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THE BRITISH COLUMBIA REPORTS

BEING

REPORTS OF CASES

DETERMINED IN THE

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

WITH

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

AND

A DIGEST OF THE PRINCIPAL MATTERS

REPORTED UNDER THE AUTHORITY OF

THE LAW SOCIETY OF BRITISH COLUMBIA

BY

E. C. SENKLER, K. C.

VOLUME LIII.

35110

VICTORIA, B. C.
Printed by The Colonist Printing & Publishing Company, Limited.
1939.

Entered according to Act of the Parliament of Canada in the year one thousand nine hundred and thirty-nine 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.

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THE HON. ARCHER MARTIN.

JUSTICES OF THE COURT OF APPEAL.

CHIEF JUSTICE:

THE HON. ARCHER MARTIN.

JUSTICES:

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THE HON. WILLIAM GARLAND ERNEST McQUARRIE.
THE HON. GORDON McGREGOR SLOAN.
THE HON. CORNELIUS HAWKINS O'HALLORAN.

SUPREME COURT JUDGES.

CHIEF JUSTICE:

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THE HON. DAVID ALEXANDER McDONALD.
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ATTORNEY-GENERAL:

THE HON. GORDON SYLVESTER WISMER, K.C.

MEMORANDA.

On the 13th of January, 1939, John Owen Wilson, Barrister-at-Law, was appointed Junior Judge of the County Court for the County of Cariboo and a Local Judge of the Supreme Court of British Columbia.

On the 13th of January, 1939, His Honour Herbert Ewen Arden Robertson, Junior Judge of the County Court for the County of Cariboo was appointed Judge of the said Court and a Local Judge of the Supreme Court of British Columbia in the room and stead of His Honour Frederick Calder, resigned.

On the 14th of April, 1939, His Honour John Charles McIntosh, Junior Judge of the County Court for the County of Nanaimo was appointed Judge of the said Court and a Local Judge of the Supreme Court of British Columbia in the room and stead of His Honour Charles Howard Barker, resigned.

On the 14th of April, 1939, Paul Phillips Harrison, one of His Majesty's counsel learned in the law, was appointed Junior Judge of the County Court for the County of Nanaimo and a Local Judge of the Supreme Court of British Columbia.

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"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, the "Supreme Court Rules, 1925," be amended as follows:—

(*a.*) By striking out Rules 8, 9 and 10 of Order 65, and substituting therefor the following:—

"8. In all causes and matters where costs are payable and are subject to taxation such costs shall be taxed as follows:—

"(*a.*) Where costs are payable between party and party they shall be taxed in accordance with the provisions of Appendix N: Provided that in any cause or matter the Court or a Judge may direct that the costs payable to any party shall be taxed either under Appendix M or as between solicitor and client:

"(*b.*) In all other cases where costs are payable, including costs as between solicitor and client, such costs shall be taxed in accordance with the provisions of Appendix M, with such further allowances as the taxing officer or, in the case of a review of taxation, the Judge or the Court shall consider proper.

"9. Where the Judicial Committee of the Privy Council directs a party to bear the costs of an appeal to it incurred in British Columbia such costs shall be taxed by the Registrar in accordance with the provisions of Appendix M.

"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 provisions 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.

"10B. For the purpose of determining the proper column for taxation of costs in any garnishee, attachment, interpleader, or other similar proceedings, the amount involved shall be deemed to be the amount involved in such proceedings irrespective of the amount claimed in or under any action or judgment in or under which such proceedings are taken, and the taxing officer shall, where necessary, receive evidence in order that he may determine the amount involved in such proceedings.

"10C. For the purpose of determining the proper column for taxation of costs in any action for redemption or foreclosure of a mortgage or other security or for the enforcement of an agreement for sale, the amount involved shall be deemed to be the amount of money, exclusive of costs, payable in order to redeem or to satisfy the plaintiff's claim, as the case may be.

"10D. Where in Appendix N there is a fee or allowance *per diem*, if the time occupied in any one day exceeds four and one-half hours the fee allowed may in the discretion of the taxing officer be increased by an amount not exceeding fifty per cent. of the fee allowed by the Tariff.

"10E. Subject to the provisions of Rule 2 of this Order, whenever any party shall be awarded the costs of some only of the issues, or part only of the total costs, the taxing officer shall, subject to review by a Judge, apportion the allowances under the items applicable.

"10F. (1.) In the event of any pending cause or matter being settled on the basis that any party thereto shall pay or recover costs of such cause or matter, if the amount of such costs is not determined by such settlement, then upon filing a memorandum of such settlement or a consent signed by both parties they shall be taxed by the taxing officer upon applica-

tion of any party in the same manner as if an Order had been made for such taxation.

"(2.) Upon any taxation under this rule the amount involved shall be determined by the terms of the settlement; provided that if it is agreed by the parties to the said settlement that the costs shall be taxed under any one of the columns set forth in Appendix N, then they shall be so taxed."

(*b.*) By striking out Regulation (41) of Order 65, and substituting therefor the following:—

"(41.) Any party who may be dissatisfied with the certificate or allocatur of the taxing officer as to any item or part of an item which may have been objected to, or with the decision of the taxing officer as to the scale applicable to the taxation, or as to the apportionment of allowances under Rule 10E of this Order, may, within fourteen days from the date of the certificate or allocatur, or such other time as the Court or a Judge or taxing officer, at the time he signs his certificate or allocatur, may allow, apply to a Judge at Chambers for an order to review the taxation as to the same item or part of an item, and the Judge may thereupon make such order as the Judge may think just; but the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid."

And that the amendments aforesaid shall come into operation on the first day of November, 1938, and shall apply to all causes and matters commenced before, on, or after that date.

G. S. WISMER,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., October 11th, 1938.

"RULES OF COURT."

PURSUANT to the "Court Rules of Practice Act," being chapter 249 of the "Revised Statutes of British Columbia, 1936," and all other powers them thereunto enabling, their Lordships the Chief Justice and Judges of the Supreme Court of British Columbia have been pleased to order and do hereby order that on the 1st day of November, 1938, Appendix N of the Appendices to the "Supreme Court Rules, 1925" be struck out, and the following be substituted therefor:—

"APPENDIX N.

"TARIFF OF COSTS BETWEEN PARTY AND PARTY IN ANY ACTION, CAUSE, OR PROCEEDING IN THE SUPREME COURT OF BRITISH COLUMBIA AND IN ANY APPEAL OR PROCEEDING IN THE COURT OF APPEAL (EXCEPT PROCEEDINGS UNDER THE 'WINDING-UP ACT' OR UNDER THE 'BANKRUPTCY ACT'), EXCLUSIVE OF DISBURSEMENTS BUT INCLUSIVE OF ALL ALLOWANCES TO COUNSEL AND SOLICITORS, AND APPLICABLE TO ALL TAXATIONS HELD ON AND AFTER THE 1ST DAY OF NOVEMBER, 1938, WHETHER THE ACTION, CAUSE, PROCEEDING, OR APPEAL WAS COMMENCED BEFORE OR ON OR AFTER THE 1ST DAY OF NOVEMBER, 1938.

"(1.) In all actions, causes, proceedings, and appeals in which the amount involved can be determined, the costs shall be taxed under the column applicable, as follows:—

"(*a.*) Where the amount involved is $3,000 or under the costs shall be taxed under Column 1.

"(*b.*) Where the amount involved exceeds $3,000 but does not exceed $10,000 the costs shall be taxed under Column 2.

"(*c.*) Where the amount involved exceeds $10,000 but does not exceed $25,000 the costs shall be taxed under Column 3.

"(*d.*) Where the amount involved exceeds $25,000 the costs shall be taxed under Column 4.

"(2.) In all other actions, causes, proceedings, and appeals the costs shall be taxed under Column 2.

"Provided, however, that in all actions, causes, proceedings, and appeals the Court or a Judge may at any time before taxation order the costs or any part thereof to be taxed on a higher scale than that which would be otherwise applicable, in the following cases:—

"(*a.*) Where some difficult point of law or construction is involved:

"(*b.*) Where the question litigated is of importance to some class or body of persons:

"(*c.*) Where the question litigated is of general or public interest:

"(*d.*) Where the result of the action or counterclaim is in effect determinative of rights between the parties beyond the relief actually recovered or denied in the action or counterclaim;

or in any other case for special reason.

Tariff Item.	Col. 1.	Col. 2.	Col. 3.	Col. 4.
1. Letters, interviews, and instructions before the commencement of any cause or matter	$5.00	$5.00	$10.00	$15.00
2. Commencement of cause, inclusive of writ or originating summons, statement of claim, petition, citation, and stated case, with all particulars and amendments	50.00	75.00	100.00	150.00
3. All process for commencement of proceedings not in a cause, including originating motions, applications to the Court or a Judge under a Statute, proceedings in assessment appeals, proceedings under Crown Office Rules, and all analogous matters	25.00	35.00	50.00	75.00
4. Defendant's costs for instructions and process in opposition to the proceedings set forth in the next preceding item herein or any of them	20.00	30.00	40.00	65.00
5. Proceedings for judgment where no defence filed, applications under Order 14, and necessary motions for judgment	35.00	50.00	75.00	100.00
6. All process for third-party procedure	40.00	50.00	75.00	100.00
7. Defence, counterclaim, answer, and stated case, including particulars and amendments	40.00	50.00	75.00	100.00
8. Reply where necessary and defence to counterclaim	20.00	25.00	35.00	50.00
9. Fee for each motion or application not elsewhere provided for per diem (exclusive of simple adjournments):—				
(a.) If opposed	20.00	35.00	50.00	75.00
(b.) If unopposed	15.00	15.00	20.00	25.00
(This item shall include motions and applications made after as well as before judgment has been entered, and appeals from a Registrar to a Judge.)				

Tariff Item.	Col. 1.	Col. 2.	Col. 3.	Col. 4.
10. Payment into and out of Court	$5.00	$7.50	$10.00	$15.00
11. Discovery of documents	10.00	15.00	25.00	50.00
12. Fee for attending on examination of any party for discovery, cross-examination on affidavits, examination in aid of execution, and examination of witness *de bene esse* or on commission, for the first two hours or any part thereof	20.00	30.00	50.00	75.00
For each subsequent hour or any part thereof	10.00	15.00	20.00	25.00
13. All proceedings for obtaining and answering interrogatories, exclusive of applications for leave to deliver same	15.00	25.00	50.00	75.00
14. Proceedings relating to admission of facts where admissions made or obtained	10.00	15.00	25.00	35.00
15. Defendant's costs for all services where cause discontinued before defence or answer	20.00	30.00	40.00	60.00
16. Subject to the last preceding paragraph, all process relating to settlement and discontinuance of any cause or matter to be taxed only if settled pursuant thereto	35.00	50.00	100.00	200.00
17. All process relating to taking of accounts and inquiries, references and assessment of damages by the Registrar:—				
(*a.*) Where witnesses heard, per diem	40.00	50.00	75.00	100.00
(*b.*) Where witnesses not heard, per diem	25.00	35.00	50.00	75.00
18. Conduct of sale where property sold by order of Court	25.00	35.00	50.00	75.00
19. All process relating to the settling-down of cause or matter for trial or hearing, including record for Judge	15.00	20.00	25.00	35.00
20. Consultations preparatory to trial and advising on evidence	25.00	50.00	75.00	150.00
21. Instructions for brief on trial with witnesses to be taxed only if action or proceeding set down, inclusive of taking minutes of evidence of witnesses, instructions to counsel	50.00	100.00	150.00	250.00
22. Instructions for brief on trial without witnesses to be taxed only if action or proceeding set down	25.00	50.00	75.00	150.00
23. Instructions for brief on motions and applications where brief necessary	15.00	25.00	35.00	50.00
24. Trial or hearing of cause or matter where no witnesses called, including special or stated case, originating motion or summons, application to the Court or a Judge under a Statute, proceedings under Crown Office Rules, argument on point of law, hearing of appeal from inferior tribunal, hearing of assessment appeal, and all other analogous matters, inclusive of counsel fees, for each half-day or less	35.00	50.00	75.00	100.00
25. Trial or hearing of cause or matter where witnesses called, including originating motion or summons, application to the Court or a Judge under a Statute, proceedings under Crown Office Rules, hearing of appeal from inferior tribunal, hearing of assessment appeal, and all other analogous matters, inclusive of counsel fees, per diem	75.00	100.00	150.00	200.00
26. Preparation of written argument requested or authorized by the Court or Judge	25.00	35.00	75.00	100.00
27. Costs of the day, when trial not commenced and when ordered, exclusive of disbursements	25.00	35.00	50.00	75.00

Tariff Item.	Col. 1.	Col. 2.	Col. 3.	Col. 4.
28. All process relating to the signing of judgment after trial or hearing, including attendance to hear judgment, drafting minutes, settlement of same	$10.00	$10.00	$25.00	$40.00
29. Taxation of costs	10.00	15.00	20.00	25.00
30. Process under "Attachment of Debts Act" when no issue directed	15.00	25.00	35.00	50.00
Where an issue is directed the costs of such issue, including the costs of the application upon which such issue was directed, shall be taxed under the appropriate items as in an action.				
31. (1.) Applicant's costs of interpleader proceedings	25.00	25.00	35.00	35.00
(2.) Claimant's costs of interpleader proceedings when no issue directed	25.00	50.00	75.00	100.00
(3.) Claimant's costs where issue directed, including the costs of the application on which such issue was directed, shall be taxed under the appropriate items as in an action.				
32. Correspondence between solicitor and agent, where proceedings carried on in registry elsewhere than where solicitor carries on business	10.00	15.00	25.00	35.00
33. Correspondence with client or his agent, where client or agent and solicitor reside in different places	10.00	15.00	25.00	35.00
34. Instructions to agent for examinations coming under Item 12 held elsewhere than where solicitor carries on business.	10.00	15.00	25.00	35.00
35. Preparing and issuing writ of *fi. fa.* or other writ of execution, exclusive of any application to Court or Judge	7.50	7.50	7.50	10.00
Appeals.				
36. Fee advising appellant on appeal inclusive of notice of appeal:—				
(a.) Interlocutory appeal or appeal from County Court	25.00	35.00	50.00	75.00
(b.) Other appeals	35.00	50.00	100.00	150.00
37. Application to fix amount of security for costs where necessary	10.00	15.00	20.00	25.00
38. Preparation of Appeal-books (and copies) and factums (and copies) whether printed or typewritten, for each copy, per folio	.05	.06	.08	.10
39. Fee approving Appeal-books, including application to Registrar to settle	5.00	7.50	10.00	20.00
40. Fee revising and settling factum, including instructions for brief	50.00	75.00	100.00	150.00
41. Where no factum instructions for brief for appellant or respondent:—				
(a.) Interlocutory appeal or appeal from County Court	25.00	35.00	50.00	75.00
(b.) Other appeals	35.00	50.00	75.00	100.00
42. Motions and applications to the Court or a Judge, including motions and applications concerning appeals to the Supreme Court of Canada, per diem	25.00	35.00	50.00	75.00
43. Conduct of appeal, including counsel fees, per diem:—				
(a.) Interlocutory appeal or appeal from County Court or other inferior tribunal	50.00	75.00	100.00	125.00
(b.) Other appeals	75.00	100.00	150.00	250.00

Tariff Item.	Col. 1.	Col. 2.	Col. 3.	Col. 4.
44. Attendance of out-of-town counsel on first day of sitting and also while case is on peremptory list, for one counsel not exceeding three days, exclusive of the day the hearing commences, per diem	$15.00	$15.00	$15.00	$15.00
45. In addition to the fees allowed under Items 43 and 44, there shall be allowed to out-of-town counsel for expenses $10 per diem, not to exceed in the aggregate	20.00	20.00	50.00	70.00
46. All process relating to the signing of judgment, including attendance to hear judgment, drafting minutes, settlement of same	10.00	10.00	25.00	40.00
47. Taxation of costs	10.00	10.00	15.00	25.00
48. Correspondence with agents relating to appeal, where heard elsewhere than where solicitor carries on business	5.00	7.50	10.00	15.00

"In all actions, causes, proceedings, and appeals in which the items in Columns 1, 2 and 3 of the above Tariff apply, the maximum amount of costs taxable by any party against any other party, exclusive of disbursements, shall not exceed the sums hereinafter set out. Provided that where the costs, exclusive of disbursements, of any party have been reduced by reason of the application of the maximum allowances hereinafter set forth, any costs, exclusive of disbursements, which are to be deducted from or set off against the costs which have been so reduced shall be reduced in the same proportion.

Tariff Item.	Col. 1.	Col. 2.	Col. 3.
1. Where action or cause settled before defence or answer	$40.00	$50.00	$75.00
2. Where judgment obtained in default of appearance, exclusive of interlocutory applications	40.00	50.00	75.00
3. Where judgment obtained in default of defence and no motion for judgment or hearing is necessary	50.00	75.00	100.00
4. Where in any action, cause, or matter in the Supreme Court judgment is obtained otherwise than by reason of default of appearance or default of defence	400.00	600.00	1,000.00
5. In any appeal to the Court of Appeal	400.00	600.00	1,000.00"

The foregoing tariff of costs is hereby approved to take effect on the 1st day of November, 1938.

Dated this 11th day of October, 1938.

A. MORRISON, C.J.S.C.
D. MURPHY, J.
D. A. McDONALD, J.
A. I. FISHER, J.
HAROLD B. ROBERTSON, J.
A. M. MANSON, J.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

VICTORIA COLD STORAGE AND TERMINAL WAREHOUSE COMPANY LIMITED AND PORTER v. CITY OF VICTORIA.

S. C.
In Chambers
1938
Mar. 23, 30.

Practice—Costs—Security for—Insolvent plaintiff as nominal plaintiff.

On an application by the defendant for security for costs when it is shown that the plaintiff is an insolvent company, a nominal plaintiff for the benefit of somebody else and not suing either as a trustee in bankruptcy or as an executor:—
Held, that security must be given.

APPLICATION for security for costs. Heard by FISHER, J. in Chambers at Vancouver on the 23rd of March, 1938.

Maclean, K.C., for the application.
McAlpine, K.C., and *J. L. Farris, contra.*

Cur. adv. vult.

30th March, 1938.

FISHER, J.: This is an application for security for costs and counsel on behalf of the defendant relies on the authorities set out at p. 1472 of the Annual Practice, 1938. One of the

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In Chambers
1938

VICTORIA COLD STORAGE AND TERMINAL WAREHOUSE COMPANY LIMITED AND PORTER v. CITY OF VICTORIA

Fisher, J.

authorities there set out, *viz.*, *Cowell* v. *Taylor* (1885), 31 Ch. D. 34; 55 L.J. Ch. 92, and *Sykes* v. *Sykes* (1869), L.R. 4 C.P. 645; 38 L.J.C.P. 281, referred to in the *Cowell* case, are cases where security was not ordered and these are relied upon by counsel for the plaintiffs. It must be noted, however, that in the *Cowell* case an insolvent plaintiff sued as trustee in bankruptcy of an insolvent estate and in the *Sykes* case the plaintiffs were two executors, one of whom was out of the jurisdiction and the other a bankrupt. What Bovill, C.J. said in the *Sykes* case, at pp. 647-8, should also be noted:

> To entitle a defendant to security, he must show not only that the plaintiff is insolvent, but also that he is suing as a nominal plaintiff, in the sense of another person being beneficially interested in the result of the action. In that case, the Court would stay the proceedings until security is given. That doctrine, however, has never been applied to the case of an executor or the assignee of a bankrupt. . . . No authority has been or could be produced in which security for costs has been ordered to be given by a plaintiff suing as executor or as assignee, simply on the ground that he is not in a position to pay costs.

In my view it has been shown that the present case is a case where an insolvent company, *viz.*, the Victoria Cold Storage and Terminal Warehouse Company, Limited, is a nominal plaintiff for the benefit of somebody else. It is not suing either as a trustee in bankruptcy or as an executor. Security must, therefore, be given and if the parties cannot agree on the amount or the terms of the order further argument may be submitted in writing.

Application granted.

REX v. COY.

S. C.
In Chambers
1938
Jan. 26;
Feb. 14.

Municipal law—Licensing by-law—Employee of a foreign company—"A person carrying on a business"—Sections 5 (2) and 68 of the Summary Convictions Act, R.S.B.C. 1936, Cap. 271—Applicability.

C. was employed by a Seattle, U.S.A. company as its representative in Vancouver. The company rented desk room for him in Vancouver and his duty was to see that orders for the purchase of lumber made by the company from its Seattle office were filled and the lumber shipped from British Columbia. He did not obtain orders for the purchase or sale of goods. He was convicted under by-law No. 1954 for that he being a person carrying on business within said city failed to obtain a licence in respect thereof and pay the specified fee. On a case stated:—

Held, that C. was not a person within the meaning of said by-law and that said facts did not constitute the carrying on a business or maintaining an office by him within the meaning of the by-law, and the Court would not be justified in inferring from the case stated that the company was not registered under the Provincial Companies Act.

On the contention that the conviction should be sustained by construing the by-law along with the provisions of the Summary Convictions Act, which make aiders and abettors guilty of the offence:—

Held, that the charge implied the carrying on a business without a licence and since it was not apparent from the case stated that the accused knew that the company was carrying on business or maintaining an office without a licence, a guilty knowledge on his part was not shown.

CASE STATED by police magistrate Wood, Vancouver, under section 89 of the Summary Convictions Act. The accused was convicted for that he, being a person carrying on a business office in Vancouver, unlawfully failed to procure a licence in respect thereof from the city and pay therefor the specified fee. The case stated showed:

(a) Said Coy resided in Vancouver and was employed by the Globe Export Lumber Co. of Seattle, Washington, U.S.A. and represented it in Vancouver. (b) The company rented desk room in an office in Vancouver and the rent was $10 per month, paid by the company. (c) Coy did not obtain orders for the sale or purchase of goods by the company, but his duty was to see that orders for purchase of lumber given by the said company from its Seattle office were filled and the lumber dispatched from British Columbia. (d) All lumber purchased by the company in British Columbia was paid for by that company directly from Seattle to the vendors. (e) Coy had no licence issued by Vancouver for a business office for the year 1937. (f) The company had no licence issued by Vancouver for a business office for the year 1937.

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1938

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The questions submitted were:

(a) Is the said Coy a person within the meaning of by-law number 1954 of the said city of Vancouver? (b) Do the facts stated constitute carrying on a business or maintaining an office within the meaning of the said by-law?

Heard by FISHER, J. in Chambers, at Vancouver on the 26th of January, 1938.

Edith L. Paterson, for appellant.
Wasson, for the Crown, respondent.

Cur. adv. vult.

14th February, 1938.

FISHER, J.: This is a case stated by Herbert S. Wood, Esquire, K.C., police magistrate in and for the city of Vancouver, under the provisions of section 89 of the Summary Convictions Act, R.S.B.C. 1936, Cap. 271.

On December 13th, 1937, the appellant C. T. Coy was convicted before the said magistrate for that he, being a person carrying on a business office within the said city of Vancouver, did unlawfully fail to procure a licence in respect thereof from the city and pay therefore the specified fee contrary to the form of the by-law in such case made and provided. The questions submitted are:

(*a*) Is the said C. T. Coy a person within the meaning of by-law number 1954 of the said city of Vancouver?

(*b*) Do the facts stated constitute carrying on a business or maintaining an office within the meaning of the said by-law?

It is or must be common ground that the by-law number 1954 in question herein should be strictly construed (see Maxwell on the Interpretation of Statutes, 8th Ed., 250-251, and *O'Brien* v. *Cogswell* (1890), 17 S.C.R. 420, at 424-5) and that with respect to the facts I am confined to those set out in the case stated. I deal with the matter on such basis.

Counsel on behalf of the said C. T. Coy, appellant herein, relies especially upon *Lewis* v. *Graham* (1888), 20 Q.B.D. 780, in which, according to the head-note, it was held that

a clerk employed by a solicitor at offices in the city of London does not "carry on business" there within the meaning of the Mayor's Court Extension Act, 1857 (20 & 21, Vict. c. clvii.), s. 12, so as to be subject to the jurisdiction of the Mayor's Court.

Counsel on behalf of the respondent seeks to distinguish the

Lewis case from the present one but I do not think it is distinguishable. As I read the *Lewis* case the decision was based on the ground that in the said Mayor's Court Extension Act the words "carry on business" must mean carry on his business—not the business of another. Counsel for the respondent apparently argues that in the present case it cannot be the business of the Globe Export Lumber Co. even though it rents the premises and pays the rent as it does according to the case stated. In support of his argument counsel cites the Companies Act, R.S.B.C. 1936, Cap. 42, Sec. 195 (1) (*b*), reading as follows:

(1.) An extra-provincial company not registered as required by this Part shall not be capable:—

(*b*.) Of acquiring or holding land or any interest therein in the Province or registering any title thereto under the "Land Registry Act."

It might be a fair inference of fact from the case stated that the said company is an extraprovincial company but I do not think I would be justified in inferring that it is not registered in British Columbia and so the argument based on such inference must be rejected, even assuming it would be sound if such basis were established. On the case stated before me my conclusion must be, and is, that the business was that of the Globe Export Co. It is, however, also sought to distinguish the *Lewis* case on the ground that in such case the solicitor was in the same office and might be said to have had control of the clerk employed in a different sense from that in which the said Globe Export Co. controlled the said appellant. I think the short answer to this, however, is that the real question with regard to control is, who has control of the business? See *Lewis's* case, *supra*, especially at p. 782, on this phase of the matter. Having found that the business was that of the Globe Export Co., I also find that the said company, and not the said appellant, had control of its business.

Counsel for the respondent, however, further relies upon section 5 (2) and section 68 of the Summary Convictions Act, the relevant parts of which may shortly be said to provide that every person who aids or abets any person in the commission of an offence is a party to and guilty of the offence. Reliance by the respondent upon such sections, upon the hearing of the

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case stated herein, seems to me to amount to contending in effect that even though the Court should hold that an employee, employed, as the appellant here was, in a business which he neither owned in whole or in part nor controlled at all, is not a person carrying on a business within the meaning of said by-law when construed strictly by itself, nevertheless the Court should hold that he is such a person when the by-law is construed along with or in the light of the provisions of the Summary Convictions Act as aforesaid. In support of his contention, counsel on behalf of the respondent refers to *Rex* v. *Harkness* (*No. 1*) (1904), 10 Can. C.C. 193 (see also *Rex* v. *Harkness* (*No. 2*) (1905), 10 O.L.R. 555; 10 Can. C.C. 199) and *Lalonde* v. *Regem* (1908), 15 Can. C.C. 72. As to these cases, however, it must be noted that in the *Harkness* case it is quite apparent that the Court expressly finds that the accused had a guilty knowledge of the character of the transactions and in the *Lalonde* case it is a fair inference that the Court is making a similar finding, whereas in the present case it is not apparent from the case stated that the accused had any knowledge that the Globe Export Co. was carrying on a business or maintaining an office without a licence. It must be noted that the offence of which the appellant was found guilty as aforesaid cannot be said to be simply that of carrying on business but it must be admitted that the charge implied carrying on business without a licence. In my view, therefore, a "guilty knowledge" on the part of the appellant is not shown and the present case is distinguishable from the *Harkness* and *Lalonde* cases, *supra,* and is more like the case of *Reg.* v. *Dowd* (1899), 4 Can. C.C. 170, relied upon by counsel for the appellant. In the *Dowd* case it was held that it had not been shown that Dowd had any guilty knowledge of the intention of the contracting parties to gamble in stocks or merchandise, that *mens rea* was lacking and that there did not appear to have been such an identity of interest between him and the firm for which he was correspondent as to lead to a presumption of such guilty knowledge as to render him liable for aiding and abetting.

Whether the said by-law is construed by itself or in the light of the said sections of the Summary Convictions Act therefore

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my answers to the questions would be the same and are as follows:

(1) The said C. T. Coy is not a person within the meaning of by-law number 1954 of the said city of Vancouver.

(2) The facts stated do not constitute carrying on a business or maintaining an office within the meaning of the said by-law by the said C. T. Coy.

Order accordingly.

Order accordingly.

THE CANADIAN BANK OF COMMERCE v. THE YORKSHIRE & CANADIAN TRUST COMPANY.

C. A.
In Chambers
1938
Feb. 24.

Practice—Courts—Appeal to Supreme Court of Canada—Section 65 of Supreme Court Act, R.S.C. 1927, Cap. 35—Notice of appeal—Application to extend time for—"Special circumstances"—Costs.

On a motion for extension of time to serve the notice of appeal required by section 65 of the Supreme Court Act, the grounds submitted for the extension were that the question raised was one of general public importance and the delay was due to the necessity of receiving instructions from the head office of the bank in Toronto.

Held, in the circumstances that extension of time for service of the notice of appeal should be granted.

Anweiler v. *Grand Trunk Pacific Ry. Co.*, [1928] 3 W.W.R. 13, applied.

MOTIONS by plaintiff for approval of security on appeal to the Supreme Court of Canada and for extension of time for giving notice of appeal. Heard by MARTIN, C.J.B.C. in Chambers at Vancouver on the 24th of February, 1938.

Hossie, K.C., for the motions: This is an appeal from a judgment on a special case under B.C. Rule 389. Judgment was delivered on the 11th of January, 1938, and the time for giving notice of appeal expired on the 31st of January, as it must be given within 20 days after judgment under section 65 of the Supreme Court Act. The question raised on the appeal is of general public importance to banking all over Canada. The delay in giving notice of appeal was due to our having to receive

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1938

THE CANADIAN BANK OF COMMERCE *v.* THE YORKSHIRE & CANADIAN TRUST CO.

instructions from the head office of the bank in Toronto, and there was delay in obtaining the reasons for judgment of the late Mr. Justice McPHILLIPS who wrote the dissenting judgment. No special circumstances are required under section 65 of the Supreme Court Act. The distinction between sections 65 and 66 in this regard should be noted: see *Anweiler* v. *Grand Trunk Pacific Ry. Co.*, [1928] 3 W.W.R. 13.

Clyne, contra: This case is substantially the same as *Rowlands* v. *Canada Southern R.W. Co.* (1889), 13 Pr. 93, a decision of Maclennan, J.A. and affirmed by the Court of Appeal in Ontario. The decision in *Anweiler* v. *Grand Trunk Pacific Ry. Co.*, [1928] 3 W.W.R. 13 was that of a single judge: see also *Fraser* v. *Neas*: *Roddy* v. *Fraser* (1924) 35 B.C. 70. The question is whether it is in the interest of justice to grant the extension. We have not been prejudiced by the delay.

Hossie, in reply: In *Rowlands* v. *Canada Southern R.W. Co.* (1889), 13 Pr. 93, there was no dissenting judge and the delay of over a fortnight was unexplained. The parties were close at hand, but in our case the head office is over 2,000 miles away in another Province, further there was no question of public importance in the *Rowlands* case.

MARTIN, C.J.B.C.: Both motions are allowed. Under the present circumstances I prefer to apply *Anweiler* v. *Grand Trunk Pacific Ry. Co.*, [1928] 3 W.W.R. 13; 23 Sask. L.R. 41, as being closer in its facts to the present one than *Rowlands's* case; this case, indeed, is even stronger than *Anweiler's* case because that was not one of general public importance, as the report of the case at page 35 of 23 Sask. L.R. shows, and this motion for further time was launched before the 20 days expired, which apparently was not done in the *Rowlands* or *Anweiler* cases. The costs of the motion for further time will be to defendant in any event of the appeal; those of the motion to approve will be in the appeal.

Motions allowed.

REX v. ADVENT.

S. C.
1937
Dec. 16.
1938
March 5.

Criminal law—Charge—"Wound and hunt big game"—Conviction—Certiorari—Power to amend conviction and reduce penalty—Summary Convictions Act—R.S.B.C. 1936, Caps. 271 and 108, Sec. 18 (a) (ii).

The accused was convicted on a charge that he "unlawfully did, during the close season, wound and hunt big game, to wit, a doe deer, contrary to section 18, subsection (*a*) (ii) of the Game Act. Upon *certiorari* proceedings:—

Held, that the conviction as set out is for two separate offences and is not within the saving provisions of section 64 of the Summary Convictions Act, but this case is within the terms of section 101 of said Act and the conviction should be amended by striking out one of the charges, *viz.*, that of wounding and by inserting the time and place as set out in the information.

Held, further, that as under said section 101 the Court has like powers to deal with the case as seemed just, as are by section 82 of said Act conferred upon the Court to which an appeal is taken under section 77 thereof, the penalty imposed of $25 and costs should be reduced to $10 and costs.

APPLICATION by way of *certiorari* to set aside a conviction by a justice of the peace on a charge that accused "unlawfully did during the closed season, wound and hunt big game, to wit, a doe deer, contrary to section 18, subsection (*a*) (ii) of the Game Act. Heard by FISHER, J. at Vernon on the 16th of December, 1937.

Kidston, for accused, referred to *Rex* v. *Rozonowski* (1926), 36 B.C. 327 at p. 330; *Selwood* v. *Mount* (1839), 9 Car. & P. 75 at p. 77; *Gunnestad* v. *Price* (1875), L.R. 10 Ex. 65; *Reg.* v. *Edmundson* (1859), 2 El. & El. 77 at p. 83; *Johnson* v. *Needham*, [1909] 1 K.B. 626; *Rex* v. *Jordan* (1925), 35 B.C. 1 at p. 6.

Earle, for the Crown, referred to *Grey* v. *Pearson* (1857), 6 H.L. Cas. 61 at p. 106; *Mattison* v. *Hart* (1854), 14 C.B. 357 at p. 385; *In re Alberta Election Act*, [1921] 3 W.W.R. 867; *Rex* v. *Colpe* (1937), 52 B.C. 280; *Rex* v. *Montemurro*, [1924] 2 W.W.R. 250; *Rex* v. *Hardy* (1932), 46 B.C. 152; *Rex* v. *Gustafson* (1929), 42 B.C. 58; *Rex* v. *Nat Bell Liquors, Ld.*,

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[1922] 2 A.C. 128; *Rex* v. *Chin Yow Hing* (1929), 41 B.C. 214; *Rex* v. *Cox* (1929), *ib.* 9; *Rex* v. *Henderson* (1929), *ib.* 242; *Rex* v. *Denaburg* (1935), 43 Man. L.R. 332; *Rex* v. *Smith and Stewart* (1935), 49 B.C. 550; *Rex* v. *Leschiutta* (1933), 47 B.C. 407; *Rex* v. *Yong Jong* (1936), 50 B.C. 433.

Cur. adv. vult.

5th March, 1938.

FISHER, J.: This is an application by way of *certiorari* proceedings to set aside a conviction made by F. G. Saunders, a justice of the peace for the county of Yale, whereby the applicant, Steve Advent, was convicted "for that the said Steve Advent unlawfully did, during the closed season, wound and hunt Big Game, to wit—a doe deer, contrary to section 18, subsection (*a*) (ii) of the Game Act," R.S.B.C. 1936, Cap. 108, and whereby it was adjudged that the said Steve Advent for the said offence should forfeit and pay the sum of $25 and also pay a certain sum for costs.

It was agreed between counsel that the application should be dealt with as though the writ of *certiorari* had been issued and a return thereto had been made. The application to set aside the conviction is based upon several grounds set out in the notice of motion and, with respect to grounds therein numbered 1, 2, 3, 6 and 8, I have only to say that, upon consideration of the depositions now before me, my decision would be that there was evidence establishing that the offence of unlawfully hunting, as charged, took place on November 21st, 1937, within the jurisdiction of the said justice of the peace. As to the use that may be made of the depositions upon such an application as this I might refer to my own judgment in *Rex* v. *Colpe* (1937), 52 B.C. 280, especially 283 and 286.

Another main ground upon which the application is based is, in effect, that the said conviction is invalid because it is for two separate offences. As to this ground I have first to say that I have come to the conclusion that the conviction as above set out is a conviction for two separate offences and is not within the saving provisions of section 64 of our Summary Convictions Act, R.S.B.C. 1936, Cap. 271, which provides that no convic-

tion shall be held to charge two offences on account of its stating the offence to have been committed in different modes. In this connection reference might be made to the following cases: *Johnson* v. *Needham*, [1909] 1 K.B. 626; *Re Wagner* (1916), 25 Can. C.C. 407; 9 W.W.R. 1000, and *Rex* v. *McManus*, 31 Can. C.C. 180; [1919] 3 W.W.R. 190. As already intimated, however, I think the offence of unlawful hunting, being an infraction of the Game Act, over which the justice has jurisdiction has been committed and the question arises whether or not the conviction is amendable under section 101 of the said Summary Convictions Act. Upon this question I have had written argument from both counsel and it has been of great assistance to me. The wording of section 101 must of course be noted and counsel on behalf of the applicant contends, *inter alia*, that section 101 does not permit an amendment which would reduce the conviction from one for two offences to one for a single offence. I think, however, that the decision in *Rex* v. *Toy Moon* (1911), 21 Man. L.R. 527; 19 Can. C.C. 33; 1 W.W.R. 50, is against this contention. In that case it was held by a majority of the Court that, even on the assumption that a conviction for playing or looking on while others were playing in a common gaming-house was bad, on the ground that the charge is double, and was not within the saving provisions of a section of the Criminal Code, similar to section 64 as aforesaid, the difficulty could be got over, as it was there, by amending the conviction by striking out one of the charges. Walsh, J. in *Rex* v. *McManus, supra*, when dealing with a summary conviction for that the accused did "take, transport or deliver intoxicating liquor into a prohibited area," after referring to the *Toy Moon* case, *supra*, speaks as though he would have amended in the same way by striking out one of the charges, if necessary, if he had considered that the conviction charged more than one offence. The *Toy Moon* decision was also referred to with approval and applied by MACDONALD, J. in *Rex* v. *Richard*, [1920] 2 W.W.R. 14, and *Rex* v. *Leahy* (1920), 28 B.C. 151. It might be noted that in the latter case the Court referred to the construction to be placed upon the words "nature of the offence" in section 1124. In *Rex* v. *Toy Moon* the amendment

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was made under said section 1124 of the Criminal Code which is similar to said section 101 of our Summary Convictions Act. The present case I am satisfied is within the terms of said section 101, and, applying the decision in *Rex* v. *Toy Moon,* I hold that the conviction may and should be amended by striking out one of the charges, *viz.,* that of wounding.

It is further contended by counsel on behalf of the applicant that, even if the conviction is amendable, nevertheless, in the circumstances of this case, an amendment should not be ordered. I cannot see, however, that any injustice will be done by my so ordering. On the contrary, I hold that it is just and proper that the conviction should be amended by striking out the words "wound and." I think it is just and proper also that the conviction should be amended by inserting the time and place as set out in the information. Although the formal conviction does not set out the time and place the information does and there is apparently a memorandum of conviction endorsed thereon in the words "found guilty." I am satisfied that it is only the formal conviction that is defective and that, as already indicated, the evidence in the depositions before me establish that the offence of hunting was committed at the time and place alleged in the information.

With respect to the punishment to be imposed I hold that, under section 101, I have the like powers in all respects to deal with the case as seems just as are by section 82 of the Summary Convictions Act conferred upon the Court to which an appeal is taken under the provisions of section 77. See *Rex* v. *McKenzie* (1907), 12 Can. C.C. 435; *Re Rex* v. *Drolet* (1925), 43 Can. C.C. 310. I have amended the conviction by reducing it to a conviction for hunting only and, after perusal of the depositions as aforesaid, I think that, although the punishment imposed by the justice of the peace was not in excess of that which might lawfully have been imposed, justice will be done if I reduce the penalty, as I do, from the fine of $25 and costs imposed to $10 and costs. I therefore uphold the conviction but it will be amended as I have indicated. Order accordingly; no costs.

Order accordingly.

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Divorce—Decree obtained in the Canton of Neuchatel in Switzerland—Petitioner never domiciled in said Canton—Whether domiciled in Canada—Entry of pleading by respondent in Swiss Court—Authorization of—Acquirement of domicil by choice—Evidence.

Respondent is a native of Switzerland. He has lived in Canada since 1927 and he married the petitioner in Canada in 1929. In 1935 respondent went to Switzerland where he obtained a decree of divorce from the petitioner and immediately returned to his farm in British Columbia. The Swiss Consul in Vancouver, who had sent notice of the proceedings in Switzerland to the petitioner herein, was informed in writing by her that she denied the jurisdiction of the Swiss Court. It was found on the evidence that the Canton of Neuchatel where the decree of divorce was obtained, was never the domicil of the respondent herein and the petitioner herein did not in fact submit to the jurisdiction of the Court thereof.

Held, that even if the entry of a plea and cross-demand in the Courts of Neuchatel on behalf of the petitioner herein had been authorized by her, it would not preclude her from denying the validity of the Swiss decree.

Held, further, that the contention that because the decree granted by the Courts of the Canton of Neuchatel was one which would be recognized as valid by the Courts of the Swiss domicil of origin of the respondent herein it must be recognized as valid here, cannot be upheld, as, in order to sustain the contention it must be established that when he launched the proceedings in Switzerland he had a domicil in one of the Republics of Switzerland. Upon the evidence it must be found that he had abandoned his domicil of origin and acquired a new domicil in Canada which he had during the pendancy of the Swiss proceedings, it was immaterial what view the Courts of his domicil of origin held as to the validity of the Neuchatel decree, it had no extraterritorial effect at any time and must be regarded in Canadian Courts as an invalid decree.

PETITION by a wife for judicial separation and the custody of her child. The facts are set out in the reasons for judgment. Heard by MANSON, J. at Vancouver on the 9th of April, 1938.

J. A. Russell, K.C., and *E. N. R. Elliott*, for petitioner.
Nicholson, and *Sigler*, for respondent.

Cur. adv. vult.

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MANSON, J.: The respondent is a citizen of the Confederacy of Switzerland. He was born in 1905. In May, 1927, he left Switzerland and came to this continent. After spending a very short time in the eastern States he joined his brother at Montreal by arrangement and came west to Red Deer, Alta. He and his brother inherited quite a substantial sum from their father and in November of 1927 they bought, in partnership, a section of land near Red Deer and settled down to farming. The farm had buildings upon it including a house, and was fully equipped. The brothers invested in the farm $23,000.

The respondent met the petitioner in Switzerland in 1924 or 1925. An attachment between them gradually developed and although there was no proposal of marriage before the respondent left Switzerland the respondent corresponded in terms of affection with the petitioner from Red Deer, and he told her of the advantages in Canada for her son by a previous marriage, a boy in his teens, and he pressed her to come to Red Deer and keep house for himself and his brother. She came with her son, George Bard, in January of 1928. She brought from Switzerland all her personal effects. The respondent says she brought eight or ten trunks of personal belongings, carpets, and a complete set of silverware sufficient for twelve persons. One concludes that she came with the expectation of remaining. The petitioner says, and the respondent does not deny, that the respondent took advantage of the situation at the Alberta farm and forced his way into her bedroom. From then on intimate relations between the parties existed. The respondent says that intimate relations existed in Switzerland, but this the petitioner denies, and I accept the petitioner's word.

In the summer of 1928 the respondent went to Pouce Coupe in this Province to spy out the Peace River land. The petitioner says that he was not getting along very well with his brother, but in any event he liked the Peace River and bought a one-half section of land there with a dwelling upon it and invested some $7,500 in the land and equipment. He had undertaken to pay the passage of the petitioner and her son from Switzerland to Alberta—some $1,000, but did not do so.

He apparently suggested to the petitioner before going to the Peace River that she might, if she wished, return to Switzerland but he did not make money available for her to do so. She and her son, with the respondent, moved in August of 1928 to the new home a few miles from Pouce Coupe. On the 9th of November, 1929, the petitioner and the respondent were married at Pouce Coupe. A child, Vivianne, was born on the 25th of that month. Relations between the parties seem to have been satisfactory until some months after the birth of the child. The respondent says that they began to have differences early in 1930, that the petitioner's disposition had changed and that she wanted to run the farm. This, he says, he resented. Unfortunately, the respondent became indebted in quite a substantial sum to the petitioner and money matters became a subject of acrimony between them. On April 30th, 1930, there was a quarrel at the breakfast table, apparently over money matters, and the respondent cut the petitioner's head open with a saucepan. The respondent says he apologized but relations were more or less strained from that time onwards. In the Fall of 1933 the respondent built a seven-roomed house on the Peace River farm. In April of 1934 the respondent underwent an operation for an appendix at the Pouce Coupe hospital. While relations were not friendly, the petitioner went to see him at least once while he was in the hospital. The petitioner in January, 1934, consulted a notary public with respect to promissory notes which her husband had given her in 1929. In February she consulted a solicitor and in April she was again in touch with the local notary public but says she told him not to press matters while her husband was in the hospital. On 12th June a writ was issued by the petitioner against her husband, and on 26th October, 1934, the respondent gave the petitioner in settlement of this action a mortgage upon the Peace River farm for $4,737.24, carrying interest at 6 per cent. per annum. Cohabitation ceased when the husband learned that his wife contemplated taking proceedings on the promissory notes, presumably in April, 1934. The wife moved into the new house in May, 1934, and the husband remained in the old house, or moved back to the old house shortly after-

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wards. In the Fall of 1934 the respondent, without a word to his wife or to his step-son as to his intentions, went to Switzerland and launched divorce proceedings as against his wife in the Courts of the Republic and Canton of Neuchatel, Switzerland, in January of 1935.

Notice of the proceedings was sent by registered mail by the Swiss Consul at Vancouver to the petitioner at Pouce Coupe, and on the advice of her solicitor the Swiss Consul was advised under date of March 22nd, 1935 (Exhibit 6), that the petitioner denied the jurisdiction of the Swiss Court on the ground that petitioner and respondent were domiciled in British Columbia. On 16th May, 1935, the petition in this cause was filed in the Pouce Coupe registry. Petitioner's solicitor left Pouce Coupe shortly afterwards and she subsequently got in touch with a legal representative in Switzerland. In April of 1935 the respondent returned to his farm in the Peace River and operated the same. Later in the year he dismantled the farm as far as he could. He sold the machinery, stock, granaries and furniture—the granaries, it would seem, in breach of the mortgage (Exhibit 3). On September 17th, 1935, the respondent, through his solicitor, wrote the petitioner that she must vacate the farm by noon of the 19th of September, 1935 (Exhibit 14). In that letter the petitioner was advised that the respondent was preparing a suitable house for her at Dawson Creek which would be ready by the end of September, and that in the meantime he had arranged for the accommodation of the petitioner and of the child, Vivianne, at the hotel at Dawson Creek. The respondent stipulated that Vivianne was to be sent to school at once; that the petitioner was not to remove any of the respondent's goods or chattels and that the respondent's goods and chattels had been checked over on the inventory of same made shortly before the respondent had left in the summer of 1935 for Red Deer, Alta. The letter was of a very peremptory character. Petitioner refused to live in Dawson Creek and arrangement was made for her accommodation at Pouce Coupe. The respondent has remained in Canada since his return in April of 1935. On 19th July, 1937, the First Civil Tribunal of the District of Neuchatel, Republic and Canton of Neuchatel,

Switzerland, pronounced a decree of divorce as between the parties and awarded the custody of the child Vivianne to her father with the right to the mother to visit the child four weeks in each year (Exhibits 4 and 4a). On September 1st, 1937, the respondent came to the house of the petitioner and demanded the child. The demand was refused. On the 3rd of September the respondent returned and forcibly took the child away from its mother in his car. The account of the incident given by the respondent is in several material respects not in accord with the account given by the petitioner and by the boy, Robert Becker, who was present at the time. I accept the mother's account of what occurred. After the respondent had picked up the child and started from the house towards the respondent's car, the engine of which he had left running, the petitioner followed him. She stepped on the running-board of the car after the respondent had got into the same and set it in motion, and the respondent pushed her off the running-board. She fell and sustained a broken collar-bone. The respondent did not turn to see what happened to her, but kept going. He was making his way eastward when he was stopped by the police. The child was returned and delivered into the custody of Mr. and Mrs. Best of Tupper Creek, B.C., where she remained until just prior to this trial when the child was, upon my direction, brought to the city of Vancouver and delivered into the custody of the petitioner.

The Confederacy of Switzerland is made up of States or Cantons and its mode of government is patterned after that of the United States of America. Each Canton chooses, controls and pays its own magistracy for ordinary civil trials. The States are sovereign, as are the American States, in non-federal matters. Upon the respondent's evidence he was not born in the Canton of Neuchatel and he never lived there. There was not a tittle of evidence adduced to show that the respondent or his parents had at any time a domicil in the Canton of Neuchatel. There was evidence that the forbears of the respondent had in bygone years prior to the birth of the respondent, registered as bourgeois of Neuchatel. The respondent was described in the Swiss "Demand for Divorce" as "*agronome,*

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originaire de Neuchatel, etabli a Pouce Coupe, Colombie Britannique." This description was translated by the expert at the trial as follows: "agriculturist, native of Neuchatel who took his abode at Pouce Coupe, British Columbia. (*Vide* Exhibits 7 and 7a). In Exhibit 13, the military service book of the respondent, Neuchatel is given as his *"lieu d' origine"*—his place of origin. Neuchatel has been referred to as the "legal home" of the respondent. Be Neuchatel what it may, upon the evidence it is clear beyond doubt that Neuchatel was not at any time the domicil of the respondent.

In *Le Mesurier* v. *Le Mesurier,* [1895] A.C. 517 it was laid down by the Judicial Committee at p. 540 that

"according to international law, the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage."

In the same case, Lord Watson, at p. 528, said:

On the other hand, a decree of divorce *a vinculo,* pronounced by a Court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extraterritorial authority.

Clearly, the Republic of Neuchatel not having been the domicil of the respondent at any time, the Neuchatel decree had and has no extraterritorial authority.

Counsel for the respondent, however, takes the position that the petitioner having pleaded in the Courts of Neuchatel, not only by way of answer but by way of cross-demand, she cannot now be heard in our Courts to deny the validity of the Neuchatel decree. In *Armitage* v. *Attorney-General. Gillig* v. *Gillig,* [1906] P. 135, Gillig was domiciled in the State of New York. His wife took divorce proceedings against him in the State of South Dakota. Gillig was served in England and entered an answer and cross-claim. Sir Gorell Barnes, President of the Probate Division, makes this observation at p. 140:

In a sense, therefore, he submitted to the jurisdiction of the Dakota Court. But, according to the view which we entertain here, that action by him would have been absolutely nugatory unless the Court in Dakota had jurisdiction. There is a passage in Mr. Dicey's book on domicil, where a contrary view is expressed, and where he appears to think that a party, by appearing and pleading, may give the Court jurisdiction (Dicey on Domicil, Ed. 1879, p. 233). That, I think, is not in accordance with the

law of this country. In fact, I myself, have so held, and I dismissed a suit some years ago on the petitioner's own evidence.

In *Harriman* v. *Harriman,* [1909] P. 123, at 131, Cozens-Hardy, M.R. says, "the jurisdiction in matters of divorce is not affected by consent." In *Brown* v. *McInness* (1927), 38 B.C. 324, at 326, MURPHY, J. makes this observation in speaking of a contest by a respondent of a wife's petition for a divorce in the Courts of the State of Washington:

He appeared at the trial and strenuously, but unsuccessfully, resisted the granting of the decree. It is true that, even if not domiciled in Washington in the English legal sense, he could not successfully question the jurisdiction of the Washington Court before that tribunal because the law of Washington allows a wife after separation to acquire a domicil on which divorce proceedings will found by one year's residence in the State. Nor are the facts of his having appeared and contested the suit conclusive that the decree is valid here. Consent cannot give jurisdiction in divorce proceedings according to our law.

In *Hyman* v. *Hyman,* [1929] P. 1, at p. 31 Scrutton, L.J. observes:

When the full Court of Appeal in *Harriman* v. *Harriman,* [1909] P. 123, 131, discussed the effect of estoppel of the parties on the jurisdiction of the Court, Lord Cozens-Hardy said: "The jurisdiction in matters of divorce is not effected by consent. No admission of cruelty or adultery, however formal, can bind the Court. The public interest does not allow parties to obtain divorce by consent, and the analogy of ordinary actions cannot be applied" . . . . The alteration of the *status* of marriage involves considerations far beyond the private agreement of the parties.

