case like the present inspection alone would obviously be insufficient.

In my judgment the obligation of the respondent in this case to use "reasonable care" within the meaning of *Indermaur* v. *Dames* is understandingly expressed by Greer, L.J. in the licensee case of *Ellis* v. *Fulham Corporation* (1937), 107 L.J.K.B. 84, at pp. 87-8 (boy's foot cut by glass in a municipal wading-pool), as a duty to see that the risks from unusual danger (*viz.,* danger one cannot avoid by using ordinary care) should be provided against, either by sufficiently removing the risks from the use of the stairway, or by seeing to it that customers did not use the stairway at all, or were warned of the danger in using it. See also the licensee with an interest or invitee case of *Kennedy* v. *Union Estates Ltd.* (1940), 55 B.C. 1 (defective benches in a public resort), affirmed [1940] S.C.R. 625; reference may be made also to *Corby* v. *Hill* (1858), 4 C.B. (N.S.) 556; 140 E.R. 1209; what Willes, J. said there at p. 1213,

C. A.
1947

LUSK
v.
YE OLDE
ENGLISH
FISH AND
CHIPS LTD.

O'Halloran,
J.A.

provides an informative background for his later much quoted observations in *Indermaur* v. *Dames.*

In *Indermaur* v. *Dames,* moreover, it is noted at p. 190 it was argued the defendant could only be bound to keep his place of business in the same condition as other places of the kind according to the best known mode of construction. Willes, J. rejected that argument for a reason which applies equally here to any argument based upon inspection, or any practice or usage of the respondent in replacing burned-out lights, *viz.,* that

> no usage could establish that what in fact unnecessarily dangerous was in law reasonably safe as against persons towards whom there was a duty to be careful.

That is to say no practice of inspection periodic or otherwise however frequent adopted by the respondent, could keep the premises reasonably safe, if the stairway might easily become unnecessarily dangerous in the intervals between such inspections. In this case because of the risk of unusual danger from a light which it was known could easily go out, it was the duty of the respondent either to have a system of continuous lighting while the stairway was in use or else to see that it was not used without proper warning if unlighted.

The respondent failed in several branches of his duty. He neglected to recognize the obvious, *viz.,* that the stairway was dangerous if unlighted. Having failed to provide for continuous lighting, he also neglected proper warning of the risk of danger. Nor did he instruct his waitresses and employees to warn customers against use of the stairway if unlighted. The injured appellant wife was actually directed to the stairway by a waitress who if properly instructed would have warned her of the danger, or at least would have reported to some one in authority that the light was out.

The foregoing conclusions do not place any "absolute" duty upon the respondent, in the sense that "absolute" sometimes is used in the decisions. My conclusions are based upon the proposition that the duty upon the respondent was to take reasonable care that the appellant wife should not have been exposed to any dangers which she could have avoided by exercising ordinary care for her own safety. That is founded upon *Indermaur* v.

Dames, Excelsior Wire Rope Co. v. *Callan* and *Glasgow Corporation* v. *Muir and Others.*

I have examined the decisions of the English Court of Appeal in *Greenwood* v. *Central Service Supply Co.* (1940), 109 L.J.K.B. 799 and *Fisher* v. *Ruislip Northwood U.D. and Middlesex C.C.*, [1945] K.B. 584. They both relate to "black-outs" during the war, and I am unable to find them in point here. The defendant (third party) won in the former case but the defendant lost in the latter. As to the former, it is noted that MacKinnon, L.J., observed at p. 800 that if the accident had happened in times of peace an obligation would have been imposed on the third-party defendant which did not exist during the war.

The question has been discussed thus far on the premise that in a case of this kind the test of reasonable care cannot be satisfied by periodic inspections alone. However, even if periodic inspections could affect the outcome of the case, the evidence is plain as I read it, that the respondent never did recognize, as he reasonably ought to have done, the unusual danger the stairway presented if unlighted. No doubt for that reason he failed to provide any system or method of adequate inspection in an attempt to meet that danger. He had no system, method or practice in the proper sense of the words. He said he always kept a stock of lights on hand (about two dozen) for replacement of the 40-odd lights on the premises, and his practice regarding burned out lights was,

if I am notified or I see it myself I have it fixed right away.

It was all premised on "if" he was notified or "if" he saw it himself.

No instructions were given to employees to notify him immediately a light was out. He had no definite times or occasions to check the lights. He said also

I used to go around the store and see if they [the lights] were burned out, and if they were I would have them fixed.

There was no evidence whatever of any practice which could be characterized as a regular system or method of inspection. No evidence was given regarding the "life" of the lights. There was nothing to indicate for example that a light used in any given place would normally last a certain length of time. In particular,

C. A.
1947

LUSK
v.
YE OLDE
ENGLISH
FISH AND
CHIPS LTD.

O'Halloran,
J.A.

no evidence was given regarding any system of regular inspection of the stair or wash-room lights.

The inspection of the lights was haphazard and offhand. Somebody might see a light was out and might tell the respondent or they might not. He might see a light was out or he might not. He would go around occasionally at unstated and uncertain intervals to see if the lights were burned out. The cook testified that

> when anyone reported a light being out either to me or to Mr. Rogers, [the respondent] I secure the light and put it back where it was needed.

But there was no requirement upon "anyone" to tell him or the respondent that any light, let alone the stair light was out. It stands out clearly from the record that no one paid any particular attention to the stairway light. This haphazard attitude was consistent with the respondent's evidence at the trial (which the learned judge did not accept) that the stairway was not dangerous if the light was out. The lack of systematized care is emphasized by the evidence of one of the employees who assisted the appellant wife after the injury, that she had told the respondent three days or more before, that the stair light was out, but that he was busy at the time. The respondent denied this. Although the learned judge accepted the respondent's testimony on that point, it still points up the failure to give his employees any instructions regarding burned out lights which in itself is evidence of lack of care particularly in respect to the stair light.

In these circumstances, once the learned judge found the stairway was dangerous when unlighted (as he did), then if reasonable inspection of that light could be regarded as an important element in keeping the stairway safe, it seems beyond doubt, upon the respondent's own testimony that he failed to exercise reasonable care in that respect. In my judgment with respect the record before us is devoid of evidence to indicate any serious effort was made to see that the stairway was lighted continuously. That is not so surprising since the respondent made it clear he did not believe the stairway would become dangerous if it was not kept lighted continuously.

The foregoing conclusions make it necessary to consider an aspect of the case, which the learned judge did not examine (but

which in view of the conclusions he reached he was prepared to assume in the appellant's favour) *viz.*, whether the injured appellant failed to exercise reasonable care for her own safety. The *onus* of establishing that proposition rested on the respondent and his counsel directed argument to it in this Court. The evidence as stated was that the light was out, that the stairway was very dark, that there was no hand-rail, and that there was no warning of the danger. The 13 steps were of uniform width, but the second step from the top was one half inch higher than the others. The only evidence of how the accident happened is given by the injured appellant. She said she "slipped on the edge" of one of the top stairs. When asked what made her fall, she said in one place she "couldn't say," and in another place:

> Well it was dark and I must have stepped a little farther than I should have done over the step.

When asked if it was a case of missing her footing, she said "Yes." She said her heel teetered on the edge of the step and she knew she had to fall.

There is nothing in the evidence to indicate she was not using reasonable care for her own safety. I find no evidence of contributory negligence, or that she accepted the risk. As stated before the learned judge made no finding on these points. The inferences from the testimony preponderate easily to the view that without a hand-rail to hold on to, and being unable to see the steps in the dark, she missed taking a step properly, with the result that she stumbled and fell as she did. Negligence is found in the respondent as a matter of inference from his breach of duty in conjunction with all the circumstances and see *Cameron* v. *David Spencer Ltd.* (1940), 55 B.C. 167, at pp. 174-5. Even if the respondent (defendant) could have rebutted that inference he has not done so, and see also *Lennie* v. *The Township of Etobicoke,* [1943] O.W.N. 622 and *Letang* v. *Ottawa Electric Railway* (1926), 95 L.J.P.C. 153.

For the foregoing reasons, with deference, I would set aside the judgment, and allow the appeal accordingly. Since the majority of the Court have reached the conclusion the appeal must be dismissed no useful purpose may be served by my considering the damages to which the appellants would have been entitled if my view had prevailed.

C.A.
1947

LUSK
v.
YE OLDE
ENGLISH
FISH AND
CHIPS LTD.

ROBERTSON, J.A.: The learned trial judge's finding that the stairs in question when the light at the foot of the stairs was out constituted a dangerous place, is not attacked on this appeal. This alone is not sufficient to support the plaintiffs' cause of action. The plaintiffs must go further and prove that the dangerous condition of the premises was the result of negligence on the part of the defendant.

It is common ground that the plaintiff was an invitee. In *Indermaur* v. *Dames* (1867), L.R. 2 C.P. 311 the Exchequer Chamber adopted the following statement of law as to an invitee:

> . . . "With respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, when there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding or otherwise, . . . , must be determined by a jury as a matter of fact."

Lord Hailsham, L.C. said in *Robert Addie & Sons (Collieries)* v. *Dumbreck,* [1929] A.C. 358, the occupier owed to the invitee the duty of taking reasonable care that the premises are safe. See *Hambourg* v. *The T. Eaton Co. Ltd.,* [1935] S.C.R. 430, at p. 436, approving the law so stated. The standard thus to be applied is not a standard of perfection. *McMillan* v. *Murray, ib.* 572, at p. 574.

The plaintiff alleges the defendant's negligence is shown in two ways: (a) by the absence of a railing and (b) inadequate inspection. The defences are that the plaintiff was, under the circumstances, *volens,* and that the inspection was adequate. In the view which I take it is not necessary to decide whether or not she was *volens.*

There was a wash-room for guests which was at the head of a stairway. To get to this stairway one entered into a hall and then turned to the right up the stairs, almost to the head of the stairs, and then again turned to the right to a wash-room. There was an overhead electric light at the bottom of the stairs which at the time of the accident was not lighted and an electric light at the head of the stairs but to the right, above the entrance to the wash-room which was lighted. The plaintiff who was a guest was told by one of the waitresses where the wash-room was. She

entered the hall at the bottom of the stairs and found there was no light at the bottom of the stairs. She went up safely. When coming down she fell and sustained the injuries for which she sues for damages. The plaintiff had no difficulty in going up the stairs, but coming down "it looked like a dark pit." The accident took place between 9 and 10 o'clock on the night of the 16th of February, 1943. Rogers, the then manager of the restaurant, said that any time a light was burnt out he was notified and it would be replaced; that he himself used to go around the "store" and see if they were burnt out, and if they were he would have them fixed. The night the accident occurred, between 7 and 8 o'clock, he saw the lights at the bottom of the stairs and on the landing and they were both burning. Rogers was not cross-examined as to this.

There was no evidence at all in regard to the condition of the electric lights or how long a light bulb would burn, or as to whether or not they often burnt out or, in short, anything to assist the Court in this way. There is merely the evidence of Rogers showing that the lights did burn out from time to time and had to be replaced. There is nothing to show when the light at the foot of the stairs burnt out. It might have done so a minute before the plaintiff started upstairs. If there had been an half hourly supervision of all lights by a competent man, the light might have burnt out within a minute or so after he had last inspected it, and just before the accident complained of. With the number of employees who were using the stairway in question it is fair to assume that if a light were burnt out it would be reported to Rogers. It is not shown that any reasonable supervision would have prevented the accident.

In this case we have the finding of the learned trial judge [*ante*, p. 32]:

> . . . That the absence of a light at the bottom of the stairway created a situation of danger is obvious, but it is quite clear on the evidence that the defendant did not know, and it cannot be held it ought to have known, that the light was out at the time the plaintiff went to the wash-room.

He held that the failure to observe that the light was burnt out during the critical period of time could not be held to be negligence on the part of the defendant and that the absence of a hand-rail on the stairway did not in any way contribute to the

C. A.
1947
LUSK
v.
YE OLDE
ENGLISH
FISH AND
CHIPS LTD.
Robertson, J.A.

accident, or that any difference in the rise in the top step was a contributing factor. After careful consideration of the facts, I am unable to say that the learned judge was wrong in these findings.

In *Greenwood* v. *Central Service Co.*, [1940] 2 K.B. 447 the plaintiff was in a taxi-cab which collided with an unlighted street refuge. She sued the taxi company for personal injuries. The taxi company brought in the Borough Council as defendants, alleging that the collision was due to the negligence of the Borough Council in failing to keep the refuge lighted. At the trial the Borough Council gave evidence that there was great difficulty in keeping the lamps always alight; they were apt to go out; that they had a lorry going around on patrol with lighted lamps and whenever they found a lamp was out they replaced it by a lighted one. The learned county court judge found that the means adopted by the Borough Council to keep the lights on was in the circumstances a reasonable way of dealing with a difficult situation. The Court of Appeal held that there was no absolute duty to maintain the light, only a duty to exercise reasonable skill and care.

Under all the circumstances I am unable to say the learned trial judge was wrong in dismissing the action.

The appeal is dismissed.

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

Solicitors for appellants: *Tiffin, Russell & Co.*
Solicitors for respondent: *Craig, Tysoe, Stewart & Langfield.*

"COURT RULES OF PRACTICE ACT."

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that, pursuant to the "Court Rules of Practice Act," being chapter 249 of the "Revised Statutes of British Columbia, 1936," and all other powers thereunto enabling:—

1. Rule 15A of Order 36 of the "Supreme Court Rules, 1943," be amended by striking out the words "and Vancouver" in the first line, and substituting "Vancouver and New Westminster."

2. Subclause (7) of clause (*a*) of Rule 1 of the "Divorce Rules, 1943," be amended by adding after the words "the claim for damages, if any," the words "and the proposed place of trial."

3. Rule 30 of the said "Divorce Rules, 1943," be amended by adding the following as clause (*c*):—

"(*c*) Every cause shall, unless the Court or a Judge otherwise orders, be tried in the place named in the petition."

And that the above amendments do take effect on the 1st day of May, A.D. 1948.

G. S. WISMER,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., March 12th, 1948.

INGLE AND INGLE v. HANSON *ET AL.*

C. A.
1947
May 29;
Sept. 24.

Negligence—Personal injury—Fence between lots in disrepair—Lane with sidewalk adjoining fence from street to rear of lots—Fence fell on infant while playing in lane—Damages—Liability.

The defendant, a lunatic, represented by the Attorney-General, owned a lot on the north side of Frances Street, Vancouver, number 1245, of which the defendant Barr was tenant, and west and adjoining said lot was lot number 1235 of which the infant plaintiff and her father were tenants. The fence in question ran from Frances Street north on the line between the two lots. Immediately east of the fence on lot 1245 is a lane on which is a cement sidewalk running from Frances Street north beyond the lots. The Hanson Estate had repaired the fence in 1940 and 1945 under instructions from the agent of the Attorney-General but in 1945 were not made to the part of the fence that afterwards fell and injured the plaintiff. This unrepaired part was blown down in the winter of 1945-46 and had been raised and left leaning in a westerly direction against the posts from which it had been broken away. On the 20th of June, 1946, while the infant plaintiff was playing on the cement walk in the lane, the fence fell down in an easterly direction upon the plaintiff who suffered severe injuries. In an action for damages the plaintiff recovered judgment against the Lena Hanson Estate.

Held, on appeal, reversing the decision of LENNOX, Co. J. (O'HALLORAN, J.A. dissenting), that even if the appellant had control in this case the general principle is laid down that a stranger to a contract between a landlord and tenant, who is well aware of the danger, has no claim for damages against the owner arising from accident caused by want of repair. The defendant owed the plaintiff only the obligation of a licensor to a licensee, and the only duty would be to warn the child of danger actually known to him.

Cavalier v. *Pope*, [1906] A.C. 428, applied.

APPEAL by defendant Lena Hanson from the decision of LENNOX, Co. J. of the 26th of February, 1947, in an action for damages resulting from the collapse of the boundary fence separating the premises known as 1235 and 1245 Frances Street in the city of Vancouver on the 26th of June, 1946. The fence fell upon the infant plaintiff and a nail in the fence struck the infant plaintiff in the eye resulting in severe injury. The defendant (a lunatic) is the owner of the premises known as 1245 and the defendant Barr is the occupier of said premises. The defendant Barrett is owner of the premises known as 1235 and the plaintiffs are the occupiers of said premises.

C. A.
1947

INGLE
v.
HANSON

The appeal was argued at Vancouver on the 29th of May, 1947, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

McFarlane, for appellant: It is submitted there is no duty by the owner of lot 1245 to the plaintiff to keep the fence in repair. In June and July, 1945, the fence had been repaired: see Salmond on torts, 10th Ed., 500; Williams on Landlord and Tenant, 2nd Ed., 352; *Robbins* v. *Jones* (1863), 15 C.B. (N.S.) 221; *Cavalier* v. *Pope,* [1906] A.C. 428; *Bromley* v. *Mercer,* [1922] 2 K.B. 126; *Bottomley* v. *Bannister,* [1932] 1 K.B. 458; *Davis* v. *Foots,* [1940] 1 K.B. 116; *Terainshi* v. *Canadian Pacific Ry. Co.* (1918), 25 B.C. 497; *Bentley* v. *Vancouver Exhibition Association* (1936), 50 B.C. 343; *Power* v. *Hughes* (1938), 53 B.C. 64; *Donoghue* v. *Stevenson,* [1932] A.C. 562; *Farr* v. *Butters Bros. & Co.,* [1932] 2 K.B. 606; *Otto and Another* v. *Bolton and Norris* (1936), 52 T.L.R. 438; *Travers* v. *Gloucester Corporation,* [1946] 2 All E.R. 506; *Canadian Pacific Ry. Co.* v. *Anderson,* [1936] S.C.R. 200; *Shirvell* v. *Hackwood Estates,* [1938] 2 All E.R. 1; Line Fences Act, R.S.B.C. 1936, Cap. 95. The Crown Costs Act does apply.

Schultz, for respondents: The cases referred to do not apply. All the walls and fences between the two lots belong to the Hanson Estate. We say the fence was a trap. The condition of the fence was known to the Hanson Estate: see *Payne* v. *Rogers* (1794), 2 H. Bl. 349; 126 E.R. 590. The owner is bound to repair: see *Aldham* v. *United Dairies (London), Ld.,* [1940] 1 K.B. 507, at p. 513; *Brown* v. *T. and E. C. Cotterill* (1934), 51 T.L.R. 21; *Lusk and Lusk* v. *Ye Olde English Fish and Chips Ltd.* [*ante,* p. 464]; [1947] 1 W.W.R. 913, at p. 917; *Heaven* v. *Pender* (1883), 11 Q.B.D. 503, at p. 509; *Donoghue* v. *Stevenson,* [1932] A.C. 562, at pp. 580-1; *Latham* v. *R. Johnson & Nephew, Limited,* [1913] 1 K.B. 398, at p. 415; *Rundle* v. *Hearle,* [1898] 2 Q.B. 83; *Heap* v. *Ind Coope and Allsopp, Ld.,* [1940] 2 K.B. 476, at pp. 482-4. On the *quantum* of damages see Halsbury's Laws of England, 2nd Ed., Vol. 2, p. 148; *Hepburn* v. *Hepburn and Watt,* [1947] 1 W.W.R. 804, at p. 807.

McFarlane, replied.

Cur. adv. vult.

O'HALLORAN, J.A.: Although the learned trial judge did not give reasons for his judgment, I am satisfied there is evidence to justify findings of fact upon which the judgment may rest.

The Ingle and Barr families lived in neighbouring houses on Frances Street in Vancouver. Between their houses and close to the boundary-line but wholly on the Barr side (owned by the appellant Hanson Estate) ran a cement sidewalk which gave access to the front entrance of the DeJulius house (also owned by the Hanson Estate) immediately to the rear of the Barr house (see Exhibit 3). This cement walk also divided the DeJulius house from the Law house to the rear of the Ingle house. A dilapidated fence four feet high ran along the side of the cement walk nearest the Ingle and Law houses. This sidewalk was in common use by the residents of the four houses. Their children and other children used it constantly playing back and forth between the houses.

In June, 1946, a five-year-old child of the Ingle family was seriously injured when a portion of the heavy fence between the Ingle and Barr houses toppled over on her when she was on or near the sidewalk on the Barr side, where the evidence leaves no doubt she had every right to be. The learned trial judge dismissed claims against Barrett the owner of the Ingle house and against Barr the tenant of the Hanson Estate house, but gave judgment against the Hanson Estate as owner of the fence and the property upon which it was built. The Hanson Estate appealed.

Three important facts derive conclusively from the testimony. First according to the surveyor, the fence was on the Hanson Estate property. The man who built the fence (*viz.*, the owner of the Ingle property) testified it was not his fence, but that he built it for Mrs. Hanson who paid him for it. Secondly, the fence was controlled, maintained and repaired by the Hanson Estate and not by its tenants. The Hanson Estate had repaired the fence in 1940 (Exhibit 8) and again in June, 1945, a year before the accident. Although it had assumed or accepted this duty nevertheless thirdly, on two occasions the Hanson Estate

C. A.
1947

INGLE
v.
HANSON

O'Halloran,
J.A.

neglected to repair when it knew the portion of the fence with which we are now concerned was badly in need of repair.

The first occasion was in June, 1945. Repairs were then done to the fence north and south of the portion now involved, but this latter part, *viz.*, the part which toppled over on the child, was not then repaired. The carpenter who did those 1945 repairs testified that the Hanson Estate agent (since deceased) told him not to repair the part of the fence now in question. The carpenter said it was rotten then and he was intending to repair it, but he left it undone, because the Hanson Estate agent told him not to repair it. The latter, with knowledge of its condition ordered him to "let it stay there." The second occasion was in the early part of 1946, after the fence had blown down and DeJulius had telephoned the Hanson Estate agent about it, but nothing was done, except somebody raised it up and stood it against two old fence posts. In the circumstances the Hanson Estate could not have failed to know the cement walk was in use as a common passageway, and could not have failed to know that children of the four houses and their friends would naturally play around the fence.

Combining the three circumstances: (a) That it had undertaken the duty of keeping the fence in repair; (b) that it knew the fence was in bad condition and hence that it could easily topple over; and (c) that children were constantly playing around it, the duty of the Hanson Estate to take reasonable steps to safeguard the children becomes plain in the view that I must take. Its neglect to carry out that duty results in its liability upon the principle applied by the House of Lords in *Excelsior Wire Rope Co. v. Callan* (1930), 99 L.J.K.B. 380, which was decided about a year after the Scottish case of *Robert Addie & Sons (Collieries)* v. *Dumbreck* (1929), 98 L.J.P.C. 119. In the *Excelsior* case the House of Lords upheld the judgment in favour of the five-year-old child. Lord Buckmaster (quoted in part by Lord Wright in *Glasgow Corporation* v. *Muir and Others* (1943), 112 L.J.P.C. 1, at p. 8) said at p. 383:

> . . . It was therefore well known to the appellants that when this machine was going to start it was extremely likely that children, with the wire in motion, would be exposed to grave danger. I do not think it necessary in the least to define that it is because the children were licensees in

relation to the machine, or trespassers in relation to the machine, that the obligation cast upon the appellants here exists.

The principle which determined that decision, obviously rests upon rational foreseeability of danger to children *(Hay (or Bourhill)* v. *Young* (1942), 111 L.J.P.C. 97, at pp. 99 and 103) whether the occasion for the application of the principle, is machinery (the *Excelsior* case), a rotting fence (as here), a rotted bench (as in *Kennedy* v. *Union Estates Ltd.* (1940), 55 B.C. 1; affirmed [1940] S.C.R. 625), or anything which is liable to become dangerous if it is not guarded or kept in repair. Previously, at p. 382, Lord Buckmaster said in the *Excelsior* case, and it is equally applicable here:

. . . There is some evidence to show that the children were mischievous, . . . , [my note—there is no such evidence here] but that appears to me to be totally irrelevant. It really is a ridiculous thing to imagine that you can expect the same gravity and decorum from children as that which is sometimes associated with advanced years, and for the purposes of this case it is important to remember that the duty which we are about to examine is a duty to these children.

Upon the facts stated and upon the principles of law recited I am of opinion with deference that the Hanson Estate failed in its duty to keep the fence in a state of repair which would not become dangerous to children it could not reasonably have failed to know were constantly playing about it. The Court is entitled to put itself in the place of the person charged with the duty and to consider what such a person should have reasonably anticipated as a natural and probable consequence of neglecting to repair the fence (*Glasgow Corporation* v. *Muir and Others* (1943), 112 L.J.P.C. 1, at p. 4).

Nor, in my opinion, can the Hanson Estate as owner escape liability because its tenant Barr occupied the premises upon which the child was hurt. In *Todd* v. *Flight* (1860), 9 C.B. (N.S.) 377; 142 E.R. 148, it was held an action lay against the owner of premises who let them to a tenant in a ruinous and dangerous condition, and who permitted them so to remain until by reason of the want of repair they fell upon and injured the house of an adjoining owner. The action in essence was one of negligently failing to repair. Erle, C.J. after reviewing the decisions said, p. 389:

. . . , if the wrong causing the damage arises from the non-feasance or

C. A.
1947
INGLE
v.
HANSON
O'Halloran, J.A.

the mis-feasance of the lessor, the party suffering damage from the wrong may sue him.

The *ratio* of *Todd* v. *Flight* is examined in *Hall* v. *Norfolk (Duke of)*, [1900] 2 Ch. 493, at pp. 499-500 (Kekewich, J.); *St. Anne's Well Brewery Company* v. *Roberts and Others* (1928), 44 T.L.R. 603 and *Wringe* v. *Cohen,* [1940] 1 K.B. 229.

The Hanson Estate on the evidence failed in its duty to take the care which attached to it on the principle stated by Lord Esher in *Heaven* v. *Pender* (1883), 11 Q.B.D. 503, approved and broadened in *Donoghue's* case (1932), 101 L.J.P.C. 119, at p. 128 (and see *Hay (or Bourhill)* v. *Young* (1942), 111 L.J.P.C. 97, at p. 105) that

"when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other."

In *Glasgow Corporation* v. *Muir and Others* (1943), 112 L.J.P.C. 1 Lord Wright said at pp. 7-8:

. . . The issue can be stated on the general principles of the law of negligence without any reference to the special rules relating to the position of those who come as invitees upon premises. The children were clearly invitees within the rules laid down in *Indermaur* v. *Dames* [(1866), L.R. 1 C.P. 274; 35 L.J.C.P. 184; affirmed (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181] because they were customers at the appellants' shop. But that authority does no more than lay down a special subhead of the general doctrine of negligence. Indeed, in *Heaven* v. *Pender,* Lord Esher, M.R., would have decided the case simply on the general principles of negligence.

Applying the *ratio* in *Excelsior Wire Rope Co.* v. *Callan, Glasgow Corporation* v. *Muir and Others* and *Todd* v. *Flight* I must conclude with deference that the appeal ought to be dismissed.

ROBERTSON, J.A.: The appellant, a lunatic, represented by the Attorney-General of the Province, who is her committee by virtue of section 47 of the Lunacy Act, and is also her guardian *ad litem,* appeals from a judgment for damages against her in favour of the respondents, the infant Lillian Ingle and her father, her next friend, for negligence under the circumstances now to be related.

At all material times the appellant owned a lot described shortly as parcel A, on the north side of Frances Street. On

it are three houses, a duplex, 1245 and 1247 Frances Street, in the south-west corner of the lot, and in the north-west corner 1243 Frances Street. In 1923 the appellant caused to be built a boundary fence which, with the exception of a small part which is not material here, runs from Frances Street north to a lane. Part of the fence is on the west boundary-line of parcel A, but at the point where the accident took place the fence is undoubtedly on parcel A. A short distance to the east of the fence and to the west of 1245 and 1243 Frances Street a cement sidewalk runs from Frances Street, north to the lane. It was used by the occupants of the three houses on parcel A, going to and from Frances Street.

The only evidence as to the terms of rental is that 1245 Frances Street was rented to Barr; 1247 to Kendall and 1243 to DeJulius. There is no evidence as to how much of the property each was entitled to use or as to the use of the cement walk or as to any agreement to make repairs to the fence, or otherwise.

Immediately to the west of parcel A is lot 13 on which stands a house, 1235 Frances Street, belonging to Barrett, where his tenants, the respondents Ingle, and Lillian Ingle lived. In 1945, upon the instructions of Anthony, agent of the Attorney-General, repairs were made to part of the fence, but not to the part which afterwards fell over and injured the child. This unrepaired part of the fence was blown down in the winter or early spring of 1946 and had been raised and left leaning in a westerly direction against the posts from which it had broken away. The collapse of the fence was reported to Anthony but nothing was done to repair it. The evidence does not show that Anthony knew that Mrs. Barr had "pushed the fence back." All he knew was that the fence had blown down. The infant, on the 26th of June, 1946, was playing alone on the sidewalk on parcel A when, for some unexplained reason, this part of the fence—a very heavy fence—fell down in an easterly direction "in one piece" (the posts which had supported it remaining standing), and she sustained the injuries for which this action is brought. It is suggested that the child might have pulled the fence over. There

C. A.
1947

INGLE
v.
HANSON

Robertson, J.A.

is no evidence to support this and because of its weight and her tender age I think this submission cannot be accepted.

The respondents allege that the appellant was negligent in that, with the knowledge that the fence was in bad repair and in a dangerous and defective condition, it allowed the same to remain in that condition. The learned judge below made no findings of fact.

There is no evidence as to any covenant either on the part of the appellant or Barr the tenant, to repair the fence. There is, of course, no contractual relation of any sort between the appellant and the respondents. Therefore any right of action they may have must be in tort. *Cunard and Wife* v. *Antifyre,* [1933] 1 K.B. 551, at p. 556. It is submitted that the fact that Anthony, the agent for the Attorney-General, did some repair work to the fences in 1945 and to the sidewalk in 1941 shows that the appellant through her committee, the Attorney-General, had control of the fence. I do not think so.

Lord Atkinson in *Cavalier* v. *Pope,* [1906] A.C. 428, at pp. 433-4, pointed out that it was submitted by appellant's counsel that the premises under consideration were under the control of the landlord because of his agreement to repair; and then he said:

> . . . ; but the power of control necessary to raise the duty, for a breach of which damages were recovered in the several cases to which we have been referred, implies something more than the right or liability to repair the premises. It implies the power and the right to admit people to the premises and to exclude people from them. But this power and this right belong to the tenant, not to the landlord, and the latter's contract to repair cannot transfer them to him. The existence of such an agreement may entitle a landlord to demand from his tenant admission to the premises for the servants and workmen required to carry out his contract, but nothing in the shape of control.

In *Terainshi* v. *Canadian Pacific Ry. Co.* (1918), 25 B.C. 497 the facts were that the defendant company rented an apartment-house, the lessee agreeing to pay 25 per cent. of the gross income as rental. The plaintiff who was employed by the lessee as an elevator boy, sued for injuries resulting from the defective state of the elevator. It was held that the fact that the company sent its own engineer from time to time to examine and make any necessary repairs to the elevator, did not place the defendant

in the position of being in occupation of the premises. See also *Gregson* v. *Henderson Roller Bearing Co.* (1910), 20 O.L.R. 584.

Even if the appellant had control in this case, I think there would be no liability. As I understand it, the general principle is laid down in *Cavalier* v. *Pope, supra,* that a stranger to a contract between a landlord and tenant, who is well aware of the danger, has no claim for damages against the owner arising from accident caused by want of repair.

In *Heake* v. *City Securities Co. Ltd.,* [1932] S.C.R. 250, following *Cavalier* v. *Pope, supra,* it was held that, there being no trap, the plaintiff, not being a party to a lease, could not recover damages arising from a fire on the leased premises, such fire resulting from the deposit of an accumulation of inflammable material on the premises. See *Taylor* v. *People's Loan & Savings Corp.,* [1930] S.C.R. 190, at pp. 192-3.

Even if the infant respondent could be said to be a licensee of the appellant, the only duty would be to warn the child of danger actually known to her. If she had no knowledge, there would be no liability. *Sutton* v. *Bootle Corporation,* [1947] K.B. 359.

Upon the assumption that the landlord did not retain control, the respondents sought to impose liability upon the appellant upon two grounds: (1) Nuisance; (2) negligence constituting a trap. As to the first point, it is sufficient to say that the liability for nuisance only applies to public nuisances, *e.g.,* on a highway, or to injuries to property. See *Bromley* v. *Mercer,* [1922] 2 K.B. 126. The analogy of cases relating to nuisances adjoining places of passage or public highways cannot be applied to "merely a defect in the interior of the house." *Cavalier* v. *Pope,* [1905] 2 K.B. 757, at pp. 762-3. An action for private nuisance is correctly confined to injuries to property. *Cunard and Wife* v. *Antifyre,* [1933] 1 K.B. 551, at pp. 556-7.

This Court in *Bentley* v. *Vancouver Exhibition Association* (1936), 50 B.C. 343, held that the defendant, having given up possession and control of the building in question to certain societies, was not liable to the plaintiff, a visitor to the exhibition, for injuries sustained because of insufficient lighting, there being no trap.

C. A.
1947
INGLE
v.
HANSON
Robertson, J.A.

To maintain an action for negligence there must be a duty owing by the defendant to the plaintiff—*Lane* v. *Cox*, [1897] 1 Q.B. 415, at p. 417 and *Bottomley* v. *Bannister*, [1932] 1 K.B. 458—and a breach of that duty resulting in damages. *Otto and Another* v. *Bolton and Norris* (1936), 52 T.L.R. 438, at p. 440. There is no contractual duty. The duty then can only arise if there is a concealed trap. *Fraser* v. *Pearce* (1928), 39 B.C. 338.

The liability of occupiers towards licensees and guests is only for setting a trap. *Cavalier* v. *Pope*, [1905] 2 K.B. 757, at p. 763.

In *Fairman* v. *Perpetual Investment Building Society*, [1923] A.C. 74 it was held that the only duty owed by the landlords to the plaintiff who lodged with her sister in a flat in the building and who had no contractual relations with the defendants, was not to expose her to a concealed danger or trap.

The owner of a house is not liable to the child of his tenant of one of the rooms in his house, who is injured by falling through a railing which was not in the nature of a trap or concealed danger. See *Dobson* v. *Horsley*, [1915] 1 K.B. 634; also *Burchell* v. *Hickisson* (1880), 50 L.J.Q.B. 101. A thing is not a trap which can be seen by any person exercising ordinary care. *Bay-Front Garage, Ltd.* v. *Evers*, [1944] S.C.R. 20.

As to whether something constitutes a trap, the position of an infant is no different to that of an adult. See *Latham* v. *R. Johnson & Nephew, Limited*, [1913] 1 K.B. 398, at p. 407.

In *Otto's* case, *supra*, and *Travers* v. *Gloucester Corporation*, [1946] 2 All E.R. 506, it was held that the principle of *Donoghue* v. *Stevenson*, [1932] A.C. 562 and other like cases have no application to accidents occurring on leased premises.

Dealing now with the last point: Could it be said that the fence constituted a trap? In *Latham* v. *R. Johnson & Nephew, Limited, supra*, at p. 415, it is said a trap

> involves the idea of concealment and surprise of an appearance of safety under circumstances cloaking a reality of danger.

The difficulty in dealing with this matter as a question of fact is that there is no evidence to show why the fence fell down or the height or type of fence or the appearance of the fence other than that it was leaning against a post. No one seemed to think

there was any danger of the fence falling down; apparently everyone could see its condition. There does not seem to be any proof in this case of a trap.

It was held in *Groves* v. *Western Mansions (Limited)* (1916), 33 T.L.R. 76, referred to by Smith, J. in giving the judgment of the majority of the Court in *Heake's* case, *supra,* at p. 257, that the plaintiff who had slipped on a defective step and suffered injuries, could not recover without proof of the existence of a concealed trap, and as she could not prove this she was not entitled to damages.

Although it is clear that the appellant knew the condition of the fence, there is nothing to show that it was thought to be dangerous. There was no necessity of a warning in any case, as the danger, if any, was apparent to anyone.

The appeal, in my opinion, must be allowed.

SIDNEY SMITH, J.A.: I agree with my brother ROBERTSON that there is no ground upon which the judgment below can be sustained. To begin with, it seems to me that the plaint discloses no cause of action with respect to the appellant; against whom the allegations are that she owns premises bounded by a fence which she negligently allowed to fall into a dangerous state of disrepair, so that it fell upon and injured the infant plaintiff; and that the defendant Barr was the occupier of the appellant's premises. There are no other material allegations. It would seem to me that this fails to make out a *prima facie* case. It is not stated where the plaintiff was when injured, or whether she stood in any relationship to the appellant that created any duty, or even that the fence constituted a hidden danger.

It is clear law that when an outsider is injured by the dangerous condition of rented premises *prima facie* his claim, if he has one, is against the occupier. Here the plaintiff's case seems to have been based on the assumption that the law was otherwise if the landlord had a duty toward the tenant to repair. I need not consider the circumstances under which this might perhaps be so, since the plaintiff quite failed to show that the appellant was under this duty in the present case. If neither landlord nor tenant agrees to repair then, as between themselves, neither need

C. A.
1947
INGLE
v.
HANSON
Sidney Smith, J.A.

do so. The only evidence here was that the appellant's agent had done repairing, and we were asked to draw the inference that she had thereby assumed responsibility generally for repairs. But no such inference can legitimately be drawn. A landlord often makes repairs when he is under no duty to do so, on the principle of "a stitch in time saves nine." There is no ground, however, for saying that by so doing he creates any general obligation to repair. I think the above in itself is sufficient to show that the appellant was not liable.

But even assuming that the appellant had owed the plaintiff a duty to repair, it would have been necessary for the plaintiff to show that she was a licensee or invitee and that she had been injured by a danger. On the first point I think the evidence falls short of proving her either the one or the other; on the second the danger must be a hidden danger, unknown to the plaintiff. Here whatever danger existed was perfectly open and obvious; there was no question of concealment. Further I do not think there was sufficient proof that the fence fell merely because of its condition. It is true there is no evidence that the plaintiff herself caused it to fall; but since there was no explanation given for its collapse, I do not thing the plaintiff satisfied the *onus* that lay upon her.