Since *Armitage* v. *Attorney-General. Gillig* v. *Gillig, supra,* some of the older authorities must be regarded as overruled, to wit: *Bond* v. *Bond* (1860), 2 Sw. & Tr. 93 (appearance without protest); *Zycklinski* v. *Zycklinski* (1862), *ib.* 420 (application for further particulars by respondent); *Callwell* v. *Callwell and Kennedy* (1860), 3 Sw. & Tr. 259. (*Vide* Halsbury's Laws of England, 2nd Ed., Vol. 6, p. 297, n. (*p*). The entry of a plea in a foreign Court by a respondent in divorce proceedings is, I think, an act of a less formal and binding character than the executing of a contract as between parties. *Hyman* v. *Hyman* went to the House of Lords, and while the facts in that case were not on all fours with the facts in the case at Bar, nevertheless, in my view the reasoning in the Court of Appeal and the House of Lords is apposite. In *Hyman* v. *Hyman,* [1929] A.C. 601 Lord Hailsham at p. 608 says in

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speaking of a separation deed between the husband and wife wherein the wife covenanted not to take proceedings against her husband to allow her alimony or maintenance beyond the provision made for her by the deed, the wife thereafter having obtained a decree for dissolution of the marriage on the ground of her husband's adultery:

> I am prepared to hold that the parties cannot validly make an agreement either (1.) not to invoke the jurisdiction of the Court, or (2.) to control the powers of the Court when its jurisdiction is invoked.

And Lord Buckmaster, at p. 625, observes that the Courts in exercising their power to grant the change of *status* "are in no way bound by the contracts made between the parties." Lord Atkin, at p. 629, after referring to the statutory powers of the Court, and to the fact that they were granted partly in the public interest, observes:

> The powers of the Court in this respect cannot be restricted by the private agreement of the parties . . . .—To apply another maxim, "*Privatorum conventio juri publico non derogat.*" In my view no agreement between the spouses can prevent the Court from considering the question. . . . .

Their Lordships, it is true, were dealing with the question of maintenance after decree of divorce, but what their Lordships unanimously said has, in my view, direct applicability to the facts under consideration in the case at Bar, and when coupled with the very clear language of Sir Gorell Barnes in the *Armitage* case, *supra,* there would seem to be no doubt that the entry of a plea and a cross-demand by the petitioner, in the Courts of Neuchatel, does not preclude her from now questioning the validity of the Neuchatel decree. Counsel for the respondent in this connection referred to *Swaizie* v. *Swaizie* (1899), 31 Ont. 324; *In re Williams and Ancient Order of United Workmen* (1907), 14 O.L.R. 482; *Burpee* v. *Burpee* (1929), 41 B.C. 201; *Carter* v. *Patrick* (1935) 49 B.C. 411; and *In re Graham Estate. Nolan* v. *Graham,* [52 B.C. 481]; [1937] 3 W.W.R. 413. In each of these cases the party seeking redress in the Canadian Courts had been the aggressor, so to speak, in the foreign Court whose jurisdiction he thereafter sought to impugn. These cases are not, in my opinion, to be taken as negativing the very clear principle enunciated in the cases to which I have referred.

I have already referred to the fact that after the petitioner's solicitor left Pouce Coupe she was without a solicitor for a time. She denies that she gave authority to her legal representatives in Switzerland to file a cross-demand for a divorce. She says that although the proceedings in Neuchatel were initiated in January of 1935 and not concluded until July of 1937 she had little or no advice as to the progress in the Courts of Neuchatel. Furthermore she says that her evidence was not taken in the foreign proceedings although she says she did furnish her legal representative there with the respondent's letters to her prior to her coming to Canada. Weighing her evidence together with the very clear letter from her solicitor to the Swiss Consul denying the jurisdiction of the Swiss Courts (Exhibit 6) on the ground of want of domicil, I find as a fact that the petitioner did not submit to the jurisdiction of the Courts of Neuchatel in the matter of the divorce decree which the respondent there sought and obtained. I further note that the representations made in the "Demand in Divorce" in the Neuchatel proceedings by the husband were not all in accord with the facts. In paragraph 16 he says that his wife obtained an acknowledgment of debt in her favour far in excess of the sum he actually owed her. This is scarcely reconcilable with the fact that in settlement of the proceedings taken in this Court by the wife the husband gave to her a mortgage on the Peace River farm for $4,737.24, being the exact amount which the wife claimed as against her husband in paragraph 2 of her statement of claim (Exhibit 3) without costs. Paragraphs 18 and 23 are not in accord with the facts. Legal proceedings were not started until the 12th of June, 1934, some two months after the husband had come out of the hospital.

Counsel for the respondent has still another string to his bow, and submits (1) that the respondent had never lost his domicil of origin in one of the republics of Switzerland; (2) that if the decree of divorce granted by the Courts of the Republic of Neuchatel is one which would be recognized by the Courts of the republic of his domicil, then it would be recognized as a valid decree by the Courts of this Province. At the trial counsel read the affidavit of Gaston Jaccard, a Doctor of Laws of the University of Lausanne, Switzerland. The affidavit was

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presented pursuant to leave granted by the order of my brother, MURPHY, J. of the 23rd of February, 1938. Mr. Jaccard, after assuming that the "legal home" of the respondent was at all material times in the Canton of Neuchatel, testifies:

> In my opinion the judgment pronounced in the action brought by the said Alfred Edward Chatenay against his wife, Elena Amada Chatenay, of which judgment the said exemplification thereof is marked Exhibit "A" to this my affidavit as aforesaid, would be recognized as binding and valid in Switzerland and the marriage between the said parties thereby dissolved and the other relief therein granted binding upon both of the parties to the said action.

Counsel refers to the line of cases of which *Wyllie* v. *Martin* (1931), 44 B.C. 486 is one of the more recent. In order to maintain the proposition for which the respondent contends it must be established that the respondent had, when he launched his proceedings in the Republic of Neuchatel, a domicil in some one of the republics of Switzerland.

Attention has already been drawn to the fact that the respondent at no time had a domicil in the Republic of Neuchatel. He was born on the 30th of March, 1905, and resided in the Republic of Vaud for nineteen years up to and including a part of the year 1924, and thereafter in the Republic of Zurich for one year from the year 1924 up to and including a part of the year 1925, and thereafter in the Republic of Bern for two years from the year 1925 to the middle part of 1927 when he left for Canada. His mother died in 1908 and his father in 1914. After the death of his father the respondent was under the guardianship of his uncle, but whether under a legal guardianship or not, does not appear.

The *indicia* to be looked at in determining domicil are many. One seeks to determine the mind of the person whose domicil is to be determined. The *onus* is upon the party seeking to show that the domicil of origin has been abandoned in favour of a new domicil. I shall note first the *indicia* relied upon to support the view that the domicil of origin of the respondent had not been abandoned. Counsel for the respondent submits that the evidence discloses: (a) that the respondent was born in the Republic of Vaud, Switzerland, that his parents were citizens of Switzerland and that the respondent has not abandoned his Swiss nationality although he has been a resident of

Canada since 1927; (b) that the respondent resided in the Republic of Vaud for the first nineteen years of his life, in the Republic of Zurich for the next year and for the next almost two years in the Republic of Bern; (c) that the respondent had some correspondence from time to time with the Swiss Consul in Canada and that he annually paid through the Swiss Consul his Swiss military tax; (d) that the respondent avowed his intention of returning to Switzerland from time to time and particularly to the witness Bard on two or more occasions; (e) that the respondent had Swiss and French securities in the Republic of Lausanne, Switzerland, that he had a bank account in the bank at Lausanne and that he and his brother had furniture, which they inherited from their parents, in a warehouse at Lausanne; (f) that the respondent had made a will in the Swiss form in 1926 and had not since made another will; (g) that the respondent kept in close touch with relatives and friends in Switzerland and was a subscriber while in Canada to Swiss journals and newspapers; (h) that the respondent, upon his own statement, only invested in farms in Canada with the idea of making money and selling the same and returning to Switzerland.

Counsel for the petitioner, in alleging that the domicil of origin was abandoned, submits: (a) that no one of the *indicia* referred to by counsel for the respondent in itself determines the matter of domicil; (b) that a citizen or subject of one country may have domicil elsewhere; (c) that the respondent had no settled home or any home of his own in Switzerland; (d) that the respondent, upon his own evidence, was never employed in Switzerland; (e) that upon his own statement he and his brother left Switzerland for Canada "to take up land" (*vide* paragraph 6, Exhibit 7a); (f) that in his passport (a renewal passport—Exhibit 16) the respondent is described as an agriculturist which he never was at any time in Switzerland, and that this description is the respondent's own description of himself; (g) that the investment by the respondent and his brother of $23,000 in an established farm in Alberta and in the equipment and working thereof is the strongest possible evidence that the respondent had the mind of remaining in

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Canada; (h) that the respondent's letters to the petitioner in Switzerland in the Fall of 1927 are strong indication that the respondent was inviting the petitioner to make a permanent home in Canada (*vide* extracts from respondent's letters in Exhibit 12a). It is pointed out that there was no suggestion by the respondent in his letters, in so far as they are disclosed, that he and his brother had simply made a speculative investment in a farm in Alberta and intended to return to Switzerland. In the same connection attention is drawn to the fact that the petitioner, acting upon the letters of the respondent, came to Alberta with all her personal effects as if to make a new home and not merely a temporary one. In one of these letters the respondent says: "You are well aware that if we buy a farm after having worked here for six months it is because we realize what it means, and that we are resolved to make a success with the farm"; (i) that the respondent undertook to pay the passage of the petitioner from Switzerland to Alberta; (j) that it is strong evidence that the respondent had definitely abandoned his domicil of origin in that he bought a half section of land in the Peace River area of this Province in 1928 and fully equipped the same and broke the land, investing in all in the Peace River some $7,500, and in that he took up residence in the new home with the petitioner and her son. They moved from Red Deer with all their effects and brought machinery; (k) that the respondent said nothing to the petitioner of an intention to return to Switzerland but on the contrary said he intended remaining in Canada; (l) that it is even stronger evidence that the respondent had the "*animus manendi*" in that in the Fall of 1933 he built a new seven-roomed house on the Peace River farm, and in that he bought an interest in the Dawson Creek Co-operative store, and in that in various documents he refers to himself as "of Pouce Coupe" and as "farmer" and as "agriculturist"; (m) that the respondent told the petitioner that he would never wear a Swiss Army uniform—this, after he had served 77 days in the Swiss Army in or about 1926 or 1927.

In the consideration of the matter it is also to be taken into consideration that the respondent, at his own expense, sent the

son of the petitioner, George Bard, from the home in the Peace River to take a course in an agricultural school at Olds, in the Province of Alberta.

In the determination of the question of domicil all the *indicia* are to be looked at, and all the surrounding circumstances. The whole picture must be viewed in perspective. The bias and motives of the witnesses must be eliminated. At the very beginning one is confronted with the fact that the conduct throughout of the respondent was not as honourable as it might have been, and his representations to the Swiss Court were not entirely truthful. An examination of the portions of the letters written by the respondent to the petitioner in Switzerland discloses an attitude of mind on the part of the respondent that does not commend itself. His expressions of affection are rather guarded. He broaches a business partnership with no suggestion that it is to be merely a temporary one. He does not make clear whether he wants the petitioner as a mistress or as a wife. He allures her by the promise that she will make money and that in five years she will have made quite a sum. He states in evidence that he had an affection for the petitioner in Switzerland, but when he gets her to Canada, thousands of miles removed from her friends, he breaks into her room and establishes a relationship which he does not hesitate to continue. He says he did not know that a child was expected until just before he married the petitioner and he did not marry the petitioner until just before the birth of the child. I do not accept any such protestation of innocence. In his "Demand" in Switzerland he suggests that his wife, "probably anticipating his death and unbeknown to him," (paragraph 18, Exhibit 7a) brought legal proceedings. There was no foundation for any such representation to the Court, and as already pointed out, his statement to the Court that she started a lawsuit while he was in the hospital was not a truthful statement. All these things detract from the weight of the testimony given by the respondent. Of the witness Bard, suffice it to say, that, while he is the son of the petitioner, he is at the present time living with his father in France and it was obvious that he was distinctly friendly to the respondent who had brought him from France

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to give evidence, and I formed the opinion that his evidence was somewhat coloured in the respondent's favour.

The fact that the respondent did not cast off his allegiance to Switzerland is not conclusive. It is common knowledge that there are very many people who have been in Canada a great many years who have not become British subjects and yet there can be no possible doubt that they have acquired a domicil in some Canadian Province. It is of more weight that the respondent retained his Swiss passport and paid annually his Swiss military tax. Whether the tax was trivial or otherwise does not appear. It was given in evidence that a Swiss citizen must either do his annual military service or pay a military tax, and the inference is that if a Swiss citizen does neither, even though in a foreign country, he would be in difficulties if he returned to Switzerland even though it were only on a visit, and it may be that it is still, as it was after the Great War, that a Swiss citizen cannot cast off his Swiss nationality to become a subject of another country without the consent of the Swiss Government. It may well have been that payment of the tax was to protect the respondent's Swiss holdings. In his testimony he gave no specific explanation as to why he paid the tax. While weight is to be attached to payment by respondent of the Swiss military tax, that evidence must be considered coupled with the uncontradicted testimony of the petitioner that the respondent had declared that he would never wear a Swiss uniform. In *Ross* v. *Ross,* [1930] A.C. 1 it was said by Lord Buckmaster at pp. 6-7:

> Declarations as to intention are rightly regarded in determining the question of a change of domicil, but they must be examined by considering the person to whom, the purposes for which, and the circumstances in which they are made and they must further be fortified and carried into effect by conduct and action consistent with the declared expression.

The witness Bard alone of the witnesses (apart from the petitioner) gave evidence with regard to declarations by the respondent of his intention to return to Switzerland. He says that he recalls the respondent declaring his intention to return to Switzerland first in the Fall of 1931 before he went to Olds. He does not say whether by way of a visit or permanently. He states further that he recalls the respondent making a similar

declaration in the Fall of 1933 before the new house was built on the Peace River farm. Again he does not tell us whether there was an avowal on the part of the respondent to return to Switzerland permanently. The carpenter who built the house with the assistance of both husband and wife and the hired men, on cross-examination said he heard no suggestion on the part of the respondent that he intended to return to Switzerland, and yet he was with the parties for about three months. The petitioner says the respondent told her he intended to remain in Canada and, in any event, both of the declarations to Bard were made after the relations between the respondent and his wife had become strained and they are not consistent with the respondent's conduct in building in the Fall of 1933 a new seven-roomed house on his farm, nor are they consistent with the conduct of the respondent in returning to British Columbia after a trip of about three months' duration to Switzerland, nor with the respondent's conduct in remaining in Canada since his return from Switzerland in April of 1935. No great weight is to be attached to the fact that the respondent has securities and a bank account in Switzerland, the original *corpus* of which was inherited from his father, nor is great weight to be attached to the fact that he has a will in the Swiss form made in 1926. Had he made a will in the Swiss form in 1935 when in Switzerland or in the Swiss form while in Canada, the fact might have been of considerable weight. The fact that he kept in close touch with relatives and friends in Switzerland is inconsequential as is also the fact that he was a subscriber while in Canada to Swiss journals and newspapers. Thousands of citizens who have migrated from the British Isles to Canada and have acquired domicil in Canada continue to subscribe for the "London Times," the "Manchester Guardian" or other Old Country journals. Nor do I attach weight to the respondent's assertion now that in buying with his brother the farm in Alberta and in his subsequent purchase of a farm in the Peace River area he was merely making financial investments. Had evidence been led to show that at the time of the purchase of these farms the respondent had unequivocally declared that they were merely speculative investments and

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that he had no intention of remaining permanently in Canada, that evidence would have carried weight, but *ex post facto* statements carry little weight. He himself said to the Swiss Court in his demand that he came to Canada "to take up land." In his "Demand" this phrase is used on the very first paragraph: "Who took his abode at Pouce Coupe, British Columbia." One of the very strongest indications of the *animus manendi* is the taking up of land in a new country—the establishment of a home. Here we have the respondent and his brother taking up a big improved farm at Red Deer, farming themselves for almost eleven consecutive years, and mortgaging the Red Deer farm for $7,500. We have the respondent setting up a new home in the Peace River block, farming the one-half section himself, breaking the soil, putting in crops, building a new and a big house. There is the fact also that the respondent married at Pouce Coupe. These are *indicia* which, it seems to me, I cannot ignore. The fact that the respondent sent the boy, Bard, to an agricultural school to train him as an agriculturist is significant. He was obviously not training him for farming in Switzerland but for farming in Canada. The boy had been with him on the farm for four years or almost so. The fact that the respondent went to Switzerland knowing full well, as he admits, that he had no ground for a divorce in British Columbia from his wife, and the fact that he returned immediately after launching the proceedings suggests that his motive in going to Switzerland was to get a divorce and not to return to Switzerland permanently. There is indication of what Lord Merrivale in *H.* v. *H.*, [1928] P. 206 at p. 214 referred to as a "proved desire to avoid a jurisdiction." The fact that he returned to Canada in April of 1935, and has been here since, is significant. The fact that he induced the petitioner to come to Alberta with all her personal effects weighs against his contention that he had at that time the intent to return to Switzerland. Taking all the evidence into account, bearing in mind the unveracity of the respondent on occasions, and his bitterness, and the whole of the surrounding circumstances and all the *indicia,* I can arrive at no other conclusion than that the respondent abandoned his domicil of origin and acquired a new

domicil in Canada which latter domicil he had during the pendency of the Swiss proceedings and I so find as a fact. In these circumstances, the respondent not having had a domicil in any of the republics of Switzerland at the time he launched proceedings in Switzerland, it is immaterial what view the Courts of his domicil of origin held or hold with regard to the validity of the Neuchatel decree. In my opinion the Neuchatel decree had no extraterritorial effect at any time and it must be regarded in our Courts as an invalid decree. To again quote Lord Merrivale in *H.* v. *H.* (*supra*) at p. 212: ". . . independent authority to decree divorce cannot, consistently with English law, co-exist at the same time in two sovereign States." In *Doucet* v. *Geoghegan* (1878), 9 Ch.D. 441 it was held upon facts not dissimilar to those in the case at Bar, though, as it seems to me, not so clear, that there was abandonment of the domicil of origin and the acquisition of an English domicil.

Now, as to the claim of the petitioner for a decree of judicial separation. She founds this on several grounds, the chief of which is the allegation of cruelty. The respondent's "Demand in Divorce" in the Swiss proceedings (paragraph 12 *et seq.*) makes clear the respondent's view that resumption of marital relations between the parties is impossible. I quote paragraph 15 of the "Demand": "However, on several occasions violent and painful scenes took place," and upon the respondent's own evidence at the trial I am entirely satisfied that there was such cruelty on his part as to justify the decree asked for. The evidence of the petitioner and of several of the other witnesses confirms me strongly in that view and the decree is pronounced.

The petitioner asks the custody of the child, Vivianne. The child is nine years of age. She is not interested in the quarrel as between her parents. Counsel for the petitioner tendered the child as a witness. I demurred, as I could see nothing to be gained by dragging the child into the matter. I am satisfied that the child has every affection for both parents and it would be regrettable if anything were done that might interfere with her attitude in that respect. The respondent sought to show that the mother was not a good mother to her child. Stress was laid upon the fact that at the Peace River farm the mother

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objected to the child going out into the fields and about machinery with her father. In my view the mother was right. The child broke her leg twice—once in the barn and once while with the hired man on a wagon. The child was in Court during a good deal of the trial. Her attachment to her mother was obvious, and observing the demeanour of the mother I have no doubt that the attachment was reciprocated. It is fit and proper that a little girl of nine should be in the custody of her mother, and it is so ordered. The father will have liberty to visit the child on one convenient day of each week. The child will not be removed from the jurisdiction without leave. It is to be hoped the parents will both bear in mind that the welfare of the child is important, that they will remember that they brought this child into the world and that their unfortunate differences are something that should be buried deep and be unheard of again for the sake of the child.

Costs to the petitioner under column 4, Appendix N, as in *Wyllie* v. *Martin* (*supra*), and see also *Bourgoin* v. *Bourgoin* (1930), 42 B.C. 349.

Petition granted.

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May 4, 6.

STROMME v. WOODWARD STORES LIMITED AND SWEET SIXTEEN LIMITED.

Negligence—Damages—Window-cleaner falls from window to street—Injures passerby—Liability—Inevitable accident—Workmen's Compensation Act, R.S.B.C. 1936, Cap. 312—Applicability.

Rel'd to
Le MacIsaac v Beretanos
25 BCR (3d) 610
(BC Prov. Ct)

Woodward Stores Limited, who owned the Selkirk Block on Hastings Street West in Vancouver, rented the ground floor and the storey immediately above to the defendant "Sweet Sixteen." "Sweet Sixteen" sub-leased the upper story to one Le Fohn, who carried on a beauty parlour. Le Fohn employed a window-cleaner to clean three windows facing on the street. The window-cleaner went through one window and walked along a ledge about 18 inches wide and somewhat sloping, to reach the other windows. He finished cleaning the windows, but on the way back to the first window he fell, and striking the plaintiff, a passerby, injured him. In an action for damages:—

Held, that the *onus* is on the plaintiff, and as the evidence does not dis-

close that the property was in a state of disrepair or that it was in a dangerous condition, the action fails.

Held, further, that the Workmen's Compensation Act and the Accident Prevention Regulations have no applicability to the facts here. They were passed for the protection of a certain class of workmen.

ACTION for damages for injuries sustained by the plaintiff owing to a window-cleaner falling from a window and striking him while passing by on the street. Tried by MORRISON, C.J.S.C. at Vancouver on the 4th of May, 1938.

McAlpine, K.C., and *W. H. Campbell*, for plaintiff.

Bull, K.C., and *Merritt*, for defendant Woodward Stores Limited.

L. St. M. Du Moulin, Soskin, and *R. T. Du Moulin*, for defendant Sweet Sixteen Limited.

Cur. adv. vult.

6th May, 1938.

MORRISON, C.J.S.C.: This is a case of inevitable accident. "An 'accident' is used in the popular and ordinary sense and means a mishap or untoward event not expected or designed."

The Selkirk Block, from the ledge of which the man fell into the street below and injured the plaintiff, a passerby, is owned by the defendant Woodward Stores Ltd., who had rented the ground floor No. 137 Hastings Street West and all the rooms or portions of the upper storey immediately above the store to the defendant "Sweet Sixteen." The defendant "Sweet Sixteen" in turn rented the said upper portion to one Le Fohn under lease from month to month, who carried on a Beauty Parlour under the name of "Los Angeles Permanent Wave Shop," and who was the occupant and was in possession and control at the time material to the issue herein.

On the 16th of March, 1937, these occupants employed a window-cleaner to clean the three windows of this shop. He went out through one window, walked along a ledge about eighteen inches wide and somewhat sloping and had finished cleaning the three windows when on his return, and when about to come back through the window through which he had gone out on the ledge, he fell into the street and injured the plaintiff.

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The plaintiff now claims damages for the injuries thus sustained through the alleged negligence of the defendant and especially invokes the Workmen's Compensation Act, R.S.B.C. 1924, Cap. 278 and amending Acts and R.S.B.C. 1936, Cap. 312 and the Accident Prevention Regulations passed and issued thereunder, and claims that the building should have been furnished with safety devices for the protection of window-cleaners as provided by the regulations and that the building was therefore in a dangerous state.

I find that these statutory enactments have no applicability to the facts above stated. They were passed for the protection of a certain class of workmen. As the case was left one must go through a process of guesswork to find how the man came to fall. He himself says he does not know. One must not, be the guessing ever so accurate, proceed in that way to adjudicate. The *onus* is on the plaintiff to prove the facts explicitly. I cannot from the evidence find that the property was in a state of disrepair or that it was in a dangerous condition. The action, therefore, fails.

Action dismissed.

DOBROSKI v. MACKAY.

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1938

Mar. 22, 29.

Motor-vehicles—Negligence—Making right turn at intersection—Child crossing intersection—Contributory negligence.

The defendant driving his car westerly on Georgia Street in Vancouver turned to his right to go north on Hornby Street at about 5.30 p.m. on a dark winter day. As he turned into Hornby Street at from ten to twelve miles an hour, passing through a space which had been opened up for him by pedestrians, the infant plaintiff, nine years old, who was going westerly on the north side of Georgia Street, ran out into the open space just in front of the oncoming car, and was struck and injured. The defendant had not sounded his horn or given any other warning.

Held, that in the circumstances the defendant was negligent in going at too high a speed and not making it known to the infant plaintiff that he was turning through the pedestrian traffic on the north side of Georgia Street. The plaintiff was also negligent and both were equally guilty of negligence contributing to the accident.

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ACTION for damages for injuries sustained by the infant plaintiff resulting from the defendant running into her with his automobile at a street crossing. The facts are set out in the reasons for judgment. Tried by McDONALD, J. at Vancouver on the 22nd of March, 1938.

P. D. Murphy, for plaintiff.
L. St.M. Du Moulin, for defendant.

Cur. adv. vult.

29th March, 1938.

McDONALD, J.: The infant plaintiff, an intelligent girl of nine years, who is accustomed to the traffic on the streets in Vancouver, was proceeding westerly with her sister on the northerly sidewalk on Georgia Street at 5.30 on the afternoon of a dark winter day. The pedestrian traffic at the time was heavy and there was also a considerable amount of motor traffic. The little girl, being anxious to reach her home, was skipping along ahead of her sister. Many pedestrians were passing easterly and westerly and crossing Hornby Street at its intersection with Georgia Street. The defendant was driving his motor-car westerly on Georgia Street. When the infant plaintiff reached the Hornby Street kerb, she stopped and she saw cars following her along Georgia Street but she did not know that the defendant's car was about to turn north on Hornby Street. The defendant did not sound his horn or give any warning. As he turned into Hornby Street he says he was going about 10 or 12 miles an hour, passing through a space which had been opened up for him by pedestrians. The little girl, not noticing that defendant had made the turn, ran out from the kerb and was struck down and injured. In *Johnson* v. *Elliott* (1928), 40 B.C. 130, MACDONALD, C.J.A. made use of this expression (p. 133):

> When a pedestrian is crossing a street he expects, and reasonably so, that drivers behind him will take care not to injure him; will not quarter into him. They can see; he cannot, without turning around.

In that case judgment was given for the pedestrian and the judgment was upheld by the Supreme Court of Canada ([1928] S.C.R. 408). The case is to be distinguished on the ground

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that in the present case, if the infant plaintiff had hesitated a moment longer before leaving the kerb, the accident would not have happened. On the other hand, the case is similar in many respects and I think the defendant must be held not to have exercised the due care which was required of him under the circumstances, in that he failed to make it known to the infant plaintiff that he was turning to the north, cutting through the pedestrian traffic and, further, I think he was negligent in going at too high a rate of speed. I think under all the circumstances he ought to have done what MACDONALD, J. required of the defendant in *James* v. *Piegl* (1932), 46 B.C. 285 at p. 289, *viz.*, "that he would slacken his speed and have his car under such control that it could be stopped almost instantly." As a matter of fact the danger to the pedestrian was as great when the driver's speed was at ten or twelve miles an hour as it would have been at 20 miles an hour because the driver himself says that at the speed at which he was travelling he could not stop in less than ten or twelve feet. Having regard to all the circumstances, the accident that happened was no more unlikely to happen at the speed at which the defendant was travelling than if he had been going at a higher speed. I think he was negligent on two grounds, *viz.*, that he failed to give the pedestrian due warning of his intention to turn and that he was proceeding at too high a rate of speed. I have found it very difficult in these cases, where both plaintiff and defendant are at fault, to say just in what precise proportion their respective faults contributed to the accident. In this case I am unable to reach any better conclusion than that both were equally guilty of negligence contributing to the accident. The plaintiff, fortunately, has made a good recovery from a broken leg. I assess her general damages at $350. The special damages recoverable by her mother amount to $486.10. Each of the plaintiffs will recover one-half of the amount of the damages assessed. Costs will be taxed under column 1 of Appendix "N."

SPENCER v. DEANE.

C. C.
In Chambers
1938
April 29;
May 4.

Practice—Parties—Counterclaim—Joinder of third party as defendant to counterclaim—Relief claimed against third party an alternative one—County Court Rules, Order V., r. 23.

Not Agreed with Jones v. Schespernisse. 4 WWR (NS) 1.

The plaintiff's car while being driven by his wife collided with the defendant's car and he brought an action against the defendant for damages. The defendant disputed liability and counterclaimed alleging that the plaintiff's wife was the plaintiff's servant and agent and engaged in the course of her duties as such and the collision was the result of her negligence. The defendant claimed against both the plaintiff and his wife the sum of $491.42 being the cost of repairing his car and against the wife contribution under the Contributory Negligence Act for any damages and costs which may be awarded to the plaintiff against the defendant. An application by the defendant under Order V., r. 23, of the County Court Rules, to have the plaintiff's wife made a defendant to his counterclaim was dismissed.

APPLICATION by defendant under Order V., r. 23 of the County Court Rules to have the plaintiff's wife made a defendant to his counterclaim as the counterclaim raises questions between the defendant and the plaintiff along with the plaintiff's wife. Heard by SHANDLEY, Co. J. in Chambers at Victoria on the 29th of April, 1938.

H. W. Davey, for the application, referred to *Smith* v. *Buskell,* [1919] 2 K.B. 362.

Manzer, contra, referred to *Times Cold Storage Company* v. *Lowther & Blankley,* [1911] 2 K.B. 100; *Macklin* v. *Young,* [1933] S.C.R. 603; *Anderson* v. *MacKenzie and Boultbee,* [1934] 1 W.W.R. 303.

Cur. adv. vult.

4th May, 1938.

SHANDLEY, Co. J.: The plaintiff's car and the defendant's car collided whilst the plaintiff's car was being driven by his wife. The plaintiff sued the defendant for damages. The defendant disputed his liability and filed a counterclaim alleging the wife of the plaintiff was the plaintiff's servant and agent in the premises and engaged in the course of her duties as such, and that the collision was caused by the negligence of the

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plaintiff's wife and that defendant's car was damaged and he incurred expenses in the repair amounting to $491.42. In the prayer of the counterclaim the defendant claims against both the plaintiff and his wife the said sum of $491.42 and as against the wife contribution under the Contributory Negligence Act for any damages and costs which may be awarded to the plaintiff against the defendant.

The defendant now makes application under Order V., r. 23, of the County Court Rules, to have the plaintiff's wife made a defendant to his counterclaim on the ground that his counterclaim raises questions between the defendant and the plaintiff along with the plaintiff's wife.

I think this case is distinguishable from the decision in *Smith* v. *Buskell*, [1919] 2 K.B. 362. In that case the plaintiff sold to the defendant jelly cuttings to be dispatched by the plaintiff to be packed well and securely and in such a manner as to enable them to withstand the ordinary risks attaching to a journey by rail, which the defendant in his defence alleged plaintiff failed to do. The defendant also counterclaimed for damages alleging that the railway company in breach of its duty as carriers failed to take any proper steps to prevent the jelly cuttings being exposed to the weather, but despatched the same in open trucks and allowed the same to stand in water during the course of their transit. The relief claimed against the seller and the relief claimed against the railway company overlapped and therefore the defendant's claim was joint and not alternative.

In this case there is no overlapping. The defendant cannot succeed against the plaintiff if it is held that the wife of the latter was not his agent: in that event the defendant's claim against the wife is an alternative one.

It was decided in the case of *Times Cold Storage Company* v. *Lowther & Blankley*, [1911] 2 K.B. 100, that under the rule a defendant cannot join a person as a defendant to a counterclaim against whom he alleges that he has got an alternative cause of action, *i.e.*, a cause of action in the event of his failing to succeed against the original plaintiff.

Now as regards the defendant's claim against the plaintiff's wife for contribution under the Contributory Negligence Act,

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as the plaintiff's wife cannot be made a defendant to the counter-claim then the question of the defendant's claim for contribution under the Contributory Negligence Act necessarily cannot be considered in this action.

The application is dismissed with costs.

Application dismissed.

REX v. MIKET.

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1938
March 28;
April 12.

Agreed with R. v. Cohen 71 C.C.C. 142

Distd Patterson v. R. 67 D.L.R. (2d) 82 (S.C.C.) + [1968] 2 C.C.C. 247

Criminal law—Bawdy-houses—Accused rents room in house—Carries on business of common prostitute there—Charged with keeping a common bawdy-house—Criminal Code, Sec. 225.

The accused occupied a room in a rooming-house, where she had been living some months. The rear of the rooming-house was directly opposite the rear door of a beer parlour. She solicited men in the beer parlour and took them to her room in the rooming-house for the purposes of prostitution. A charge against her under section 225 of the Criminal Code of keeping a common bawdy-house was dismissed.

Held, on appeal, reversing the decision of police magistrate Wood, that this case comes within the provisions of section 225 of the Criminal Code, the judgment of acquittal is set aside and a new trial ordered.

Rex v. *Richards*, [1938] 2 D.L.R. 480; [1938] O.W.N. 139, followed.

Rex v. *Sorvari* [1938] O.R. 9; [1938] 1 D.L.R. 308 not followed.

APPEAL by the Crown from the decision of police magistrate Wood, Vancouver, of the 22nd of March, 1938, dismissing a charge against the accused of unlawfully keeping a disorderly house, to wit, a common bawdy-house in Vancouver. The accused had a room in a rooming-house at number 83, Pender Street West in Vancouver. She solicited men in a beer parlour opposite the rooming-house and took them to her room. It was held by the learned magistrate that a woman living alone in her house or room and receiving men for the purposes of acts of prostitution with herself alone is not guilty of keeping a bawdy-house, following *Rex* v. *Mannix* (1905), 10 Can. C.C. 150.

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The appeal was argued at Vancouver on the 28th of March, 1938, before MARTIN, C.J.B.C., MCQUARRIE and SLOAN, JJ.A.

Orr, for appellant: This is a charge under section 225 of the Criminal Code. The learned magistrate followed the case of *Rex* v. *Mannix* (1905), 10 Can. C.C. 150. The section was amended in 1907 by adding in all the words after "prostitution" that are in the section as it is now. In spite of the amendment a woman in her home cannot be convicted of keeping a bawdy-house, if the Ontario case of *Rex* v. *Sorvari,* [1938] O.R. 9, is followed. The section as it reads now provides for a case of this kind, and the submission is that the Ontario case should not be followed: see also *Rex* v. *Sands* (1915), 25 Can. C.C. 120; *Bedard* v. *Regem* (1916), 26 Can. C.C. 99 at p. 108.

Murdock, for respondent, referred to *Rex* v. *Thomas,* [1938] 1 D.L.R. 127.

Cur. adv. vult.

12th April, 1938.

MARTIN, C.J.B.C.: We are all of opinion that this appeal should be allowed, the judgment of acquittal set aside, and a new trial ordered. It was only out of respect to a Court of co-ordinate jurisdiction, the Ontario Court of Appeal, that we thought it well to reserve our judgment in order to consider the decision of that Court in the case of *Rex* v. *Sorvari* (1937), 69 Can. C.C. 281; [1938] 1 D.L.R. 308, and the result is that, for the reasons set out by our brother SLOAN, in which the changes in legislation and relevant decisions thereupon are exactly traced, we find ourselves unable, with every respect, to follow it. If any justification be needed for our adoption of this course, it will be found in the very recent judgment (of the 7th instant) of the said Ontario Court in *Rex* v. *Richards,* [1938] 2 D.L.R. 480; [1938] O.W.N. 139, wherein doubt is cast upon the soundness of its said decision in *Sorvari's* case.

MCQUARRIE, J.A.: I would allow the appeal.

SLOAN, J.A.: This is an appeal by the Attorney-General from the dismissal by police magistrate Wood for the City of Van-

couver, of a charge against one Babe Miket for that she "did unlawfully keep a disorderly house, to wit, a common bawdy-house . . . ."

The appeal involves consideration of section 225 of the Criminal Code and the appellant submits that the learned magistrate erred in deciding that the said section "did not apply to the case of a place kept by one woman as her home as well as a place for purposes of prostitution."

The facts are not in dispute and may be summarized as follows: The respondent occupied a room in a rooming-house, the rear of which is directly opposite the rear door of a beer parlour. She had been living in this room for some months and stated to police officers that it was her practice—in fact, her only means of living—to solicit men in the beer parlour and take them to her room for the purposes of prostitution.

On the night of her arrest two police officers visited her room at about 11 o'clock and found a man with her. She stated she had "picked him up" in the beer parlour, and that she had charged him $2 to have intercourse with her. The man admitted that such were the facts.

The respondent occupied the room as her home and no other girls were with her.

The learned magistrate dismissed the charge against the respondent following, with hesitation, the decision in *Rex* v. *Sorvari* (1937), 69 Can. C.C. 281.

In my view, with the greatest deference, a consideration of section 225 and its legislative history, leads but to one interpretation and I regret that the conclusion I have reached is not in accordance with the decision in *Sorvari's* case.

The respondent was charged under section 229, the relevant wording of which is as follows:

> Everyone is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy-house . . . .

Section 225 defines a common bawdy-house, and that section as enacted by R.S.C. 1906, Cap. 146, read as follows:

> A common bawdy-house is a house, room, set of rooms or place of any kind kept for purposes of prostitution.

The section in question was in this form when a series of cases

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decided that a woman living by herself in a house cannot be convicted of keeping it as a common bawdy-house unless other women than herself resort to it for the purpose of acts of prostitution—see *e.g., Rex* v. *Mannix* (1905), 10 Can. C.C. 150.

In 1907 (Can. Stats. 1907, Cap. 8, Sec. 2) the section was amended to read (italics are mine):

> A common bawdy-house is a house, room, set of rooms or place of any kind kept for purposes of prostitution *or occupied or resorted to by one or more persons for such purposes.*

I cannot escape the conclusion that the intention and effect of adding the italicized words to the section was to meet the difficulty law-enforcement officers had in securing convictions against prostitutes who lived singly. That the amendment succeeded in its purpose is clear from a number of cases: see *e.g., Rex* v. *Mercier* (1908), 13 Can. C.C. 475; *Bedard* v. *Regem* (1916), 26 Can. C.C. 99 at 108, and see Tremeear's Criminal Code, 4th Ed., at p. 255.

In 1917 (Can. Stats. 1917, Cap. 14, Sec. 3) the section was again amended to read as follows (its present form):

> A common bawdy-house is a house, room, set of rooms or place of any kind kept for purposes of prostitution *or for the practice of acts of indecency,* or occupied or resorted to by one or more persons for such purposes.

Italics are mine.

The added italicized words are not material and have no application to the case before us. The apposite wording of the section is to my mind as follows:

> A common bawdy-house is a . . . room . . . occupied or resorted to by one person(s) for such purposes (*i.e.,* purposes of prostitution).

There is no doubt in my mind but that the respondent occupied or resorted to her room not for the act of committing fornication but for the purposes of prostitution [*Theirlynck* v. *Regem* (1931), 56 Can. C.C. 156], and when once that is proved then in my opinion she is guilty of the offence charged; that is to say she is keeping a common bawdy-house within the meaning of the present statutory definition of such a place.

I would therefore allow the appeal.

Appeal allowed.

Solicitor for appellant: *Oscar Orr.*

Solicitor for respondent: *W. J. Murdock.*

ANDERSON v. CALEDONIAN INSURANCE COMPANY.

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Mar. 11, 14; *April* 12.

Insurance, accident—Wife owner of car—Name of husband inserted in policy by mistake—Effect of—Driver of car without licence—Breach of statutory condition—Insurer's knowledge—Continuation of defence in action against insured—Waiver.

The plaintiff held a policy of insurance to indemnify her against liability for injury to others by her car. The policy ran out in July, 1935, and her husband applied to the agents of the defendant company for a like policy to cover said car. The agents sent him an application and he signed it without noticing that his name appeared as applicant and owner of the car instead of the name of his wife, and the policy was duly issued in his name. On the 5th of November, 1935, while the car was driven by one Hanbury, a boy of seventeen years of age, it struck and injured one Hughes. The next day plaintiff's husband notified the defendant's agents in writing of the accident, that Hanbury, a boy of seventeen years was driving the car, and that he had no licence. On February 19th, 1936, Hughes brought action against the plaintiff and Hanbury for damages. The defendant company was immediately notified of the action and of the defence that in fact a boy named Kennedy was entrusted with the car and not Hanbury, but Kennedy had allowed Hanbury to drive the car after they had left the plaintiff's house. The defendant company then undertook the defence of the action and carried through to judgment, but the trial judge declined to accept plaintiff's evidence and found she had entrusted the car to Hanbury and gave judgment in favour of Hughes. The plaintiff then brought this action that the defendant company indemnify her against the Hughes judgment. Two defences were raised, first that the policy was not issued in her name and there was no contract between herself and the defendant company; secondly, there was breach of a statutory condition in that Hanbury who drove the car, had no driver's licence. It was held on the trial that the case must be decided on the same basis as it would be had the plaintiff been named in the policy, and that if it were necessary to do so the evidence establishes estoppel. Further, that the defendant had full knowledge of the breach of the statutory condition and elected to proceed with the defence, thereby waiving any right to dispute liability on this ground.

Held, on appeal, reversing the decision of MURPHY, J., that as it was not until the trial judge in the former action found that the car had been entrusted to Hanbury that the insurance company knew that to have been the fact, the company did not undertake the defence of the first action with full knowledge of the breach of the statutory condition and therefore did not, by undertaking the defence, waive the right to set up said breach as a ground for repudiating liability under the policy.

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APPEAL by defendant from the decision of MURPHY, J. of the 14th of January, 1938 (reported, 52 B.C. 370), in an action for specific performance of an agreement between the plaintiff and defendant, whereby the defendant agreed to indemnify the plaintiff against liability for loss or damage arising from the ownership, use or operation of the plaintiff's automobile. The plaintiff previously had a policy of insurance to indemnify her from liability for injury to others, that ran out in July, 1935, and her husband applied to the agents of the defendant company for a like policy to cover the car. The agents sent him an application and he signed it without noticing that his name appeared as applicant and owner of the car instead of the name of his wife, and the policy was issued in his name. On the 5th of November, 1935, while the car was driven by one Hanbury, a boy of seventeen years of age, it struck and injured one Hughes. The next day the plaintiff's husband notified the defendant's agents in writing of the accident, that Hanbury, a boy of seventeen years was driving the car, and that he had no licence. On February 19th, 1936, Hughes brought action against the plaintiff and Hanbury for injuries sustained. The defendant company was immediately notified of the action and of the defence that in fact a boy named Kennedy was entrusted with the car and not Hanbury, but Hanbury was allowed to drive the car by Kennedy after they had left the plaintiff's house. The defendant company then undertook the defence of the action and carried through to judgment, but the trial judge declined to accept plaintiff's evidence and found she had entrusted the car to Hanbury, and gave judgment in favour of Hughes against both Hanbury and herself. The plaintiff then brought this action that the defendant company indemnify her against the Hughes judgment under the policy.

The appeal was argued at Vancouver on the 11th and 14th of March, 1938, before MARTIN, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

McAlpine, K.C., for appellant: The company conducted the first case. The youth Hanbury drove the car, and it turned out

he had no licence. You cannot repudiate a contract until you know there has been a breach: see *Morrison* v. *The Universal Marine Insurance Co.* (1873), L.R. 8 Ex. 197 at pp. 203 and 205; *Scarf* v. *Jardine* (1882), 7 App. Cas. 345; *Cadeddu* v. *Mount Royal Assurance Co.* (1929), 41 B.C. 110; *Lindal* v. *U.S. Fidelity & Guaranty Co.*, [1933] 2 D.L.R. 148 at p. 159. The youths Kennedy and Hanbury were not called as witnesses because they could not be relied upon and the plaintiff agreed that this was so.

Clyne (*D. K. Macrae,* with him), for respondent: An offer of settlement was made by Hughes but we were not informed of this. We were prejudiced by an offer made that was not submitted to us. The defendant is estopped from denying liability by reason of the breach of condition as they knew of Hanbury not having a licence, as appears in Mr. Anderson's letter to the company on November 16th, 1935: see *Western Canada Accident and Guarantee Insurance Company* v. *Parrott* (1921), 61 S.C.R. 595 at p. 601; *Abram Steamship Co.* v. *Westville Shipping Co.*, [1923] A.C. 773. It was a breach of duty by the appellant in allowing its duty to defend to conflict with its own interest, as the insurance company was interested in showing that Mrs. Anderson gave the car to Hanbury which would involve a condition in the policy. The company cannot put itself in a dual position: see *Beattie* v. *U.S. Fidelity & Guaranty Co. Lindal* v. *U.S. Fidelity & Guaranty Co.*, [1933] 1 W.W.R. 334 at p. 347, and on appeal [1934] S.C.R. 33. An offer of settlement was made by counsel for Hughes during the Hughes trial, but this was not communicated to Mrs. Anderson who was given no chance to accept it: see *MacLure* v. *The General Accident Assurance Co. of Canada* (1925), 35 B.C. 33. The company's counsel must convey the offer to Mrs. Anderson. She is entitled to an opportunity to accept and they were guilty of a breach of duty: see *Sill* v. *Thomas* (1839), 8 Car. & P. 762; *Groom* v. *Crocker,* [1937] 3 All E.R. 844 at p. 848; Halsbury's Laws of England, 2nd Ed., Vol. 1, p. 249, sec. 424.

McAlpine, in reply, referred to Halsbury's Laws of England, 2nd Ed., Vol. 2, pp. 520 and 524; *Swinfen* v. *Lord Chelmsford* (1860), 29 L.J. Ex. 382 at pp. 386-7; *Sourendra Nath Mitra* v.

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Srimati Tarubala Dasi (1930), 46 T.L.R. 191; *C. Schmidt & Sons Brewing Co.* v. *Travellers' Ins. Co.* (1914), 90 Atl. 653; *Auerbach* v. *Maryland Casualty Co.* (1923), 140 N.E. 577; *Rogan* v. *Prudhomme,* [1925] 1 D.L.R. 347.

Cur. adv. vult.

12th April, 1938.

MARTIN, C.J.B.C.: I would allow the appeal for the reasons given by my brother SLOAN.

SLOAN, J.A.: This is an appeal from a judgment of MURPHY, J., by the appellant company (defendant below) in an action for (*inter alia*) specific performance of a contract of insurance.

It appears that the respondent Margaret S. Anderson, wife of Stanley J. Anderson, in July, 1935, was the owner of a Pontiac automobile, and in that month the appellant company issued a policy of insurance whereby it undertook to indemnify Stanley J. Anderson against liability imposed by law upon the said Anderson for loss or damage arising from the ownership, use, or operation of the said automobile. It is now common ground between the parties that the respondent Mrs. Anderson is to be regarded as the insured to all intent and purpose as if the policy of insurance had issued to her.

On the 15th of November, 1935, whilst the car in question was being driven by one George K. Hanbury, a youth of seventeen, it struck and injured a man named Hughes. Hanbury did not have a driver's licence.

On the 16th of November, 1935, Stanley J. Anderson, in reporting the accident, wrote to the agents of the appellant in part as follows:

> . . . . I may say that my daughter was being taken to a dance by a young man called James Kennedy, who was entrusted with the car, but in stopping to pick up another couple who were not quite ready, he allowed young George Hanbury to go on with the car and come back for them. Young Hanbury is 17 years of age, and had no licence, . . .

On the 19th of February, 1936, the said Hughes commenced an action in the Supreme Court against Mrs. Anderson the present respondent, Kennedy and Hanbury. Kennedy was dropped from the action which continued against Mrs. Anderson

and Hanbury. The appellant company undertook the defence of Mrs. Anderson under the terms and conditions of the policy of insurance.

In September of 1936 the Hughes action came on for trial before FISHER, J., when judgment was given for the plaintiff Hughes against Mrs. Anderson and Hanbury for the sum of $957.75 and costs.

Mr. Justice FISHER in delivering judgment said, in part:

In my view the evidence of the daughter of Mrs. Anderson as to what occurred in the afternoon is of considerable importance. I think it is a fair inference, and I draw the inference, that in the afternoon the mother was asked, that is, the defendant Margaret S. Anderson, was asked by her daughter for the car, and she said her daughter could have it, knowing at the time the defendant Hanbury was taking her to a party that evening, and having also the evidence as to the knowledge on the part of the defendant Mrs. Anderson as to the previous use of the car by George Hanbury, as I find, I do not accept the evidence of the mother, the defendant Margaret S. Anderson, that she gave the car to Mr. Kennedy. I find as a fact and I am satisfied that the defendant Margaret S. Anderson consented to Mr. Hanbury using the car to take her daughter to a party, as he certainly did that evening, in the course of which this accident happened, as I find, through the negligence of Hanbury in not keeping a proper look-out. I find both defendants liable to the plaintiff.

With deference I am unable to understand the basis upon which Mr. Justice FISHER found that any liability attached to Mrs. Anderson as there was no relationship of master and servant nor any other relationship that I can discover which would render Mrs. Anderson liable for the negligent acts of Hanbury. Mere entrustment does not create civil liability. *Boyer* v. *Moillet* (1921), 30 B.C. 216; *Perrin* v. *Vancouver Drive Yourself Auto Livery* (1921), *ib.* 241. This judgment of Mr. Justice FISHER was not appealed.

On September 18th, 1936, the solicitor for the appellant company wrote to Mrs. Anderson in part as follows:

We are advised by the insurance company that in view of the evidence accepted by the judge of the trial to the effect that Hanbury was driving the car with your permission, that they repudiate liability.

The statutory conditions expressly prohibit, as no doubt you know, the entrusting of a car to an unlicensed driver. According to the finding of the judge, you permitted an unlicensed driver to drive the car on the occasion in question.

On September 24th, 1936, the company's solicitor again wrote in part as follows:

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As I advised you verbally yesterday, the Caledonian Insurance Company have decided not to appeal the judgment of the Honourable Mr. Justice FISHER, dated September 10th, 1936. I am also instructed to advise you that the company repudiates liability on two grounds; one, that you were not insured and two, that there has been a breach of the statutory condition in respect to permitting an unlicensed driver to drive your car. You will remember that the Honourable Mr. Justice FISHER, in giving judgment found as a fact that you had permitted Hanbury to drive your car.

While the Caledonian Insurance Company agreed to defend you in this action they decided in view of the circumstances that they can do nothing more.

On August 28th, 1937, Mrs. Anderson issued her writ in the present action against the insurance company and in due course the matter came to trial before Mr. Justice MURPHY. Stanley J. Anderson at the trial testified as follows:

Mr. Anderson, you advised the Insurance Company on November 16th that the car had not been entrusted to George Hanbury, did you not? I advised them that it had been entrusted to James Kennedy.

And not to Hanbury? Yes.

And you maintained that position right through up to and during the trial of the action? Yes.

And Mrs. Anderson did likewise? Yes.

You gave evidence in regard to the entrustment of the car? Yes.

Mrs. Anderson gave evidence with regard to the entrustment of the car? Yes, I believe so.

And your daughter gave evidence as to the entrustment of the car?

THE COURT: To Kennedy.

McAlpine: You all testified it had been entrusted to Kennedy, and the first intimation that the defendant company had that the car was entrusted to Hanbury was when the learned judge refused to accept your evidence and Mrs. Anderson's evidence, and found that the car had been entrusted in fact to George Hanbury. That is right? That was the trial judge's finding.

Up until that time neither you nor Mrs. Anderson, nor anybody on your behalf had ever suggested or conveyed the suggestion to the Insurance Company or anybody on behalf of the Insurance Company that the car had been entrusted to anybody else but to James Kennedy? No.

Mrs. Anderson testified as follows:

Let me put it this way: that neither the company nor its solicitor had any information or knowledge that that car at the time of the accident was being driven by George Hanbury and that car had been entrusted to him by you? It was stated all the way from the very beginning that the car was being driven by James Kennedy.

And not by George Hanbury? No.

And the first intimation the Insurance Company had that was the fact was when his Lordship Mr. Justice FISHER, pronounced judgment? I could not make any statement about that.

You know, Mrs. Anderson, the information came from you? Well, yes.

No one gave any information about who the car was entrusted to except yourself and Mr. Anderson. It that correct? Yes.

. . . . . .

I asked you this on discovery: "You were notified immediately after the trial that in view of the learned trial judge's finding that you had loaned the car to Hanbury, that the company repudiated liability. Isn't that so? Yes.

That is true, is it not? Yes.

. . . . . .

You never intimated to the defendant company or to its solicitor, that you had ever loaned the car to Hanbury? To Hanbury?

Yes. No, I hadn't loaned the car to him.

And the company could only get that knowledge from you or your husband? Yes.

The learned trial judge gave judgment for Mrs. Anderson upon the ground that the appellant company with full knowledge of the breach of the statutory condition of the policy assumed and carried on her defence in the Hughes action, and consequently waived any right to dispute liability under the policy for breach of such condition. He held in effect that the appellant company fell within *Western Canada Accident and Guarantee Insurance Company* v. *Parrott* (1921), 61 S.C.R. 595, and *Cadeddu* v. *Mount Royal Assurance Co.* (1929), 41 B.C. 110. The learned trial judge stated in his reasons for judgment (52 B.C. 374-5):

The decision of this case, therefore, depends upon a question of fact, namely, whether or not the defendant company, with full knowledge of the breach complained of, assumed and carried on plaintiff's defence in the Hughes action. That it did have such knowledge is I think placed beyond question by Exhibit 7, [*i.e.*, the letter of November 16th, quoted above] being the notification to the insurance company of the accident which Burgess, defendant's manager, admits receiving on or about November 18th, 1935. That letter contained this statement:

"Young Hanbury is 17 years of age, and had no licence, but I understand Mr. Hanbury, Sr., is taking up the matter with the police department to see what can be done about it."