On the hearing before us the plaintiff tried to obviate the difficulty of showing that she was an invitee or licensee, injured by a hidden danger, by claiming that the fence was a nuisance. As a necessary step she claimed that the concrete walk on the appellant's side of the fence, on which the plaintiff was standing when injured, was in the nature of a highway. This claim was based on the fact that at the rear of Barr's premises were other rented premises whose tenants made use of the same concrete walk. Not only, however, is this claim inconsistent with paragraphs 4 and 5 of the plaint, which allege that Barr was the tenant of the premises bounded by the offending fence (and which premises included the walk), but there is nothing in the evidence to suggest that this walk was not entirely private property. Whether one tenant or several used it as of right is

C. A.
1947
INGLE
v.
HANSON

clearly irrelevant. Any pretence that it was anything like a public thoroughfare is wholly unsupported by evidence.

For these reasons I would allow the appeal.

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

Solicitor for appellant: *M. M. McFarlane.*
Solicitor for respondents Ingle: *W. A. Schultz.*
Solicitor for respondent Barrett: *G. W. Scott.*
Solicitor for respondent Barr: *A. E. Branca.*

REX *EX REL.* GOULT v. NANAIMO DRY CLEANING AND LAUNDRY WORKERS UNION LOCAL No. 1.

S. C.
In Chambers
1947
July 16, 22.
C. A.
1947
Aug. 6, 12.

Practice—Industrial Conciliation and Arbitration Act, 1947—Trade-union—Unlawfully authorize a strike—Magistrate—Jurisdiction—Legal entity—Service of summons—Prohibition—B.C. Stats. 1947, Cap. 44, Secs. 2, 35 (3) and 38—R.S.B.C. 1936, Cap. 271.

On June 20th, 1947, a summons was issued under the Summary Convictions Act against Nanaimo Dry Cleaning and Laundry Workers Union Local No. 1 of Nanaimo, a trade-union within the meaning of the Industrial Conciliation and Arbitration Act, 1947, charging that it did unlawfully authorize a strike of its employees before a conciliation board had been appointed to endeavour to bring about an agreement between them, contrary to section 35 (3) of said Act. The summons was served on one Eula Patterson, the president of said union. On June 26th the local magistrate adjourned the hearing for a week and on June 30th said Eula Patterson obtained an order *nisi* prohibiting him from hearing the charge. On motion for final order two grounds were raised: (1) That the magistrate had no jurisdiction to hear the complaint against the local union by virtue of the service of the complaint on Eula Patterson as no law of the Province makes provision for service on an organization of the nature of the above named Local No. 1 and (2) that the magistrate had no jurisdiction over the said Local No. 1 charged herein as it is not a legal entity. The motion was dismissed holding that under the terms of the statute the magistrate had jurisdiction over the subject-matter of the charge and the regularity of the service on the union was a matter for the magistrate. The legislation by its very terms has made attributable to the trade-union certified under it the characteristics of a juristic person.

Held, on appeal, affirming the decision of MACFARLANE, J., that a trade-

S. C.
In Chambers
1947

REX EX REL. GOULT v. NANAIMO DRY CLEANING AND LAUNDRY WORKERS UNION LOCAL NO. 1

union, acting as a "bargaining agent" or "bargaining authority," as defined in section 2 of the Industrial Conciliation and Arbitration Act, 1947, has been endowed by the Legislature by the terms of the enactment in question, with the *status*, attributes and responsibilities of a *persona juridica*. It is in consequence, for relevant purposes, an entity having a separate legal existence distinct from its members. The trade-union involved in the dispute out of which this case arose was a trade-union acting as a "bargaining authority" within the meaning of the Act. It follows that it is a legal entity, subject to the provisions and sanctions of the said Industrial Conciliation and Arbitration Act, 1947. *Held*, further, that the question of service was proceedural in character and was for the learned magistrate to consider and determine in the first instance.

APPEAL by the applicant on the proceedings herein from the order of MACFARLANE, J. of the 22nd of July, 1947, dismissing a motion to make final the writ of prohibition issued by the Supreme Court pursuant to the order *nisi* of COADY, J. made on the 30th of June, 1947.

The motion for a final order for a writ of prohibition was heard by MACFARLANE, J. in Chambers at Vancouver on the 16th of July, 1947.

R. J. McMaster, for the motion.
Cunliffe, contra.

Cur. adv. vult.

22nd July, 1947.

MACFARLANE, J.A.: This is a motion to show cause why a writ of prohibition directed to be issued by my brother COADY and addressed to His Worship Police Magistrate L. Beevor-Potts of the city of Nanaimo should not be made final.

The order *nisi* herein was issued in respect to an information and complaint against Nanaimo Dry Cleaning and Laundry Workers Union Local No. 1, alleging an infraction of section 35, subsection (3) of Cap. 44, B.C. Stats. 1947, cited as the "Industrial Conciliation and Arbitration Act, 1947."

In a judgment which I handed down on the 16th instant, I disallowed certain preliminary objections so that the substance of the application might be argued. One objection then made was that the grounds as set out in the notice of motion were not stated precisely as in either the order *nisi* or the writ itself. For the

purpose of this motion, I am directing myself to the grounds stated in the notice of motion. These grounds are as follows:

1. That the said magistrate has no jurisdiction to hear the information or complaint against the said Nanaimo Dry Cleaning and Laundry Workers Union Local No. 1 by virtue of service of the complaint and summons herein upon Eula Patterson as no law of the Province of British Columbia makes provision for service on an organization of the nature of the above named Local No. 1.

2. That the said magistrate has no jurisdiction over the said Local No. 1 charged herein as the said Local No. 1 is not a legal entity.

Another preliminary objection then made was that the affidavits served were not endorsed to show on whose behalf they were filed in accordance with rule 15 of the Crown Office Rules. Counsel for the applicant then stated that the applicant was one Eula Patterson and that this appeared from the fact that the papers served were intituled "In the Matter of Eula Patterson." I did not sustain the objection but I said I thought it should be understood that the applicant should be definitely identified and the rules followed so that would be done. The penalty for failure so to endorse the affidavits is that they may not be used without the consent of the judge. I allowed the affidavits to be read on the hearing for the same reason as given above in respect of the first objection, that is, that the substance of the application might be argued now.

The importance of these rules becomes more evident now as the question which I now have to decide is whether there was any service of the information and complaint on the trade-union, and a conflict has arisen as to whether counsel for the applicant appeared before the magistrate in answer to the information and complaint. If he did so, then that may be an answer to the allegation that no service was effected upon the trade-union. The identification of the applicant before me may also be important as I shall attempt to show later because if the trade-union is the applicant here, it may not be permitted to take advantage of the contention made for it that it has not been properly served in the original proceedings. The contention that it is not the applicant here is weakened by the argument of counsel who says that the name of the applicant is to be obtained by inference from the title to the proceedings. As I pointed out in my previous judgment, although our Crown Office Rules do not provide for any

S. C.
In Chambers
1947

REX EX REL. GOULT v. NANAIMO DRY CLEANING AND LAUNDRY WORKERS UNION LOCAL NO. 1

Macfarlane, J.

other heading than "In the Supreme Court of British Columbia," in the title to the proceedings here the name of the union appears, the heading being not only "In the Matter of Eula Patterson" but also "and In the Matter of Nanaimo Dry Cleaning and Laundry Workers Union Local No. 1." If counsel for the applicant is relying on the fact that the proceedings are intituled "In the Matter of Eula Patterson" for the purpose of establishing that she is the applicant, it may be asked why is not the same inference to be drawn in respect of the trade-union as its name also appears in like manner.

On the hearing before the magistrate, according to the transcript of the proceedings produced here three informations are set out, the first against some 27 persons who are charged with unlawfully striking; the second against three persons, one of whom is Eula Patterson, who are charged as representatives of the trade-union above named, with authorizing a strike, and the third against the trade-union itself for unlawfully authorizing a strike.

The third information, I may say in passing describes the union as a bargaining authority, certified under the Industrial Conciliation and Arbitration Act, 1947, and as having bargained collectively and failed to conclude a collective agreement between the Imperial Laundry, City Cleaners and Dyers and their employees, who did unlawfully authorize a strike before a conciliation board had been appointed . . . contrary to the statute. . . . After reciting all three informations the transcript reads:

THE COURT: Mr. *McMaster*, do you want to plead today?

McMaster: No, I am asking for a remand for a week, your Worship.

THE COURT: You are representing all?

McMaster: Yes, I am representing all.

THE COURT: On the three different informations?

McMaster: Yes, your Honour.

THE COURT: I do not think there is any necessity for the accused to appear in person, is there, Mr. *Cunliffe?*

Cunliffe: Oh no, under the Summary Convictions Act, they can appear by counsel.

THE COURT: I think I had better have the stenographer sworn in this case.

Cunliffe: He is an official court stenographer.

McMaster: I would like to say for the record with regard to the summons that has been issued against the union, I am appearing on behalf of Mrs.

Patterson, who was served with the summons, and subject to any objections, preliminary objections that may be raised as to the state of the proceedings.

THE COURT: And there is to be a plea for the representatives of the union. You are appearing for them?

McMaster: Yes.

THE COURT: And I think it is the 27 employees.

McMaster: Yes.

Cunliffe: There are some minor amendments to be made to the information, and if your Honour would look first of all, at the information against the 27 employees. At the end, where it starts off, "employees in a unit, to wit: Imperial Laundry, City Cleaners and Dyers," I want to add in there, "employees."

THE COURT: To wit: Imperial Laundry, City Cleaners and Dyers employees.

Cunliffe: Yes. And in the fifth line of that same paragraph where it gives the name of the union as "Nanaimo Dry Cleaners and Laundry Workers' Union, Local No. 1" I want to change the word, "Cleaners" to the word "cleaning."

THE COURT: Is that all?

Cunliffe: That is all.

THE COURT: Both those amendments are allowed.

McMaster: I wanted to go on the record I cannot agree. I do not know if those are material amendments or not. I have not had an opportunity to go into it.

THE COURT: The amendment is allowed.

Cunliffe: In the case against the union, the name there should be changed; where the word comes in as "Cleaners," it should be "Cleaning."

THE COURT: The Nanaimo Dry Cleaning and Laundry Workers.

Cunliffe: Yes.

McMaster: I am in the same position with regard to that.

Cunliffe: On the other charge against Radford, Lawson and Mrs. Patterson there is a similar amendment where the name of the union comes in.

THE COURT: "Being representatives of a trade-union, to wit: Nanaimo Dry Cleaners and Laundry Workers' Union."

Cunliffe: Yes, I want to change the word "Cleaners" to "Cleaning."

McMaster: I take the same objection to that.

Cunliffe: I take it those amendments are allowed.

THE COURT: All amendments are allowed.

It is unfortunate, I think, that counsel after stating that he appeared on all three informations did not make it clear in his subsequent statement that he was not appearing for the union. It is obvious that Mrs. Patterson was not personally charged in the third information and there was no reason why counsel should appear for her in her personal capacity on the return of that information.

It is likewise unfortunate that the proceedings here were

S. C.
In Chambers
1947

REX EX REL. GOULT
v.
NANAIMO DRY CLEANING AND LAUNDRY WORKERS UNION LOCAL NO. 1

Macfarlane, J.

intituled as I have indicated "In the Matter of the Nanaimo Dry Cleaning and Laundry Workers Union Local No. 1," if it was the intention that these proceedings were not to be taken on its behalf as an applicant, as it has been held by the Court of Appeal in Saskatchewan in proceedings by way of *certiorari* where questions were raised under legislation analogous to that under consideration here, that an applicant cannot be heard to object on the ground of failure to serve it properly in its non-corporate capacity, when the application for the writ of *certiorari* was made and taken on its behalf, *vide Mackay and Mackay* v. *International Association Machinists Lodge No. 1057, Saskatoon,* [1946] 2 W.W.R. 257.

A writ of prohibition issues only in respect of want or excess of jurisdiction. I think that there can be no question here that under the terms of this statute the magistrate had jurisdiction over the subject-matter of the charge. The only question that remains is then whether he had jurisdiction over the person. That involves only the question of service. I think it is also clear that the regularity of the service on the union is a matter for the magistrate. The only question left for me on this application is whether there was no service or could be no service on the trade-union of the information and complaint which was before him. Without at the moment deciding the question as to whether in the circumstances which I have mentioned the union is entitled to object and addressing myself to the grounds set out in the notice of motion, there are two points to be considered, points which must necessarily in a large measure be considered together. The first of these is whether the objection that no law of the Province of British Columbia makes provision for service on an organization of the nature of the trade-union is a good objection and secondly, whether the union can be served at all on the ground that it is not a legal entity.

I think in order to consider these points that is it necessary to deal with the statute itself as the question as to what sort of entity at all the union is under this statute affects vitally the consideration of the point as to whether service on Mrs. Patterson was service on the union.

The statute defines a trade-union as meaning

an international, national, or provincial organization of employees, or a local branch chartered by and in good standing with such an organization.

An affidavit has been filed here that this union is a branch chartered by and in good standing with the Canadian Congress of Labour and I am assuming, because it is not contested before me, that that organization is a trade-union. The statute provides for certification of a trade-union as a bargaining authority for a unit of employees. It authorizes the bargaining authority when certified for a unit to require the employer to commence collective bargaining. It also provides protection for the trade-union from interference; it imposes on it certain restrictions; it recognizes the insertion in a collective agreement as a condition of employment that employees shall have membership in a specific trade-unon; it requires that every employer shall honour a written assignment of wages and, unless such an assignment is revoked in writing, remit the sum named in the assignment at least once each month to the union. I need not set out all the provisions of that nature. I mention these only as illustrations of the fact that the statute recognizes the union and protects its interests. These are elements which are characteristic of the establishment of what is often referred to in law as a juristic person. Counsel for the applicant submits that because a trade-union is certified as a bargaining authority for a unit of employees and is not authorized in its own right to make agreements that the statute does not make it an entity (or as I prefer, the expression juristic person), but that if it does so, it makes it such solely for the purpose of acting as agent for the union and that as it is not authorized to declare a strike, it does not become a person liable under the section of the statute under which the information is laid. I do not think that this distinction is important, at least so far as I am concerned. I may here also say that I do not think that the cases as to whether a trade-union generally is a legal entity and suable or not suable as such in other proceedings, such as were considered in *Hollywood Theatres Ltd.* v. *Tenney* (1939), 54 B.C. 247 and *Stephen et al.* v. *Stewart et al.* (1943), 59 B.C. 410, at p. 425, are applicable to the consideration of the *status* of the union under this statute as I have to decide here. The question I have to decide is as to

S. C.
In Chambers
1947

REX EX REL. GOULT
v.
NANAIMO DRY CLEANING AND LAUNDRY WORKERS UNION LOCAL NO. 1

Macfarlane, J.

the effect of this particular statute conferring these particular powers and imposing particular restrictions and liabilities on the trade-union bringing itself under it, that is, whether in these circumstances there is created here a juristic person recognized by law.

One thing further may be said and that is this, that sections 34, 35, 36 and 37 all specifically subject the trade-union certified under the Act to penalties for infractions of the statute. I do not see, in view of the powers, privileges and the restrictions imposed by these penalty clauses how it can be contended that under the terms of this particular statute the trade-union certified under it is not recognized by law as a juristic person subject to the provisions of the Act.

Further with regard to the question of service, the statute provides that

> Every trade-union . . . that authorizes or calls a strike contrary to this Act . . . liable, on summary conviction.

The Summary Convictions Act provides for service upon a person and defines "person" as including a corporation, partnership or party. The term party is not defined in that statute nor have I been referred to any other statute containing a definition of it. The wording, however, of section 38 of the Industrial Conciliation and Arbitration Act, 1947, it seems to me, clears up this difficulty. That section declares that:

> If an employers' organization, employees' organization, . . . , or trade-union is guilty of an offence under this Act, any officer, agent or authorized representative of the employers' organization, corporation, employees' organization, or trade-union who assented to the commission of the offence is a party to and guilty of the offence.

We have thus a provision for service on a person which includes a party under the Summary Convictions Act which is made applicable by the statute here and a declaration that the trade-union who assents to the commission of an offence is a party to that offence. As I have said earlier, the question of the regularity of the service is not for me. Counsel contends that as in all other statutes provision is made for service in a particular manner on juristic persons such as corporations, societies and others, and there being no such provision here, service cannot be made. In the argument before me the case of *Reg.* v. *Toronto*

Railway Co. (1898), 2 Can. C.C. 471, was cited. In that case Rose, J., whose judgment was approved on appeal, deals with the question of service at the foot of page 474, and on page 475. After referring to the provisions of then section 562 of the Code, he cites the case of *Newby* v. *Colt's Patent Fire-arms Co.* (1872), L.R. 7 Q.B. 293, where Blackburn, J. stated the law to be as follows, at p. 296:

> . . . At common law the service of a writ on a corporation aggregate, which from the nature of the body could not be personal, was by serving it on a proper officer, so as to secure that it came to the knowledge of the corporation,

etc. His subsequent remarks are also pertinent to this case but I do not think it necessary to quote them. The same situation exists there as here, namely, that if service may be effected, I have not to determine whether the service has been proper. The questions of appearance and pleading are also discussed as in case of non-appearance the right of the magistrate then to consider the question of the regularity of service and his right to proceed. In dealing with this point, Street, J. in delivering the judgment of the Court of Appeal has this to say at p. 481:

> I have nothing to add to the answers contained in the judgment of my brother Rose to the objection that the Code contains no provision as to how a corporation is to be served with a summons. If we come to the conclusion that the Code was intended to provide for the summary conviction of corporations for offences, it will be the duty of the courts, in the absence of special directions as to the manner in which they are to be served with the summons, to see that it is properly brought to their notice.

It was argued before me on the strength of a statement in Paley on Summary Convictions, 9th Ed., that in default of a mode of service being prescribed by the statute, the service must be personal. I have read the passage in Paley and I do not think the illustrations given there are applicable to service of the summons under circumstances such as are found here. Having before me the statute which I have and the provisions of the Summary Convictions Act, I am not prepared to hold that service of the information and complaint cannot be made on the trade-union. I am also of the opinion that this legislation by its very terms has made attributable to the trade-union certified under it the characteristics of a juristic person, or in other words, has made it an entity under the terms of the statute and while it

S. C.
In Chambers
1947

REX EX REL. GOULT v. NANAIMO DRY CLEANING AND LAUNDRY WORKERS UNION LOCAL NO. 1

Macfarlane, J.

is not necessary for me so to decide that where proceedings are brought by way of prohibition in the name of the trade-union, and such trade-union is a party to the proceedings (following *Mackay and Mackay* v. *International Association Machinists Lodge No. 1057, Saskatoon, supra*) I do not think it is open to the trade-union here to object on the ground of failure to serve it properly in its non-corporate capacity.

I am not making any finding as to the appearance before the magistrate, but on the other grounds I would dismiss the motion for the issuance of the writ.

From this judgment the applicant appealed. The appeal was argued at Victoria on the 6th of August, 1947, before SLOAN, C.J.B.C., O'HALLORAN and ROBERTSON, JJ.A.

R. J. McMaster (*A. W. Fisher,* with him), for appellant: There are two main branches: (1) Whether the union is by the Act of 1947 created into a separate entity so as to be independent of its membership; (2) whether the union as a subject of said Act is there any provision whereby it can be brought before a magistrate. Before the Act a trade-union was only recognized as a collection of individuals banded together by common interest. There was nothing to create or constitute any legal entity having a separate corporate existence: see *Metallic Roofing Co.* v. *Local Union No. 30* (1905), 9 O.L.R. 171 followed in *Sykes* v. *One Big Union,* [1934] 1 W.W.R. 655; *In re Landlord and Tenant Act. Yue Shan Society* v. *Chinese Workers' Protective Assn. (No. 2),* [1944] 3 W.W.R. 497, at p. 525; *Society Brand Clothes Ltd.* v. *Amalgamated Clothing Workers of America,* [1931] 3 D.L.R. 361, at p. 366. There must be something in the Act that creates a corporation: see Salmond on Jurisprudence, 9th Ed., 425; *Aitken* v. *Associated Carpenters and Joiners of Scotland* (1885), 12 R. 1206, at p. 1211; *Taff Vale Railway* v. *Amalgamated Society of Railway Servants,* [1901] A.C. 426; *Amalgamated Builders Council* v. *Herman* (1930), 65 O.L.R. 296, at p. 301; *Labour Relations Board* v. *Dominion Fire Brick & Clay Products,* [1947] 3 D.L.R. 1, at p. 2; *Re Provincial Board of Health for Ontario and City of Toronto* (1920), 51 D.L.R. 444, at p. 450; *Turner's Dairy Ltd. et al.* v. *Williams*

et al. (1940), 55 B.C. 81, at pp. 99-100; *United Steel Workers of America, Local 1005* v. *Steel Co. of Canada Ltd.,* [1944] 2 D.L.R. 583, at pp. 586-7; *Clay Products Workers' Union* v. *Dominion Fire Brick & Clay Products,* [1947] 1 D.L.R. 378; *Mackay and Mackay* v. *International Association Machinists Lodge No. 1057, Saskatoon,* [1946] 2 W.W.R. 257. The 1947 Act is not for the purpose of creating unions a legal entity. It is for the purpose of settling disputes. *Bistry et al.* v. *Cloak Contractors Association,* [1936] O.W.N. 511, at p. 512. On the meaning of organization see *Amalgamated Society of Railway Servants* v. *Osborne,* [1910] A.C. 87. The Act does not contemplate a trade-union being a "corporation." If under the Act the trade-union is a legal entity then the magistrate has no jurisdiction. A magistrate has no jurisdiction until service has taken place. No procedure is provided in the Act for service: see *Regina* v. *Dibblee*: *In re Thompson* (1893), 32 N.B.R. 242; *Reg.* v. *Toronto Railway Co.* (1898), 2 Can. C.C. 471; Crankshaw's Magistrate's Manual, 3rd Ed., 301; *Ex parte Woodstock Electric Light Co.* (1898), 34 N.B.R. 460; *Re Chapman and Corporation of London* (1890), 10 Ont. 33; Paley on Summary Convictions, 9th Ed., 215; *Pearks, Gunston & Tee Limited* v. *Richardson,* [1902] 1 K.B. 91. The writ of prohibition should be made final.

Cunliffe, for respondent: The trade-union having sought privileges under the Act it is liable to the conditions under the Act. All the sections in the Act show that when the trade-union emerges from the common law it becomes liable to the conditions set out in the Act: see *United Steel Workers of America, Local 1005* v. *Steel Co. of Canada Ltd.,* [1944] 2 D.L.R. 583; *Mackay and Mackay* v. *International Association Machinists Lodge No. 1057, Saskatoon,* [1946] 2 W.W.R. 257; *Labour Relations Board* v. *Dominion Fire Brick & Clay Products,* [1947] 3 D.L.R. 1, at p. 2. If it brings itself under the Act it is a legal entity. The question of service is a question of procedure and whether there has been proper procedure is a question for the magistrate. The Summary Convictions Act provides for service of process: see *Newby* v. *Colt's Patent Fire-arms Co.* (1872), L.R. 7 Q.B. 293; Paley on Summary Convictions, 9th Ed., 223.

C. A.
1947

REX EX REL. GOULT v. NANAIMO DRY CLEANING AND LAUNDRY WORKERS UNION LOCAL NO. 1

The union is a "party." The magistrate must see that the union is effectively served.

McMaster, in reply, referred to *Rex* v. *Sparks* (1913), 18 B.C. 116; *In re Rex* v. *Pulak,* [1939] 2 W.W.R. 219.

Cur. adv. vult.

12th August, 1947.

SLOAN, C.J.B.C.: From a careful examination of the provisions of the Industrial Conciliation and Arbitration Act, 1947, I have reached the conclusion that, for the purposes of that Act and proceedings thereunder, a trade-union, acting as a "bargaining agent" or "bargaining authority" as defined in section 2 thereof, has been endowed by the Legislature, by the terms of the enactment in question, with the *status,* attributes and responsibilities of a *persona juridica.* It is, in consequence, for relevant purposes, an entity having a separate legal existence distinct from its members.

The trade-union involved in the dispute out of which this case arose is a trade-union acting as a "bargaining authority" within the meaning of the Act. It follows therefore, in my opinion, that it is, as a legal entity, subject to the provisions and sanctions of the said Industrial Conciliation and Arbitration Act, 1947.

I agree with my brothers that the question of service is procedural in character and is for the learned magistrate to consider and determine in the first instance.

I would therefore dismiss the appeal.

O'HALLORAN, J.A.: On 20th June last a summons under the Summary Convictions Act, Cap. 271, R.S.B.C. 1936, was issued against Nanaimo Dry Cleaning and Laundry Workers Union Local No. 1 of Nanaimo, a trade-union within the meaning of the Industrial Conciliation and Arbitration Act, 1947, Cap. 44, B.C. Stats. 1947, charging that

> being a trade-union and bargaining authority certified under the Industrial Conciliation and Arbitration Act, 1947, and having bargained collectively and failed to conclude a collective agreement between the Imperial Laundry City Cleaners and Dyers and their employees, [it] did unlawfully authorize a strike of the said empolyees before a conciliation board had been appointed to endeavour to bring about an agreement between them.

On 26th June the local magistrate adjourned the hearing for a

week. In the meantime on 30th June, Eula Patterson, the president of the trade-union obtained a rule *nisi* prohibiting her from hearing the charge laid against the trade-union. On 22nd July, MACFARLANE, J. discharged the rule *nisi*. A special sittings of this Court took place on the 6th and 7th of August to hear an appeal therefrom. The appeal is founded on submissions that the learned magistrate lacked jurisdiction to entertain the charge in that (a) the trade-union is not a legal entity, and (b) even if it is a legal entity, it is neither a person nor a corporation within the meaning of the Summary Convictions Act, Cap. 271, R.S.B.C. 1936, and amending Acts (sections 15 and 34), and hence there is no way in which it may be served and brought before the learned magistrate to answer the charge. This appeal has nothing to do with the merits of the case against the trade-union. The trade-union was not represented in this Court or before MACFARLANE, J.

In my judgment the trade-union involved here is a legal entity upon the principle that legislation of the British Columbia Legislature, like the Trade-unions Act, Cap. 289, R.S.B.C. 1936, and Industrial Conciliation and Arbitration Act, 1947, *supra,* has recognized trade-unions as statutory entities possessing a legal existence apart from their members. It is true the trade-union here has not been formally incorporated under any Act of the Legislature which relates to the incorporation of an association or group of people. But the Legislature, by conferring upon it rights, immunities and powers, and imposing upon it duties and obligations enforceable by penalties against it as a trade-union, has recognized its legal *status* as a statutory entity distinct from its members.

In *Taff Vale Railway v. Amalgamated Society of Railway Servants,* 70 L.J.K.B. 905; [1901] A.C. 426, counsel for a trade-union which was sued for damages growing out of a strike, moved to eliminate its name as a defendant, on the ground that it was neither a corporation nor an individual and could not be sued in a *quasi*-corporate or any other capacity. The House of Lords adopted Farwell, J.'s historic judgment refusing the motion, as did also the Supreme Court of the United States, 21

C. A.
1947

REX EX REL. GOULT v. NANAIMO DRY CLEANING AND LAUNDRY WORKERS UNION LOCAL NO. 1

O'Halloran, J.A.

years later in *United Mine Workers* v. *Coronado Co.* (1922), 259 U.S. 344. Taft, C.J. said at p. 390:

> . . . The legislation in question in that case [the *Taff Vale* case] did not create trade unions but simply recognized their existence and regulated them in certain ways, but neither conferred on them general power to sue, nor imposed liability to be sued.

In *Schuberg v. Local No. 118, International Alliance Theatrical Stage Employees* (1926), 37 B.C. 284, the late Mr. Justice GREGORY gave damages against the trade-union. The judgment was upheld in this Court (1927), 38 B.C. 130. The division of opinion in this Court did not concern the point now considered. In *Hollywood Theatres Ltd.* v. *Tenney* (1939), 54 B.C. 247 the trustees of two trade-unions were sued in their representative capacity, and although neither union was named a defendant in the action judgment was given against them in the formal order as entered (p. 274). The judgment was varied accordingly but at pp. 275-78 is found an examination of the decisions supporting the principle above stated, that a trade-union may be proceeded against in its own name, if its legal existence as such has been recognized by the Legislature; and see also *United Steel Workers of America, Local 1005* v. *Steel Co. of Canada Ltd.*, [1944] 2 D.L.R. 583, at pp. 596-7, a decision of the Ontario Labour Court.

Applying the foregoing principle, the provisions of the Industrial Conciliation and Arbitration Act, 1947, *supra,* under which the trade-union is charged (see charge, *supra*), are, in my opinion, conclusive of the intention of the Legislature to attribute legal personality to trade-unions. In the words of Scott, L. J. in *National Union of General and Municipal Workers* v. *Gillian,* [1946] K.B. 81, at p. 85, the clear purpose of the statute is to encourage collective bargaining by legalizing trade-unions (and employers' organizations as well) formed for purposes some of which, taken alone, were obnoxious to the common law as being in restraint of trade. Under section 2 (1) of the statute "bargaining authority" includes a certified "bargaining agent" which in turn is defined as

> a trade-union that acts on behalf of employees in collective bargaining with their employer or as a party to a collective agreement with their employer.

If a trade-union can act on behalf of another person, it must

be an entity with legal *status* and responsibility. If it can act as a party to an agreement with an employer, it must be capable of entering into an agreement, of executing the agreement and of carrying out that agreement. By section 9 (1) a trade-union may apply to the Board (the Labour Relations Board) to be certified as the bargaining authority for the unit (group of employees). By section 11 (2), if the Board is satisfied that the statutory conditions have been complied with, it shall certify the trade-union as the bargaining authority of the employees in the unit. By section 12 (*a*) such certified bargaining authority shall have exclusive authority to bargain with the employer on behalf of the unit and to bind it by an agreement in writing with the employer. Section 59 (*d*) makes it clear the trade-union has power to act as an agent, and section 38 expressly indicates it may employ agents.

These sections (and I have referred to a few only) are illustrative of the nature of the statute which makes it clear on its face throughout, that the trade-union is a statutory entity, with a separate legal existence from the individuals who are its members. The statute in nowise deals with a trade-union as if it were simply a committee of individuals, or a collective name which the members have chosen to represent them collectively and individually in their united interest while they are acting in common. The statute, recognizing that trade-unions are self-acting bodies of great concentrated strength with the faculty of quick unit action and elasticity (and see *National Union of General and Municipal Workers* v. *Gillian, supra,* at p. 86), has by necessary implication created them statutory entities by conferring upon them effective statutory rights, duties and immunities distinct from their members.

If a trade-union fails to carry out its statutory duties and obligations, or acts contrary to the provisions of the statute, it is made liable upon summary conviction to fines up to $125 a day, and see sections 33 to 37. These penalty sections distinguish between the fines to be imposed upon individuals and the fines to be imposed upon trade-unions and employers' organizations. The trade-union is not regarded simply as a collection of individuals, but as something possessing a separate legal existence from its

C. A.
1947

REX EX REL. GOULT v. NANAIMO DRY CLEANING AND LAUNDRY WORKERS UNION LOCAL NO. 1

O'Halloran, J.A.

members. Needless to say, a trade-union could not be fined as a trade-union unless it had a legal existence as such. If a trade-union can be fined, it can be convicted, and if it can be convicted, it can be prosecuted and charged. In the *Taff Vale* case, *supra,* Lord Brampton at p. 913 said that the very omission from the statute of any provision enabling the trade-union to be proceeded against in any other name than its own, led to the reasonable conclusion that it was Parliament's intention it should be proceeded against under no other name than its own.

I have not overlooked that the trade-union in the *Taff Vale* case was registered. But after studying the English Acts of 1871 and 1876 upon which it was based, I must conclude from their provisions, as well as from the judgments of the three Courts read together (the House of Lords (1901), 70 L.J.K.B. 905, reversed the Court of Appeal (1900), 70 L.J.K.B. 219 which had reversed Farwell, J.) that registration *solus* was not in truth the turning point of the decision. It was but one of many elements reflecting Parliament's recognition of trade-unions as legal entities. The House of Lords chose it as perhaps the most easily illustrative of its reasoning through which the compellable inference was drawn that a trade-union could be sued in its own name, despite the fact that the statutes had omitted to say so, and had also refrained from declaring that registration should render the trade-union a body corporate, as was done in the case of building societies and other types of association referred to in the judgment of the Court of Appeal. I do not think the decision of the House of Lords can be fully understood unless one also reads the decision of the Court of Appeal which it reversed.

It is to be observed as well that the trade-unions involved in *Le Roi* v. *Rossland Miners Union* (1901), 8 B.C. 370 (one of the four unions in this latter case was incorporated under the Benevolent Societies Act) and the *Schuberg* case, *supra,* and the *Hollywood Theatres* case, *supra,* were not registered in the manner required by the English Acts of 1871 and 1876. In my judgment the test is not registration *solus* but is recognition by the Legislature. That recognition may be signified in many ways without literal registration. For example, section 2 of the Trade-unions Act, Cap. 289, R.S.B.C. 1936 (first enacted as Cap. 66

of the statutes of 1902), provides that no trade-union and no trustees of any trade-union shall be liable in damages for the wrongful acts there enumerated unless the members or appropriate governing body have authorized or concurred in the wrongful acts (see also section 2). That plainly indicates the trade-union may be made liable for damages in an action against it in its own name, without joining trustees in a representative capacity.

Our Trade-unions Act treats a trade-union as a statutory entity capable of being sued as such (and see the *Hollywood Theatres* case, *supra,* at pp. 275-78). The Acts of 1871 and 1876 under consideration in the *Taff Vale* case, did not give that express right to sue a trade-union. Hence recognition of trade-unions as statutory entities in this Province by the Trade-unions Act, *supra,* is overwhelmingly stronger than in the legislation under review in the *Taff Vale* case. It seems a proper conclusion that if the English Acts of 1871 and 1876 had contained an express provision that the trade-union could be sued in its own name, such as is found in our Trade-unions Act, Farwell, J. would never have been called on to decide the point. The question would have been too plain for argument.

Legislative recognition of the existence of the trade-union in this particular case is also far stronger than in the *Taff Vale* case. Sections 34, 35, 36 and 37 of the Industrial Conciliation and Arbitration Act, 1947, expressly provide that a trade-union may be prosecuted under its own name for breaches of the statute. As already explained, the legislation considered in the *Taff Vale* case omitted to say that a trade-union could be sued under its own name, which was the point in dispute in that case. These express provisions in our Industrial Conciliation and Arbitration Act, 1947, provide clear legislative recognition to a degree that mere provision for registration (such as existed in the *Taff Vale* case) could not equal. Emphasizing that the trade-union itself is distinct from its officers and members and may be prosecuted as such, it is noted that by section 38, if a trade-union is found guilty of an offence under the statute, then any officer, agent or authorized representative of the trade-union who assented to the

C. A.
1947

REX EX REL. GOULT v. NANAIMO DRY CLEANING AND LAUNDRY WORKERS UNION LOCAL NO. 1

O'Halloran, J.A.

commission of the offence also becomes a party to and guilty of the offence.

While what has been said seems conclusive in itself against the submissions of the appellant, it may be added in respect to the question of registration *solus,* that there are two provisions in our statute which contain the elements of legislative recognition by registration. The first is in section 11 (2) when the Labour Relations Board certifies the trade-union as the bargaining authority as it did in this case. This must mean that the Provincial Board has acknowledged the legal existence of the trade-union and has public record thereof. The second is in section 64 (2) which enables the Board to direct a trade-union which is a party to an application for certification, to file with the Board (a) a statutory declaration of one of its officials stating the names and addresses of its officers and (b) a copy of its constitution and by-laws. This information required for certification under our statute, does not seem to be any less than that required for registration under the English Act of 1871 (see section 13 thereof)) considered in the *Taff Vale* case.

Perhaps it should be said that *Society Brand Clothes Ltd.* v. *Amalgamated Clothing Workers of America,* [1931] S.C.R. 321 and *International Ladies Garment Workers Union et al.* v. *Rothman,* [1941] S.C.R. 388 arose under the Quebec Civil Code and hence provide little assistance in a case like this, where the legislation is to be interpreted according to common-law principles. In the former case Sir Lyman Duff, C.J., then Duff, J., said at p. 328 that the defendants admittedly were not a corporation, but whether they were or were not a person in the juridical sense within the meaning of the Quebec Civil Code, was a question to be decided according to the law of the State of New York.

It is noted in passing that some observations in the *Society Brand Clothes* decision were relied on in *Clay Products Workers' Union* v. *Dominion Fire Brick & Clay Products,* [1947] 1 D.L.R. 378. That case concerned legislation which I gather from the terms of the judgment, cannot have been parallel with the above-noted provisions in our Trade-unions Act and our Industrial Conciliation and Arbitration Act, 1947. *Mackay and Mackay* v. *International Association Machinists Lodge No.*

1057, Saskatoon, [1946] 2 W.W.R. 257 recognized the trade-union as a legal entity under the legislation there considered. But as I read the decision, it seems to be based substantially on the principle of estoppel, such as I thought was applicable under the decisions cited in *In re Landlord and Tenant Act. Yue Shan Society* v. *Chinese Workers' Protective Assn. (No. 2),* [1944] 3 W.W.R. 497, at pp. 500-07.

For the foregoing reasons I must hold that the trade-union here is a legal entity under the Industrial Conciliation and Arbitration Act, 1947, and accordingly that the learned magistrate has jurisdiction to entertain the charge preferred against it.

Appellant counsel's other point is that assuming the trade-union is a legal entity (as I find it is), yet he urges that since it is neither a corporation nor a human person it cannot be served with the summons, and hence there is no way in which it can be brought before the learned magistrate to be tried. This is submitted by counsel because it is said the Industrial Conciliation and Arbitration Act, 1947, itself provides no way to serve a trade-union, and the Summary Convictions Act is limited by sections 15 and 34 to a corporation and a human person. In my judgment, even if there were no statute or existing rule (and I do not say there is not) directing how a trade-union which is a legal entity, may be served, nevertheless once the learned magistrate has jurisdiction to entertain the charge (as I find he has) then the mode of service is a procedural matter for the magistrate. All he is concerned with then is that service shall be made in such a way that the summons shall come reasonably to the notice of the statutory entity. If it is prejudiced in any way, then it is for the magistrate to relieve it from that prejudice, so it may have a fair trial, with the opportunity for full defence.