Defendant, in addition, knew that Hanbury was the driver of the car at the time the accident occurred and that plaintiff was not then even in it. It obtained this information from said letter of November 18th, 1935, and had it confirmed by the statement of plaintiff and her witnesses as to what their evidence would be at the Hughes trial.

With great deference I am of the opinion that the learned trial judge, while correct by stating the issue, misconceived the effect of the evidence. There is no doubt that Mrs. Anderson knew on November 16th, that Hanbury had driven her car on the occasion in question and it is clear that the appellant company was

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advised of this fact but it is equally clear that the Andersons persisted both before and during the Hughes trial and in this action that they had not entrusted the car to Hanbury. They steadfastly maintained that the car had been entrusted to Kennedy and while he, in truth, did not have a driver's licence that fact was unknown to the Andersons when they gave him the car to drive.

In my view the appellant company was justified in relying upon the representations of its insured. To hold otherwise would mean that an insurance company would have to set up a tribunal of its own to determine the truth or otherwise of the report of an occurrence by the insured in order to decide whether it should or should not repudiate liability. To my mind an insurance company is under no such obligation. The appellant company believed, as it has the right to do, the statements of the Andersons and defended the Hughes action on behalf of Mrs. Anderson on the basis of representations made by them.

One essential issue in the Hughes trial was the question of the entrustment of the car to Hanbury. The driving of it by him was not decisive of the point but merely an element to be considered when arriving at the determination of that issue. While the appellant company had knowledge of the driving by Hanbury that did not prove entrustment especially when the persons who had the best knowledge of the matter denied any such arrangement. It was only when Mr. Justice FISHER in the Hughes action disbelieved the Andersons and found as a fact that Hanbury had been entrusted with the car that the appellant company was entitled in fact to repudiate its liability under the policy of insurance on the ground set out in its letters to Mrs. Anderson and which I have quoted above.

It follows therefore, in my opinion, that the appellant company did not undertake the defence of Mrs. Anderson in the Hughes action with full knowledge of the breach of a statutory condition. They had no such knowledge in the view I have taken, until Mr. Justice FISHER gave his judgment and it was then that they repudiated liability.

Under these circumstances the appellant company does not fall within the *Parrott* and *Cadeddu* cases cited above.

Mrs. Anderson in her action also sued for damages alleging that the appellant company was guilty of negligence in the conduct of the trial in the Hughes action, in not calling Kennedy and Hanbury to give evidence on her behalf. The learned trial judge made no finding on this issue and I consider it unnecessary, under the circumstances of this case to deal with this aspect of the matter.

Another ground of negligence was alleged: that the appellant company failed to communicate to Mrs. Anderson an offer of settlement made to it by Hughes. In my opinion the pleadings as drawn do not disclose a cause of action in that respect. Alternatively, if the matters necessary to found such an action had been pleaded, I do not think that Mrs. Anderson is entitled to succeed on this issue, because of clause 4 (2) of the statutory conditions of the policy. *C. Schmidt & Sons Brewing Co.* v. *Travellers' Ins. Co.* (1914), 90 Atl. 653; *Auerbach* v. *Maryland Casualty Co.* (1923), 140 N.E. 577.

The learned trial judge did not deal with this aspect of the case in his reasons for judgment but counsel for the respondent pressed it upon us, as an additional ground for supporting the judgment and for that reason I have dealt with it.

In the result, and for the reasons I have stated, with respect, I would allow the appeal.

O'HALLORAN, J.A.: Further consideration has compelled me gradually to reach the conclusion, with respect, that in the special circumstances, the appellant insurance company cannot be fixed with knowledge of breach of a statutory condition, until the judgment of FISHER, J., was given in the Hughes action. I associate myself, if I may with the reasons for judgment of my brother SLOAN, which I have had the advantage of reading.

I would allow the appeal accordingly.

Appeal allowed.

Solicitors for appellant: *Farris, Farris, McAlpine, Stultz, Bull & Farris.*

Solicitors for respondent: *Macrae, Duncan & Clyne.*

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March 9;
May 3.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA *EX REL.* THE COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA v. COWEN.

Motion for leave to App Granted
53 B.C.R. 97

Apl'd
Cassett v. Nelson
1939 1 W.W.R. 72.

Injunction—Foreign dentist—Advertising in British Columbia—Right of action—Appeal—R.S.B.C. 1936, Cap. 72.

The defendant, a dentist practising his profession in the City of Spokane in the State of Washington, advertised in the Trail, Nelson and Fernie newspapers and on radio broadcasts over the Trail and Kelowna stations in respect of his practice of dentistry in Spokane. In an action at the instance of the College of Dental Surgeons of British Columbia an injunction was granted restraining the defendant from so advertising in British Columbia in respect of his practice of dentistry in Spokane.

Held, on appeal, reversing the decision of McDONALD, J. (O'HALLORAN, J.A. dissenting), that the learned judge below has given a more extended application to the Dentistry Act than is justified because it is concerned alone with the practice of dentistry within this Province and the prohibition there of acts relating to the practice of dentistry does not extend to those carried on outside it, as in this case by the appellant who practises in the city of Spokane.

APPEAL by defendant from the order of McDONALD, J. of the 30th of November, 1937 (reported, 52 B.C. 305). The defendant is an American and practises dentistry at Spokane in the State of Washington. He is not a member of the College of Dental Surgeons of British Columbia. He advertised extensively in the newspapers in Trail, Nelson and Fernie, British Columbia, and over the radio at Trail and Kelowna. The defendant was warned not to advertise in British Columbia but he continued to do so, and on October 21st, 1937, a writ was issued in the name of the Attorney-General on relation of the College of Dental Surgeons for an injunction restraining him from advertising in British Columbia. A motion was then made for an *interim* injunction and an order was made to cross-examine the appellant on his affidavits. Upon the hearing of the motion parties agreed that the motion be treated as for a permanent injunction and the trial of the action.

The appeal was argued at Vancouver on the 9th of March, 1938, before MARTIN, C.J.B.C., McQUARRIE and O'HALLORAN, JJ.A.

J. A. MacInnes (*Aubrey,* with him), for appellant: An injunction was granted and we say there was no jurisdiction. The Act does not refer to advertising and the finding of illegality was an error: see *Re Crichton* (1906), 13 O.L.R. 271 at pp. 284-5. The intent of the Dentistry Act limits its application to dentistry in the Province. The Act does not delegate to this corporation any power or control over anyone not a member. Being neither within the Province nor within the College no regulation can affect the defendant in any way: see *McGee* v. *Pooley* (1931), 44 B.C. 338; *Corporation of Liverpool* v. *Norris* (1847), 9 L.T. Jo. 167; *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works, Bindschedler,* [1898] A.C. 200. Advertising is a substantial and legitimate part of the newspaper business and the injunction is wrong as far as it applied to the publishers and papers: *Keeble* v. *Hickeringill* (1809), 11 East 574; *Hilton* v. *Eckersley* (1855), 6 El. & Bl. 47; *Mogul Steamship Company* v. *MacGregor, Gow & Co.,* [1892] A.C. 25. The remedy by injunction does not lie: see *Attorney-General* v. *Wellington Colliery Co.* (1903), 10 B.C. 397. The material here discloses no cause of action: see *Davis* v. *Barnett et al.* (1866), 26 U.C.Q.B. 109; *White* v. *Mellin,* [1895] A.C. 154; *Webster* v. *Webster,* [1916] 1 K.B. 714; *Sports General Press Agency, Limited* v. *"Our Dogs" Publishing Company, Limited,* [1917] 2 K.B. 125. The rights alleged to have been invaded are private rights as distinguished from public rights and the action is improperly instituted: *Attorney-General and Spalding Rural Council* v. *Garner,* [1907] 2 K.B. 480. The injunction should not have been granted as no damage is alleged or proven: see *Cotton* v. *Vancouver* (1906), 12 B.C. 497; *Hooper* v. *City of North Vancouver* (1922), 31 B.C. 51; *The Emperor of Austria* v. *Day and Kossuth* (1861), 3 De G. F. & J. 217.

Maitland, K.C. (*C. F. MacLean,* with him), for respondent: The advertising is such that if carried on by a member of the College in British Columbia, would amount to unprofessional conduct. The standard of ethics to be observed by members is that standard which the members of the particular profession have imposed upon themselves: see *Re Davidson and Royal College of Dental Surgeons of Ontario* (1925), 57 O.L.R 222;

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Alberta Dental Association v. *Sharp,* [1930] 2 W.W.R. 45. The affidavits filed show that the advertising of the appellant would be unprofessional if done by a member of the College. We submit that the maintenance of the dental profession in British Columbia upon a high and dignified level is recognized in Canada as being for the public good, and the responsibility is vested in the College: see *Hall* v. *Ball* (1923), 54 O.L.R. 147. Secondly, the Court has jurisdiction to restrain the appellant by injunction from doing within British Columbia anything contrary to or lowering or tending to lower that standard or level. The Courts have jurisdiction and control over acts done within the Province: see *Badische Anilin und Soda Fabrik* v. *Henry Johnson & Co. and Basle Chemical Works, Bindschedler,* [1896] 1 Ch. 25. Cowen appeared and submitted to the jurisdiction. The advertisements of the appellant amount to a holding out of himself in British Columbia as being qualified to practise dentistry. It is an invasion of the rights of the members of the College of Dental Surgeons in British Columbia.

MacInnes, replied.

Cur. adv. vult.

3rd May, 1938.

MARTIN, C.J.B.C.: The judgment of the Court is that this appeal is allowed, our brother O'HALLORAN dissenting.

Putting my own views in the briefest way, in my opinion the learned judge below has, with every respect, given a more extended application to the statute—the Dentistry Act, Cap. 72, R.S.B.C. 1936—than is justified, because it is concerned alone with the practice of dentistry within this Province and the prohibition there of acts relating to the practice of dentistry does not extend to those carried on outside it, as in this case by the appellant in the city of Spokane in the State of Washington, U.S.A. I have not reached this conclusion without a very careful examination of the entire statute, out of deference particularly to the valuable judgment that our brother O'HALLORAN has written, but, with all due respect to other opinions, it is the only conclusion that I feel I can arrive at.

What is "practising the profession of dentistry" within this Province is defined by section 63 of said Act, and it is, as I

understand the argument, conceded or, if not, should be, that were it not for the word "entitled" in the expression "qualified or entitled to do all or any of the above things . . . " therein prohibited the judgment appealed from cannot be supported. But I am unable to apprehend how that word can be so relied upon, whatever it may be held to mean or include, having regard to the way it and cognate words and expressions, such as "authorized to practise," "duly registered," "entitled to be registered," "qualified and permitted to practise," "registered as members," "persons registered," "members of the College," "entitled to practise" and certificate therefor (section 56), "right to practise," "duly registered and licensed," "practitioner of dentistry," are loosely and synonymously employed in, *e.g.*, sections 2, 9, 19, 20, 23, 30 (2), 32, 33-5, 39, 40, 55-6, 59, 61, 67, 68 (2) (3) (4) and Schedule, 76, 77 and 78, because whatever either of the said words "entitled " or "qualified" may mean, they are both directed against those persons only who "do all or any of the above things" within this Province, and it is the "doing" therein of the immediately preceding acts specified by said section 63 that constitutes "practising the profession of dentistry" which the section applies to, and not to an invitation (which is what the present advertisements amount to) to make use of dental services "practised" outside this Province.

It has been overlooked that however a person may be "qualified" he is not "entitled to practise the profession of dentistry and dental surgery in the Province of British Columbia" unless he takes out an annual certificate in the following form prescribed by section 56:

COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA.
Annual Certificate No.

This is to certify that is a member in good standing of the College of Dental Surgeons of British Columbia, and is entitled to practise the profession of dentistry and dental surgery in the Province of British Columbia until the first day of March, A.D. .

Dated the day of .

. . . . . .
Registrar.

Failure to take out this certificate also subjects him to penalties of fines ("forfeitures") and suspensions from membership in the College and from practice (section 57), and by section 59

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the absence of his name from the College's annual list of members "shall be *prima facie* evidence that such person is not registered or entitled to practise under this Act." In view of these provisions it is clear that the word "entitled" in section 63 must be read to mean what it is declared to mean in the said paramount, and in this relation, key section 56 and certificate thereunder—*viz.*, "entitled to practise the profession of dentistry and dental surgery in the Province of British Columbia"; and therefore the addition of the useless (in this connexion) word "qualified" is a mere redundancy. That the acts of "practising" prescribed by said section 63 are restricted to this Province further appears by the proviso therein which declares that they 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" . . and also by section 61 in the same group of sections entitled "Effect of Registration or Non-registration"; and if still further evidence of that obvious (to my mind) intention be needed it will be found in, *e.g.*, section 2, subsection (2) and sections 61 (1), 68 (2) (3), 73 and 78.

It is almost superfluous to say that if the defendant were a member of the said Dental College the matter would present an entirely different complexion, but upon its present facts it rests (without foundation, in my opinion) not upon his professional misconduct but solely upon an alleged statutory prohibition against not only the people of this Province but the whole world.

McQUARRIE, J.A.: The appellant is not subject to any rule, regulation or principle of ethics established by the College of Dental Surgeons of British Columbia, of which he is not a member. Furthermore, there appears to be no statutory enactment prohibiting a resident of a foreign country from advertising in British Columbia that he is practising dentistry in such foreign country and soliciting the patronage of British Columbia residents who can conveniently attend at his office.

I would therefore allow the appeal.

O'HALLORAN, J.A.: This is an appeal from an injunction granted at the suit of the Attorney-General of British Columbia on relation of the College of Dental Surgeons of this Province,

perpetually restraining David Cowen of Spokane, Washington, in the manner following:

THIS COURT DOTH ORDER, ADJUDGE AND DECREE that the defendant [Cowen] be and he is hereby perpetually restrained from holding himself out within the Province of British Columbia by means of advertising of any kind as being qualified to practise the profession of dentistry and the defendant, his servants and agents and each and every of them be and he is and they are hereby perpetually restrained from advertising within the Province of British Columbia in respect of the practice of dentistry in any manner which if done by a member of the College of Dental Surgeons of British Columbia would be improper or unprofessional.

The injunction resolves itself into two branches: (1) holding out by advertising as qualified to practise dentistry and (2) advertising in a manner which if done by a registered dentist would be improper or unprofessional. I shall deal with the two branches separately in that order.

The appellant is a citizen of the United States residing in Spokane, Washington, where he carries on the practice of dentistry under the name and style of "Peerless Dentists." It is not alleged that he has actually done dental work in the Province; and it is admitted that he is not a member of the Dental College of this Province. The complaint that the appellant has held himself out within British Columbia as qualified to practise the profession of dentistry is supported by production of advertisements inserted by the defendant in the Fernie "Free Press," the Nelson "Daily News" and the Trail "Daily Ad-News," newspapers published in and circulating throughout South-Eastern British Columbia. It is also admitted he has held himself out similarly by announcements on his behalf over the Trail and Kelowna radio stations.

The appellant entered an appearance to the writ of summons and submitted to the jurisdiction. He was given leave to file affidavits on his behalf but with liberty to the respondent to cross-examine thereon. Pursuant to order he was examined in Spokane, Washington, upon affidavits filed by him. In the course of this examination the appellant admitted the advertisements in the British Columbia newspapers were drawn up by him and inserted by him, and that the script for the radio advertising over the Kelowna and Trail radio stations was written by such stations under his direction. When asked "You are not

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qualified to practise in British Columbia?" his answer was "I am not licensed." When asked "Assuming that advertising of this kind published by you in British Columbia papers is deemed to be unprofessional in British Columbia, do you think it proper and right for you to publish such advertisements" his answer was "I do." Further when asked:

> Assuming that the ethics of the dental profession in British Columbia require no other advertising by a member of the dental profession, than the insertion of a professional card giving his name and address and profession, do you agree that these standards should be maintained in British Columbia?

His answer was "I do not." He asserted his intention of continuing such advertising in British Columbia unless prevented or restrained. He stated also he believed his office to be better equipped to take care of the dental requirements of the people of South-Eastern British Columbia than any dentist in South-Eastern British Columbia.

As a result of this advertising some twenty people per month in the summer and some ten to fifteen people per month in the winter from South-Eastern British Columbia visited the appellant's Spokane offices for dental work. The newspaper advertisements contain a picture of the appellant, with eye-catching slogans such as "If it hurts don't pay"; "Our methods are so simple and gentle—that you sit and smile in the dental chair while the work progresses"; "No matter what particular branch of dentistry you desire, it can be painlessly performed at this office more efficiently and it will cost you less"; "Positively the greatest dental plate values obtainable"; "We do all branches of dentistry at savings of half the regular cost"; "Dr. Cowen's sensational reductions continue"; "A discount of $6.50 will be allowed for bus or train fare, on either plate work, gold or bridgework." These examples come within what is described in *Semler* v. *Oregon State Board of Dental Examiners* (1934), 34 P. (2d) 311 at p. 314, as high pressure "bait advertising" used to lure the unsuspecting public, and as characteristic of methods used by quacks, charlatans and unscrupulous practitioners to entice the public.

If the appellant by his conduct in this Province by himself, his servants or agents has committed a breach of the law of

British Columbia, then a restraining order may be properly made against him notwithstanding his American citizenship and residence in Spokane, Washington, *vide Badische Anilin und Soda Fabrik* v. *Basle Chemical Works, Bindschedler* (1897), 67 L.J. Ch. 141. There the action was for an injunction to restrain the defendant Bindschedler a Swiss subject who carried on business at Basle under the style of Basle Chemical Works Bindschedler, from sending into England a certain dye which was an infringement of the plaintiff's patent. Although the appeal of the foreign defendant was allowed by the Court of Appeal (*vide* (1897), 66 L.J. Ch. 497) and affirmed by the House of Lords, it is clear from what was stated by Lindley and A. L. Smith, LL.J., in the Court of Appeal as well as by Lord Herschell in the House of Lords that it was because it was not shown that the foreign defendant was responsible in law for the acts complained of in England. In the case at Bar full responsibility in law of the appellant for the complained of acts in British Columbia is admitted.

We have then to consider whether the complained of acts constitute a breach of the law of this Province. This involves study of the Dentistry Act, Cap. 72, R.S.B.C. 1936, which governs the profession of dentistry in this Province; by section 25 thereof the Dental Council therein mentioned is empowered to make such rules, regulations and by-laws, subject to approval of the Lieutenant-Governor in Council, as may be necessary for the better guidance, government, discipline and regulation of the Council and of the profession of dentistry and for the carrying out of the Act. The discharge of these duties by the Council as in the case of the Benchers of the Law Society, or the Medical Council, is not a mere matter of private concern but one affecting the public, having to do with the welfare of society in maintaining the standards which should prevail in the profession in respect to the ethics, conduct and integrity of those engaged in the practice of the profession, *vide, inter alia, Rex* v. *Manning* (1915), 25 Can. C.C. 227, at p. 230; *Hall* v. *Ball* (1923), 54 O.L.R. 147 at p. 153; *Alberta Dental Association* v. *Sharp,* [1930] 2 W.W.R. 45 at 47; *Semler* v. *Oregon State Board of Dental Examiners, supra.*

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By section 62 of the Dentistry Act, *supra,*

> Any person not registered under this Act, . . . , who practises dentistry or dental surgery in the Province shall be guilty of an offence against this Act.

The practice of dentistry is thus defined by section 63 of the said Act:

> 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 holds himself out as being qualified or entitled to do all or any of the above things.

Anyone who "practises dentistry" in the Province, without being registered under the Act violates the statute; anyone who holds himself out in the Province as "being qualified" in the Province or "entitled" in the Province to "do all or any of the above things" is "deemed" to be "practising dentistry" and therefore violates the statute. The expressed intent of the Legislature is to broaden the definition of "practising dentistry" so that in addition to its generally accepted meaning of engaging in practice in the Province it includes also the "holding out" in the Province by any person that he is "qualified or entitled" to do certain specific acts such as to extract teeth for a fee.

The wording in the statute "who holds himself as being qualified or entitled" challenges attention; upon the true construction thereof the decision in this case depends. If this wording permits a reasonable construction which will support the purpose of the Dentistry Act to protect both the public and the dental practitioners in the Province, then in my view that construction should be adopted.

It is not (a) "qualified and entitled," nor (b) "entitled" alone, nor (c) "qualified" alone. The Legislature by the form of the language employed, manifestly intended a distinction between "qualified" as such and "entitled" as such. If the words "or entitled" did not occur, the word "qualified" in the context of section 63, *supra,* could reasonably include the qualification of registration under the Dentistry Act which alone "entitled" a person to practise; but the use of the word "entitled" prohibits that construction in that "qualified" would then be given the

same meaning as "entitled." In its context the word "qualified" may reasonably be construed as possessing qualifications by diploma, degree, licence to practise elsewhere, or other hall-mark which would enable registration in this Province as a dentist; while "entitled" may reasonably be construed as already possessing the requirement of registration in this Province.

In effect the appellant has advertised in British Columbia: "I have all the qualifications necessary to register in this Province: In fact I am better qualified than your dentists who are entitled to practise here. But I cannot do your dental work here, because, despite my superior qualifications, I am not entitled to practise here. But come to my office in Spokane, where I am entitled to practise, and I will give you better dental work at less cost, in fact I will give you a discount of $6.50 on plate-work, gold or bridge-work." Asserted qualifications of this nature are not hampered by geographical limitations; they are intended to be in effect wherever the representations are made. The advertising has already been described as "bait-advertising"; the line and the bait are in British Columbia although the fisherman is in Spokane and pulls in his line from there. To catch the "fish" in Spokane he fishes in British Columbia with "qualification" bait.

This is not a case of advertising in United States newspapers or periodicals which circulate in Canada, nor of advertising broadcasts over United States radio stations. We are only concerned here with advertisements in British Columbia newspapers and over British Columbia radio stations (*i.e.,* holding out in British Columbia) which might as well have been done by a Canadian dentist registered in Alberta, but who is not registered, *i.e.,* "entitled" to practise in this Province, or for that matter by a resident of this Province who is not registered, *i.e.,* "entitled" to practise. In my view the principle applies equally to resident or non-resident, once the distinction between "qualified" and "entitled" is accepted. To support a contention that a non-resident of the Province is permitted to do an act which a resident is prohibited from doing by statute, should at the least require that permission to be expressed in clear statutory language.

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Assistance is obtained from several cases in England relating to the construction of section 3 of the Dentists Act, 1878, reading in material part as follows:

. . . , a person shall not be entitled to take or use the name or title of "dentist" . . . , or any name, title, . . . implying that he is registered under this Act or that he is a person specially qualified to practise dentistry, unless he is registered under this Act.

In *Barnes* v. *Brown* (1908), 78 L.J.K.B. 39, a Divisional Court composed of Lord Alverstone, C.J., and Bigham and Walton, JJ., held that "specially qualified" referred only to special personal qualifications acquired by study and practice, and not to qualifications sufficient to obtain registration under the Act. In *Bellerby* v. *Heyworth* (1909), 78 L.J. Ch. 666, the Court of Appeal composed of Cozens-Hardy, M.R., and Buckley and Kennedy, LL.J., refused to follow *Barnes* v. *Brown,* and held section 3, *supra,* to mean, that although a man may act as a dentist he shall not call himself a dentist or use any words implying that he is a person specially qualified to do the work of a dentist, unless he is registered under the Act. *Bellerby* v. *Heyworth* was affirmed in the House of Lords (1910), 79 L.J. Ch. 402, overruling *Barnes* v. *Brown.* The Lord Chancellor (Lord Loreburn) at p. 404:

The Act itself does not forbid anyone from practising dentistry, but it only forbids the assumption of the "name, title, addition, or description." . . . . On the whole, I think what is referred to is the possession of qualifications for registration, and that the object and effect is to make all who hold what I will in popular language call the hall mark become registered. If they are not registered, then they must not say either that they are registered or that they have the qualifications which would entitle them to be registered.

In the last few lines, the Lord Chancellor has, in my view, expressed the distinction between "qualified" and "entitled" intended by our Legislature. In the English Act, *supra,* the words "implying that he is registered under this Act" are equivalent to "implying that he is entitled" to practise; while the words "specially qualified to practise dentistry" are equivalent to "qualified" to practise, *viz.,* possessing qualifications by diploma, degree, licence to practise elsewhere, or other hall-mark to obtain registration.

While it may be said therefore that the appellant is one who holds himself out as "qualified" to practise dentistry yet it is

contended that the advertisements make it clear it was a "holding out" only that the appellant was "qualified" to practise in Spokane. This is equivalent to a contention that he held himself out only as "entitled" to practise in Spokane. To give effect thereto would destroy the distinction between "qualified" and "entitled" which the Legislature has seen fit to make. On the other hand if it is contended he held out that he was "qualified and entitled" only in Spokane, the obvious answer is, irrespective of where he is "entitled" to practise his advertisements and his statements in evidence show not only that he held out in British Columbia that he possessed all the qualifications necessary to obtain registration in British Columbia, but that his qualifications were superior to those required to obtain registration in this Province, and that was the basic inducement held out by him in this Province to bring British Columbia residents to Spokane.

In my view the language of the statute was aptly chosen for the protection of the British Columbia public against unregistered resident and non-resident dental practitioners. I am therefore compelled to the view that the appellant has committed a breach of the Dentistry Act, by holding himself out as "qualified" even though he has not claimed to be "entitled" to practise in this Province.

It was also contended by the appellant that the act complained of in any event was not an invasion of a public right and action did not lie at the instance of the Attorney-General of the Province. The Dentistry Act, as already stated was passed for the protection of the public. Breaches of that statute or of the rules, regulations and by-laws made thereunder infringe the rights of the public. The public is concerned in seeing that Acts of Parliament are obeyed, *vide Attorney-General* v. *Premier Line, Ltd.* (1931), 101 L.J. Ch. 132 at 135—the Attorney-General represents the whole of the public in seeing that the law shall be observed, *vide The Attorney-General* v. *The Ely, Haddenham and Sutton Railway Co.* (1869), 38 L.J. Ch. 258 at p. 262. The Court has jurisdiction to grant an injunction at the suit of the Attorney-General against the infringement or threatened infringement of a public right, where there has been a breach of statutory duty, quite apart from the particular remedy provided

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by statute—*Attorney-General* v. *Sharp* (1930), 99 L.J. Ch. 441, and whether or not the breach involves an invasion of any rights of property, *vide* Halsbury's Laws of England, 2nd Ed., Vol. 18, p. 51.

Arriving at the conclusion I have, it should be unnecessary to deal with the second branch of the injunction, *viz.*, restraining the appellant from advertising within the Province in any manner in which if done by a member of the College of Dental Surgeons would be improper or unprofessional. If I am right in my conclusion on the first branch, then any advertising in British Columbia by the appellant, proper or improper (according to Dental College ethical standards) is a breach of the statute, and no good purpose is served by enquiring into the degree of propriety or impropriety disclosed in the advertisements. If I am wrong in my conclusion on the first branch then the second branch can be supported only on the ground of a breach of a public statute or an infringement of a public right at common law—*Attorney-General* v. *Sharp, supra,* at p. 443.

The two branches were not appreciably distinguished in the course of argument and counsel based argument mainly on the second branch. Subject to what I have said on the first branch there is no prohibition in the Dentistry Act against improper advertising. The Appeal Book discloses no rules, regulations or by-laws made under section 25 of the Act for the "better guidance, government, discipline, and regulation . . . of the profession of dentistry and the carrying-out of this Act." Therefore on the second branch no breach of the statute is shown. Can it be said that advertising of the nature described is an infringement of a public right at common law? It was argued that "bait-advertising" of this nature breaks down professional ethics, and is manifestly not for the public good. Admitting this contention it remains that under section 25 of the Act, the power to define the standard of professional ethics is vested in the Dental Council; in other words what common-law rights in this respect existed (if any) have been absorbed in the statutory power of the Dental Council. It is true the president, registrar and one other member of the Dental Council state on affidavit that "advertising by any member of the said College in respect

of the practice of dentistry of the nature adopted and carried on by the defendant . . . would be considered a breach of professional ethics, and as unprofessional conduct on the part of any member . . . " and "would amount to unprofessional conduct."

Under the authority of the Alberta Court of Appeal in *Alberta Dental Association* v. *Sharp, supra,* and English and Ontario cases there cited the opinion of professional brethren of good repute and competency is stated as the guide for determining the propriety of a member's conduct. In those cases, however, the Council of the profession had power to deal with the member and the cases came before the Courts by way of appeal from the Council's action. In the case at Bar the appellant is not a member of the Dental College. The complained of advertising may be eminently against all professional ideas of honour and dignity, but except for the conclusion arrived at on the first branch, it has not been shown to be a violation of the statute.

I would therefore amend the injunction by striking out the words

And the defendant, his servants and agents and each of and every of them be and he is and they are hereby perpetually restrained from advertising within the Province of British Columbia in respect of the practice of dentistry in any manner which if done by a member of the College of Dental Surgeons of British Columbia would be improper or unprofessional.

By reason of the conclusion I have reached on the first branch, the views I have expressed on the second branch do not really affect the result.

I would accordingly dismiss the appeal.

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

Solicitor for appellant: *F. C. Aubrey.*
Solicitor for respondent: *R. L. Maitland.*

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Apld
Hiatt v. Zien
[1937] 2 DLR. 530

Consd
Kennedy v. Union Estates Ltd.
[1940] 1 DLR. 662

POWER AND POWER v. HUGHES.

Negligence—Apartment-house—Injury to tenants—Entrance to suites from balcony—Defective railing—Fall from balcony—Licensees—Knowledge of defect by owner—Liability.

The plaintiff husband rented a two-room suite on the second floor of an apartment-house where he and his wife lived, the house belonging to the defendant. A balcony ran the full length of the east side of the building and ten suites were entered from the balcony, the plaintiffs' being one of them. A staircase led from the ground floor to a hall on the second floor from which the balcony was reached through a door in the centre, five suites being on each side of this door. The plaintiffs' suite was No. 17 to the north of the door and suites 18 and 19 were further to the north. On the evening in question the plaintiffs visited a friend in suite 19, and while chatting to the friend both husband and wife leaned against the railing on the outside of the balcony just opposite the entrance to suite 19. The railing suddenly gave way, precipitating both plaintiffs to the ground below. In an action for damages it was held on the trial that the defective railing constituted a trap and both plaintiffs were awarded damages.

Held, on appeal, reversing the decision of FISHER, J. (O'HALLORAN, J.A. dissenting), that both plaintiffs were in respect to the use of that part of the balcony in front of suite 19 mere licensees, as suite 19 was farther away from the entrance to the balcony than their own suite, and that part of the balcony was not necessary for ingress and egress to their own suite. That the defendant did not know of the concealed danger and the duty of a licensor to a licensee should be limited to not exposing him to a concealed danger known to the licensor but not apparent to the licensee.

APPEAL by defendant from the decision of FISHER, J. of the 28th of January, 1938 (reported, 52 B.C. 492), in an action for damages for injuries sustained in falling from the verandah on the second storey of an apartment-house belonging to the defendant, the railing on the verandah having given way when the plaintiffs leaned against it. The plaintiff Terence Power rented suite 17 on the second floor of the defendant's apartment-house, where he lived with his wife and child. The main entrance to the suite was from the verandah that ran along the east side of the building. The verandah was reached from a stairway on the inside of the building that led to a door opening on the verandah. Beyond the entrance to suite 17 and to the north

were three other suites numbered 18, 19 and 20. On the evening of the accident the plaintiff husband and his wife went from their suite to see a friend who was in suite 19. While chatting to the friend both husband and wife leaned against the outside railing of the verandah opposite the entrance to suite 19. The railing suddenly gave way and both husband and wife fell to the ground below. Mrs. Power was severely injured and Mr. Power suffered injuries of a lesser degree.

The appeal was argued at Vancouver on the 10th and 11th of March, 1938, before MARTIN, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

Tysoe (*Wade,* with him), for appellant: The plaintiffs were mere licensees and took the premises as they found them: see *Robert Addie & Sons (Collieries)* v. *Dumbreck,* [1929] A.C. 358 at p. 371. *Fairman* v. *Perpetual Investment Building Society,* [1923] A.C. 74, is the same as this one: *Lucy* v. *Bawden,* [1914] 2 K.B. 318; Salmond on Torts, 9th Ed., 514. The plaintiffs lived in suite 17 and they were like any other visitor when going to suite 19, which was beyond their suite, the entrance to the verandah being in the other direction from suite 17: see *Hambourg* v. *The T. Eaton Co. Ltd.,* [1935] S.C.R. 430; *Wilson, Sons & Co., Lim.* v. *Barry Railway* (1916), 86 L.J.K.B. 432; *Hayward* v. *Drury Lane Theatre and Moss' Empires,* [1917] 2 K.B. 899 at p. 913; *Latham* v. *R. Johnson & Nephew, Limited,* [1913] 1 K.B. 398 at pp. 415-6. This was not a trap and there is no evidence that the defendant ought to have known of the defect in the railing: see *Mersey Docks and Harbour Board* v. *Procter,* [1923] A.C. 253 at p. 274; *Cole* v. *De Trafford (No. 2),* [1918] 2 K.B. 523 at p. 528. There is no evidence of failure to use reasonable care and skill to see that no danger exists: see *Sutcliffe* v. *Clients Investment Co.* (1924), 94 L.J.K.B. 113; *Fraser* v. *Pearce* (1928), 39 B.C. 338 at p. 344; *Gordon* v. *The Canadian Bank of Commerce* (1931), 44 B.C. 213 at p. 222; Salmond on Torts, 9th Ed., 522-3; *Dymond* v. *Wilson* (1936), 50 B.C. 458; *Liddle* v. *Yorkshire (North Riding) County Council,* [1934] 2 K.B. 101 at p. 119; *Purkis* v. *Walthamstow Borough Council* (1934), 151 L.T. 30; *Weigall*

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Maitland, K.C. (*C. F. MacLean,* with him), for respondents: The respondents fell about eighteen feet. *Gordon* v. *The Canadian Bank of Commerce* (1931), 44 B.C. 213 is not against us, and *Fraser* v. *Pearce* (1928), 39 B.C. 338, is in our favour. The respondents were at least licensees with an interest and the defective railing constituted a trap: see *Elgeti* v. *Smith* (1937), 51 B.C. 545; Halsbury's Laws of England, 2nd Ed., Vol. 20, p. 207, sec. 226; *Mehr* v. *McNab* (1894), 24 Ont. 653; *Cavalier* v. *Pope,* [1906] A.C. 428; *Huggett* v. *Miers,* [1908] 2 K.B 278; *Wallich* v. *Great West Construction Co.* (1914), 6 W.W.R. 1404. A licensee with an interest is in the same position as an invitee: see *Watt* v. *Adams Bros. Harness Mfg. Co., Ltd.,* [1927] 3 W.W.R. 580. The defective railing constituted a trap: see *McPherson* v. *Credit Foncier Franco Canadien,* [1929] 3 W.W.R. 348; *Cunard and Wife* v. *Antifyre, Ld.,* [1933] 1 K.B. 551; *Kynoch* v. *Bank of Montreal,* [1923] 3 W.W.R. 161; *Ellis* v. *Fulham Borough Council,* [1938] 1 K.B. 212; Salmond on Torts, 9th Ed., 516; *Dobson* v. *Horsley* (1914), 84 L.J.K.B. 399.

Tysoe, in reply, referred to *Heake* v. *City Securities Co. Ltd.,* [1932] S.C.R. 250.

Cur. adv. vult.

10th May, 1938.

MARTIN, C.J.B.C.: I would allow the appeal for the reasons given by my brother SLOAN.

SLOAN, J.A.: This action was brought against a landlord by a tenant and his wife under the following circumstances: The tenant Terence Power rented a two-room suite from the landlord Hughes and had lived therein with his wife and child for approximately two and a half years prior to the occurrence in question. The apartment-house was a two-storey affair and the Powers' suite was on the second floor and numbered 17. A verandah ran along the east side of the building on the second floor and suite 17, along with others, opened on to this verandah. It was, in fact, the only means of ingress to and egress from the

suites. North of suite 17 were three other suites; numbers 18, 19, and 20, and at suite 20 the verandah came to an end. The tenants of suite 17 would not pass suites 18, 19 or 20 on the way to the common staircase. This verandah was retained in the possession of the landlord.

At the time in question the Powers, husband and wife, walked along the verandah from their suite 17 to suite 19 wherein lived a friend. The time was between 7 and 8 o'clock in the evening and the reason motivating the visit was their desire to make up a game of bridge. Terence Powers, whilst chatting to his friend on the verandah in front of suite 19 leaned against the verandah rail which gave way suddenly, precipitating him and his wife to the ground. The wife apparently followed her husband through the railing because she had her hand on his shoulder and overbalanced with him.

Husband and wife were successful in securing a judgment below; the landlord now appeals to us and raises questions of considerable difficulty.

Counsel for respondents did not raise any question of liability or obligation flowing from contract, either express or implied, but based his submission, here and below, on tort.

I first propose to deal with the question of the wife. As this action is based on tort and not contract, in order to arrive at a proper understanding of the measure of the duty, if any, owing her by the landlord, she must be placed, in my opinion, in one of three categories, *viz.*, a mere licensee, a licensee with an interest or an invitee, for as Greer, L.J., said in *Bottomley* v. *Bannister,* [1932] 1 K.B. 458 at 476:

> It is a commonplace of the law of negligence that before you can establish liability for negligence you must first show that the law recognizes some duty towards the person who puts forward the claim. . . . ; English law does not recognize a duty in the air, so to speak; that is, a duty to undertake that no one shall suffer from one's carelessness.

Her counsel placed her in the second group of the classification open to her, but with this I am unable to agree. A licensee with an interest is that class of licensee who has an interest in common with the occupier of the premises. *Holmes* v. *North Eastern Railway Co.* (1869), L.R. 4 Ex. 254, affirmed (1871), L.R. 6 Ex. 123; *Wright* v. *London and North Western Railway Co.*

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(1876), 1 Q.B.D. 252; *Hayward* v. *Drury Lane Theatre and Moss' Empires,* [1917] 2 K.B. 899; *Robert Addie & Sons (Collieries)* v. *Dumbreck,* [1929] A.C. 358; *Hambourg* v. *The T. Eaton Co. Ltd.,* [1935] S.C.R. 430 at 436. Similarly it is trite law that to create the relationship of invitee and invitor there must be a common interest: *Mersey Docks and Harbour Board* v. *Procter,* [1923] A.C. 253 at 272; *Coleshill* v. *Manchester Corporation,* [1928] 1 K.B. 776.

Whatever may be said of the relationship between the landlord and the wife of the tenant with respect to the premises actually demised, or to the common staircase and that portion of the verandah necessary to be used for ingress and egress to and from suite 17, I cannot see any interest in common between the landlord and the tenant's wife in the use of that portion of the verandah in front of suite 19 by the woman for the purpose of paying a social call. In my opinion her use of that portion of the verandah the railing of which broke away, was as a mere licensee. Her user was one of choice and not of necessity. And, as I repeat, this action is not founded on contract but on tort, I can see no distinction between the tenant and his wife in relation to the obligations of the landlord with respect to the part of the premises in question. They are both, in my view, under the circumstances of this case mere licensees of the landlord when paying a visit to another suite.

The learned trial judge reached the conclusion that the wife was a bare licensee and I am happy to agree with him.

I wish at this juncture to refer to relevant findings of fact by the learned trial judge. In his reasons for judgment he said [52 B.C. at pp. 492-4, 499]:

> I accept the evidence of the plaintiffs with respect to the circumstances under which they sustained the injuries complained of herein while on the balcony of the apartment-building or rooming-house owned by the defendant. I find that they were making an ordinary and reasonable use of the balcony at the time the accident occurred and that the railing of the said balcony was in such a condition of hidden decay and disrepair as to constitute a trap in the sense of a concealed danger to both of them. I find that, while the plaintiffs were lawfully using the said balcony, the railing of the balcony, in consequence of its defective condition as aforesaid, suddenly gave way precipitating both the plaintiffs to the ground and causing them personal injuries. . . . . I find that the aforesaid

balcony and common stairway remained in the possession and control of the defendant and though I cannot find that the trap, that is, the concealed danger, was known to the defendant I do find that it ought to have been known to her. . . . . The defendant is, therefore, responsible for the damages caused by her negligence in allowing the trap to exist, which, as I have held, ought to have been known to the defendant.

The question now confronting us is whether or not the learned trial judge was right in law in saddling the landlord with responsibility for damage arising out of a concealed danger the existence of which she had no knowledge but, as he said, "ought to have been known to her." The answer to this problem involves consideration of a branch of jurisprudence that has been clouded and obscured by considerable conflict of judicial opinion. With some hesitation I have come to the conclusion that no such obligation rests upon a licensor toward a licensee.

With deference I must confess to some doubt concerning the proper interpretation to be placed upon the language of Crocket, J., who delivered the judgment of the Court in *Hambourg* v. *The T. Eaton Co. Ltd., supra,* as it is this doubt that has given rise to my hesitation to form a firm opinion. After reviewing the well-known authorities on this point he said at p. 438:

For my part I cannot think that it was intended, by the use of the debated alternative phrase in defining an owner's or occupier's liability for a concealed danger in the quoted passages relied upon, to lay down the principle that the owner or occupier owed the same duty to a licensee without an interest as to an invitee. The appellant being a mere licensee, the respondent's only duty to him was not to expose him to a hidden peril or trap, that is, as I understand it, a peril, which was not apparent to the licensee but the existence of which was known to the licensor. . . .

That statement of law standing alone, would, in my opinion, settle the controversy so far as this Court is concerned but then the following words are added by Mr. Justice Crocket:

—(or, if one is disposed to add the alternative phrase above discussed) or which ought to have been known to the licensor.

The facts in that case were such that Mr. Justice Crocket said at p. 440:

. . . it seems impossible to hold either that he knew the lens was likely to become overheated and burst or that he ought to have known that to be the case

and in consequence the point did not come up for direct decision.

I am inclined to the view, however, that the judgment as a whole is to be read as a distinct indication that the Supreme

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Court of Canada prefers to define the obligation of a licensor to a licensee as extending only to a duty not to expose him to a concealed danger or hidden peril the existence of which is not apparent to the licensee but known to the licensor.

Several reported cases in England decided since the *Hambourg* case was argued support the opinion I understand to be expressed in that case. In *Purkis* v. *Walthamstow Borough Council* (1934), 151 L.T. 30, Greer, L.J., at p. 33, said:

> Under the circumstances, in my judgment, he was a licensee and nothing more than a licensee . . . and the only duty on the defendants was their duty to him as such licensee; that is to say, they would be liable if there were a danger which was known to them and was not known to the boy, and which the boy could not be expected to avoid.

In *Ellis* v. *Fulham Borough Council,* [1937] 3 All E.R. 454, Greer, L.J., at p. 456, said:

> In *Addie (R.) & Sons (Collieries)* v. *Dumbreck,* [1929] A.C. 358, Lord Hailsham, L.C., directly laid down the proposition that, in considering cases of this kind, there are only three categories, and there is no no-man's land, which may be regarded as a position which creates a liability, albeit the case is not within any one of the three categories. Unfortunately, by what I think was a slip in giving judgment, he stated the rule as between licensor and licensee as being in effect the same as that between invitor and invitee, and I do not regard the decision of the other members of the court as agreeing with that part of the finding of Lord Hailsham, L.C. I treat his finding as if the words "or ought to be known" were eliminated from it, because that is in accordance with the authorities when we are dealing with a case of licensor and licensee.

In *Coates* v. *Rawtenstall Borough Council, ib.* 602, Greer, L.J., at 606, with reference to the judgment below, said:

> Unfortunately, he was led, by some statement which was made by Lord Hailsham, L.C., in *Addie (R.) & Sons (Collieries)* v. *Dumbreck,* to state once or twice a principle which was inapplicable to this case, because it seems to allege that the case of the licensee depends upon the same basis as does the case of an invitee. That was a slip on the part of Lord Hailsham, L.C., and one was not surprised that the commissioner should have made the same slip as Lord Hailsham, L.C., made, but, be that as it may, it does not affect his conclusion of fact with regard to the question as to whether there was or was not, in fact, a danger, known to the defendant council's representative, against which he failed to take precautions, so far as I know.

Slesser, L.J., added his weight to the observations of Greer, L.J., by saying at p. 607:

> Though some confusion may have arisen through the language of Lord Hailsham, L.C., in *Addie (R.) & Sons (Collieries)* v. *Dumbreck,* the duty [to the licensee] is quite clear. As was pointed out by Greer, L.J., in

Purkis v. *Walthamstow Borough Council* (1934), 151 L.T. 30, the liability could arise only if there were a danger known to it, that is, to the defendant council, and not known to the plaintiff, which he could not be expected to avoid.

The third member of the bench, Scott, L.J., agreed with the judgments delivered by Greer and Slesser, LL.J.

I think we may now take it as settled that the duty of a licensor to a licensee is correctly stated in the *Coates* case, *supra,* and while this decision is not binding upon us nevertheless that Court commands a respectful deference.

In the result upon the facts found below, in my opinion, the learned trial judge erred in law in not dismissing the action and I consequently, with respect, allow the appeal.

O'HALLORAN, J.A.: The respondents husband and wife had lived for some two and a half years in a two-room suite, one of ten apartments on the second floor of a two storey apartment-house owned by the appellant landlord in Vancouver. The entrance and only access to each apartment was from an outside balcony extending in front of all the suites; access to this balcony was obtained from a stairway which emerged in the centre, with five suites on either side. A wooden railing ran along the outside of the balcony. The landlord retained possession and control of the stairway and common balcony. While one of the respondents was leaning against the balcony railing in front of the suite next adjoining their own, the railing suddenly gave way, precipitating both of them to the ground some ten or more feet below. The learned judge who tried the case, FISHER, J., accepted the evidence of the respondent husband and wife with respect to the circumstances under which they sustained injury, and awarded the wife $800 and the husband $276.95 damages against the landlord. The learned judge found that the balcony railing suddenly gave way while the respondents were making an ordinary reasonable and lawful use of the common balcony and also that the railing was in such a condition of hidden decay and disrepair as to constitute a concealed danger to both of them.

In limine, it should be observed: (1) The learned judge accepted the evidence of the respondent husband and wife in

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the respects in which their credibility was vital; his finding that the balcony railing was in such a condition of hidden decay and disrepair as to constitute a concealed danger was necessarily based on that evidence; his finding that the respondents were making "an ordinary reasonable and lawful" use of the common balcony, is a finding that their user of that part of the common balcony fronting the suite next adjoining their own was in accord with the accepted user thereof by right and necessity, by persons living in the five apartments on that side of the stairway. Findings of that nature are not easily disturbed by a Court of Appeal as the trial judge saw and heard the witnesses, and was thus in a superior position to that of a Court of Appeal, in judging their demeanour and credibility on pure questions of fact vital to the decision—*Powell* v. *Streatham Manor Nursing Home* (1935), 104 L.J.K.B. 304; (2) We are concerned therefore with a concealed danger; we are not concerned with principles to be applied where the danger is not concealed; (3) We are concerned with a common balcony in an apartment-house; a common balcony which does not form part of the demised suites, and is retained in the possession and control of the landlord, but yet with liberty and necessity of user by the tenants their wives and children, deliverymen and messengers, visitors, guests and such like persons in order to enable the tenants and their families to live in their apartments with the accepted amenities. We are not concerned with demised premises as such, as for example if the respondents had suffered injuries within the confines of their own or a neighbour's apartment.

In my view, once it is found as a fact (as it has been) that the balcony railing was a concealed danger and that the respondents were making an ordinary reasonable and lawful use of the common balcony, then they are entitled to succeed and the appeal should be dismissed and it is not essential for the decision of this case to determine whether the respondents are "invitees" or "licensees." I base this conclusion to a substantial extent on what I understand to be the *ratio decidendi* of the decision of the House of Lords in *Fairman* v. *Perpetual Investment Building Society* (1922), 92 L.J.K.B. 50; Lord Atkinson, Lord Sumner and Lord Wrenbury held that the condition of the com-

mon stairway being obvious to any person using ordinary care, there was nothing in the nature of a concealed danger, and accordingly the appellant—a lodger living with her married sister—could not succeed. Lord Buckmaster and Lord Carson, however, dissented as to the facts only and held there was a concealed danger, a concealed defect which constituted a danger which persons with ordinary careful use would not notice, and that the appellant should recover. As I read the decision the *ratio decidendi* was the existence or non-existence of a concealed danger. The three law Lords who held against the appellant did so, not because they considered her a "licensee," but because knowing the condition of the stairway, she did not use reasonable care; obviously even an "invitee" could not have recovered in the face of that finding. In the case at Bar, we have the same elements as would have enabled the appellant to succeed in the *Fairman* case, *viz.,* (1) Existence of a concealed danger, and (2) the respondents did not know of the concealed danger and at the time of the accident were using the common balcony in an ordinary, reasonable and lawful manner.

In coming to the conclusion that the respondents should succeed on the facts stated I am fortified by the evidence concerning the particular nature of the common balcony in the case at Bar. This establishes in my view at least that the respondents have the same right to recover as if the accident happened in that part of the common balcony directly fronting their own suite, instead of fronting the next adjoining suite. It appears that in this design of apartment-house with common balcony the landlord for the joint advantage of himself and the persons living in the five apartments at least (1) brought into being a condition whereby entry to each suite and access to the stairway and to each of the five suites from the others was feasible only by user of the common balcony. (2) This condition of itself brought another condition into being, *viz.,* that the common balcony became available as occasion required to the people living in the five suites as an open air general room. It was being so used at the time of the accident; the evidence points to similar use on other occasions. This second condition is one the landlord could reasonably anticipate when he rented two-room suites in an

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apartment-house of this design. To rent suites which had no other entrance, the landlord gave the residents of the five suites a "street" or a common open-air room of their own. Some of their rights of user of the common balcony arose from necessity and some sprang as of course from their exercise of the rights due to necessity. These conditions distinguish the case at Bar from the classic examples to which we have been referred involving unoccupied fields, public parks, children's recreation grounds, stairways, passageways and such like. Following the application of the *Fairman* case, *supra,* and also in the light of the particular facts before us, I hold the duty of the appellant landlord in the case at Bar was a common-law duty, which required him to maintain the common balcony in such a condition that the residents of the five suites at least who had the user of it would not be exposed to any dangers which they could avoid by the exercise of ordinary care. I would dismiss the appeal accordingly.

In deference to the majority opinion and in view of the importance of the points involved I should add one further observation. If I should be wrong in concluding that the respondents are entitled to succeed on the findings of fact of the learned trial judge that the balcony railing was a concealed danger and that the respondents were making an ordinary reasonable and lawful use of the common balcony, without first determining whether the respondents are to be classed as "invitees" or "licensees," then by reason of the special rights of user in the respondents to which I have already referred I hold them to be "invitees" and would dismiss the appeal on that ground. I use the term "invitee" in the sense that permission of user to both respondents from the landlord was a matter of business and not a matter of grace—*vide* Salmond on Torts, 8th Ed., 510 and *Ellis* v. *Fulham Corporation* (1937), 107 L.J.K.B. 84 at p. 93.

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

Solicitor for appellant: *H. R. Wade.*
Solicitors for respondents: *Fleishman & MacLean.*

REX v. CROWE (No. 3).

C. C.
In Chambers
1938
April 1, 4.

Criminal law—Summary conviction—Appeal by Crown—Security for costs —Whether required—Criminal Code Sec. 750(c).

On an application for an order that an appeal from the dismissal of a charge by a justice of the peace be quashed on the ground that the justice of the peace did not fix an amount as security for costs sufficient to cover the respondent's costs of appeal it was

Held, that section 750 (*c*) of the Criminal Code applies only to an appeal by the accused and on an appeal from the dismissal of a charge the appellant is not bound to give security for the accused's costs.

Held, further, that in the present case the justice of the peace fixed $50 as security and he is the judge of the sufficiency of the amount. The County Court judge had no jurisdiction to quash the appeal on the ground that the amount was not sufficient.

APPLICATION for an order that the appeal herein be quashed on the ground that the justice of the peace did not fix as security for costs an amount sufficient to cover the respondent's costs of appeal. The justice of the peace had on the *ex parte* application of the solicitor for the appellant fixed the sum of $50 as security for costs which sum had been paid into Court. Heard by SHANDLEY, Co. J. in Chambers at Victoria on the 1st of April, 1938.

R. D. Harvey, for the application.
C. L. Harrison, contra.

Cur. adv. vult.

4th April, 1938.