The dividing line between jurisdiction and practice may not always be easy to mark, but this is not a case in which any real difficulty exists. Sometimes rules of practice are found in a statute, although that is really the field of rules of Court. If no relevant rule of practice is found in the statutes or existing rule of Court, then it is for the particular Court of competent jurisdiction to make a rule consonant with reason and justice, in order that the administration of justice may not be hindered or delayed.

C. A.
1947
REX EX REL. GOULT v. NANAIMO DRY CLEANING AND LAUNDRY WORKERS UNION LOCAL NO. 1
O'Halloran, J.A.

The matter was touched on recently in *Fenchurch Export Corp.* v. *Sitka Spruce Lumber Co. (No. 2)*, [1947] 2 D.L.R. 143, at pp. 145-6, which applied Lord Chancellor Westbury's description of practice in *Attorney-General* v. *Sillem* (1864), 10 H.L. Cas. 704; 11 E.R. 1200 as

"rules that make or guide the *cursus curiæ*, and regulate the proceedings in a cause within the walls or limits of the Court itself."

The statute here subjects the trade-union to be fined as a trade-union if it shall commit specified statutory breaches. That must mean the trade-union can be prosecuted and tried as a trade-union. How the trade-union is to be served with a summons to bring it before the magistrate to answer for its breaches of the statute in essence and principle then becomes plainly a matter of practice and procedure within Lord Westbury's definition. If no rule is laid down by statute or existing rule of Court, then it is for the magistrate to direct how it is to be served—and see also section 23 (11) of the Interpretation Act, Cap. 1, R.S.B.C. 1936. In this case the trade-union was served by serving its president Eula Patterson.

I must conclude that the point relating to service of the summons is a matter of practice and procedure and not of jurisdiction. It appears further this question of service was never raised before the learned magistrate. The proceedings did not get that far. There seems to be some confusion as to whether the trade-union was represented by counsel before the learned magistrate. There were three separate charges before him, only one of which was against the trade-union. The hearing on 26th June involved fixing a convenient date for the trials of the three charges. The trade-union was not then called upon to plead, and in view of the order *nisi* on 30th June prohibiting the learned magistrate from hearing the case, it has not yet been called on to plead. Having found the learned magistrate has jurisdiction, I am of opinion that in the existent circumstances the case must take the ordinary course of trial procedure.

I agree with the learned judge appealed from that the order *nisi* directing prohibition ought to be discharged. I would dismiss the appeal.

ROBERTSON, J.A.: The Nanaimo Dry Cleaning and Laundry

Workers Union Local No. 1 of Nanaimo (to which it may be convenient to refer as the union) is an unincorporated local union, being a branch of the Canadian Congress of Labour, an unincorporated association from which it holds a charter. "Trade-union" is defined by the Act to be next mentioned, as *inter alia,* a

> national, or provincial organization of employees, or a local branch chartered by and in good standing with such an organization.

A summons directed to the union charging that it

> being a trade-union and bargaining authority certified under the Industrial Conciliation and Arbitration Act, 1947, and having bargained collectively and failed to conclude a collective agreement between the Imperial City Cleaners and Dyers and their employees, did unlawfully authorize a strike of the said employees before a conciliation board had been appointed to endeavour to bring about an agreement between them,

was served upon Eula Patterson, its president. She appeals from the dismissal of her application for a writ of prohibition. Her counsel submitted:

> 1. That the union named in the complaint as a union is not created by the Act into such a separate entity or legal person as to be independent of its members and subject to the terms and sanctions of the Act in its own name; and 2. That if the union as the union is so subject to the said Act, there is no provision in the Act whereby it can be brought before a magistrate.

Dealing with the first point, it is clear that an unincorporated association, not being a partnership or legal entity known to the law, may not be sued in its name. See *In re Landlord and Tenant Act. Yue Shan Society* v. *Chinese Workers' Protective Assn. (No. 2),* [1944] 3 W.W.R. 497. But the authorities show that there may be a legal entity known to the law which is neither a corporation nor a partnership. Farwell, J. said in *Taff Vale Railway* v. *Amalgamated Society of Railway Servants,* [1901] A.C. 426, at p. 429:

> . . . Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents. It is beside the mark to say of such an association that it is unknown to the common law. The Legislature has legalised it, and it must be dealt with by the Courts according to the intention of the Legislature.

Mr. Justice Farwell's judgment was approved of in the House

C. A.
1947

REX EX REL. GOULT v. NANAIMO DRY CLEANING AND LAUNDRY WORKERS UNION LOCAL NO. 1

Robertson, J.A.

of Lords. A legal entity may therefore be recognized by the law as a body distinct from its members. Scott, L.J. said in *National Union of General and Municipal Workers* v. *Gillian,* [1946] K.B. 81, at p. 85:

> . . . A trade union has many activities; it has some existence, and it is something. The omission of Parliament to christen it with some new *generic* name is immaterial, for Parliament has absolute sovereignty and can make new legal creatures if it likes. It is able, for instance, to create a *persona juridica* not previously known to the law, if it so chooses, or to clothe an existing association of natural persons with what may be called co-operative personality so as to give it the *status* of a *persona juridica.*

In my opinion the Act in question mentioned in the complaint has constituted a union, a *persona juridica.* The Act confers upon the union certain benefits and immunities and imposes certain restrictions and liabilities upon it. Sections conferring benefits are 4, 5, 8, 9, 11, 12, 13 and 14. Shortly, under these provisions, an employer may not interfere with the formation or administration of a union; an employer may not refuse to employ any person or discriminate against any person . . . because the person is a member or officer of a union; and must honour a written assignment of the wages of a member of a union to the union. A union, claiming to have as members in good standing a majority of employees as a unit, may apply to the Board, constituted by the Act, to be certified as the bargaining authority for the unit and if so certified, it has exclusive authority to bargain collectively on behalf of the unit and to bind it by a collective agreement until the certification is revoked. It may require the employer to commence collective bargaining and every collective agreement entered into by it is binding upon it and every employee in the unit for which the bargaining authority has been certified.

Sections which impose restrictions and liabilities are as follows: 34, prohibiting trade-unions from attempting at an employer's place of employment during working hours to persuade an employee to join or not to join a union or support any activity to restrict or limit production or refusing or neglecting to furnish information or returns required by the Act. Section 36 subjects the union to a fine if it refuses to bargain collectively. Section 64 provides that the Board may direct a trade-union to file with it

a statutory declaration signed by its president or secretary or other official stating the names and address of its officers and a copy of its constitution and by-laws and that the trade-union shall comply with the direction within the time prescribed by the Board. Under these circumstances I am clearly of the opinion that the trade-union in question is a *persona juridica* and may, as section 37 provides, be prosecuted in its union name for an offence against the Act.

As to the second point, I agree with my brother O'HALLORAN that it is not a question of jurisdiction but one of practice and procedure and for the magistrate.

I would dismiss the appeal.

Appeal dismissed.

REX v. NORTHEY *ET AL.*

C. A.
1947
Apr. 8, 9, 12, 13, 14, 15; *May* 12.

Criminal law—Conspiracy—Unlawful common design—Evading payment of income tax—Improper admission of evidence—Substantial wrong or miscarriage of justice—Criminal Code, Secs. 1014, Subsec. 2, 1019 and 1020—Can. Stats. 1940, Cap. 31, Secs. 12 and 19.

The three appellants, father and two sons, carrying on business under the name of Millwork Industries Limited, while engaged in war contracts supplying West Coast Shipyards with furniture for the ships constructed, were charged with conspiracy to defraud the Government in breach of Code section 444, the substance of the charge being that the three accused had entered into an unlawful agreement to evade payment of income tax. The Crown sought to establish conspiracy by proof of fraudulent manipulation of accounts of various concerns in which the accused were interested and also tendered statements elicited from the accused by an investigator conducting an inquiry under the provisions of the Department of Munitions and Supply Act. The investigator was one J. B. Wilson and the statements the accused made to him were during the appeal termed "the Wilson evidence." The trial judge received the Wilson evidence and found the accused guilty. During the hearing of the appeal the Court unanimously decided that the so-called "Wilson evidence" was improperly received below by reason of the prohibition against its disclosure found in section 19 of the Department of Munitions and Supply Act, Can. Stats. 1940, Cap. 31, and the remaining question was whether reception of the inadmissible evidence caused the appellants substantial wrong and did a miscarriage of justice

C. A.
1947
REX
v.
NORTHEY
ET AL.

thereby occur within the meaning of section 1014, subsection 2 of the Criminal Code?

Held (SLOAN, C.J.B.C. and ROBERTSON, J.A. dissenting), that the appeal from conviction must be dismissed.

Per O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.: The evidence of Sparrow (the appellants' book-keeper) both in its direct aspect and in its indirect aspects supported as it is in so many respects by the documentary records found in the Northey office (including records therein visibly altered) leaves no room for doubt that the three appellants acted in concert in furtherance of and consequent upon an unlawful design. It is not possible to escape the conclusion that proof of the guilt of the three appellants was conclusively established, quite apart from the "Wilson evidence" and quite apart from any hearsay evidence which may have crept into the proceedings. The Crown has satisfied the *onus* upon it of showing that the verdict would necessarily have been the same if no improper testimony had been admitted. In these circumstances the appeal must fail since it cannot be said that any substantial wrong or miscarriage of justice has actually occurred within the meaning of Code section 1014, subsection 2.

Per SLOAN, C.J.B.C., and ROBERTSON, J.A.: It must be understood that the improper reception of the "Wilson evidence" is regarded as highly prejudicial to the fair trial of the accused. It follows that because of the principles enunciated in *Allen* v. *Regem* (1911), 44 S.C.R. 331, the provisions of section 1014, subsection 2 of the Code ought not, as a matter of law, to be applied in the circumstances herein.

On dismissal of the appeal the Court unanimously reduced the sentences for J. L. Northey from 18 months to six months; P. M. Northey and A. J. Northey from three years to one year and the fines in the three cases were increased from $2,000 to $10,000. Default in payment of fines the original judgment was to stand.

APPEAL by accused from their conviction by LENNOX, Co. J. on the 13th of February, 1947, on a charge

that at the city of Vancouver between January 1st, 1942, and December 31st, 1944, they did conspire together by deceit or falsehood or other fraudulent means to defraud His Majesty the King in the right of the Dominion of Canada contrary to section 444 of the Criminal Code of Canada.

On the trial the Crown tendered certain evidence that the three accused gave before James C. Wilson who was appointed by the Department of Munitions and Supply on June 29th, 1945, as an investigator with powers which are set out in the Act as a commissioner under the Inquiries Act. The investigation was initiated by the Hon. C. D. Howe, Minister of Munitions and Supply and his powers as contained in The Department of Munitions and Supply Act.

The appeal was argued at Victoria on the 8th and 9th and the 12th to the 15th of April, 1947, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Farris, K.C. (*John L. Farris,* with him), for appellants: We challenge the right to put in the evidence taken before Wilson the investigator. It was taken without protection under the Canada Evidence Act and should be excluded not only because it was not free and voluntary but there was a false assurance that there was no danger of future action: see *Rex* v. *Barker,* [1941] 3 All E.R. 33; *Rex* v. *Anderson* (1942), 58 B.C. 88. On the assurances that were given and that there was nothing to fear see *Walker* v. *Regem,* [1939] S.C.R. 214. If we have not invoked the Canada Evidence Act it was because of the inducements that it was not necessary. The evidence introduced by the ledger sheets is hearsay and could not convict on a conspiracy charge: see Phipson on Evidence, 8th Ed., 205; *Murray* v. *Gibson* (1880), 28 Gr. 12, at p. 21; *Middlefield* v. *Gould et al.* (1861), 10 U.C.C. P. 9; *Hill* v. *Manchester and Salford Water Works Co.* (1833), 5 B. & Ad. 866.

Fraser, K.C. (*Sharp,* with him), for respondent: With respect to their not applying for protection under the Canada Evidence Act, there is no evidence to show they were lulled to sleep by assurances that the protection was not required. After consultation counsel decided not to apply: see *Rex* v. *Mazerall,* [1946] 4 D.L.R. 336. We refer to section 20 of The Department of Munitions and Supply Act, Can. Stats. 1943, Cap. 8, Sec. 10. In going over the invoices many are altered and falsified. They changed the names of purchasers of goods and the materials. Sparrow's evidence is sufficient to convict the accused. The original invoices are there with the alterations in fact and is not hearsay. We have the proof that all these invoices are false. There are nine cases of manufactured invoices where the consignees knew of this and benefited by it: see *Rex* v. *Miller* (1940), 55 B.C. 121, at p. 126; *Rex* v. *Meyrick and Ribuffi* (1929), 21 Cr. App. R. 94; *Reg.* v. *Quinn and others* (1898), 19 Cox, C.C. 78. They were acting in pursuance of a common design. As to the so-called hearsay evidence, no

C. A.
1947

REX
v.
NORTHEY
ET AL.

violation of justice has occurred: see *Rex* v. *Ortynsky,* [1927] 1 W.W.R. 957; *Rex* v. *Dillabough* (1944), 60 B.C. 534; *Rex* v. *Bush* (1938), 53 B.C. 252, at p. 256; *Schmidt* v. *Regem,* [1945] S.C.R. 438, at p. 440.

Farris, in reply: On what constitutes a case for giving effect to section 1014, subsection 2 of the Code see *Rex* v. *Haddy* (1944), 29 Cr. App. R. 182, at p. 188. There is no issue as to invoices altered or falsified. The issue is one of conspiracy. As to the law on section 1014, subsection 2 of the Code see *Levesque & Graveline* v. *Regem,* [1934] 4 D.L.R. 416. You cannot draw inferences on failure of defendants to testify: see *Rex* v. *Nerlich* (1915), 34 O.L.R. 298, at p. 315. After eliminating improper evidence could the learned judge have dismissed? See *Regina* v. *Barry and Others* (1865), 4 F. & F. 389; *Sweeney* v. *Coote,* [1907] A.C. 221, at p. 222; *Humphrey* v. *Wilson* (1917), 25 B.C. 110, at p. 114. Archie was in charge of the office and Sparrow's evidence eliminates Paul from what happened there. The statement that Sparrow was an honest witness should not be accepted: see *Rex* v. *James* (1945), 61 B.C. 161; *Baron* v. *Regem,* [1930] S.C.R. 194, at p. 197; *Reid* v. *Regem,* [1943] 2 D.L.R. 786; *Makin* v. *Attorney-General of New South Wales* (1893), 63 L.J.P.C. 41, at p. 46. Where improper evidence is so overpowering that no man can escape the impact of that evidence see *Rex* v. *Haddy* (1944), 29 Cr. App. R. 182; *Schmidt* v. *Regem,* [1945] S.C.R. 438; *Gouin* v. *Regem,* [1926] S.C.R. 539; *Allen* v. *Regem* (1911), 44 S.C.R. 331.

Cur. adv. vult.

12th May, 1947.

SLOAN, C.J.B.C.: The appellants were found guilty by LENNOX, Co. J. on a charge of conspiracy to defraud His Majesty the King. The substance of the charge was that the three accused had entered into an unlawful agreement to evade payment of income tax. The Crown sought to establish the conspiracy by proof of fraudulent manipulation of the accounts of various concerns in which the appellants were interested.

In addition to this class of evidence, which, in itself, in part, was inadmissible as hearsay, the Crown tendered, and the

learned trial judge received in evidence, statements elicited from the accused by an investigator conducting an inquiry under the provisions of The Department of Munitions and Supply Act. The investigator was a chartered accountant by name of James Clarence Wilson and for convenience, during the appeal, the statements the accused made to Mr. Wilson were compendiously termed "the Wilson evidence." During the hearing of the appeal the Court unanimously decided that the so-called "Wilson evidence" was improperly received below by reason of the prohibition against its disclosure found in section 19 of The Department of Munitions and Supply Act as enacted by section 12 of Cap. 31, Can. Stats. 1940.

That left for consideration the single question: Did the reception of the inadmissible evidence cause the appellants substantial wrong and did a miscarriage of justice thereby occur within the meaning of section 1014, subsection 2 of the Criminal Code?

The *onus* is on the Crown under section 1014, subsection 2 to satisfy the Court beyond a reasonable doubt that notwithstanding the wrongly admitted evidence the appellants suffered no substantial wrong thereby and that in consequence no miscarriage of justice occurred at the trial. See *Brooks* v. *Regem,* [1927] S.C.R. 633.

In my view, with deference, the Crown has not satisfied that *onus* in the circumstances of this case.

A paramount consideration to be borne in mind in this case is the fact that the "Wilson evidence" amounted in practical reality to a full confession by the accused of the offence charged, and thus the burden on the Crown of satisfying the Court that the accused suffered no substantial wrong at their trial by the improper reception of this inadmissible evidence must be measured commensurately with its exceptionally damaging character.

The Crown sought to discharge this *onus* by inviting this Court to consider the remaining evidence contending it revealed a long and varied series of transactions from which an irresistable inference could and ought to be drawn that the appellants were engaged in a common and agreed design to defraud the Government of Canada of properly payable income taxes. *Paradis* v.

C. A.
1947
REX
v.
NORTHEY
ET AL.
Sloan, C.J.B.C.

Regem, [1934] S.C.R. 165; *Rex* v. *Miller* (1940), 55 B.C. 121.

This submission of the Crown necessitates an examination of the relevant authorities dealing with the effect to be given section 1014, subsection 2 of the Code.

Before doing so it is, I think, essential to note, in passing, the distinction between the old Code section 1019 and its present counterpart section 1014, subsection 2 as enacted in 1923. The old section 1019 provided in effect that a new trial should not be ordered unless the Court was of opinion that there had been a miscarriage of justice. By section 1014, subsection 2, as I pointed out above, the *onus* is shifted to the Crown in conformity with the proviso to section 4 (1) of the English Criminal Appeal Act, 1907. The Canadian cases prior to 1923 must be read in the light of this distinction.

From my reading of the relevant English and Canadian authorities it seems to me that from the English proviso and our own sections 1019 and 1014, subsection 2 there has developed over the years a distinction in principle in application of these sections to cases of misdirection in point of law and misreception of evidence.

In cases of misdirection the English and Canadian Courts have felt free to examine the evidence adduced below and if that evidence was of such character that a reasonable jury after being properly directed would without doubt convict upon it then, in that event, no substantial wrong or miscarriage of justice had actually occurred by reason of the misdirection.

In cases of misreception of evidence which may have been prejudicial to the fair trial of the accused, appellate Courts of both England and Canada have not (until recently) felt free to weigh the balance of the evidence, and thus substitute their decisions on questions of fact for the verdicts of trial tribunals whose function it is to decide issues of that nature.

The distinction between these two methods of approach to the problem of deciding whether substantial wrong has been done by misdirection in point of law, or misreception of evidence, which may have prejudiced the minds of the jury or trial judge, seems to me finds its foundation in this: that in cases of misdirection Courts of Appeal are fortified by findings by a trial tribunal of

all the facts necessary to support the conviction. The whole of the evidence has been weighed and conclusions reached thereon by tribunals erected to exercise that assigned and special function. If then a jury properly instructed and acting reasonably would, without doubt, reach the same verdict upon the same facts no miscarriage of justice has occurred. It may be because of serious misdirection the validity of those findings of fact are called into question and when that circumstance appears a new trial is the method (in Canada) of ensuring that the accused is to have the benefit of a hearing before a properly instructed trial Court.

In cases of misreception of evidence other factors emerge. Findings are made below on disputed facts but on what facts? And once there is carved out of the body of the evidence adduced at the trial that part of it which was improperly received, and it was of a charactetr that might have prejudically influenced the verdict of the trial tribunal, Courts of Appeal must of necessity, in order to support the conviction, resolve themselves into fact-finding tribunals. They must weigh the balance of the evidence and reach conclusions thereon unsupported by findings of fact below which, because of the illegal evidence adduced at the trial, are deprived of any sanction. Courts of Appeal, in this event, have to speculate as to what verdict the jury would, without doubt, have rendered, not upon the same facts, as in the case of misdirection, but on a different set of facts, involving perhaps different considerations and different possible defences. The exercise of a jurisdiction of this kind is an unwarranted usurpation of the powers vested in trial Courts and deprives the accused of his undoubted right to be tried fairly on proper evidence by a jury or trial judge, as he may elect. The function of this Court is not to retry the accused and to decide upon his guilt or innocence. This Court is a Court of review and the issue before us, in this case, is not the guilt or innocence of the accused but whether or not the accused has had a fair trial on proper evidence —see *Rex* v. *Lee Fong Shee* (1933), 47 B.C. 205, at p. 211.

I now turn to consider the English authorities from which I have drawn these conclusions expressed above.

In *Reg.* v. *Gibson* (1887), 16 Cox, C.C. 181 (a Court consist-

C. A.
1947
REX
v.
NORTHEY
ET AL.
Sloan, C.J.B.C.

ing of Lord Coleridge, C.J., Pollock, B., Stephen, Mathew, and Wills, JJ.), it was held that a verdict is vitiated by the admission of illegal evidence and that a Court of Criminal Appeal should not assume the functions of a jury and weigh the balance of the evidence.

In *Rex* v. *Marsham,* [1912] 2 K.B. 362, the principle of the *Gibson* case was extended to an appeal from a magistrate sitting without a jury.

I may interpolate here to mention that the learned trial judge in this case was exercising the functions of both judge and jury. *Rex* v. *Bush* (1938), 53 B.C. 252; *Rex* v. *Miller, supra,* at p. 172; *Rex* v. *Campbell,* [1947] 1 D.L.R. 904.

The principle of the *Gibson* case finds authoritative expression in *Makin* v. *Attorney-General for New South Wales,* [1894] A.C. 57.

The judgment of the Lord Chancellor at pp. 69-70, reads in part as follows:

. . . The point of law involved is, whether where the judge who tries a case reserves for the opinion of the Court the question whether evidence was improperly admitted, and the Court comes to the conclusion that it was not legally admissible, the Court can nevertheless affirm the judgment if it is of opinion that there was sufficient evidence to support the conviction, independently of the evidence improperly admitted, and that the accused was guilty of the offence with which he was charged.

It was admitted that it would not be competent for the Court to take this course at common law, but it was contended that sect. 423 of the Criminal Law (Amendment) Act, 1883 (46 Vict. No. 17) empowered, if even it did not compel the Court to do so. That section is in these terms:—

"The judge by whom any such question is reserved shall as soon as practicable state a case setting forth the same with the facts and circumstances out of which every such question arose and shall transmit such case to the judges of the Supreme Court who shall determine the questions and may affirm amend or reverse the judgment given or avoid or arrest the same or may order an entry to be made on the record that the person convicted ought not to have been convicted or may make such other order as justice requires. Provided that no conviction or judgment thereon shall be reversed arrested or avoided on any case so stated unless for some substantial wrong or other miscarriage of justice."

Reliance was of course placed upon the language of the proviso. It was said that if without the inadmissible evidence there were evidence sufficient to sustain the verdict, and to show that the accused was guilty, there has been no substantial wrong or other miscarriage of justice. It is obvious that the construction contended for transfers from the jury to the Court the determination of the question whether the evidence—that is to say, what

the law regards as evidence—established the guilt of the accused. The result is that in a case where the accused has the right to have his guilt or innocence tried by a jury, the judgment passed upon him is made to depend not on the finding of the jury, but on the decision of the Court. The judges are in truth substituted for the jury, the verdict becomes theirs and theirs alone, and is arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords.

It is impossible to deny that such a change of the law would be a very serious one, and that the construction which their Lordships are invited to put upon the enactment would gravely affect the much cherished right of trial by jury in criminal cases. The evidence improperly admitted might have chiefly influenced the jury to return a verdict of guilty, and the rest of the evidence which might appear to the Court sufficient to support the conviction might have been reasonably disbelieved by the jury in view of the demeanour of the witnesses. Yet the Court might under such circumstances be justified or even consider themselves bound to let the judgment and sentence stand.

These are startling consequences, which strongly tend in their Lordships' opinion to show that the language used in the proviso was not intended to apply to circumstances such as those under consideration.

Their Lordships do not think it can properly be said that there has been no substantial wrong or miscarriage of justice, where on a point material to the guilt or innocence of the accused the jury have, notwithstanding objection, been invited by the judge to consider in arriving at their verdict matters which ought not to have been submitted to them.

In their Lordships' opinion substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the Court founded merely upon a perusal of the evidence. It need scarcely be said that there is ample scope for the operation of the proviso without applying it in the manner contended for.

The *Makin* case was followed in *Rex* v. *Dyson,* [1908] 2 K.B. 456, wherein Lord Alverstone, C.J., said at pp. 457-8:

. . . We feel that we cannot act upon the proviso in sub-s. 1 of s. 4, [Criminal Appeal Act, 1907] for it is in our judgment plain that we cannot substitute ourselves for the jury and find the facts which are necessary to support the conviction. . . . The case of *Makin* v. *Attorney-General for New South Wales,* [1894] A.C. 57 is directly in point. In a Criminal Law Amendment Act of the Colony it was provided, with reference to appeals upon a case stated, that "no conviction or judgment thereon shall be reversed, arrested or avoided in any case so stated unless for some substantial wrong or other miscarriage of justice." And the Privy Council held that that provision did not transfer from the jury to the Court the determination of the question whether the evidence established the guilt of the accused. "Their Lordships," they said, "do not think it can properly be said that there has been no substantial wrong or miscarriage of justice, where on a point material to the guilt or innocence of the accused the jury

C. A.
1947

REX
v.
NORTHEY
ET AL.

Sloan, C.J.B.C.

have . . . been invited by the judge to consider in arriving at their verdict matters which ought not to have been submitted to them." That passage indicated the principle on which we ought to proceed here.

See also *Rex* v. *Stoddart* (1909), 2 Cr. App. R. 217, at p. 245; *Rex* v. *Ellis,* [1910] 2 K.B. 746, at p. 765.

In *Rex* v. *Fisher,* [1910] 1 K.B. 149, at p. 153, a misreception evidence case, Channell, J. in delivering the judgment of the Court, said:

. . . We are of opinion that the evidence as to the other cases was inadmissible in this case, because it was not relevant to prove that he had committed the particular fraud for which he was being charged, in that it only amounted to a suggestion that he was of a generally fraudulent disposition. On the other hand, if all the cases had been frauds of a similar character, shewing a systematic course of swindling by the same method, then the evidence would have been admissible.

In the circumstances of this case we cannot come to any other conclusion but that the jury may have been influenced by the evidence of the other cases, and, therefore, although there was sufficient evidence to convict the prisoner without the evidence as to the other cases, in accordance with the rule laid down in this Court, the conviction cannot stand.

In *Maxwell* v. *The Director of Public Prosecutions,* [1935] A.C. 309, Viscount Sankey, L.C., in delivering the judgment of the House of Lords at pp. 323-24, said:

If in any case the evidence against a prisoner (other than that which is inadmissible)) is very strong and is abundant to justify a jury in convicting, it may well seem unfortunate that a guilty man should go free because some rule of evidence has been infringed by the prosecutor. But it must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed. Hence the great care which has always been shown by the Court in applying the provisions of s. 4 of the Criminal Appeal Act, 1907, and refusing to quash a conviction. It is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded and discredited.

In *Ibrahim* v. *Regem,* [1914] A.C. 599, Lord Sumner in delivering the judgment of the Privy Council, after quoting a passage from the judgment of Lord Herschell in *Makin's* case, *supra,* sums up the effect of the English proviso thus (p. 616):

. . . In other words such a proviso is not to be construed as investing a statutory Court of criminal review with the functions of the original trial judge and jury.

He then said:

This is a very different matter from the duty of this Board in advising His Majesty as to the exercise of his prerogative. . . .

and proceeds to examine the circumstances of that case in the light of the jurisdiction he was then exercising.

I now turn from the English authorities illustrative of the principles invoked in cases of misreception of evidence to a few leading English cases dealing with misdirection.

In *Rex* v. *Cohen and Bateman* (1909), 2 Cr. App. R. 197, Channell, J. in delivering the judgment of the Court, said at p. 207, in dealing with the proviso:

. . . "This section has been considered in almost all the cases which have come before this Court, but these precedents are of little use in subsequent cases because of the varying circumstances of each particular case. Although, therefore, the principle is quite clear, we desire to express it again. Taking sect. 4 with its proviso, the effect is that if there is a wrong decision of any question of law the appellant has the right to have his appeal allowed, unless the case can be brought within the proviso. In that case the Crown have to shew that, on a right direction, the jury must have come to the same conclusion. A mistake of the judge as to fact, or an omission to refer to some point in favour of the prisoner, is not, however, a wrong decision of a point of law, but merely comes within the very wide words 'any other ground,' so that the appeal should be allowed according as there is or is not a 'miscarriage of justice.' There is such a miscarriage of justice not only where the Court comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the judge may reasonably be considered to have brought about that verdict, and when, on the whole facts and with a correct direction, the jury might fairly and reasonably have found the appellant not guilty. Then there has been not only a miscarriage of justice but a substantial one, because the appellant has lost the chance which was fairly open to him of being acquitted, and therefore, as there is no power of this Court to grant a new trial, the conviction has to be quashed. If, however, the Court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events no substantial miscarriage of justice within the meaning of the proviso, notwithstanding that the verdict actually given by the jury may have been due to some extent to such an error of the judge, not being a wrong decision of a point of law."

In *Woolmington* v. *The Director of Public Prosecutions,* [1935] A.C. 462, the House of Lords refused to invoke the proviso because their Lordships could not say in the circumstance of that case if the jury had been properly directed "they would have inevitably come to the same conclusion."

C. A.
1947
REX
v.
NORTHEY
ET AL.
Sloan, C.J.B.C.

In *Rex* v. *Haddy,* [1944] K.B. 442, the observations of Channell, J., in *Rex* v. *Cohen and Bateman, supra,* were approved. And see *Rex* v. *Farid* (1945), 30 Cr. App. R. 168, at p. 180.

It seems to me there emerges from these illustrative English cases the distinction I sought to make at the beginning of this judgment between the application of the proviso to cases of misdirection and misreception of evidence. It is not without significance to remember in considering the quoted English authorities that the Courts in that jurisdiction, because of their lack of authority to order a new trial, must have felt under greater compulsion than Canadian Courts to substitute a decision of an appellate tribunal for the verdict of the jury—a compulsion successfully resisted, it seems to me, until the *Stirland* case.

Stirland v. *Director of Public Prosecutions,* [1944] A.C. 315 is a decision of the House of Lords in a case turning on misreception of evidence and Viscount Simon, L.C. in delivering judgment said (pp. 320-21):

My Lords, the point of law immediately involved is as to the admissibility of certain questions put in cross-examination of the appellant at the trial after he had put his character in issue, but at the end of the argument the House intimated that, whether the point of law raised on the appellant's behalf was well founded or not, no substantial miscarriage of justice could be regarded as having actually occurred, and, consequently, that the conviction should stand.

Apart altogether from the impeached questions (which the Common Serjeant in his summing-up advised the jury entirely to disregard), there was an overwhelming case proved against the appellant. When the transcript is examined it is evident that no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice, and this is the proper test to determine whether the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, should be applied. The passage in *Woolmington* v. *The Director of Public Prosecutions,* [1935] A.C. 462, 482, 483, where Viscount Sankey, L.C. observed that in that case, if the jury had been properly directed it could not be affirmed that they would have "inevitably" come to the same conclusion should be understood as applying this test. A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence, but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict. That assumption, as the Court of Criminal Appeal intimated, may be safely made in the present case. The

Court of Criminal Appeal has recently in *R.* v. *Haddy,* [1944] K.B. 442 correctly interpreted s. 4, sub-s. 1 of the Criminal Appeal Act and the observation above quoted from *Woolmington's* case in exactly this sense.

It is manifest from this judgment that Viscount Simon bases his observations on *Woolmington's* case and *Haddy's* case. Both these were cases of misdirection and not of misreception of evidence. In consequence it would seemingly appear that those appellate Courts, bound by judgments of the House of Lords, are now in cases of misreception of evidence, even if it seems substantial and prejudicial in effect, in a position to weigh the balance of the evidence and reach conclusions of fact thereon.

In my view, however, appellate Courts in Canada, not bound by judgments of the House of Lords, in criminal cases are not yet placed in that position.

That brings me then to a consideration of the Canadian authorities wherein the distinction I made is, I think manifest and still is, in my opinion, in effect.

In *Allen* v. *Regem* (1911), 44 S.C.R. 331, the effect of misreception of evidence was considered. The Chief Justice in delivering the judgment of the Court, consisting of Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ., said (pp. 335, 336-37, 339-40):

. . . The only question as to which a doubt existed in my mind at the argument, was whether the improper admission of this evidence was an irregularity so trivial that no substantial wrong or miscarriage was thereby occasioned, there being other sufficient evidence of guilt. The majority in the court below thought that the irregularity was trivial, that no harm was done the prisoner and that by reason of the provisions of section 1019 of the Canada Criminal Code the appeal should be dismissed. . . .

There are, obviously, verbal distinctions which can be made between the English Act and the section of our code. The English statute enacts that the appeal shall be allowed in a certain number of enumerated cases—including that of a verdict which cannot be supported having regard to the evidence—and that in any others the appeal shall be dismissed. As appears by the citation from *Rex* v. *Fisher*, [1910] 1 K.B. 149, that statute has been construed by the Court of Criminal Appeals to mean that the conviction must be set aside where improper evidence has been admitted—even if having regard to the whole evidence there is sufficient to support the verdict. This is now the settled rule notwithstanding the proviso to the English Act that the appeal may be dismissed even if the point raised might be decided in favour of the appellant if the court considers that no substantial miscarriage of justice has occurred. Our section 1019 is practically to the same effect. It provides that no conviction shall be set aside if it appears that

C. A.
1947
REX
v.
NORTHEY
ET AL.
Sloan, C.J.B.C.

some evidence was improperly admitted unless some substantial wrong or miscarriage of justice was thereby occasioned. The underlying principle of both is that, while the court has a discretion to exercise in cases where improper evidence has been admitted, that discretion must be exercised in such a way as to do the prisoner no substantial wrong or to occasion no miscarriage of justice; and what greater wrong can be done a prisoner than to deprive him of the benefit of a trial by a jury of his peers on a question of fact so directly relevant to the issue as the one in question here—the existence of previous threats—and to substitute therefor the decision of judges who have not heard the evidence and who have never seen the prisoner? It may well be that in our opinion sitting here in an atmosphere very different from that in which the case was tried the evidence was quite sufficient, taken in its entirety, to support the verdict, but can we say that the admittedly improper questions put by the Crown prosecutor and the answers which the prisoner apparently very reluctantly gave did not influence the jury in the conclusion they reached? We must not overlook the fact that it is the free unbiassed verdict of the jury that the accused was entitled to have.

Despite all the changes made in recent years in the procedure in criminal and *quasi*-criminal cases, the classic saying of Lord Hardwicke still holds that "it is the greatest consequence to the law of England and to the subject that these powers of the judge and jury are kept distinct, that the judge determines the law, and the jury the fact; and if ever they come to be confounded it will prove the confusion and destruction of the law of England."

. . .

It was argued that the section of our Code, upon which the Chief Justice in the Court of Appeal relied, specially provides that the appeal shall be dismissed even where illegal evidence has been admitted, if there is otherwise sufficient legal evidence of guilt. I cannot agree that the effect of the section is to do more than, as I said before, give the judges on an appeal a discretion which they may be trusted to exercise only where the illegal evidence of other irregularities are so trivial that it may safely be assumed that the jury was not influenced by it. If there is any doubt as to this the prisoner must get the benefit of that doubt *propter favorem vitæ*. To say that we are in this case charged with the duty of deciding the extent to which the improperly admitted evidence may have influenced some of the jurors would be to hold, as I have already said, that Parliament authorized us to deprive the accused in a capital case of the benefit of a trial by jury. The law on this express point was laid down by the Judicial Committee of the Privy Council in 1893 in *Makin* v. *Attorney-General for New South Wales*, [1894] A.C. 57, at pp. 69, 70.

The learned Chief Justice quotes passages from the judgment of the Lord Chancellor in *Makin's* case and concludes his own judgment by saying (p. 341):

On the whole I am of opinion that 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, . . .

Allen v. *Regem* was followed in *Gouin* v. *Regem* (1926), 46 Can. C.C. 1, and see *Thiffault* v. *Regem* (1933), 60 Can. C.C. 97, at pp. 103, 104; *Rex* v. *Kelly* (1916), 27 Can. C.C. 282, *Levesque & Graveline* v. *Regem* (1934), 62 Can. C.C. 241; *Koufis* v. *Regem,* [1941] S.C.R. 481.

The last authority of the Supreme Court of Canada in point in this present matter is *Schmidt* v. *Regem,* [1945] S.C.R. 438, a case involving misdirection and not misreception of evidence. The *Gouin* case and the *Stirland* case, *supra,* were both referred to therein with approval.

While it seems to me that the *Stirland* case extends the misdirection principle to cases involving misreception of evidence, the decision is, in its relation to cases of misdirection, one which the Canadian Courts can follow without conflict with *Allen* v. *Regem.* It is in its relation to cases of misreception of evidence that, in my view, a conflict between *Stirland's* case and *Allen* v. *Regem* arises.

I do not think, therefore, the *Schmidt* case in approving *Stirland's* case thus overruled *Allen* v. *Regem* when the point in issue was misdirection. It would appear to me that if it was intended to overrule *Allen* v. *Regem* in the *Schmidt* case appropriate language would have been employed to effectuate that purpose. If I am right in this view it follows *Allen* v. *Regem* is applicable herein and binding on this Court. In consequence it is not the proper function of this Court, under the circumstances herein, to weigh the balance of the evidence and thus deprive the appellant of his right to a fair trial before a trial Court upon legally admissible evidence.

In contrast to the principle of *Allen* v. *Regem* in its relation to misreception of evidence the following cases illustrate the attitude of the Supreme Court of Canada when dealing with cases of misdirection: *Vigeant* v. *Regem,* [1930] S.C.R. 396; *Boulianne* v. *Regem,* [1931] S.C.R. 621; *Chapdelaine* v. *Regem,* [1935] S.C.R. 53. In general effect they parallel the English decisions on misdirection and I think support the distinctions I have endeavoured to make.

C. A.
1947
REX
v.
NORTHEY
ET AL.
Sloan, C.J.B.C.

It must be understood that I regard the improper reception of the "Wilson evidence" as highly prejudicial to the fair trial of the accused. That is the foundation upon which my judgment rests. Compare, *e.g., Rex* v. *Spain* (1917), 28 Can. C.C. 113, wherein it was held that if admissions made to police officers by the accused were improperly received at the trial nevertheless by reason of the accused repeating these admissions in substance in his own defence when in the witness box he had thereby suffered no substantial wrong.

We have met with this same circumstance in this Court with the same result as in *Rex* v. *Spain,* but that is not this case. Here the learned trial judge had before him, in his opinion, evidence properly receivable which amounted to admissions by the accused of the conspiracy charged. There was, therefore, no need for him to apply his mind judicially to the balance of the evidence nor any need for him, for example, to consider the credibility of the witness Sparrow. If he did consider it necessary to examine and weigh the balance of the evidence in order to reach his verdict can it not be said with reason that in so doing the admissions of the accused may have influenced his final conclusion? From his point of view he had every right to be influenced to an irresistible degree by these admissions.

In his reasons for judgment at the conclusion of the trial the learned trial judge said:

> It is true that the law of conspiracy is somewhat difficult to prove and it is also true that in the proof of conspiracy, one act or two acts taken out of the general practice would not, of course, prove or allow the Court to infer conspiracy on those isolated acts. But this is also true, that the general practice shown by those individual examples might, with the congregation of those items, be sufficient and properly sufficient in law, and in every other way, to come to the conclusion that the conspiracy is proved.

I draw particular attention to the word "might" in the foregoing passage.

After referring to a previous decision of his in *Rex* v. *Lang* (unreported), the learned trial judge continued as follows:

> I find that I cannot come to any other conclusion on the evidence before me but that the charge is proved. Accused, J. L. Northey, Sr., Paul Northey and Archibald Northey, I find you guilty as charged.

Now the evidence before him included the "Wilson evidence" and it seems clear to me from his language that this evidence

may have had a strong influence in assisting the learned trial judge to reach a conclusion, especially in view of his deliberate use of the doubtful "might" in relation to the balance of the evidence.

That brings me to a consideration of the report of the learned trial judge. The manner in which this report came before us requires some explanation. This appeal opened before us in Victoria on the morning of April 8th last. Due to his unfortunate illness the report of the learned trial judge was not before us on that day, and because counsel for the appellants had to leave shortly for the East on public business we proceeded with the appeal without the report.

On the afternoon of April 9th the Court held the "Wilson evidence" improperly received. The appeal from then on was directed to the application of section 1014, subsection 2.

On Friday, April 11th, I instructed the registrar of our Court to communicate with the registrar of the Court at Vancouver to ascertain when the report would be made available to us.

On the opening of the morning session on Monday, April 14th, the registrar advised us that the report had been received from the learned trial judge. It was dated on Saturday, April 12th. It reads in part as follows:

As trial judge the outcome of the whole matter and the finding of guilt was arrived at first by my absolute belief in the evidence of Mr. Sparrow. This witness at first was very evidently anxious to see that his employers were not hurt by his evidence but later gave his evidence frankly and sincerely, and was an absolutely believable witness, even though (as so often happens to witnesses under skilful cross-examination) slight discrepancies could be shown in his evidence here and there.

Second—by the overwhelming evidence of the manipulation of cheques and vouchers.

As to the introduction or admission of the Wilson Commission evidence, while I admitted that evidence, after strenuous opposition by counsel for the accused, I was very well aware that if it should not have been admitted I must be most careful to see that my judgment must not depend upon it.

There was no doubt in my mind that the conspiracy was proved beyond a doubt without taking into consideration at all the Wilson Commission evidence. That evidence, to my mind only showed, from the statements of the accused there, that the crime completely proved without such evidence, was only further substantiated by it. In other words had there been no admission of the Wilson Commission evidence I would still have found the accused guilty.

C. A.
1947
REX
v.
NORTHEY
ET AL.
Sloan, C.J.B.C.

With deference I think the language of Anglin, C.J.C., in *Baron* v. *Regem* (1930), 53 Can. C.C. 154, at p. 155 is in point:

> . . . It was never intended by this section [section 1020] to enable the trial Judge, after an appeal had been argued, to put before the Court of Appeal by way of certificate or otherwise, whether *proprio motu* or by direction of the Court of Appeal, his answer to the various points taken upon the appeal. That, in substance, is what has been done in this case.

In *Rex* v. *James* (1945), 61 B.C. 161, at p. 164, O'HALLORAN, J.A. (BIRD, J.A. concurring) said:

> . . . In his report under Code section 1020 the learned judge gave elaborate reasons supporting his conclusion of guilt. But I think it obvious that a report under section 1020, given, as it is, after notice of appeal has been filed, must be confined to the purpose for which it is permitted, and cannot be regarded as reasons for judgment or as a substitute therefor.

In my view, with respect, the report herein falls within the observations in *Baron* v. *Regem* and *Rex* v. *James* and suffers from a like infirmity.

There is another comment I feel constrained to add. It seems to me the decision rests with this Court and not the Court below to say whether or not evidence improperly received may or may not have influenced the trial tribunal. The real question to be decided is, in my opinion, whether "a" jury—not "the" jury—may be prejudicially influenced in its verdict. Similarly it is not whether "the" judge but "a" judge may also be so influenced. To hold otherwise would lead to strange results manifest on reflection and requiring no elaboration from me. Surely the test must be based upon what this Court considers the normal reactions of a reasonable man would be to the impact on his judgment of evidence *ex facie* damaging in nature—*cf. Rex* v. *Mouers* (1920), 34 Can. C.C. 287, Hodgins, J.A. at p. 299. It is no reflection to say of a normal individual, reacting reasonably to this circumstance that his judgment may have been influenced be evidence believed by him to be properly before him.

An experienced trial judge could very well exclude from his consideration facts which had come to his attention but which he held not properly receivable. In this case the learned trial judge was under no such compulsion. It was his right—indeed his duty—to consider and give full effect to the admissions of the accused after holding such evidence properly receivable by him. To say under these circumstances the "Wilson evidence" may

not have influenced the verdict is stretching credulity to a point beyond my reach.

The admission of the "Wilson evidence" operated to the prejudice of the accused in yet another manner: it effectively destroyed possible defences open to the accused on the balance of the evidence.

In consequence they were deprived of the right of every accused to have a fair trial on a fair field with full opportunity to present whatever defences were open to them however weak.

Before leaving this case I would like to adopt with deference and approval, the language of Stuart, J.A. in *Rex* v. *Picariello and Lassandra* (1923), 39 Can. C.C. 1, at pp. 13 and 14:

. . . We have in these days an earnest appeal from all sides for the enforcement of the law. But it must be an enforcement of the law according to law or otherwise the gravest consequences would ensue. We ought not to yield too readily to the temptation to decide the facts as to guilt ourselves and then brush aside errors in law which occurred at the trial. The public would soon learn of the danger to their respective individual liberties if such a course were followed. Indeed this Appellate Division was by Parliament constituted a Court of Appeal in Criminal Cases for the purpose only of checking errors in law and for the purpose of ensuring that all persons convicted or acquitted should be convicted or acquitted in accordance with the law. This is where an ill-formed public talks often of "technical points," little appreciating where their criticism leads.

So that it is obligatory upon us to examine with care the law given to the jury upon which they must act. Regardless of the consequence in an individual case the rule of law must continuously and persistently be vindicated, for in the long run it is only thus that the government of law will prevail. It is, of course, not every error of law that will vitiate a verdict. Section 1019 of the Cr. Code has a saving provision to the effect that it is only where the error has in the opinion of the Court occasioned some substantial wrong or miscarriage of justice that a new trial may be ordered. It is here that divergence of opinion is so clearly possible because obviously it was not intended that the Court of Appeal should itself in every case form an opinion as to the guilt of the accused on reading the evidence and if it thinks him guilty uphold the conviction. This would be to assume the functions of the jury. The clause means that the Court must conclude that the accused has not had a proper legal trial in a substantial sense, for, as against him, it is a miscarriage of justice if he has not had such a trial because in justice that is what he is entitled to. Hence it will be seen that whether a clear error in law has or may have prevented a substantially proper legal trial may often be a question of doubt and the answer given will often depend upon the emphasis an appeal Judge feels in conscience compelled to place upon the seriousness of the error and upon his view of the possibility that a fair trial of all conceivable defences has not taken place.

C. A.
1947

REX
v.
NORTHEY
ET AL.

In the result and feeling bound by *Allen* v. *Regem, supra,* in the circumstances of this case, I would allow the appeal, quash the conviction and direct a new trial.

O'HALLORAN, J.A.: The three appellants, father and two sons, were convicted by LENNOX, Co. J. of conspiracy to defraud the Government of Canada in breach of Code section 444. While engaged in war contracts (supplying West Coast Shipyards with furniture at unit prices for the ships constructed) under the name of Millwork Industries Limited, their business office records were altered in several ways and in numerous instances in order to conceal the true profits.

On the afternoon of the second day of the six-day appeal argument this Court ruled unanimously that admissions made by the appellants (referred to as the "Wilson evidence") in a departmental inquiry under The Department of Munitions and Supply Act, Can. Stats. 1939 (Second Session), Cap. 3 and amendments (particularly Cap. 31 of 1940 and Cap. 8 of 1943) had been improperly admitted at the trial.

Quite apart from the "Wilson evidence" thus excluded there remains a large volume of testimony. One branch consists of the evidence of Sparrow the book-keeper for the three Northey appellants; the other branch consists of the evidence of witnesses from some 30 business firms who produced ledger sheets, office copies of invoices or other records from their respective firms to compare with the Northey records produced by Sparrow. Some of the invoices produced by Sparrow from the Northey office were fictitious, but the majority had been genuinely issued but falsified in the Northey office.

Counsel for the appellants conceded a great deal of fraud of this kind had taken place in the Northey office. He was ready to concede in the face of the overwhelming evidence, that the appellant Archie Northey and the book-keeper Sparrow were guilty of fraud upon the Government, but he emphasized again and again that if all hearsay evidence were eliminated, there was no evidence whatever to implicate the father or the other son with Archie Northey and the book-keeper Sparrow in the many fraudulent transactions which were disclosed. With respect, I am unable to accept this submission.

The frauds were carried on systematically over a period of three years. That in itself is evidence of preconceived design. It was rebuttable, it is true, but the appellants did not go into the witness box to give any explanation which could deprive that evidence of its criminal inferences. The father and the other son were actively engaged in the business during that time. They were continually in and out of the office. The father was president of the company, Paul was vice-president and managing-director, and Archie was secretary-treasurer. Some two of the three of them signed the Millwork Industries cheques which required two signatures. Instances appear where they profited personally by frauds committed in the office. The evidence of Sparrow is most damaging to all the appellants, the more so when it is read in the light of the surrounding circumstances properly in evidence. He had been employed by the father and then joined Millwork Industries Limited when it was formed in 1942, at a salary of $80 per month, later increased to $125 per month. His evidence clearly implicates the three appellants in the conspiracy as charged. It is plain the learned judge accepted his evidence.

In a conspiracy charge the question is not whether the three appellants participated in acts, but whether they participated in the unlawful design: see *Rex* v. *Miller* (1940), 55 B.C. 121, at p. 126. That may be established by inference from the conduct of the parties, *per* Rinfret, J. in *Paradis* v. *Regem,* [1934] S.C.R. 165, at p. 168; and see *Rex* v. *Meyrick and Ribuffi* (1929), 21 Cr. App. R. 94. The evidence of Sparrow served a double purpose. It implicated the three appellants directly in the conspiracy. But even without that portion of it which does so, his evidence otherwise of what took place in the Northey office (such, for example, as the business activities of the three Northeys, their close family business relationship and the character and practice of their business), when properly estimated in the light of all the surrounding circumstances, raised a presumption of concerted purpose entitling the trial judge (here acting as a jury under Code section 835 and see *Rex* v. *Miller, supra,* at p. 127) to find the existence of the unlawful agreement which is the gist of the crime of conspiracy.

C. A.
1947
REX
v.
NORTHEY
ET AL.
O'Halloran,
J.A.

In my judgment the evidence of Sparrow, both in its direct aspect and in its indirect aspects, supported as it is in so many respects by the documentary records found in the Northey office (including records therein visibly altered), leaves no room for doubt that the three appellants acted in concert in furtherance of and consequent upon an unlawful design. I find myself unable to escape the conclusion that proof of the guilt of the three appellants was conclusively established, quite apart from the "Wilson evidence" and quite apart from any hearsay evidence which may have crept into the proceedings. In the language of Kerwin, J. when applying *Stirland* v. *Director of Public Prosecutions,* [1944] A.C. 315 (320-1) in delivering the judgment of the Court in *Schmidt* v. *Regem,* [1945] S.C.R. 438, at p. 440, the Crown respondent has satisfied the *onus* upon it of showing that the verdict would necessarily have been the same if no improper testimony had been admitted; and see *Rex* v. *Welch and Ackerman,* [*ante,* p. 183]; [1946] 3 W.W.R. 655 and cases there collected. In these circumstances the appeal must fail, since it cannot be said that any substantial wrong or miscarriage of justice has actually occurred within the meaning of Code section 1014, subsection 2.

But counsel for the appellants submitted that the "Wilson evidence" in particular is so strong that no judge could escape its influence, with the result he urges, that its inclusion may have led the learned judge to convict, when he might not have convicted if it had not been included. With respect, this reasoning discloses what I must regard as innate fallacies.

When the remaining admissible evidence is such that the trial judge must necessarily convict thereon, it cannot matter if damaging inadmissible testimony has crept in. That is so for two reasons at least: First, when there is admissible evidence conclusive of guilt, then the inadmissible evidence, even if it had been admissible, could not do more than confirm the conclusive proof presented. In the second place, when the evidence is such the trial judge must necessarily have convicted, then he is acting perversely if he fails to convict on that evidence. To say he might not have convicted in such circumstances, unless he had other or stronger evidence before him, is therefore to assume he

might have acted perversely. But an appellate Court will not assume that a trial judge has not or will not exercise his judicial functions properly; and see *Rex* v. *Bush* (1938), 53 B.C. 252; *Rex* v. *Miller, supra,* at p. 128; and *Rex* v. *James* (1945), 61 B.C. 161, at p. 164.

Consideration of section 1014, subsection 2 invites reference to three further aspects of the case. First, the learned trial judge did not refer to the "Wilson evidence" in his reasons for judgment. That is not without significance, for if it had influenced him one would expect specific mention in his reasons for judgment of such strong support for his conclusion. In the second place, counsel for the Crown respondent stated to this Court (and it was not questioned by appellants' counsel), that he had asked the learned trial judge to deal first with the case independently of the "Wilson evidence."

It is to be observed as well in passing, that in his report to this Court under Code section 1020 the learned trial judge said that if the "Wilson evidence" had not been admitted he would still have found the appellants guilty. A judge's report cannot be regarded as a substitute for his reasons for judgment. But I am of the view that when a question of whether a miscarriage of justice has occurred arises under Code section 1014, subsection 2 the judge's report in that respect is of the very greatest importance.

A third aspect of the case which an appellate Court is entitled to take into consideration under section 1014, subsection 2 is that the three appellants did not testify in their own behalf (and see *Rex* v. *Bush* (1938), 53 B.C. 252). The direct evidence of Sparrow implicated the three appellants; the learned judge believed that evidence, and he had no evidence to the contrary. In addition, the cumulative effect of the admissible testimony in my judgment at least carries such a compelling degree of practical certainty, that in the absence of any explanation by the appellants, they must be held guilty as charged.

It may be advisable to observe in conclusion that we are not here concerned with a trial before a jury. This appeal lies from a judge acting as a jury under Code section 835. Had the appellants' trial taken place before a jury the "Wilson evidence," if

C. A.
1947

REX
v.
NORTHEY
ET AL.

O'Halloran,
J.A.

admitted, might have caused irreparable damage to the appellants in the minds of the jury; it may be doubted if any instructions the judge could have given the jury would have disabused their minds of its damaging influence. But this trial was not before a jury. It was held before a judge trained and experienced in criminal matters. Bearing in mind that there is (as I think with respect) conclusive evidence to convict without the "Wilson evidence" and without the hearsay evidence, and also bearing in mind that the learned judge said in his report that he would have found the appellants guilty even if the "Wilson evidence" had not been admitted, I should be loath to hold that he became powerless to function judicially by reason of his knowledge of the "Wilson evidence," even if for present consideration it may be regarded in the same light as a "confession."

I should hesitate long before I held that such a judge could not try the case without being unduly influenced by the "Wilson evidence." In my opinion to so hold would deny all those qualities of impartiality of mind and judgment, which are held out as part of the mental equipment of experienced criminal judges. It would be equivalent to an assertion that such a judge must be governed by his emotions instead of by his reason and his legal training; that his conclusions spring from impressions of the moment and are not actuated by reasonable analysis and judicial responsibility. I should pause a long time indeed before yielding my judgment in favour of what may not inaptly be described as a state of judicial bankruptcy.

County judges and magistrates in our large cities do a great volume of judicial criminal work. Not infrequently they have to pass upon the admissibility of "confessions." If such a judge or magistrate should reject a confession because the Crown has failed on the "trial within the trial" to show it was voluntary, no one would be heard to say that the judge or magistrate in question cannot adjudicate upon the case without being unduly influenced by his knowledge of the existence of the inadmissible confession. Such a contention would strike at the foundation of our system of criminal trial, for then the trial would have to be carried on before another judge or magistrate than the one who had held the "trial within the trial."

I hope there is no danger that what has been said in the last few paragraphs may obscure the real point in this appeal which in my opinion is this, *viz.*, after the "Wilson evidence" and any hearsay evidence are excluded, is there enough evidence left, that a judge must necessarily convict thereon? In the last analysis there is only one way to determine that, *viz.*, to read through the evidence in the appeal book and examine the exhibits in the light thereof. After doing so with the argument of counsel in mind, and with great deference to other views, I can reach no conclusion which would justify me in setting aside the verdict of guilty.

In my judgment the appeals from conviction must be dismissed. I agree with the variations in the sentence appeals announced by the Chief Justice when delivering the oral judgment of the Court herein.

ROBERTSON, J.A.: I agree with the Chief Justice that this is not a case for the application of Code section 1014, subsection 2 and accordingly I would quash the convictions and order a new trial.

SIDNEY SMITH, J.A.: I have had the benefit of reading the judgment of my brother O'HALLORAN and agree both in his conclusion and his reasons.

BIRD, J.A.: I would dismiss the appeal for the reasons given by my brother O'HALLORAN in which I concur.

I also concur with the disposition of the sentences of all three accused, which has been announced by the Chief Justice.

Appeal dismissed, Sloan, C.J.B.C. and Robertson, J.A. dissenting.

S. C.
1947
Feb. 14.
Jan. 7;

MURRAY v. MURRAY.

Practice—Production of documents—Official—Objection to produce—Privilege—Production contrary to public interest—Power of Court to inspect.

The petitioner in a divorce action, in order to prove the respondent's adultery by evidence showing that he contracted a venereal disease during coverture from a person other than herself, caused to be issued a subpœna *duces tecum* to the person in charge of the records of the Provincial Department of Health under the Venereal Diseases Suppression Act, the respondent having consented in writing to the production in evidence of the record of his illness and treatment for venereal disease kept by the Department of Health pursuant to that Act.

Held, that documents otherwise relevant and liable to production need not be produced if, owing to their actual contents or the class of documents to which they belong, the public interest requires that they be withheld. The only point disputed is whether or not the Court ought to inspect the documents to satisfy itself that the claim of privilege is rightly made. The only object in the Court looking at the documents here would be to satisfy itself as to whether or not the Minister had good reason for withholding them. Since those reasons are before the Court, the Court is entitled to consider them and also entitled to look at the public statute, the Venereal Diseases Suppression Act, under which the records in question are kept, and having done so the Court is satisfied that it is against public interest that the records in question should be given in evidence.

Held, further, that the present opinion is concerned only with the production of documents, but the same principle must apply to the exclusion of verbal evidence which, if given, would jeopardize the interests of the community. For the reasons given by the Minister, the witness should be not required to answer the question asked him.

ON a petition for divorce the petitioner sought to prove adultery by evidence showing that the respondent contracted a venereal disease during coverture from some person other than herself. The facts are set out in the head-note and reasons for judgment. Heard by WILSON, J. at Victoria on the 7th of January, 1947.

Stanton, for petitioner.
H. Alan Maclean, for the Minister.

Cur. adv. vult.

14th February, 1947.

WILSON, J.: In this divorce case the petitioner seeks to prove the respondent's adultery by evidence showing that he contracted

a venereal disease during coverture from some person other than herself. She has caused to be issued a subpœna *duces tecum* to the person in charge of the records of the Provincial Department of Health under the Venereal Diseases Suppression Act, R.S.B.C. 1936, Cap. 300. The respondent has consented in writing to the production in evidence of the record of his illness and treatment for venereal disease kept by the Department of Health pursuant to that Act.

The witness summoned duly appeared and was asked if he had a record of the illness and treatment of the respondent and was also asked to produce the record. He objected to answering the question, and he objected to producing the record. He stated that this was done under instructions from his Minister and produced an affidavit by the Minister stating that the public interest required that the records should not be produced. Counsel for the Minister asked to be heard and was heard.

The Minister, in his comprehensive affidavit, states that

> it would be contrary to public interest to permit the production of any of such records either with or without the consent of the patient involved and further that it would be contrary to public interest for an officer of my department to give *viva voce* evidence relating to the said records, or relating to information which he had obtained while employed in the administration of the Venereal Diseases Suppression Act.

He proceeds to supplement this declaration of opinion with very cogent reasons. He says that the records

> consist of case histories of persons treated for venereal diseases including provision for recording the names of persons with whom the patient has had sexual contact and remarks upon the result of confidential investigation made by officers of my department.

He then proceeds:

> It is my conviction and belief that if the production of records kept under the Venereal Diseases Suppression Act were required to be made upon subpœna issued in civil cases that the programme of my Department would be gravely hampered and further, that the free flow of information to my said Department would be impeded because patients would be less likely to seek assistance from the Department and would be less likely to give confidential information. Any interference with the free flow of information to the Department would be injurious to the public welfare and interest.

It is common ground here that, as stated in the head-note to the report of *Duncan* v. *Cammell Laird & Co., Ltd.,* [1942] 1 All E.R. 587 (H.L.):

> . . . Documents otherwise relevant and liable to production need not

S. C.
1947
MURRAY
v.
MURRAY
Wilson, J.

be produced if, owing to their actual contents, or the class of documents to which they belong, the public interest requires that they should be withheld.

The only point disputed before me was whether or not the Court ought to inspect the documents to satisfy itself that the claim of privilege is rightly made. In the *Cammell Laird* case Viscount Simon, L.C., after an exhaustive review of the authorities concludes (p. 594):

> . . . The practice . . . in both countries is to treat a ministerial objection taken in proper form as conclusive. The reasons given by Pollock, C.B., by Lord Dunedin and by Lord Kinnear cannot be gainsaid. As Lord Parker said in another connection in *The Zamora*, [1916] 2 A.C. 77, at p. 107: "Those who are responsible for the national security must be the sole judges of what the national security requires."

Viscount Simon, at p. 595 further expressly disapproves of the decision of the Judicial Committee in *Robinson* v. *State of South Australia* [*No. 2*], [1931] A.C. 704 in which it was held that, in the circumstances of that case, a judge was entitled to look at certain documents in order to determine whether or not a Minister of the Crown might, on the grounds of public policy, withhold them from production.

The *Robinson* case was relied on by counsel for the petitioner. Counsel, in their argument, left me confronted with two tasks. The first task was to decide whether or not the *Robinson* case was, as think it is, distinguishable from the *Cammell Laird* case, and inapplicable to the case at Bar. The second task would only arise if I decided the *Robinson* case was not distinguishable, and would consist in determining whether in view of the rather confusing pronouncement of Lord Dunedin in *Robbins* v. *National Trust Co.*, [1927] A.C. 515. I ought to follow the judgment of the House of Lords or that of the Judicial Committee.

I think I can justifiably and properly save myself an enquiry into either of these large subjects. My only object in looking at the documents here would be to satisfy myself as to whether or not the Minister had good reasons for withholding them. It may be, and probably is, the law that he does not have to furnish any reasons. Be that as it may, he has, in the present case, given, in his affidavit, good and sufficient reasons. Since those reasons are before me I am entitled to consider them, and I am also entitled to look at the public statute, the Venereal Diseases Suppression

Act, R.S.B.C. 1936, Cap. 300, under which the records in question are kept. Having done so, I am fully satisfied that it is against public interest that the records in question should be given in evidence.

The suppression of venereal disease is palpably and obviously a matter of urgent public interest. The necessity for secrecy in respect of the records of persons treated for venereal disease is convincingly demonstrated in the Minister's affidavit, demonstrated in terms on which I cannot improve. Therefore I can and do, without inspecting the documents in question, and without deciding whether or not I am entitled to inspect them, find that the documents need not be produced in evidence.

In the *Cammell Laird* case Viscount Simon at p. 595, says this:

> . . . The present opinion is concerned only with the production of documents, but it seems to me that the same principle must also apply to the exclusion of verbal evidence which, if given, would jeopardise the interests of the community.

I subscribe to this view, and therefore hold that, for the reasons given by the Minister, the witness should be not required to answer the questions asked him.

I also find that the procedure followed here in claiming the privilege, that of filing an affidavit by the Minister, conforms to the requirements as to procedure set out on pages 592 and 593 of the *Cammell Laird* judgment and that the affidavit itself does not appear to be open to any of the objections taken by Lord Blanesburgh to the Minister's affidavit in the *Robinson* case.

In conclusion I should add that there was some argument as to whether the provisions of the Venereal Diseases Suppression Act have any bearing on the question. Section 7 forbids any person employed in the administration of the Act from revealing to any other person matters coming to his knowledge in the course of his employment and provides that he may be dismissed if he disobeys this rule. But this general provision would not, in my opinion, entitle an employee to refuse to obey an order of a competent Court requiring him to give evidence.

Section 8 of the Act reads as follows:

> 8. (1.) No report or certificate of any legally qualified medical practitioner or of any agent of the Provincial or any Local Board of Health given

S. C.
1947
MURRAY
v.
MURRAY
Wilson, J.

for the purposes of this Act bona fide and without negligence that any person (including any prisoner) is suffering from venereal disease shall render him liable to an action, nor be admissible in evidence in any proceedings against such medical practitioner or agent, or be made the ground of any prosecution, action, or suit against him.

(2.) All records, reports, and certificates made or kept under authority of this Act shall be absolutely privileged.

Subsection (2) presents some difficulty because it grants absolute privilege without saying to whom it grants the privilege. I know of no cause of privilege, in the sense in which the word is used when speaking of evidence, where the privilege does not belong to a person or class of persons by whom it may be claimed or waived. Here, it has been suggested, the privilege may be said to be that of the patients who are treated, and the respondent who admits being a patient, may waive his privilege so that the records may be produced. As against this it might be argued that subsection (2) might, on a reasonable construction, be thought to refer to the classes of persons referred to in subsection (1) which class does not include the respondent. I do not find it necessary to deal with this matter. It is evident, once the Crown has raised the point of public interest, that a waiver of privilege by a patient, doctor or other persons to whom the privilege granted by subsection (2) may apply cannot have the effect of compelling the Crown to reveal facts or documents which it is, by the law entitled to withhold.

Ruling accordingly.

BOYD AND BOYD v. KUHN.

C. A.
1947
Jan. 21, 22; *March* 4.

Automobiles—Negligence—Running down boy coming from behind a standing car—Horn not sounded nor speed reduced—Standard of care.

The Island Highway on Vancouver Island runs north and south and the accident in question happened on this road about 15 miles north of Nanaimo. At about 7 o'clock on Saturday evening of May 11th, 1946, the defendant was driving north on this road with his wife and two children. He was travelling at about 20 miles an hour when he saw about 300 feet ahead of him a car coming from the north come to a stop on the westerly and proper side of the road, directly opposite a house across the road on the east side. He saw a man and woman sitting in the front seat and two boys in the rear seat. There was considerable brush, but no house, gate or driveway on the westerly side of the road for some distance north and south of the standing car. When the defendant came within about 45 feet of the standing car he noticed the two boys get out of the car on their proper side. As he came abreast of the standing car one or both of the boys seemed to be bending down to pick something off the road. Then almost at once his car hit one of the boys who emerged suddenly from behind the standing car. The defendant had not sounded his horn at any time nor did he at any time before the impact reduce his speed or put on the brakes before the accident happened. The trial judge held the defendant liable mainly on the ground that failure to sound his horn and reduce his speed constituted negligence in the circumstances.

Held, on appeal, reversing the decision of WILSON, J. (O'HALLORAN, J.A. dissenting), that the trial judge had imposed upon the defendant a standard of conduct which under all the circumstances of the case must be pronounced too exacting. The defendant here was bound to take that kind of care which a reasonably prudent man in his place would have taken, neither more nor less. The principle is stated in a sentence by Duff, C.J. in *McMillan* v. *Murray,* [1935] S.C.R. 572, at p. 574.

APPEAL by defendant from the decision of WILSON, J. of the 8th of November, 1946, in an action for damages for personal injuries suffered by the plaintiff Stuart Boyd when run down by the defendant's automobile. The facts are set out in the head-note and reasons for judgment.

The appeal was argued at Victoria on the 21st and 22nd of January, 1947, before SLOAN, C.J.B.C., O'HALLORAN and SIDNEY SMITH, JJ.A.

Manzer, for appellant: A driver is not bound to anticipate the reckless action of a six-year-old child merely because children

C. A.
1947
BOYD AND BOYD v. KUHN

are thoughtless and do not appreciate danger: see *Henry Morgan and Co. Ltd.* v. *Bloomfield* (1933), 55 Que. K.B. 452, at p. 456; *Wilson* v. *Rebotoy,* [1930] 1 D.L.R. 273; *Seiden* v. *Pinkerton* (1926), 31 O.W.N. 325; *McCallum* v. *Hooper* (1929), 67 Que. S.C. 139; *Black* v. *Veinot,* [1934] 1 D.L.R. 803. The facts are distinguishable in *Whitten* v. *Burtwell* (1920), 47 O.L.R. 210, at p. 215. The appellant could not be expected to anticipate that the children would attempt to cross the road in front of him. To this the above cases apply. There was no such finding that the defendant failed to keep a proper look-out. As to the finding that the defendant failed to alter his speed in the circumstances, in fact he was travelling at a low rate of speed in daylight. As to his not sounding his horn, this is done only when reasonably necessary and it was broad daylight at the time. The fault of the child continued down to the last moment and proximate cause and contributory negligence do not apply as the accident happened wholly without his fault: see *British Columbia Electric Railway Company, Limited* v. *Loach,* [1916] 1 A.C. 719. The act of the child running out into the highway could not reasonably have been foreseen by him: see *Rickard* v. *Ramsay,* [1936] S.C.R. 302, at pp. 305-6.

Cunliffe, for respondents: The defendant was guilty of negligence in the following particulars: (a) He did not keep a proper look-out; (b) his speed was excessive in the circumstances; (c) he did not have the car under proper control; (d) he drove with defective brakes; (e) he did not sound his horn, and (f) he drove his car carelessly and recklessly. The learned judge having found the defendant was negligent the question for this Court is whether there is evidence on which the trial judge could so find: see *Schram* v. *Kearns,* [1941] 2 W.W.R. 177. They must show on the finding of the facts that he was clearly wrong: see *Claridge* v. *British Columbia Electric Railway Co. Ltd.* (1940), 55 B.C. 462. The child was an infant of tender years to whom the doctrine of contributory negligence does not apply: see *Gardner* v. *Grace* (1858), 1 F. & F. 359; *Merritt* v. *Hepenstal* (1895), 25 S.C.R. 150; *Winnipeg Electric Ry. Co.* v. *Wald* (1909), 41 S.C.R. 431, at pp. 437-40; *Leslie* v. *Clark and Buzza Ltd.* (1930), 42 B.C. 391, at p. 397; *Bouvier* v. *Fee,*

[1932] S.C.R. 118, at pp. 119-20; *Rickard* v. *Ramsay,* [1936] S.C.R. 302; *Eyers* v. *Gillis & Warren Ltd. and Chivers,* [1940] 3 W.W.R. 390; *Gargotch et al.* v. *Cohen et al.,* [1940] O.W.N. 479; *Pawluk* v. *Northeastern Flour Mills Ltd.,* [1941] 3 W.W.R. 1; *Placatka* v. *Thompson,* [1941] 1 W.W.R. 528; *The King* v. *Laperriere—The King* v. *Dubeau,* [1946] S.C.R. 415, at p. 444. The trial judge saw and talked with the infant plaintiff.

Manzer, replied.

Cur. adv. vult.

4th March, 1947.

SLOAN, C.J.B.C. agreed with SIDNEY SMITH, J.A.

O'HALLORAN, J.A.: This appeal concerns the responsibility of the appellant motorist who in the course of passing a standing motor-car on a narrow road in the country (the Island Highway, some 15 miles north of Nanaimo) ran down a six-and-a-half-year-old boy who emerged from behind the standing motor-car. The boy had got out of the standing car and was running across the road to the house in which he lived. The learned trial judge awarded $2,933.95 damages against the appellant ([1946] 3 W.W.R. 589), on the main ground that failure to sound his horn and reduce his speed, constituted negligence in the special circumstances, and made him the responsible agent for the collision.

About 7 o'clock on a Saturday evening in May the appellant motorist was driving north with his wife and two small children. He was travelling along at 20 miles an hour when he saw, two or three hundred feet ahead of him, an approaching motor-car come to a full stop on the westerly and proper side of the road, directly opposite a house across the road. He saw a man and woman sitting in the front seat and two young boys in the rear seat. There was considerable brush, but no house, gate, or driveway, on the westerly side of the road for some distance north and south of the standing car.

When the appellant came within approximately 45 feet of the standing car he noticed the two boys get out of the car on their proper side. Just before he came abreast the standing car, one or both of the boys seemed to be bending down to pick something

C. A.
1947

BOYD AND BOYD v. KUHN

O'Halloran, J.A.

off the road. The next thing the appellant knew, his car hit one of the boys who emerged suddenly from behind the standing car. The appellant had not sounded his horn at any time; nor did he at any time before the collision reduce his speed of 20 miles an hour nor did he put on his brakes until the emergency of collision.

The conclusion forces itself upon me with respect that the appellant in the particular circumstances ought to have foreseen the likelihood of some one from the standing car crossing the road to the house directly opposite. It ought to have occurred to him that was very likely the reason the car stopped where it did. There was nothing on the side of the road where the car was to cause it to stop there; the house across the road did indicate a likely reason for its stopping where it did. He ought at least to have sounded his horn to warn the occupants of the standing car of his approach, so that if any of them intended to cross the road to the house opposite they would know he was coming. It seems to me, that the wisdom if not the necessity, of sounding the horn in the circumstances, would instinctively occur to any prudent motorist, particularly to one so well acquainted with that area as the appellant.

There are other supporting reasons why he should have done so. The two adults in the front seat of the standing car were turned around toward the young boys in the back seat. It would be fairly obvious to the appellant that they might be oblivious of his approach, and he ought to have taken the precaution to sound his horn in warning. Again the appellant lived in the district, and he was aware that the adults in the car were Mr. and Mrs. Akenhead and also that they knew Mrs. Boyd who lived in the Erickson house directly opposite where the car stopped. While the evidence does not disclose that the appellant actually knew that one of the boys in the Akenhead car was Mrs. Boyd's son, it was but a short mental step for him to infer that the Akenheads were most likely stopping there that Saturday evening because of the Erickson place, and that it was reasonably probable some one in their car would cross the road to see Mrs. Boyd. These circumstances would naturally impress themselves on the mind of a prudent and reasonable man and prompt him to sound

his horn so that the occupants of the standing car should be warned of his approach.

Not only did the appellant fail to sound his horn but he failed also to reduce his speed when about to pass the standing car. If he had sounded his horn and had seen the occupants of the standing car were aware of his approach, there might be reason to say there was no occasion for him to reduce his speed below the 20 miles an hour at which he was travelling. Since he had not seen fit to sound his horn, prudence ought to have dictated a reduction of his speed when closely approaching, and before passing the standing car when he must have seen that the occupants gave every outward indication of being completely oblivious of the presence of his on-coming car. This is stressed because shortly before that when he was some 45 feet away and saw the two young boys getting out of the standing car he did not reduce his speed or sound his horn. Nor did he reduce his speed or sound his horn when he saw the boys or one of them seeming to bend down to pick something off the road. The road was 15 feet wide at the point, and "a considerable portion of the standing car was on the travelled portion of the road."

The test in my judgment for the Court to apply in this action of negligence is, ought the appellant, as a reasonable man in the recited circumstances, to have foreseen that omission to sound his horn when approaching the standing car on the narrow country road, coupled with failure to reduce his speed when about to pass that standing car, might cause injury to some occupant of that car. Anticipation of harm, and not the proximity in point of space or time or the number of intervening events is of governing importance. In this aspect see the decision of the House of Lords in *Glasgow Corporation* v. *Muir and Others* (1943), 112 L.J.P.C. 1, particularly at pp. 4, 5, 7, 9, 11 and 12 and *Brown* v. *Walton et al.* (1943), 58 B.C. 498 and decisions referred to at pp. 515-16, and 518-19. I must conclude, as the learned judge did, that a prudent and reasonable man in the appellant's situation would have foreseen the risk of danger, and would have minimized it, if he did not eliminate it entirely, by sounding his horn, and also by substantially reducing his speed when passing

C. A.
1947

BOYD AND BOYD v. KUHN

O'Halloran, J.A.

the standing car; and note the reasoning in *Rickard* v. *Ramsay,* [1936] S.C.R. 302.