SHANDLEY, Co. J.: This is an interlocutory application for an order that the appeal herein, against an order of a justice of the peace dismissing the information and complaint that the respondent, whilst intoxicated, unlawfully had control of an automobile contrary to the Criminal Code, be quashed or dismissed, on the ground that the said justice of the peace did not order or fix an amount sufficient to cover the respondent's costs of appeal, or alternatively that the appellant had not deposited any amount ordered or fixed by the said justice of the peace, or alternatively, an adequate or sufficient amount.

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Briefly, the facts are that the said justice of the peace on the *ex parte* application of counsel for the appellant fixed the sum of $50 as security for the respondent's costs, appellant's counsel telling the said justice that $50 was the usual amount. The said sum of $50 was then deposited as security for costs. Counsel for the respondent endeavoured to persuade the said justice of the peace to reopen the question of the amount of security to be given but he refused to do so unless the appellant's counsel consented which consent was not obtained.

Counsel for the respondent now contends the words "security for costs" means "sufficient security," and therefore because the application was *ex parte* and that the amount fixed is not sufficient or adequate, the appellant has not complied with section 750 of the Criminal Code, and the appeal should be quashed; to support his contention that an appellant appealing from an order dismissing an information and complaint must give security for costs he cited *Rex* v. *Malone* (not reported) in which His Honour Judge McINTOSH in the County Court of Nanaimo quashed such an appeal where no security had been given relying on the decision of *Rex* v. *Wong Chong Quong* (1923), 32 B.C. 41. That authority was a case stated in which it was held that the recognizance required by section 762 of the Criminal Code and r. 14 of the Criminal Rules, 1906, is a condition precedent to the right of appeal and that this rule applies to the Crown when appellant.

In *Rex* v. *Malone,* the case of *Dunnett* v. *Williams* (1919), 31 Can. C.C. 176 was not brought to the attention of the presiding judge. In that case Chief Justice Brown said that in his view a careful examination of section 750 of the Criminal Code shews that it has in contemplation only an appeal on the part of the accused, and that he had consulted such of his brother judges as were available and found their opinion in harmony with his own.

I think I am bound by the decision in *Dunnett* v. *Williams* and must hold that the appellant was not bound to give security for the respondent's costs. In any event counsel for the appellant herein filed an affidavit of James Forman, Esquire, the justice of the peace in question, in which he states that he fixed

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the sum of $50 as security which sum he deemed sufficient security to cover the costs of appeal herein. He is the judge of the sufficiency of the amount and it is not for me to say how he should arrive at the amount. I have no jurisdiction to quash the appeal because that amount is not sufficient—see *Rex* v. *Slipp, Ex parte Basque* (1932), 4 M.P.R. 238.

The application is dismissed. Question of costs reserved until after the trial.

Application dismissed.

KEECH v. THE CANADIAN BANK OF COMMERCE.

S. C.
1938
May 23.

Banks and banking—Forged cheques cashed by the bank—Delay in notifying bank by customer after knowing of forgeries—Further forgeries after customer knew of forgeries—Extent of liability of bank—Estoppel.

The plaintiff had a savings account with the defendant bank. On the 28th of April, 1936, he had his passbook made up and he then found that six cheques amounting to $510 to which his name was forged were charged up against him. Instead of pointing this out to the bank or asking to see the cheques, he told the manager not to honour any more cheques on his account; that when he wanted money he would come to the bank. On the bank requesting him to put this in writing he refused to do so. Between the 28th of April and the 8th of June, 1936, ten more forged cheques were charged against his account. He then notified the bank of the forgeries and the forger was prosecuted and convicted. There was no evidence of the bank being prejudiced as to the cheques cashed prior to April 28th, 1936, owing to the plaintiff not telling of the forgeries when he discovered them.

Held, that there was no estoppel against the plaintiff in respect of the cheques drawn prior to April 28th, 1936, and the plaintiff is entitled to judgment for the amount of those cheques.

ACTION to recover from the bank certain moneys charged to his account being moneys paid by the bank on cheques upon which his name was forged by his son-in-law. Tried by ROBERTSON, J., at Vancouver on the 17th of May, 1938.

G. P. Hogg, for plaintiff.

Hossie, K.C., and *Ghent Davis*, for defendant.

Cur. adv. vult.

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ROBERTSON, J.: Prior to June 20th, 1935, the plaintiff and his wife had a joint savings account with the defendant. She died on that date. After her death he continued the account. During the period between December 20th, 1935, and June 8th, 1936, there were charged up to his account sixteen cheques to which his signature had been forged by his son-in-law Davidson. Six of these cheques amounting to $510 were charged prior to April 28th. On the last-mentioned date the plaintiff had his passbook made up and then discovered that these cheques, or some of them, were charged up against him. Instead of pointing this out to the bank, or asking to see the cheques, he told its manager not to honour any more cheques on his account; that when he wanted money he would come to the bank. The bank requested him to put these instructions in writing but he refused. He now gives as his reason for not telling the bank about these forged cheques on April 28th, 1936, that he thought his wife must have drawn these cheques. He says he did not actually discover the forgeries until June 12th when Davidson told him of these and other forgeries. He then notified the bank. The plaintiff is a stupid man but I cannot accept his explanation. He knew perfectly well on April 28th that moneys were being charged up against his account in respect of cheques which he had not signed. If he had told the bank then the bank would not have cashed the cheques afterwards presented for payment and charged to the plaintiff's account.

The defendant relies upon two defences. The first is based upon a "Verification of Balance" dated June 16th, 1936, signed by the plaintiff, which is said to be a release. I disposed of this contention on the trial stating that because of the express exceptions contained in it, it did not assist the defendant.

The second defence is based on estoppel. The defendant relies upon the cases of *Greenwood* v. *Martins Bank, Ld.* (1931), 101 L.J.K.B. 33; [1932] 1 K.B. 371; and on appeal (1932), 101 L.J.K.B. 623; [1933] A.C. 51; *Ewing* v. *Dominion Bank* (1904), 35 S.C.R. 133. In the *Greenwood* case the facts were that the plaintiff's wife had forged his name to a large number of cheques which the bank had paid. The plaintiff became

aware of this but, being persuaded by his wife to say nothing about it, he kept silent for eight months when he finally told his wife he had determined to disclose to the bank what had taken place. His wife committed suicide. It was held there that the bank had been prejudiced because during the lifetime of the wife it could have sued her and joined her husband as a defendant, as he was liable for her tort, that as the right of action abated by reason of her death the bank had been prejudiced. In *Ewing* v. *Dominion Bank, supra,* the plaintiffs had received notice that the bank held a note purporting to be signed by them and asking them to provide for it. Two days after the notice was mailed the proceeds of the note had been drawn out of the bank by the payees. It was held it was the duty of the plaintiffs to have informed the bank, by telegraph or telephone, that they had not made the note and as by reason of their not doing so the bank was prejudiced, the plaintiffs were estopped from setting up it was not their signature to the note.

The present case is quite different. Davidson was prosecuted and sentenced in June, 1936, to two years in prison. It is not shown that the bank was prejudiced by the silence of the plaintiff, except as to the forged cheques cashed by the bank after April 28th, 1936. *M'Kenzie* v. *British Linen Company* (1881), 6 App. Cas. 82; 44 L.T. 431, appears to me to support the plaintiff's right to succeed as to the forged cheques cashed prior to April 28th. In that case one Fraser had forged M'Kenzie's name to a bill. The bill became due on April 10th and was not paid. On April 12th which was a Saturday, the British Linen Co. mailed a notice to M'Kenzie of dishonour of the bill. M'Kenzie received this note the same evening but did not go to the bank. On the Monday following Fraser called at the Dominion Linen Co.'s office with a three months' renewal bill, dated April 14th, 1879, bearing the same signatures as the original bill. The renewal bill was accepted by the bank who then delivered to Fraser the original bill. Three days before the renewal bill became due the agent for the respondents wrote to M'Kenzie advising him that this bill was coming due on July 17th. The bill being dishonoured the agent again wrote to M'Kenzie so stating. On July 29th, M'Kenzie, through his

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solicitor, advised the other side that he then declined to pay the bill on the ground that the signatures thereto were forgeries. The evidence showed that the plaintiff, because of the communication from the bank, saw Fraser on April 14th, who then admitted to him he had forged his name but told him he had taken up the bill by cash and handed him the original bill. When he received the notice with regard to the second bill he again saw Fraser who told him he would meet the bill when due, and accordingly he did not inform the bank. He thus delayed for two weeks informing the bank of the forgery. Lord Selborne, L.C. said at p. 91:

> If the first of these questions ought to be answered in the appellant's favour, I am clearly of opinion that the circumstances of the case raise no estoppel against him. He has done nothing from first to last by which the respondents can have been led to act in any way in which they would not otherwise have acted, or to omit to take any step for their own security, or in any sense for their benefit, which they would otherwise have taken; . . . .

Lord Blackburn said at p. 100:

> I agree that if he thus leads the bank to believe in the genuineness of the signature till it has lost some opportunity of recovering on the bill which if the bank had known of the forgery they might have used, it would be a sufficient alteration in the bank's position to preclude him as against the bank.

And Lord Watson said at p. 109:

> The only reasonable rule which I can conceive to be applicable in such circumstances is that which is expressed in carefully chosen language by Lord Wensleydale in the case of *Freeman* v. *Cooke* [1848], 2 Ex. 654; see note, *ante*, p. 87. It would be a most unreasonable thing to permit a man who knew the bank were relying upon his forged signature to a bill, to lie by and not to divulge the fact until he saw that the position of the bank was altered for the worse. But it appears to me that it would be equally contrary to justice to hold him responsible for the bill because he did not tell the bank of the forgery at once, if he did actually give the information, and if when he did so, the bank was in no worse position than it was at the time when it was first within his power to give the information.

No one called for the bank suggested the bank had suffered any prejudice. It still has its right of action against Davidson. For these reasons I think there is no estoppel against the plaintiff in respect of the cheques drawn prior to April 28th, 1936. These cheques amount to $510. There will be judgment for that amount for the plaintiff.

Judgment for plaintiff.

BULL v. SLOAN.

C. A.
1938
March 7; *April* 12.

Will—Construction—Child en ventre sa mere—Beneficiaries named in will—Intention of testator—Right of posthumous child to share in estate.

A testator by his will gave all his property "unto my wife Monica Alexandria Sloan and three infant children, David Alexander Sloan, John Kenneth Sloan and Monica Marjorie Sloan, or such of my said children as shall attain the age of twenty-one years, in equal shares with power to my executors to pay over to my said wife as guardian of my infant children, the income of the expectant share of any such child or such part thereof as my said wife shall think necessary for the maintenance and education of such child during minority." Five months after testator's death a fourth child was born. Upon originating summons an order was made declaring that the posthumous child was entitled to share equally in the estate with the other three children.

Held, on appeal, reversing the decision of MANSON, J., that the beneficiaries under the will were described as *personæ designatæ* and not as a class and therefore the child born after testator's death is not entitled to share in the estate.

APPEAL by defendants David A. Sloan, John K. Sloan and Monica M. Sloan from the decision of MANSON, J. of the 30th of October, 1937, on an originating summons issued by the executor of the will of David Sloan, deceased, to obtain a judicial interpretation of the said will. David Sloan was married twice, first to Evelyn A. Sloan, by whom he had two sons and one daughter, the appellants herein. His first wife died and he married her sister, Monica A. Sloan, in 1928. The will was made on January 9th, 1935, on the eve of Mr. and Mrs. Sloan going on a trip to Honolulu. At that time there were no children of the second marriage. Mr. Sloan's will named only the three children then in existence and his wife as beneficiaries. On July 29th, 1935, Mr. Sloan was seriously injured in an aeroplane crash and died on the 4th of August, 1935. Mrs. Sloan was at that time pregnant and a daughter, Frances Davida Sloan, was born on the 3rd of December, 1935. After appointing Mr. *A. E. Bull* as executor, the will recited:

I give, devise and bequeath all my property both real and personal of whatsoever kind and wheresoever situate unto my wife Monica Alexandria Sloan and my three infant children David Alexander Sloan, John Kenneth Sloan and Monica Marjorie Sloan, or such of my said children as shall

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attain the age of twenty-one years, in equal shares with power to my executor to pay over to my said wife as guardian of my infant children the income of the expectant share of any such child or such part thereof as my said wife shall think necessary for the maintenance and education of such child during minority. Such payment to my said wife as guardian of such child shall be good and sufficient payment by my executor.

Upon the hearing under the originating summons it was held that Frances Davida Sloan will share equally with her brothers and sister in the estate.

The appeal was argued at Vancouver on the 7th of March, 1938, before MARTIN, C.J.B.C., MCQUARRIE and SLOAN, JJ.A.

Locke, K.C., for appellants: There was error in declaring that the posthumous child Frances Davida is entitled to share in the estate. The will expressly designates as beneficiaries the wife and the three children and the executor is given power to pay over to the wife as guardian of the children the income of the expectant share of any such child. The words "such child" must refer to "said children" mentioned above. Had the infant Frances Davida been born prior to her father's death she could not have claimed any share in the estate, as the beneficiaries are clearly designated by name in the will. The cases referred to in the judgment below do not apply as there is no gift here to the children as a class but rather to the mother and children by name. The rule is accurately stated in Halsbury's Laws of England, Vol. 28, pp. 740-41, sec. 1370 and note (*b*). The basis of the decision in *Goodfellow* v. *Goodfellow* (1854), 18 Beav. 356, that the true construction of the will was that the gift was to the children as a class. The rule determining the question is accurately stated in Jarman on Wills, 7th Ed., 2146.

J. W. deB. Farris, K.C., for respondents Monica A. Sloan and Frances Davida Sloan: In interpreting the will the Court will consider the position of the testator and surrounding circumstances at the time the will was made: see *Allgood* v. *Blake* (1873), L.R. 8 Ex. 160 at p. 162; *Boyes* v. *Cook* (1880), 14 Ch. D. 53 at p. 56, where James, L.J. said: "You must place yourself, so to speak, in his [testator's] arm-chair"; *Kingsbury* v. *Walter*, [1901] A.C. 187 at pp. 189 to 192. What he meant by "my three children" was under the circumstances "all my children" and the Court in construing the will must if in any

way possible make the words apply to after-born children: see *Matchwick* v. *Cock* (1798), 3 Ves. 609; 30 E.R. 1180. Ambiguous expressions will be construed in our favour: see *Goodfellow* v. *Goodfellow* (1854), 18 Beav. 356; *Aldwell* v. *Aldwell* (1874), 21 Gr. 627. If the judgment below is correct the gift in question is a gift to a class. A class is defined in *M'Kay* v. *M'Kay,* [1900] 1 I.R. 213 at p. 218. See also *Kingsbury* v. *Walter,* [1901] A.C. 187 at 191; *Elliot* v. *Joicey (Lord),* [1935] A.C. 209; *Villar* v. *Gilbey,* [1907] A.C. 139. The rule laid down in *Kingsbury* v. *Walter,* [1901] A.C. 187 at p. 188 should be carefully considered.

T. Edgar Wilson, for executor: The question is whether the posthumous child should share in the estate. There is nothing to add to the argument submitted.

Locke, in reply, referred to *Blasson* v. *Blasson* (1864), 2 De G. J. & S. 665.

Cur. adv. vult.

12th April, 1938.

MARTIN, C.J.B.C.: I would allow the appeal for the reasons given by my brother SLOAN.

SLOAN, J.A.: This is an appeal from an order made by Mr. Justice MANSON interpreting the will of the late David Sloan upon the application of the executor by way of originating summons.

David Sloan, deceased, made his will on January 9th, 1935, by which instrument he gave all his property

unto my wife, Monica Alexandria Sloan and my three infant children David Alexander Sloan, John Kenneth Sloan and Monica Marjorie Sloan, or such of my said children as shall attain the age of twenty-one years, in equal shares with power to my executor to pay over to my said wife as guardian of my infant children the income of the expectant share of any such child or such part thereof as my said wife shall think necessary for the maintenance and education of such child during minority.

We were invited to consider the circumstances surrounding the making of the will and the following facts are extracted from the material before us: David Sloan was married twice; first to Evelyn Alexandria Sloan by whom he had two sons and one daughter—the infant children named in the will. His first wife died and in 1928 he married her sister, Monica Alexandria.

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The will in question was hurriedly prepared when Mr. Sloan was ordered by his physician to take a trip to Honolulu for the benefit of his health. He returned to Vancouver in March, 1935.

In May or June of 1935, Mrs. Sloan advised her husband that she was pregnant and he spoke to a friend about his wife's condition and discussed with him the matter of making another will in which his wife, the three children and the expected child would be named beneficiaries.

On the 29th of July, 1935, Mr. Sloan was seriously injured in an aeroplane accident and on August 4th, 1935, died of his injuries.

He had never effectuated his intention of making a new will and the will of January 9th, 1935, was duly probated by the executor named therein.

The expected child, a daughter, was born on December 3rd, 1935, and was named Frances Davida Sloan.

The only question at issue is whether the posthumous child, Frances Davida Sloan, although not named in the will, is entitled to share in her father's estate equally with the named beneficiaries. Mr. Justice Manson held in her favour and the other infant children of the testator now appeal to us.

In approaching this matter I think it advisable to keep in mind the warning of Lord Halsbury in *Kingsbury* v. *Walter*, [1901] A.C. 187 at 188. He said:

> I confess I regard with great jealousy when you are construing a particular will, any unnecessary observations upon questions of abstract propositions which are likely, do what you will in order to apply your observations to the particular will, to be quoted afterwards as applicable to a different will made by a different person using different language under totally different circumstances from those of the will to which you applied them.

The authorities relevant to this matter are numerous and yet so many turn upon niceties of language and complexities of circumstance present in each particular case, that it is a useless task to attempt an exhaustive review.

To my mind the interpretation of the present will can be found in the answer to one question: Are the beneficiaries in the will described as a class or as *personæ designatæ*? If a class then a "fictional construction" would extend to the inclusion of

the child *en ventre sa mere,* under the circumstances of this case, as there is no doubt in my mind that such construction would secure to the child a benefit to which it would have been entitled if actually born at the date of the death of the testator "as within the reason and motive of the gift" to the class. *Elliot* v. *Joicey (Lord),* [1935] A.C. 209, at 234.

However, from a careful reading of the language of the will, and in the light of the circumstances surrounding the making of it, I am somewhat reluctantly compelled to the conclusion that the beneficiaries were described as *personæ designatæ* and not as a class and that therefore Frances Davida Sloan is not entitled to a share in the estate.

It is helpful to remember that the testator did not consider that the child *en ventre sa mere* was provided for in his will and Mr. Justice MANSON in speaking of the intention of the testator said:

> . . . . having in mind the date of the will and the date of the birth of the child, Frances Davida, he could not have had in contemplation the posthumous child.

I am in complete agreement with that statement and I cannot see my way clear to do violence to the unambiguous language of the will in order to read into it an intention expressly negatived by the testator himself.

The respondent relied to some extent upon *Goodfellow* v. *Goodfellow* (1854), 18 Beav. 356. The learned author of Jarman on Wills, 7th Ed., 1695 (note (*a*)) says of this decision that it "is a little difficult to justify."

I must confess, with deference, my difficulty in following the reasoning by which Romilly, M.R., arrived at his conclusion that the original will in that case indicated an intention to include a class. That, however, was the basis of his finding and I would prefer to consider that decision as limited in its application to the particular facts and circumstances of that case.

With respect I would allow the appeal.

MCQUARRIE, J.A.: I agree in allowing the appeal.

Appeal allowed.

Solicitor for appellants: *C. H. Locke.*

Solicitor for respondent: *T. Edgar Wilson.*

Solicitor for respondents Monica Alexandria Sloan and Frances Davida Sloan: *D. S. Wallbridge.*

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In Chambers
1938
May 6, 10.

REX v. CROWE (No. 4).

Criminal law—Summary conviction—Dismissal of complaint—Appeal by Crown successful—Rights of appellant to costs of appeal.

A charge against the accused that while intoxicated he did unlawfully have control of an automobile was dismissed by a justice of the peace. An appeal by the informant was successful and accused was convicted. *Held,* that the informant is entitled to the costs of the appeal.

APPLICATION by the informant for the costs of the successful appeal to the County Court from the dismissal of a charge by a justice of the peace. Heard by SHANDLEY, Co. J. in Chambers at Victoria on the 6th of May, 1938.

C. L. Harrison, for the application.
R. D. Harvey, contra.

Cur. adv. vult.

10th May, 1938.

SHANDLEY, Co. J.: On the hearing of the question of costs counsel for the respondent contended that the appellant's solicitor was in the employ of the city of Victoria in connection with the appeal herein, and is employed by the city of Victoria as city prosecutor upon permanent salary and not on a basis of remuneration as between solicitor and client for or on behalf of Dunnell, the informant and complainant, and that the said Dunnell does not require to be indemnified in costs in connection with this appeal as the said Dunnell is not liable for any costs in connection therewith to the said city prosecutor or at all, and he relied on statements he made in his own affidavit. Counsel for the appellant examined him on this affidavit and the deponent admitted that the statements contained in his affidavit were made on belief only. The statements in the affidavit were not corroborated by any person.

According to the decision in *The King* v. *Licence Commissioners of Point Grey* (1913), 18 B.C. 648, affidavits based on the bald statements of belief, without disclosing the grounds thereof as required by rule 523, are worthless and furthermore not only must the Court be able to ascertain the source of

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information and belief, the deponent's statements must be corroborated by some person speaking from his own knowledge.

The appellant is therefore entitled to costs and I fix the same as follows: $5 on the motion to quash the appeal which was dismissed; $5 on the application to quash the appeal which was dismissed; $50 for the costs of the appeal; $17 paid to witness Osborne; $72.45 the cost of the transcript of the evidence taken in the police Court; $14 to witness Dr. T. Miller.

The aggregate amount of the said costs payable by the respondent to the appellant, namely, $163.45 shall be paid to the clerk of the peace in and for the county of Victoria within seven days from the date hereof, to be paid over by him to the solicitor for the appellant.

Order accordingly.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA *EX REL.* THE COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA v. COWEN. (No. 3).

C. A.
1938
May 18, 27.

Practice—Appeal to Supreme Court of Canada—Application to the Court of Appeal for leave—Matter of public interest—R.S.C. 1927, Cap. 35—R.S.B.C. 1936, Cap. 72.

A dentist practising his profession in the city of Spokane in the State of Washington advertised in the Trail, Nelson and Fernie newspapers and by means of radio broadcasts over the Trail and Kelowna stations of the Canadian Broadcasting Corporation. An injunction was granted at the instance of The College of Dental Surgeons of British Columbia, restraining him from so advertising. An appeal to the Court of Appeal was allowed and the injunction was set aside. On motion to the Court of Appeal, leave to appeal to the Supreme Court of Canada was granted.

MOTION for leave to appeal to the Supreme Court of Canada from the decision of the Court of Appeal of the 3rd of May, 1938 (reported, *ante*, p. 50).

The motion was heard at Vancouver on the 18th of May, 1938, by MARTIN, C.J.B.C., MACDONALD, MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.

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ATTORNEY-GENERAL FOR BRITISH COLUMBIA v. COWEN

Maitland, K.C., for the motion: Whether an American dentist can advertise across the border in Canada is a matter of public interest that affects all the Provinces: see *Hall* v. *Ball* (1923), 54 O.L.R. 147; *Minister of Finance* v. *Caledonian Insurance Co.* (1923), 33 B.C. 232; *Chan* v. *C.C. Motor Sales Ltd.* (1926), 37 B.C. 88 at p. 90; *Riley* v. *Curtis's and Harvey and Apedaile* (1919), 59 S.C.R. 206 at p. 209.

J. A. MacInnes, contra: There is no question of law involved and it cannot be said to come within the principles laid down as to "public interest": see *Doane* v. *Thomas* (1922), 31 B.C. 457; *In re Assessment Act and Heinze* (1914), 20 B.C. 149.

Maitland, replied.

Cur. adv. vult.

27th May, 1938.

MARTIN, C.J.B.C.: We are all of the opinion leave should be granted to appeal to the Supreme Court of Canada.

Motion granted.

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1938
May 23, 30.

MACKENZIE v. HARBOUR AND BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED.

Damages — Negligence — Injuries — Death of injured — Actions by widow under Administration Act and Families' Compensation Act—Damages for shortened expectation of life—Apportionment of part of said damages to deprivation of privilege of caring for defendants—Abatement—R.S.B.C. 1936, Caps. 5, Sec. 71(2), and 93.

Consd
Richter v. Condy
[1939] 1 W.W.R. 152

Adhered to
McGinnes v. Murphy
[1940] 1 W.W.R. 92

Refd to
Child v. Stevenson
37 DLR (3d) 429
(BCCA)

In attempting to drive his car past a street-car which had stopped at an intersection, the defendant H. struck and injured the plaintiff's husband as he stepped from the street-car, which resulted in his death a month later. The plaintiff brought action in which she pleaded the Administration Act and claimed special damages and costs. She then brought a second action in which she pleaded the Families' Compensation Act and general damages and costs. The actions were consolidated. The deceased was 25 years old, a boiler-maker or tinsmith by trade and logging-camp employee by occupation. With slight interruptions he had had steady employment. The plaintiff was 24 years old and there were no children.

Held, that despite the omission of the plaintiff to specifically claim more than she did, under the authorities she is entitled to the full benefit of the provisions of section 71 (2) of the Administration Act and to recover, *inter alia*, damages in the first action for the loss by the deceased of his expectancy of life. These damages were assessed at $15,000 of which $10,000 was allocated to the element of deprivation of the privilege of caring for dependants. In the second action general damages of $10,000 were awarded. It was also ordered that the general damages allowed under the Administration Act should be abated to the extent that the plaintiff was the beneficiary under the administration of the portion of the $15,000 ascribed to the deprivation of the privilege of caring for dependants.

TWO ACTIONS consolidated as a result of the death of the plaintiff's husband who was run into by the defendant Harbour when driving his automobile at the corner of Woodland Drive and Venables Street in the city of Vancouver at about 7.30 on the evening of the 31st of December, 1936. Tried by MANSON, J. at Vancouver on the 23rd of May, 1938.

Crux, for plaintiff.
J. W. deB. Farris, K.C., and *Riddell*, for defendant company.
Housser, for defendant Harbour.

Cur. adv. vult.

30th May, 1938.

MANSON, J.: The plaintiff, administratrix of the estate of Donald Wilson Mackenzie under letters of administration, brings these two separate actions against the defendant company and the defendant Harbour as a result of the death of her husband following an accident at the corner of Woodland Drive and Venables Street in the city of Vancouver, B.C., on the evening of December 31st, 1936. The actions were consolidated by order of May 6th, 1937. The plaintiff alleged negligence on the part of the defendant Harbour in the driving of a motor-car and on the part of the employees of the defendant company in the operation of a street-car in which the deceased was a passenger. The actions as against the defendant company were dismissed at the trial.

In the first action the plaintiff pleaded the Administration Act, R.S.B.C. 1936, Cap. 5, and claimed special damages in the sum of $741 and costs of the action. In the second action the

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plaintiff pleaded the Families' Compensation Act, R.S.B.C. 1936, Cap. 93, and claimed general damages and costs of the action.

The facts may be considered under two heads: (a) Was the defendant Harbour guilty of the negligence which caused the grievous bodily harm to the deceased as alleged; and (b) Were the injuries sustained by the deceased the proximate cause of his death?

Harbour was driving a motor-car in an easterly direction along Venables Street about 7.30 p.m. There was a street-car going east ahead of him. When Harbour was more than a block behind the street-car he particularly observed it and he was then, upon his own statement, travelling approximately twice as fast as the street-car. He slowed down his car as the motorman did his, as they approached Woodland Drive. The street-car, again upon Harbour's own statement, was going very slowly just west of Woodland Drive. There was no one in the rear vestibule and the defendant Harbour concluded no one intended to alight from the rear door. He overtook the street-car and as he passed the front vestibule door opened and the deceased stepped out and collided with Harbour's car. The deceased sustained very serious injuries—a badly fractured jaw, fractured collar-bone and fractured skull. The latter injury was not diagnosed by the attending surgeon but observed by the autopsist. I have no hesitation upon the evidence in concluding that the defendant Harbour was negligent in attempting to pass the street-car under the circumstances and that the deceased sustained the injuries mentioned as a result of that negligence.

The deceased was taken to the hospital. His jaw was given medical attention and he was returned to the ward to await some recovery before receiving further surgical attention. His right shoulder required an open reduction and the surgeon intended to correct the remaining fracture of his jaw and his teeth. The patient's condition improved and his temperature dropped to normal, about 10 days after he had entered the hospital. After the temperature had been normal for four days and after the surgeon had satisfied himself that the clinical condition had improved to a point where the necessary further work could be

done with safety the patient was again taken to the operating room and some, at least, of the necessary surgical work done. A few hours after the patient was returned to the ward his temperature rose, he developed pneumonia and an empyemia, and shortly afterwards died. Upon the evidence of the doctors I do not think that I could fairly find otherwise than that the illness from which the patient died was induced by the injuries which he had sustained as a result of the defendant Harbour's negligence. Upon the authorities I conclude that the negligence of Harbour was the direct and proximate cause of the death of the plaintiff's husband.

The deceased was a young man of 25 and his wife, the plaintiff, at the time of the accident was 24—almost 25. The deceased was a boiler-maker or tinsmith by trade and a restaurant and logging-camp employee by occupation. In the logging-camp he earned $2.25 net per day seven days a week. His employment was not without interruption from time to time, but he seems to have sought and found work with reasonable steadiness.

The first action was commenced by the deceased. He died on January 30th, 1937, and letters of administration were granted to his wife on February 19th, 1937. On March 2nd, 1937, the wife, as administratrix, was substituted as plaintiff and the pleadings and proceedings amended accordingly. The plaintiff, under the amended writ, claimed damages "suffered as a result of Donald Wilson Mackenzie being struck . . . and also to recover damages for expenses incurred as a result of the said accident and for costs." As already pointed out, the plaintiff in her statement of claim pleaded the Administration Act and claimed special damages and costs. She did not, however, specifically claim otherwise as she might have done under section 71 of the aforementioned Act, nor did she claim under the Families' Compensation Act in this action as she might and ought to have done. The latter omission was cured by the bringing of the second action, an action which would have been otherwise unnecessary. Subsection (2) of section 71 of the Administration Act reads as follows:

(2) The executor or administrator of any deceased person may bring and maintain an action for all torts or injuries to the person or property

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of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, be entitled to, except that recovery in the action shall not extend to damages in respect of physical disfigurement or pain or suffering caused to the deceased or to damages in respect of expectancy of earnings subsequent to the death of the deceased which might have been sustained if the deceased had not died; and the damages recovered in the action shall form part of the personal estate of the deceased.

In the prayer of the statement of claim the plaintiff, in addition to claiming special damages and costs, claimed "such further and other relief as in the premises may seem meet." Order XX., r. 6, of our Supreme Court Rules is identical with the corresponding English Rule. It reads as follows:

6. Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and it shall not be necessary to ask for general or other relief, which may always be given, as the Court or a judge may think just, to the same extent as if it had been asked for. And the same rule shall apply to any counterclaim made or relief claimed by the defendant in his defence.

If a claim made in the endorsement on the writ is not repeated in the statement of claim it will be treated as abandoned. *Vide Cargill* v. *Bower* (1878), 10 Ch. D. 502; 47 L.J. Ch. 649; *Lewis and Lewis* v. *Durnford* (1907), 24 T.L.R. 64, *per* Swinfen Eady, J. If damages form part of the relief sought by the plaintiff they should be distinctly claimed in the statement of claim; but even if the pleadings omit to ask for damages, the Court will not be prevented by any technical difficulty from doing justice, if justice requires that damages be given. *Vide London Chatham and Dover Railway Company* v. *South Eastern Railway Company* (1891), 61 L.J., Ch. 294; [1892] 1 Ch. 120, at 152 (C.A.). It has always been the practice of the Court to confine the relief given under the power to grant general relief to relief which is consistent with the case made out on the pleadings, and not to give relief inconsistent with it. *Vide Cockerell* v. *Dickens* (1840), 1 Mont. D. & De G. 45; 3 Moore, P.C. 98; 13 E.R. 45; *Mathers* v. *Green* (1865), 1 Chy. App. 29; 35 L.J. Ch. 1.

Despite the omission of the plaintiff to specifically claim more than she did, I think that consistent with the authorities I may give to her the full benefit of the provisions of section 71 (2) of the statute. It follows that the plaintiff is entitled to recover,

inter alia, damages in the first action for the loss by the deceased of his expectancy of life.

The classic authority in a case of this kind is *Rose* v. *Ford,* [1937] A.C. 826; 106 L.J.K.B. 576. That case is admirably reviewed by Adamson, J. in *Stebbe* v. *Laird* (1937), 45 Man. L.R. 541; [1938] 1 W.W.R. 173. The difficulty which arises in assessing damages for the loss of the expectancy of life is discussed in both these cases. In the House of Lords their Lordships refrained from setting down a complete enumeration of the elements to be taken into account in the fixing of the amount. It was a matter, Lord Roche concluded, which would have to be left to the good sense of judges and juries. It does appear, however, that one of the elements to be considered is the deprivation of the anticipated ability to care for one's dependants. Death intervenes to prevent the realization of this anticipation.

Care is to be exercised where claim is made under both statutes to avoid duplication of damages. That difficulty was resolved in *Rose* v. *Ford, supra,* by leaving out of consideration in the fixing of the amount allowed for the loss of the expectancy of life under the Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5, c. 41), the factor that the deceased was deprived of the anticipated privilege of caring for possible dependants. There the deceased was a young woman of 23 years of age. Her father, as her administrator, brought action under the Fatal Accidents Acts, 1846 to 1908, for her dependants, and under the Law Reform (Miscellaneous Provisions) Act, 1934, for the benefit of her estate. Under the former Acts he was allowed £300. Under the latter Act he was allowed special damages and £1,000 for loss of the expectancy of life.

It is profitable to quote the very full discussions of their Lordships in the House of Lords in order that we may have in mind the considerations which weighed with their Lordships on the two points which give perplexity in the case at Bar, namely, (1) the fixing of the amount to be allowed for the expectancy of life, and (2) the avoidance of duplication of damages, and in quoting I shall not attempt to segregate the discussions upon the two points mentioned but shall rather quote what I consider to be the particularly apt passages in the judgments of each of

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their Lordships on both points. Lord Atkin at p. 835 observes:

I should add that I see no difficulty as to the alleged duplication of damages under the Act of 1934 and the Fatal Accidents Acts. If those who benefit under the last-mentioned Acts also benefit under the will or intestacy of the deceased personally, their damages under those Acts will be affected. If they do not, there seems no reason why an increase to the deceased's estate in which they take no share should affect the measure of damages to which they are entitled under the Act.

Lord Wright at pp. 852-3 observes:

One other point I ought to mention. It is said that, if this element of damages is allowed, there may be a risk of duplication of damages in particular because the Act of 1934 by s. 1, sub-s. 5, provides that the rights conferred by the Act shall be in addition to, and not in derogation of, rights conferred on dependants by the Fatal Accidents Act or other like Acts. If the Act necessarily involved this consequence, it would all the same have to be enforced. But in my opinion the Act does not. I think that in practice no duplication of damage need occur. I think the jury would be properly directed to take into account either that they were at the same time giving damages under Lord Campbell's Act as they did here, or that such damages had been or might be given. The object of damages in these cases is compensation for the benefit of the estate. It is true that the claims under Lord Campbell's Act are independent and are for the separate pecuniary loss sustained by the dependants, whereas the damages under the Act of 1934 go into the general estate in which quite different persons, creditors, legatees, or other beneficiaries, may be interested. But one of the fruits of continued life is generally provision for dependants. If that provision is made good by awards under the Fatal Accidents Acts, the loss consequent on the shortening of life may be deemed to be *pro tanto* reduced. The award of damages in the present case shows how duplication may be avoided. This matter can fairly be left to the good sense of the jury or judge.

Lord Roche at pp. 859-62 observes:

Nevertheless, it is this question of the assessment of damages which gives me more anxiety than any other part of this case, and I venture to make some further observations upon this aspect of the matter. I am very conscious that this discussion leads into paths of abstruse thought and technicalities of the law far remote from the practical directions which judges will have to give to themselves and to juries for the purposes of determining questions of amount But when the task of giving such directions has to be undertaken, abstruse thought and technicalities can be left behind, and as a starting-point there can be taken the simple fact that in a proper case this is an element of damage which ought to be taken into account. I derive assistance as to the method of proceeding from that point from two sources. The first source is certain decisions of the Courts of Scotland which were cited in argument here but which are helpful rather on the question of damages than on the question of principle, because the law of Scotland is not troubled with the same rule as the *Baker* v. *Bolton* (1808), 1 Camp. 493 rule. The second source is the method adopted by the Court of Appeal in the present case. The Scottish decisions to which I would

refer are: *Macmaster* v. *Caledonian Ry. Co.* (1885), 13 R. 252, in which a court presided over by Lord President Inglis dealt with the matter of a shortened life both from an objective and subjective point of view, and *Reid* v. *Lanarkshire Traction Co.*, [1934] S.C. 79. In the latter case Lord Sands, dealing with a similar matter, said: "Still there is something in it which I confess puzzles me, once it is conceded that a man is entitled to compensation for the shortening of his life. But the matter is so hedged with metaphysics that, were I charging a jury, I think I should be disposed to be content to tell them that the shortening of life was an element which they were entitled to take into consideration in measuring the damage suffered by the deceased, and to leave it to them, without any strict analysis of the content of the idea, to assess the damages, contenting myself with warning them that the weight to be given to this element must be moderate, and they must not consider what price the man would have put upon his life." I also should be very content with a direction such as this; but it might be supplemented with advice as to how to proceed in such a manner as the Court of Appeal proceeded here. The effect of what the Court of Appeal has done as to amount is this: As Greer, L.J. has said there is not a question of separate cause of action for each item of damages; but it is customary in order to arrive at a lump sum, which is to constitute the judgment or verdict, to direct attention to and quantify various items or elements of damages such as pain and suffering, loss of earnings during incapacity and permanent disablement if any. Accordingly in the present case it was quite correct, where obviously the principal element was that the expectation of life was cut down so greatly, to treat that as the main matter. That element was quantified at an amount which seems to comply with Lord Sands' recommendations, and it was obviously and rightly arrived at without regard to the question of the amount of future earnings and solely on the basis of what was life going to be worth to a healthy young woman earning her own living, with dependent parents and with some prospects of marriage. This method seems to me to be correct. It eliminates, and rightly so, the question of rich and poor, and pays regard to the normal and the average. A rich miser living in squalor or a very poor man deeply sunk in misery might require special treatment; but ordinarily a person may be assumed to have or be able to earn enough to live his or her life and to enjoy it. Earnings or income are otherwise and to an extent beyond this irrelevant. This having been done it was justly said that the pain and suffering were slight in the circumstances and that the other injuries and in particular the loss of the leg were in effect swallowed up in the estimates made for the first and main element. Clearly in other cases the relative importance of these several elements might be very different and would receive the appropriate explanation. But the building up of a whole sum out of several items or elements is both in accordance with general practice and in accordance with the method adopted in this House in the case of *The Liesbosch*, [1933] A.C. 449, where the problem was to ascertain the value of a vessel to its owner as a going concern.

I would add that I confess to some apprehension lest this element of damage may now assume a frequency and a prominence in litigation far greater than is warranted in fact, and becoming common form may result

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in the inflation of damages in undeserving cases, or, more probably perhaps, may become stale and ridiculous to the detriment of real and deserving cases, such as the present. But the abatement of these possible evils may be left to the good sense of judges and juries, and I may be permitted to express the hope that the assistance of a jury—in my judgment a most admirable tribunal for such a purpose—may be not seldom availed of in the future.

The exceptions specifically set forth in subsection (2) of section 71 of the Administration Act relieve me of the necessity of discussing several elements of damages which were fully discussed in the House of Lords. One, however, of the exceptions merits discussion. I refer to the one which reads: "or to damages in respect of expectancy of earnings subsequent to the death of the deceased which might have been sustained if the deceased had not died." Subsections (1) and (2) of section 1 of the Law Reform (Miscellaneous Provisions) Act, 1934, read in part as follows:

(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action . . . . . vested in him shall survive . . . . . for the benefit of his estate.

(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person:— . . . .

(c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent of his death, ...

That there would be loss to the estate consequent upon loss of expectancy of earnings subsequent to the death is, I think, clear, and that loss falls within the ambit of the language of clause (*c*) above quoted. But in *Rose* v. *Ford, supra,* their Lordships clearly intimated that in their view the clause did not preclude them from taking into account as an element in fixing the *quantum* of damages for loss of expectancy of life the element of deprivation of privilege of providing for dependants. Were it not for the decision of the House of Lords one might be of opinion that the deprivation of the privilege of providing ought not to be taken into account on the ground that the privilege of providing is in itself dependent upon the opportunity to earn. However, as I view the discussions of their Lordships, they did not have regard to that fact but rather to the fact that (*inter alia*) the deprivation of the privilege of providing was the deprivation of one of the fruits or satisfactions or pleasures of

life for which the estate of the deceased is entitled to be compensated. I again direct attention to the language of Lord Roche in this connection at p. 861:

> That element [expectancy of life] was quantified at an amount which seems to comply with Lord Sands' recommendations, and it was obviously and rightly arrived at without regard to the question of the amount of future earnings and solely on the basis of what was life going to be worth to a healthy young woman earning her own living, with dependent parents and with some prospects of marriage. This method seems to me to be correct . . . . *ordinarily a person may be assumed to have or be able to earn enough to live his or her life and to enjoy it. Earnings or income are otherwise to an extent beyond this irrelevant.*

The italics are mine.

In the case at Bar no difficulty arises with regard to the special damages claimed under the Administration Act. They are allowed at $586. Under our law funeral expenses may not be allowed as they are allowed in England and in several of our sister Provinces under specific statutory provision.

In view of the fact that to the estate accrues the damage to the deceased by reason of loss of expectation of life, and that as Lord Wright has said: "One of the fruits of continued life is generally provision for dependants," I think it necessary in the assessment of damages to indicate the portion of the amount I allow for the loss of expectancy of life which I ascribe to the fact that the deceased was deprived of his anticipated privilege of caring for dependants. I think that is necessary to prevent possibility of duplication of damages. The deceased was a young man of 25. His wife says he was in good health prior to the accident. Deriving guidance from the discussions in the House of Lords I think it not unreasonable to allow by way of general damages under the Administration Act the sum of $15,000, of which amount I ascribe $10,000 to the element of deprivation of privilege of caring for dependants.

In the second action I allow general damages in the sum of $10,000.

There will be abatement in the general damages allowed under the Administration Act, to the extent that the plaintiff is the beneficiary under the administration of the portion of the $15,000 ascribed to the deprivation of the privilege of caring for dependants.

Judgment accordingly with costs.

Judgment for plaintiff.

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McDERMID v. BOWEN: THE GENERAL ACCIDENT ASSURANCE COMPANY OF CANADA, THIRD PARTY (No. 3).

Motor-vehicles — Damages—Negligence—Injury to gratuitous passenger—Driving in fog—Insurance company third party—Separate defence of driver being intoxicated—Misdirection alleged—Questions and answers by jury—B.C. Stats. 1935, Cap. 50, Sec. 53; 1932, Cas. 20, Sec. 5, (159M).

The plaintiff brought action for damages for injuries sustained in an accident when a gratuitous passenger in a car driven by the defendant and The General Accident Assurance Company of Canada was added as a third party by order pursuant to section 159M of the Insurance Act as enacted by B.C. Stats. 1932, Cap. 20, Sec. 5. The jury answered questions and found the defendant guilty of negligence which contributed to the accident consisting of "excessive speed at the time of the accident." To the question, "At the time of the accident, was there a fog there of such density as to prevent the defendant from having a proper or sufficient view of the highway or of the traffic thereon so as to render driving on the highway in question hazardous and dangerous?" the answer was "Yes." To the question, "Did the driving of the defendant in such fog contribute to the accident?" the answer was "Yes." To the question, "Did the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk she ran impliedly agree to incur it?" the answer was "Yes." It was held that the plaintiff voluntarily incurred the risk and the action was dismissed.

Held, on appeal, affirming the decision of ROBERTSON, J. (O'HALLORAN, J.A., dissenting), that although the trial judge misdirected the jury in respect to the *onus* of proof as to the existence of fog at the time of the accident, nevertheless since the misdirection could not have been prejudicial to the appellant a new trial should not be ordered.

Held, further, that the mere fact of driving a motor-vehicle in a fog does not constitute negligence provided it is at a speed consistent with the control of the car within the limits of visibility.

APPEAL by plaintiff from the decision of ROBERTSON, J. of the 20th of April, 1937 (reported, 51 B.C. 525), in an action for damages for injuries sustained owing to the alleged negligent operation of a motor-vehicle owned and driven by the defendant Carmen Bowen, in which the plaintiff was a passenger. Bowen had a policy of insurance with The General Accident Assurance Company of Canada. The insurance company refused to defend Bowen and on its own motion was joined as a third party in the

action. The insurance company repudiated liability to indemnify the defendant on the ground that he was under the influence of intoxicating liquor and incapable of keeping his car under control at the time of the accident. The plaintiff met the defendant at about 5 o'clock in the afternoon of the 22nd of October, 1936, and they went to the Angelus Beer Parlour and then to the Devon Cafe for dinner. After dinner they went to the office where Bowen was employed and then drove to the liquor store on Hornby Street. They then went to the Angelus Hotel. After this they again went to the liquor store and then to the Commodore Cabaret. They left there at about a quarter to 1 a.m. and drove to New Westminster and carried on in the direction of Bellingham. They arrived at the international boundary at about 3.45 a.m. but were turned back. When they reached a point about a mile and a quarter south of Cloverdale on the Pacific Highway, Bowen ran into the back of a truck which was going in the same direction. The right-hand side of the Bowen car caught the left-hand side of the rack at the back of the truck and the Bowen car was thrown on its side and burst into flames. Bowen denied negligence and that the accident was inevitable. The insurance company raised the defences that there was no negligence, that Bowen was under the influence of liquor at the time of the accident, that he operated the car in such a fog that it rendered the highway hazardous and dangerous for driving, and the plaintiff with full knowledge of the risks attending such driving voluntarily assumed the risks thereof and Bowen and the plaintiff were at the time engaged in a joint adventure. The questions submitted to the jury and answers thereto were as follow:

1. Was the defendant guilty of negligence which contributed to the accident? Yes.

2. If so, in what did such negligence consist? Excessive speed at time of accident.

3. Was the defendant, at the time of the accident, under the influence of intoxicating liquor to such an extent as to be for the time being incapable of the proper control of his car? Seven say no; one says yes.

4. If you answer question 3 in the affirmative, did the conditions of the defendant contribute to the accident?

5. If you answer questions 3 and 4 in the affirmative, did the plaintiff freely and voluntarily with full knowledge of the nature and extent of the

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risk she ran by reason of such condition of the defendant impliedly agree to incur it?

6. Was the defendant at the time of the accident in such a condition, as a result of imbibing intoxicating liquor, as to render it dangerous for him to drive his car? Seven say no; one says yes.

7. If your answer to question 6 is in the affirmative, did the condition of the defendant contribute to the accident?

8. If your answer to questions 6 and 7 is in the affirmative did the plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk she ran impliedly agree to incur it?

9. At the time of the accident, was there a fog there of such density as to prevent the defendant from having a proper or sufficient view of the highway or of the traffic thereon so as to render driving on the highway in question hazardous and dangerous? Yes.

10. If your answer to question 9 be in the affirmative did the driving of the defendant in such fog contribute to the accident? Yes.

11. If your answer to questions 9 and 10 be in the affirmative did the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk she ran impliedly agree to incur it? Seven say yes and one says no.

11a. Was there an arrangement express or implied made between the plaintiff and the defendant and whereby they had joint control of the car at the time of the accident? No.

12. Damages. Special $812.45. General, $2,000.

The jury after sitting for three hours brought in the answers to the questions submitted. On motion for judgment, the learned trial judge dismissed the action.

The appeal was argued at Vancouver on the 29th of March, 1938, before MARTIN, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

Denis Murphy (*D. Freeman,* with him), for appellant: The defence of *volens* on account of fog and the questions relative thereto should not have been put to the jury, and in view of the manner in which the trial was conducted, namely, that the defence relied upon by the insurance company was the drunkenness of Bowen, the jury was led into a side issue, namely fog, which the insurance company could not rely on, and abandoned. The jury should not have found on the evidence that the plaintiff could be *volens* as to fog: see *Smythe* v. *Campbell* (1930), 65 O.L.R. 597; *Gauley* v. *Canadian Pacific Railway Co.* (1930), *ib.* 477; *Stewart* v. *Godwin,* [1933] O.W.N. 712. It is submitted that the defence of *volens* could not on the facts in this case and the principles laid down in the above cases cited, apply. There was error in not directing the jury that the *onus* of proving

the defence to the effect that the appellant was *volens* as to fog rested solely on the insurance company. On the findings of the jury the learned judge should have given the verdict as found by the jury to the plaintiff. The learned judge erred in not reviewing all the evidence in connection with the circumstances of the accident, and particularly in not reviewing the evidence as to fog at the time of the accident. The verdict of the jury was perverse and inconsistent. The plaintiff was severely injured and disfigured for life by scars on her neck and forehead. The amount allowed by the jury for damages is insufficient.

Bull, K.C., for respondents: As to the jury's findings, excessive speed in itself is not negligence: see *Fillion* v. *O'Neill*, [1934] 4 D.L.R. 598 at p. 605. Driving in a fog is not negligence, but driving in a fog at such a speed that the driver cannot pull up within the range of his visibility is negligence. The answers of the jury must be given a reasonable construction, and their finding was that the defendant was negligent in driving at an excessive speed at the time of the accident, having regard to the existence of fog of such density as to prevent him having a proper or sufficient view of the highway or of the traffic thereon, so as to render driving on the highway hazardous and dangerous. See *Marshall* v. *Cates* (1903), 10 B.C. 153. The redirection of the trial judge to the jury on the question of *volens* left no room for doubt in the minds of the jury that they were to consider the combination of the two things, namely, excessive speed, having regard to the existence of fog. See *Kouch* v. *Adkins*, [1933] O.W.N. 709; *Foley* v. *Township of East Flamborough* (1899), 26 A.R. 43 at p. 47; *Scott* v. *Fernie* (1904), 11 B.C. 91. *Volens* has no application in cases that arise from violation of a statutory duty: see *Baddeley* v. *Earl Granville* (1887), 19 Q.B.D. 423. The reasons for judgment of the learned judge below are correct in law.

Murphy, replied.

Cur. adv. vult.

12th April, 1938.

MARTIN, C.J.B.C. agreed with the reasons for judgment of SLOAN, J.A.

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SLOAN, J.A.: The plaintiff appeals from a judgment of Mr. Justice ROBERTSON dismissing her action consequent upon the answers by a jury to questions. Submissions of considerable nicety were advanced by her counsel including an objection to the charge of the learned trial judge to the jury. It is this aspect of the case with which I propose to deal first.

The relevant facts, shortly stated, are as follows: The action was brought by the appellant to recover damages for personal injuries caused by the alleged negligent operation of an automobile owned and operated by the respondent in which the appellant was a passenger on the occasion in question.

The accident happened on October 23rd, 1936, on the Pacific Highway near Cloverdale about 5 o'clock in the morning when the respondent ran into the rear end of a truck. The appellant alleged that the accident, and her resultant injuries, were caused by the negligence of the respondent which consisted in not keeping a proper look-out, in not having the motor-vehicle under proper control and in proceeding at an excessive rate of speed. The statement of claim also alleges as a particular of negligence that the respondent was driving "at such a rate of speed and in such a manner as to be unable to control the said automobile within the range of his visibility." This pleading would, I think, be wide enough to cover excessive speed in a fog but counsel for the appellant submitted and I take it to be common ground, that at the trial the only pleading of negligence upon which he relied was excessive speed and lack of proper look-out.

The respondent Bowen by his statement of defence denies each and every allegation of negligence made against him by the appellant.

At the time of the accident the respondent Bowen was insured against claims of this kind by a policy of insurance issued by the respondent company but the company repudiated its liability under the policy alleging that the collision and resulting injuries and damages were the result of the respondent Bowen operating his automobile while under the influence of intoxicating liquor.

The respondent company on its own application was joined as third party in the action under section 48 of the Insurance Act Amendment Act, 1935, B.C. Stats. 1935, Cap. 38 (now

R.S.B.C. 1936, Cap. 133, Sec. 175 (7) and filed a statement of defence which denied all the allegations of negligence pleaded by the appellant, and then set up, in the alternative, two separate defences: that the respondent Bowen was driving his automobile while intoxicated and that the appellant

with knowledge of the defendant's said condition, rode in the said automobile as a gratuitous passenger and voluntarily assumed all the risks attendant on the journey and in particular all such risks that might arise from the defendant's said condition.