In the circumstances, with respect, the appellant must be held negligent. In view of the immaturity of the injured boy, counsel for the appellant conceded no question of contributory negligence could arise. However, counsel for the appellant took exception to this passage in the learned judge's reasons for judgment:

> He [the appellant] also saw that the persons who got out of the car were very young children—of an age when the only prediction one can confidently make of their conduct is that it will be unpredictable and ungoverned by reason or caution,

on the ground that it placed too high a duty upon the appellant, and was contrary to decisions of the Ontario and Quebec appellate Courts respectively in *Seiden* v. *Pinkerton* (1926), 31 O.W.N. 325; *Wilson* v. *Rebotoy,* [1930] 1 D.L.R. 273, and *Henry Morgan and Co. Ltd.* v. *Bloomfield* (1933), 55 Que. K.B. 452.

Those three decisions, and *Black* v. *Veinot,* [1934] 1 D.L.R. 803 in my view are readily distinguishable in their respective facts from the circumstances of this case to which the learned judge was directing his mind. They have none of the factual elements of recited "foreseeability," which are so prominent in this case. That the actions of young children—more particularly under seven years of age—are unpredictable is a well-known fact in everyday life. Some decisions in this aspect are referred to in *Edwards* v. *Smith* (1941), 56 B.C. 53, at pp. 63-4, including *Williams* v. *Eady* (1893), 10 T.L.R. 41, at p. 42. It may be added that in the House of Lords' decision of *Excelsior Wire Rope Co.* v. *Callan* (1930), 99 L.J.K.B. 380, the greater duty to take care arising in the case of young children is stressed throughout, and see also *Rickard* v. *Ramsay,* [1936] S.C.R. 302.

Counsel for the appellant submitted also that the appellant was under no duty to anticipate that some one would dart in front of him from behind a standing motor-car. That might be a very good answer in other circumstances. For example, if he had sounded his horn properly and also had substantially reduced his speed when about to pass the standing car, this case would take on a different aspect. The circumstances which have been

recited at the outset point up the factors which were present or ought to have been present in the mind of the appellant as he approached the standing car. If he had given the weight to those factors which one would expect from a reasonable man in his situation he could not escape realizing that failure to sound his horn and to substantially reduce his speed created a condition pregnant with risks of danger. One might perhaps point also to the circumstance that since the boy got out of the rear seat of the car, the chances were more than equal that if he were going across the road he would go from the rear of the standing car rather than from its front.

If we add to the foregoing, consideration of the unpredictable nature of young boys, we have a combination of circumstances leading to create risks of danger which an on-coming motorist in the situation of the appellant and alive to his surroundings would have sensed at once, and would have taken precautions against. Having failed to foresee the risks of danger which a reasonable man ought to have provided against in the circumstances, the appellant is liable for what directly resulted and see *Aldham* v. *United Dairies (London) Ltd.* (1939), 109 L.J.K.B. 323, at p. 326; *Edwards* v. *Smith* (1941), 56 B.C. 53, at p. 65, and *Hay or Bourhill* v. *Young,* [1943] A.C. 92, at p. 107.

The degree of care required depends upon the circumstances of each case. There is no uniform standard, and see *Caswell* v. *Powell Duffryn Associated Collieries, Ld.,* [1940] A.C. 152, Lord Wright, at pp. 175-6. It is to be emphasized also that the degree of care required is a question of fact and not of law, and see *Lochgelly Iron and Coal Co.* v. *M'Mullan* (1933), 102 L.J.P.C. 123, at p. 131, and *Caswell* v. *Powell Duffryn Associated Collieries, Ld., supra,* at pp. 175-6. Since it is a question of fact, the learned trial judge's finding thereon will not be disturbed by an appellate Court, unless it is established he has misconceived the evidence or misapprehended its weight, and see *Borrowman* v. *The Permutit Company,* [1925] S.C.R. 685 and *In re Harmes Estate. Harmes* v. *Hinkson,* [1946] 2 W.W.R. 433, at p. 449 (P.C.). It may be added that Akenhead and his seven-year-old son testified they did not hear or see the appel-

C. A.
1947

BOYD AND BOYD v. KUHN

O'Halloran, J.A.

lant's car approaching. Akenhead testified also that he kept the engine running while the car was standing.

In my judgment no ground has been shown to justify interference with the learned trial judge's findings of fact upon which the decision of this case so largely depends. Nor can I find the law has been incorrectly applied to those facts as found.

I would dismiss the appeal.

SIDNEY SMITH, J.A.: In my opinion the learned trial judge has imposed upon the defendant (the appellant herein) a standard of conduct which under all the circumstances of the case must be pronounced too exacting. It is, of course, the merest commonplace to say that we must not be wise after the event; but it is not always easy to exclude from one's mind the unconscious effect of after-acquired knowledge, or so, at least, I have found. The standard of care depends in every case upon all the circumstances. In the matter under review I would like to adopt the language of MACDONALD, C.J.B.C. in *Edwards* v. *Smith* (1941), 56 B.C. 53 in the following passage at p. 61:

> I do not propose to impose standards of care upon my neighbour that I do not impose upon myself unless convinced of my own negligence: there is a tendency, when occasionally an accident occurs, to be unreasonable in stipulating high standards of care. In this class of case, insisting upon these so-called high standards would in the end do more harm than good. The case is unfortunate to the parties concerned: the respondent lost the use of an eye and should succeed if by fairly applying principles of law she is entitled to compensation: we should be equally sure before imposing a serious liability on one, doubtless of limited means, that we are acting in accordance with law.

That seems to me to be apt language; and to be generally applicable to the present case, notwithstanding that the majority of the Court in the *Edwards* case did not agree with the Chief Justice on the particular standard of care demanded in the circumstances there involved.

The principle is stated in a sentence by Duff, C.J. in *McMillan* v. *Murray*, [1935] S.C.R. 572, at p. 574:

> . . . The standards to be applied are not standards of perfection.

Applying this principle, I think that the defendant here was bound to take that kind of care which a reasonably prudent man in his place would have taken—neither more nor less. That the party concerned was a child is a factor to be taken into considera-

tion with all the other factors—it is nothing more. It calls for a measure of care to be determined by the immaturity of the child and of all the other circumstances of this particular case.

The facts are set out in the reported judgment of the learned trial judge and need not be repeated now. The crucial point to be remembered is the comparatively low speed of the defendant's car—20 miles an hour. This may be compared very favourably with the speed required for passing through a school-zone in a city—15 miles an hour. Then, too, it must be noticed that the defendant saw the other car coming to a stop at a distance of between 200 and 300 feet from him, with the two adults in the front seat and the two boys in the back, each car in plain view of the other. He saw the boys—and it was the last thing he saw of them before the accident—get out of the car on the off-side from him and bend down to pick something off the road. (This turned out to be a milk-bottle which no doubt had dropped from the car.) Then it is said that the defendant should have known that the boys intended to visit a house across the road. As pointed out by the Supreme Court in *Swartz* v. *Wills,* [1935] S.C.R. 628, at p. 632:

> . . . . , distances must be translated into time in order to determine what are the rights of the parties.

The events of this action unfolded in the short space of six and a half to ten seconds and I doubt whether the defendant in all the circumstances, as he saw them, could reasonably be expected to reach this conclusion. I should have thought it would have been a more reasonable conjecture on his part to suppose that they had stopped to pick something off the side of the road. That is what he saw them doing. In the circumstances he was, in my view, not lacking in prudence in proceeding in broad day, in full sight, without sounding his horn, at the moderate speed of 20 miles an hour; or, as expressed by Duff, C.J. at p. 574 of the *McMillan* case, *supra*:

> . . . . , 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.

I think therefore the appeal must be allowed.

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

Solicitors for appellant: *Heisterman, Manzer & Wootton.*
Solicitors for respondents: *F. S. Cunliffe & Company.*

C. A.
1947
Mar. 13, 19.

REX *EX REL.* PALLEN v. KERR.

Dentistry Act—Practising—Different words in same section—Distinction in meaning—"The public"—Construction — Single dental sale — R.S.B.C. 1936, Cap. 72, Sec. 63 (1)—B.C. Stats. 1939, Cap. 11, Sec. 2.

The introduction into section 63 (1) of the Dentistry Act by B.C. Stats. 1939, Cap. 11, Sec. 2 of the words "the public" indicated that a distinction was intended to be made between those words and the words "any person" already in the section and that "the public" was intended to mean more than one person. It follows that proof of one sale of repairs of a denture to a member of the public does not support a charge of supplying such repairs to the public. Further, as the words "the public" are used in contradistinction to members of the dentistry profession, the meaning of the section is not free from doubt, and therefore the doubt should be resolved in favour of the accused.

APPEAL by accused from his conviction by LENNOX, Co. J. on appeal from the dismissal by W. W. B. McInnes, Esquire, deputy police magistrate, Vancouver, on a charge that

between the 5th day of May, 1946, and the 17th day of May, 1946, . . . being a person not registered under the Dentistry Act, . . . , did unlawfully practise dentistry . . . between the dates aforesaid, did supply to the public repairs for an artificial denture or artificial dentures, for a fee paid to you. . . .

The appeal was argued at Vancouver on the 13th of March, 1947, before SLOAN, C.J.B.C., O'HALLORAN and SIDNEY SMITH, JJ.A.

MacInnes, K.C., for appellant: On the definition of the word "public" see *United States* v. *Luce* (1905), 141 Fed. 385, at p. 391; *Apothecaries Company* v. *Jones*, [1893] 1 Q.B. 89, at p. 93. They must exercise the calling on more than one occasion: see *Reg.* v. *Whelan* (1900), 4 Can. C.C. 277; *Rex* v. *Cruikshanks* (1914), 23 Can. C.C. 23. A single act does not constitute an offence: see *Rex ex rel. Kingston* v. *Sutcliffe* (1932), 59 Can. C.C. 108.

Bull, K.C., for the Crown: The accused carried on the business of dentistry. The sign on his door showed this. On the word "public" see *Totem Steam Navigation Co.* v. *Inland Revenue Commissioners*, [1941] 2 K.B. 194, at p. 203; *Lynde* v. *Nash*, [1928] 2 K.B. 93. The Interpretation Act is conclu-

sive. If you supply one it is sufficient. The "public" means one of the community.

Cur. adv. vult.

19th March, 1947.

Per curiam (SIDNEY SMITH, J.A.): The appeal herein involves the construction of section 63 of the Dentistry Act, R.S.B.C. 1936, Cap. 72, as amended by B.C. Stats. 1939, Cap. 11, Sec. 2. The amended section reads as follows:

63. (1.) Any person shall be deemed to be practising the profession of dentistry within the meaning of this Act who, for a fee, salary, reward, or commission paid or to be paid by an employer to him, or for fee, money, or compensation paid or to be paid either to himself or an employer, or any other person, examines, diagnoses, or advises on any condition of the tooth or teeth, jaw or jaws of any person, or who either directly or indirectly takes, makes, performs, or administers any impression, operation, or treatment or any part of any impression, operation, or treatment of any kind of, for, or upon the tooth or teeth, jaw or jaws, or of, for, or upon any disease or lesion of the tooth or teeth, jaw or jaws, or the malposition thereof, of any person, or who fits any artificial denture, tooth, or teeth in, to, or upon the jaw or jaws of any person, "or who supplies or offers to supply to the public artificial teeth, dentures or repairs therefor": Provided that this section shall not interfere with the privileges conferred upon physicians and surgeons by any Act relating to the practice of medicine and surgery in this Province, nor with the privileges heretofore conferred upon registered students, nor with the ordinary vending or calling of a druggist.

(The words in quotations were inserted by the 1939 amendment).

The appellant is a dental mechanic and appeared before W. W. B. McInnes, Esquire, deputy police magistrate, on a charge that he did supply to the public repairs for an artificial denture or dentures for a fee paid to him. It was admittedly proved in evidence that a member of the public had in fact received from the appellant repairs to dentures and had paid him a fee therefor. The charge was dismissed by His Worship upon the ground that

the evidence, being confined to a single instance, is [insufficient] to support the charge as it is worded.

An appeal was taken to the county court judge's criminal court and came before LENNOX, Co. J. who took the opposite view and convicted the accused. It is this decision that is now under review.

The question for our consideration turns on what is meant by the word "public" in the context in which it is used in this section. It will be noted that the section appears to draw a distinc-

C. A.
1947

REX EX REL. PALLEN v. KERR

tion between the words "any person" as used four times in the section prior to the 1939 amendment, and the words "the public" introduced by the amendment. This would indicate that the intention of the Legislature was that "the public" should be taken to embrace more than one person, for otherwise there would be no occasion for the change in the language. The principle was considered and stated by Lord Goddard, C.J. in the Court of Criminal Appeal recently in *Rex* v. *Wicks,* [1946] 2 All E.R. 529, at p. 533, in these terms:

> . . . It is a sound rule of construction that when there are different statutes *in pari materia,* though made at different times or even expired, and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other: *per* Lord Mansfield, C.J., in *R.* v. *Loxdale* (1758), (1 Burr. 445 at p. 447), followed by the Court of Appeal in *Goldsmiths' Company* v. *Wyatt,* [1907] 1 K.B. 95 ([(1906)] 76 L.J.K.B. 166 at p. 169). Conversely, if the legislature uses different words in several statutes, *prima facie* the inference is that a different meaning is intended: *per* Bayley, J. in *R.* v. *East Teignmouth (Inhabitants)* (1830) (1 B. & Ad. 244, at p. 249).

This inference is *a fortiori* where, as here, the Legislature has used different words in the same section of the statute. In these circumstances we think that proof of one sale to the public does not satisfy the plural meaning that must be assigned to the word "public" as here used.

It was common ground in the debate before us that the word "public" was intended to be employed in contradistinction from the members of the dentistry profession: in other words, those following the practice of dental mechanics could, and did in the ordinary course of their business, sell their wares to the members of the dentistry profession, but were prohibited from doing so to anyone outside of such profession. That seems to be the case, for otherwise they would be unable to dispose of their workmanship at all; but this shows that the section, however it may be read, is not free from doubt. In the present case if the word "public" is to be used, it should be limited by a proviso making it exclusive of the members of the dentistry profession.

The section then, however regarded, is not clear; and I think the concluding remarks of Lord Goddard, in the case already referred to at p. 534, are appropriate. He said this:

> A further argument which was pressed on the court was that where there

is ambiguity or doubt as to the meaning of a statute which the canons of construction fail to solve, the matter should be resolved in favour of the subject and against the legislature which has failed to explain itself. This is a well-known doctrine and has been applied in more than one case, . . .

I think the above doctrine is applicable here and that reference may also be made to the recent case in this Court of *Rex* v. *Santiago Mines Limited* [*ante*, p. 87]; [1946] 3 W.W.R. 129.

The appeal must be allowed.

Appeal allowed.

REX *EX REL.* FLEMING v. ARTHUR.

C. A.
1946
Sept. 12, 26.

Criminal law — Government Liquor Act — Construction — Physician and surgeon — Prescription — Evidence—Crown Costs Act—R.S.B.C. 1936, Caps. 67, 160, Sec. 22 and 271, Sec. 89.

Accused was convicted by the magistrate on a charge that being a physician he unlawfully did give a prescription for liquor to other than a *bona-fide* patient in a case of actual need contrary to section 22 of the Government Liquor Act. On appeal by way of case stated MANSON, J. affirmed the conviction after answering the following questions in the negative: (a) Was I wrong in holding there was any evidence that the said James Ross Arthur is a physician within the meaning of the Government Liquor Act? (b) Was I wrong in holding there was any evidence that a prescription within the meaning of the Government Liquor Act was given?

"Physician" as defined in the Government Liquor Act "means a member of The College of Physicians and Surgeons of British Columbia who is registered under the 'Medical Act' and who is lawfully and regularly engaged in the practice of his profession."

Held, on appeal, reversing the decision of MANSON, J., that there was no attempt to prove any of these essentials, and there was no competent evidence that the appellant signed the prescription in question or that he gave it to the woman who presented it at the liquor store. The prosecution failed to bring out the essential elements of proof of guilt which the statute demands. Both questions must be answered in the affirmative and the conviction quashed.

Held, further, that the Crown Costs Act deprives the appellant of the costs of his successful appeal and applies equally to costs of the proceedings in the case stated in the Supreme Court.

APPEAL by accused from the decision of MANSON, J. of the 29th of July, 1946, whereby the appellant's appeal by way of

C. A.
1946

REX EX REL. FLEMING v. ARTHUR

case stated was dismissed and his conviction by W. W. B. MacInnes, Esquire, deputy police magistrate for the city of Vancouver, affirmed. The charge against James Ross Arthur was that he at the said city of Vancouver, . . . , between the 1st day of November, 1945, and the 5th day of January, 1946, being a physician unlawfully did give a prescription for liquor to other than a *bona-fide* patient in a case of actual need contrary to the provisions of section 22 of the Government Liquor Act. . . .

The appeal was argued at Victoria on the 12th of September, 1946, before O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

Gould, for appellant: The Crown has failed to prove that accused is a physician as charged. They must prove he is a member of The College of Physicians and Surgeons, that he is qualified as a graduate and that he is lawfully and regularly engaged in the practice of a physician: see *Children's Aid Society of the Catholic Archdiocese of Vancouver* v. *City of Salmon Arm* (1940), 55 B.C. 495. There is no evidence that the prescription was in fact issued by accused. They must prove his handwriting: see *Pitre* v. *Regem* (1932), 59 Can. C.C. 148; *Rex* v. *O'Brien* (1911), 7 Cr. App. R. 29.

Jestley, for the Crown: A witness identifies both prescription and the signature. The name is followed by "M.D." which is sufficient to estop him from repudiating the signature. There is evidence from which you can draw the inference: see Phipson on Evidence, 8th Ed., 150; *Gremare* v. *Le Clerc Bois Valon* (1809), 2 Camp. 144. No one can use "M.D." except a qualified physician and surgeon. There is ample evidence for the magistrate to draw the inference that he is qualified.

Gould, in reply, referred to *Rex* v. *Volpatti,* [1919] 1 W.W.R. 358; *Rex* v. *Caskie* (1922), 31 B.C. 368; *Rex* v. *McLane Rex* v. *Noon* (1927), 38 B.C. 306.

Cur. adv. vult.

26th September, 1946.

O'HALLORAN, J.A.: This is an appeal on a case stated under section 89 of the Summary Convictions Act, Cap. 271, R.S.B.C. 1936. It concerns the legality of the conviction of the appellant under section 22 of the Government Liquor Act, Cap. 160, R.S.B.C. 1936,

that he at the said city of Vancouver in the Province of British Columbia, between the 1st day of November, 1945, and the 5th day of January, 1946, being a physician unlawfully did give a prescription for liquor to other than a *bona-fide* patient in a case of actual need contrary to the provisions of section 22 of the Government Liquor Act, Revised Statutes of British Columbia, 1936, chapter 160, and amending Acts contrary to the form of the statute in such case made and provided.

On the case stated before him, MANSON, J. affirmed the conviction after answering the following questions in the negative:

(a) Was I wrong in holding there was any evidence that the said James Ross Arthur is a physician within the meaning of the Government Liquor Act?

(b) Was I wrong in holding there was any evidence that a prescription within the meaning of the Government Liquor Act was given?

"Physician" as defined in section 2 of the Government Liquor Act,

means a member of The College of Physicians and Surgeons of British Columbia who is registered under the "Medical Act" and who is lawfully and regularly engaged in the practice of his profession.

There was no attempt to prove any of these essentials. They were quite obviously overlooked.

"Prescription" as defined in said section 2,

means a memorandum signed by a physician, and given by him to a patient for the obtaining of liquor pursuant to this Act for use for medicinal purposes.

There was no competent evidence that the appellant signed the prescription in question or that he gave it to the woman who presented it at the liquor store. The liquor vendor testified it was presented by a woman "who claimed to be Dr. Arthur's nurse," and that he concluded it was Dr. Arthur's signature because of its similarity to the signature on "many" other prescriptions purporting to have been issued by Dr. Arthur. The prosecution evidence stopped there. That is not competent evidence since it lacks the bilateral quality stressed in *Rex* v. *O'Brien* (1911), 7 Cr. App. R. 29, at p. 31, and *Pitre* v. *Regem*, [1933] S.C.R. 69.

I must conclude the prosecution failed to bring out the essential elements of proof of guilt which the statute demands, *cf. The Children's Aid Society of the Catholic Archdiocese of Vancouver* v. *City of Salmon Arm* (1940), 55 B.C. 495, at p. 500. In the absence of these essentials of proof, the time never arrived at which the *onus* could be invoked which is imposed by section

C. A.
1946
REX EX REL. FLEMING v. ARTHUR
O'Halloran, J.A.

97 (2) of the Government Liquor Act. The facts brought out in this case do not support any legitimate inferences which extend beyond reasonable probability of guilt. But that is not enough in a criminal case where the inferences must point to guilt beyond reasonable doubt, and see *Rex* v. *Findlay* (1944), 60 B.C. 481, at p. 486.

In my judgment both questions must be answered in the affirmative, the judgment of MANSON, J. set aside and the conviction quashed. The appeal is allowed accordingly.

I reach the conclusions also that the Crown Costs Act, Cap. 67, R.S.B.C. 1936, deprives the appellant of the costs of his successful appeal, and that the Crown Costs Act applies equally to costs of the proceedings on the case stated in the Supreme Court. I see no escape from these conclusions in view of the previous decisions of this Court in *Rosebery Surprise Mining Co.* v. *Workmen's Compensation Board* (1920), 28 B.C. 284, and *Watson* v. *Howard* (1924), 34 B.C. 449 as interpreted and applied in *Rex* v. *McLane Rex* v. *Noon* (1927), 38 B.C. 306.

The appeal is allowed accordingly.

SIDNEY SMITH, J.A.: I agree with my brother O'HALLORAN that this appeal should be allowed, but I prefer to confine myself to the first ground only, namely, that there was no evidence that James Ross Arthur was a physician within the meaning of the Government Liquor Act. It seems to me that if an inference does not logically accord with and follow from the facts, then one may say that there is no evidence to support it. In this case there was clearly no evidence from which such an inference could be drawn.

BIRD, J.A.: I would allow the appeal for the reasons given by my brother O'HALLORAN, in which I concur.

Appeal allowed.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada:

BOYD AND BOYD v. KUHN (p. 545).—Reversed by Supreme Court of Canada, 14th October, 1947. See [1948] 2 D.L.R. 800.

REX v. JOHANSON (p. 393).—Reversed by Supreme Court of Canada, 18th June, 1947. See [1947] 4 D.L.R. 337; 89 Can. C.C. 305.

REX v. NORTHEY *et al.* (p. 515).—Reversed by Supreme Court of Canada, 23rd March, 1948. See [1948] S.C.R. 135; [1948] 3 D.L.R. 145; 91 Can. C.C. 193.

Case reported in 57 B.C. and since the issue of that volume appealed to the Judicial Committee of the Privy Council:

LUDDITT *et al.* v. GINGER COOTE AIRWAYS LIMITED (p. 176).—Decision of Supreme Court of Canada affirming decision of the Court of Appeal, affirmed by the Judicial Committee of the Privy Council, 5th February, 1947. See [1947] A.C. 233; [1947] 1 All E.R. 328; [1947] W.N. 85; [1947] L.J.R. 1067; 177 L.T. 334; 63 T.L.R. 157; [1947] 2 W.W.R. 591; [1947] 2 D.L.R. 241; 16 F.L.J. 275.

INDEX.

ABORTION—Criminal Code, Sec. 303—Charge—Unlawfully using instrument with intent to procure miscarriage—Necessity of proving use of instrument—Reasonable doubt. - - - - - - **307**
See CRIMINAL LAW. 1.

2.——*Evidence of previous convictions.* - - - - - - - - **279**
See CRIMINAL LAW. 2.

ACCESS—Necessary and reasonable. **177**
See LAND REGISTRY ACT.
METES AND BOUNDS.

ACCOMPLICE. - - - - - **183**
See CRIMINAL LAW. 7.

ACTION—By tenant to recover back excessive rent—Whether rent illegally increased—Wartime Rentals Regulations. - - - **191**
See LANDLORD AND TENANT. 6.

2.——*For declarations of validity and invalidity of claims and damages.* - **419**
See MINES AND MINERALS.

ADULTERY—Wife's—Miscarriage or birth of still-born child—Evidence of husband of non-access—Admissibility. - - - - - - - **343**
See DIVORCE. 1.

AGREEMENT—For continuance of employee and payments for property by employee—Repudiation of agreement by farmer—Whether farmer a trustee or relationship of vendor and purchaser. - - - **225**
See TRUSTS AND TRUSTEES.

APARTMENT-BUILDING—Suite in—Covenant for quiet enjoyment — What constitutes breach. - - **188**
See LANDLORD AND TENANT. 5.

APPEAL. - - - - - - **279**
See CRIMINAL LAW. 2.

2.——*By Crown.* - - - - - **275**
See CRIMINAL LAW. 20.

3.——*Conviction—Bail.* - - **401**
See CRIMINAL LAW. 3.

4.——*Conviction—New trial.* - **372**
See CRIMINAL LAW. 12.

5.——*Duty of appellate Court.* - **250**
See PRACTICE. 6.

APPEAL—*Continued.*

6.——*From sentence—Conviction—Probation officer—Suspension of sentence—Jurisdiction.* - - - - - - **102**
See CRIMINAL LAW. 8.

7.——*Interlocutory.* - - - **368**
See COSTS. 3.

8.——*Taxation — Appendix N — When higher scale of fees is allowed.* - **341**
See COSTS. 4.

9.——*To Supreme Court of Canada—Application for leave.* - - - **441**
See PRACTICE. 1.

APPENDIX N—Taxation — Appeal — When higher scale of fees is allowed. - - - - - - - **341**
See COSTS. 4.

APPORTIONMENT — Costs — Divided success. - - - - - **313**
See CONVERSION.

ASSIGNMENT — Subletting—Covenant against without leave. - **352**
See LANDLORD AND TENANT. 1.

ASSOCIATION — *Granted charter under Part II. of The Companies Act, 1934—Branches started in several places — Used only for gambling—All convicted for keeping disorderly houses—Action to annul charter for abuse and misuser—Can. Stats. 1934, Cap. 33.*] In August, 1935, the Secretary of State pursuant to Part II. of The Companies Act, 1934, did grant a charter under said Act to Sutro Pappas and others in the city of Vancouver under the name of Hellenic Colonization Association for the following purposes: (a) To inculcate, cultivate and promote among its members the social virtues, good fellowship, mutual helpfulness and rational recreation; (b) to assist and promote the immigration to Canada of worthy Europeans and to encourage and comfort them and generally to promote colonization; (c) to promote social welfare among its members by arranging all forms of social entertainment; (d) to create branches or lodges throughout the Dominion of Canada and to establish clubrooms where its members may meet together to promote the objects aforesaid. One of those to whom the charter was granted was Sutro Pappas who remained a director from its incorporation until the trial. A charter for a branch of the

ASSOCIATION—*Continued.*

association known as branch 5, Princeton, was granted by the association to Sutro Pappas and under his management club premises operated in January, February and March, 1938, and on or about the 14th of March, 1938, Pappas was convicted for unlawfully keeping a disorderly house, to wit, a common gaming-house. The charter was then cancelled and regranted to Pappas who operated in Dawson Creek and in September, 1943, he was convicted of the same offence. Branches were also established in Prince Rupert, Calgary and Alberni and in each place the managers were in due course similarly convicted. In an action for a declaration that the defendant had misused and abused its letters patent and charter and for judgment cancelling said letters patent and charter and dissolving the defendant corporation:—*Held*, that the evidence discloses that the association was incorporated, not for the purpose set out in its charter, but for the purpose of operating a chain of gambling branches, all paying tribute to the promoters of the association. The defendant association has at no time *bona fidely* operated under its charter, but wrongly used its charter as a cloak under which to operate its illegal branch club gambling operations and misused and abused its charter to such an extent as being against general public policy. The Attorney-General was the proper person to bring the action, the Dominion Companies Act has taken nothing away from the common-law rights to have a charter annulled and an action can be maintained to have a charter annulled for abuse or misuser. The abuse or misuse must be of such consecutive acts and the general policy of the association such as would indicate a clear intention that the association wished to use the charter as a mere cloak for its improper acts. The charter shall be annulled in accordance with the plaintiff's prayer. THE ATTORNEY-GENERAL OF CANADA ACTING ON BEHALF OF HIS MAJESTY THE KING v. HELLENIC COLONIZATION ASSOCIATION. - - - **16**

AUTOMOBILES — *Negligence — Running down boy coming from behind a standing car —Horn not sounded nor speed reduced—Standard of care.*] The Island Highway on Vancouver Island runs north and south and the accident in question happened on this road about 15 miles north of Nanaimo. At about 7 o'clock on Saturday evening of May 11th, 1946, the defendant was driving north on this road with his wife and two children. He was travelling at about 20 miles an hour when he saw about 300 feet ahead of him a

AUTOMOBILES—*Continued.*

car coming from the north come to a stop on the westerly and proper side of the road, directly opposite a house across the road on the east side. He saw a man and woman sitting in the front seat and two boys in the rear seat. There was considerable brush, but no house, gate or driveway on the westerly side of the road for some distance north and south of the standing car. When the defendant came within about 45 feet of the standing car he noticed the two boys get out of the car on their proper side. As he came abreast of the standing car one or both of the boys seemed to be bending down to pick something off the road. Then almost at once his car hit one of the boys who emerged suddenly from behind the standing car. The defendant had not sounded his horn at any time nor did he at any time before the impact reduce his speed or put on the brakes before the accident happened. The trial judge held the defendant liable mainly on the ground that failure to sound his horn and reduce his speed constituted negligence in the circumstances. *Held*, on appeal, reversing the decision of WILSON, J. (O'HALLORAN, J.A. dissenting), that the trial judge had imposed upon the defendant a standard of conduct which under all the circumstances of the case must be pronounced too exacting. The defendant here was bound to take that kind of care which a reasonably prudent man in his place would have taken, neither more nor less. The principle is stated in a sentence by Duff, C.J. in *McMillan* v. *Murray*, [1935] S.C.R. 572, at p. 574. BOYD AND BOYD v. KUHN. - - - - **545**

BAIL—Application for pending appeal—Sufficiency of grounds for—Conviction. - - - - - - - **42**
See CRIMINAL LAW. 9.

2.——*Pending appeal from conviction—Previous good character — Exceptional circumstances.* - - - - **401**
See CRIMINAL LAW. 3.

BREAKING AND ENTERING—With intent to steal. - - - - **131**
See CRIMINAL LAW. 4.

BRITISH NORTH AMERICA ACT. **150**
See CONSTITUTIONAL LAW.

BUILDING CONTRACT—*Work contracted for completed but in a negligent or improper manner — Contractor may recover contract price less sum necessary to complete work as specified.*] Zaluski and his wife let a contract to Holmes for the construction of a dwelling-

BUILDING CONTRACT—*Continued.*

house with written specifications. Holmes verbally employed the plaintiff to do the interior plastering and exterior stucco work on the house, but said nothing about specifications. The plaintiff completed the work and rendered a bill which included $325 for stucco work. Zaluski found fault with the stucco work under the terms of the contract and specifications and Holmes withheld payment of $300, but paid the balance of the bill. The plaintiff brought action claiming a mechanic's lien against the lands and premises for $300 and to recover that sum from Holmes. It was held on the trial that the stucco work was not done in a workmanlike manner nor according to specifications in that cracks had developed in the stucco work and the action was dismissed. *Held*, on appeal, reversing the decision of SHANDLEY, Co. J. (O'HALLORAN, J.A. dissenting), that in a case such as this where the plaintiff did the work called for but some of it was done in a negligent or improper manner, he is entitled to judgment against Holmes for the balance of the contract price less a deduction in a sum necessary to complete the work in a proper and workmanlike manner and to a lien for the balance due less the sum required to pay to have the work set right. HOLLISTON v. ZALUSKI *et al.* - - **1**

CAPITAL—Increase of—"Reorganization"—Allotment of shares in course of. - - - - - - - **87**
See COMPANY.

CARE—Standard of. - - - **545**
See AUTOMOBILES.

CARNAL KNOWLEDGE—Of girl under 16—Evidence of complainant—Offence requiring corroboration — Insufficiency of—Confession. - **380**
See CRIMINAL LAW. 5.

CHARGE — Abortion—Criminal Code, Sec. 303—Unlawfully using instrument with intent to procure miscarriage. - - - - - - - **307**
See CRIMINAL LAW. 1.

2.——*Powers of judge—Power to receive plea.* - - - - - - - **449**
See INFANTS.

CHARITABLE GIFTS—Gift to church to be added to the endowment fund—No endowment fund — Uncertainty — *Cy-pres* doctrine. - - **321**
See WILL. 1.

CHARTER—Granted under Part II. of The Companies Act, 1934, Can. Stats. 1934, Cap. 33—Branches started in several places—Used only for gambling—All convicted for keeping disorderly houses—Action to annul charter for abuse and misuser. **16**
See ASSOCIATION.

CHILD—Testimony of under oath—Enquiry into—Whether sufficient. - **372**
See CRIMINAL LAW. 12.

CHURCH—Gift to be added to the endowment fund—No endowment fund—Uncertainty—*Cy-pres* doctrine. - - - - - - **321**
See WILL. 1.

CLAIM—*For use and occupation—Counterclaim for continuing damages—Application to amend counterclaim to include further continuing damages—Appeal — Jurisdiction of county court to award damages after date of issuance of plaint—R.S.B.C. 1936, Cap. 58, Sec. 22; Cap. 148, Sec. 2 (7).*] The appellant agreed to lease premises from the respondent, the tenancy "commencing as hereinafter specified." The agreement provided that the respondent would make certain alterations and installations as required by the city of Vancouver, at the completion of which the tenancy would commence at a rental of $80 per month. Some months later, the appellant commenced an action against the respondent in the Supreme Court for specific performance of the agreement or, in the alternative, damages, and was awarded $100 damages by WILSON, J. On May 15th, 1945, the appellant, having been in occupation of the premises since September 1st, 1944, without payment of compensation and WILSON, J. having found, *inter alia*, that there was no lease in existence, the respondent commenced action in the county court claiming for use and occupation of the premises by the appellant. The appellant filed a dispute note setting up the defence of *res judicata* and counterclaiming for continuing damages for the period since the judgment of WILSON, J. to the date of the issuance of the plaint. The respondent filed a reply to the counterclaim alleging that the counterclaim was *res judicata* having been determined finally by the judgment of WILSON, J. The appellant applied to strike out the plaint as being *res judicata* and the respondent applied to strike out the counterclaim on the same grounds. LENNOX, Co. J. held that the plaint was not *res judicata* but that the counterclaim was. The appellant appealed and the Court of Appeal found that neither claim was *res*

CLAIM—*Continued.*

judicata (*vide* (1945), 61 B.C. 81). The appellant applied to the county court to amend the counterclaim to include further alleged continuing damages since the plaint was issued. LENNOX, Co. J. dismissed the application. The appellant appealed. *Held*, on appeal, affirming the decision of LENNOX, Co. J. (O'HALLORAN, J.A. dissenting), that the county court lacks jurisdiction to award continuing damages from the date of the issuance of the plaint down to the date of assessment. There is no provision or rule in either the County Courts Act or County Court Rules similar to rule 482 of the Supreme Court Rules. Section 77 of the County Courts Act cannot be interpreted as extending jurisdiction but only applies to "practice or procedure." Section 22 of the County Courts Act and section 2 (7) of the Laws Declaratory Act do not extend or enlarge the jurisdiction of the county court but, by the express words of each respective section, are confined to causes of action within the jurisdiction of the county court. MOORE v. DEWOLF. - - - - - - **161**

CLAIMS—Jumping of. - - **419**
See MINES AND MINERALS.

COLLISION. - - - - - **81**
See NEGLIGENCE. 2.

2.——*At an intersection—Motor-vehicles—Right of way.* - - - - - **33**
See NEGLIGENCE. 3.

3.——*Plank crossing on railway—Two-car train and motor-truck.* - - **385**
See NEGLIGENCE. 1.

COMPANIES ACT, 1934, THE—Can. Stats. 1934, Cap. 33, Part II.—Charter granted under. - - **16**
See ASSOCIATION.

COMPANY—*"Reorganization"—Increase of capital—Allotment of shares in course of reorganization—Securities Act, R.S.B.C. 1936, Cap. 254, Secs. 3 (g) and 4 (1)—B.C. Stats. 1937, Cap. 69, Sec. 3—R.S.B.C. 1936, Cap. 271, Sec. 30 (2).*] On the 18th of August, 1944, when the capital stock of the defendant company consisted of 1,500,000 shares of 50 cents each and the company was in a helpless position financially, the directors passed a resolution that in view of negotiations with Eastern mining interests the capital stock of Santiago Mines Limited be increased to not exceeding 6,000,000 shares of the par value of 50 cents per share and on the 5th of September, 1944, the resolution was confirmed

COMPANY—*Continued.*

by the shareholders. On the 11th of December, 1944, the company's capital was increased to $2,000,000 divided into 4,000,000 shares of 50 cents each. On the 18th of December, 1944, the company gave an option to Remsen Financial Corporation Limited to purchase 2,000,000 shares at certain prices upon certain terms. On January 3rd, 1945, three persons were appointed directors of the company and on the application of the company the Ontario Securities Commission on the 12th of January, 1945, gave permission for the sale through the medium of any registered broker in Ontario of shares of company referred to in the agreement of December 11th, 1944. On the 19th of January, 1945, the company issued to one Crowe-Swords 500,000 of its shares and this exhausted the company's total share capital irrespective of the 2,000,000 shares optioned to the Remsen Company. On January 22nd, 1945, the directors of the company resolved that 2,000,000 shares should be allotted to the Remsen Company in accordance with the terms of the option agreement above mentioned. On February 23rd, 1945, the superintendent of brokers wrote the company stating that the issue of 2,000,000 of its shares appeared to be trading in contravention of section 4 (1) of the Securities Act. On a prosecution commenced on the 19th of June, 1945, that between the 1st of December, 1944, and the 31st of January, 1945, the Santiago Mines Limited unlawfully did act as a broker contrary to the provisions of section 4 (1) of the Securities Act, it was submitted that what took place was in the course of reorganization of the company and therefore fell within the exception in section 3 (*g*) of the Securities Act, there being no difference in meaning between "reorganization" and "reconstruction." On appeal from the dismissal of the charge by deputy police magistrate W. W. B. McInnes, it was held that Santiago Mines Limited was guilty. *Held*, on appeal, reversing the decision of LENNOX, Co. J. (ROBERTSON and BIRD, JJ.A. dissenting), that "reorganization" is a commercial rather than a legal term. The company in its own resolutions made before any of these questions arose referred to its activities as being a "reorganization" and on the evidence this is not an inapt word to express in a commercial sense what took place here. The magistrate came to a conclusion different from that of the learned judge who arrived at his conclusion with some hesitation. The point is therefore not free from doubt. This is a penal statute and must be strictly construed. The *onus* of

COMPANY—*Continued.*

proving its case has not been discharged by the Crown, moreover if the *onus* of proving that these various matters amounted to a "reorganization" falls upon the appellant under section 30 (2) of the Summary Convictions Act, such *onus* would be discharged by the appellant proving the probability that this was so, and this has been done. The appeal is allowed and the conviction quashed. REX v. SANTIAGO MINES LIMITED (NON-PERSONAL LIABILITY). - - - **87**

COMPLAINANT—Evidence—Corroboration. - - - - - - **380**
See CRIMINAL LAW. 5.

CONFESSION—Carnal knowledge of girl under 16—Evidence of complainant—Offence requiring corroboration—Insufficiency of—Trial within a trial. - - - - - **380**
See CRIMINAL LAW. 5.

2.——*Definition.* - - - - **294**
See CRIMINAL LAW. 18.

CONSPIRACY — Libel—Evidence—Accomplice — Corroboration — Charge—Warning to jury. - - **183**
See CRIMINAL LAW. 7.

2.——*Unlawful common design—Evading payment of income tax.* - - **515**
See CRIMINAL LAW. 6.

CONSTITUTIONAL LAW—*Public harbour—Foreshore—Dominion or Provincial ownership — Claim of possessory title — British North America Act, 1867 (30 & 31 Vict. c. 3), Sec. 108—R.S.B.C. 1936, Cap. 140, Sec. 37 (2) and (3).*] The plaintiff brought action to recover possession of lots 13 and 13-A in block 61 of section 1 in Nanaimo District. The defendant denies being on the plaintiff's lands and claims that the building he occupies and known as the Anderson boat-house is situate below high-water mark of Nanaimo Harbour and is the property of the Crown in the right of the Dominion, and alternatively, that if the plaintiff does own any part of lots 13 and 13-A, such parts are above high-water mark and do not include any of the foreshore occupied by the defendant, that the defendant and his predecessors in title have been in uninterrupted possession and occupation for more than 40 years and pleads the Statute of Limitations. The boat-house in question was built on piles on the foreshore by one Shaw in 1888 and acquired by one Anderson in 1914 who lived there until 1944, when it was transferred to the defendant who is still in possession. Said

CONSTITUTIONAL LAW—*Continued.*

lot 13 as shown on official plan 584 (later amended as 13 and 13-A) was conveyed to John Hirst in 1874 and in 1919 the lot was conveyed to the Hirst Estate Land Co., said company obtaining a certificate of indefeasible title for said lot in 1920. By *mesne* conveyances the lot became the property of the plaintiff company holding a certificate of indefeasible title of January 28th, 1946. It was held on the evidence that lots 13 and 13-A, according to official map 584, lie almost wholly between high and low-water marks and includes within its area the Anderson boat-house. As to defendant's claim that the area being foreshore belongs to the Crown, the official map 584 and the plaintiff's certificate of indefeasible title based on the map is conclusive against him and subsection (3) of section 37 of the Land Registry Act and said certificate of title are conclusive against him as to his claim for possessory title. *Held*, on appeal, affirming the decision of HARRISON, Co. J., that the plaintiff relies upon its certificate of indefeasible title issued under chapter 140 of the Revised Statutes of British Columbia, 1936. Subsection (3) of section 37 provides that after the issuance of a certificate of indefeasible title no title adversely shall be acquired by length of possession merely. This subsection was the same in 1920, so that no possession after the issue of the certificate of indefeasible title in 1920 can affect the title. As to the defendant's claim to continual possession since one Shaw built and occupied the boat-house in 1888; there is not sufficient evidence to warrant a finding that Shaw was in actual undisputed possession of the land. The *onus* is on the defendant and the *onus* is not satisfied. NANAIMO ICE AND COLD STORAGE LIMITED v. BLYTH. - - **150**

CONTRACT. - - - - - **1**
See BUILDING CONTRACT.

2.——*Delivery business—Terminable contract—Goodwill—Sale on threat to terminte contract — Undue influence — Inquiry into motive—Whether tortious act.*] A. was the owner of a delivery business, the goodwill of which consisted of a contract, terminable at will, for the delivery of beer for a brewer's delivery agency of which B., A.'s brother, was the manager. A. sold his business to a company controlled by B. as a result of threats by B. to terminate the beer delivery contract unless he did so. The price paid was more than adequate for the physical assets of the business but inadequate if the beer delivery contract was of value. On the evidence it appeared that B. had an un-

CONTRACT—*Continued.*

trammelled discretion to exercise the right of the brewers' delivery agency to terminate the contract with A. In an action by A. to set aside the sale on the ground of undue influence:—*Held,* that since B. was entitled to terminate the beer delivery contract, he was entitled to threaten to terminate it, and so long as he acted as servant or agent of his principal in so doing, his motive was not open to inquiry. The evidence indicated that B.'s principal did not repudiate or complain of his actions and hence no finding could be made that in making his threats to A. he was acting for himself. In the circumstances the price paid to A. was not grossly inadequate since the goodwill had no value and the action was dismissed. SUTHERLAND v. SUTHERLAND. - - - - - **194**

CONTRACTOR—Work contracted for completed but in a negligent or improper manner — Contractor may recover contract price less sum necessary to complete work as specified. - - - - **1**
See BUILDING CONTRACT.

CONTRIBUTORY NEGLIGENCE. - **81**
See NEGLIGENCE. 2.

CONVERSION — *Judgment for damages—Effect of on right of property — Costs—Divided success—Apportionment.*] Mere recovery without satisfaction of a judgment for damages for conversion has not the effect of changing the ownership of the property. When the judgment is paid, the plaintiff is divested of his right to the property. On appeal from a judgment holding that the defendants had converted the plaintiffs' launch to their own use, the main argument was upon the question of liability, there being little said as to damages. *Held, per* ROBERTSON and BIRD, JJ.A. (SIDNEY SMITH, J.A. dissenting and would allow the appeal), that the damages be reduced from $899 to $449. On the question of costs it was *Held,* that the defendant was entitled to general costs of the appeal, but that the respondents were entitled to the costs of the issue on which they succeeded, namely, that of liability. *Held,* further, that both parties should tax their costs as if successful, the appellant to receive one-fourth of his taxed costs and the respondents three-fourths of their taxed costs with proper set-off. SADLER AND PERRY v. SCOTT *et al.* - - **313**

CONVEYANCE—Registration of—Allowing registration by metes and bounds. - - - - - - **177**
See LAND REGISTRY ACT.
METES AND BOUNDS.

CONVICTION. - - - - - **102**
See CRIMINAL LAW. 8.

2.——*Appeal—Bail.* - - **401**
See CRIMINAL LAW. 3.

3.——*Appeal—New trial ordered.* **372**
See CRIMINAL LAW. 12.

4.——*Application for bail pending appeal—Sufficiency of grounds for.* - - **42**
See CRIMINAL LAW. 9.

CONVICTIONS—Evidence of previous. - - - - - - - **279**
See CRIMINAL LAW. 2.

CORROBORATION. - - - **183**
See CRIMINAL LAW. 7.

2.——*Evidence — Complainant — Insufficiency of.* - - - - - - **380**
See CRIMINAL LAW. 5.

COSTS — Divided success—Apportionment. - - - - - - **313**
See CONVERSION.

2.——*Grounds for awarding.* - **444**
See DIVORCE. 2.

3.——*Scale of — Interlocutory appeal—"Amount involved"—Order LXV., rr. 10 and 10A.*] The plaintiff sued for an accounting and for judgment for the amount found due thereon and for unstated damages for breach of a contract to pay commissions. There was no claim for any specific amount in the endorsement on the writ, the statement of claim or elsewhere. An appeal from the refusal of an order for the examination on discovery of a second past officer of the defendant company was allowed with costs. The plaintiff proceeded before the trial of the action to tax its costs of that appeal. The registrar allowed the costs to be taxed under Column 4 of Appendix N on the strength of an affidavit that the plaintiff "would if successful" be entitled to recover more than $50,000. On motion to review the taxation:—*Held,* reading rules 10 and 10A of Order LXV. together, that under the circumstances the "amount involved" within the meaning thereof could not be ascertained until after the trial, but that if the plaintiff elected, as it was open to it to do, to tax its costs of the interlocutory appeal prior to the trial then Column 2 of Appendix N would apply. The "evidence for the purpose of determining the amount involved" which the registrar purported to "receive" in the form of said affidavit was premature. FENCHURCH EXPORT CORPORATION v. SITKA SPRUCE LUMBER COMPANY LIMITED *et al.* - **368**

COSTS—*Continued.*

4.——*Taxation—Appeal—Appendix N—When higher scale of fees is allowed.*] Appendix N permits this Court to order the costs to be taxed on a higher scale than that which would otherwise be applicable where some difficult point of law or construction is involved; where the question litigated is of importance to some class or body of persons; where the question litigated is of general or public interest or in any other cases for special reason. On the application by the successful defendant appellant for an order that its costs be taxed under Column 4, the Court held the points involved were not difficult questions of law or more difficult than we meet in most appeals, that the decision cannot be said to be a "question litigated" of importance to some class or body of persons; that the question litigated is not of general public interest nor is there any special reason for allowing taxation on a higher scale. HARE AND THE GROLIER SOCIETY LIMITED v. BETTER BUSINESS BUREAU OF VANCOUVER. (No. 2). - **341**

COUNTERCLAIM—Continuing damages—Application to amend counterclaim to include further continuing damages — Appeal — Jurisdiction of county court to award damages after date of issuance of plaint. - - - - - **161**
See CLAIM.

COUNTERFEITING. - - - **416**
See CRIMINAL LAW. 10.

COUNTY COURT—Judgment in default of dispute note—Application to set aside—Omission by solicitor—Discretion—Exercise of—Imposition of terms—Severity of—County Court Rules, 1932, Order IX., r. 9. **71**
See PRACTICE. 2.

2.——*Jurisdiction.* - - - **161**
See CLAIM.

COURT—Appellate—Duty of. - **250**
See PRACTICE. 6.

2.——*Power of to inspect documents.* - - - - - - - - **540**
See PRACTICE. 7.

COVENANT—Not to assign or sublet without leave — Giving occupancy to third person—Whether evasion of covenant. - - - **352**
See LANDLORD AND TENANT. 1.

CRIMINAL LAW — *Abortion — Criminal Code, Sec. 303—Charge—Unlawfully using instrument with intent to procure miscarriage—Necessity of proving use of instrument—Reasonable doubt.*] The accused was convicted on a charge under section 303 of the Criminal Code with using an instrument with intent to procure a miscarriage. *Held,* on appeal, reversing the decision of WILSON, J. (O'HALLORAN, J.A. dissenting), that his conviction must be quashed since there was no evidence upon which a jury, acting reasonably and giving him the benefit of the doubt, could find that he had used an instrument. REX v. CAMPBELL. (No. 2). - - - - - - - - **307**

2.——*Abortion — Evidence of previous convictions — Conviction — Sole defence of accused that "he was not the man"—Question of "intent" not in issue — Appeal.*] Accused was convicted when charged with unlawfully using an instrument upon the person of a certain woman with intent to procure her miscarriage. The Crown put in evidence as part of its case a previous conviction against the accused for a similar offence and adduced evidence of similar acts indicating that on numerous occasions he had carried out similar operations upon other women, further that he equipped a nursing-home for carrying on this business. On appeal that the evidence was wrongfully admitted:—*Held,* reversing the decision of HARPER, J. (O'HALLORAN and BIRD, JJ.A. dissenting), that the appellant gave evidence at the trial and the defence was "a categorical denial" that he was the man who had committed this crime. This statement of the defence displaced any need on the part of the Crown to prove "intent" by adducing evidence of similar acts. By his defence of "I am not the man" the Crown was left with the sole duty of establishing that the accused was in fact the man who performed the illegal operation. Here the defence and the only defence was made manifest in the clearest terms and was known from the commencement of the trial. It did not concern the issue of intent and therefore the impeached evidence was inadmissible. The appeal is allowed and there must be a new trial. REX v. CAMPBELL. - - **279**

3.——*Bail—Pending appeal from conviction—Previous good character—Exceptional circumstances.*] The accused and a woman named Gough were joint owners of a boarding-house. On the night of July 18th, 1946, there was a drinking party at which accused objected to Gough drinking. She decided to go out, ordered and got into a taxi, the

CRIMINAL LAW—*Continued.*

accused following her who ordered the taximan to stop. As he did not stop Clark fired a shot through the rear window of the car. Accused was convicted of unlawfully having in his possession a revolver for a purpose dangerous to the public peace and sentenced to 12 months' imprisonment. Since conviction the accused and Gough were again on good terms and she apprehended no further trouble with him. On application for bail pending the termination of the appeal:—*Held*, that in view of the fact that Gough had nothing to fear from Clark if he was released and the previous good character of the accused, there were exceptional circumstances which warranted an order for bail being made. REX v. CLARK. - - **401**

4.——*Breaking and entering a dwelling-house with intent to steal—A room in an hotel—Not a dwelling-house—Lesser offence—Criminal Code, Secs. 335 (g), 459 and 1016, Subsec. 2.*] At about 8 o'clock in the morning the complainant woke up in his room in an hotel and saw the accused standing close to his bed. After telling complainant that he had better see if anything is missing, the accused walked out and downstairs. Complainant then telephoned for the police. Accused was convicted on a charge of "breaking and entering a dwelling-house with intent to steal." *Held*, on appeal, reversing the decision of police magistrate H. S. Wood, Vancouver (O'HALLORAN and BIRD, JJ.A. dissenting), that the hotel room occupied by the complainant even though it be his permanent residence is not a dwelling-house within the definition for it is not a permanent building, being only one room within a permanent building. *Rex* v. *George Eldridge* (1944), 60 B.C. 315, applied. REX v. FEENEY. - - - - - **131**

5.——*Carnal knowledge of girl under 16—Evidence of complainant—Offence requiring corroboration—Insufficiency of—Confession—Trial within a trial—Lesser offence substituted — Indecent assault — Criminal Code, Secs. 301, Subsec. 2, 835 and 1016, Subsec. 2.*] The accused was convicted on a charge under section 301, subsection 2 of the Criminal Code of carnally knowing a girl of previous chaste character under the age of 16 years and above the age of 14. On the facts related by the complainant the accused and another boy took her in a car to an isolated spot near Ioco and there forcibly had sexual intercourse with her. The complainant was the only witness as to the offence and corroboration was necessary

CRIMINAL LAW—*Continued.*

under said section in order to obtain a conviction. The learned trial judge found corroboration in the evidence as to the condition of the girl's clothes after the assault and her condition then as shown by her appearance and by medical examination, by the identification of the car, and by the finding of certain "prophylactic articles" and two "soiled handkerchiefs" at the place where the offence took place. *Held*, on appeal, that none of this evidence implicated the accused. It was corroborative in the sense that it tended to affirm the credibility of the complainant, but it was not independent evidence and was therefore not corroborative within the statutory requirement. The learned judge also found corroboration in a confession made by the accused after his arrest. *Held*, on appeal, that there was not sufficient inquiry upon the trial within a trial to warrant the admission of the confession. *Held*, further, that the result would have been a new trial were it not that the Court concluded a conviction for indecent assault should be substituted as the charge of indecent assault was included in the charge of carnal knowledge and the trial judge had no doubt whatever that the complainant's story was true, and that the accused indecently assaulted her. REX v. O'HARA. - - - - - - **380**

6.——*Conspiracy — Unlawful common design—Evading payment of income tax—Improper admission of evidence—Substantial wrong or miscarriage of justice—Criminal Code, Secs. 1014, Subsec. 2, 1019 and 1020—Can. Stats. 1940, Cap. 31, Secs. 12 and 19.*] The three appellants, father and two sons, carrying on business under the name of Millwork Industries Limited, while engaged in war contracts supplying West Coast Shipyards with furniture for the ships constructed, were charged with conspiracy to defraud the Government in breach of Code section 444, the substance of the charge being that the three accused had entered into an unlawful agreement to evade payment of income tax. The Crown sought to establish conspiracy by proof of fraudulent manipulation of accounts of various concerns in which the accused were interested and also tendered statements elicited from the accused by an investigator conducting an inquiry under the provisions of the Department of Munitions and Supply Act. The investigator was one J. B. Wilson and the statements the accused made to him were during the appeal termed "the Wilson evidence." The trial judge received the Wil-

CRIMINAL LAW—*Continued.*

son evidence and found the accused guilty. During the hearing of the appeal the Court unanimously decided that the so-called "Wilson evidence" was improperly received below by reason of the prohibition against its disclosure found in section 19 of the Department of Munitions and Supply Act, Can. Stats. 1940, Cap. 31, and the remaining question was whether reception of the inadmissible evidence caused the appellants substantial wrong and did a miscarriage of justice thereby occur within the meaning of section 1014, subsection 2 of the Criminal Code? *Held* (SLOAN, C.J.B.C. and ROBERTSON, J.A. dissenting), that the appeal from conviction must be dismissed. *Per* O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.: The evidence of Sparrow (the appellants' bookkeeper) both in its direct aspect and in its indirect aspects supported as it is in so many respects by the documentary records found in the Northey office (including records therein visibly altered) leaves no room for doubt that the three appellants acted in concert in furtherance of and consequent upon an unlawful design. It is not possible to escape the conclusion that proof of the guilt of the three appellants was conclusively established, quite apart from the "Wilson evidence" and quite apart from any hearsay evidence which may have crept into the proceedings. The Crown has satisfied the *onus* upon it of showing that the verdict would necessarily have been the same if no improper testimony had been admitted. In these circumstances the appeal must fail since it cannot be said that any substantial wrong or miscarriage of justice has actually occurred within the meaning of Code section 1014, subsection 2. *Per* SLOAN, C.J.B.C. and ROBERTSON, J.A.: It must be understood that the improper reception of the "Wilson evidence" is regarded as highly prejudicial to the fair trial of the accused. It follows that because of the principles enunciated in *Allen* v. *Regem* (1911), 44 S.C.R. 331, the provisions of section 1014, subsection 2 of the Code ought not, as a matter of law, to be applied in the circumstances herein. On dismissal of the appeal the Court unanimously reduced the sentences for J. L. Northey from 18 months to six months; P. M. Northey and A. J. Northey from three years to one year and the fines in the three cases were increased from $2,000 to $10,000. Default in payment of fines the original judgment was to stand. REX v. NORTHEY *et al.* - **515**

7.——*Conspiracy to libel — Evidence—*

CRIMINAL LAW—*Continued.*

Accomplice—Corroboration—Charge—Warning to jury.] In the case of an appeal from a conviction on the ground that, although there was evidence that a witness was an accomplice, the trial judge did not warn the jury of the danger of convicting on his uncorroborated testimony, but it is clear to the Court of Appeal that the judge was of the opinion that there was no evidence from which he could reasonably infer that the witness was an accomplice and that there is no doubt that this conclusion was correct, the appeal should be dismissed. On the assumption that the jury found the witness to have been an accomplice the absence of the warning does not necessarily invalidate the conviction since the Court of Appeal, if satisfied that the jury properly directed must have found the accused guilty, can under the saving provisions of section 1014, subsection 2 of the Criminal Code dismiss the appeal. *Rex* v. *Nowell* (1938), 54 B.C. 165, applied. Section 1014, subsection 2 is by no means confined to cases of misreception of evidence. It embraces a principle of general application extending also to cases of misdirection and of non-direction amounting to misdirection, where the appellate Court is satisfied from the record as a whole that on any view of the evidence, no jury properly instructed could reasonably have found any verdict other than the one which was actually found. REX v. WELCH AND ACKERMAN. - - - - **183**

8.——*Conviction—Appeal from sentence —Probation officer—Suspension of sentence —Jurisdiction—Criminal Code, Secs. 1015, 1026 and 1081.*] The Court of Appeal has no jurisdiction to suspend the passing of sentence on an appeal from conviction (O'HALLORAN, J.A. dissenting). REX v. CRUICKSHANKS *et al.* - - - **102**

9.——*Conviction — Application for bail pending appeal—Sufficiency of grounds for.*] Accused Hemow was convicted of robbery with violence on May 28th, 1946, but was not sentenced until the end of June when the Assizes concluded. It was then too late to appeal to the Court of Appeal as it had finished its sittings in June. Notice of appeal on a point of law was given for the sittings of the Court of Appeal to commence on the 10th of September, the ground of appeal being that the evidence was circumstantial and not sufficient to warrant a conviction. The accused is 24 years old; he has had no previous conviction; his record is good. He has a good trade. He has been

CRIMINAL LAW—*Continued.*

working "as an engineer" for the past three years earning $4,000 a year during the fishing-season in each year and during this time supported an invalid father, an invalid brother and his mother and sisters. His employer says that during this period he has always been a man of good character who does his work properly and effectively. He wishes to employ him during the fishing-season between July 5th and September 10th. The jury recommended leniency. On an application for bail:—*Held,* that in this case the facts are sufficient to warrant an order for bail. REX v. HEMOW AND VALOVICH. - - - - - - - - - **42**

10.——*Counterfeiting—Possessing mould—Mould found buried in accused's garden—Burden on Crown—Criminal Code, Sec. 550 (a)—New trial.*] The defendant was convicted of having the unlawful possession of a mould capable of being used in the manufacture of counterfeit coins. The mould in question was found by police officers in an ice-cream freezer buried in a rose garden of a house owned by the defendant and occupied by himself with his wife, his mother and his brother. *Held,* on appeal, reversing the decision of MANSON, J., that the mere finding of an article buried in the garden of a householder does not, in itself, and in the absence of some evidence indicating his knowledge of its existence or consent to its remaining in that place or some other surrounding circumstances from which a reasonable inference could be drawn inculpating the householder, discharge the burden of proof of possession resting upon the Crown. The conviction is quashed and a new trial ordered. REX v. HAGGERTY. **416**

11.——*Evidence—Adverse witness—Undefended accused—Duty of judges as to—Judge taking large part in examination of witness—R.S.C. 1927, Cap. 59, Sec. 9.*] The accused was convicted of conspiring with one Barrisove and Dorothy Walsh to defraud the Government of Canada by fraudulent withdrawal from the Postal Savings Bank of $300. He was tried separately and conducted his own defence. Dorothy Walsh, who had pleaded guilty, testified for the prosecution. The Crown's case depended substantially upon her evidence. Objection was taken that the presiding judge frequently participated in the examination by putting pressing questions and making comments unfavourable to the accused and calculated to impress upon the jury his conviction of the guilt of the accused. Objection was taken that in the course of pressing

CRIMINAL LAW—*Continued.*

examination and without application by Crown counsel, under section 9 of the Canada Evidence Act, the learned judge ruled, "she is a hostile witness in law and I am giving the privilege to Crown counsel to put leading questions to her." Further, under pressure by judge and Crown counsel she was led to admit the truth of an unsworn statement she had made to the police in the absence of the appellant. It was put in as an exhibit and was read in substantial part to the jury. *Held,* on appeal, reversing the decision of MANSON, J. (SIDNEY SMITH, J.A. dissenting), that it is the function of a judge to keep the scales of justice in even balance between Crown and accused. A judge's duty does not justify judicial participation in the examination of a witness of a nature which a jury could reasonably interpret as indicating a predisposition on the part of the judge toward one side or the other. The examination of this important witness was such as not only to deprive the accused of the assistance to which on the authorities he was entitled from the Court but was calculated to impress the jury against the accused. Whether the ruling as to hostility of the witness is open to question or not, the examination prior to the making of this ruling was contrary to proper procedure and highly prejudicial to the accused. In this case an actual injustice was done to the appellant by reason of the irregularities so prejudicial to the fair trial of the appellant that they combined to cause a mistrial. The conviction is quashed and a new trial ordered. REX v. DARLYN. - - - - - - - - **428**

12.——*Evidence—Testimony of child under oath—Enquiry into—Whether sufficient—Conviction—Appeal—New trial ordered.*] It is the duty of the presiding judge to satisfy himself whether a child of tender years is or is not capable of being sworn and he must first find that the child understands both the nature of an oath and the consequences thereof. The enquiry before the child is sworn, although brief, must cover both of said points. On the trial of a charge of procuring, the girl in question, who was nine years old, was asked by the magistrate, "Do you understand about swearing on the Bible to tell the truth?" She answered "Yes" and was then sworn by the magistrate. The accused's counsel made no objection to the competency of the child as a witness. The accused was convicted and he appealed. *Held,* that since there was nothing in the enquiry to show that the

CRIMINAL LAW—*Continued.*

child knew the consequences of an oath, the appeal should be allowed and a new trial ordered. REX v. ANTROBUS. - - **372**

13.——*Formal charge setting forth offence — Indictment — Essential averment omitted—Insufficiency—Motion by Crown to amend indictment — Granted—Criminal Code, Sec. 889, Subsec. 2.*] The two accused were charged under section 399 of the Criminal Code that they "unlawfully did retain in their possession certain stolen goods knowing the same to have been stolen." On the trial the jury disagreed as to the accused Gordon but found the accused Rycer guilty and he was sentenced to three years' imprisonment. He appealed on the ground that the trial judge, without jurisdiction so to do, allowed an amendment to be made to the indictment during the course of the trial. The amendment consisted of the addition of the words "knowing the same to have been stolen," which were lacking from the indictment upon which the accused were arraigned. After Crown witnesses had given their evidence, counsel for the appellant moved to quash the indictment. After argument the motion was refused, but the judge allowed a counter-motion to amend the indictment as aforesaid under section 889, subsection 2 of the Code. *Held*, on appeal, affirming the decision of HARPER, J. (O'HALLORAN, J.A. dissenting), that the words omitted from the indictment were words "requisite to constitute the offence" and they contained allegations of matters "essential to be proved." There is no doubt that unless this charge can be amended under section 889, subsection 2, it cannot be amended at all. But the language of that subsection seems to be sufficient. If there has already been proof given of the missing element and if the accused cannot be prejudiced thereby, the amendment may in the discretion of the judge be granted. The learned judge found there was ample evidence on which he could so find and as to prejudice there clearly could be none here. *Brodie* v. *Regem*, [1936] S.C.R. 188, distinguished. REX v. GORDON AND RYCER. **44**

14.——*Government Liquor Act — Construction — Physician and surgeon — Prescription — Evidence — Crown Costs Act—R.S.B.C. 1936, Caps. 67, 160, Sec. 22 and 271, Sec. 89.*] Accused was convicted by the magistrate on a charge that being a physician be unlawfully did give a prescription for liquor to other than a *bona-fide* patient in a case of actual need contrary to section 22 of the Government Liquor Act. On appeal by way of case stated MANSON, J. affirmed the conviction after answering the following questions in the negative: (a) Was I wrong in holding there was any evidence that the said James Ross Arthur is a physician within the meaning of the Government Liquor Act? (b) Was I wrong in holding there was any evidence that a prescription within the meaning of the Government Liquor Act was given? "Physician" as defined in the Government Liquor Act "means a member of The College of Physicians and Surgeons of British Columbia who is registered under the 'Medical Act' and who is lawfully and regularly engaged in the practice of his profession." *Held*, on appeal, reversing the decision of MANSON, J., that there was no attempt to prove any of these essentials, and there was no competent evidence that the appellant signed the prescription in question or that he gave it to the woman who presented it at the liquor store. The prosecution failed to bring out the essential elements of proof of guilt which the statute demands. Both questions must be answered in the affirmative and the conviction quashed. *Held*, further, that the Crown Costs Act deprives the appellant of the costs of his successful appeal and applies equally to costs of the proceedings in the case stated in the Supreme Court. REX *ex rel.* FLEMING v. ARTHUR. - - - - - - - - **557**

15.——*Retaining stolen goods knowing the same to have been stolen—Evidence—Proof of identity of goods found with those stolen—Criminal Code, Sec. 399.*] The two accused were convicted for unlawfully retaining in their possession stolen goods knowing the same to have been stolen, to wit, two ladies' wrist watches, one man's wrist watch, one wrist-watch strap, four Parker fountain pens and one lady's Parker fountain pen, the property of one Edwards. Edwards deposed to the loss by theft from his premises in New Westminster on the night of June 9th, 1946, of two ladies' wrist watches, a watch having a leather strap, a watch bracelet as well as six fountain pens of which one was a lady's pen, the value of the watches and bracelets being $75. The value of the pens was not proved. One Herd saw the two accused on the 13th of June, 1946, near the Beacon Theatre with the articles in question and he bought the articles from them for $40. The only evidence adduced by the Crown to identify the articles as those stolen from Edwards' prem-

CRIMINAL LAW—*Continued.*

ises was that of Edwards himself. He swore the ladies' watches were exactly similar to those stolen from his premises and he had only two such watches, that the other articles as well as the bracelet were similar to the articles stolen, though the watch when stolen had a different bracelet thereon, and the 5 pens stolen, including the lady's pen, were very similar to those stolen, but on cross-examination he admitted he would not identify them as the articles that were stolen, only that they were similar. *Held*, on appeal, reversing the decision of police magistrate Wood of Vancouver, that the Crown has failed to adduce sufficient evidence here upon which the learned magistrate could reasonably find identification of the goods proven to have been in the possession of the accused men as the stolen goods. There being no sufficient identification, it follows that there is no proof that the goods were stolen and the convictions are set aside. *Rex* v. *Fitzpatrick* (1923), 32 B.C. 289 and *Rex* v. *Davis* (1940), 55 B.C. 552, applied; *Rex* v. *Pomeroy* (1936), 51 B.C. 161 and *Rex* v. *Kolberg* (1935), *ib.* 535, distinguished. REX v. CAREY AND MUNROE. - - - - - - **173**

16.——*Selling "tags" on street without leave—Ordered by police officer to move on—Refusal by accused to move on—Obstruction—Criminal Code, Sec. 168—B.C. Stats. 1933, Cap. 79, Sec. 13.*] The accused was convicted of obstructing a police officer in the execution of his duty. The accused was standing on a street corner with a box containing "tags" in one hand and a tin can in the other, rattling it to attract the attention of passers-by. He had on the lapel of his coat a placard reading, "Give to win the peace." An officer in uniform told him he was a police officer and asked him to move along. Accused said, "Well, I am not going to leave the corner." The constable then said, "Move along, please." Accused moved about three steps then came back and remained there. The officer then withdrew for further instructions. He then came back and found accused in the same place. He again asked accused to move along. Accused replied, "I have orders to stay here and I guess I will stay." *Held*, on appeal, affirming the decision of deputy police magistrate MacInnes (BIRD, J.A. dissenting on the ground that the direction was not lawful since it was not given in the execution of any duty), that persistence in doing what a person is lawfully directed by a police officer in the execution of his duty to refrain from doing, is obstruction of the officer. *Rex* v. *Golden* (1936), 51 B.C. followed. REX v. JOHANSON. - - - - - **393**

17.——*Testimony as to identity—Evidence contrary to statements previously made—Prior statements admitted to be untrue—Weight of such evidence for jury—Judge's charge.*] A witness made a statement prior to the trial which was contrary to that given by him in the witness box, and he admitted that the previous statement was untrue. *Held*, that this is not a ground for rejecting his testimony as worthless but merely affects its weight and it is for the jury to say whether and to what extent the testimony is to be believed. The appeals, heard together by consent, were from convictions of robbery with violence. The two accused were positively identified by two witnesses at the trial, and proof of identity depended upon the acceptance of their testimony. One of these witnesses had testified at a previous trial that he was unable to identify the appellants. His wife, the other witness, had told the police at a line-up that she could not identify them. Both gave reasons at the trial for not telling the truth on the previous occasions. The appellants contended that the trial judge should have told the jury to discard said testimony entirely, and, alternatively, that he should have warned the jury it was unsafe to convict on that testimony alone. *Held*, that there was no substance in the objections taken on the appeal to the judge's charge to the jury and the appeals were dismissed. REX v. WATERFIELD AND GILMORE. - **407**

18.——*Theft of watches — Found in accused's possession—Absence of explanation—Confession—Definition—Accused takes watches from his pocket when questioned by police.*] All statements made by an accused to a policeman are not confessions; they are only such when they are inculpatory not when they are exculpatory or otherwise. Where a person under arrest is asked by a policeman what he has in his pocket and in answer thereto produces articles which are afterwards proven to have been stolen, his act in producing them is not a confession. Where an accused is charged with stealing goods from a store which were found in his possession, the Crown makes out a *prima facie* case when it shows that the goods were exposed for sale at the time of the alleged theft and that the owner had not sold them. REX v. ANGELUCCI. - **294**

19.——*"Theft" in section 773 (a), Crim-*

CRIMINAL LAW—*Continued.*

inal Code as inclusive of "theft from the person" in section 379 where value of subject-matter not over $25—Maximum sentence on summary trial — Criminal Code, Secs. 774, Subsec. 2 and 778.] Accused was convicted on a charge that he did unlawfully steal one billfold and one twenty-dollar bill from the person of one Kiena and was sentenced to one year's imprisonment. The accused appealed from sentence to imprisonment for one year on the ground that "theft" in Code section 773 (*a*) is employed as a term of generic import. The Court was of opinion that submission is supported by a study of sections 347 to 389 of the Code which embraces various forms of theft. Hence it must be *Held*, that "theft" in section 773 (*a*) includes "theft from the person" as described in section 379 where, as here, the value of the subject-matter does not exceed $25. In these circumstances under existing Code sections 774, subsection 2 and 778 (as applied by this Court in *Rex* v. *Clifton*, [1945] 3 W.W.R. 480) the maximum sentence is six months. Accordingly the sentence to imprisonment for one year was set aside and a sentence of six months' imprisonment with hard labour was imposed to run from the date of conviction. REX v. ARNETT. - - - - - **405**

20.——*The Opium and Narcotic Drug Act, 1929—Possession of drug—Evidence—Dismissed—Appeal by Crown—Whether new trial—Can. Stats. 1929, Cap. 49, Sec. 4 (1) (d)—Criminal Code, Secs. 1013 and 1014.*] On the trial of a charge under section 4 (1) (*d*) of The Opium and Narcotic Drug Act, 1929, of the unlawful possession of a narcotic drug, the Crown called a policeman who testified that he had found in the accused's room eye-droppers and some Kleenex which he had handed to the analyst. The Crown produced the analyst's certificate. The analyst was not called nor was the drug produced in Court. The magistrate dismissed the charge without calling upon the defence. On appeal by the Crown:—*Held*, that the appeal should be allowed and the acquittal set aside, O'HALLORAN and SIDNEY SMITH, JJ.A. declining to grant a new trial, O'HALLORAN, J.A. saying that section 1013, subsection 5 of the Code enacted by 1930, Cap. 11, Sec. 28 does not mean that a direction for a new trial is mandatory in such a case and that under all the circumstances he would not give the direction especially as the Crown had not asked for it, and SIDNEY SMITH, J.A. saying that since the Crown had not asked for a new trial, he was content to set aside the acquittal, ROBERTSON, J.A. dissenting as to the new trial and that a new verdict of guilty could not be directed because the accused had not had an opportunity of presenting his defence, therefore the only alternative was to direct a new trial. REX v. OLSEN. - - - - - - **275**

CROWN—Appeal by. - - - **275**
See CRIMINAL LAW. 20.

2.——*Burden of proof of possession on.* - - - - - - - - **416**
See CRIMINAL LAW. 10.

3.——*Whether impliedly bound — Statutes.* - - - - - - **419**
See MINES AND MINERALS.

CROWN COSTS ACT. - - **557**
See CRIMINAL LAW. 14.

CY-PRES—Gift to church to be added to the endowment fund—No endowment fund—Uncertainty. - **321**
See WILL. 1.

DAMAGES—Counterclaim for continuing—Application to amend counterclaim to include further continuing damages — Appeal — Jurisdiction of county court to award damages after date of issuance of plaint. - - - - - - **161**
See CLAIM.

2.——*Judgment for—Effect of on right of property.* - - - - **313**
See CONVERSION.

3.——*Liability.* - - - **481**
See NEGLIGENCE. 5.

4.——*Measure of.* - - - **444**
See DIVORCE. 2.

5.——*Motor-vehicles—Collision at an intersection—Right of way.* - - **33**
See NEGLIGENCE. 3.

DEFAMATION—Defence of justification—Evidence of similar acts to show method—Pleading of justification. - - - - - **24, 241**
See LIBEL. 2.

DELIVERY BUSINESS—Terminable contract—Goodwill—Sale on threat to terminate contract—Undue influence—Inquiry into motive — Whether tortious act. - - - **194**
See CONTRACT. 2.

DENTISTRY ACT — *Practising — Different words in same section—Distinction in meaning—"The public" — Construction — Single dental sale — R.S.B.C. 1936, Cap. 72, Sec. 63 (1)—B.C. Stats. 1939, Cap. 11, Sec. 2.*] The introduction into section 63 (1) of the Dentistry Act by B.C. Stats. 1939, Cap. 11, Sec. 2 of the words "the public" indicated that a distinction was intended to be made. between those words and the words "any person" already in the section and that "the public" was intended to mean more than one person. It follows that proof of one sale of repairs of a denture to a member of the public does not support a charge of supplying such repairs to the public. Further, as the words "the public" are used in contradistinction to members of the dentistry profession, the meaning of the section is not free from doubt, and therefore the doubt should be resolved in favour of the accused. REX *ex rel.* PALLEN v. KERR. **554**

DISCOVERY—Examination of past officer of company—Whether more than one past officer can be examined—Rule 370c (1). - - **362**
See PRACTICE. 4.

DISCRETION. - - - **350**
See PRACTICE. 6.

2.——*Exercise of.* - - - **71**
See PRACTICE. 2.

DISORDERLY HOUSES — Convictions for keeping—Charter granted association under Part II. of The Companies Act, 1934, Can. Stats. 1934, Cap. 33—Branches started in several places — Used only for gambling—Action to annul charter for abuse and misuser. - **16**
See ASSOCIATION.