Secondly, that the injuries suffered by the appellant were the result of the respondent Bowen driving his automobile in a fog of such density that rendered driving hazardous and dangerous and that the appellant knew of the fog and the resultant hazard and with such knowledge voluntarily assumed "all the risks of driving in the said fog."

It is apparent that this question of fog was raised by the third party as an element in the defence of *volens* but it is to be noted that excessive speed in the fog was not alleged by the third party pleading but specifically denied. The mere driving in a fog, in my opinion, while hazardous, is not negligence providing that such driving is at a speed consistent with control of the car within the limits of visibility.

Keeping in mind the pleadings of the various parties to this action and the issues raised therein I now turn to the charge of the learned trial judge.

In dealing with the position of the respondent company he said:

The interest the insurance company has is this: if it is successful in showing either the defendant was not guilty of negligence—in which case he does not have to pay—or that the defendant committed some breach of contract, they are released from liability. In either of these two cases they escape payment under the policy, but it is not a matter on which you can find any fault with them if they come into court and stand upon their legal right to get out from under liability providing they are *bona fide* in their defence. If you find the defence is not made out you will govern yourselves accordingly. It places you gentlemen of the jury in an awkward position because you find that Mr. *Bull* [for the respondent company] and Mr. *Du Moulin* [for the respondent Bowen] allege this: they say the defendant was not guilty of negligence. They stand shoulder to shoulder upon that question, but when it comes to a question of whether or not the defendant was intoxicated, then they are in opposite directions.

On the question of the *onus* of proving intoxication he said:

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The *onus* is on the insurance company because they allege that affirmatively, and they have to prove to your satisfaction by the preponderance of evidence that the defendant at the time of the accident was under the influence of intoxicating liquor to such an extent as to be for the time incapable of the proper control of his car. Bear that in mind, gentlemen. It is only that question of whether or not the defendant was negligent that the *onus* lies on the plaintiff.

It will be noted that the learned trial judge in that passage makes no mention of the fact that the *onus* was on the respondent company to prove the existence of fog as part of its defence. The word "question" is in the singular and refers to the defence of *volens* in relation to intoxication.

The learned trial judge in his charge relating to the burden of proving negligence, and the elements to be considered in relation thereto, said:

In this case, there was a duty owing by the defendant to the plaintiff. I am telling you that as a matter of law. That duty was to take such care in driving that car as was reasonable under all the circumstances. For instance, the driver of that car should not have had such a rate of speed. I am not saying he did that. He had not the car under control. And again, by way of illustration, he should not have proceeded at a high rate of speed in a fog when he could not pull up his car and avoid something that might be within his range of vision. . . . .

Was the defendant guilty of negligence which contributed to the accident? I suggest you consider these questions when you retire to the jury room, in the order in which they are set out on this paper which you will take with you, and in considering that question you will take into consideration all the various points of negligence upon which evidence has been given in this case. You will, of course, confine yourselves to the evidence in this case and those things I have already mentioned, speed, look-out, drunkenness, driving in fog, and so on. When I come to deal with the facts, as I shall very shortly, I shall refer to these various acts of negligence. . . .

There was a fog there, and that the defendant notwithstanding that fog drove his car at a high rate of speed. The plaintiff says he was negligent in doing that. . . . Assuming there was a fog you have to come to a conclusion as to whether or not the defendant was negligent in driving in that fog, and one species of negligence would be driving at a high rate of speed on that occasion. . . .

If the defendant drove in the fog at a high rate of speed so that he could not stop within his range of vision, he was as a matter of law, and I tell you he was clearly guilty of negligence. . . .

With regard to the question of fog I may say this, that Mr. *Bull* took the position there was no fog. Mr. *Murphy* agreed to that position, but Mr. *Du Moulin* relies on the evidence of the defendant and the other evidence to support it, that there was fog.

In my opinion the charge of the learned trial judge on this question of negligence could lead the jury to but one conclusion:

that the burden of proving the existence of fog was upon the appellant and a part of her affirmative case. With reference to the last-mentioned observations in the charge that Mr. *Bull* (for the respondent company) took the position there was no fog Mr. *Bull* before us stated what he actually submitted to the jury was to the effect that from the circumstances of the collision the respondent Bowen was either driving in a fog or intoxicated. Accepting Mr. *Bull's* statement makes it difficult to understand how the learned trial judge could have thought that Mr. *Murphy* agreed with the stand taken by Mr. *Bull*. In any event I do not view that observation of the learned trial judge as in any material way directing the jury as to the *onus* of proof concerning the question of fog. The learned trial judge stated that "Mr. *Du Moulin* [relies upon] the evidence [given by] the defendant and the other evidence to support it, that there was fog," but as Mr. *Du Moulin* had not raised the issue in his pleading I do not see that such a position taken by counsel for the respondent Bowen advances the matter.

The learned trial judge put questions to the jury, and the answers thereto by the jury may be summarized as follows: The respondent Bowen was driving at an excessive rate of speed at the time of the accident; he was not intoxicated; at the time of the accident there was a fog of such density as to prevent Bowen from having a proper or sufficient view of the highway and the traffic thereon so as to render driving on the highway in question hazardous and dangerous; that driving in such fog contributed to the accident and that the appellant freely and voluntarily with full knowledge of the risk she ran in the fog impliedly agreed to incur it. Damages were assessed at $2,812.45.

On these answers the learned trial judge dismissed the action.

It was strenuously argued before us that the answer to the question as to the appellant's acceptance of the risk of driving in the fog did not bar her right of recovery as there was no question put, and, of course, none answered, which would extend her acceptance of the risk to driving in the fog at an excessive rate of speed. It was submitted that while she may have accepted the ordinary hazards incident to driving in a fog, the

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jury never found that she had agreed to accept the risks that might arise consequent upon excessive speed in the fog. This submission has caused me considerable difficulty but I think the solution thereof is found in the further direction of the learned trial judge. The jury having answered certain questions, including the one wherein they found excessive speed at the time of the accident, came back and asked for further instruction on question 11. On this occasion the following appears:

The Foreman: Your Lordship, can you interpret No. 11 for us? We are not unanimous on that clause.

THE COURT: You are not unanimous?

The Foreman: No, we are not unanimous.

THE COURT: Let me see it. What is 11? Oh, well, question 11 is, "If your answer to questions 9 and 10 be in the affirmative, did the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk she ran, impliedly agree to incur it? You see now you have answered 9, there was a fog of sufficient density to prevent the defendant from having a proper and safe view of the highway. Then you say [No. 10] that contributed to the accident. Now then, the next question is, did the plaintiff, that is the young lady, freely and voluntarily, with full knowledge of the nature and extent of the risk she ran, impliedly agree to incur it? Now did she know and realize the condition owing to the fog conditions, and did she understand the nature and risk she ran in allowing him to drive it—drive in that fog under those weather conditions, and did she then freely and voluntarily impliedly agree to incur it? Now you have to take into consideration there the fact that there were patches of fog, and it is a question of whether or not it was one of those things that she perhaps thought the fog conditions would be only temporary, or was the condition such that she knew and appreciated the danger of driving through the fog at that excessive speed?

In my opinion the learned trial judge imported into question 11 the element of excessive speed and the answer must be interpreted in the light of the charge.

From this digression I return to a discussion of those portions of the charge relative to the *onus* of proof concerning the fog condition. I am free to confess it is a vexing question. First of all—I am satisfied, with respect, that the learned trial judge erred in his charge in this aspect of the matter, and that there was misdirection in relation to the *onus* of proof concerning the fog condition. It was no part of the appellant's case and yet the learned trial judge in my opinion left it to the jury in that way.

Having arrived at that conclusion it does not follow however

that a new trial should be ordered as I am unable to see in what manner the misdirection complained of was prejudicial to the appellant. All that happened, in effect, was that the appellant had an additional element of negligence found in her favour, and it is mere imaginative speculation to say, that if the jury had been properly directed on the question of *onus* as to the proof of fog, they would have answered question 11 in a different manner. I consider the language of MARTIN, J.A. (now Chief Justice of British Columbia) in *Perry* v. *Woodward's Ltd.* (1929), 41 B.C. 404, at p. 417, singularly appropriate to this case. He said:

> Such being the case no substantial wrong or miscarriage of justice has been occasioned by the matters complained of and hence a new trial should not be granted in accordance with the long-established practice of the Appellate Courts of this Province so far back at least as rule 287 of 1880, and our present App. Rule 6 has, if anything, added to our discretion to make the order that we "think fit" to attain justice.

A further matter remains to be considered. The appellant submitted that questions 9, 10, and 11 should not have been put to the jury. Those questions are set out above in the second charge of the learned trial judge to the jury. The ground for this complaint is that there was no evidence to support such questions, especially number 11. I do not propose to deal at any length with this submission but consider the questions proper to be asked (the form of question 11, however, with respect, leaves much to be desired) and, when answered, by the jury, the well-known principles summarized in *McCannell* v. *McLean*, [1937] S.C.R. 341, apply. I cannot say in this case, reviewing the evidence as a whole, that the finding of the jury in answer to questions 9, 10, and 11, "is absolutely unreasonable . . . and shows that they have not really performed the judicial duty cast upon them."

In the result I would dismiss the appeal.

O'HALLORAN, J.A.: The plaintiff was injured while riding in a motor-car driven by the defendant Bowen, and sued him for damages. The issue of the defendant's intoxication was specifically raised in the statement of defence of The General Accident Assurance Company of Canada which had applied and was added as third party in the action. This issue over-

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shadowed all others in the course of the trial. Here follow the answers to the thirteen questions submitted to the jury: [already set out in statement.]

We were told by counsel for the appellant that this was the first occasion on which an insurance company was added as third party under section 175 (7) of the Insurance Act, Cap. 133, R.S.B.C. 1936. Two actions, in effect, were tried at the one time: (1) wherein the issue was between the plaintiff and defendant as to the defendant's negligence and consequent responsibility; and (2) wherein the issue was between the defendant and the third party, as to whether the defendant's negligence (if any) consisted of driving while intoxicated. As already stated, intoxication became the most important issue at the trial, although it was not the issue between the plaintiff and the defendant, except to the extent that it bore on the issue of negligence.

It will be noted that on the main issue the jury found the defendant was not intoxicated. The defendant was found negligent in driving at an excessive speed at the time of the accident, and damages were awarded in the sum of $2,812.50. However, the learned judge held the answer to question 11 to mean that the plaintiff, with full knowledge of the defendant's negligence, agreed to incur the risk, and accordingly dismissed the action.

Having asked in question No. 1, "Was the defendant guilty of negligence which contributed to the accident," and in question No. 2, "If so, in what did such negligence consist?" the third and next obvious question was—Did the plaintiff with knowledge of such negligence (if any) agree to incur the risk thereof? In my opinion this important question was not asked the jury.

It was, with respect, an error to confine the application of the doctrine of *volens,* solely to the subject-matter of questions 9 and 10. Foggy weather was simply one element—one of the circumstances—for the jury to take into consideration in determining the question of general negligence presented in questions 1 and 2.

It was of vital importance that upon this point the question

to the jury should be so clear and unequivocal as to leave no room for misapprehension. In question No. 9, the jury are asked if the fog was so dense as to render driving "hazardous and dangerous" without definitely relating it to negligence of the defendant; the answers to questions Nos. 10 and 11 should be read accordingly.

The practice of requiring the jury to answer specific questions is apt to become an instrument of mental confusion with consequent inconsistent answers, unless the number of such questions is reduced to clear cut essential issues stated in simple form. Having regard to the trend of the trial, the questions, in my view at least, were presented in a form which led the jury to misconceive the issues of fact between the plaintiff and the defendant, resulting in supplementary answers tending to defeat the full effect of the answers to questions Nos. 1, 2, and 12.

I would therefore allow the appeal and direct a new trial.

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

Solicitors for appellant: *Murphy, Freeman & Murphy.*

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

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1938
Mar. 14, 15;
April 1.

Criminal law—Charge of conducting a lottery—Queensland State Lottery—Sale of "interim receipts" in British Columbia—Forwarded to Queensland—Criminal Code, Secs. 69 and 236 (c).

Distd.
Rex v. Miller
99 C.C.C. 79

The accused was convicted on a charge laid under the first part of section 236 (*c*) of the Criminal Code, namely: that he "unlawfully did conduct a scheme for the purpose of determining who, the holders of tickets were the winners of property proposed to be disposed of by a mode of chance." The accused was the North American representative of the "Queensland State Lottery" conducted and drawn under Government supervision in aid of Queensland public hospitals. He received from Queensland books of "interim receipts" with stubs attached. These he sent to sub-agents throughout Canada and the United States, the sub-agents upon making sales sent the stubs and money to the accused

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who forwarded the same to headquarters in Queensland, and in due course each purchaser would receive a ticket direct from Queensland which entitled him to a chance for a prize in the "draw" which was wholly controlled and managed by the "Queensland State Lottery" officials in Australia.

Held, on appeal, reversing the decision of police magistrate Wood, that the above section of the Criminal Code is primarily aimed at those who have the power of control over the scheme complained of to select, by whatever means, the winners in the lottery and not at those who merely act as their servants or agents in affording persons in this country an opportunity, by means of receipts or tickets, to try their luck in a draw in a foreign country.

Held, further, that section 69 of the Criminal Code is of no assistance to the Crown in the circumstances of this case.

APPEAL by accused from his conviction by police magistrate Wood of the city of Vancouver on a charge that he did unlawfully conduct a scheme for the purpose of determining who the holders of tickets were the winners of property proposed to be disposed of by mode of chance. Lotteries were conducted under the supervision of the Queensland Government for assistance to hospitals. There are three different lotteries at different prices, called: "Special Casket," "The Golden Casket Art Union" and "Mammoth Casket" and interim receipts were sold for each of these at $4, $2 and $1.60 respectively. Books containing ten "interim receipts" each are obtained by agents and sold throughout Canada and the United States. When a purchaser pays, say, $4 he receives an "interim receipt" and when his money is received in Queensland he is sent a ticket from Queensland on which is a different number from the number on the "interim receipt," and it is this ticket and the number thereon which participates in the draw. The drawing, which takes place in Queensland, is on the number on the ticket. The accused received the books with the "interim receipts" and distributed them amongst his several agents in Canada and the United States. The money received for the "interim receipts" was paid to him and was forwarded by him to Queensland.

The appeal was argued at Vancouver on the 14th and 15th of March, 1938, before MARTIN, C.J.B.C., MCQUARRIE and SLOAN, JJ.A.

J. L. Farris, for appellant: This is a Queensland Government

lottery and is legal in that State. Rankine is an agent in Canada. He receives the books with stubs and "interim receipts"—there are ten in each book. He distributes these amongst agents who sell them and the stubs and money are sent back to him. He then forwards the stubs and money to Queensland. He has nothing to do with the operation of the drawing in Queensland and has nothing to do with determining who the winners are. The charge is under section 236 (*c*) of the Code. He had nothing to do with the scheme to determine winners. Selling tickets or "interim receipts" does not come within that section. He is not charged with conducting a lottery: see *Jenks* v. *Turpin* (1884), 53 L.J.M.C. 161 at p. 171; *Rex* v. *Nelson* (1929), 51 Can. C.C. 213.

Orr, for the Crown: It is an offence to do certain things under section 236 of the Code, and in this case section 236 must be referred to. The words in section 236 (*c*) "so proposed to be disposed of" must be construed in this charge. With relation to "scheme" there are thirteen points. Accused is the North American representative of the lottery scheme. Our case rests on section 69 of the Code, and the word "aid" to commit an act is important. He did certain outstanding things in addition to selling tickets. He appointed agents and "tried" to appoint agents. There is here a continuous course of conduct by him in this work lasting over one year. The file of correspondence filed as an exhibit shows this. He looked after complaints from customers, notified winners and paid commissions to his agents. He gave directions as to how winners were to get their money: see *Rex* v. *Tooke* (1794), 25 St. Tri. 1 at p. 120; *Rex* v. *Russell* (1920), 33 Can. C.C. 1 at p. 7. I want to show that this man did everything except turn the wheel. With reference to the application of section 69 see *Rex* v. *Hynes* (1919), 31 Can. C.C. 293; *Barratt* v. *Burton* (1893), 63 L.J.M.C. 33; 10 T.L.R. 124. Another charge might be made under section 235 (*d*): see *Du Cros* v. *Lambourne* (1906), 21 Cox, C.C. 311; *Rex* v. *Patry* (1935), 52 B.C. 1; *Regina* v. *Roy* (1900), 9 Que. Q.B. 312. Without what he did they could not carry on. As to being charged for carrying on illegal acts in another country see *Rex* v. *Godfrey,* [1923] 1 K.B. 24.

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Farris, in reply, referred to *Rex* v. *Hendrie* (1905), 10 Can. C.C. 298.

Cur. adv. vult.

1st April, 1938.

MARTIN, C.J.B.C.: It is enacted by section 236, subsection (*c*), of the Criminal Code, as amended by Cap. 56, Sec. 3, 1935, that

> Every one is guilty of an indictable offence and liable to two years' imprisonment and to a fine not exceeding two thousand dollars who . . .
>
> (*c*) conducts or manages any scheme, contrivance or operation of any kind for the purpose of determining who, or the holders of what lots, tickets, numbers or chances, are the winners of any property so proposed to be advanced, loaned, given, sold or disposed of; or [conducts, manages or is a party to any scheme, contrivance or operation of any kind by which any person, upon payment of any sum of money, or by obligating himself to pay any sum of money, shall become entitled under such scheme, contrivance or operation to receive from the person conducting or managing such scheme, contrivance or operation, or any other person, a larger sum of money than the amount paid or to be paid, by reason of the fact that other persons have paid or obligated themselves to pay any sum of money under such scheme, contrivance or operation].

The words in brackets indicate the amendment.

The appellant was on the 18th of January last convicted by the police magistrate of Vancouver

> for that he the said J. Henry Rankine, at the said city of Vancouver, between the 1st day of January, 1937, and the 18th day of December, A.D. 1937, unlawfully did conduct a scheme for the purpose of determining who, the holders of tickets were the winners of property proposed to be disposed of by a mode of chance contrary to the form of the statute. . . .

At the outset it is to my mind doubtful if this conviction could be sustained in the more than inartistic, if not indeed uncertain, way in which it charges the offence complained of, in that it treats the two distinct classes of those "who . . . are winners" without necessarily holding lots of tickets, etc., and those who are "the holders of" said lots, etc., as being the same, though the statute clearly deals with them as two classes disjunctively by using the word "or," the intent of which is completely disregarded by the confused way in which the charge is laid, so as to make it, I am inclined to think, senseless and inoperative as not being based upon the statute.

But assuming that this objection can be overcome, the question for our determination is, does the said charge cover the

facts of this case? which in brief are that the appellant has been in substance selling tickets personally, and by his servants or sub-agents, within this Province to purchasers who hoped to win prizes in a lottery admittedly "conducted" and "controlled" by the Queensland State Government in aid of Queensland public hospitals. This sale or distribution of tickets was effected here by giving the purchaser an "interim receipt" for the money he paid which was sent to headquarters in Australia and in due course the purchaser received a ticket which entitled him to a chance for a prize in the "draw" which was wholly controlled and managed by the "Queensland State Lottery" officials in that country. The evidence is not in dispute, and there is none to show that the appellant took, or had the right to take, any part in the conduct or management of this legalized sweepstake in Australia, despite which the learned magistrate found him to be "one of the principals conducting this scheme."

The language employed in the first and relevant part of said section (*c*), under which this charge is laid, is as Lord Wright said (all the other Lords concurring) of another section, very recently in *Admiralty Commissioners* v. *Valverda (Owners)*, [1938] A.C. 173 at 189, "not free from difficulty [but] when the practical effect of the section is looked at its intention is clear," to me at least, and it is that it is primarily aimed at those who have the power of control over the scheme complained of to determine, *i.e.*, to select by whatever means, the winners in the lottery, and not at those who merely act as their servants or agents in affording persons in this country an opportunity by means of receipts or tickets or otherwise to try their luck in a draw in a "foreign," legally, country. That appellant did in some cases perform other minor services incidental to his primary ministrations as a salesman does not alter the principle, and therefore section 69 of the Code, upon which the prosecution relies, does not in my opinion, apply.

It may be noted that this view derives support, though to my mind none is needed, from the addition made by the said amendment of 1935 which emphasizes said distinction between control and participation, by in effect creating a new offence by expanding the responsibility from conducting and managing to include

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one who "or is a party to any scheme contrivance or operation," etc. I express no opinion as to what the scope of that new language may be, other than to say that it is obvious that one may be "a party to a scheme" over which he has no control whatever, and had this charge been laid under this amendment, or under some of the other subsections of section 236, different considerations would have arisen with which we have no present concern.

It follows that, under section 1014, the appeal must be allowed, the conviction quashed and a judgment of acquittal entered.

McQUARRIE, J.A.: This is an appeal from a conviction of the appellant by police magistrate Wood in and for the city of Vancouver in the Province of British Columbia, for that he, the appellant, at the City of Vancouver between the 1st day of January, 1937, and the 18th day of December, 1937, did unlawfully conduct a scheme for the purpose of determining who, the holders of tickets were the winners of property proposed to be disposed of by a mode of chance. The penalty imposed was a fine of $500 and in default of payment three months in gaol. As stated by the magistrate "this case involved what is popularly known as the Australian Sweepstake, a Queensland Government lottery, run for the benefit of hospitals." It is common ground that the charge was laid under paragraph (*c*) of subsection 1 of section 236 of the Criminal Code. Said subsection 1 consists of paragraphs (*a*), (*b*), (*bb*), (*c*), (*d*) and (*e*), all of which appear to constitute separate, distinct and complete offences. All we are concerned with, however, is paragraph (*c*) and more particularly with the offence of unlawfully conducting a scheme for determining who, the holders of tickets were the winners of property proposed to be disposed of by mode of chance as set out in the conviction.

On the hearing the learned Chief Justice enquired of counsel for the Crown why a charge of selling lottery tickets had not been made against the appellant instead of the rather involved charge which was made against him. Counsel for the Crown responded that there was the difficulty of obtaining the necessary

evidence to substantiate a charge of selling and consequently I presume it will be admitted by the Crown that such evidence does not appear in the case at Bar. It might be suggested that the 1935 amendment to said paragraph (*c*) might clear the matter up inasmuch as under that amendment the words "or as a party to any scheme, contrivance or operation . . ." After consideration, however, I am satisfied that the amendment is of no particular assistance to the Crown in this case as it was aimed particularly against machines or devices which were operated in Canada. Although I am quite aware that no legal significance may attach thereto, I refer to Revised House of Commons Hansard, 1935, pp. 4297-8, which contains a report of the discussion in the House of Commons when the Senate amendments to the bill for amending the Criminal Code came before the house, as follows:

Mr. Guthrie: Passing that for the moment, the next amendment was suggested after the bill had passed this House, I think in the first instance by county crown attorney in the city of Ottawa and also some other county crown attorneys in different cities of Canada. It is to check as far as possible these gambling devices found in stores and places where the public resort, in regard to which the law is a little uncertain at the present time. The Senate has put in a clause that any person who: conducts, [etc. as in the 1935 amendment hereinbefore referred to].

Mr. Lapointe: That applies only to those who are making money out of the operation of these machines?

Mr. Guthrie: Yes, making money out of these slot machines and gambling devices.

Mr. Lapointe: It does not apply to those who put their money in them?

Mr. Guthrie: No, only to anyone who conducts or manages such a machine.

Mr. Guthrie was then the Minister of Justice and Mr. Lapointe was then a member of His Majesty's loyal Opposition and is now Minister of Justice.

Counsel for the Crown outlined to us thirteen points in which the appellant was shown to have taken part in the operation or conduct of the alleged scheme under the first part of said paragraph (*c*). It is quite clear, however, that everything the appellant did was performed in Canada and that the "scheme, contrivance or operation" referred to in said paragraph (*c*) took place, if at all, in Australia.

It is common ground I think that section 236 standing alone

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would not have justified the conviction but counsel for the Crown contended that reference might be had to section 69 of the Code which provides in paragraph (*b*) of subsection 1 that

every one is a party to and guilty of an offence who,—does or omits an act for the purpose of aiding any person to commit the offence.

He argued that by the acts enumerated in the thirteen points previously referred to the appellant had aided in the commission of the offence and was therefore a party to and guilty of the offence under said subsection (*c*) of conducting the scheme set out in the conviction. There was no proof that the conducting of a lottery in Australia was unlawful in that country and I think it would be safe for us to assume that such a thing was not an offence there inasmuch as this particular lottery appears to have been conducted by the Government of Queensland. Surely a person cannot be convicted of aiding in the commission of an offence unless it were first shown that an offence had been committed, which is not the case here. I, therefore, think the appeal should be allowed and the conviction quashed.

SLOAN, J.A.: This is an appeal from a conviction by police magistrate Wood at Vancouver, whereby the appellant was found guilty of the charge that he

unlawfully did conduct a scheme for the purpose of determining who, . . . were the winners of property proposed to be disposed of by mode of chance.

The charge was laid under the first part of section 236 (*c*) of the Criminal Code and requires consideration of what is known as the "Golden Casket Art Union" (otherwise described as the "Queensland State Lottery") purporting to be "conducted and drawn under Government Supervision in aid of Queensland Public Hospitals."

The appellant was described as the North American representative of the lottery but notwithstanding his somewhat grandiose title I understand from the somewhat loose and indefinite evidence his functions to be very largely confined to the distribution of tickets "or interim receipts" through the medium of agents and the dispatch to Australia of the moneys collected from the sale of such interim receipts. The purchaser of the "interim receipt" received in due course his "Golden Casket" ticket from Australia and it is this ticket and the number thereon

which participated in the "draw." The prize-winning number was selected by a mechanical contrivance in Australia operated, no doubt, by appropriate officials of the "Queensland State Lottery." According to the usual method of procedure the Canadian winners received their prize money by bank draft from that country.

The question for decision is a narrow one: On the facts (briefly outlined) was the appellant rightly convicted of conducting a scheme for the purpose of determining who were the winners of the prizes? With respect, in my opinion, on the facts proved he was not guilty of the offence charged. It may be that he was guilty of other offences in connection with his activities relative to this Queensland lottery but that is a matter not before us for consideration and I do not propose to deal with that aspect of the case.

In my view the scheme "for the purpose of determining who were the winners" was "conducted" by the officials in Australia and it is not disclosed in the evidence nor can any inferences be drawn, in my opinion, that the appellant had any control over the conduct of the scheme by which the prize winners were selected. He was essentially a distributor of "interim receipts" and I cannot think that his activities in that regard constituted "conducting a scheme" within the meaning of the section under which he was charged. To hold otherwise, to my mind, would lead to absurd conclusions, *e.g.*, the sale of one interim receipt would make the seller guilty of conducting the scheme. Alternatively, if one thousand agents were engaged in selling interim receipts, could it be said that each one of the thousand was conducting the scheme? I think not.

The scheme for selection of the prize winners was carried on in Australia, and the final step in that scheme was the operation of the mechanical device under the control of the officials of the Queensland State Lottery. It was not any act of the appellant but theirs which determined who were the winners of the prizes.

I cannot agree that section 69 of the Code is of any assistance to the Crown under the circumstances of this case.

I would, therefore, with respect, quash the conviction upon

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the ground that it cannot be supported, having regard to the evidence.

Appeal allowed.

Solicitor for appellant: *John L. Farris.*
Solicitor for respondent: *Oscar Orr.*

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June 14, 30.

REX v. BELT.

Criminal law—Indecent assault upon a male person—Two charges of same offence—Pleads guilty to both charges—Sentenced to three years on each charge—Sentences to run consecutively—Appeal from sentence—Criminal Code, Secs. 773, 774 and 779.

On two charges that the accused "being a male person unlawfully did indecently assault another male person," he pleaded guilty to both and voluntarily admitted nine other similar offences which he asked to be taken into consideration. He was sentenced to serve three years on each charge, the sentences to run consecutively. On appeal from sentence:—

Held, affirming the sentence, that the magistrate had jurisdiction to impose the sentence, and under the circumstances no ground appeared upon which the Court would be justified in reducing it.

APPEAL by convict from sentence passed upon him by police magistrate Wood at Vancouver on the 18th of May, 1938, on his conviction that he, being a male person, unlawfully did indecently assault another male person, to wit N . . . H . . . and for that he, being a male person, unlawfully did indecently assault another male person, to wit D . . . H . . . The accused elected to be tried forthwith by the magistrate and pleaded guilty to both charges and voluntarily admitted nine other similar offences which he asked to be taken into consideration. He was sentenced to serve three years on each count, the sentences to run consecutively. After he had pleaded guilty the magistrate enquired as to the ages of the assaulted persons, and was informed by the accused, who was not under oath, that they both were under the age of fourteen years.

The appeal was argued at Vancouver on the 14th of June, 1938, before MARTIN, C.J.B.C., MACDONALD, MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.

The appellant, in person, read the magistrate's report and submitted that the magistrate had no jurisdiction to impose a sentence greater than that set forth in section 779 of the Criminal Code.

McCulloch, for the Crown: Section 779 of the Criminal Code applies only if the accused be tried under section 773 or when tried under section 774 if the offence is one of those mentioned in section 773. In this case the magistrate did not form an opinion as to the age, so the offence is not one mentioned in section 773. The accused was tried under section 774 and the punishment is not limited by section 779. The cases of *Rex* v. *Ah Sing* (1937), 52 B.C. 146 (in which an election was given) and *Rex* v. *Ollech*, [1938] 1 W.W.R. 651 (in which an election was not given) deal with indecent assaults upon females where the magistrate must form an opinion that the assault is not an assault with intent to commit rape, as an assault with intent to commit rape is excepted from the magistrate's jurisdiction under section 774. Therefore, these cases must be tried under section 773 and then section 779 limits the punishment. The magistrate, therefore, may only summarily try an indecent assault upon a female not amounting, in the magistrate's opinion, to an assault with intent to commit rape. In an indecent assault upon a male the magistrate may proceed under section 773 if he forms the opinion that the age of the person assaulted is under fourteen years, or may proceed under section 774 if he does not form such an opinion, in which case the penalty is not limited by section 779.

Cur. adv. vult.

On the 30th of June, 1938, the judgment of the Court was delivered by

MARTIN, C.J.B.C.: We have come to the conclusion, appellant, that the learned magistrate had jurisdiction to impose the sentence upon you that he did impose, that is to say, three years on the two charges, to run consecutively, making six years in all.

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Under ordinary circumstances it might well be the case that we would consider it our duty to reduce that sentence, but this case is something that is very much out of the ordinary. You, when sentence was being passed upon you after you had been convicted of the said two offences against the two boys, asked the magistrate to take into consideration nine other similar offences that you admitted you also had been guilty of and, quoting from the record, asked that they "all be dealt with at once."

Under such circumstances we have only to say that no ground appears upon which we would be justified in reducing the sentence that has been passed upon you for all these shameful crimes.

Appeal dismissed.

S. C.
In Chambers
1938
June 29;
July 12.

RE HERBERT HENRY BECK, DECEASED AND THE SUCCESSION DUTY ACT.

Succession duty—Deceased domiciled in British Columbia—A portion of estate in Province of Ontario—Allowance for duty paid in Ontario—R.S.B.C. 1936, Cap. 1, Sec. 13 (1) (a); B.C. Stats. 1907, Cap. 39, Sec. 4 (7).

H. H. Beck died on June 21st, 1931, domiciled in British Columbia, and probate was issued on March 14th, 1932. His whole estate was valued at $465,226.09. On February 1st, 1933, the executors paid the Province of British Columbia $10,000, to be applied on succession duties and interest. On February 8th, 1938, the assessor of succession duties for British Columbia assessed the succession duties on the whole estate at $29,413.10. A portion of the estate in the Province of Ontario was valued at $254,441.26, of which $217,236.76 was personal property. On March 10th, 1936, the executors paid $7,000 to the Province of Ontario on account of succession duties payable in that Province. The proper officer in Ontario assessed the total succession duties payable in Ontario on personal property at $20,214.87, and the executors paid the balance payable in Ontario, namely $13,214.57 with interest, on the 19th of January, 1938. When the $7,000 was paid on account in Ontario those in authority in British Columbia agreed that the executors were entitled to an allowance for this amount, and the executors now claim they are entitled to an additional allowance by British Columbia of $13,214.57, and are only liable to British Columbia for the difference

between the succession duty so paid in Ontario and the succession duty assessed in British Columbia in respect of the transmission of the personal property in Ontario. The persons entitled to the personalty in Ontario were at the time of Beck's death domiciled or resident within British Columbia. On July 15th, 1908, an order in council was passed in British Columbia "That the provisions of subsection (7) of section 4 of the Succession Duty Act as to the allowance of succession duties by this Province be and are hereby extended so as to apply to the Province of Ontario upon the Government of Ontario informing this Government that an order in council has been passed extending a similar allowance to the Province of British Columbia." A similar order in council was passed in Ontario on August 28th, 1908, and an order in council of April 3rd, 1934, which took the place of the order in council of August 28th, 1908, provided for the like allowance. The reciprocal arrangement allowing a reduction of duty was rescinded by both Provinces by orders in council in 1937.

Held, that section 13 (1) (*a*) of the Interpretation Act provides that "The repeal of an Act in whole or in part or the revocation of a regulation . . . . shall not affect . . . any right, privilege, right of action, . . . existing, accrued or accruing, . . . , under the Act or regulation repealed or revoked." The order in council in question of 1908 was a regulation within the meaning of section 13 (1) (*a*) and said section preserved the privilege of the beneficiaries and they are entitled to the allowance in respect of the principal moneys paid to Ontario.

PETITION by the executors and trustees of the will of Herbert H. Beck under section 40 of the Succession Duty Act, to determine what property of the deceased is subject to duty and the transmission in respect of which duty is payable and the amount thereof. Heard by ROBERTSON, J. in Chambers at Victoria on the 29th of June, 1938.

Copeman, for the executors.
Carew Martin, for the Crown.

Cur. adv. vult.

12th July, 1938.

ROBERTSON, J.: This is a petition by the executors and trustees of the will of Herbert H. Beck under section 40 of the Succession Duty Act, R.S.B.C. 1936, Cap. 270, to have the Court determine what property of the deceased is subject to duty and the transmission in respect of which duty is payable and the amount thereof. Beck died on the 21st of June, 1931, domiciled in the Province of British Columbia. Probate was

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In Chambers
1938

RE H. H. BECK, DECEASED AND THE SUCCESSION DUTY ACT

Robertson, J.

issued on the 14th of March, 1932. The affidavit of value and relationship was filed on the 25th of April, 1935. Subsequently the petitioners and the Assessor for British Columbia of Succession Duties agreed upon the value of the whole estate at $465,226.09. On the 1st of February, 1933, the petitioners had paid to the Province of British Columbia $10,000 to be applied on the succession duties and interest. On the 8th of February, 1938, the Assessor of Succession Duties for the Province of British Columbia assessed the succession duties on the whole estate, inside and outside British Columbia, at $29,413.10. A portion of this estate was in the Province of Ontario. It was agreed by the petitioners and the proper officers of the Province of Ontario, for the purpose of assessing succession duty payable in respect thereof according to the law of Ontario, that the value of the estate in Ontario was $254,441.26, of which $217,236.76 was personal property.

On the 10th of March, 1936, the petitioners paid to the proper officer in the Province of Ontario the sum of $7,000 on account of succession duties payable in that Province. The Province of British Columbia agrees that the petitioners are entitled to an allowance for this amount. On the 6th of October, 1937, the proper officer of the Province of Ontario assessed the total succession duties payable in Ontario on the personal property at $20,214.87. Crediting the $7,000 against this amount, there remained to be paid $13,214.57 succession duty and interest $6,412.56, making a total of $19,627.43, which the petitioners paid to the Province of Ontario on the 19th of January, 1938. The petitioners now claim that they are entitled to an additional allowance by the Province of British Columbia of $13,214.57 and are only liable to British Columbia for the difference between the succession duty so paid in Ontario and the succession duty assessed in British Columbia in respect of the transmission of the personal property in Ontario. On the 15th of July, 1908, the Lieutenant-Governor in Council of British Columbia passed the following order in council:

That the provisions of subsection (7) of section 4 of the Succession Duty Act as to the allowance of succession duties by this Province be and are hereby extended so as to apply to the Province of Ontario upon the Government of Ontario informing this Government that an order in council has

been passed extending a similar allowance to the Province of British Columbia.

On the 28th of August, 1908, the Lieutenant-Governor in Council of Ontario passed an order in council which extended to British Columbia "a similar allowance," and later, by an order in council dated the 3rd of April, 1934, which took the place of the order in council of the 28th of August, 1908, provided for the like allowance. On the 27th of May, 1937, the Lieutenant-Governor in Council of Ontario passed an order in council, revoking the order in council of the 3rd of April, 1934, and providing that such revocation should apply only to estates of persons dying on or after the 1st of June, 1937. On the 11th of June, 1937, the Lieutenant-Governor in Council of British Columbia passed the following order in council:

That the reciprocal arrangement with the Province of Ontario allowing for a deduction of duty by virtue of the provisions of section 9, subsections (1), (2), (3) of the "Succession Duty Act," being chapter 61 of the Statutes of 1934, be rescinded as and from the first day of June, 1937, being the date on which cancellation of the arrangement was made effective by the Province of Ontario.

Counsel for the Crown submits that in so far as the right to the allowance had not been taken advantage of while the British Columbia order in council was in existence, the right to an allowance is gone. Counsel for the petitioners submits his clients are entitled to the allowance on four grounds, *viz.*: (1) The order in council of the 11th of June, 1937, does not revoke the 1908 order in council. (2) Assuming there was revocation, it does not affect this estate as its rights are preserved to it by virtue of section 13 (1) (*a*) of the Interpretation Act. (3) The 1937 order in council is invalid because it purports to have a retrospective effect. (4) The 1937 order in council is invalid as the power to revoke must be exercised in accordance with section 9 (3) which was not done.

I find it necessary to consider only ground 2. Section 13 (1) (*a*) of the Interpretation Act provides that:

The repeal of an Act, in whole or in part, or the revocation of a regulation . . . shall not affect . . . any right, privilege, right of action, . . . existing, accrued, accruing, . . . , under the Act or regulation repealed or revoked.

While it is true certain sections (*e.g.*, 7 and 8) refer to orders in council and regulations I think the 1908 order in council in

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question was a regulation within the meaning of section 13. It comes within the dictionary definitions. Volume 8 of the Oxford Dictionary, at p. 380, defines regulation as

> A rule prescribed for the management of some matter, or for the regulating of conduct; a governing precept or direction; a standing rule.

The Standard Dictionary definition is very much the same. In the Oxford Dictionary, as one of the illustrations of the use of the word, there is a quotation from Macaulay's History of England (1849) as follows:

> From the records of the Privy Council it appears that the number of regulations [of the Privy Council] as they were called, exceeded two hundred.

Under section 9 an allowance may be made, in the case of another Province of the Dominion, whether or not such Province makes an allowance for the succession duty paid to British Columbia; and as to all other countries, only if such country makes an allowance for the duty paid in British Columbia. The order in council in question regulated the allowance to be made in British Columbia in respect of duty paid on personal property in Ontario. It contained a regulation. The revoking of the order in council revoked the regulation. It would be an extraordinary thing if, for instance, accrued rights of action arising out of a revoked regulation were preserved and one arising out of a revoked order in council which contained a regulation was destroyed. Then had the petitioners a privilege which was existing?

The persons entitled to the personalty in Ontario were, at the time of Beck's death, domiciled or resident within the Province of British Columbia. They were, by virtue of section 7 of the Act, not having refused the benefits conferred by the will, liable to pay duty in respect of the transmission to them of the personalty in Ontario. This statutory obligation was, however, by reason of the order in council subject to this privilege, *viz.*, that an allowance should be made by British Columbia in respect of any money paid in Ontario for succession duty and the statutory debtor would only be liable for the amount (if any) by which the duty so imposed in British Columbia "exceeded the duty or tax so paid elsewhere." These persons then had the privilege of protecting themselves from the payment of double duty, by payment in Ontario and then by claiming an allowance

from British Columbia. It was not a privilege which existed only when they had paid the money in Ontario. Their privilege was the right to an allowance to reduce their liability. I am therefore of the opinion that section 13 preserved the privilege of the beneficiaries and they are entitled to the allowance in respect of the principal moneys paid to Ontario. This disposes of the only point which was argued. There is no dispute between the parties as to the other points which fall for determination under section 40.

The petitioners are entitled to costs.

Petition granted.

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Negligence—Damages—Automobiles—Head-on collision—Rule of the road—Driving on left side—Emergency—R.S.B.C. 1936, Cap. 116, Sec. 19.

On the 8th of July, 1937, at about nine o'clock in the morning, the plaintiff was driving a loaded truck north-easterly on the Cariboo Road on his way to Prince George. He was on a straight portion of the road, a hill rising abruptly on his right side and a steep fall on the left, when he saw the defendant driving an Austin motor-car coming round a sharp bend towards him about 150 feet away. The defendant in coming round the curve was close to the bank on his left and continued on the left side of the road. Both cars were travelling at about 25 miles an hour. Upon seeing the defendant the plaintiff continued on, expecting him to turn to his right side of the road, but when 30 feet away, seeing a collision was imminent, as the defendant continued on his left side, he turned sharply to his left to the clear side of the road, but he had barely started doing so when the defendant turned to his right and the cars collided. It was held on the trial that the defendant was solely responsible for not keeping on his proper side of the road.

Held, on appeal, affirming the decision of MURPHY, J. (O'HALLORAN, J.A. dissenting), that the defendant should have gone to his own side of the road in good time, and having chosen to hold on his course on the wrong side until the cars were in imminent danger of collision, the plaintiff had reasonable grounds for concluding that the defendant was going to continue on his course, and he could not be reasonably held at fault for endeavouring at the last moment to avoid a collision by leaving his own side of the road.

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APPEAL by defendant from the decision of MURPHY, J. of the 7th of December, 1937, in an action for damages owing to a collision between the plaintiffs' truck and a car driven by the defendant. The plaintiffs were awarded damages in the sum of $2,715, and the defendant's counterclaim was dismissed. The collision took place on the 8th of July, 1937, at about 9 o'clock in the morning at a sharp curve on the Cariboo Highway about six miles north of Lytton. The plaintiff Wood, with his mother beside him, was driving a loaded truck, weighing in all about twelve tons, north-easterly on the Cariboo Road going to Fort George, and the defendant was driving south-westerly on said road and coming round a sharp curve. The plaintiff Wood was on a straight portion of the road and he first saw the defendant when about 150 feet away. He states the defendant was on the wrong side of the road, but he kept on expecting the defendant to turn out to his right side when he got closer, but the defendant did not turn out. He saw there was going to be a collision so he turned out sharply to his left, but the defendant then suddenly turned to get to his right side and the cars crashed together. The learned trial judge held that the defendant was solely responsible for the accident.

The appeal was argued at Vancouver on the 3rd and 4th of March, 1938, before MARTIN, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

W. B. Farris, K.C. (*J. L. Farris,* with him), for appellant: The road was fourteen and one-half feet wide and the plaintiffs' truck was seven and one-half feet wide. There is no evidence to support the finding of the trial judge. Even if Wood's version of the accident is accepted he was guilty of negligence and at least contributed to the accident. The impact took place at least two feet on the defendant's side of the road. There was a hole in the road made by the left wheel of the defendant's car at the point of impact and the hole is on the defendant's side of the road. The defendant claims he turned to his right side of the road when he was 120 feet away from the plaintiff. That the Court of Appeal will reverse the findings of the trial judge see

Zellinsky v. *Rant* (1926), 37 B.C. 119. The fact that the defendant was at one time on the wrong side of the road does not constitute negligence as long as he turns to the right side in time to let traffic going in the opposite direction pass: see *Allen* v. *Lord,* [1928] 4 D.L.R. 62; *Flett* v. *Sanford,* [1925] 4 D.L.R. 730 at p. 732. The plaintiff Wood failed to apply his brakes when he should have done so and he did not sound his horn. He was negligent in turning to the left when nearing the defendant's car. There was no ground for his doing this. The defendant's version of the accident fits in with the marks on the pavement.

Bull, K.C. (*Ray,* with him), for respondents: The defendant drove on the wrong side of the road close to the bluff side and continued to do so until so close to the plaintiff that the plaintiff could do nothing to avoid a collision. There are two stories, either of which if believed is sufficient to support a judgment in his favour, and the plaintiff's story was believed by the trial judge. The defendant says the plaintiff pulled over to the wrong side of the road. The plaintiff admits he did so at the last moment, in the agony of collision in a last effort to avoid a catastrophe. The defendant came round a sharp curve on the wrong side of the road with the left wheel within eighteen inches of the bank on his left side, and the learned judge so found. The plaintiff was keeping a proper look-out and when the cars came in view of one another there was ample time for the defendant to turn out to his right side, but he continued ahead without turning out, and the plaintiff was confronted with a head-on collision. The plaintiff took the best course possible in turning out at the last moment. The defendant was guilty of an infraction of the Highway Act: see *Thomas* v. *Ward* (1913), 11 D.L.R. 231; *Myall* v. *Quick* (1921), 62 D.L.R. 509; *Hamilton* v. *Palisser Hotel Auto & Taxi Co.,* [1928] 4 D.L.R. 962; *Ludlow* v. *International Provision Co.,* [1924] 1 D.L.R. 324; *Turley* v. *Thomas* (1837), 8 Car. & P. 103; *Chaplin* v. *Hawes* (1828), 3 Car. & P. 554; *The Paludina* (1926), 135 L.T. 707 at pp. 710-11. The learned trial judge found in our favour on the facts, and it would only be on the basis that he was clearly wrong that his findings could be upset: *see McKay Bros* v. *V.Y.T. Co.* (1902), 9 B.C. 37 at pp. 44-5; *Galt* v. *Frank Waterhouse*

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& Co. of Canada Ltd. (1927), 39 B.C. 241; *Powell* v. *Streatham Manor Nursing Home* (1935), 104 L.J.K.B. 304 at pp. 306 and 311; *"Hontestroom" (Owners)* v. *"Sagaporack" (Owners)* (1926), 95 L.J.P. 153 at pp. 154-5. As to the weight to be attached to the movement of vehicles after impact see *Motion* v. *Jure* (1928), 39 B.C. 354 at p. 358.

Farris, replied.

Cur. adv. vult.

12th April, 1938.

MARTIN, C.J.B.C.: This appeal should, in my opinion, be dismissed because upon its facts the learned judge below has reached the right conclusion. The only point upon which, to my mind, there was doubt, arose out of the fact that the plaintiff (respondent) first saw the defendant's car at an admitted distance of 60-70 feet ahead and approaching him on its wrong side despite which he continued his course and speed of 20-25 miles per hour without braking for approximately twenty feet more before deciding that the only thing that could be done in the attempt to avoid the collision then imminent was to apply his brakes and turn out to the left, which he did, and that manœuvre would have been effective had not the defendant at almost, if not quite, the same time belatedly turned to his proper side of the road which inevitably brought the cars into collision. The learned judge exonerated the plaintiff from his said manœuvre on the ground that

> in the agony of collision [he] took what seemed to him the best method of avoiding an immediately impending crash in a set of circumstances for which defendant was solely responsible and the bringing about of which by the defendant was a contravention of the Highway Act.

But it was, however, submitted by Mr. *Farris* in his careful argument that the stage of "agony of collision" had not been reached when the plaintiff first saw the defendant's head-on position and yet held on to his own course and speed for an unwarrantable time thereafter before he decided to reduce his speed and turn out to the left from his proper side of the road as aforesaid, and that he should at least have at once applied his brakes and reduced his speed before attempting any change of course. With this submission I am disposed to agree to the

extent only that the plaintiff was not in the agony of collision, properly and strictly speaking, when he saw the defendant at 60-70 feet, though swiftly merging into it, but his conduct may be justified on another somewhat analogous, yet distinct ground immediately preceding the "agony" stage, which is that he was entitled in a sudden emergency to a reasonable time, depending upon the circumstances of the case, to exercise his judgment upon what steps he should best take to avoid the collision which was literally facing him if the defendant held on his wrong course. During the argument I ventured to express this view and say that there were many cases to support it which I would refer to and I now cite the leading ones, *viz., The Bywell Castle* (1879), 4 P.D. 219 (C.A.) wherein the "sound rule," and applicable to the present case, is stated by that very able judge Cotton, L.J., at pp. 228-9:

For in my opinion the sound rule is, that a man in charge of a vessel is not to be held guilty of negligence, or as contributing to an accident, if in a sudden emergency caused by the default or negligence of another vessel, he does something which he might under the circumstances as known to him reasonably think proper; although those before whom the case comes for adjudication are, with a knowledge of all the facts, and with time to consider them, able to see that the course which he adopted was not in fact the best. In this case, though to put the helm of the Bywell Castle hard a-port was not in fact the best thing to be done, I cannot hold that to do so was under the circumstances an act of negligence on the part of those who had charge of that vessel.

In *U.S. Shipping Board* v. *Laird Line, Ld.*, [1924] A.C. 286 (H.L.) Lord Shaw said, p. 292:

I have always held *The Bywell Castle*, [(1879)] 4 P.D. 219, 222, 226 to be a case of the highest authority, and I will conclude my own opinion by saying that I think the language of the three great judges—namely, James, Brett and Cotton, L.JJ.—may be said to apply in terms to the present case. For instance, Brett, L.J. says: "I am clearly of opinion that when one ship, by her wrongful act, suddenly puts another ship into a position of difficulty of this kind, we cannot expect the same amount of skill as we should under other circumstances. The captains of ships are bound to show such skill as persons of their position with ordinary nerve ought to show under the circumstances. But any Court ought to make the very greatest allowance for a captain or pilot suddenly put into such difficult circumstances; and the Court ought not, in fairness and justice to him, to require perfect nerve and presence of mind, enabling him to do the best thing possible."

And Lord Dunedin said, p. 290:

. . . It has been laid down again and again that when a situation

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suddenly occurs which demands a manœuvre, the person in charge of the ship at the moment cannot be condemned if he does not act quite instantaneously. He is entitled to an interval, however short, and it must be short, for his mind to grasp the situation and to express itself in an order. This was laid down in clear terms by Butt, J. in *The Emmy Haase*, [(1884)] 9 P.D. 81, and the same was repeated in the Judicial Committee in the case of *S.S. Kwang Tung* v. *S.S. Ngapoota*, [1897] A.C. 391, 393.

And he adds, p. 291:

. . . the Rowan is hit by a consideration analogous to that which prevailed in the well-known case of *The Bywell Castle*, [(1879)] 4 P.D. 219 and many others—namely, that it is not in the mouth of those who have created the danger of the situation to be minutely critical of what is done by those whom they have by their fault involved in the danger.

In the said *Kwang Tung* v. *Ngapoota* case the Privy Council held, p. 393:

Their Lordships concur in the principle laid down by Butt, J. in the case of *The Emmy Haase*, [(1884)] 9 P.D. 81, namely, that compliance with rule 18 at the very moment when danger becomes apparent is not necessary, for a man must have time to consider whether he should reverse or not. The Court is not bound to hold that a man should exercise his judgment instantaneously—a short, but a very short, time must be allowed him for this purpose.

That language is entirely appropriate to the present case.

In *Ketch Frances (Owners)* v. *Steamship Highland Loch (Owners)*, [1912] A.C. 312, at 317, Lord Chancellor Loreburn said, *per curiam*:

I do not know why the owners of the launch should assume that the ketch would act in the thoroughly unreasonable manner in which I think she did act.

An instructive case, and very similar to this in that the collision was caused by both drivers turning at the same moment into the same side of the road, is *Wallace* v. *Bergius*, [1915] S.C. 205 wherein the Lord Justice-Clerk said, pp. 208-9:

I think the driver of a motor car is in the same position as the master of a ship in this respect, that if at the last moment he reasonably judges that a collision is absolutely inevitable unless he does something, and if that something might avoid a collision, he acts perfectly reasonably in taking that course. I am quite satisfied that there is no ground whatever for imputing contributory negligence to the defender's driver. Whether he should not have swerved a little sooner may be a question, but if he had swerved a little sooner even that might not have averted the collision. He swerved at the time when he thought the danger was imminent, when he saw that nothing was being done by the person who was causing the danger; but it was then too late, and the cars curved in to meet in collision on the south side of the road.