DIVIDED SUCCESS — Costs — Apportionment. - - - - **313**
See CONVERSION.

DIVORCE — *Evidence — Wife's adultery—Miscarriage or birth of still-born child—Evidence of husband of non-access—Admissibility.*] The rule of law that neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to bastardize a child of the marriage applies only where the effect of the evidence either directly or indirectly is to bastardize a child born during wedlock. The rule therefore does not apply where the respondent had a miscarriage or gave birth to a still-born child in which case the evidence of the petitioner, the husband, of non-access is

DIVORCE—*Continued.*

therefore admissible. *Holland* v. *Holland* (1925), 41 T.L.R. 431, followed. *Russell* v. *Russell*, [1924] A.C. 687, distinguished. CLARE v. CLARE. - - - **343**

2.——*Practice — Decree absolute pronounced—Husband's claim for damages and costs against co-respondent — Measure of damages — Grounds for awarding costs—Effect of co-respondent's ignorance that respondent was a married woman.*] The petitioner and respondent were married on June 7th, 1943, and three days later the petitioner left for overseas in His Majesty's forces. He did not return to Canada until July, 1945. There was no child of the marriage. A child was born to the respondent and co-respondent in November, 1944. On the husband's petition for divorce a decree absolute was pronounced and in the prayer of the petition he sought as against the co-respondent damages and costs. The petitioner testified that the co-respondent told him he did not know the respondent was married until their child was born and further told him he figured it was his duty to marry the girl for the sake of the child and he kept them. *Held,* that the petitioner did not establish that the co-respondent well knew the respondent was married nor did he establish that the co-respondent should have known and was reckless. This is not a case where even nominal damages should be awarded by reason of the original and only adultery alleged. On the evidence it is clear the co-respondent continued to live with the respondent after learning she was a married woman and it was his duty to marry the girl for the sake of the child. The further intimacy in the circumstances is not a ground for awarding damages. *Held,* further, that the law is clear that the co-respondent cannot be condemned in costs any more than he could be ordered to pay damages. *Butterworth* v. *Butterworth and Englefield, &c.,* 89 L.J. P. 151; [1920] P. 126, applied. LOGAN v. LOGAN AND ZAJAC. - - - - - - - **444**

DOCUMENTS — Production of — Official—Objection to produce—Privilege—Production contrary to public interest—Power of Court to inspect. - - - - - **540**
See PRACTICE. 7.

DRUG—Possession of. - - **275**
See CRIMINAL LAW. 20.

DUE DILIGENCE. - - - **262**
See SHIP.

DWELLING-HOUSE—Breaking and entering with intent to steal—A room in an hotel—Not a dwelling-house. - - - - - - **131**
See CRIMINAL LAW. 4.

EMPLOYMENT—Duty to seek. - **460**
See MASTER AND SERVANT.

ENDOWMENT FUND. - - **321**
See WILL. 1.

ESTATE—Residuary—Executor and trustee—Vested interests subject to charges. - - - **205**
See WILL. 2.

EVIDENCE. - - - **557, 275**
See CRIMINAL LAW. 14, 20.

2.——*Adverse witness—Undefended accused—Duty of judges as to—Judge taking large part in examination of witness.* **428**
See CRIMINAL LAW. 11.

3.——*Conspiracy to libel—Accomplice—Corroboration—Charge—Warning to jury.* - - - - - - - - **183**
See CRIMINAL LAW. 7.

4.—*Contrary to statements previously made—Prior statements admitted to be untrue—Weight of such evidence for jury—Judge's charge.* - - - - - **407**
See CRIMINAL LAW. 17.

5.——*Improper admission — Substantial wrong or miscarriage of justice.* - **515**
See CRIMINAL LAW. 6.

6.——*Of complainant—Carnal knowledge of girl under 16—Offence requiring corroboration—Insufficiency of.* - - **380**
See CRIMINAL LAW. 5.

7.——*Of previous convictions.* - **279**
See CRIMINAL LAW. 2.

8.——*Of unsoundness of mind—Will torn when found—Whether intention to revoke—Burden of proof.* - - - - **62**
See WILL. 4.

9.——*Retaining stolen goods knowing the same to have been stolen—Proof of identity of goods found with those stolen—Criminal Code, Sec. 399.* - - **173**
See CRIMINAL LAW. 15.

10.——*Similar acts to show method.* - - - - - - - **24, 241**
See LIBEL. 2.

11.——*Testimony of child under oath—Enquiry into—Whether sufficient.* - **372**
See CRIMINAL LAW. 12.

EVIDENCE—*Continued.*

12.——*Verdict against.* - **385**
See NEGLIGENCE. 1.

13.——*Wife's adultery—Miscarriage or birth of still-born child—Evidence of husband of non-access—Admissibility.* - **343**
See DIVORCE. 1.

EXCEPTIONAL CIRCUMSTANCES — Bail—Previous good character. **401**
See CRIMINAL LAW. 3.

EXECUTOR AND TRUSTEE — Residuary estate—Vested interests subject to charges. - - - - **205**
See WILL. 2.

EXPLANATION — Absence of—Confession. - - - - - - - **294**
See CRIMINAL LAW. 18.

FARMER AND EMPLOYEE—Farmer buying land at employee's request—Agreement for continuance of employee and payments for property by employee—Repudiation of agreement by farmer—Whether farmer a trustee or relationship of vendor and purchaser. - - **225**
See TRUSTS AND TRUSTEES.

FENCE—Disrepair—Personal injury—Damages—Liability. - - **481**
See NEGLIGENCE. 5.

FORESHORE — Public harbour—Dominion or Provincial ownership—Claim of possessory title. - - **150**
See CONSTITUTIONAL LAW.

FRAUD—Jumping of claims. - **419**
See MINES AND MINERALS.

GENERAL AVERAGE. - - **262**
See SHIP.

GIFT—Charitable. - - - **321**
See WILL. 1.

GOODWILL—Delivery business — Terminable contract—Sale on threat to terminate contract — Undue influence — Inquiry into motive—Whether tortious act. - **194**
See CONTRACT. 2.

GOVERNMENT LIQUOR ACT—Construction—Physician and surgeon—Prescription. - - - **557**
See CRIMINAL LAW. 14.

HOTEL—Room in—Not a dwelling-house. - - - - - - **131**
See CRIMINAL LAW. 4.

HUSBAND AND WIFE—Mutual wills—Fresh will by survivor. - **75**
See WILL. 3.

IDENTITY—Testimony as to—Evidence contrary to statements previously made—Prior statements admitted to be untrue. - - - **407**
See CRIMINAL LAW. 17.

IMPROVEMENT DISTRICT—Incorporation of. - - - - **142, 297**
See LANDS.

INCOME TAX—Evading payment of—Conspiracy—Unlawful common design. - - - - - - **515**
See CRIMINAL LAW. 6.

INDECENT ASSAULT—Substituted for carnal knowledge. - - **380**
See CRIMINAL LAW. 5.

INDICTMENT—Essential averment omitted—Insufficiency—Motion by Crown to amend indictment—Granted—Criminal Code, Sec. 889, Subsec. 2. - - - - - - - **44**
See CRIMINAL LAW. 13.

INDUSTRIAL CONCILIATION AND ARBITRATION ACT, 1947. - - **493**
See PRACTICE. 5.

INFANTS—*The Juvenile Delinquents Act, 1929—Charge — Powers of judge — Trial "without publicity"—Rights of informant—Power to receive plea of accused.*] There is only one offence known to The Juvenile Delinquents Act, 1929, Can. Stats 1929, Cap. 46, and that is "a delinquency." The form of the charge should be that the accused child "did commit a delinquency in that he did unlawfully: (stating the act complained of). If said act is found to have been committed, the child should not be "convicted" but should be adjudged to have committed a delinquency and dealt with as provided in section 20 (1) of the Act. The only powers possessed by the Court in relation to a child adjudged to be a delinquent are those set forth in said section 20 and suspension of sentence is not one of them. Meaning of "suspended sentence" explained. To try a child on a charge not open to be laid under the Act and to "convict" him instead of proceeding in the manner provided by the Act amounts to more than an irregularity and the conviction must be quashed. The Juvenile Court trial should be *in camera* except for members of the Juvenile Court Committee and such other persons as are entitled to be present at a trial *in camera*. The informant is entitled to be present throughout the

INFANTS—*Continued.*

trial; but since juveniles are not to be dealt with as offenders but one to be helped and guided, an informant acting as private prosecutor will be well advised to retire once all the circumstances of the deliquency are fully before the Court. It is open to the judge to receive in appropriate circumstances a "plea" from the accused child if he can do so with safety: otherwise he should resort to the method set forth in the reasons herein. REX *ex rel.* CAMERON v. H. AND H. **449**

INFORMANT—Rights of. - - **449**
See INFANTS.

INFORMATION AND BELIEF. - **250**
See PRACTICE. 6.

INJUNCTION. - - **142, 297**
See LANDS.

2.——*Interlocutory—Order containing—Discretion—Affidavit in support—Sufficiency—Information and belief—Appeal—Duty of appellate Court.* - - - **250**
See PRACTICE. 6.

"INTENT"—Question of not in issue. **279**
See CRIMINAL LAW. 2.

INVITEE—Injury to—Falling down stairway—Light facing stairway had burned out. - - **30, 464**
See NEGLIGENCE. 4.

IRRIGATION—Water Act, 1939—Incorporation of improvement district—Lieutenant-Governor in Council—Power to appoint trustees in letters patent. - - **142, 297**
See LANDS.

JUDGE—Adverse witness—Examination of—Duty of judges as to. - **428**
See CRIMINAL LAW. 11.

JUDGMENT—County Court—In default of dispute note—Application to set aside—Omission by solicitor—Discretion — Exercise of—Imposition of terms — Severity of — County Court Rules, 1932, Order IX., r. 9. - - - - - - **71**
See PRACTICE. 2.

2.——*For damages—Effect of on right of property.* - - - - **313**
See CONVERSION.

JURISDICTION. - - **102, 493**
See CRIMINAL LAW. 8.
PRACTICE. 5.

JURISDICTION—*Continued.*

2.——*Of county court to award damages after date of issuance of plaint.* - **161**
See CLAIM.

JURY—Evidence—Judge's charge . - **407**
See CRIMINAL LAW. 17.

2.——*Warning to.* - - **183**
See CRIMINAL LAW. 7.

JUSTIFICATION—Defence of—Evidence of similar acts to show method—Pleading of justification. - - - - - **24, 241**
See LIBEL. 2.

JUVENILE DELINQUENTS ACT, 1929, THE. - - - - - - **449**
See INFANTS.

LAND—Bought by farmer at employee's request—Agreement for continuance of employee and payments for property by employee—Repudiation of agreement by farmer — Whether farmer a trustee or relationship of vendor and purchaser. - **225**
See TRUSTS AND TRUSTEES.

LANDLORD AND TENANT—*Covenant not to assign or sublet without leave—Giving occupancy to third person—Whether evasion of covenant—R.S.B.C. 1936, Cap. 143, Sec. 19.*] The defendant D. leased a premises from the plaintiff in which she covenanted not to assign or sublet without leave. D. then entered into a written agreement with the defendant I. whereby I. became the exclusive occupant of the premises, the agreement expressly denying any right in the occupant to legal possession. On an application under section 19 of the Landlord and Tenant Act to the county court, it was ordered that possession of the premises in question be delivered up to the landlord. *Held,* on appeal, reversing the decision of LENNOX, Co. J., that the mere act of the lessee in letting other persons into possession and permitting them to use the premises for their own purposes is not, so long as the lessee himself retains the legal possession thereof, a breach of the covenant not to assign or sublet or part with possession. A lessee can retain possession although he gives exclusive occupation to another. *Chaplin* v. *Smith,* [1926] 1 K.B. 198, applied. CARMICHAEL v. DOLMAGE AND MACINNES. - - - - - - - - **352**

2.——*Order 294 Wartime Prices and Trade Board—Rental regulations—"Housing accommodation" — "Multiple-family building"—"Single-family house."*] In September, 1940, the then owners demised the premises in question to the appellants for use and occupation as a dwelling and rooming-house. The respondent purchased the property in 1944. The appellants lived in the premises and let out a number of the rooms to lodgers. On February 12th, 1945, the respondent gave the appellants notice to vacate pursuant to section 15B of order 294 of the Wartime Prices and Trade Board. The appellants say they rented the house as a private dwelling-house intending to use it for themselves. They made no structural alterations, no partitions were put in. The appellants shared one of the bathrooms with a lodger. There were five doors; they called one of these the front door. The appellants did not put in any of these doors. One door entered directly into the dining-room; another into a billiard room; another entered into a "huge front hall" and another into a "panelled hall that goes into a large hall." It is not shown that they were separate entrances into the alleged suites, nor is there any evidence to show that the lodgers had separate entrances. The arrangement of the rooms lent itself to several of them being rented together in a group or a suite. They were not "individual self-contained suites." There was only one kitchen in the house. These separate groups of rooms had no private kitchens or private toilets. There was no evidence to show who supplied the water, gas, electric light or heating. The appellants lived in two rooms. There were 15 persons living in the house. An order was made for possession. *Held,* on appeal, affirming the decision of LENNOX, Co. J. (O'HALLORAN, J.A. dissenting), that on the submission that the premises in question were in a "multiple-family building" and therefore section 15B did not apply, the definition of "multiple-family building" indicates the housing accommodations must be separate. The heading of 15B is "single-family house." The appellants say the premises are not a "single-family house," as the evidence shows there are several families living in it. The test is not how many families live in a house, but whether or not it is a house designed for the occupation of a single family. It is clear that the notice to vacate in question put an end to the tenancy. MORROW v. GREEN AND GREEN. - - - **210**

3.——*Payment of rent—Place of payment—Rule that debtor must seek creditor—From first landlord continued to go to rented premises for his rent—In circumstances by*

LANDLORD AND TENANT—*Continued.*

implication payment was to be made at rented premises—R.S.B.C. 1936, Cap. 143, Sec. 19.] A landlord appealed from the dismissal of his summons under section 19 of the Landlord and Tenant Act for possession of the premises occupied by the tenant under a verbal lease from month to month at a rental of $10 per month payable in advance on the 1st day of each month. Prior to May 1st the landlord went to the tenant's house or office to collect the rent. In May and June, as the landlord had not called for the rent, the tenant tendered it to the landlord who refused to accept it because he had a pending application to the Board for increase of rental. There was no further offer to pay the rental by the tenant although she was, as the learned trial judge finds, always ready and willing to pay her rent. The landlord did not ask for the rent. On September 30th, 1946, he gave notice to quit on or before the 31st October, 1946. She did not give up possession, whereupon he took proceedings under section 19 of the Landlord and Tenant Act, alleging she was in default for her rent for 15 days. It was held on the trial that when no particular place of payment of rent is mentioned, it is incumbent on the part of the tenant to go to the landlord and pay or tender him the money, but in this case the landlord undertook to go to the tenant to collect rent each month and this he did until May 1st, 1946, when he failed to call so the tenant sent her son to the landlord in the middle of the month with her rent but the landlord refused to accept it and he again refused to accept the rent in the middle of June. The rent was increased to $15 per month on July 25th, 1946. The landlord never called for the rent again and he found the tenant was always ready to pay if he called. The application for a writ of possession to issue was dismissed. *Held*, on appeal, affirming the decision of SHANDLEY, Co. J., that under these circumstances by implication the payment of the rent was to be made at the rented premises. The tenant was not in default and accordingly the appeal should be dismissed. BROWNE v. WHITE. - **402**

4.——*Right of possession — Wartime Prices and Trade Board, orders 294, secs. 13 (a), 15B and 15C, 537, and 571, sec. 6 (2)—"To the Sheriff" — Res judicata—Misdescription of premises—Effect of County Court Rules, 1932, Order VII., r. 6—Court of Appeal Rule 5—R.S.B.C. 1936, Cap. 143, Secs. 19 and 22.*] In proceedings under section 19 of the Landlord and Tenant Act where an order is made "in the County Court of Victoria" directing that a writ to place the landlord in possession shall issue "to the Sheriff" it must mean the sheriff of the county of Victoria. Section 22 of the Act provides that the judge may order a writ to issue to the sheriff. This must be to the sheriff for the county in which the land lies. Where proceedings leading to an order declaring that the tenant wrongfully held possession against the right of the landlord were based on a six-months' notice to vacate given under sections 15B and 15C of order 294 of the Wartime Prices and Trade Board, the question of the right to possession is not thereby rendered *res judicata* in subsequent proceedings taken under section 13 of said order 294 for default in payment of rent for 15 days or longer. BARRE v. MCMANUS. - - - - **345**

5.——*Suite in apartment-building—Covenant for quiet enjoyment—What constitutes breach.*] The tenant of a suite in an apartment-building sued the landlord for damages for breach of an implied covenant for quiet enjoyment alleging that on August 24th, 1943, the landlord slapped one of her children on the face near the entrance to her apartment and threatened to cut the tenant's throat, and on July 31st, 1945, she slapped one of the tenant's children on the back at the front steps of the tenant's apartment and threatened to wring the children's necks. The learned trial judge found in the plaintiff's favour and fined the landlord $250. *Held*, on appeal, reversing the decision of BOYD, Co. J., that it was not suggested by the plaintiff that the actions of the defendant in any way affected her enjoyment of the premises in question. None of the matters complained of took place on the demised premises. To constitute a breach of a covenant for quiet enjoyment there must be some physical interference with the enjoyment of the demised premises. HORMIDGE v. MAGUR. - - - **188**

6.——*Wartime Rentals Regulations—Action by tenant to recover back excessive rent—Whether rent illegally increased—One cannot take advantage of his own wrong.*] In an action to recover back the amount of rental paid in excess of the amount which the tenant alleged the landlord could legally charge for the premises which were leased to the plaintiff on July 30th, 1941, it was held that the premises in question do not fall within the definition of housing accommodation as set out in order No. 7 of the

LANDLORD AND TENANT—*Continued.*

Wartime Prices and Trade Board and the action was dismissed. *Held*, on appeal, affirming the decision of MACFARLANE, J., that that part of the rented premises referred to as a "storehouse," etc., had not been included in the tenancy which existed prior to the passing of the rent-freezing orders under the Wartime Rentals Regulations which were in force when the lease now in question (which the plaintiff alleged called for an illegal increase in the rent) was entered into. *Per* SIDNEY SMITH, J.A.: Even if there was an attempt to evade the regulations by including in the demised premises a store-room of little consequence for the purpose of founding an excuse for increasing the rent above the basic rent fixed by the regulations, yet since the appellant was a party to the scheme, he cannot take advantage of a state of things which he produced. MARK WONG v. QUON YUEN HAN. - - - - - - **191**

LAND REGISTRY ACT—*Registration of conveyance—Allowing registration by metes and bounds—Access required—Necessary and reasonable—R.S.B.C. 1936, Cap. 140, Sec. 105, Subsec. (1) (a) and (e); B.C. Stats. 1945, Cap. 42, Sec. 4.*] Application was made to the Registrar of the Land Registry office at Vancouver on behalf of H. L. Coville and Annie T. Coville to register a conveyance to them from T. P. Crowther and Dora A. S. Crowther of a parcel of acreage in West Vancouver known as lot 20 as described in the judgment of LENNOX, Co. J., save and except the westerly 176½ feet thereof, and to register a conveyance from the Crowthers to John L. Loveseth and Margaret Loveseth of the said westerly 176½ feet. No subdivision plans were submitted to the approving officer of the Municipality of West Vancouver but the applicants sought to have the registrar divide the said parcel under section 105 (1) of the Land Registry Act by accepting a metes and bounds or abbreviated description. Notices of the applications under section 105 were given to the municipality and a hearing was held by the registrar at which evidence was called and counsel heard on behalf of the applicants and municipality. The registrar ruled that he had the right to split the lot by dividing the frontage and if he approved of that and ordered a conveyance, automatically the remaining portion became a lot and would be shown on the Land Registry books as such, therefore he proposed to deal only with the application of the Covilles. Counsel for the municipality objected to acceptance of the application on the ground that the land as at present subdivided is a division of a district lot into blocks or parcels of acreage and shows no division of blocks into lots; that the subdivision plan showing said lot 20 was filed in 1908 before it was necessary to have a municipal approving officer approve of the location of roads and that the road shown on the map as fronting lot 20 was impractical to build as it ran along a river bottom, therefore there was no sufficient access by public highway and there had not been previous legal establishment of such sufficient highways as may be required to be provided under section 85 of the Land Registry Act as mentioned in section 105 (1) (*e*). The registrar found the said lot 20 was a lot under subclause (*a*) of section 105 (1); that there was a practice in the Vancouver and other Land Registry offices of treating dedicated roads as access and where access is shown by a dedicated road drawn on a registered plan same would have to be accepted as giving sufficient access under the Land Registry Act. He also found that it made no difference to his finding whether the application was treated as coming under subclause (*a*) or (*e*) of section 105 (1). The municipality appealed to the county court as permitted by the 1945 amendment to the Land Registry Act and the appeal was argued before LENNOX, Co. J. *Held*, on appeal, reversing the Registrar of the Vancouver Land Registry office that subclause (*a*) of section 105 (1) deals with a subdivision plan creating "blocks of lots" not just lots. The only subdivision plan existing in relation to the property dealt with is one showing D.L. 816 and the westerly 80 acres of D.L. 793, containing 20 parcels, of which the so-called lot 20 is one. To come within subclause (*a*) of section 105 (1) there must be a subdivision plan showing "blocks of lots" and there is no such plan. *Held*, before the registrar can permit a metes and bounds or abbreviated description under subclause (*e*) of section 105 (1) it is not sufficient that there be designated roads shown on the registered subdivision plan; there must be shown necessary and reasonable access to all new parcels by the previous legal establishment of such sufficient public highways as are or may be provided by or under section 85 of the Land Registry Act. This was not done here and therefore the acceptance of the description by the registrar would be against the public interest as mentioned in subclause (*e*) of section 105 (1). IN THE MATTER OF THE LAND REGISTRY ACT AND AMENDMENTS AND IN

LAND REGISTRY ACT—*Continued.*

THE MATTER OF AN APPLICATION BY H. L. COVILLE AND ANNIE T. COVILLE UNDER SECTION 105 AS AMENDED OF SAID ACT AND IN THE MATTER OF A PORTION OF DISTRICT LOT 816 AND THE WESTERLY 80 ACRES OF DISTRICT LOT 793, GROUP 1, NEW WESTMINSTER DISTRICT, PLAN 1598 AND IN THE MATTER OF AN APPEAL BY THE MUNICIPALITY OF THE DISTRICT OF WEST VANCOUVER TO THE COUNTY COURT OF THE COUNTY OF VANCOUVER. - - - - - - **177**

LANDS — *Improvement district — Letters patent under the Water Act, 1939—First trustees named in letters patent—Whether power given under the Water Act to name first trustees—Injunction—B.C. Stats. 1939, Cap. 63.*] The plaintiffs are owners of more than one-half of the area which the owners thereof constituted an improvement district under the name of Ellison Irrigation District by letters patent issued under the provisions of the Water Act, 1939. The defendants were named as the first trustees of the district in the letters patent providing for their holding office for certain periods. The plaintiffs contend there is no power given by the Water Act, 1939, to the Lieutenant-Governor in Council to name the first trustees and the board of trustees must be elected by the owners of the land. The plaintiffs ask for an order restraining the defendants from exercising any powers with respect to said lands. They claim there is no affirmative substantive power in any part of the Act to appoint trustees. The defendants contend that although the order in council authorizing the issue of letters patent and the letters patent themselves cannot go beyond the powers given by the Act, the power to name the first trustees exists by necessary implication. *Held,* that the only place where can be found an affirmative substantive power of appointment is in the words of section 49 (1) of the Water Act, 1939. Two portions of it bear some significance (1) "with such powers as are necessary to carry out the said objects," and (2) he may by letters patent provide "that other specified provisions shall apply thereto." In one or other of these portions of section 49 (1) there is power to make provision for the appointment of first trustees such as is made here. [Reversed by Court of Appeal.] BULMAN AND BULMAN v. ANDERSON, BOOTH AND GEEN. **142, 297**

LEGAL ENTITY—Trade-union. **493**
See PRACTICE. 5.

LETTERS PATENT—Under the Water Act, 1939—First trustees named in letters patent—Whether power given under the Water Act to name first trustees—Injunction. **142, 297**
See LANDS.

LIABILITY. - - - - **30, 464**
See NEGLIGENCE. 4.

2.——*Damages.* - - - **481**
See NEGLIGENCE. 5.

LIBEL — Conspiracy to—Evidence—Accomplice — Corroboration — Charge—Warning to jury. - - **183**
See CRIMINAL LAW. 7.

2.——*Publication — Whether defamatory in their natural and primary sense—Justification — Whether occasion of qualified privilege—What constitutes.*] The plaintiff company is the publisher of a literary work known as the "Book of Knowledge" and the plaintiff Hare is a saleslady in the company's employ. The defendant is an incorporated society under the Societies Act of British Columbia. The objects of the defendant are set out in the judgment. In an action for damages for libel the words complained of are as follows:—"GROLIER SOCIETY. A woman giving the name of Miss Hare has a new method of selling 'The Book of Knowledge.' She states she represents the Vancouver School Board and is attached to the Family Allowance Department of the Government and is interested in the Children's Aid. Her proposition is that the woman on whom she calls makes a down payment of $10 by signing over their family allowance for one year. She claims to be operating all across Canada. She is about 35 years of age, well dressed, blonde, and drives a cream-coloured coupe, the number of same not known. A report to the police or the bureau should be made if she calls." Several defences are raised, three of which are: (a) That the words are not defamatory in their natural and primary sense, and are incapable of bearing the meaning assigned to them by the plaintiff; (b) justification as to the words in their ordinary sense, and (c) qualified privilege. The publication is admitted and it is admitted the "Grolier Society" named in the published statement refers to the plaintiff company. *Held,* that the words are defamatory in their natural and primary sense, that is, their plain and popular meaning and the defence of justification clearly fails. The burden of proving the truth of the statement published falls on the defendant and this burden has not

LIBEL—*Continued.*

been discharged. As to the defence of qualified privilege, the defamatory statements and the circumstances under which they were made go far beyond anything that the doctrine is intended to protect and applying the principles laid down in the cases referred to one cannot find that under the particular circumstances here that the occasion was a privileged one. The plaintiffs are therefore entitled to damages. [Reversed by Court of Appeal.] MARGARET M. HARE, MARRIED WOMAN AND THE GROLIER SOCIETY LIMITED v. BETTER BUSINESS BUREAU OF VANCOUVER. - **24, 241**

LIEUTENANT-GOVERNOR IN COUNCIL —Power to appoint trustees in letters patent. - **142, 297**
See LANDS.

MAGISTRATE—Jurisdiction. - **493**
See PRACTICE. 5.

MASTER AND SERVANT—*Wrongful dismissal—Duty to seek other employment—Pending arbitration—Effect of.*] The plaintiff, an employee, was found to be entitled to damages for wrongful dismissal. The question of the wrongfulness of his dismissal was at the time the subject of arbitration as provided by a collective bargaining agreement between the local union of the International Woodworkers of America as the collective bargaining agency of the employees and the defendant. This is no ground for holding that the employee was relieved of the duty of minimizing the damages by seeking other employment while the arbitration was pending. HNATNICKY v. PACIFIC PINE COMPANY LTD. - **460**

MAXIMUM SENTENCE—Summary trial—Criminal Code, Secs. 774, Subsec. 2 and 778. - - - **405**
See CRIMINAL LAW. 19.

METES AND BOUNDS—*Allowing registration of conveyance by—Access required—Necessary and reasonable.*] *Held,* before the registrar can permit a metes and bounds or abbreviated description under subclause (*e*) of section 105 (1) it is not sufficient that there be designated roads shown on the registered subdivision plan; there must be shown necessary and reasonable access to all new parcels by the previous legal establishment of such sufficient public highways as are or may be provided by or under section 85 of the Land Registry Act. This was not done here and therefore the acceptance of the description by the registrar would be

METES AND BOUNDS—*Continued.*

against the public interest as mentioned in subclause (*e*) of section 105 (1). IN THE MATTER OF THE LAND REGISTRY ACT AND AMENDMENTS AND IN THE MATTER OF AN APPLICATION BY H. L. COVILLE AND ANNIE T. COVILLE UNDER SECTION 105 AS AMENDED OF SAID ACT AND IN THE MATTER OF A PORTION OF DISTRICT LOT 816 AND THE WESTERLY 80 ACRES OF DISTRICT LOT 793, GROUP 1, NEW WESTMINSTER DISTRICT, PLAN 1598 AND IN THE MATTER OF AN APPEAL BY THE MUNICIPALITY OF THE DISTRICT OF WEST VANCOUVER TO THE COUNTY COURT OF THE COUNTY OF VANCOUVER. - - **177**

MINES AND MINERALS — *Jumping of claims—Action for declarations of validity and invalidity of claims and damages—Fraud—Whether cause of action—Statutes—Whether Crown impliedly bound—R.S.B.C. 1936, Cap. 181, Secs. 18, 58, 61 and 85.*] The power to dismiss an action on the ground that a statement of claim discloses no cause of action should not be exercised except where the case is perfectly clear. The plaintiff sued for a declaration that the mineral claim as staked by him (a relocation of a pre-existing claim in which he had been interested) was at all material times a valid and subsisting claim; that the claim staked by the defendants was invalid and void because of their fraud; that the certificate of improvements and the Crown grant were issued in fraud of the plaintiff; and for an order for conveyance to the plaintiff of the defendant's claim, and for damages for fraud. When the action came on for trial and before any evidence was heard, WILSON, J., on the motion of the defendants, dismissed the action on the ground the statement of claim disclosed no cause of action. He applied *hesitante Hand* v. *Warren* (1899), 7 B.C. 42; 1 M.M.C. 376. *Held,* on appeal, reversing the decision of WILSON, J., after referring to sections 18, 58, 61 and 85 of the Mineral Act, and distinguishing *Hand* v. *Warren, supra,* on the facts, that under the principles above stated the appeal should be allowed and a new trial ordered. If it can be affirmed that at the time when a statute was enacted, it was apparent from its terms that its beneficent purpose would be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown had agreed to be bound. *Province of Bombay* v. *Municipal Corporation of Bombay* (1946), 62 T.L.R. 643, applied. ERICKSON v. FISHER AND FISHER AND THE ATTORNEY-GENERAL FOR BRITISH COLUMBIA. - **419**

MISCARRIAGE—Unlawfully using instrument with intent to procure—Necessity of proving use of instrument—Reasonable doubt. - **307**
See CRIMINAL LAW. 1.

MOTOR-VEHICLES — Damages—Collision at an intersection—Right of way. - - - - - - **33**
See NEGLIGENCE. 3.

MOULD — Possession — Found buried in accused's garden—Counterfeiting——Burden of proof of possession on Crown. - - - **416**
See CRIMINAL LAW. 10.

MUTUAL WILLS — Husband and wife—Fresh will by survivor. - **75**
See WILL. 3.

NECESSARY AND REASONABLE—Access. - - - - - - **177**
See LAND REGISTRY ACT.
METES AND BOUNDS.

NEGLIGENCE — *Collision—Plank crossing on railway—Two-car train and motor-truck—Verdict against the evidence—Appeal.*] Shortly after the noon hour on the 24th of November, 1945, a two-car train of the plaintiff company was travelling east on the Burnaby Lake line of the plaintiff company at about 30 miles an hour and approaching the intersection of Westminster Avenue. Regent Street runs east and west almost parallel with the railway track about 60 feet on its north side and at its west end where it reaches Westminster Avenue it takes a sharp turn south on Westminster Avenue and crosses the railway track on a plank crossing. When the motorman on the two-car train came into view of Regent Street and about 180 feet away from the plank crossing he saw the motor-truck of the defendant coming west on Regent. He sounded his whistle and a second time when about 120 feet away and again when getting close to the plank crossing. He thought they would stop and let them pass when he first sounded his whistle but he realized on the third sounding that they were not going to stop. He put on his emergency brakes but it was then too late to avoid the accident and the two vehicles collided on the plank crossing. The two men on the defendant's motor-truck stated they did not hear the whistle. There was a clear vision between the railway track approach and Regent Street except some brush about five and one-half feet high between Regent Street, close to the plank crossing, and the railway to the west, but not high enough to obscure the vision. After the collision, the train

NEGLIGENCE—*Continued.*

carried the motor-truck about 125 feet on the railway track. On the trial the jury found that the driver of the defendant's motor-truck was 75 per cent. to blame and the driver of the two-car train 25 per cent. to blame. *Held*, on appeal, reversing the decision of SARGENT, Co. J. (SIDNEY SMITH, J.A. dissenting), that the driver of the motor-truck was wholly to blame for the accident. There was no duty cast upon the train operator to take steps to reduce the speed of the train before he did so. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED v. BUCKERFIELD'S LIMITED. - **385**

2.——*Contributory negligence by plaintiff—Street collision—Continuing negligence of defendant—Cause of accident.*] At about 8.35 o'clock on the morning of the 17th of May, 1945, the plaintiff was driving his delivery truck south on Hall's Prairie Road. On reaching the intersection of Trans-Canada Highway, he stopped at the stop sign and allowed a west-bound car on the highway to pass and he then observed defendant's east-bound car on the highway some 750 feet to his right. He proceeded to cross the highway in low gear at about 6 or 7 miles an hour. The defendant saw the plaintiff's truck at the "stop sign" when he was about 750 feet to the west and he had the truck in constant view until the moment of impact. He was in control of the situation from the first time he saw the truck and was proceeding at 40 miles an hour. He did not sound his horn or apply his brakes until about 18 feet from the point of impact, when it was too late for effective action and he struck the plaintiff's truck "amidships" just as it was completing its crossing of the highway. It was held on the trial that the defendant was solely responsible for the collision because he failed to avail himself of the opportunity to avoid collision which was open to him at all material times, and no question of statutory right of way is involved here. *Held*, on appeal, affirming the decision of SULLIVAN, Co. J. (SIDNEY SMITH, J.A. dissenting and holding the parties were equally liable), that even if the respondent had been careless in crossing the road as he did, it cannot be regarded as a causative factor since the oncoming appellant, by the exercise of ordinary care, could have avoided the consequences of any lack of care which, on the case as presented, could be attributed to the respondent. The appellant was not sufficiently alert to the likelihood of danger ahead and did not take proper action to reduce his speed in due

NEGLIGENCE—*Continued.*

time. WILSON v. CLINE. - - **81**

3.——*Damages — Motor-vehicles — Collision at an intersection—Right of way—R.S.B.C. 1936, Cap. 116, Sec. 21.*] In an action for damages resulting from a collision of cars at the intersection of 29th Avenue and McKenzie Street in the city of Vancouver at about 5.30 in the afternoon of the 7th of October, 1944, the plaintiff was travelling east on 29th Avenue and the defendant White, driving a car of the Lake of the Woods Milling Company Limited with its consent, was proceeding south on McKenzie Street. The plaintiff, as he approached the intersection, saw no one on his right and then looking to the left saw a car approaching the intersection at a leisurely pace and he then proceeded to go through the intersection; when reaching just past the centre of the intersection he was hit by the defendant's car. A witness, one Anderson, who was driving his car south on McKenzie Street testified that the defendant White caught up to him some 90 feet from the north kerb of 29th Avenue driving at about 30 miles an hour and on his reaching the intersection had not yet got back to his proper side of the road and did not slacken his speed until he put on his brakes at the moment of impact. The defendant said he saw the plaintiff when he was about 40 feet north of the kerb on 29th and he thought the plaintiff would give him the right of way as he reached the intersection first. The plaintiff saw Anderson's car as it neared 29th, but he did not see White's car as it was behind Anderson's car when he looked and he did not see it until it was almost on him in the centre of the intersection. It was held that White was wholly to blame for the accident. *Held*, on appeal, affirming the decision of SARGENT, Co. J. (SIDNEY SMITH, J.A. dissenting in part and holding the plaintiff one-third to blame), that the negligence of White in the manner mentioned was the decisive cause of the accident. The fact that the plaintiff did not see White until he was close to him may have been that it was hidden behind the Anderson car. In any case his failure to see it was not the decisive cause of the accident. HUNTER v. LAKE OF THE WOODS MILLING COMPANY LIMITED AND WHITE. - - - - - - **33**

4.——*Injury to invitee in restaurant—Falling down stairway—Light facing stairway had burned out—Light had been on about an hour previous to accident—Whether keeper negligent.*] The plaintiffs Mr. and Mrs. Lusk with their son went to the restaurant premises of the defendant at 44 Hastings Street West in Vancouver on the 16th of February, 1943, at about 9 o'clock in the evening for a meal. The plaintiff Frances Lusk asked the waitress where the washroom was and she was directed to it. It was on the mezzanine floor with a closed stairway leading up from the ground floor. There was a light almost immediately above the bottom of the stairway, also a light near the top but somewhat to the right. The light at the bottom was intended to light the stairway which, at this time of night, would otherwise be quite dark. No appreciable amount of light from the restaurant floor reached the stairway. This light at the bottom was unfortunately burned out at the time. Mrs. Lusk went up the stairs safely, but when returning down she fell and was injured. Her evidence was accepted that the stairway was very dark. The light at the top only threw a side light on the two top steps. The evidence of the manager of the defendant company was that the light at the bottom of the stairway was on at between 7 and 8 o'clock and it burned out apparently some time between that hour and 9 o'clock when the accident happened. A Mrs. Clarke said that some days prior to this, she told the manager this light was out. The manager did not remember this, but said that if she did so it would be replaced at once. *Held*, that in face of the manager's evidence the light was on earlier that evening and assuming the light was out when Mrs. Clarke informed him, the light had been replaced before the evening of the accident, but unfortunately burned out again. There was no reason for considering the manager an untruthful witness. The burden of showing negligence was on the plaintiff and the burden has not been discharged. The action is dismissed. [Affirmed by Court of Appeal.] LUSK AND LUSK v. YE OLDE ENGLISH FISH & CHIPS LTD. - - - - - **30, 464**

5.——*Personal injury — Fence between lots in disrepair—Lane with sidewalk adjoining fence from street to rear of lots—Fence fell on infant while playing in lane—Damages—Liability.*] The defendant, a lunatic, represented by the Attorney-General, owned a lot on the north side of Frances Street, Vancouver, number 1245, of which the defendant Barr was tenant, and west and adjoining said lot was lot number 1235 of which the infant plaintiff and her father were tenants. The fence in question ran

NEGLIGENCE—*Continued.*

from Frances Street north on the line between the two lots. Immediately east of the fence on lot 1245 is a lane on which is a cement sidewalk running from Frances Street north beyond the lots. The Hanson Estate had repaired the fence in 1940 and 1945 under instructions from the agent of the Attorney-General but in 1945 were not made to the part of the fence that afterwards fell and injured the plaintiff. This unrepaired part was blown down in the winter of 1945-46 and had been raised and left leaning in a westerly direction against the posts from which it had been broken away. On the 20th of June, 1946, while the infant plaintiff was playing on the cement walk in the lane, the fence fell down in an easterly direction upon the plaintiff who suffered severe injuries. In an action for damages the plaintiff recovered judgment against the Lena Hanson Estate. *Held*, on appeal, reversing the decision of LENNOX, Co. J. (O'HALLORAN, J.A. dissenting), that even if the appellant had control in this case the general principle is laid down that a stranger to a contract between a landlord and tenant, who is well aware of the danger, has no claim for damages against the owner arising from accident caused by want of repair. The defendant owed the plaintiff only the obligation of a licensor to a licensee, and the only duty would be to warn the child of danger actually known to him. *Cavalier* v. *Pope*, [1906] A.C. 428, applied. INGLE AND INGLE v. HANSON *et al.* - - - - **481**

6.——*Running down boy coming from behind standing car—Horn not sounded or speed reduced—Standard of care.* - **545**
See AUTOMOBILES.