And Lord Dundas, pp. 209-10:

I consider that the pursuer's driver, having chosen to hold on his course upon his wrong side until the cars were apparently bound to meet within a period of, at the most, a very few seconds, the defender's driver had reasonable grounds for concluding that for some cause or another the pursuer's driver was going to continue on his course; and that the defender's driver cannot reasonably be held in fault for endeavouring at the last moment to avoid a collision by leaving his own side of the road. . . . I would only add with reference to some observations of the pursuer's counsel that while I agree that there would be danger in rashly applying nautical cases to incidents of the road, I do not see any reason why, making all due allowance for the obvious differences between sea and land, between ships and motor cars, the fundamental considerations of good sense and fairness that underlie the one class of cases may not be applicable, and applied if the circumstances warrant it, to cases of the other category.

And Lord Guthrie at pp. 210-1:

He must go to his own side in good time. What is good time must always be a question of circumstances. In this case I am not going into seconds or yards. It is enough to say that the pursuer's chauffeur was not entitled to keep on his wrong side to the very last moment—or, to use a popular expression, to run it fine—because, as here, he would inevitably confuse an approaching driver by making it uncertain whether he was going to persevere on the wrong side, or to swerve to his own side. . . . [It] is in accordance with what your Lordship said in the case of *Wilkinson* v. *Kinneil Cannel and Coking Coal Co. Limited,* [(1897)] 24 R. 1001, that a person could not be said to be guilty of contributory negligence merely because, when he saw the danger, he did not take the wisest course, but in the agitation of the moment took an unwise course in endeavouring to escape from it. If necessary, which I do not think it is, I would go further than the defender finds it necessary to go here, for it seems to me that his driver not only did a reasonable thing, but that he did the right thing.

The concluding observation may well, I think, be applied to the present case.

Then in the leading case of *Admiralty Commissioners* v. *S.S. Volute,* [1922] 1 A.C. 129, Lord Chancellor Birkenhead in delivering a celebrated judgment said at p. 136:

In all cases of damage by collision on land or sea, there are three ways in which the question of contributory negligence may arise. A. is suing for damage thereby received. He was negligent, but his negligence had brought about a state of things in which there would have been no damage if B. had not been subsequently and severably negligent. A. recovers in full: . . . At the other end of the chain, A.'s negligence makes collision so threatening that though by the appropriate measure B. could avoid it, B. has not really time to think and by mistake takes the wrong measure. B. is not held to be guilty of any negligence and A. wholly fails.

It is well said in Salmond on Torts, 9th Ed., 482 of this "important judgment," that though it is "based mainly upon a con-

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sideration of Admiralty precedents, . . . its ratio certainly applies to all collisions on land or sea," and the same view has been very recently expressed by Scott, L.J., in *The Eurymedon* (1937), 54 T.L.R. 272, 277.

In conclusion I cite what Lord Sumner said, Viscount Dunedin and Lord Carson agreeing, in the well-known case of *S.S. Hontestroom v. S.S. Durham Castle,* [1927] A.C. 37, 48-9, in answer to the objection that the trial judge had not in his findings of fact proceeded upon manner or demeanour but upon inferences only, which could as well be drawn by a Court of Appeal, *viz.*:

> My Lords, this appeal illustrates in two ways the unsatisfactory results which follow from disregard of this settled practice. On the question of seamanship the learned President finds the Sagaporack alone to blame; the Court of Appeal (Bankes, L.J. on one ground, Scrutton, L.J. on another, Atkin, L.J. generally) find the Hontestroom alone to blame. One of your Lordships finds that they were both to blame, and another is of opinion that the facts condemn the Hontestroom much more conclusively than the Court of Appeal did. These questions must always be very difficult, when the data can only be ascertained from evidence tainted by the frailty and fallibility of human nature, in the person of a pilot whose navigation is impugned. At least we should not make further difficulties for ourselves by assuming that the trial judge has not understood the case if his views do not agree with our own, or by overruling his estimate of the witnesses on a paper review of their words, stripped of the material colour, which hesitation or promptitude, shiftiness or candour may well have given them. It is, of course, true that the trial judge may have been imposed upon, but I think it is more useful, that we should be on our guard against imposing on ourselves.
>
> Again, a good deal of fun has been poked at what is called "Admiralty arithmetic," but the scoffer always has to fall back on the use of it himself. What else can he do? As tests of the credibility of a nautical tale these calculations are invaluable, but they cannot be infallible. They sometimes prove logically that there was no collision at all. . . . We may review the whole case by conjectures of our own, but as all calculation rests on some assumed position, course, observation or speed, which itself has to be taken from one witness or another, it is eventually not the arithmetic nor the conjecture, but the trial judge's impression that should prevail.

That is my view of what "should prevail" in this case and therefore the appeal must be dismissed.

SLOAN, J.A.: This is an appeal from a judgment of MURPHY, J., in an automobile accident case wherein the appellant (defendant) was found guilty of negligence and held liable to the respondent for damages amounting to $2,715.

In my view the appellant, despite the able and exhaustive argument of his counsel, has not discharged the *onus* of convincing us that the learned trial judge was clearly wrong in his finding of fact.

The appellant, however, advanced an alternative argument which merits consideration. He submitted that, even if the respondent's version of the accident is accepted, the facts so found render the respondent guilty of ultimate, or at least, contributory negligence.

The relevant facts, as found, are simple enough. Shortly after 9 o'clock in the morning on the 8th day of July, 1937, the respondent Wood was proceeding in a northerly direction on the Cariboo Highway. He was driving a large truck while the appellant was driving a comparatively light car south on the highway.

The learned trial judge accepted the evidence of the respondent and found that the appellant came round a sharp curve on the wrong side of the road and that the respondent, confronted with a head-on collision, turned out to the left to avoid it. The appellant at practically the same instant performed the same manœuvre which resulted in the collision of the two cars. The learned trial judge found that, at this juncture, there was no time for either party to stop.

The appellant, however, submits that the respondent was guilty of ultimate or contributory negligence in not applying his brakes when he first saw the appellant approaching on the wrong side of the road. The respondent admitted that he saw the appellant coming round the curve on the wrong side of the road 60 or 70 feet away and that he did not immediately apply his brakes but continued on his course for a distance of approximately twenty feet before he swung to the left and applied his brakes.

The respondent gave as his reason for not immediately applying his brakes when he saw the oncoming car that he anticipated it would change its course to the proper side of the road. That the respondent is entitled to rely on the appellant observing the rule of the road admits of no argument. *Carter* v. *Van Camp et al.*, [1930] S.C.R. 156. Nor do I think it can be said that

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the respondent waited for an unreasonable length of time for the appellant to change his course. The respondent was travelling at 25 miles per hour and would cover twenty feet in less than one second. I do not think that the law obligates a man, under circumstances of this kind, to make an instantaneous decision.

In my opinion the respondent, up to the time he swung to the left, could not be said to be guilty of any negligence. When he did so the two cars were approximately 30 feet apart. The appellant was travelling at a speed equal to or in excess of the speed of the respondent and thus the two cars were, in effect, approaching each other at the combined speed of approximately 50 miles an hour and the distance between them would diminish with startling rapidity.

When the two cars were approximately 30 feet apart it is my opinion, taking into consideration the circumstances of this case, that the respondent was not negligent at that point in not applying his brakes, for it is manifest to me that at that point he concluded the appellant was going to continue his course on the wrong side of the road and so, in the agony of impending collision, he did the only thing he considered was left for him to do: swung his car to the clear side of the road. In my opinion the respondent cannot be held at fault if, at that moment, the appellant turned out to his proper side of the road. From the time both cars began to turn out the learned trial judge has found, and I believe rightly so, that the accident was inevitable.

In my view the situation was brought about solely by the negligent driving of the appellant and therefore upon him the responsibility for the ensuing damage should rest.

For the reasons given by the learned trial judge, supplemented by these observations of my own, I would dismiss the appeal.

O'HALLORAN, J.A.: The learned trial judge found:

> The whole body of his [appellant's] car was on the wrong side of the road; his left wheels were distant not more than eighteen inches from the left side of the road . . .; he continued travelling ahead without making any deviation. The plaintiff [respondent] then confronted, as he was, with a head-on collision attempted to pull out to the left to avoid it. Very shortly thereafter, but definitely thereafter, in a matter of a split second, as counsel for plaintiff [respondent] aptly put it, the defendant [appellant] did the same thing.

The learned judge held that the appellant was "hugging the bank," on his left side of the road on a blind curve, in driving round it; that his car was entirely over on the wrong side from the centre line. The appellant was then found entirely responsible for the accident and judgment was given against him for the damages claimed, *viz.*, $2,715 and costs.

With due deference to the learned trial judge, such a finding in my view at least is conclusively negatived by the cumulative evidence of four witnesses called on the respondent's behalf at the trial. The evidence of these four witnesses (two of the respondent's employees and two Provincial police constables) recites the marking of the courses of both the truck and the car, upon the respondent's own instructions at the scene of accident as well as the subsequent measurement of such markings. These measurements were then embodied in a plan of the scene of the accident as shown in Exhibit 11. The result is a measured plan, based wholly on the respondent's statements at the scene of the accident and almost immediately following its occurrence.

It is true the learned judge stated that where there was a conflict of testimony between the appellant and the respondent he believed the respondent and his mother. I have accordingly disregarded entirely the evidence of the appellant and given weight to what I regard as the conclusive cumulative evidence of the respondent's own witnesses based on the path of both the truck and the car as pointed out to them by the respondent himself almost immediately after the accident. In taking this course I have in mind the principle laid down in *Powell* v. *Streatham Manor Nursing Home* (1935), 104 L.J.K.B. 304, and particularly the passage in Lord Wright's judgment pointing out that where the trial judge has had an opportunity of forming an opinion as to the credibility of the witnesses in a matter on which that credibility was vital, and had come to a decision, the Court of Appeal should not reverse the learned judge, other things being equal. That principle is of course accepted and anything I say is intended only to be consistent with it. I should add perhaps that the credibility of the respondent's witnesses to which I refer was not called into question; I would say with

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respect that the cumulative weight of that evidence was either not considered, or not given the weight it demands.

In support of the conclusion to which I have come, after careful study, I refer to (a) the evidence of Douglas Allanson and Jack Wise, employees of the respondent, who arrived at the scene of accident in another truck of the respondent some three minutes after the collision. On the instructions of the respondent they covered with planks the tire marks of both the truck and the motor-car back to where both vehicles commenced to turn out from the inside of the road. This evidence is corroborated by the respondent Wood who assisted them; (b) the evidence of constable Horace Elgie of the Provincial police (called by the respondent) who arrived at the scene of the accident within an hour and a half thereafter. The respondent showed him the boards set out as above, but he took no measurements; (c) the evidence of constable H. P. McEwen of the Provincial police (called by the respondent) who arrived at the scene of the accident within three hours thereafter, the only other persons present being the respondent and his mother.

The planks laid down by Wood, Allanson and Wise had then been removed, but an outline of white clay showed in the black tarvia where they had been placed. Constable McEwen in the presence of the respondent then took measurements which showed (1) a hole in the road nine feet from the left bank (*viz.*, nine inches to the right of the centre line of the road); this hole was indicated by constable Elgie as the point at which the tire marks of both truck and car came together, *viz.*, the point of impact; (2) at a point 30 feet from the hole in the road, *viz.*, the point of impact—the appellant's tire marks were four feet ten inches from the left bank. That is to say, taking the constable's evidence as to the width of the road at sixteen feet six inches and the width of the appellant's car at five feet two inches, then at the point where the appellant's car was found by the learned trial judge to be proceeding entirely over on his wrong side of the road (*viz.*, 30 feet from the point of impact) the left wheels of appellant's car instead of "hugging the bank" were actually four feet ten inches from the bank; and instead of his car being wholly and entirely

on his wrong side, his right wheels were nearly two feet over on his proper side (*viz.*, one foot nine inches); (3) at a point 31 feet six inches from the point of impact the respondent's truck was two feet six inches from the right bank instead of one foot as he stated in evidence. That is to say, taking the constable's width of the road at sixteen feet six inches and the width of the truck at seven feet six inches, then at this point (31 feet six inches from the point of impact) the left wheels of respondent's truck were one foot nine inches over on the wrong side of the road; (4) therefore when the appellant and the respondent were respectively some 30 feet from the point of impact the former was only one foot eight inches more on his wrong side than the latter was.

This analysis of the evidence of respondent's witnesses based on measurements taken three hours after the accident in his presence, from marks made by him and his own employees, gives quite a different picture of the accident to that presented by the respondent on the witness-stand at the trial five months after.

Confirming the above measurements, F. C. Underhill a Civil Engineer and B.C. Land Surveyor made measurements some three months afterwards for the appellant, at the scene of the accident, according to directions given him there by constables Elgie and McEwen. These measurements were incorporated in the plan, that is, Exhibit 11. It should be noted that Underhill found the "travelled" portion of the highway (as distinct from the width of the road) at the material points to be fourteen and one-half feet in width (and it is so marked on Exhibit 11) instead of sixteen and one-half feet as stated by constable McEwen. In the analysis I have made I have taken constable McEwen's figure of sixteen and one-half feet, thereby giving the respondent any advantage therefrom. If Underhill's figure of fourteen and one-half feet were accepted, the analysis would be much more conclusive.

Appellant's counsel on the strength of this evidence attacked at some length the correctness of the findings of the learned judge below. Counsel for the respondents did not seek to question the correctness of this plan, Exhibit 11, unless it can be said (and I do not think it can be) he did so indirectly by relying wholly on the reasons for judgment below.

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From this plan, Exhibit 11, based on the evidence of respondents' witnesses it is patent that the collision occurred solely through the negligence of the respondent in that (a) At the point of impact the appellant's car was wholly and entirely on his own and proper side of the road, his left wheels being clearly on his proper side at least nine inches to the right of the centre line. The respondent himself admits that the appellant moved over, three or four feet further from the left bank in proceeding the last 30 feet before the impact. If the appellant had moved over three and one-half feet, then adding this to the four feet ten inches, *supra,* his left wheels would have been eight feet four inches from the left bank, *viz.,* completely on his own side of the road, leaving eight feet three inches for the respondents' truck, seven and one-half feet wide, to have passed on its own side. (b) The appellant was not therefore "hugging" the left bank, but when first seen by the respondent was four feet ten inches from the left bank, and then proceeded diagonally across the curve so there could be no reason for the respondent to anticipate a head-on collision. (c) The respondents' truck did not at any time deviate from its course (*viz.,* did not turn out to the left) and at the point of impact, due to failure to follow the curve of the road, its right front wheel was clearly more than one foot on the wrong side, and its left front wheel eight feet six inches on the wrong side of the road. The path of the truck conclusively shows the respondent did not turn to the left; this fact destroys respondent's evidence that he turned to the left in the agony of collision to avoid a head-on collision. (d) If the respondent had kept to his own side and followed the curvature of the road he had ample room to pass and no collision would have occurred.

Furthermore in evaluating the respondent's evidence in the light of the resulting contrary evidence of his own witnesses the following factors cannot be ignored: (1) The respondent had spent the previous day in Vancouver loading the truck and had driven all the previous night, with the exception of an hour's rest at midnight. With the exception of one hour he had been 27 hours without sleep. (2) According to the plan, Exhibit 11, if the respondent had swung to the left as he claimed and as found by the learned trial judge his truck would have gone off

the road before reaching the point of impact. (3) On examination for discovery the respondent stated he first saw the appellant's car some 125 to 150 feet away and corroborated this by stating he had come about half way down a straight stretch of 200 to 300 feet. At the trial, however, he stated he was "almost on the corner" of the curve when he first saw the appellant's car 60 to 70 feet away. (4) On his own evidence he could have stopped or slowed down when he first saw the appellant as he says 60 or 70 feet away on the curve. Although driving a truck weighing with its load some twelve tons and travelling on a three per cent. down grade some 25 miles an hour he did not reduce his speed on approaching a dangerous blind curve. The curve in question was well known to the respondent and was thus described by constable McEwen:

> There is quite a bank on the road. There is an angle like this—and to go around that you have to keep lifting your car around like that, because if you set your wheel and drive straight like, you will come around on the wrong side of the road. It is that type of a curve.

This factual analysis of the events of the accident eliminates entirely the basic facts upon which the learned trial judge based his conclusions. The important parts of the respondent's testimony at the trial are thereby conclusively negatived by the combined testimony of four of his own witnesses; this testimony in turn is based wholly on the respondent's statements made almost immediately after the accident. I am therefore of the opinion the accident was caused solely by the negligence of the respondent in failing to drive prudently and keep to his own proper side of the road.

I should add, that in view of the above conclusion and the consequent elimination of the particular basic facts upon which the appellant was found liable in the Court below, I do not express any opinion concerning the liability of the parties on the facts as predicated in the Court below.

I would, therefore, allow the appeal, and direct that judgment be entered for the appellant on his counterclaim with costs. Damages to be assessed.

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

Solicitors for appellant: *Farris, Farris, McAlpine, Stultz, Bull & Farris.*

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

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May 18;
June 7.

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Trustees of Lethbridge
v. Ind. Order Foresters
[1940] 2 D.L.R. 273

Dist
Re Sask Farm
Security Act 1944 Sec 6
[1947] 3 D.L.R. 699

Aprvd
A-G. Ont v Barfried
Enterprises
42 D.L.R. (2d) 137.

Constitutional law—Municipal corporation—Extra-provincial rights—Non-resident bondholders — Interest — Whether the Victoria City Debt Refunding Act, 1937, is ultra vires of the Legislature of British Columbia—B.C. Stats. 1937, Cap. 77.

The plaintiff brought this action on behalf of himself and all other debenture holders of the City of Victoria, for a declaration that the Victoria City Debt Refunding Act, 1937, is *ultra vires* of the Legislature of British Columbia, on the grounds: (a) that it is legislation relative to and affecting debentures that have been sold outside the Province that are negotiable and payable and owned by persons and corporations living and domiciled outside the Province; (b) that the Act purports to legislate in regard to civil rights of such holders of debentures that subsist outside the Province; (c) that section 4 of the Act is *ultra vires* as it prohibits actions being brought in the Courts of the Province against the defendant corporation by debenture holders; (d) that section 25 is *ultra vires* as it confiscated property belonging to debenture holders outside the Province; (e) that said Act is in conflict with the Interest Act. It was held that the pith and substance of the Act was to destroy the civil right of debenture holders outside the Province to return of principal at the mature date and arbitrarily to fix the rate of interest payable during the extended period, which was beyond the power of the Province.

Held, on appeal, reversing the decision of ROBERTSON, J., that the Provincial Legislature was competent to enact this statute under the powers conferred by the B.N.A. Act under the specific heads (8) and (13) of section 92, *i.e.*, "Municipal institutions in the Province," "Property and civil rights in the Province."

Ladore v. *Bennett*, [1938] O.R. 324, applied.

APPEAL by defendants and the Attorney-General of British Columbia from the decision of ROBERTSON, J. of the 6th of May, 1938, declaring that an Act of the Legislature of British Columbia known as the Victoria City Debt Refunding Act, 1937, assented to on the 10th of December, 1937, is *ultra vires* the Legislature. The plaintiff is the holder of a bearer debenture for $100, one of an issue of August 1st, 1933, and payable August 1st, 1948, with interest at five and one-half per cent. payable half yearly. He sues on behalf of himself and all other holders of debentures issued under this by-law and other by-

laws of the city which were purchased, payable and negotiable outside the Province, to have declared *ultra vires* a public Act obtained at the instance of the city and known as the Victoria City Debt Refunding Act, 1937, and for an injunction restraining the trustees, appointed under the Act, from performing their duties. The Act recites that

> Whereas the city is no longer able to meet and discharge the payments of principal and interest of the said outstanding debentures and stock and other indebtedness . . . the city has prayed that . . . the Legislative Assembly, do grant relief to the city by authorizing the city, . . . , to issue refunding debentures and stock equal in total principal amount to the total principal amount of the said outstanding debentures and stock and other indebtedness, which said refunding debentures and stock shall be payable on or before the thirty-first day of December, 1966, and shall bear interest at the rates hereinafter provided in each year until maturity.

The Act then provided that

> The council may, . . . , by by-law . . . , authorize the issue of refunding debentures of the city bearing date the thirty-first day of December, 1936, maturing the thirty-first day of December, 1966, . . . , bearing the rates of interest hereinafter specified, . . . , to be exchanged by the city for outstanding debentures of the city, all subject to the terms and conditions herein set out. . . . The exchange shall take place as soon as practicable after the coming into force of this Act. Each refunding debenture shall bear the rate of interest stated in the outstanding debenture for which it is to be exchanged until the date of maturity of the said outstanding debenture . . . , and thereafter at the rate of four and one-half per centum per annum until paid.

The appeal was argued at Vancouver on the 18th of May, 1938, before MARTIN, C.J.B.C., MACDONALD, MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.

Maclean, K.C. (*Pringle,* with him), for appellant: The city owed $17,000,000 and they had the refund Act drafted to meet the wishes of a committee of the bondholders. The majority of the bondholders are in favour of the Act. The scheme is in the interest of the bondholders. Only a certain amount of time is given and it is a fair and just piece of legislation. There is no repudiation in the Act whatever. It is not insolvency legislation. There is no invasion of Dominion jurisdiction and therefore the power of the Legislature is absolute: see *L'Union St. Jacques de Montreal* v. *Belisle* (1874), L.R. 6 P.C. 31. The rights of the bondholders are modified but not destroyed: see *Florence Mining Co. Limited* v. *Cobalt Lake Mining Co., Limited* (1909),

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18 O.L.R. 275 at p. 292; *Hodge* v. *The Queen* (1883), 9 App. Cas. 117. They have the right to modify the right created whether in British Columbia or in New York: see *Jones* v. *Canada Central R.W. Co.* (1881), 46 U.C.Q.B. 250. It has power to borrow outside the Province and it must have power to pay outside: see *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society,* [1938] A.C. 224 at p. 243; *Royal Bank of Canada* v. *The King,* [1913] A.C. 283 at p. 298. The learned judge below followed *Ottawa Valley Power Company et al.* v. *The Hydro-Electric Power Commission et al.,* [1937] O.R. 265 and *Beauharnois Light, Heat and Power Co. Ltd. et al.* v. *The Hydro-Electric Power Commission of Ontario et al., ib.* 796, but these cases have no application to this one. The obligation is in British Columbia and the moneys are made payable at certain places outside the Province merely for convenience: see *Royal Trust Co. (Shell Estate)* v. *Attorney-General for Alberta,* [1937] 1 W.W.R. 376. It is an incident to aiding the municipality out of trouble: see *Bateman and Matthews* v. *Spencer,* [1923] 1 W.W.R. 1281 at p. 1286; *Toronto Railway Co.* v. *Toronto Corporation,* [1906] A.C. 117 at p. 120.

Sinnott, for respondent: The bonds carry interest at five and one-half per cent. until 1942, after that the interest is reduced to four and one-half per cent.: see *Crosby* v. *Prescott,* [1923] S.C.R. 446; *Independent Order of Foresters* v. *Lethbridge Northern Irrigation District,* [1937] 1 W.W.R. 414; *Credit Foncier Franco-Canadien* v. *Ross and Attorney-General for Alberta,* [1937] 2 W.W.R. 353; *In re Bennett Estate. Provincial Treasurer of Manitoba* v. *Bennett,* [1936] 1 W.W.R. 691; *Royal Trust Co. (Shell Estate)* v. *Attorney-General for Alberta,* [1937] 1 W.W.R. 376 at p. 381.

Maclean, in reply, referred to *Ladore* v. *Bennett,* [1938] O.R. 324.

Cur. adv. vult.

7th June, 1938.

MARTIN, C.J.B.C.: In this appeal we are all of opinion that the statute which is the subject of this controversy, that is to

say the Victoria City Debt Refunding Act, 1937, Cap. 77, is a valid piece of legislation within the power of the Legislature of this Province. The reasons for our coming to that conclusion will no doubt be stated by the other members of this Court either now or in writing as they feel disposed, and for the moment I am expressing in a brief way, owing to the urgency of the matter, my own opinion, and the reason for it is this, that I regard this legislation as being in all essential respects in the nature of moratorium legislation and therefore within the jurisdiction of this Province over "Property and civil rights" therein —B.N.A. Act, Sec. 92 (13).

The learned judge in his very carefully prepared judgment, which has been of much assistance to us, proceeded upon the ground, as he states at the end of his reasons at page 32 of the appeal book, thus:

> The legislation in question, however, in my opinion, cannot be said to be incidental to any matter in respect of which the Province was legally legislating. The pith and substance of the Act is to destroy the civil right of a person or corporation outside the Province to the return of her [debenture] or its principal at the mature date of the debenture and arbitrarily to fix the rate of interest payable to them during the extended period, which I think is beyond the power of the Province.

With every respect to the learned judge and the careful consideration he has given to this important matter, I venture to think if the aspect that guides me in my decision had been presented to him he might have taken another view, because after examination of the moratorium legislation of this Province I am unable to find any relevant and essential element in this municipal statute not already found in that legislation, beginning with the statute passed in the early stages of the Great War, Cap. 35 of 1915, and entitled "An Act to confer certain Powers upon the Lieutenant-Governor in Council respecting Contracts relating to Land" (later styled the Moratorium Act, Cap. 44 of 1917), and the progressive expansion of that legislation finally culminating in the Mortgagors' and Purchasers' Relief Act, 1934, Cap. 49 of 1934, with yearly amendments down to 1937, Cap. 52.

The main relevant effect of that statute of 1934, expressing it as briefly as possible, is that it carries out the principles of a

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moratorium in various forms as applied to obligations arising out of "any instrument," *i.e.*, "mortgage or agreement of sale or purchase in respect of or affecting lands" (section 2). The first statute began, in 1915, by authorizing certain nominated judges in this Province in their specified discretion to stay actions already pending (section 2) and to postpone payments of principal and in one case at least, of interest (section 2 (*a*) (ii), and time for redemption, and relieve from forfeitures, etc., but, it should be noted, that by section 6, "debentures, bonds, or stocks, or mortgages or trust deeds made to secure issues" thereof were excluded from the operation of the Act. But the course of legislation so progressed that by the said 1934 Act, the doors of the Courts of this Province were closed to all actions taken on said "instruments" affecting land and no one could "take or continue proceedings" in or out of Court in the four classes of cases set out in section 4 "except by leave of a judge granted upon application as hereinafter provided," and by sections 6 and 8 "absolute discretion" was conferred upon him to deal with the matter on such terms and conditions as he "may deem proper"; and by section 3 (*a*) it is again to be noted that "any obligation or charge authorized or created by by-law of a municipality is excluded from the Act.

To my mind it is beyond serious controversy that no sound objection could be taken to the imposition of a "term or condition" under said Act by which the door of the Court would be closed, against, *e.g.*, the holder of a mortgage upon land in this Province bearing interest at the rate of 8, 9 or 10 per cent. (which were the usual rates thereon when I first began to practise in this Province over 44 years ago), and that it would be within the judge's "absolute discretion" to say to him—"Before I give you leave to bring an action you must reduce your interest to the present legal rate fixed by the Parliament of Canada at five per cent.," and if that be so then that relief from excessive interest can be given in this Province no matter where the mortgage was executed, or where the principal or interest due thereunder are payable. There is no legal reason why our Legislature could not have specially included in the said Acts those said particular debentures, bonds, trust deeds, etc., and municipal

"obligations or charges" above noted which it specially excluded therefrom, and it would be entirely open to it to extend those Acts to all other classes of property persons and corporations in this Province and thereby create a complete moratorium, if, in its wisdom it thought the urgency of the public welfare required it.

What in effect has been done by this Debt Refunding Act is that the Legislature has, instead of resorting to the delegation of its remedial powers to the judiciary by a moratorium Act (as it has the right to do in this respect—*Shannon* v. *Lower Mainland Dairy Products Board,* [1938] 2 W.W.R. 604) come directly to the relief of the city by this statute "with," as its preamble expressly declares "the object of alleviating the burden of debt charges in respect of the outstanding debentures and stock and other indebtedness," and I am unable to see any distinction in principle between that "alleviation" and the "relief" afforded to other debtors suffering from other "burdens of debt," affecting lands by the said Mortgagors' and Purchasers' Relief Act, 1934, and there is no legal reason why there should not, if the circumstances require it, be a moratorium Act applying to municipal obligations as well as to others.

Criticism was directed to this provision in section 4 of his Act, *viz.*:

> . . . notwithstanding the provisions of any Statute or law to the contrary, no action or proceeding shall be brought, maintained, or continued in any Court of the Province against the City by or on behalf of any owner or holder of any outstanding debenture, or by or on behalf of any owner or holder of any interest coupon or interest warrant on any outstanding debenture, or by or on behalf of any person holding a foreign judgment founded upon any such outstanding debenture or interest coupon or interest warrant relating thereto.

No doubt legislation of this description which closes the Courts will always invite criticism, but if it is valid constitutionally it is not for the Courts to question the policy of the Legislature but only to pass upon its scope and application. It is to be remarked, however, that there is nothing new in the passing of such legislation in the history of this Province, because on the very first day of the inauguration of the old Crown Colony of British Columbia (as distinguished from the senior Colony of Vancouver's Island established in 1849, by Cap. 48) by

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Governor Douglas of Vancouver's Island, at Fort Langley, B.C., on the 19th of November, 1858, it was found necessary to pass a Proclamation having the force of law validating certain Acts which in his capacity as Governor of Vancouver's Island, he, and his officers, had "done before the establishment of any legitimate authority in British Columbia" and declaring that

> the said James Douglas, and the said other persons, shall be and hereby are severally and jointly indemnified, freed, and discharged from and against all actions, suits, prosecutions, and penalties whatever, in respect of any such act, matter, or thing, and that the same shall not be questioned in any of Her Majesty's Courts of civil or criminal jurisdiction in this Colony.

The moratorium Acts already cited are another illustration, and recently it became our duty in the case of *Vancouver Growers Limited* v. *McLenan, Gilmore and Peterson* (1937), 52 B.C. 42 to give effect to section 5 of the Natural Products Marketing (British Columbia) Act Amendment Act, 1936 (Second Session), Cap. 30, and close the door of the Court against an action brought contrary to that section which declares that

> No action shall be brought against any person who at any time since March twenty-ninth, 1934, has acted or purported to act or who hereafter acts or purports to act as a member of any board appointed under or pursuant to the provisions of "The Natural Products Marketing Act, 1934," of the Dominion or under this Act for anything done by him in good faith in the performance or intended performance of his duties under either of the said Acts, and every action now pending which if it were brought hereafter would be within the scope of this section is hereby stayed.

See also *St. John* v. *Fraser,* [1935] S.C.R. 441; and it may be noted that in England restrictions upon the right to bring actions are to be found, *e.g.,* in section 51 of the Supreme Court of Judicature (Consolidated) Act, 1925 (Annual Practice, 1938, pp. 2421-2; Yearly Practice, p. 1675) and the Mental Treatment Act, 1930, s. 16 (Annual Practice, 1938, p. 5) and the Public Authorities Protection Act, 1893 (Annual Practice, 1938, p. 5).

It is not necessary, however, to enlarge upon this aspect of the case and so I will only add as a matter of precaution that this question of property and civil rights really covers, as I understand it, the only question, in its various forms brought to our attention, and all other objections to the validity of the statute were disclaimed. I find, and I think we all find, much confirmation in general, if such be needed, of our views, by the

recent decision of the Court of Appeal of Ontario in *Ladore* v. *Bennett,* delivered the 17th of May, the full text of which we have had the benefit of perusing.

It follows that the appeal is allowed and the judgment below set aside.

MACDONALD, J.A.: I think the Act was validly enacted. It is not the intendment of the Act to interfere with the civil rights of persons or corporations beyond the Province although as often occurs with Provincial Acts, parties residing elsewhere may be affected by it. If, when the Act was enacted, all debenture holders resided within the Province it would not become *ultra vires* if all, or some of them, moved to another Province. It would be immaterial whether or not a debenture holder left the Province after the Act was passed or resided in another Province at that time. The obligation was created within this Province and in the last resort it is enforceable here.

We had the benefit of reasons for judgment in *Ladore* v. *Bennett,* [1938] 3 D.L.R. 212, a decision of the Court of Appeal for Ontario, not available to the trial judge. On the other point raised it is enough to say that it is not an Act in relation to interest.

I would allow the appeal.

MCQUARRIE, J.A.: I agree in allowing the appeal.

SLOAN, J.A.: This is an appeal from a decision of Mr. Justice ROBERTSON wherein he held that an Act of the Provincial Legislature—the Victoria City Debt Refunding Act, 1937—was *ultra vires.* In a carefully considered judgment he summarizes his reasons for so finding as follows:

> The pith and substance of the Act is to destroy the civil right of a person or corporation outside the Province to the return of her or its principal at the mature date of the debenture and arbitrarily to fix the rate of interest payable to them during the extended period, which I think is beyond the power of the Province.

The questions submitted for determination by us on this appeal are limited to two matters. The one—Does this Act derogate from a civil right existing and enforceable outside the Province? The other—Is it an Act in relation to interest and thus in con-

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flict with the exclusive legislative competence of the Parliament of Canada conferred by section 91 (19) of the B.N.A. Act.

The learned judge below has made, in his reasons for judgment, an analysis of the various relevant sections of the Act and I do not think there is any necessity to reproduce again those sections in detail. It is sufficient for my purpose to say that in my opinion the "pith and substance" of this enactment —*Union Colliery Company of British Columbia* v. *Bryden,* [1899] A.C. 580; its "true nature and character"—*Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96, may be described as an effort to "recast the city's debt structure with the object of alleviating the burden of debt charges" now borne by the city consequent upon the issue of debentures. This is to be effectuated by a scheme whereby the present outstanding debentures are to be exchanged for so called "refunding debentures." The maturity date of the refunding debentures is fixed at a period some years later than the maturity dates of the outstanding debentures (generally speaking) and in addition the refunding issue will bear a lower interest rate (generally speaking) than did the old. The real purpose and effect of the enactment is to give the city a breathing spell, so to speak, in which to rehabilitate its finances and so meet its obligations at the expiration of the amended time of payment.

As my Lord Chief Justice pointed out when delivering oral reasons the enactment is one within the realm of moratorium legislation.

In my opinion, with respect, the Provincial Legislature was competent to enact this statute under the powers conferred by the B.N.A. Act under the specific heads (8) and (13) of section 92, *i.e.,* "Municipal institutions in the Province," "Property and civil rights in the Province."

Counsel for the respondent was frank to concede that if all the outstanding debentures were held by the citizens of and in this Province the only question that could arise as to the constitutional validity of this enactment would be his submission that it was an Act in relation to interest. If this submission is, for the moment, put to one side and effect given to his first con-

tention, *i.e.*, interference with extra-territorial civil rights of foreign bondholders the Act might be *intra vires* in relation to those debentures held in the Province and *ultra vires* with respect to those held by persons outside the Province. This anomalous result can only be arrived at, in my opinion, because of a basic misconception concerning the enforceable rights of the foreign bondholders. While it is true that the debentures are payable, at the option of the holders, not only within but without the Province nevertheless the right to enforce the "substance of the obligation," evidenced by the debentures, is a civil right exercisable solely within the Province. *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society,* [1938] A.C. 224. In this connection it is to be noted that the outstanding debentures

> are by statutory direction charged upon and are payable by rates levied upon rateable land or on the rateable lands and improvements within the municipality of the defendant corporation.

It follows, in my view, that this Act does not derogate from any extra-territorial civil right; that is to say there is no right of action in the foreign bondholders by which the substantive obligations of the contract could be effectively enforced in a foreign jurisdiction.

When this conclusion is reached, then, in my opinion, *Ottawa Valley Power Company et al.* v. *The Hydro-Electric Power Commission et al.,* [1937] O.R. 265; *Beauharnois Light, Heat and Power Co. Ltd. et al.* v. *Hydro-Electric Power Commission of Ontario et al., ib.* 796, and *Royal Bank of Canada* v. *The King,* [1913] A.C. 283, are not in point.

The refunding scheme does affect the obligations enforceable in the Province by a bondholders' action but the Legislature of the Province has authority to make laws, providing they relate exclusively to those subjects of legislation within the limits prescribed by section 92, "as plenary and as ample . . . as the Imperial Parliament in the plenitude of its power possessed and could bestow"—*Hodge* v. *The Queen* (1883), 9 App. Cas. 117 at 132, and see *Jones* v. *Canada Central R.W. Co.* (1881), 46 U.C.Q.B. 250 at 261.

It follows in my opinion, with respect, that this attack upon the constitutional validity of the Act fails.

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I turn now to the second submission of the respondent. He was successful below in his contention that the impugned Act was in conflict with the Interest Act of the Dominion (R.S.C. 1927, Cap. 102) which law was enacted in the exercise of the exclusive power of the Dominion to make laws in relation to interest under section 91 (19).

As I understand the relevant authorities it appears that even when the subject-matter of the questioned legislation clearly falls within a specific head of section 92 the enquiry does not end at that point.

> The further question must be answered, whether it falls also under an enumerated head in s. 91. If so, the Dominion has the paramount power of legislating in relation to it:

Toronto Electric Commissioners v. *Snider,* [1925] A.C. 396 at 406; *Attorney-General for Canada* v. *Attorney-General for British Columbia,* [1930] A.C. 111 at 118.

Is this Act, then, one not relating exclusively to subject-matters within section 92, but one also in relation to interest? In my opinion, with respect, it is an Act in relation to subject-matters assigned exclusively under section 92 (8), (13) and is not one in relation to any subject-matter within the exclusive legislative competence of the Dominion.

It does not purport to be an Act relating generally to interest, and while some of the provisions contained therein "affect" interest as an incident in the effectuation of the general scheme of the enactment, nevertheless it cannot, in my opinion, be said to be an Act "in relation to" interest. (*Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association,* [1902] A.C. 73).

To hold otherwise would be to imperil, without reason, many Provincial statutes which contain references affecting interest incidental to the exercise of legislative powers assigned to the Province under the appropriate heads of section 92.

In my opinion, with respect, this second objection to the constitutional validity of this legislation is also untenable.

We were referred to a number of decisions during argument but I find it unnecessary to enter into a survey thereof.

It is perhaps sufficient for me to say (if I may, with deference) that I am in complete accord with the judgment of

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the Court of Appeal for Ontario in *Ladore* v. *Bennett* delivered on the 17th of May last and seemingly, at this writing, unreported.*

In my view that case cannot be distinguished in principle from this and I have found it of considerable assistance in arriving at my conclusions, not only on the interest aspect but upon both submissions of the respondent.

The respondent referred to decisions wherein the *situs* of debentures is regarded as an important consideration in the application of revenue statutes, *e.g.*, Succession Duty Acts, but I have concluded that such decisions are not of assistance in the determination of the issues in this case.

In the result and with deference I would allow the appeal. My brother O'HALLORAN has authorized me to add that he is in agreement with the observations contained herein.

Appeal allowed.

Solicitors for appellants: *Elliott, Maclean & Shandley.*
Solicitor for respondent: *P. J. Sinnott.*

REX v. ZELKY.

C. A.
1938
June 15, 16.

Criminal law—Charge of living on the earnings of prostitution—Proof—No visible means of support—Evidence of—Criminal Code, Sec. 216, Subsec. 1 (l) and 2, and Sec. 1014.

The accused was convicted on a charge of being a male person, unlawfully did live in part upon the earnings of prostitution. The evidence disclosed that about two years previous to his arrest he came to Vancouver from Bridge River, where he had been working for some years, first as a miner and for the last year as a bartender in a beer parlour. He had $2,400 when he arrived in Vancouver, but about a year after he arrived in Vancouver he was taken down with appendicitis, was operated on and remained in a doctor's care for a month, and during his illness he received financial assistance from a brother. Shortly after coming to Vancouver he came in contact with a girl with whom he lived from time to time, and it appeared that this girl was during this period kept by two men, the accused being one of them. There was no evidence

Held
R. v. Heffler
71 WWR 615
(Man CA)
cf
10 CR NS 103

*Since reported, [1938] O.R. 324; [1938] 3 D.L.R. 212.

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that the woman practised prostitution during the times she was living with the two men. The accused had $18 when he was arrested.

Held, on appeal, reversing the decision of police magistrate Wood, that there has not been that certainty or reasonable proof of the lack of visible means of support that the law required, and the conviction must be set aside as it cannot be supported in the record of the evidence within section 1014 of the Criminal Code.

APPEAL by accused from his conviction by police magistrate Wood, Vancouver, on May 17th, 1938, on the charge that being a male person, he was living in whole or in part on the earnings of prostitution. The accused had been living for some months prior to his arrest, at various apartments and hotels in the city of Vancouver, with a woman who had a previous reputation as a prostitute. The evidence led by the Crown showed that accused had $18 in cash in his possession when arrested and that his room rent was paid for a week in advance. At the places where the accused had lived with the woman he had paid the rent. There was no evidence tendered that the accused ever received any money from the woman. The woman was not called as a witness. The accused testified that he had been living on $2,400 accumulated while working as a miner and logger and $384 loaned him by his brother during a period when he was incapacitated through illness. His brother corroborated his evidence. It was admitted by the accused that the woman had lived with another logger periodically and received money from him while she was consorting with the accused. The accused denied receiving any money from the woman and maintained that he advanced her money from time to time.

The learned magistrate in convicting the accused refused to accept his evidence or that of his brother. He found the accused had no visible means of support in the sense contemplated by section 216, subsection 2 of the Code. That the accused having lived with a prostitute, he must satisfy the Court that he is not living on the earnings of prostitution.

The appeal was argued at Vancouver on the 15th and 16th of June, 1938, before MARTIN, C.J.B.C., MACDONALD, MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.

Donnenworth, for appellant: There is no evidence that the

woman was a prostitute during the time she lived with the accused according to the definition of the word: see *Rex* v. *De Munck,* [1918] 1 K.B. 635. The incriminating statement made by the woman to the police officers in the presence of the accused at the time he was arrested is not evidence as the accused denied it at the time: see *Stein* v. *Regem,* [1928] S.C.R. 553; *Rex* v. *Christie,* [1914] A.C. 545. She was not called by the Crown although available. Accused had been separated from the woman a week before his arrest. Accused gave a credible account of himself and showed that he had $2,400 when he arrived in Vancouver a little over a year prior to his arrest and had received $384 additional by way of a loan from his brother. The Crown has not contradicted this and there was no reason for the magistrate to disbelieve this evidence. If the magistrate was entitled to disbelieve the defence evidence the fact remains on the Crown's showing that accused had $18 cash when arrested with his room rent paid up a week and this is sufficient answer to the charge: see *Rex* v. *Sheehan* (1908), 14 B.C. 13; *Reg.* v. *Riley* (1898), 2 Can. C.C. 128. *Rex* v. *Munroe* (1911), 19 Can. C.C. 86 is distinguishable on the facts as accused's association with the woman was the only inculpatory circumstance brought out against him. The learned magistrate erred in holding that section 216, subsection 2 placed an *onus* on accused to satisfy him that he was not living on the earnings of prostitution. If this section does place any *onus* on the accused, then the same was discharged by accused's production of $18 of lawful money of Canada and his having a paid-up room to live in and such *onus* thereby shifted back on the Crown to establish guilt beyond a reasonable doubt: *Rex* v. *Ward,* [1915] 3 K.B. 696; *Rex* v. *Lee Fong Shee* (1933), 47 B.C. 205.

Dickie, for the Crown: My submission is that the woman being a prostitute every room or apartment she and the accused occupied thereby became a house of prostitution and that the *onus* was cast on the accused under section 216, subsection 2 to satisfy the magistrate that he was not living on her earnings. Mere production of $18 does not satisfy the *onus* and the magis-

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trate's finding should not be disturbed: see *Rex* v. *Munroe* (1911), 19 Can. C.C. 86.

The judgment of the Court was delivered by

MARTIN, C.J.B.C.: We do not think it necessary to call upon you to reply, Mr. *Donnenworth*.

We are all of the opinion that it has not been proved, as it is necessary to prove to support a conviction under the circumstances of the present case, that the appellant "has no visible means of support" within subsection 2 of section 216.

The learned magistrate proceeded upon the principle laid down in the decision of the Ontario Court of Appeal in *Rex* v. *Munroe* (1911), 19 Can. C.C. 86, and while that may be adopted as a safe guide as to the bare possession of money, yet it simply comes to this, to put it briefly, that the question as to what is "visible means" depends upon all the circumstances of each case, p. 91, including the state of the times in which that adjudication must be made.

We find it sufficient to say that on the facts before us, even discrediting the evidence of the appellant and his brother, yet sufficient remains for us to hold that there has not been that certainty or reasonable proof of the lack of visible means of support that our law requires, and so we say, looking at the case as a whole, that the conviction must be set aside upon the ground that it is "unreasonable and cannot be supported having regard to the evidence," within section 1014 of the Code.

The appeal is therefore allowed.

Appeal allowed.

[IN BANKRUPTCY.]

S. C.
1938
Aug. 17.

IN RE EXECUTORS OF GORDON DRYSDALE, DECEASED.

Bankruptcy — First execution creditors — Costs — Priority — Directions— R.S.C. 1927, Cap. 11, Secs. 24, 25, 26, 29 and 121—Can. Stats. 1932, Cap. 39, Secs. 9, 12 and 13—R.S.B.C. 1936, Cap. 91, Secs. 33 and 35.

S. recovered judgment against the executors of the Gordon Drysdale estate for debt and costs. The assets of the estate consisted only of lands and equities in land. The judgment creditor filed certificate of judgment in the Land Registry under the provisions of the Execution Act. Upon proceeding to enforce the judgment a receiving order in bankruptcy was made against the executors of the estate, and the creditors' execution proceedings were stayed. S., as first execution creditor then claimed priority for costs of action and execution under sections 25 (2), 29 and 121 of the Bankruptcy Act. The trustee in bankruptcy declined to admit the claim on the ground that no execution process had been lodged with the sheriff. On the creditors' application for directions that this application should be admitted:—

Held, that the intention of the Act was to provide for priority for such costs, and in a Province where writs of *eligit* and *fieri facias de terris* are abolished, the failure of the Act to deal with the different methods of execution in the respective Provinces should not deprive the first judgment creditor of the rights intended to be given him. Lodgment of execution with the sheriff is not necessary to entitle the first execution creditor to priority for costs.

APPLICATION by first execution creditor for directions that its claim be admitted and paid under section 121 of the Bankruptcy Act. Gould Samuel & Co. Ltd. recovered judgment against the executors of the Gordon Drysdale estate for debt and costs. The assets of the estate consisted only of lands and equities in land. The judgment creditor filed certificate of judgment in the Land Registry under the provisions of the Execution Act, which Act (section 33) abolished writs of *eligit* and *fieri facias de terris,* declaring (section 35) that a registered judgment

shall form a lien and charge on all the lands of the judgment debtor . . . . , in the same manner as if charged in writing by the judgment debtor under his hand and seal; and after the registering of the judgment the judgment creditor may, if he wishes to do so, forthwith proceed upon the lien and charge thereby created.

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The judgment creditor proceeded to enforce its judgment under the Act when a receiving order in bankruptcy was made against the executors of the deceased, and this order under section 24 of the Bankruptcy Act stayed the creditors' execution proceedings. Gould Samuel & Co. Ltd., first execution creditor, then claimed priority for costs of action and of execution under sections 25 (2), 29 and 121 of the Bankruptcy Act. The trustee in bankruptcy, on the ground that no execution process had been lodged with the sheriff, declined to admit the claim. The application for directions that this claim should be admitted was heard by MANSON, J. at Vancouver on the 17th of August, 1938.

J. A. MacInnes, for judgment creditor.
Ghent Davis, for the trustee.

MANSON, J.: It is clear that the intention of the Act is to provide for such costs and that too close or literal a reading of the text should not be allowed to bring about a result not intended. The failure of the draftsman of the Act to deal with the different methods of execution in the respective Provinces of the Dominion should not, in a Province where writs of *eligit* and *fieri facias de terris* are abolished, deprive the first judgment creditor of the rights intended to be given him. Uniformity in all Provinces of practice under a Dominion statute is more desirable than any literal or slavish following of the letter of the Act when the intention is clearly shown. The decisions in *Larue* v. *Royal Bank of Canada* (1925), 7 C.B.R. 285; [1926] S.C.R. 218; *In re Wiley* (1925), 7 C.B.R. 239; *In re Estate of Bell* (1934), 16 C.B.R. 6; *In re Arthur W. Ferguson* (1935), *ib.* 261; and *In re Alva A. Riggs* (1938), 19 C.B.R. 222, all support the conclusion that the first judgment creditor is entitled under section 121 of the Bankruptcy Act to his priority for costs of one action.

Application granted.

WINTER v. SCHULTE.

C. A.
1938
Jan. 14, 24.

Money had and received—Action to recover—Money taken from bank to avoid succession duty—Plea of illegality—Public policy.

The plaintiff and her aunt had a joint bank account in the Carroll and Hastings Streets branch of the Bank of Montreal in Vancouver. The aunt died on the 9th of January, 1936, when the account stood at $6,367.62. On the 15th of January following the plaintiff and her sister (the defendant) went to the bank and the plaintiff withdrew by cheque $6,350. She and her sister then went to the Canadian Bank of Commerce where they leased a safety-deposit box in their joint names and deposited the money in the box, the defendant taking both keys. On the following day the defendant took all the money out of the safety-deposit box and took it to Seattle where she lived. Not being able to recover the money, the plaintiff brought action against her sister for money had and received. No objection was taken in the pleadings against the legality of the transaction as being one to defraud the Provincial receiver in the way of succession duty, but during the trial defendant's counsel drew it to the attention of the trial judge as being contrary to public policy. The trial judge did not pass upon it in his reasons for judgment but gave judgment for the plaintiff.

Held, on appeal, affirming the decision of McDonald, J., that it would only be in a case of a very clear kind that it would be the duty of the Court of Appeal to investigate such a matter on the ground of public policy after the trial judge had declined to do so.

APPEAL by defendant from the decision of McDonald, J. of the 8th of December, 1937, in an action to recover money had and received by the defendant to the use of the plaintiff. The plaintiff claims that on the 15th of January, 1936, she handed to the defendant (her sister) the sum of $6,350 in currency for safe-keeping. On the plaintiff's repeated requests that the money be handed over to her the defendant has refused to do so.

The appeal was argued at Victoria on the 14th of January, 1938, before Martin, C.J.B.C., Macdonald and Sloan, JJ.A.

Donaghy, K.C., for appellant: This money was in the joint account of the aunt and the plaintiff in the Carroll and Hastings Streets branch of the Bank of Montreal in Vancouver. The aunt died on the 9th of January, 1936. The plaintiff and defendant are sisters. The defendant who was a married woman lived in Seattle. The defendant came up from Seattle and she and her sister (the plaintiff) went to the bank and drew $6,350 out of

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the account, leaving a small balance in the account. They then went to the Bank of Commerce where they rented a safety-deposit box in their joint names. The money was put in the box and the defendant kept both keys. On the following day the defendant took the money from the safety-deposit box and took it to Seattle. When they took this money from the Bank of Montreal there was a clear violation of the law in respect to the Succession Duty Act. The law is that the Courts will leave her precisely where she is. She came to British Columbia in 1932, was a cashier in the Old Country and she operated on the Stock Exchange. The Courts will not help a party guilty of defeating the Succession Duty Act: see Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 174, sec. 249; *Brightman & Co.* v. *Tate,* [1919] 1 K.B. 463 at 468; *Montefiore* v. *Menday Motor Components Company,* [1918] 2 K.B. 241; *Major* v. *Canadian Pacific Ry. Co.* (1922), 64 S.C.R. 367 at p. 376. This amounts to trespass and conversion: see *North Western Salt Company, Limited* v. *Electrolytic Alkali Company, Limited,* [1914] A.C. 461.

G. L. Fraser, for respondent: This money belongs to the plaintiff and the learned judge has so found. There is no proof whatever that the succession duty was not paid: see Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 165, sec. 236.

Donaghy, replied.

Cur. adv. vult.

On the 24th of January, 1938, the judgment of the Court was delivered by

MARTIN, C.J.B.C.: We are all of the opinion that the appeal should be dismissed. The circumstances are unusual in that no objection was taken in the pleadings against the legality of the transaction (as being one to defraud the Provincial revenue) but it was "presented" by defendant's (appellant) counsel, as he tells us, to the learned trial judge's attention as one whose circumstances were of such alleged apparent moral turpitude that it was the duty of the Court itself, *ex mero motu,* to take cognizance thereof and refuse to give any assistance to the parties. Now the peculiarity of the case is that the learned judge, when the matter was so "presented" to his attention did not see fit to investigate it and the parties were not called upon

to go into the situation or explain their alleged nefarious conduct as being contrary to public policy. The ground upon which we are now asked to allow the appeal is that the learned judge should have investigated that matter and thereafter if the illegality were established, either have refused to proceed with the trial, or dismissed the action.

Now that is something which has not hitherto come before this Court. There are cases in this Province where trial judges have thought proper to interfere *ex mero motu* upon the grounds of public policy, and hold that the doors of the public Courts should be shut against giving any assistance to persons who had so grossly misconducted themselves that in the public interest it was desirable that they should not be heard or afforded any relief from the consequences of their common turpitude. There is, *e.g.*, the well-known case of *Guilbault* v. *Brothier* (1904), 10 B.C. 449, and another one, unreported, is a judgment of my own, shortly after that, when on circuit in Nelson many years ago, in which it came to my attention during the trial that the dispute between the parties clearly arose out of the division of the profits they had made in conducting bawdy-houses, and their conduct was so clearly *contra bonos mores* and affected with moral turpitude that I held that a Court should not lend its assistance to such litigants, and so I refused further to entertain the matter or make any order at all, and left them to their own devices—*cf. St. Lawrence Service Stations Ltd.* v. *Hand,* [1938] 2 D.L.R. 412 (S.C.).

Another case in this Province, before the old Full Court, is *Meriden Brittania Company* v. *Bowell* (1896), 4 B.C. 520 (in which it so happens that Mr. *Bodwell, K.C.,* and myself were opposing counsel) and it is instructive because when on appeal the Court itself took the objection for the first time that the agreement was illegal, p. 524, a new trial was asked for and granted, my late brother WALKEM saying, p. 524:

> My brother McCREIGHT and I, however, think that as the imputation cast by Mason upon Mr. Wylie seriously reflects upon him, and therefore upon the plaintiff company, as his principal in this transaction, the opportunity which is asked to enable the company to refute Mason's statements should be given.

The unusual difficulty we are confronted with in this case is that it was not conveyed to the parties below that the learned

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judge after being apprized of the situation intended, or not, to deal with it upon the ground of public policy (which we are now invited in the notice of appeal to do) and therefore the matter was not adequately gone into at the judge's request or otherwise and he did not pass upon it in his reasons for judgment, and so the plaintiff now formally charged was not given the opportunity to clear herself, and therefore it is impossible for us to deal satisfactorily with the matter on the incomplete facts before us, and it would obviously not be in accordance with justice to direct a new trial under these exceptional circumstances.

We do not say that under no circumstances whatever it would be improper for us to go into a matter raising a question of illegal agreement even if the learned judge has not thought fit to do so, but it is perfectly clear that herein the proper course would have been to call upon the parties to give as full an explanation as they could if it was thought proper to entertain the question, and it would only be in a case of a very clear kind that it would be our duty to investigate such a matter on the ground of public policy after the trial judge had declined to do so.

In a case just decided, a decision of the House of Lords, in *Fender* v. *St. John-Mildmay*, [1938] A.C. 1 at pp. 11-12, Lord Atkin says:

> On the other hand, it fortifies the serious warning illustrated by the passages cited above that the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds. I think that this should be regarded as the true guide. In popular language, following the wise aphorism of Sir George Jessel cited above, the contract should be given the benefit of the doubt.

The present is a much stronger case because we have not reached the stage as to whether or no the benefit of the doubt should be given.

We also refer to the very recent cases of *Turner* v. *Alberta Pacific Grain Co., Ltd.*, [1938] 1 W.W.R. 97; and *Fuller* v. *Stoltze, ib.* 241, on the same subject.

There being no other ground submitted for our consideration, it follows that the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *Dugald Donaghy.*
Solicitors for respondent: *Wismer & Fraser.*

VANDEPITTE v. BERRY.

S. C.
1938
May 30;
July 28.

Motor-vehicles—Accident—Judgment against minor—Unsatisfied—Statutory right of action against father of minor—Estoppel—Inapplicability of—B.C. Stats. 1926-27, Cap. 44, Sec. 12.

In 1928 the plaintiff recovered judgment against the defendant's daughter for damages owing to a collision between two automobiles. On the last day of the trial it was disclosed that the daughter was a minor, but no application was made to join a guardian *ad litem*. The judgment remained wholly unsatisfied and the plaintiff brought the present action against the father under section 12 of the Motor-vehicle Act Amendment Act, 1927.

Held, that the plaintiff is given by the statute a clear right against the parent in addition to her right against the minor and the statutory right is not to be taken away by estoppel. It would be, however, a proper term in the judgment against the father that the judgment should abate to the extent that the plaintiff recovers against the daughter.

ACTION against R. E. Berry, the parent and guardian of Jean Berry, against whom the present plaintiff previously brought action for damages resulting from a collision between a car owned by R. E. Berry and driven by his daughter Jean and a car driven by J. E. Vandepitte, his wife, the plaintiff, being a passenger in his car, on the 5th of March, 1928. Both drivers were found equally responsible for the accident and judgment was given against Jean Berry for one-half the damages suffered by the plaintiff. The plaintiff's judgment remaining wholly unsatisfied she brought this action against Jean Berry's father, relying upon section 18A of the Motor-vehicle Act. Tried by MANSON, J. at Vancouver on the 30th of May, 1938.

W. H. Campbell, for plaintiff.
Housser, for defendant.

Cur. adv. vult.

28th July, 1938.

MANSON, J.: Reference must be made to a prior action in this Court in the year 1928. That action arose out of an automobile accident at the corner of Tenth Avenue and Carnarvon

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Street, Vancouver, B.C., on March 5th, 1928. Jean Berry, the minor daughter of R. E. Berry, the defendant in the present action, while driving her father's car was involved in an accident at the corner mentioned. Mrs. Vandepitte, the present plaintiff, brought action against Miss Berry, the usual action arising out of an automobile accident. It was not known that Miss Berry was a minor until the last day of the trial. It then developed that she was, but in spite of that knowledge no application was made to join a guardian *ad litem* as is required by our Rules. Miss Berry had joined the husband of the plaintiff as a third party. On June 13th, 1928, judgment was pronounced in favour of the plaintiff against Miss Berry for the sum of $4,600 and $528.25 costs.* At the trial the husband of the plaintiff was found equally responsible for the accident with the defendant, and judgment was given over against him for one-half of the judgment awarded to the plaintiff as against the defendant. It would seem clear that the judgment against the husband of the plaintiff was erroneous in law in the light of a later decision in the Supreme Court of Canada, namely, *Macklin* v. *Young*, [1933] S.C.R. 603. Neither Miss Berry nor Mr. Vandepitte appealed. The judgments stand and the plaintiff's judgment remains wholly unsatisfied.

R. E. Berry, the defendant in this action, was the parent and guardian of Miss Berry, who at all material times was living with her father as a member of his family. She was driving the motor-car of her father at the time of the accident with his permission.

Section 18A of the Motor-vehicle Act, R.S.B.C. 1924, Cap. 177, as enacted by B.C. Stats. 1926-27, Cap. 44, Sec. 12, reads as follows:

> 18A. So long as a minor is living with or as a member of the family of his parent or guardian, the parent or guardian shall be civilly liable for loss or damage sustained by any person through the negligence or improper conduct of the minor in driving or operating a motor-vehicle on any highway; but nothing in this section shall relieve the minor from liability therefor.

The section as quoted was in force at all times material to this action.

The plaintiff's judgment remaining wholly unsatisfied she brings this action against the defendant and relies upon the section of the Motor-vehicle Act above quoted.

* An appeal from the dismissal of a motion to set aside the judgment was dismissed (1928), 40 B.C. 408; [1929] 1 D.L.R. 1002.

I have had the assistance of able written argument by counsel. Counsel for the defendant submits that any cause of action which the plaintiff may have had arising out of the accident *transit in rem judicatam* and that, having obtained judgment against Miss Berry, the plaintiff cannot now maintain a separate action against her father. It is contended that a construction of the statute which would permit of this action being maintained would result in absurdities and in an injustice which the Legislature cannot be held to have contemplated. It is further contended that in order to maintain this action the plaintiff must take the position (a) that section 18A, *supra,* provides a separate and independent cause of action and one which, although arising out of the same circumstances, may be pursued independently (and, therefore, if so desired, contemporaneously) with an action against the infant daughter, or (b) that the Legislature has by this enactment created the parent or guardian an independent tortfeasor.

In approaching an examination of the section of the Motor-vehicle Act above quoted, it is to be borne in mind that a minor is in general liable for his torts in the same manner and to the same extent as an adult, and that a father, apart from statute, is not liable for the torts of his children, even while they are under age and living in his house. True, there may be an employer liability on the part of the father for the acts of his child where the child is acting as the father's servant, but that question does not arise here. What section 18A does is to put upon the father a wholly new and statutory liability not by way of substitution for the liability of the child but in addition thereto. The liability of the child is preserved by the *"non obstanti"* clause at the end of the section.

To succeed in the cause of action against the father more must be established than in the cause of action against the child. It is necessary to prove negligence on the part of the child in both cases and that damage ensued to the plaintiff as the direct result of the negligence, but in order to succeed as against the father it must be established additionally (a) that the child was a minor and (b) that the child was at the time of the accident living with her father or was a member of the family of the

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father. It cannot be said that the causes of action against the father and the minor are the same. Certainly, proof of the child's minority and of the fact that the child was living with her father or was a member of the family of her father was not essential to the success of the action against the child Jean Berry. It cannot be said that these matters are *res judicata.*

Since the insertion of section 18A in the statute by the statutes of 1926-27 certain amendments thereto have been made by the Legislature. The corresponding section in the current statute, R.S.B.C. 1936, Cap. 195, namely, section 45, reads as follows:

45. In case a minor is living with or as a member of the family of his parent or guardian, the parent or guardian shall be civilly liable for loss or damage sustained by any person through the negligence or improper conduct of the minor in driving or operating on any highway a motor-vehicle [entrusted to the minor by the parent or guardian]; but nothing in this section shall relieve the minor from liability therefor. [In every action brought against the parent or guardian of a minor in respect of any cause of action otherwise within the scope of this section, the burden of proving that the motor-vehicle so driven or operated by the minor was not entrusted to the minor by the parent or guardian shall be on the defendant.]

The substantial alterations are in brackets. With section 45 of the current statute is now to be read section 74A (1) as enacted by section 11 of Cap. 54 of the statutes of 1937. It reads as follows:

74A. (1.) In an action for the recovery of loss or damage sustained by any person by reason of a motor-vehicle on any highway, every person driving or operating the motor-vehicle who is living with and as a member of the family of the owner of the motor-vehicle, and every person driving or operating the motor-vehicle who acquired possession of it with the consent, express or implied, of the owner of the motor-vehicle, shall be deemed to be the agent or servant of that owner and to be employed as such, and shall be deemed to be driving and operating the motor-vehicle in the course of his employment; but nothing in this section shall relieve any person deemed to be the agent or servant of the owner and to be driving or operating the motor-vehicle in the course of his employment from the liability for such loss or damage.

Under section 18A as enacted in 1926-27 there was a definite limit to the liability of the parent or guardian for the negligence of the child in that there was no liability unless the child was living with or was a member of the family of his parent or guardian. Out of that limitation there arises the presumption that the Legislature was of the opinion that there was a moral responsibility upon the parent for the negligence of the child in

such circumstances which it should convert into a legal liability, but in imposing legal liability upon the parent it did not pretend to say, as it does say specifically in the more recent legislation, that the child was to be deemed to be the servant or agent of the parent. In all probability the Legislature realized that very frequently a child living in the home of his parent or guardian is not the servant or agent of the parent or guardian at all when he drives a motor-car. The parent or guardian may not even own the car and may know nothing about the driving. Speculation leads one to the conclusion that the Legislature was proceeding rather upon the ground of public policy, believing that if it put liability upon the parent, the parent would exercise a restraining hand upon the child in the matter of motor-driving which he might otherwise not do. I find nothing in the section which justifies me in reading into it the doctrine of *respondeat superior* or adding to it the words "and the minor shall be deemed to be the servant or agent of the parent or guardian." The fact might well be that the minor was the servant or agent of some one other than the parent. That person might be liable for the minor's negligent driving upon the ordinary principle of *respondeat superior* but the parent would remain liable if the conditions of the section were otherwise fulfilled. The section does not impute to the parent the tort. It does not make of him a tortfeasor and no question, therefore, of joint tortfeasor can arise. The language is clear—"the parent or guardian is civilly liable." The Legislature has made B. liable for the tort of A., as it had a right to do, and without stating its reason for so doing. Need more be said then that the parent becomes liable *ex statuto?*

While it is quite true that the Interpretation Act, R.S.B.C. 1936, Cap. 1, Secs. 19 and 20, enacts that an amendment of a statute shall not be deemed to involve a declaration that the law was considered by the Legislature to have been different from the law as it is after the amendment, nevertheless, one cannot close one's eyes to the significance of section 74A, *supra*, which so specifically introduces the doctrine of *respondeat superior*. Nothing could be clearer than that the Legislature in 1937 intended to qualify still further the liability of a parent for the torts of a minor child in the operation of a motor-vehicle. It

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had already qualified the liability somewhat by the insertion of the "entrusting" clause in 1929, Cap. 44, Sec. 7. What the Legislature does by way of amendment sometimes discloses its view as to the state of the law prior to the amendment. The amendments of 1929 and 1937, above referred to, clearly indicate that in the view of the Legislature the liability of the parent or guardian for the motor torts of a minor under section 18A was originally an unqualified one and not one dependent upon the doctrine of principal and agent. That opinion is in accord with the interpretation which I have put upon section 18A as it stood prior to amendment.

Having arrived at the conclusion that the statute does not make the parent a tortfeasor, that no question therefore of joint tortfeasor arises and that the causes of action as against the parent and minor are different and independent of each other, it becomes unnecessary for me to discuss many of the authorities cited by counsel for the defendant. Suffice it to say that if my interpretation is correct, *Brinsmead* v. *Harrison* (1872), L.R. 7 C.P. 547; 41 L.J.C.P. 190, and similar cases have no application. In the *Brinsmead* case, at p. 553, Kelly, C.B. cited with approval the conclusion reached by Parke, B. in *King* v. *Hoare* (1844), 13 M. & W. 494; 14 L.J. Ex. 29; 153 E.R. 206. It was thus stated—a judgment in an action against one of two joint tortfeasors is a bar to an action against the other for the same cause. That rule, now done away with in England, still prevails in this Province but has obviously no applicability to the case in hand. *Wright* v. *London Omnibus Co.* (1877), 2 Q.B.D. 271; 46 L.J.Q.B. 429, was cited as a case parallel to the one at Bar. It may be readily distinguished. There it was held that the plaintiff, having accepted an award of compensation against a servant, could not subsequently successfully pursue the employer. As was said by Cockburn, C.J., at p. 274:

> The party damaged cannot obtain compensation both against the master and against the servant. Either the master can be rendered liable or the servant, but not first one and then the other.

No question of master and servant arises here.

The authorities are fully discussed in *Freshwater* v. *Bulmer Rayon Co.* (1932), 102 L.J. Ch. 102; [1933] Ch. 162 (affirmed

in the House of Lords—*vide* [1933] A.C. 661; 102 L.J. Ch. 318) and the rule as to merger in judgment is clearly stated. In March, 1928, the British Acetate Silk Corporation, which had just been incorporated in that month, entered into an agreement to buy out the Bulmer Rayon Company as of February 1st, 1928, formal transfer of the business to be completed in May, 1928. The Bulmer Company from October, 1925, onwards polluted a river upon which its manufacturing plant was situate to the damage of the plaintiffs who were farming downstream. The pollution continued after the take-over by the corporation. The corporation by its solicitors undertook to pay any damages occasioned to the plaintiffs by acts of pollution on the part of the Bulmer Company prior to February, 1928. Plaintiffs obtained judgment for damages for acts of pollution by the corporation and by its predecessor. The corporation became bankrupt and the plaintiffs' judgment remained wholly unsatisfied. They thereupon brought action against the Bulmer Company for damages occasioned by the pollution of the river by the Bulmer Company prior to the take-over of the business by the corporation. It was urged that the right of action against the Bulmer Company had merged in the judgment against the corporation and that therefore the plaintiffs could not succeed. It was held otherwise in all the Courts. The judgment of Luxmoore, J., p. 169 *et seq.*, is particularly instructive. At p. 174 he says:

> What is the position if a plaintiff sues in respect of a tort and recovers judgment for damages suffered by reason of that tort against a person who did not commit it and was not liable in law for the resulting damage? Can he then sue the real tortfeasor? It seems to me that the answer must depend on whether the judgment recovered has been satisfied or not. For if it has been satisfied the plaintiff cannot in law recover a second judgment in respect of the same wrong. If however the judgment has not been satisfied or is only partially satisfied, then there seems to me to be no legal ground, apart from agreement or estoppel, to prevent the plaintiff suing and recovering judgment against the actual tortfeasor so long as credit is given for anything recovered under the earlier judgment. I think this position is established by a careful consideration of such cases as *Brinsmead* v. *Harrison*, [*supra*]; *Ex parte Drake. In re Ware* (1877), 5 Ch. D. 866; *Morris* v. *Robinson* (1824), 3 B. & C. 196; and *Bradley & Cohn Limited* v. *Ramsay and Co.* (1912), 106 L.T. 771.

And he says further at p. 175:

> But it was pointed out in the Divisional Court by Lush J. that the doctrine that a right of action merges in a judgment recovered only applies to

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the case where the cause of action said to be merged is the same cause of action as that in respect of which the judgment was recovered. . . .

And again upon the same page:

If the judgment is satisfied the cause of action against the actual tort-feasor cannot be sued upon, but this I think is not because the cause of action is merged in the judgment but because double satisfaction cannot be recovered.

In my view, the reasoning of the learned judge is applicable to the facts in the case at Bar. As I have already observed, the cause of action against the father is a different cause of action from that against the daughter.

And so, the common-law liability of a wife and the statutory liability of a husband in respect of the same subject-matter are several liabilities, as was held in *Beck* v. *Pierce* (1889), 23 Q.B.D. 316; 58 L.J.Q.B. 516. There a judgment had been recovered by the plaintiff against the wife for a debt incurred by her before marriage, but such judgment remaining unsatisfied because she had no separate estate, an action for the debt was afterwards brought by the plaintiff against the husband who had acquired property from his wife to an amount exceeding the debt, and it was held the judgment recovered against the wife was no defence to the action against the husband. The language of Lindley, L.J., at p. 321, is apposite when considering the nature of the liability of the father under section 18A. He observes:

The husband's liability since the Married Women's Property Act is, as it was before, a liability in respect of his wife's contracts or torts, and not a liability in respect of his own contracts or torts; and, although he is not a surety, any defence open to her appears to be open to him also.

The reasoning of Lord Esher, M.R. and his learned colleagues in *Keen* v. *Henry* (1893), 63 L.J.Q.B. 211; [1894] 1 Q.B. 292, in dealing with the liability of the registered proprietor of a hackney carriage under the relevant English statute is entirely consistent, as it seems to me, with the reasoning in *Freshwater* v. *Bulmer Rayon Co.* and *Beck* v. *Pierce, supra,* and is in accord with the principles I have applied in the interpretation of section 18A.

It would be a proper term in a judgment against the father that the judgment should abate to the extent that the plaintiff recovers against the daughter. The principle of abatement is

regularly applied by the Courts in dealing with actions where the element of expectancy of life is common to claims under two different statutes; in England, the Law Reform Act and the Fatal Accidents Act; here the Administration Act, R.S.B.C. 1936, Cap. 5, and the Families' Compensation Act, R.S.B.C. 1936, Cap. 93. In *Rose* v. *Ford,* [1937] A.C. 826; 106 L.J.K.B. 576, the question of duplication of damages under the two statutes was fully discussed. In *Mackenzie* v. *Harbour and British Columbia Electric Ry. Co. Ltd.,* [*ante,* p. 88]; [1938] 2 W.W.R. 333, abatement was directed as it was also in *Feay* v. *Barnwell,* [1938] 1 All E.R. 31, and in *May* v. *McAlpine & Sons, Ltd.,* [1938] 3 All E.R. 85.

The law discourages multiplicity of actions but it by no means follows that separate actions cannot arise out of the same tort. The cases where that may occur are many. By way of illustration I would mention the actions which a dependant may have under the Families' Compensation Act and which the same dependant may have *qua* administrator under the Administration Act, as in *Mackenzie* v. *Harbour and British Columbia Electric Ry. Co. Ltd., supra.* In *Bell* v. *Morrow* (No. B.1057-1930, in this Court) a running-down case, the action was against the father of the driver, a minor. The action was dismissed by my brother FISHER. Subsequently, the same plaintiff brought action (No. B.1530-1930) against the infant daughter and my brother MURPHY awarded damages to the plaintiff. It would appear clear that separate actions can be maintained under section 18A.

It is submitted that the plaintiff is estopped by her election to proceed against Miss Berry in the first instance. I do not think so. She was given by the statute a clear right against the parent in addition to her right against the minor. The statutory right is not to be taken away by estoppel. In *Maritime Electric Co.* v. *General Dairies Ld.,* 106 L.J.P.C. 81; [1937] A.C. 610, at 621; 1 W.W.R. 591, at 597, the Judicial Committee said:

> The obligation to obey a positive law is more compelling than a duty not to cause injury to another by inadvertence. In the present case it may be observed that the injury is not a cause of action. Their Lordships are unable to see how the Court can admit an estoppel which would have the effect *pro tanto* and in the particular case of repealing the statute.

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If we now turn to the authorities it must be admitted that reported cases in which the precise point now under consideration has been raised are rare. It is, however, to be observed that there is not a single case in which an estoppel has been allowed in such a case to defeat a statutory obligation of an unconditional character.

Counsel for the defendant contends anomalous situations will arise if the plaintiff is allowed to pursue this action. I have considered the ones suggested by counsel. I regard none of them as serious or insuperable. After all, the Legislature has in simple direct language made it clear that a plaintiff, in such circumstances as those in the case at Bar, is to have the right of pursuing his claim for damages against both the minor and the parent. The will of the Legislature is not to be lightly balked. The situations referred to will be further considered at the continuation of the trial.

The trial will be continued in September next on a day to be fixed by the registrar on the application of the plaintiff.

Judgment accordingly.

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Practice—Costs—Appendix N, item 27—Cost of preparation of appeal books and factums—Whether a disbursement or a fee—Application of tariff.

On an application to review the taxation of the successful appellant's costs of appeal, it was

Held, that the cost of preparation of the appeal books and factums should be regarded as a disbursement and not a fee.

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APPLICATION by the respondents to review the taxation of the successful appellant's bill of costs, on the ground that the taxing officer erred in holding that the cost of preparation of the appeal books and factums should be regarded as a disbursement and not a fee. Heard by SLOAN, J.A. in Chambers at Vancouver on the 13th of June, 1938.

Rae, for the application.
Marsden, contra.

Cur. adv. vult.

17th June, 1938.

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SLOAN, J.A.: This is an application on behalf of the respondents to review the taxation of the appellant's costs of her successful appeal and to set aside the certificate of the taxing officer upon the sole ground that he erred in holding that the cost of preparation of the appeal books and factums should be regarded as a disbursement and not a fee.

The determination of this point depends upon the construction proper to be placed upon item 27 of Appendix N. That item reads as follows:

27. Cost of preparation of appeal books and factums and copies, whether printed or typewritten, not to exceed, per folio . . .

Appendix N, by the introductory statement thereto, is described as a "Tariff of Costs in the Supreme Court of British Columbia between Party and Party . . . , exclusive of all Disbursements . . ."

In all appeals in which the items in column 2 of the Tariff apply (and this is one of those cases) the "maximum amount of costs taxable" shall not exceed $500. In construing this maximum rule MURPHY, J. held in *Higgins* v. *Comox Logging Co.* (1927), 38 B.C. 477 that by reason of the introductory statement to Appendix N (referred to above) "costs" in this sense should be read as "Costs exclusive of disbursements." With that construction of the maximum rule I am in complete accord, but is the same construction to be placed upon the word "cost" in item 27? I think not. In my opinion the word "cost" in item 27 is used in the sense of an out of pocket expenditure, *i.e.*, a disbursement and I cannot regard that item as relating to a fee. I base my opinion to a large extent upon the wording of the Tariff item relating to factums, *viz.*: Item 25 (*a*). That reads as follows:

All fees in connection with the drawing, settling, deposit and delivery of factums, not to exceed . . .

When we again turn to item 27 we see that it relates to "Cost of preparation of . . . factums." To my mind that can lead but to the one conclusion that the "cost" of the preparation of factums is an entirely distinct charge from the "fee" item 25 (*a*). If that is so in relation to factums it follows that the same reasoning applies to preparation of appeal books and that

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the "cost" of such work must be regarded as a disbursement and not subject to the operation of the maximum rule.

Counsel for the respondents relied upon the judgment of MARTIN, J.A. (now C.J.B.C.) in *Stirling & Pitcairn Ltd.* v. *Kidston,* [1920] 2 W.W.R. 862 at 864 where the following appears:

> The printer's charge for printing appeal books is a disbursement; the solicitor's charge for typewriting them is a fee on which he is entitled to his profit by tariff.

This judgment was based upon the relevant items in the earlier Appendix M and in view of the present wording of Appendix N and items 25 (*a*) and 27 I do not consider that this judgment is of assistance on the only point referred to me for decision.

In this appeal the books were typewritten in the office of appellant's solicitor. I refrain from expressing any opinion as to whether or not, under these circumstances, there has been incurred a "cost" within item 27. The taxing officer held there was and the only point before me for decision is as to whether such a "cost" is a disbursement or a fee. In my opinion, as I have stated, if there is a taxable "cost" under item 27 then it must be regarded as a disbursement.

Upon the narrow point referred to me I must therefore affirm the certificate of the taxing officer.

Costs of this application to be costs to the appellant.

Application dismissed.

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Criminal law—Practice—Costs—Appeal—Dismissed on "preliminary proceeding"—Criminal Code, Sec. 1021, Subsec. 8.

Section 1021, subsection 8 of the Criminal Code declares: "On the hearing and determination of an appeal, or any proceedings preliminary or incidental thereto, under this Part, no costs shall be allowed on either side."

On the question of costs upon motion by the prosecution (respondent) therefor, after the appeal was dismissed for lack of jurisdiction on a "preliminary proceeding" taken in the proper form of a motion to do so at the opening of the hearing:—

Held, that this comes exactly within the prohibition of the above section, and the motion is refused.

MOTION to the Court of Appeal in respect of costs of appeal upon the dismissal of the appeal on a "preliminary proceeding" on motion at the opening of the hearing. Heard at Vancouver on the 17th of June, 1938, by MARTIN, C.J.B.C., MACDONALD and MCQUARRIE, JJ.A.

C. L. Harrison, for the motion.
R. D. Harvey, contra.

Cur. adv. vult.

On the 13th of September, 1938, the judgment of the Court was delivered by

MARTIN, C.J.B.C.: With respect to the question of costs that we reserved upon motion by the prosecution (respondent) therefor, after the appeal was dismissed because of our lack of jurisdiction to hear it, we have considered the written arguments submitted by counsel on the point, but note that they have overlooked the conclusion of the matter by section 1021, subsection 8 of the Code which declares that:

> On the hearing and determination of an appeal, or any proceedings preliminary or incidental thereto, under this Part, no costs shall be allowed on either side.

In this case the appeal was dismissed as aforesaid on a "preliminary proceeding" taken in the proper form of a motion to do so at the opening of the hearing, and therefore comes exactly

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within the prohibition of the section, which, it may be noted, is the same as the corresponding one in the original English Act of 1907, Sec. 13 (1), as to which see Wrottesley & Jacob's Criminal Appeal Practice (1910), p. 230; Halsbury's Laws of England, 2nd Ed., Vol. 9, pp. 288-9; Archbold's Criminal Pleading, 30th Ed., 327; and Roscoe's Criminal Evidence, 15th Ed., 354-5. This does not, however, exclude any jurisdiction that we may have in certain special cases over orders made below respecting costs, as to which *cf., e.g., Rex* v. *Howard* (1910), 6 Cr. App. R. 17; *Rex* v. *Reynolds* (1910), *ib.* 28; *Rex* v. *McCluskey* (1921), 15 Cr. App. R. 148, and *Rex* v. *Pottage* (1922), 17 Cr. App. R. 33.

The motion, therefore, is refused.

Motion refused.

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REX v. CRYSTAL DAIRY LIMITED.

Natural Products Marketing (British Columbia) Act—Order No. 8, Lower Mainland Dairy Products Board—Sale of milk without a licence—Conviction—Second sale without a licence—Plea of autrefois convict—Not a good defence—Appeal—R.S.B.C. 1936, Cap. 165.

On the 13th of January, 1938, the Crystal Dairy Limited was convicted under the provisions of the Natural Products Marketing (British Columbia) Act and amending Acts for unlawfully failing to comply with Order No. 8 of the Lower Mainland Dairy Products Board, and being a dealer and not being registered with and holding a current licence issued by the said Board, did on the 3rd of December, 1937, market milk within the area to which said scheme relates. On the 18th of January following, a second information was preferred against Crystal Dairy Limited for failing to comply with said Order No. 8, in that being a dealer and not being registered with and holding a current licence issued by the said Board, did on the 18th of January, 1938, market milk within the area to which said scheme relates. It was *held* by the magistrate that the plea of *autrefois convict* was not a good defence, and the company was convicted. An appeal to a single judge was dismissed.

Held, on appeal, affirming the decision of MURPHY, J., that on the facts each act done was a complete offence in itself, and the learned judge appealed from was right in holding that every act in marketing milk without a licence required by the Board's order was "a distinct offence."

APPEAL by defendant from the order of MURPHY, J. of the 3rd of March, 1938, on an appeal by way of case stated from G. R. McQueen, Esquire, deputy police magistrate, Vancouver. On the 18th of January, 1938, information was preferred against Crystal Dairy Limited under the provisions of the Natural Products Marketing (British Columbia) Act and amending Acts for unlawfully failing to comply with Order No. 8 of the Lower Mainland Dairy Products Board, a Board duly constituted to administer the milk marketing scheme of the Lower Mainland of British Columbia, established under the Natural Products Marketing (British Columbia) Act, in that being a dealer and not being registered with and holding a current licence issued by the said Board, did in the city of Vancouver on the day aforesaid, market milk within the area to which the said scheme relates. The information was heard on the 3rd and 17th of February, 1938, and the defendant pleaded *autrefois convict*. The evidence disclosed that Crystal Dairy Limited was convicted on the 13th of January, 1938, for unlawfully failing to comply with said Order No. 8, and being a dealer and not being registered with and holding a current licence issued by said Board, did in the city of Vancouver on the 3rd of December, 1937, market milk within the area to which said scheme relates. It was held by the magistrate that the plea of *autrefois convict* was not a good defence and the defendant company was convicted. The question submitted for the opinion of the Court was whether the magistrate was correct in finding that the plea of *autrefois convict* was not a good defence to the charge. The question was answered in the affirmative by MURPHY, J.

The appeal was argued at Victoria on the 20th of April, 1938, before MARTIN, C.J.B.C., MACDONALD, MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.

Hossie, K.C. (*Salter,* with him) for appellant: The appellant was convicted on the 3rd of February, 1938, for failing to comply with Order No. 8 of the Lower Mainland Dairy Products Board in obtaining a licence, and he sold milk on the 18th of

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January, 1938. The evidence shows he was previously convicted for failing to comply with said order on the 13th of January, 1938, having sold milk on the 3rd of December, 1937. As the statute is worded the failure to comply with the order of the Board is the offence, and he cannot be convicted a second time for the same offence. There can be a second offence only where the Act specifically states that each act shall constitute a separate offence: see *Rex* v. *Dossi* (1918), 87 L.J.K.B. 1024; *Pilcher* v. *Stafford* (1864), 33 L.J.M.C. 113; *Garrett* v. *Messenger* (1867), L.R. 2 C.P. 583 at p. 585; *Paddington Guardians* v. *Sullivan* (1903), 68 J.P. 23; *Morelli* v. *Regem* (1932), 58 Can. C.C. 128; *Rex* v. *Johnson* (1910), 17 Can. C.C. 172; *Rex* v. *Mitchell* (1911), 24 O.L.R. 324.

Maitland, K.C., for respondent: The failure to comply by selling milk is the charge, and the first conviction was on a former and different sale of milk: see *Milnes* v. *Bale* (1875), L.R. 10 C.P. 591. We rely on the judgment of the magistrate, also on that of MURPHY, J. There is the second and distinct breach in this case.

Hossie, replied.

Cur. adv. vult.

On the 13th of September, 1938, the judgment of the Court was delivered by

MARTIN, C.J.B.C.: As in our immediately preceding judgment in *Rex* v. *Hoy's Crescent Dairy Ltd.*, the first ground of appeal herein that the Natural Products Marketing (British Columbia) Act of 1936, R.S.B.C. Cap. 165, is *ultra vires*—has been disposed of by the recent decision of the Privy Council in *Shannon* v. *Lower Mainland Dairy Products Board*, [1938] 2 W.W.R. 604, and so the only ground that remains for consideration herein is the submission that the learned judge below, MURPHY, J., was wrong in holding that the offence for which the appellant was convicted in marketing milk was not the same for which he had been already convicted: in other words it is submitted that successive and distinct acts of marketing milk constituted only one continuing breach of the Board's order.

In support of this submission the case of *Garrett* v. *Messenger*

(1867), L.R. 2 C.P. 583, was chiefly relied upon, but it is to be observed, first that it was a case of a common informer and in respect to that Byles, J., said, p. 585:

> In construing every statute which gives a penalty to a common informer, care must be taken that we do not impose a heavier burthen than the Legislature contemplated.

Bovill, C.J., also said:

> If the Legislature had intended that there should be more than one penalty, that intention would no doubt have been expressed in clear and unequivocal terms.

Second, as pointed out in Paley on Convictions, 9th Ed., 543, in that case the

> penalty was imposed for using a room for music and dancing without a licence, . . .

The case at Bar is similar in principle to *Fecitt* v. *Walsh*, [1891] 2 Q.B. 304, wherein it was held that the purchase by a constable of five samples of milk in the course of delivery on the same day was a distinct purchase in each case, Day, J., saying, Lawrance, J., concurring, p. 309:

> As far as he was concerned there were five transactions; in respect of each of those transactions he might have proceeded under the statute and would then be deemed to have purchased in each case from the seller. It seems to me that the sergeant in procuring these samples must be deemed to have been the purchaser in each particular case, and that as he was the purchaser of five samples, the purchase of each one was a separate transaction, and that in respect of each of them an information would lie. As a matter of fact, the respondent only proceeded in respect of two of the samples, obtaining a separate conviction upon separate informations in respect of each of them, and our answer to the first question must be that he was right, and that more than one information could be laid against the appellant.

This is in conformity with the principle of the prior decision of Mellor, J., in *In re Hartley* (1862), 31 L.J.M.C. 232, wherein several distinct convictions of the same persons had been made for selling at the same stall on the same day meat unfit for human food, and that very learned judge said, in upholding the convictions (p. 233):

> Each exposure of a piece of bad meat was a separate offence.

In *Milnes* v. *Bale* (1875), L.R. 10 C.P. 591, *Hartley's* case was approved by Denman, J., p. 598, as "a good illustration of the principle," and at p. 595, Brett, J., said that

> . . . in *Garrett* v. *Messenger* [*supra*] the offence charged was keeping open an unlicensed house. It is not keeping it open for an hour that is

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the offence; the offence is the keeping a house to be used as a house of entertainment without a licence, which is a comprehensive offence to be proved by many acts.

Before that he had said on the same page:

. . . , in every case where it was held that there could only be one penalty in respect of several acts, it was because all the acts only constituted one offence against which the penalty was enacted. The test, as it appears to me, is whether, having charged the offence against which the penalty is enacted, you can prove it by giving in evidence several distinct acts committed by the person charged. It is not strictly accurate to speak of the penalties as cumulative in such a case as the present. The question is, whether there is one or more offences, and if the offences are distinct, there is only one penalty for each offence. I cannot find that in any case in which each act done was a complete offence in itself, and in which it would have been inadmissible to give other acts in proof of the committal of the same offence, it was held that several penalties could not be inflicted.

On the facts before us "each act done was a complete offence in itself" within that test, and the learned judge appealed from was right in holding that every act in marketing milk without a licence required by the Board's order was "a distinct offence."

The elucidation of the question on the present facts has been obscured by the inartistic form in which the information was laid, because though the gravamen of the particular offence was simply that the accused had sold milk without having the licence required by the order of the Board, yet it was so drawn as largely to confuse that specific offence with a failure to comply with "any determination or order" that the Board had power to make (of various kinds) under the Act, which failure is declared by section 12 to make the "person who fails . . . liable on summary conviction to a fine . . . or imprisonment . . . or to both": in other words, to use a homely expression, the "cart was put before the horse" in the averment, and while that did not invalidate the information yet it opened the door to a wrong approach to its real meaning.

It follows that the appeal is dismissed.

Appeal dismissed.

Solicitors for appellant: *Davis, Pugh, Davis, Hossie & Lett.*

Solicitors for respondent: *Maitland, Maitland, Remnant & Hutcheson.*

THE KING v. JAWALA SINGH.

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June 2, 3, 6; *Sept.* 13.

Qtd + Apld Rebria v Brd 32 WWR 400

Immigration—East Indian—Canadian domicil—Surreptitious entry into United States and return by stealth into Canada—Arrest—Board of Inquiry — Order for deportation — Release on habeas corpus with certiorari in aid—Appeal—R.S.C. 1927, Cap. 93, Secs. 2, 33, Subsec. 7, 40 and 42.

Jawala Singh, born in India in 1885, came to Vancouver in March, 1908, and remained in the Province until 1926, and attained Canadian domicil. He then entered the United States by stealth. He came back to the Province by stealth a number of times, owing to fear of the American authorities, but on each occasion stayed a short time and returned to the United States again. He finally came back to Canada by stealth in April, 1935, and stayed in the Province until arrested in February, 1937. On being examined by a Board of Inquiry it was ordered that he be deported on the ground that he had made a surreptitious entry into Canada, and an appeal to the minister was dismissed. On *habeas corpus* proceedings with *certiorari* in aid, he was released.

Held, on appeal, reversing the decision of MANSON, J., that being in Canada from 1908 until 1926 he had acquired Canadian domicil, but going to the United States in 1926 where he remained until 1935, he lost it. The case falls directly within the provisions of section 33, subsection 7 of the Immigration Act, and the appeal is allowed.

APPEAL by the Crown from the order of MANSON, J., declaring that Jawala Singh be set free from the custody of the district superintendent of immigration on *habeas corpus* proceedings. Jawala Singh, a native of India, came to the city of Vancouver in March, 1908, when 23 years of age. He worked in various places in the Province and in 1926 surreptitiously entered the United States but being in fear of the United States authorities he came back to Canada from time to time making a final return as a British subject in April, 1935. He then became interested in a lumber company and at the time of his arrest he had $2,000 invested in said company. He was arrested in February, 1937. An inquiry was had and it was ordered that he be deported. An appeal to the minister was dismissed. He was ordered to be deported because he had made a surreptitious entry into Canada.

The appeal was argued at Vancouver, on the 2nd, 3rd, and 6th of June, 1938, before MARTIN, C.J.B.C., MACDONALD, MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.

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Elmore Meredith, for appellant: The action of the Board throughout was regular and within the Act. 2nd. He never had domicil. 3rd. There is exclusive jurisdiction in the Board on the question of domicil. It is admitted he came back to Canada surreptitiously which renders him liable to deportation under section 33, subsection 7 of the Immigration Act. The learned judge in giving judgment commented on the fact that the superintendent gave instructions that no one was to see Jawala Singh and that was un-British, that the interpreter was not sworn and the depositions did not give all the questions put to the accused and his answers and some of the answers set out were not what accused said. The proceedings show that the interpreter was sworn but there is nothing in the material to show what questions and answers were omitted. After accused went to the United States in 1926, he came back to Canada several times surreptitiously before he came back to stay in 1935. He had nine years' residence abroad. If he stays away for more than a year he is presumed to have lost his domicil: see *Rex* v. *Tahkar* (1931), 44 B.C. 360 at p. 362; *In re Immigration Act and Santa Singh* (1920), 28 B.C. 357 at p. 359; *Attorney-General for Canada* v. *Cain,* [1906] A.C. 542; *St. John* v. *Fraser* (1935), 49 B.C. 502.

J. A. Russell, K.C., for respondent: The interpretation of the statute should be highly favourable to the liberty of the subject. The question is whether the inquiry was conducted within the terms of the Immigration Act. He was here 18 years and acquired a *status.* He was a Canadian citizen when he left for the United States in 1926. Before the inquiry, being in custody, he was not allowed to see his counsel. He is entitled to counsel under section 15 of the Immigration Act and has a right to check the interpreter who was incompetent. He was in Canada for over a year before he was arrested and was not subject to arrest under section 33, subsection 7 of said Act. The foundation was not laid for his being arrested because he was suspected. He was a Canadian citizen and had Canadian domicil. He never lost that domicil and the Act does not take it away from him. He has a right to go to the United States and come back as his domicil of choice is here. The order of

deportation is faulty as it does not say whether he is to be deported to the United States or to India: see *The King* v. *Milkha Singh* (1931), 44 B.C. 278. He revives his domicil when he returns to Canada: see *In re Marrett. Chalmers* v. *Wingfield* (1887), 36 Ch. D. 400; *In re Jeu Jang How* (1919), 27 B.C. 294 at pp. 297 and 299.

Meredith, in reply, referred to *Rex* v. *Quong Wong* (1930), 42 B.C. 241; *In re Low Hong Hing* (1926), 37 B.C. 295; *In re Wong Shee* (1921), 30 B.C. 70 and on appeal (1922), 31 B.C. 145.

Cur. adv. vult.

On the 13th of September, 1938, the judgment of the Court was delivered by

SLOAN, J.A.: This is an appeal from an order of Mr. Justice MANSON made upon the successful application of one Jawala Singh for his discharge from the custody of the District Superintendent, Pacific District, Immigration Branch of the Dominion Department of Mines and Resources. The applicant was being held for deportation pursuant to an order made in that behalf by a Board of Inquiry. Before considering the grounds upon which it may be assumed the learned judge below freed the respondent, it is necessary to enter into an examination of the facts relevant to the issues involved in this appeal.

The respondent, Jawala Singh, was born in India in 1885 and is a British subject. He arrived in Vancouver on the 16th of March, 1908, and remained in the Province until 1926, when he entered the United States by stealth. He remained in the United States until April, 1935, when he entered Canada by stealth.

On the 4th of February, 1937, he was examined before a Board of Inquiry constituted under the provisions of the Immigration Act. The decision of the Board was that he being a person other than a Canadian citizen or a person having a Canadian domicil be ordered deported from Canada under the provisions of section 33, subsection 7 of the Immigration Act and regulations in that the evidence shows that he entered Canada by stealth.

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From this decision an unsuccessful appeal was taken to the Minister of Mines and Resources.

On the 30th of October, 1937, the respondent launched an application (by way of a motion for a writ of *habeas corpus* with *certiorari* in aid) for his discharge from custody under the deportation order.

On the 21st of April, 1938, an order was made releasing the respondent from custody, which order is now the subject-matter of this appeal.

The learned judge below did not give any written reasons in explanation of his order but I take it that he felt obliged to give effect to the submissions of counsel for the respondent and I presume that the same points were advanced to us as were argued below.

Counsel for the respondent sought to maintain the said order upon the following grounds: (a) The Board of Inquiry was outside the provisions of the Immigration Act, that is to say section 33, subsection 7 is of no application herein; (b) the respondent is a Canadian citizen, that is to say, he is a British subject who has Canadian domicil, and therefore is not subject to deportation; (c) the Board of Inquiry was not conducted "judicially," *i.e.*, in a fair and impartial manner; (d) The order of deportation is faulty and in excess of jurisdiction.

I propose to deal with each separate heading in order.

Turning first then to (a). It is submitted in support of this contention that if the respondent is subject to examination and deportation by a Board of Inquiry such examination and deportation can only be conducted under sections 40 and 42 of the Immigration Act. It is suggested that the Board of Inquiry is not competent to exercise examining powers under section 33, subsection 7 to inquire into the right of a man who is in Canada to remain here. It is said that section 33, subsection 7 relates only to "entry" and "re-entry" and that once the subject of the inquiry is in Canada for some period (in this case approximately two years) this section cannot be invoked. If this argument is sound then the respondent was examined by a Board of Inquiry which sat without authority because if section 33, subsection 7 is of no application then it so happens that the condi-

tions precedent to the exercise of jurisdiction under sections 40 and 42 were not observed. However, with respect, I do not consider that this submission is sound. The apposite wording of section 33, subsection 7 is as follows:

> Any person who enters Canada . . . by . . . stealth shall be guilty of an offence under this Act . . . and any person suspected of an offence under this section may be arrested and detained without a warrant by an officer for examination . . . ; and if found not to be a Canadian citizen, or not to have Canadian domicile such entry shall in itself be sufficient cause for deportation whenever so ordered by a Board of Enquiry.

It is not disputed that this respondent entered Canada by stealth and I fail to see how any lapse of time between his illegal entry and arrest can give him any relevant rights of any kind. I can find no reason for saying that section 33, subsection 7 has no application. In truth, with deference, the respondent fits squarely within it.

An examination of sections 40 and 42 *et seq.* indicates that they were designed to supply machinery for the deportation of prohibited and undesirable classes. It is quite true that a person "who enters or remains in Canada contrary to any provision of [the] Act" is subject to examination and deportation under these sections and it may very well be that the respondent could have been boarded and deported under the powers conferred by these sections provided the proper procedure has been adopted. There are thus two alternative methods to which resort may be had in order to deport a person (subject to deportation), who makes an illegal entry into Canada. To say that because there is jurisdiction to deport the respondent under section 40 *et seq.*, there cannot be jurisdiction to deport him under section 33, subsection 7 is, with respect, an untenable submission.

This objection therefore, in my opinion, fails.

I turn now to (b). It is submitted by the respondent that he is a Canadian citizen, *i.e.*, a British subject who has Canadian domicil and is therefore not subject to deportation either under section 33, subsection 7 or sections 40 and 42. It is clear that the respondent is a British subject and that from 1908 to 1926 he resided in Canada (after having "landed" therein by "lawful

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admission"—section 2, subsection 1), and acquired a Canadian domicil and became a Canadian citizen. In 1926, however, he entered the United States by stealth and remained there until 1935. By reason of this absence from Canada the respondent lost (for the purposes of the Immigration Act) his Canadian domicil and also, in consequence, his Canadian citizenship.

The relevant section of the Immigration Act is section 2 (*e*) (iii) the apposite wording of which is as follows:

> . . . when . . . any British subject not born in Canada having Canadian domicile shall have resided for one year outside of Canada, he shall be presumed to have lost Canadian domicile and shall cease to be a Canadian citizen for the purposes of this Act, . . .

The presumption may be rebutted by the production of a certificate of any British Diplomatic or Consular officer that the absentee appeared before such officer and satisfied him of his reasonable intention to retain his Canadian domicil. The respondent did not produce the required certificate but sought to escape from the effect of its absence (section 2 (*e*) (iii)) by alleging that during the period 1926 to 1935 he returned at intervals to Canada. On this submission paragraph 9 of his affidavit is as follows:

> . . . I entered the United States surreptitiously in 1926, and obtained profitable employment but was in constant fear of U.S. Immigration authorities and kept moving about returning to Canada from time to time making a final return as a British subject to my home and domicil in April, 1935.

but the following is an excerpt from the evidence he gave before the Board on the inquiry:

> Will you tell this Board where you worked in the United States—how long, and when you came back to Canada? I worked in Bridal Veil, Oregon, about little over two years—after that I worked in Aberdeen, Washington, about three years—after that I went to California—worked on farms in Stockton, Sacramento and Marysville.
>
> How long were you there? Over five years.
>
> When did you leave California? I think last year—April.

Evidence of a more cogent character is required to establish that the respondent periodically returned to Canada at intervals of less than one year and made his entry therein each time in accordance with the provisions of the Immigration Act. Assuming we have the right to review the evidence on this aspect of the matter, and I may say I consider that given by the respondent unworthy of belief in view of his many conflicting statements,

I am convinced that the Board reached the right conclusion when it refused to give effect to this submission. It is clear that the respondent lost his Canadian citizenship by virtue of the provisions of section 2 (*e*) (iii).

In considering this question of Canadian citizenship, the Courts are not precluded by section 23 of the Immigration Act from reviewing the finding of a Board of Inquiry. *Shin Shim* v. *The King* (Supreme Court of Canada—June, 1938—unreported*).

Counsel for the respondent pressed us with his submission that when examined by the Board of Inquiry in 1937 the respondent was a Canadian citizen, having acquired this *status* since his re-entry into Canada in 1935. That submission, to my mind, cannot be supported. The entry of the respondent into Canada in 1935 was an unlawful entry and in consequence the respondent cannot be said to have "landed" in Canada within the meaning of the Immigration Act (see section 2 (*e*) (i)). Canadian domicil cannot be acquired, for the purposes of the Immigration Act, except by a person having his domicil for at least five years in Canada after having been "landed" therein, *i.e.*, after having made a "lawful admission" into Canada. The present respondent fails to fulfil both conditions precedent to the acquisition of Canadian domicil (see section 2 (*e*) (i)).

As he has not acquired a Canadian domicil since 1935, he has therefore not acquired Canadian citizenship. The submission of the respondent on this aspect of the matter fails.

That brings me to the consideration of head (c). Under this heading we find a "mixed bag of questions." First of all an attack was made upon the capability of the interpreter. I am satisfied there is nothing in this point. We have in the record an affidavit from the chairman of the Board of Inquiry. He swears to the fact that before the Board was held he had an intelligible conversation with the respondent in English, and that nearly the whole of the examination of the respondent was conducted in English without the use of the interpreter and "that only questions were submitted through the interpreter where any possible doubt existed as to the understanding thereof by Jawala Singh"—the respondent. I would consider myself credulous indeed to believe that this respondent after living and

* Since reported, [1938] 4 D.L.R. 88.

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working in Canada and the United States for at least 30 years cannot understand and speak English. So far as the attack upon the capability of the interpreter is concerned (if one was required at all), it seems to me the following excerpts from the proceedings before the Board of Inquiry answer that contention:

By counsel: [for respondent] I object to this interpreter and to proceeding with this case until I know what languages he claims to be able to speak and what dialects he claims to be able to speak.

Chairman to Mr. McRae: [the interpreter] Mr. McRae, would you at this time in the hearing tell Mr. *Hogg* the Hindu dialects you are able to speak? I speak Hindi, Hindustani and Punjabi.

By counsel: That is all you claim? Yes, that is all I claim. And English.

By Chairman: Mr. McRae, would you now ascertain from Jawala Singh the dialect he wishes to use at this hearing? Punjabi.

By Chairman: Mr. McRae, would you now tell Jawala Singh that he is to be examined before this Board of Inquiry as to his entry into and right to remain in Canada, and that I understand that Mr. *J. P. Hogg* is here acting as his counsel. Is that correct? This is understood.

The interpreter and respondent were thereupon duly sworn; the examination taking, at this session, approximately twelve pages of transcript to report.

The Board of Inquiry reconvened on February 22nd, 1937, when the following appears in the transcript of the proceedings:

Board of Inquiry reconvened February 22nd, 1937, at 2.35 p.m. Same Board members, interpreter and Jawala Singh present.

Mr. *G. P. Hogg*, acting on behalf of Mr. *J. P. Hogg*, counsel.

M. Ross, stenographer.

Chairman to Jawala Singh: Jawala Singh this Board of Inquiry is being reconvened to conduct your hearing, and Mr. *G. P. Hogg* is here acting on behalf of his father, Mr. *J. P. Hogg*, is that satisfactory to you? I am satisfied to proceed.

By Chairman to counsel: Are you satisfied Mr. *Hogg* to proceed with the Board? Yes.

With deference I do not feel that an objection of this character merits much consideration in the face of the attitude of the respondent and his counsel before the Board of Inquiry. The ground of objection by counsel before the Board was that he desired to be informed, before the inquiry proceeded, of the languages and dialects spoken by the interpreter. He was so advised and the inquiry proceeded. At a later stage, after considerable evidence had been taken both counsel and respondent assented when asked if they were satisfied to proceed. That makes an end of it. The complaint that he requested and was

refused the services of a check interpreter before the inquiry opened is an objection within the same category and may be disposed of the same way.

It should be noted that the interpreter was the Reverend Mr. McRae who was for many years the missionary for the United Church in Canada amongst the East Indians and who was for many years the official interpreter of the Department of Immigration in cases of East Indians and had in numerous cases interpreted in the Punjabi dialect. We were advised by counsel that, regrettably, he died before the application was made below.