NEW TRIAL. - **416, 372, 275**
See CRIMINAL LAW. 10, 12, 20.

OATH—Testimony of child under—Enquiry into—Whether sufficient. - **372**
See CRIMINAL LAW. 12.

OFFENCE—Formal charge setting forth—Indictment — Essential averment omitted—Insufficiency—Motion by Crown to amend indictment—Granted—Criminal Code, Sec. 889, Subsec. 2. - - - **44**
See CRIMINAL LAW. 13.

OFFICIAL—Production of documents—Objection to produce — Privilege—Production contrary to public interest. - - - - **540**
See PRACTICE. 7.

ONUS—Of proof. - - - **262**
See SHIP.

OPIUM AND NARCOTIC DRUG ACT, 1929, THE. - - - - **275**
See CRIMINAL LAW. 20.

ORDER—Continuing injunction—Discretion. - - - - - - **250**
See PRACTICE. 6.

PAST OFFICER OF COMPANY—Examination of—Whether more than one past officer can be examined—Rule 370c (1). - - - **362**
See PRACTICE. 4.

PHYSICIAN AND SURGEON—Government Liquor Act — Construction—Prescription. - - - **557**
See CRIMINAL LAW. 14.

PLEA—Power of judge to receive. - **449**
See INFANTS.

POSSESSION. - - - - **416**
See CRIMINAL LAW.

2.——*Absence of explanation.* - **294**
See CRIMINAL LAW. 18.

3.——*Right of.* - - - **345**
See LANDLORD AND TENANT. 4.

PRACTICE—*Appeal—Application for leave to appeal to Supreme Court of Canada—No issue left to be decided between parties—Court declines to hear motion—R.S.C. 1927, Cap. 35, Sec. 41—R.S.B.C. 1936, Cap. 143, Sec. 19.*] A landlord was successful on an application under section 19 of the Landlord and Tenant Act for possession of an apartment let to the defendant, Mrs. Dolmage, and at the time of the commencement of these proceedings was occupied by her brother, W. E. MacInnes, the other defendant. The order for possession obtained by the landlord was set aside by the Court of Appeal on October 22nd, 1946. The landlord now moves under section 41 of the Supreme Court Act for leave to appeal to the Supreme Court of Canada from the judgment of the 22nd of October, 1946. From the material, it appeared that the defendant MacInnes moved out of the apartment on the 30th of September, 1946. The keys of the apartment were with the caretaker of the building and the correspondence showed the tenants had surrendered possession of the apartment. The landlord was in the same position as she would have been upon a successful appeal. *Held*, that under these circumstances the appeal is really academic in the sense that the true issue between the

PRACTICE—*Continued.*

parties, namely, the right to possession of the apartment, is no longer in issue. The motion for leave to appeal should be refused. *Coca-Cola Company of Canada Ltd.* v. *Florence Matthews,* [1944] S.C.R. 385, followed. CARMICHAEL v. DOLMAGE. **441**

2.——*County court judgment in default of dispute note—Application to set aside—Omission by solicitor—Discretion—Exercise of — Imposition of terms — Severity of—County Court Rules, Order IX., r. 9.*] Upon appeal by the defendant from an order made upon the defendant's application to set aside a default judgment entered against him upon terms which required the defendant to pay into Court the sum claimed:—*Held,* affirming the decision of LENNOX, Co. J., that under Order IX., r. 9 of the County Court Rules it is essential that the defendant show *prima facie* a reasonable ground of defence and where the Court entertains doubt as to the reasonableness or the possible merit of the defence, then the Court in the exercise of its discretion may be justified in imposing more onerous terms than it would be proper to impose where reasonable grounds for defence have been shown *prima facie.* There are exceptional circumstances here which render it equitable to require the defendant to pay the money in dispute into Court. NATIONAL HEALTH ASSOCIATION v. BLANK. - - - - - - **71**

3.——*Decree absolute.* - - **444**
See DIVORCE. 2.

4.——*Discovery — Examination of past officer of company—Whether more than one past officer can be examined — Rule 370c (1).*] Rule 370c (1) confers jurisdiction upon the Court or a judge thereof to order the examination for discovery of more than one past officer of a company, if the Court or judge in their respective discretion should see fit to so order. FENCHURCH EXPORT CORPORATION v. SITKA SPRUCE LUMBER COMPANY LIMITED *et al.* - - - **362**

5.——*Industrial Conciliation and Arbitration Act, 1947—Trade-union—Unlawfully authorize a strike—Magistrate—Jurisdiction—Legal entity—Service of summons—Prohibition—B.C. Stats. 1947, Cap. 44, Secs. 2, 35 (3) and 38—R.S.B.C. 1936, Cap. 271.*] On June 20th, 1947, a summons was issued under the Summary Convictions Act against Nanaimo Dry Cleaning and Laundry Workers Union Local No. 1 of Nanaimo, a trade-union within the meaning of the Industrial Conciliation and Arbitration Act, 1947, charging that it did unlawfully authorize a strike of its employees before a conciliation board had been appointed to endeavour to bring about an agreement between them, contrary to section 35 (3) of said Act. The summons was served on one Eula Patterson, the president of said union. On June 26th the local magistrate adjourned the hearing for a week and on June 30th said Eula Patterson obtained an order *nisi* prohibiting him from hearing the charge. On motion for final order two grounds were raised: (1) That the magistrate had no jurisdiction to hear the complaint against the local union by virtue of the service of the complaint on Eula Patterson as no law of the Province makes provision for service on an organization of the nature of the above named Local No. 1 and (2) that the magistrate had no jurisdiction over the said Local No. 1 charged herein as it is not a legal entity. The motion was dismissed holding that under the terms of the statute the magistrate had jurisdiction over the subject-matter of the charge and the regularity of the service on the union was a matter for the magistrate. The legislation by its very terms has made attributable to the trade-union certified under it the characteristics of a juristic person. *Held,* on appeal, affirming the decision of MACFARLANE, J., that a trade-union, acting as a "bargaining agent" or "bargaining authority," as defined in section 2 of the Industrial Conciliation and Arbitration Act, 1947, has been endowed by the Legislature by the terms of the enactment in question, with the *status,* attributes and responsibilities of a *persona juridica.* It is in consequence, for relevant purposes, an entity having a separate legal existence distinct from its members. The trade-union involved in the dispute out of which this case arose was a trade-union acting as a "bargaining authority" within the meaning of the Act. It follows that it is a legal entity, subject to the provisions and sanctions of the said Industrial Conciliation and Arbitration Act, 1947. *Held,* further, that the question of service was proceedural in character and was for the learned magistrate to consider and determine in the first instance. REX *ex rel.* GOULT v. NANAIMO DRY CLEANING AND LAUNDRY WORKERS UNION LOCAL No. 1. - - - - - - **493**

6.——*Injunction, interlocutory — Order continuing—Discretion—Affidavit in support—Sufficiency—Information and belief—Appeal—Duty of appellate Court.*] The British Columbia Society for the Prevention of

PRACTICE—*Continued.*

Cruelty to Animals was incorporated by special Act of the Provincial Legislature in 1895 and pursuant to its corporate powers the society formed the Victoria branch by issue of a "warrant" or charter. Under its constitution the society may suspend the charter of a branch until the annual or specially called meeting of the society when it may cancel the charter of the branch. On October 1st, 1946, the executive of the society, by resolution, suspended the Victoria branch on the ground that it was operating in a manner likely to affect the good name of the society and alienate the goodwill of the public. On the next day W. R. T. Chetwynd, president of the society, served a copy of the resolution with explanatory letter on James Barr, president of the Victoria branch. Chetwynd then asked Barr if he would allow him to execute the terms of the resolution of the executive to which Barr replied that he would not. On October 4th, 1946, the society issued a writ claiming an injunction restraining from carrying on the Victoria branch and for a declaration that the property and assets held or controlled by the Victoria branch belonged to the society, and on the same day the society obtained an *ex parte* injunction restraining the branch office from dealing with the property and assets in any way. On motion, on the 22nd of October, the Chief Justice of the Supreme Court ordered the continuance of the injunction until the trial. *Held*, on appeal, affirming the decision of FARRIS, C.J.S.C., that he was fully justified in the order he made with respect to the continuance of the injunction and applying *Wheatley* v. *Ellis and Hendrickson* (1944), 61 B.C. 55 and *Taylor* v. *The Vancouver General Hospital et al.* (1945), 62 B.C. 42 the appeal must be dismissed. THE BRITISH COLUMBIA SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS v. BARR *et al.* - - **250**

7.——*Production of documents—Official—Objection to produce—Privilege—Production contrary to public interest—Power of Court to inspect.*] The petitioner in a divorce action, in order to prove the respondent's adultery by evidence showing that he contracted a venereal disease during coverture from a person other than herself, caused to be issued a subpœna *duces tecum* to the person in charge of the records of the Provincial Department of Health under the Venereal Diseases Suppression Act, the respondent having consented in writing to the production in evidence of the record of his illness and treatment for venereal disease

PRACTICE—*Continued.*

kept by the Department of Health pursuant to that Act. *Held*, that documents otherwise relevant and liable to production need not be produced if, owing to their actual contents or the class of documents to which they belong, the public interest requires that they be withheld. The only point disputed is whether or not the Court ought to inspect the documents to satisfy itself that the claim of privilege is rightly made. The only object in the Court looking at the documents here would be to satisfy itself as to whether or not the Minister had good reason for withholding them. Since those reasons are before the Court, the Court is entitled to consider them and also entitled to look at the public statute, the Venereal Diseases Suppression Act, under which the records in question are kept, and having done so the Court is satisfied that it is against public interest that the records in question should be given in evidence. *Held*, further, that the present opinion is concerned only with the production of documents, but the same principle must apply to the exclusion of verbal evidence which, if given, would jeopardize the interests of the community. For the reasons given by the Minister, the witness should be not required to answer the question asked him. MURRAY v. MURRAY. - - - - - **540**

PRACTISING — Different words in same section — Distinction in meaning. - - - - - - **554**
See DENTISTRY ACT.

PREMISES—Misdescription of—Effect. - - - - - - **345**
See LANDLORD AND TENANT. 4.

PRESCRIPTION—Government Liquor Act —Construction — Physician and surgeon. - - - **557**
See CRIMINAL LAW. 14.

PREVIOUS GOOD CHARACTER — Bail— Exceptional circumstances. **401**
See CRIMINAL LAW. 3.

PRIVILEGE — Production of documents— Official — Objection to produce— Production contrary to public interest. - - - - - - **540**
See PRACTICE. 7.

2.——*Qualified—Whether occasion of.* - - - - - - - **24, 241**
See LIBEL. 2.

PROBATION OFFICER. - - **102**
See CRIMINAL LAW. 8.

PROHIBITION. - - - - **493**
See PRACTICE. 5.

PROOF—Burden of. - - - **62**
See WILL. 4.

2.——*Identity.* - - - **173**
See CRIMINAL LAW. 15.

3.——*Onus of.* - - - **262**
See SHIP.

4.——*Possession—Burden of on Crown.* - - - - - - - **416**
See CRIMINAL LAW. 10.

PUBLIC HARBOUR—Foreshore—Dominion or Provincial ownership—Claim of possessory title. - - **150**
See CONSTITUTIONAL LAW.

PUBLICATION. - - **24, 241**
See LIBEL. 2.

RAILWAY—Plank crossing on—Collision—Two-car train and motor-truck. - - - - - - **385**
See NEGLIGENCE. 1.

REASONABLE DOUBT. - - **307**
See CRIMINAL LAW. 1.

RENT—Excessive—Action by tenant to recover back—Whether rent illegally increased—Wartime Rentals Regulations. - - - - **191**
See LANDLORD AND TENANT. 6.

2.——*Payment of—Place of payment—Rule that debtor must seek creditor.* **402**
See LANDLORD AND TENANT. 3.

RENTAL REGULATIONS—Order 294 Wartime Prices and Trade Board. **210**
See LANDLORD AND TENANT. 2.

"REORGANIZATION"—Increase of capital—Allotment of shares in course of reorganization. - - **87**
See COMPANY.

RESIDUARY ESTATE — Vested interests subject to charges. - - **205**
See WILL. 2.

RES JUDICATA. - - - **345**
See LANDLORD AND TENANT. 4.

RIGHT OF WAY. - - - **33**
See NEGLIGENCE. 3.

RULES AND ORDERS—County Court Rules, 1932, Order VII., r. 6—Effect of. - - - - - - - **345**
See LANDLORD AND TENANT. 4.

RULES AND ORDERS—*Continued.*

2.——*County Court Rules, 1932, Order IX., r. 9.* - - - - - - **71**
See PRACTICE. 2.

3.——*Court of Appeal Rule 5.* - **345**
See LANDLORD AND TENANT. 4.

4.——*Supreme Court Rule 370c (1).* - - - - - - - - **362**
See PRACTICE. 4.

5.——*Supreme Court Rules, 1943, Order LXV., rr. 10 and 10A.* - - - **368**
See COSTS. 3.

SALE—On threat to terminate contract. - - - - - - **194**
See CONTRACT. 2.

SEAWORTHINESS. - - - **262**
See SHIP.

SECURITIES ACT. - - - **87**
See COMPANY.

SENTENCE — Appeal from — Conviction—Probation officer — Suspension of sentence—Jurisdiction. - **102**
See CRIMINAL LAW. 8.

SHIP — *Seaworthiness — General average—Onus of proof—Due diligence—"Actual fault or privity of owners"—R.S.C. 1927, Caps. 186, Sec. 649 and 207.*] The five-masted schooner "City of Alberni" built in 1920 of fir, gross tonnage 1590 tons, was purchased by the plaintiff in 1940. In that year she made a voyage to Australia with lumber and returned to Vancouver with sugar from the Fiji Islands. In 1941 she made a similar voyage to Australia arriving back at Vancouver with hardwood and copra from New South Wales in November, 1941. On November 10th, 1942, she sailed on the voyage in question with a million and one-half feet of lumber for carriage to Durban, South Africa. When four days out of Vancouver the vessel was leaking so badly that it was decided to go into San Francisco for repairs, arriving there on November 24th, 1942. After repairs the voyage was continued on December 12th, 1942. From February 20th to 24th, 1943, she encountered bad weather and leaked so badly that it was decided to put into Valparaiso for further repairs, arriving there March 12th, 1943. After various inspections, the owners decided to abandon the voyage. The shipowners sold the ship and the cargo interests sold the cargo for what they respectively would bring. Heavy losses were incurred by both. In an action by the shipowners to recover a

SHIP—*Continued.*

general average contribution from the cargo interests for loss caused by a sacrifice in time of peril at sea and counterclaim by the cargo interests that the ship was initially unseaworthy and that the owners failed to use due diligence to make her seaworthy and that they must pay the cargo interests the amount of their losses:—*Held*, that the issue of seaworthiness and the issue of due diligence are here both questions of fact, depending on the evidence adduced and the proper inferences to be drawn from such evidence, the definition of seaworthiness being that the ship should be in a condition to encounter whatever perils of the sea a ship of that kind and laden in that way, may be fairly expected to encounter in crossing the Atlantic or in performing whatever is the voyage to be performed; that measured by this standard, the "City of Alberni" was not seaworthy when she sailed from Vancouver. The vessel was unseaworthy when she left San Francisco in that no proper repairs had been effected to the underwater portion of the stern and hood ends of the hull planking. In the circumstances, on the authorities, the shipowner did not exercise due diligence to make the ship seaworthy at Vancouver. *Held*, further, that the owners are entitled to limit their liability under the provisions of section 649 of the Canada Shipping Act as they have satisfactorily discharged the *onus* of proving that the loss was occasioned without their actual fault or privity. CANADIAN TRANSPORT COMPANY LIMITED, OWNERS OF THE SCHOONER "CITY OF ALBERNI" v. HUNT, LEUCHARS, HEPBURN, LIMITED. "CITY OF ALBERNI." - - **262**

SINGLE DENTAL SALE. - - **554**
See DENTISTRY ACT.

SOLICITOR — Omission by—County Court judgment in default of dispute note —Application to set aside — Discretion—Exercise of—Imposition of terms—Severity of—County Court Rules, 1932, Order IX., r. 9. **71**
See PRACTICE. 2.

STANDARD OF CARE. - - **545**
See AUTOMOBILES.

STATUTES — Whether Crown impliedly bound. - - - **419**
See MINES AND MINERALS.

30 & 31 Vict., c. 3, Sec. 108. - - **150**
See CONSTITUTIONAL LAW.

B.C. Stats, 1933, Cap. 79, Sec. 13. - **393**
See CRIMINAL LAW. 16.

STATUTES—*Continued.*

B.C. Stats. 1937, Cap. 69, Sec. 3. - **87**
See COMPANY.

B.C. Stats. 1939, Cap. 11, Sec. 2. - **554**
See DENTISTRY ACT.

B.C. Stats. 1939, Cap. 63, Secs. 49 (1) and 53 (1). - - **142, 297**
See LANDS.

B.C. Stats. 1945, Cap. 42, Sec. 4. - **177**
See LAND REGISTRY ACT.

B.C. Stats. 1947, Cap. 44, Secs. 2, 35 (3) and 38. - - - - **493**
See PRACTICE. 5.

Can. Stats. 1929, Cap. 49, Sec. 4 (1) (*d*). - - - - - **275**
See CRIMINAL LAW. 20.

Can. Stats. 1934, Cap. 33. - - **16**
See ASSOCIATION.

Can. Stats. 1940, Cap. 31, Secs. 12 and 19. - - - - - **515**
See CRIMINAL LAW. 6.

Criminal Code, Sec. 168. - - **393**
See CRIMINAL LAW. 16.

Criminal Code, Secs. 301, Subsec. 2, 835 and 1016, Subsec. 2. - - **380**
See CRIMINAL LAW. 5.

Criminal Code, Sec. 303. - - **307**
See CRIMINAL LAW. 1.

Criminal Code, Secs. 335 (*g*), 459 and 1016, Subsec. 2. - - - **131**
See CRIMINAL LAW. 4.

Criminal Code, Secs. 379, 773 (*a*), 774, Subsec. 2 and 778. - - **405**
See CRIMINAL LAW. 19.

Criminal Code, Sec. 399. - - **173**
See CRIMINAL LAW. 15.

Criminal Code, Sec. 550 (*a*). - - **416**
See CRIMINAL LAW. 10.

Criminal Code, Sec. 889, Subsec. 2. - **44**
See CRIMINAL LAW. 13.

Criminal Code, Secs. 1013 and 1014. **275**
See CRIMINAL LAW. 20.

Criminal Code, Secs. 1014, Subsec. 2, 1019 and 1020. - - - **515**
See CRIMINAL LAW. 6.

Criminal Code, Secs. 1015, 1026 and 1081. - - - - - **102**
See CRIMINAL LAW. 8.

STATUTES—*Continued.*

R.S.B.C. 1936, Cap. 58, Sec. 22. - **161**
See CLAIM.

R.S.B.C. 1936, Caps. 67, 160, Sec. 22 and 271, Sec. 89. - - - **557**
See CRIMINAL LAW. 14.

R.S.B.C. 1936, Cap. 72, Sec. 63 (1). **554**
See DENTISTRY ACT.

R.S.B.C. 1936, Cap. 116, Sec. 21. - **33**
See NEGLIGENCE. 3.

R.S.B.C. 1936, Cap. 140, Sec. 37 (2) and (3). - - - - - **150**
See CONSTITUTIONAL LAW.

R.S.B.C. 1936, Cap. 140, Sec. 105, Subsec. (1) (*a*) and (*e*). - - **177**
See LAND REGISTRY ACT.

R.S.B.C. 1936, Cap. 143, Sec. 19. - - - **352, 402, 441**
See LANDLORD AND TENANT. 1, 3.
PRACTICE. 1.

R.S.B.C. 1936, Cap. 143, Secs. 19 and 22. - - - - - - **345**
See LANDLORD AND TENANT. 4.

R.S.B.C. 1936, Cap. 148, Sec. 2 (7). **161**
See CLAIM.

R.S.B.C. 1936, Cap. 181, Secs. 18, 58, 61 and 85. - - - **419**
See MINES AND MINERALS.

R.S.B.C. 1936, Cap. 254, Secs. 3 (*g*) and 4 (1). - - - - - **87**
See COMPANY.

R.S.B.C. 1936, Cap. 271. - - **493**
See PRACTICE. 5.

R.S.B.C. 1936, Cap. 271, Sec. 30 (2). **87**
See COMPANY.

R.S.B.C. 1936, Cap. 308, Sec. 18. - **62**
See WILL. 4.

R.S.C. 1927, Cap. 35, Sec. 41. - **441**
See PRACTICE. 1.

R.S.C. 1927, Cap. 59, Sec. 9. - **428**
See CRIMINAL LAW. 11.

R.S.C. 1927, Caps. 186, Sec. 649 and 207. - - - - - - **262**
See SHIP.

STILL-BORN CHILD — Wife's adultery—Admissibility of evidence by husband of non-access. - **343**
See DIVORCE. 1.

STOLEN GOODS — Retaining—Evidence—Proof of identity of goods found with those stolen—Criminal Code, Sec. 399. - - - **173**
See CRIMINAL LAW. 15.

SUBLETTING—Covenant forbidding without leave. - - - **352**
See LANDLORD AND TENANT. 1.

SUITE — In apartment-building—Covenant for quiet enjoyment—What constitutes breach. - - **188**
See LANDLORD AND TENANT. 5.

SUMMARY TRIAL—Maximum sentence on —Criminal Code, Secs. 774, Subsec. 2 and 778. - - **405**
See CRIMINAL LAW. 19.

SUMMONS—Service of. - - - **493**
See PRACTICE. 5.

SUPREME COURT OF CANADA—Application for leave to appeal to. **441**
See PRACTICE. 1.

SUSPENSION OF SENTENCE—Jurisdiction. - - - - - - - **102**
See CRIMINAL LAW. 8.

"TAGS"—Selling on street without leave—Obstruction. - - **393**
See CRIMINAL LAW. 16.

TAXATION—Appeal—Appendix N—When higher scale of fees is allowed. - - - - - - **341**
See COSTS. 4.

TERMS—Imposition of—Severity of. **71**
See PRACTICE. 2.

TESTIMONY—Identity—Evidence contrary to statements previously made—Prior statements admitted to be untrue. - - - **407**
See CRIMINAL LAW. 17.

"THEFT" — In section 773 (*a*), Criminal Code as inclusive of "theft from the person" in section 379 where value of subject-matter not over $25. - - - - **405**
See CRIMINAL LAW. 19.

2.——*Of watches — Found in accused's possession — Absence of explanation — Confession.* - - - - - - **294**
See CRIMINAL LAW. 18.

TRADE-UNION — Unlawfully authorizing strike—Legal entity. - **493**
See PRACTICE. 5.

TRIAL — "Without publicity"—Rights of informant. - - - **449**
See INFANTS.

TRIAL JUDGE—Finding of. - **30, 464**
See NEGLIGENCE. 4.

TRIAL WITHIN A TRIAL—Confession. - - - - - - **380**
See CRIMINAL LAW. 5.

TRUST — Implication of—Mutual wills—Fresh will by survivor. - **75**
See WILL. 3.

TRUSTEES—Lieutenant-Governor in Council—Power to appoint trustees in letters patent—Injunction. - - - - - **142, 297**
See LANDS.

TRUSTS AND TRUSTEES—*Farmer and his employee—Farmer buying land at employee's request—Agreement for continuance of employee and payments for property by employee—Repudiation of agreement by farmer—Whether farmer a trustee or relationship of vendor and purchaser.*] The plaintiff (appellant) was a well to do farmer near Abbotsford and from 1936 to 1939 the defendant (respondent) was in his employ. The defendant then went to Saskatchewan where his wife had a farm but they came back to British Columbia in 1941 when he was again hired by the plaintiff who wished to retain him for at least three years. The defendant, who was of foreign birth and illiterate, then told the plaintiff that he wanted to buy a nearby property which was for sale but feared it might be sold before he could obtain the money for it which was coming to him for a pending sale of the property in Saskatchewan. The plaintiff made the purchase for $1,600 cash, the property was conveyed to him and the defendant entered into possession and remained in possession since 1941. The defendant claimed that the agreement between himself and the plaintiff was that the latter was to buy the property on defendant's behalf and the defendant was to remain in the plaintiff's employ for at least three years and to pay the plaintiff in part from the money coming from Saskatchewan and the remainder by permitting the plaintiff to retain the ten cents per hour by which the defendant's wages were to be increased and that the plaintiff was not to charge any interest. The plaintiff's story was that he was to buy the property for his own benefit for $1,600, the defendant was to occupy it as his tenant and when the defendant paid him the $800 the defendant was to receive from Saskatchewan, a "sales contract" was to be entered into. The plaintiff further said that in October, 1942, he learned that the defendant had received the Saskatchewan money in the previous July and that as it had not been

TRUSTS AND TRUSTEES—*Continued.*

paid over to him (the plaintiff) he told the defendant that the agreement was off and that the defendant was to occupy the land as his tenant for the rental of the ten cents per hour increase in wages. The defendant said that he had told the plaintiff that the Saskatchewan money had been received and that the defendant told him to use it on the property and that he did so. By an amendment allowed at the conclusion of the trial, the defendant pleaded that the price paid by the plaintiff was a loan repayable as mentioned, that the land was conveyed to the plaintiff as security and that he thereby constituted himself a trustee for the defendant. The trial judge accepted the defendant's version. *Held*, on appeal, affirming the decision of MANSON, J. (SIDNEY SMITH, J.A. dissenting), that the appeal should be dismissed. *Per* ROBERTSON, J.A.: There is nothing to show that the trial judge misapprehended any material part of the evidence or drew unreasonable inferences. Upon the authorities the plaintiff was a trustee for the defendant. The land was the defendant's and he was entitled to a conveyance of it upon payment of the moneys which the plaintiff had paid in respect of it. When the plaintiff repudiated the contract with the defendant he relieved the defendant from continuing to work for him and the defendant was entitled to specific performance. BIRD, J.A.: The trial judge's reasons taken as a whole show that notwithstanding his statement that "he took the title in his own name by way of security," he found in effect that the plaintiff acquired and held the land, not for himself, but in trust for the defendant, subject to the conditions that the latter pay the purchase price and remain in his employ for three years. There is ample evidence to support this finding. The plaintiff's repudiation of the trust was in fact and in result a refusal to continue to keep the defendant in his employment upon the terms agreed on when the trust arose. BROWN v. STOROSCHUK. - - **225**

TWO-CAR-TRAIN AND MOTOR-TRUCK—Collision. - - - **385**
See NEGLIGENCE. 1.

UNDUE INFLUENCE. - - - **194**
See CONTRACT. 2.

UNLAWFUL COMMON DESIGN — Conspiracy—Improper admission of evidence — Substantial wrong or miscarriage of justice. - **515**
See CRIMINAL LAW. 6.

UNSOUNDNESS OF MIND—Evidence of. - - - - - - **62**
See WILL. 4.

USE AND OCCUPATION—Claim for. **161**
See CLAIM.

WARTIME PRICES AND TRADE BOARD—Order 294—Rental regulations. - - - - - - **210**
See LANDLORD AND TENANT. 2.

2.——*Orders 294, secs. 13 (a), 15B, and 15C, 537, and 571, sec. 6 (2).* - **345**
See LANDLORD AND TENANT. 4.

WARTIME RENTALS REGULATIONS—Action by tenant to recover back excessive rent—Whether rent illegally increased. - - **191**
See LANDLORD AND TENANT. 6.

WATER ACT, 1939—Letters patent under. - - - - - **142, 297**
See LANDS.

WILL—*Charitable gifts—Gift to church to be added to the endowment fund—No endowment fund—Uncertainty—Cy-pres doctrine—Costs.*] The testatrix left all her estate to a trustee upon trust to pay certain legacies and thereafter "to pay or transfer all the rest, residue and remainder of my estate to the St. Andrew & Wesley Church, Vancouver, B.C. to be added to the endowment fund." The church had no endowment fund and no general charitable intention was expressed in the will. It was, therefore, contended that the gift was not necessarily for charitable purposes and failed for uncertainty. On the other hand, it was argued that since the church was a religious institution, therefore the gift must have been for the purposes of religion and so for a good charitable object. It was held that the direction as to the endowment fund was merely a provision as to the mode of employment of the gift and applying the *cy-pres* doctrine, the gift was valid as a charitable gift to the church. *Held*, on appeal, reversing the decision of WILSON, J. (O'HALLORAN and BIRD, JJ.A. dissenting), that for a gift to be a valid charitable gift, the application of the fund for charitable purposes must be obligatory. Therefore, where a gift may consistently with the will be applied to other than strictly charitable objects, it is too indefinite for the Court to execute and will fail. *Per* SIDNEY SMITH, J.A., SLOAN, C.J.B.C. concurring): If the gift had been one to the church *simpliciter*, it would be held to be a gift to the trustees in trust for the religious purposes of the church and the

WILL—*Continued.*

judge below has so found, but it was a gift to the trustees to be added to the endowment fund of the church which may not be the same thing. A charitable intention cannot be deduced from the mere fact that the trustee of the gift is a church officer or incumbent. Even on the assumption that the sole object of an endowment fund of a church is to provide a permanent income, there is nothing to show here that such income must necessarily be applied to charitable objects. *Per* ROBERTSON, J.A.: A church has many activities. Some of them are charitable within the legal meaning of that word, others although benevolent or conducive to the interests of the parishioners or to the public interest, are not within that meaning. An endowment fund without any trusts might be used for any of those purposes. Since the testatrix expressed no trust, the bequest cannot be said to be charitable within the legal meaning. It is impossible to find in the will the expression of a general charitable intention. THE TORONTO GENERAL TRUSTS CORPORATION, EXECUTORS OF THE ESTATE OF ALICE GRANT MACKAY, DECEASED v. THE CONGREGATION OF ST. ANDREW'S-WESLEY CHURCH AT VANCOUVER, A CONGREGATION OF THE UNITED CHURCH OF CANADA *et al.* **321**

2.——*Interpretation—Executor and trustee—Residuary estate—Vested interests subject to charges.*] The testator devised his estate to The Royal Trust Company as executor and trustee first upon trust to sell and convert, etc., then to hold the residuary estate upon trust first to apply the income thereof in payment to his sister during her life the annual sum of $2,400 and subject thereto to pay one equal third part of said income to his wife during her life; to pay one other equal third part of said income during the life of the wife and after her death one equal half part of such income to his son for life and to pay the remaining third part of said income to his daughter in the same manner as to his son. The son died in 1941 leaving one son only who reached 21 years of age on January 7th, 1945, and the testator's sister had previously died. On originating summons for interpretation of the will, it was held that since the death of the testator's son, the income of the residuary estate should be first charged with payment of the two annuities, one in favour of the widow, the other in favour of the daughter, each amounting to one-third of the total income, and the remaining one-third of the income to be divided in equal shares among the grandson for whom one moiety is held

WILL—*Continued.*

in trust and the children of the daughter of deceased for whom the other moiety is held in trust. In answer to questions submitted for decision it was *Held*, (1) That the grandson was entitled, after reaching the age of 21 years, to one-sixth of the income of the residuary estate; (2) that the grandson on attaining the age of 21 years became entitled to a vested interest in one equal moiety of the residuary estate, but not a vested interest in possession; (3) the moiety of the grandson and the income therefrom is subject to the charge of one-half of the income payable to the life tenants or annuitants from time to time to continue to be so charged until the death of the last surviving annuitant; (4) the accumulated income during the period between the death of the son and when the grandson attained the age of 21 years is divisible among the grandchildren as follows: to the grandson John L. Nichol a one-half portion thereof and to the children of the daughter of the deceased a one-half portion thereof. *In re* ESTATE OF WALTER C. NICHOL, DECEASED. THE ROYAL TRUST COMPANY v. Q. J. M. NICHOL, *et al.* - - - - - - **205**

3.——*Mutual wills — Identical terms— Husband and wife — Fresh will made by party who survives the other—Whether first will irrevocable on death of other—Interest of third party.*] On the 25th of August, 1944, Noah C. Skippen and his wife Rebecca Skippen made mutual wills, each providing for a life interest in favour of the survivor with remainder over to a daughter Mary E. Hodgson, the plaintiff herein. The wills were identical in form and at the time of their execution Noah C. Skippen was 93 years old and his wife 85. They were registered as joint owners of a certain property in Vancouver which was occupied by them as their home. They had entered into an agreement with each other and with the plaintiff that the plaintiff would come to reside with them for the remaining period of their lives and give them such care and attention as they required from time to time and that they would by mutual wills to be made by them, after providing for the life interest of the survivor of them, leave to the plaintiff the residue of their estates and pursuant to this understanding and arrangement between them the mutual wills in question were executed. Thereafter the plaintiff resided with them and looked after and cared for them. Rebecca Skippen died in January, 1945, and her will was probated. Noah C. Skippen obtained the life interest in her estate and he died in March, 1946. On January 8th, 1946, Noah C. Skippen executed another will revoking his former will and disposing of his estate in a different manner. On originating summons by the daughter Mary Hodgson the question to be determined was whether under the circumstances here, the deceased Noah C. Skippen was, by reason of his contract or agreement with his deceased wife, precluded from revoking his mutual will and making some other disposition of his estate. *Held*, that the facts disclose the existence of an agreement between the parties as alleged by the plaintiff herein pursuant to which they executed the wills and by which each was bound. Having so found, the surviving husband was precluded from making any other disposition of his estate and while on the authorities it is quite clear that the subsequent will will be admitted to probate, nevertheless the executor of that estate will be held to take the property subject to the trust in favour of the plaintiff. *In re* ESTATE OF NOAH C. SKIPPEN, DECEASED, AND *In re* ESTATE OF REBECCA SKIPPEN, DECEASED. MARY E. HODGSON v. J. T. ARMSTRONG AND GEORGE L. MACINNES. - - - - - **75**

4.——*Torn when found—Evidence of unsoundness of mind — Whether intention to revoke—Burden of proof — R.S.B.C. 1936, Cap. 308, Sec. 18.*] The will of George Goodwin Norris sought to be established was executed in Alberta in May, 1927, and it was found that at the time of execution he was of sound mind. The testator left his wife and three children in England in 1908 and came to Canada with the defendant Frederica Heyman with whom he lived as man and wife until his death. After living a short time in Saskatchewan, they moved to Alix, Alberta, where he practised law until 1929. During these years they passed as a married couple and a daughter was born to them in 1912. The testator had a sister living in Calgary with whom they were on friendly terms. In 1929, owing to failing health, he decided to retire, being then 60 years of age, and they moved to North Vancouver. In 1939 there was a marked change for the worse in his health and he suffered from hallucinations and from that time on he had medical assistance. In 1941 when the testator was bedridden he told his niece that he had left Miss Heyman well provided for and she was not forgotten in his will, and before leaving Alberta he had told Miss Heyman that he was leaving everything to her except a legacy and he gave her the combination of his safe where the will was kept. Later in 1941 he showed Miss Heyman

WILL—*Continued.*

the will which he kept in a black box in a drawer of his dresser. The testator died on January 3rd, 1942. When the envelope with the will was taken from the black box, there came from it a shower of small papers being the mutilated will sought to be proven. The question then arose, was the will sought to be established revoked by tearing? *Held,* that in coming to a conclusion as to whether the tearing was done with *animo recovandi,* all the surrounding circumstances must be considered. If it was torn by Norris it was done either unintentionally or in a moment of mental confusion with no intention of putting an end to the will. The careful preservation of the parts in the original envelope by a testator who must have had considerable difficulty in making the replacement by reason of his physical condition is some indication which, combined with other features of this case, lead me to the conclusion that this is a valid will and must be admitted to probate. *In re* ESTATE OF GEORGE GOODWIN NORRIS, DECEASED: EATON v. HEYMAN *et al.* - - - **62**

WITNESS — Adverse — Examination of by judge. - - - - - **428**
See CRIMINAL LAW. 11.

WORDS AND PHRASES—"Actual fault or privity of owners." - - **262**
See SHIP.

2.——*"Amount involved."* - - **368**
See COSTS. 3.

3.——*"Housing accommodation."* **210**
See LANDLORD AND TENANT. 2.

4.——*"Multiple-family building."* **210**
See LANDLORD AND TENANT. 2.

5.——*"Single-family house."* - **210**
See LANDLORD AND TENANT. 2.

6.——*"The public"—Construction.* **554**
See DENTISTRY ACT.

7.——*"To the sheriff"—Meaning of.* **345**
See LANDLORD AND TENANT. 4.

WRONGFUL DISMISSAL — Duty to seek other employment—Pending arbitration. - - - **460**
See MASTER AND SERVANT.