I now come to a question upon which counsel before us placed considerable emphasis. It appears from the record that Mr. *J. Pitcairn Hogg* acted as counsel for the respondent at the first examination by the Board of Inquiry. At the reconvened Board of Inquiry held on the 22nd of February, his son, Mr. *Gilbert Pitcairn Hogg,* appeared as counsel for the respondent. On the 30th of October, 1937, Mr. *Gilbert Pitcairn Hogg,* swore to an affidavit containing the following paragraphs (*inter alia*):

8. I have read the transcript of the proceedings of the reconvened Board of Inquiry held on February 22nd, 1937. The said transcript is not a true and correct transcript of the proceedings at the said Board of Inquiry and a large number of questions and answers are omitted therefrom. Some of the answers which appear in the said transcript are not the answers which were given by the said Jawala Singh, son of Inder Singh.

9. During the course of the said reconvened hearing of the said Board of Inquiry on February 22nd, 1937, I heard Mr. D. N. McDonnell instruct the stenographer not to take down some of the answers given by the said Jawala Singh, son of Inder Singh and accordingly I raised objection but my objection was overruled.

10. It was quite evident to me during the course of the said reconvened hearing of the said Board of Inquiry that the said stenographer was not making a true and complete transcript of the proceedings.

In so far as these paragraphs allege that questions and answers were not taken down by instructions of the chairman, the authority for thus abridging the record is to be found in section 15 of the Immigration Act. That section directs that not a complete but " . . . summary record of proceedings and of evidence and testimony taken shall be kept by the Board." What shall be taken down and what omitted is, under that section, largely within the discretion of the Board, provided, I think, that the "summary record" is a correct epitome of the

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essential and material evidence adduced, and it may well be that the answers omitted in this case were irresponsive, irrelevant, or immaterial. By reason of the section the *onus* is on the respondent to convince us that what was omitted was essential and material evidence. He has not discharged that *onus* and a careful perusal of the record in this case has satisfied me that the requirements of section 15 have been met.

That leaves for consideration the allegation in paragraph 8 of the affidavit to the effect that some of the answers of the respondent were not correctly transcribed.

That primarily is an attack upon the capability of the stenographer and cannot be said to go to the jurisdiction of the Board. In any event the allegation is too general to support any argument based thereupon. We are not told what answers are incorrectly transcribed nor in what manner nor to what extent they are material to the issues under consideration, nor if they relate to matters of substance. An objection of this kind ought to be distinctly formulated and clearly established. In this case it fails to meet the requirements.

In so far as this allegation may be regarded as an attack upon the interpreter it is my view that where the qualifications of the interpreter have been established to the satisfaction of the Board of Inquiry and of this Court it is not enough for the applicant to make a mere general allegation of an incomplete or incorrect report of the evidence before us; he must condescend to particulars showing wherein he has been prejudiced before the Board can be called upon to answer. In this case the allegations are too vague and general to call for an answer.

I have, I think, dealt with the main contentions advanced under head (c). There was one other matter, however, submitted for consideration, *i.e.*, complaint of counsel that he was not allowed proper opportunity to get his instructions from the respondent prior to the hearing before the Board of Inquiry but the record discloses no application for an adjournment nor that he was at all prejudiced by the actions of the Immigration officials and later on, as pointed out above, when before the Board of Inquiry he expressed his satisfaction to proceed. In any

event, the facts do not disclose any circumstance which would deprive the Board of jurisdiction.

I come now to the final point. It is contended the order of deportation is in excess of jurisdiction in that it directs deportation of the respondent to the place from whence he came to Canada, *i.e.*, the United States, or to the country of his birth or citizenship, *i.e.*, India. Counsel for the respondent, in a written argument filed by special leave submits that

> the word "or" in the Act and in the order is clearly a disjunctive conjunction tending to disjoin or separate two separate objectives and the order therefore is not made or given under the authority and in accordance with the provisions of the Act.

The form of order for deportation is set out in a schedule to the Immigration Act as Form C, and after certifying that the "deportee" (for the parentage of this word see Pickford, L.J., in *Rex* v. *Chiswick Police Station Superintendent. Ex parte Sacksteder*, [1918] 1 K.B. 578 at 585, and MARTIN, J.A.—now Chief Justice of British Columbia—in *In re Low Hong Hing* (1926), 37 B.C. 295 at 301) has been examined by the Board of Inquiry and is subject to deportation the operative part of the order reads as follows:

> And the said . . . is hereby ordered to be deported to the place from whence he came to Canada, or to the country of his birth or citizenship.

This is the form of the order issued in this case by the Chairman of the Board of Inquiry and I fail to see how the respondent can expect to succeed in convincing us that the order is in excess of jurisdiction when such order is, in fact, in the prescribed statutory form. Its object is, obviously, to empower the deporting authority to select, doubtless after due inquiry, that "place" or "country" to which under the circumstances it would be most expedient to return the deportee and in the absence of any direction in the statute as to how this act of state is to be carried out there is no justification for departing from the form of order prescribed by the said statute either by unauthorized additions thereto or deletions therefrom and it would be improper for us to presume that the order will not be carried out as Parliament intends *ipsis verbis*.

The power of the Federal Parliament to deport has been delegated by the provisions of the Immigration Act to a Board of

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Inquiry (section 14) or in the absence of a Board of Inquiry at a "port of entry" to the immigration "officer in charge" (section 22) or "any immigration officer" at a place other than a port of entry (section 22, subsection (2)), and when

this delegation has taken place, the depositary or depositaries of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them:

Attorney-General for Canada v. *Cain*, [1906] A.C. 542 at p. 546.

In the result and with great respect, I would allow the appeal.

Appeal allowed.

Solicitors for appellant: *McCrossan, Campbell & Meredith.*
Solicitors for respondent: *J. A. Russell & Co.*

IN RE ESTATE OF A. M. KAIME, DECEASED.

S. C.
In Chambers
1938
Sept. 7, 23.

Consd.
Re Knox
40 D.L.R. (2d) 397

Practice—Will—Foreign probate—Three executors—Application for ancillary probate in British Columbia—Grant to one of the foreign executors.

A testator domiciled in California died there leaving a will whereby he appointed three executors, one of them being his widow. Probate of the will was granted by the Court in California to all the executors. The widow filed a petition in the Victoria registry asking that ancillary probate of said will be granted to her in this Province.

Held, that there is a discretion in the Court to be exercised after consideration of the particular circumstances of the case before it, and under the circumstances shown in the material submitted, this is a case where the application should be granted, with power reserved to make the like grant to the other executors.

PETITION for ancillary probate of a will proved in California, U.S.A. Heard by FISHER, J. in Chambers at Victoria on the 7th of September, 1938.

Maunsell, for the applicant.
No one, *contra.*

Cur. adv. vult.

23rd September, 1938.

S. C.
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IN RE ESTATE OF KAIME, DECEASED

FISHER, J.: In this matter it would appear that Mr. A. M. Kaime being domiciled in California died there on the 1st of May, 1937, leaving a will whereby he appointed three executors and on the 28th of May, 1937, probate of the will was granted by the Court in California to all the executors. On the 1st of September, 1938, a petition was filed in the Victoria registry by the widow, one of the executors, asking that ancillary probate of said will should be granted to her in this Province. The registrar has not approved of the petition but referred the matter to the Court on the question of one executor only applying.

Counsel on behalf of the applicant submits that ancillary probate should be granted with power reserved to make a like grant to the other executors upon their application. On the other hand it might be suggested that our Court should follow the foreign grant and appoint the same persons and not one of them in the absence of any proof that by the law of California one of several executors can obtain probate with power reserved as one can in this jurisdiction. I have delayed disposal of the matter pending enquiries and so far as I have been able to ascertain the practice in such a case as the present one has not been settled by any judicial decision in this Province. The question of following a foreign grant, however, has been considered and dealt with by Courts elsewhere and reference might be made to the following authorities.

In the case of *In the Goods of Read* (1828), 1 Hagg. Ecc. 474 at 476; 162 E.R. 649, the Prerogative Court said:

> It is not fully decided, whether this Court is bound, in all cases and under all circumstances, to follow the grant of probate made by a Court of competent jurisdiction.

In Dicey's Conflict of Laws, 5th Ed., 512-14, there is a comment in part as follows:

> A foreign personal representative has, as such, no authority in England; but our Courts recognize the primary, though certainly not the exclusive (see *Enohin* v. *Wylie* (1862), 10 H.L. Cas. 1), jurisdiction of the Courts of a deceased person's domicil to administer his movable property, that is, to decide what testamentary dispositions he has made and how far they are valid, and to determine who is the person entitled to deal with such property. When, therefore, any person, under whatever name, is appointed by the Courts of the domicil to represent the deceased, such representative has, as a rule, a claim, though not an absolute right, to an English grant, and

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Fisher, J.

such grant will usually be made to him by the Court, which will moreover, in general, follow the foreign grant so as to give the foreign personal representative no more than such powers as are required for the performance by him in England of the duties imposed upon him under the law of the deceased person's domicil, despite the rule that limited grants are not normally made. . . .

The Court, however, may in its discretion decline to grant administration to the foreign personal representative of the deceased if there be any reason for the refusal.

"The result of the cases is, that in the Prerogative Court the tendency was to follow the foreign grant where it could be done, but there was a reluctance to lay down any absolute rule in the matter, whilst the decisions in the Court of Probate (as *Her R.H. the Duchess d'Orleans, In the Goods of*) (1859), 1 Sw. & Tr. 253; 28 L.J.P. & M. 129 have militated against the rule of following the foreign grant" (*Earl, In the Goods of* (1867), L.R. 1 P. & D. 450, 452, judgment of Sir J. P. Wilde), and the Court, whilst in general granting administration to a foreign representative appointed by the Court of the deceased's domicil, will constantly vary the person selected and the form of the grant if a variation is needed by the requirements of English law.

Sir J. P. Wilde seems to have considered different phases of the matter in several cases. In the case of *In the Goods of Cosnahan* (1866), L.R. 1 P. & D. 183, he said at p. 186:

The Court will follow the Isle of Man grant so far as to treat the deed as testamentary, but not so far as to treat the trustee as executor according to the tenor. I think he is not entitled to the grant either in that character or as universal legatee in trust. The widow is primarily entitled to administration with the will annexed, but as the testator evidently intended to exclude her from any control over the estate, and to give it to the trustee, I will carry his intention into effect by making the grant of administration with the will annexed to Mr. Quick under the 73rd section of the Probate Act (20 & 21 Vict. c. 77).

In *In the Goods of Earl, supra,* Sir J. P. Wilde, at pp. 451-3 said in part as follows:

In this case I took time to consider the question, to what extent the Court ought to follow a foreign grant of probate, the grant having been made to the applicant by the Court of the country of domicil as executrix according to the tenor. It is admitted that the terms of the will were not such as to constitute the applicant executrix according to the tenor in this country, but the Court is asked to follow the foreign grant in that respect. I have looked into the cases in which questions of this sort have arisen, and I find that for a long time considerable difficulty was felt as to the extent to which foreign grants ought to be followed. . . . This question was considered in *Enohin* v. *Wylie*, [(1862)] 10 H.L. Cas. 115, in which Lord Westbury, L.C., said: "Now, the utmost confusion must arise if, when a testator dies domiciled in one country, the Courts of every other country in which he has personal property should assume the right, first, of declaring who is the personal representative, and, next, of interpreting the will, and

distributing the personal estate situate within its jurisdiction according to that interpretation. An Englishman dying domiciled in London may have personal property in France, Spain, New York, Belgium, and Russia, and if the course pursued by the Court of Probate and the Court of Chancery in the present case were followed by the Courts of those several countries, there might be as many different personal representatives of the deceasd, and as many varying interpretations of his will, as there are countries in which he is possessed of personal property." I think there is strong good sense in these remarks, and the practical principle there pointed out is one that ought to be adhered to. The only question is, in what way ought the Court to act upon it?

The Court then under section 73 of 20 & 21 Vict. Cap. 77, decreed administration with will annexed to the applicant as the person entitled to administer under the grant of the Court of the country of domicil. It might be noted that said section 73 is similar to section 9 of our Administration Act.

In the case of *Re O'Brien* (1882), 3 Ont. 326, Boyd, C., referring to some of the cases above mentioned, says at p. 330:

The case of *In the Goods of E. S. Hill*, [(1870)] L.R. 2 P. & D. 89, which was cited to me, was one of testacy, and merely exemplifies an application of what is undoubtedly the general rule, that the grant of administration by the Courts of the domicil governs the discretion of the foreign Court in decreeing administration to the same person. This is, however, by no means the invariable rule even in cases of testacy. See cases referred to: *In the Goods of Earl*, [(1867)] L.R. 1 P. & D. 450, and *In the Goods of Cosnahan*, [(1866)] *ib.*, 183.

With reference to the above-named cases dealt with by Sir J. P. Wilde, I do not think that he had in mind or was purporting to lay down an absolute rule to be applied in all cases where probate had been granted by a foreign Court to several executors and only one of them had applied in the English Court. Counsel, however, has referred me to another case also dealt with by Sir J. P. Wilde, *viz., In the Goods of Tyrrwhit Pulman* (1863), 3 Sw. & Tr. 269, where the head-note reads as follows:

P., by his will, appointed C. and D. "executors of my will in India," and W. "sole executrix of my will in England." On an exemplification of probate granted in Calcutta to C. being sent home, probate was granted in the principal registry to W., as one of the executors of the will, reserving power of making a similar grant to the other executors in the will. The Bank of England objected to the reservation of this power. But the Court refused, on motion on behalf of W., to direct the probate to be altered.

At pp. 270-72, Sir J. P. Wilde says as follows:

This is an application made by Mrs. Anna Maria Walker to revoke a grant of probate, which was made to and accepted by her, of the will of Mr. Tyrrwhit Pulman, dated the 6th of February, 1863, and for the grant of a

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new probate of that will to her, or in the alternative for an alteration of the probate so already granted. The existing grant is "to Anna Maria Walker, one of the executors named in the will, etc." And then follow these words: "Power is reserved of making the like grant to F. W. S., and C. R. P., the other executors named in the said will." It is this reservation that she now objects to, and the substance of her prayer is that probate may be granted to her absolutely as sole executrix. . . .

What, then, is the objection to the probate as it now stands? Why simply this, that the Court has reserved a power of granting probate also to the other executors if they should claim it, and if the Court should, after hearing their claim, consider them entitled to receive it. What Mrs. Walker asks is, that the Court, without hearing the other executors, should bind itself not to entertain their claim. But, singular as this demand is, after she has already accepted the grant which she now wishes to alter, the reason for making the demand is more singular still. It is as follows:—The Court learns, with some surprise, that some person at the Bank of England has felt himself called upon to exercise his judgment in construing the will, and has come to the conclusion that Mrs. Walker's probate ought to have been granted in a different form, and entertaining this opinion, he has therefore refused to act upon it. This is a misfortune, the remedy for which does not lie within the province of this Court to point out, but it forms no reason whatever for the alteration of the present probate, and the application is therefore refused.

It is argued by counsel on behalf of the applicant that the *Pulman* case, *supra,* is logically similar to the case at Bar, where one executor is residing here at the time of the application and the other two are foreign residents. It should be noted, however, that the application dealt with by Sir J. P. Wilde in the *Pulman* case was an application to revoke a grant already made. The case seems to me to be an authority for the proposition that ancillary probate may be granted in some cases to one of several executors notwithstanding the fact that there is a foreign grant of probate to all of them. Upon the authorities before me, however, I am not prepared to hold that there is an absolute rule that in all cases and under all circumstances our Courts should on general grounds grant the application of one executor reserving power to make like grants to other executors upon their application where there has been a foreign grant of probate to several executors named in a will and one of them applies for ancillary probate here. My conclusion on the matter is that there is a discretion in the Court to be exercised after consideration of the particular circumstances of the case before it.

I therefore come now to consider the circumstances under

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which one executor only is applying in the present case. It is apparent from the material before me that considerable time has elapsed since the grant was made in California, that under the will the applicant is a main beneficiary and that she is presently residing in this Province while the two other executors are residing out of the Province. It is also apparent from the statement in the written argument of counsel for the applicant which I accept that he is "instructed by the California solicitors for all the executors and on behalf of all the executors and on ground of convenience the present form is adopted." Under the circumstances thus shown by the material before me I think that this is a case where the application should be granted with power reserved to make the like grant to the other executors. Order accordingly.

Order accordingly.

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May 16, 17, 18, 19, 20; *Aug.* 5.

Insurance, fire—Proof of loss—Policy covering house and furniture—False statements as to furniture—Statutory conditions 15 and 16.

Apd
Tarr v. Westchester Fire Ins. [1952] O.R. 7.

The plaintiff's husband held an insurance policy in the defendant company for $950 on his dwelling-house, and $1,600 on his household furniture and personal effects. He assigned the policy to his wife after the house and furnishings were destroyed by fire. In an action to recover on the insurance policy, the defendant company alleged that the statements made by the husband in his statutory declaration in relation to the particulars required by statutory condition No. 15 as to the value of the dwelling and as to the values and dates and places of purchase of the furniture and contents, and as to the actual loss or damage thereto caused by the said fire, were false to his knowledge and were made wilfully and with the fraudulent intent of inducing the defendant to pay the maximum amount of said insurance.

Held, that in determining whether there was "fraud or wilfully false statement" within statutory condition 16 by an insured in respect to particulars required by statutory condition 15, consideration must be given as to whether the actual loss sustained was less than the sum insured, where the full insurance is claimed, whether in case of over-

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valuation the excess claim has arisen from *bona fide* mistake or from a deliberate attempt to mislead, and whether the claim has been made or included in respect of goods which to the knowledge of the insured had no existence.

A finding of "fraud or wilfully false statement" in said particulars in respect to household furniture vitiates the whole claim for loss of house and furniture, where both are insured by the one policy, although no fraud or wilfully false statement has been proved in respect to the house. On the facts of this case the whole claim is vitiated by reason of the fraud and wilfully false statements in the statutory declaration, and the action is dismissed.

ACTION by plaintiff as assignee of her husband's interest in his fire-insurance policy on his dwelling-house and effects, the property having been destroyed by fire on the 14th of August, 1935. Tried by FISHER, J. at Cranbrook on the 16th to the 20th of May, 1938.

Lefeaux, for plaintiff.
Nicholson, for defendant.

Cur. adv. vult.

5th August, 1938.

FISHER, J.: The plaintiff claims as assignee of all the right, title and interest of her husband, Adolphe Sokolowsky, in and under a certain policy of fire insurance issued by the defendant insuring, *inter alia,* his dwelling-house for $950 and his household furniture, furnishings and personal effects for $1,600. The said property, situate at Yahk, was destroyed by fire on August 14th, 1935, and the full amount of the insurance under the items as aforesaid is claimed. For the sake of convenience I shall hereinafter refer to the household furniture, furnishings and personal effects simply as "goods."

In the first place the defendant denies the assignment, and in any case any receipt of notice thereof, but I have to say that I find there was an absolute assignment made in writing by the said insured to the plaintiff on April 25th, 1936, and that express notice in writing of the said assignment was given to the defendant on or about May 20th, 1936. The defendant however further pleads as follows:

By statutory condition No. 16 forming part of the said policy it was provided that any fraud or wilfully false statement in a satutory declara-

tion in relation to the particulars required in statutory condition No. 15 should vitiate the claim of the person making the declaration, and the defendant alleges that the statements made by the said A. Sokolowsky in the said statutory declaration of the 24th of August, 1935, as to the amount of the loss sustained by the said A. Sokolowsky by such fire, and as to the values of the said dwelling and as to the values and dates and places of purchase of the said furniture and contents and as to the actual loss or damage thereto caused by the said fire were false to the knowledge of the said A. Sokolowsky and that such statements were made wilfully and with the fraudulent intent of inducing the defendant to pay to the said A. Sokolowsky the sum of $2,550 being the maximum amount of the said insurance, and the defendant alleges that any claim of the said A. Sokolowsky against the defendant under the said policy by reason of the alleged loss or damage by fire was thereby vitiated and the defendant says that it is not liable to the plaintiff as assignee of the said A. Sokolowsky in respect thereto as alleged or at all.

In view of this plea of fraud or wilfully false statements on the part of the said insured A. Sokolowsky I have made a close scrutiny of all the evidence and I have carefully considered the arguments of counsel upon both the law and the facts. It seems to be common ground that, if fraud is established against the assignor, the position of the assignee is no better than if the insured had been plaintiff in the action. See *The North British & Mercantile Insurance Company* v. *Tourville* (1895), 25 S.C.R. 177, at 181.

After the fire Mr. J. H. Hazlewood was employed as an adjuster by the defendant and saw Mr. Sokolowsky several times about the proof of loss. Mr. Hazlewood gave evidence at the trial. I accept his evidence where it conflicts with that of Mr. Sokolowsky. I find that on his first visit, on August 20th, 1935, Mr. Sokolowsky gave him the scribbler (Exhibit 17) containing an inventory he had written out with three headings giving a description of the articles alleged to have been destroyed by the fire, the date of purchase and the cost of each article. Mr. Hazlewood took this scribbler away but on his second visit on August 21st, 1935, returned it to Mr. Sokolowsky and told him that the information was insufficient and that the inventory should show the actual value of each article at the time of the fire. Mr. Sokolowsky wrote out in another scribbler (Exhibit 4) a copy of the inventory, adding the actual value under a fourth heading and on August 24th, 1935, took this inventory

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(Exhibit 4) into the office of Mr. *Alan Graham* at Cranbrook and it was made Exhibit "A" to the proof of loss statutory declaration (Exhibit 13). It is and was quite apparent therefore that in such declaration Mr. Sokolowsky was making statements as to date of purchase, the cost and the actual value of each article he was declaring to have been destroyed by the fire on his premises on August 14th, 1935. It would seem that for some years before the fire Mr. Sokolowsky was in receipt of relief from the local government office at Cranbrook and when an inquiry concerning said fire was held by the deputy fire marshal, Mr. W. A. Walker, under the provisions of the Fire Marshal Act, now R.S.B.C. 1936, Cap. 100, on or about October 7th, 1935, Mr. Sokolowsky gave evidence and was confronted with the declarations which had been made by him in connection with his applications for relief (Exhibits 12 and 20) and with his said proof of loss declaration. Mr. Sokolowsky gave evidence at the trial and admitted that in or about the month of May, 1936, he had been convicted of perjury in connection with evidence given by him at said inquiry concerning the said fire held by the deputy fire marshal.

At the trial Mr. William James Ward was called as a witness by the defendant and gave evidence that Mr. Sokolowsky in a conversation on October 8th, 1935, in reply to questions, had said in effect that he "had the goods all right" but had not got them from Eaton's and Simpson's as he had previously stated but had brought them with him when he moved from Kamloops to Yahk (which was in 1926), that the statements in the said proof of loss declaration as to the date of purchase of the goods were incorrect and that "those dates" had been put in to make the goods appear newer. Mr. Ward says that Mr. Walker, deputy fire marshal, was present during part of the conversation and Mr. Walker, also called as a witness by the defendant, corroborates in part the evidence of Mr. Ward. Mr. Sokolowsky did not contradict the evidence of Mr. Ward and I accept the evidence of the latter as to what Mr. Sokolowsky said at the time referred to. It is argued, nevertheless, by counsel on behalf of the plaintiff that even in such case I should accept the evidence of Mr. Sokolowsky given at the trial that the dates

had not been put in to make the goods appear newer but were correct in respect of the years mentioned.

I now come therefore to consider in detail the goods, dates of purchase, cost and actual value as listed in Exhibit 4 and might begin by saying that I am indebted to both counsel for the assistance they have given me in this connection as it is no easy task to make a proper analysis of the list. After careful consideration I think it is quite apparent that according to such list Mr. Sokolowsky during 1931 and 1932 spent nearly $300 for linoleum, tapestry covers, rugs, carpet and curtains. Then a general idea of the nature and cost of some other purchases made according to the list after application was made for relief in August, 1931, may be got from pages 10, 13, 14 and 15 of the list and from a perusal of the evidence admitted to have been given by Mr. Sokolowsky at the fire marshal's inquiry when the deputy fire marshal had in his hand the list Exhibit 4, while Mr. Sokolowsky had in his hand the list, Exhibit 17: [evidence here quoted].

The evidence of Mr. and Mrs. Sokolowsky is in effect that they had been gradually building additions to their house and finally finished it in 1930 and that thereafter they gradually bought some furniture and furnishings for the house and clothing and other goods necessary for themselves and their three young children. Mr. Sokolowsky in his proof of loss claimed that he had lost in the fire goods, the original cost of which was $2,894.80 and the actual value at the time of the fire $2,470.57 (wrongly added as $2,809.57). A comparison of the figures shows that a comparatively small sum had been allowed for depreciation and it is quite apparent that Mr. Sokolowsky was declaring that the larger portion of the goods had been bought by him since the end of the year 1930. A perusal of said Exhibit 4 also shows that, after the exclusion of goods shown as merchandise in Exhibit 23 and goods made at home, the claim includes the sum of approximately $1,450 for goods declared to have been purchased for approximately $1,600 from the end of 1930 to August, 1935. As already intimated however Mr. Sokolowsky on August 12th, 1931, had applied for unemployment relief at the employment office in Cranbrook and then made a statutory

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declaration (Exhibit 12) in which he declared, *inter alia,* that he had no funds in the bank, that there was no money owing him and that he had no negotiable securities or cash. It would also appear that he obtained relief to the extent of approximately $30 per month from at least the spring of 1932 till the time of the fire and on April 1st, 1935, he signed a declaration in writing (Exhibit 20), part of which reads as follows:

I hereby declare I am destitute and in need of assistance for myself and my dependants because I and they have income only as shown below and have no other money and no other means of obtaining the necessities of life.

I further declare that the only employment and any source of income whatsoever of myself, dependants and any member of my family (household) during the past thirty days has been as follows:

Particulars	Relief	$31.00.

Counsel for the plaintiff confronted with this evidence suggests that it is only evidence of an attempt on the part of Sokolowsky "to obtain employment by false pretences" and still asks me to accept the present testimony of Mr. Sokolowsky which in effect is that he brought a considerable quantity of money and goods to Yahk from Kamloops in 1926, had steady work for four years and during the period from 1930 to 1935 had money not only from relief employment but from his previous savings, from the sale of goods bought as merchandise for resale, from the collection from some people of loans previously made by him out of moneys belonging to himself or his wife, from the borrowing of money from other people, from the sale of vegetables and lunches and from the doing of work (other than relief work) by himself or his wife. I am asked to believe that the money used for the purchase of goods during the years as aforesaid came from these sources and was either paid out in cash for goods (sometimes ordered C.O.D.) or forwarded by money order or postal note. Here again, however, the plaintiff is confronted with the fact that she and Mr. Sokolowsky had previously given a different account of where the money came from to buy the goods. At the fire marshal's inquiry Mr. Sokolowsky said in answer to questions (see Exhibit 22) in part as follows: [His Lordship quoted the evidence and continued].

Mr. Sokolowsky admits now that he did not get any money

from Mr. Melnyk before the fire and also that he told a different story at his trial for perjury than he did at the fire marshal's inquiry. At the inquiry he said the dates of the purchase were correct but at his trial in May, 1936, he said they were "imagination." Then I have also for consideration that he now says that the proof of loss declaration included goods to the value of $191.42 (see Exhibit 23) bought for resale and that he had included such goods in Exhibit 4 by mistake owing to thinking (as he well might) that the insurance policy covered such. In this connection it may be noted that Mr. Sokolowsky now claims to have bought on April 28th, 1934, goods at a cost of $22 and on July 2nd, 1935, goods at a cost of $32.15, as set out in Exhibit 23. On his examination at the fire marshal's inquiry he said that he got these goods from Eaton's and that he sent the money from Yahk by postal notes or money orders from the post office or the station. Miss McCartney, postmistress, and Mr. Walters, station agent at Yahk, were called as witnesses at the trial by the defendant and I accept them as credible witnesses. Having in mind their evidence I refuse to believe that Mr. Sokolowsky had bought the goods as claimed as aforesaid. In view of the evidence given before me by some of the witnesses, as to the purchase of some things from Mr. Sokolowsky, I am satisfied that he did have for sale, and did sell, a few articles to his neighbours but, on the whole of the evidence before me, I find that he did not during the years 1930-35 make any substantial amount of money from the resale of goods as claimed or have on hand at the time of the fire merchandise for sale to the value of $191.42 as set out in said Exhibit 23. It is quite obvious that the plaintiff is faced with a great many contradictory statements by her husband, the assured, but nevertheless counsel on her behalf insists that her husband is now telling the truth. It is pointed out that Mr. Sokolowsky, though he had completed his proof of loss by delivering to the defendant the statutory declaration as aforesaid on the 24th of August, 1935, had not received payment of his loss but had been compelled to attend on an inquiry into the fire by the deputy fire marshal on October 7th, 1935. It is argued that in his anxiety and stress of mind Mr. Sokolowsky

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was saying almost anything at that time and also at his trial for perjury later on but that the Court should now accept his evidence given at the present trial and find that fraud or wilfully false statement as pleaded by the defendant, has not been proved. It therefore becomes necessary to consider the authorities on the meaning of the expression "fraud or wilfully false statement" as used in statutory condition No. 16.

In *Buckley, et al.* v. *Liverpool, London & Globe Insurance Company,* 51 N.B.R. 467, at pp. 495-500; [1924] 4 D.L.R. 25, at pp. 34-36, White, J. delivering the judgment of the Court on appeal said, in part, as follows:

Counsel for the defendant cited upon the argument a number of cases where it was held there was fraud in claiming against an insurance company for a greater loss than was shown by the evidence to have actually occurred. I have examined these authorities, but though I shall refer to some of them, need not review them all, because whether there was fraud or not in this case is I think entirely a question of fact, and none of the authorities cited are of much assistance as it seems to me in determining that question. As to the effect of an excessive claim, either in respect to value or quantity of property burned, these authorities do nothing more, I think, than establish or rather, confirm what I take to be good law, that where the plaintiff claims for a substantially greater loss than actually occurred that affords evidence of fraud to be considered with other evidence in the case in deciding whether there actually was fraud. Where such excessive claim is made and there is nothing to satisfy the Court that such claim might have been made honestly though mistakenly, then such unexplained over-claim might alone establish fraud. It is because I think that in this case the plaintiffs may have been honestly mistaken as to the amount of their loss that I think fraud has not been established. Among the cases to which I have referred, cited by the appellants' counsel is the *North British & Mercantile Insurance Company* v. *Tourville* (1895), 25 S.C.R. 177. The judgment of the Court was there delivered by Taschereau, J. At p. 180 he says:

"The respondents would thus seem to contend, indirectly at least, that the Courts cannot find fraud unless it be directly proved. But, for obvious reasons, this proposition is untenable. There would be very little protection against fraud if such was the law. Those who intend to defraud do all in their power to conceal their intent. . . . It is likewise, as a general rule, only by presumptions and circumstantial or inferential evidence that dishonesty can be proved."

Beginning at p. 181 the learned judge very fully sets forth the evidence in the case, and then says (p. 189):

"If, as it has been well remarked, the force and effect of circumstantial evidence depend upon its incompatibility with, and incapability of, explanation or solution upon any other supposition than that of the truth of the

fact which it is adduced to prove, the appellants' case is as clearly made out as a case of this nature can ever possibly be. The evidentiary facts, the facts they rely upon, are unmistakably proved. Their absolute incompatibility with the respondents' theories is also patent. There is no room for any other solution if these facts are true, but that Duval grossly and wilfully exaggerated the quantity of his lumber, both on the 1st of September on his application for insurance and in his statement of loss after the fire."

So far from the judgment in that case supporting the contention made before us that gross over-statement of the quantity or value of goods lost is conclusive evidence of fraud, it is clear that the judgment proceeded upon the ground that the Court found under the facts of that case the false statement could not have been honestly made.

Another case strongly relied upon by the appellants' counsel is *Britton* v. *The Royal Insurance Company* (1866), 4 F. & F. 905 [at p. 909]. The case was tried before Willes, J. In his summing up to the jury the judge used these words which are quoted by the appellant's counsel in his factum:

"Suppose the insured made a claim for twice the amount insured and lost, thus seeking to put the office off its guard, and in the result to recover more than he is entitled to, that would be a wilful fraud, and the consequence is that he could not recover anything."

Later on in the same charge the judge says: "And if there is wilful falsehood and fraud in the claim, the insured forfeits all claim whatever upon the policy." And again at p. 910 he uses these words: "But if the jury were satisfied that he had been guilty of a wilful fraud, and had thus sought to make the fire a source of gain, instead of being satisfied with an honest indemnity, then they must find for the defendants."

Taking the whole charge together it seems clear to my mind that the learned judge's view as there expressed was that before the jury could find the claim fraudulent they must be satisfied that it was wilfully false, or what I take to be the same thing, that it was falsely made with intent to defraud. . . .

Chapman v. *Pole* (1870), 22 L.T. 306, is another case cited and relied upon by the appellants. It is a *nisi prius* case tried before Cockburn, C.J. I refer to it because it is cited in Porter on Insurance, 6th Ed., 212, and I have seen it several times referred to in other authorities and text-books. In his charge to the jury in that case, Cockburn, J. says:

"A man may make a mistake in his claim and it may be quite honestly. If, for instance, a man either fails to recollect the precise quantity of goods he has on his premises at the time of the fire, or mistakes the value of those of which he was in possession, and thus he presses a claim according to what he believes honestly to be true, but which may, in the end, turn out to be mistaken, the only consequence which ensues is, that inasmuch as the contract of insurance is simply a contract of indemnity, he can only recover to the extent of the real value of the goods he has actually lost."

In *Maple Leaf Milling Co.* v. *Colonial Assurance Co.*, 27 Man. L.R. 621; 36 D.L.R. 202; [1917] 2 W.W.R. 1091, at 1093, Perdue, J.A. said, in part, as follows: [quotation].

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In the present case I would say, as was said in the *Buckley* case, *supra,* that whether there was fraud or not is a question of fact to be determined upon the evidence in the case. I think, however, that the authorities referred to are of some assistance in pointing out some matters that should be considered in order to reach the proper finding of fact on the issue of fraud or wilfully false statements. Some of these matters are, whether or not the actual loss sustained was less than the sum insured where the full insurance is claimed, whether in case of overvaluation the excess claim has arisen from *bona-fide* mistake or from a deliberate attempt to mislead and whether a claim has been made or included in respect of goods which to the knowledge of the insured had no existence. In considering these matters one of course must have in mind the whole of the evidence and I have taken considerable time to consider the whole matter from the beginning to the end as I realize that I should not hastily make a finding that the insured was guilty of fraud or of making wilfully false statements in his proof of loss declaration. As was indicated in one of the passages above set out, a man may quite honestly make a mistake in the precise quantity or value of the goods he has on his premises. Moreover, as counsel for the plaintiff quite properly points out, an insured person might make wilfully false statements in his proof of loss declaration and yet, if they were in respect of particulars not required by statutory condition No. 15 to be furnished in the proof of loss declaration, their falsity would have no effect upon the claim. See *Goring* v. *London Mutual Fire Ins. Co.* (1885), 10 Ont. 236, at 247; and *Patterson* v. *Oxford Farmers Mutual Fire Insurance Co.* (1912), 4 O.W.N. 140; 23 O.W.R. 122; 7 D.L.R. 369, at 373.

After this digression I come back to consider whether I should accept the evidence of Mr. and Mrs. Sokolowsky given at the trial as I have to say that the evidence of the other witnesses called on behalf of the plaintiff, even if accepted, does not, in my view, go very far towards supporting the claim of the plaintiff as to the quantity or value of the goods on the premises at the time of the fire. I pause here to add that I have not overlooked the evidence of Mrs. Nedelec and Mr. George Warren, whom I

look upon as credible witnesses, endeavouring after some years to recall what they saw, but I think it must be noted that they do not testify to having seen many new things on the premises. I have already referred in detail to the dates of purchase, cost and actual value of the goods as set out in Exhibit 4 and to some of the subsequent evidence given by the insured and his wife in connection therewith and I have to say that I do not see how one could reasonably believe that goods were bought to the extent claimed by them during the years the Sokolowsky family was on relief. I think that Mr. Sokolowsky had become involved in a maze of false testimony, not, as suggested, through false pretences at the time he made his applications for unemployment relief, but through making wilfully false statements in his proof of loss declaration. I cannot accept either him or his wife as a credible witness and think many of their statements at the trial are improbable and unreasonable. I do not think I could reasonably come to any other conclusion than that the statements of Mr. Sokolowsky in his proof of loss declaration, as to the dates of purchase, were falsely made because the actual loss sustained in connection with the household furniture, furnishings and personal effects was considerably less than the sum insured to his knowledge and he was endeavouring not simply to obtain an honest indemnity but to obtain the full amount of the insurance and make the fire a source of gain. Such a conclusion in itself means that I find the insured guilty of fraud in making his proof of loss statutory declaration and I am forced to the conclusion that the insured was guilty of fraud and wilfully false statements therein in respect of the particulars required to be given by statutory condition No. 15 as I am satisfied and find that the claim included amounts for the loss of goods that were "substantially non-existent" to the knowledge of the insured and amounts for the loss of old goods that were deliberately overvalued. I cannot determine the matter arbitrarily or as I might wish but must regard the evidence and in my view of the evidence this case cannot be found to be a case "of a trivial error or of a *bona-fide* mistake or simple overvaluation of the goods burnt" but must be found to be a case of fraud and wilfully false statements in relation to the particulars required in statutory condition No. 15.

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So far I have only dealt with the plea of fraud or wilfully false statements in respect of the household furniture, furnishings and personal effects and I have now to say that I find that no fraud or wilfully fraudulent statement has been proved in respect of the house. During the argument at the trial my first impression was that in the event of such a finding the claim in connection with the house would not be vitiated but upon the authorities hereinafter referred to I am now satisfied that it would be and I think counsel for the plaintiff concedes this. In Laverty on the Insurance Law of Canada, 2nd Ed., 305, the writer says as follows:

16. Any fraud or wilfully false statement in a statutory declaration, in relation to any of the above particulars, shall vitiate the claim of the person making the declaration.

This condition is the same as condition 20 of R.S.O. 1914, c. 183, with "wilfully" added.

Under such a condition it has been held that a fraudulent or wilfully false statement violates the whole contract, so that the false statement by the person making the declaration will vitiate his whole claim and not merely the claim in respect of the particular property as to which the false statement was made. (*Harris* v. *Waterloo Mutual Fire Ins. Co.*, [(1886)] 10 Ont. 718, [etc.]). But if, for instance, the insured has one policy on his house and another on his furniture or goods, a false statement which vitiates the policy on the furniture, etc., will not affect the policy on the house, there being two separate contracts. (*Miller-Morse Hardware Co.* v. *Dominion Fire Insurance Co.*, Can. Supreme Court), 65 D.L.R. 292; [1922] 1 W.W.R. 1097.

In *Harris* v. *Waterloo Mutual Fire Ins. Co., supra,* the plaintiff by a policy of insurance against fire effected an insurance on buildings and contents, by separate amounts being placed on each. [After quoting from the judgment of Cameron, C.J. at pp. 722-25, his Lordship continued].

In *Maple Leaf Milling Co.* v. *Colonial Assurance Co., supra,* Cameron, J.A. said at pp. 638-9 (27 Man. L.R.) as follows:

It has been held in the Canadian Courts that a false statement in a statutory declaration of loss under a policy in reference to part vitiates the whole: *Cushman* v. *London & Liverpool Ins. Co.*, 5 Allen (N.B.) 246; *Harris* v. *Waterloo Mutual Fire Ins. Co.*, [(1886)] 10 Ont. 718; *Grenier* v. *Monarch Assurance Co.*, [(1859)] 3 L.C.J. 100.

In *Claflin* v. *Commonwealth Insurance Co.*, [(1884)] 110 U.S. 81, it was held that, "False statements, wilfully made under oath, intended to conceal the truth on these points, constituted an attempted fraud by false swearing which was a breach of the conditions of the policy, and constituted a bar to the recovery of the insurance": p. 97.

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In *Dolloff* v. *Phœnix Ins. Co.*, [(1890)] 19 Atl. 396, it was held that, when the insured meets the demand for a detailed statement of his loss on oath "with knowingly false statements of losses he did not sustain, in addition to those he did sustain, he ought to lose all standing in a Court of justice as to any claim under that policy.

"The Court will not undertake for him the offensive task of separating his true from his false assertions. Fraud in any part of his formal statement of loss taints the whole. Thus corrupted, it should be wholly rejected, and the suitor left to repent that he destroyed his actual claim by the poison of his false claim."

"It is immaterial whether this fraud affects the whole or only part of the claim": Welford & Otter-Barry on Fire Insurance, p. 260, citing *Britton* v. *The Royal Insurance Company*, [(1866)] 4 F. & F. 905, and *Cushman* v. *London & Liverpool Ins. Co.* and *Harris* v. *Waterloo Mutual Fire Ins. Co.*, *supra*.

My conclusion on the whole matter therefore is that the whole claim is vitiated by reason of the fraud and wilfully false statements in the statutory declaration as aforesaid and the claim must be dismissed.

Action dismissed.

Affmd
[1940] 2 WWR 97

DES BRISAY *ET AL.* v. CANADIAN GOVERNMENT MERCHANT MARINE LIMITED AND CANADIAN NATIONAL STEAMSHIP COMPANY LIMITED.

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June 2, 3, 6, 7, 8, 9, 10, 13, 14, 15; *Sept.* 12.

Negligence—Damages—Goods stored on dock for shipment destroyed by fire—"Accidentally begun"—Spread of fire—Extent of duty of warehousemen—14 Geo. III. (Imp.), Cap. 78, Sec. 86.

Distd
Kayi Agencies Ltd v. R.C. Baxter 33 DLR (3d) 367 (Sask CA)

The plaintiffs stored 1,588 cases of canned salmon on the dock of the Canadian National Steamship Company Limited in Vancouver pending shipment. While so stored the dock and contents were destroyed by fire. In an action for damages against the owners and operators of the dock:—

Held, as to the origin of the fire that the maxim "*res ipsa loquitur*" did not apply and as no evidence of negligence had been adduced and no facts proved warranting an inference of negligence, and the cause of the fire was incapable of being traced, it was one which had "accidentally" begun within the meaning of section 88, chapter 78, of the statutes of Geo. III., 1774 (Imp.), and the defendants were not liable in respect of the commencement of the fire, nor were they liable in respect of the spread of the fire, there being no proof of negligence in respect to the

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construction of the warehouse or its management or in the fact that it was not equipped with certain means of fire control which the plaintiffs contended should have been installed.

A warehouseman is not to be held liable as an insurer of goods warehoused with him. A fireproof structure is not required and the Court is not to be governed in fixing the standard of required care by standards which may be considered by fire underwriters as desirable either in the matter of the structure itself or in its equipment. The rule of law is that the warehouseman is bound to warehouse the goods in a place reasonably safe. With respect to the provision of fire control features, a higher standard should not be laid down for a warehouseman than has been required of an apartment-house proprietor.

ACTION for damages for loss of 1,588 cases of canned salmon stored for shipment on the dock of the Canadian National Steamship Company Limited in Vancouver, the dock having been destroyed by fire on the 10th of August, 1930. Tried by MANSON, J. at Vancouver on the 2nd to the 15th of June, 1938.

H. A. Bourne, and *Des Brisay,* for plaintiffs.
Alexander, and *A. R. MacLeod,* for defendants.

Cur. adv. vult.

12th September, 1938.

MANSON, J.: The defendant Canadian National Steamship Company Limited (hereinafter referred to as the "Steamship Company") is the owner of dock terminals in the city of Vancouver. In the Fall of 1929 the Steamship Company undertook an extension of its terminal dock facilities which involved very considerable new construction. A contract was let for the work. The work was nearing completion in the month of August, 1930, when on the afternoon of Sunday, August 10th, the whole structure was destroyed by fire.

The defendant, the Canadian Government Merchant Marine Ltd. (hereinafter referred to as the "Marine Company") was the agent of a number of individual freighters, each a limited company. The Steamship Company warehoused freight for ships of the Marine Company as occasion required. The Marine Company had an office at the Canadian National depot in the city of Vancouver. It is common knowledge that the Steamship Company, the Marine Company, the several incorporated

freighters and the Canadian National Railway are owned by the Canadian Government and very naturally these separate corporations work closely together.

The plaintiffs were in the canned-salmon business and had occasion to ship salmon to Montreal. The particular salmon with which we are concerned in this action was a shipment of 1,588 cases. The plaintiffs arranged by 'phone through the Marine Company for shipment on the S.S. "Canadian Miller," and were instructed that the goods were to be delivered at the dock of the Steamship Company; 1,200 cases were delivered *ex* the S.S. "Westham" from a cannery on the Fraser River on July 30th, 1930; 388 cases were trucked from the Ballantyne Pier in Vancouver Harbour to the dock of the Steamship Company on August 8th, 1930.

The fire which had such disastrous results destroyed the 1,588 cases of salmon. The plaintiffs were insured and recovered from the insurance company. Presumably the insurance company was subrogated to the rights of the plaintiffs and, presumably, in their name brings this action alleging negligence on the part of the defendants and claims damages for the loss of the salmon.

The legal right to compensation remains in the assured (*King* v. *Victoria Insurance Company*, [1896] A.C. 250), and therefore unless there has been an express assignment of the legal right, actions at law brought for the benefit of the insurer are brought in the name of the assured (*London Assurance Company* v. *Sainsbury* (1783), 3 Dougl. 245):

Macgillivray on Insurance, 2nd Ed., 904.

The function of the Steamship Company was simply to receive, store and deliver the goods to the carrier when it was ready to sail. It made a charge known as a "wharfage charge" upon goods passing over its wharf. It stored goods free of charge for 15 days but thereafter charged at the rate of two cents a case (in the case of salmon) for every 30 days. Charges were made directly to the shipper. The Steamship Company received the plaintiffs' 1,588 cases of salmon in three separate lots. The agent of the Steamship Company signed the manifest of the S.S. "Westham" for the 1,200 cases brought in by that boat, and thereby, on behalf of the Steamship Company, acknowledged delivery. The signed manifest (Exhibit 1) was delivered to

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the plaintiffs. Upon delivery to the Steamship Company's wharf of the two lots trucked from the Ballantyne Pier its agent signed in each case a wharf receipt for the goods "for delivery to the steamer 'Canadian Miller' or other steamship of the . . . line to order notify Windsor Fisheries Limited Montreal Can." (Exhibits 2 and 3). These receipts were referred to as "Export Traffic Forms" by some of the witnesses at the trial. Exhibits 2 and 3 were handed to the plaintiffs. The fact that the printed forms of the Vancouver Harbour Commissioners were used is quite immaterial, as all concerned fully understood that the receipts issued were in fact those of the Steamship Company. The words "Canadian National Steamship Co. Ltd." are to be substituted for the words "Vancouver Harbour Commissioners" where they occur in the two receipts. The receipts read in part as follows:

> It is expressly agreed that the Vancouver Harbour Commissioners received said goods as warehousemen only and are not to be liable for any loss or damage from whatsoever cause arising unless proved to have resulted from negligence of the Commissioners or their servants.

I am satisfied that, according to the established custom, the 1,200 cases were received on exactly the same basis as the 388. The "Export Traffic Form" with respect to the 1,200 cases was never actually issued. The practice apparently was not to issue that form until a few days before the sailing of the carrier. Presumably it was because the 388 cases came to the Steamship Company's dock within a few days of the sailing date of the carrier—some nine days after the 1,200 cases—that the "Export Traffic Forms" were issued with respect to the 388 cases. The last thing to be done by a shipper is to issue a delivery order to the dock directing the wharfinger to deliver the goods to the carrier. Delivery orders were never issued with respect to any portion of the 1,588 cases of salmon, and the plaintiffs were not under contractual obligation to order delivery to the S.S. "Canadian Miller." Furthermore, during the time that the goods were on the Steamship Company's wharf the plaintiffs had them labelled, wired and marked by an independent contractor. A bill of lading had not been issued by the carrier. It is very clear that the carriage had not yet started, nor had a contract of carriage been entered into. The liability of the

Steamship Company in respect of the goods of the plaintiff was that of a warehouseman and no other.

No evidence was led to show that the plaintiffs suffered loss through any act or omission of the Marine Company. The plaintiffs' claim as against that defendant entirely fails.

The pier in question was 1,000 feet long and 220 feet wide.

The sub-structure consisted of creosoted piles driven in a coarse sand and gravel fill. They were driven in January, February and March, 1930. The creosote penetration was three-quarters of an inch. The piles were capped and upon the stringers laid thereon was a deck. Upon the deck was located a warehouse—a two-storey structure at the south end, the upper storey of which was divided into a passenger concourse and offices. The outside walls of the warehouse were number 24 gauge corrugated steel. About the whole warehouse on the second storey there ran a farewell gallery—a promenade for friends of ships' passengers. The deck within the warehouse was of slow-burning construction—laminated construction (two by four scantlings laid side by side on edge and nailed together) covered by a two-and-one-half-inch or three-inch surface of asphaltic concrete. Without the warehouse the deck formed what was referred to as an apron—made of four-inch planks with a three-eighths-inch space between them laid on the stringers—the space doubtless due to the shrinkage in the drying-out process after the planks were laid. The apron was 12 feet wide. The pier was skirted by a heavy bull-rail. Within the warehouse and down its centre ran a depressed trackway 28 feet wide. It ended 100 feet from the north end of the warehouse. It was depressed four feet below the deck surface—fairly heavily cribbed along the sides with fire hatchways every 75 feet. The ties in the trackway were only about a foot above extreme high water and the crown of the fill below the pier came up practically to the trackway. The trackway was serviced by an electric haul-back to avoid the hazard of locomotives pulling cars within the shed. The trackway was roofed over along its northerly 600 feet and from it timber walls extended upward dividing the warehouse into east and west sheds. The pier was really two wharves placed back to back and separated by the depressed track. At 50-foot intervals down the floor of each

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shed there were man-holes with man-hole covers for operating revolving nozzles in case of fire below deck. An adequate stand-pipe system was provided for, but only 75 per cent. complete at the time of the fire. There were, however, available four stand-pipes (200 feet apart) in the depressed trackway, serviced by a six-inch water line carrying about 115 pounds pressure. There was a 50-foot length of two-and-one-half-inch hose at each outlet. A modern sprinkler system had been installed and tested but the valve-head connection with an eight-inch circulating water-main had not been completed. It was within three or four days of completion at the time of the fire. The east shed had a steel frame with steel columns and steel trusses. The west shed had a wooden framework. The warehouse roof was five-ply material. Curtain boards on the trusses were provided for but had not been installed. The east shed was 800 feet by 90 feet in area (divided into two sections) and the west shed 800 feet by 70 feet. A cross-shed 100 feet in depth by 200 feet in width at the north end of the depressed trackway joined the east and west sheds. The north end of the warehouse did not actually constitute a separate shed as no partition wall separated it from the two other sheds. The east shed was divided into two sections by a four-inch partition wall constructed of double thickness of two-inch by twelve-inch planks. Fire-doors permitted traffic to pass through from shed to shed. The partition wall was not metal-clad. There was no partition wall in the west shed. The area of the west shed was approximately (including the north-westerly half of the cross-shed) 63,000 square feet and of the southerly east shed approximately 40,500 square feet and of the northerly east shed (including the north-easterly half of the cross-shed) approximately 49,500 square feet. An oil-line ran underdeck with offshoots leading to outlets for servicing ships. The oil-line was filled with fuel-oil. No fire-walls had been installed. There was no cross bulkhead but the fill, its sides sloping downwards towards the fender piles so as not to interfere with berthing of ships, served as a longitudinal one at high water and to a lesser extent at low water. A cross bulkhead and fire-wall was under consideration. The sheds were open at the south end and a company constable was stationed there. He saw that

the public did not enter on the Sunday in question. The contractor had a watchman on the job. He was probably on the upper deck at the commencement of the fire. (He was not called as a witness.) Hand fire-extinguishers were in place at convenient points. There was a B.C. District Telegraph alarm system with fire-patrol boxes installed upon the pier. The watchman rang in his regular patrol calls from the various boxes and an emergency alarm could be sent in by breaking the glass of any alarm-box and pulling a hook. By arrangement, on the Sunday in question, the watchman did not ring in patrol calls. A "No Smoking" rule was in effect and strictly enforced. The pier was regularly inspected and kept clean. Several automobiles were parked in the north-west corner of the west shed. The fair inference is that each had gasoline in its tanks.

The afternoon of August 10th, 1930, was hot and dry. The humidity was average. The afternoon was ideal for a conflagration if a fire got out of hand. Speaking generally, while the pier of the Steamship Company was of a highly combustible character, in fairness, I think it should be said upon the evidence that once a fire gets under way on a pier and warehouse structure it is extremely difficult to get it under control. One concludes that the reason that more of such structures are not destroyed by fire is that surrounded, as they are, by water on three sides and a fire not being used for the heating of the warehouse sheds, they are not subject to the same fire commencement risk as ordinary commercial structures. The evidence indicates that many such structures of construction inferior to the one here involved, and with respect to which less care was taken in the matter of fire hazard, have stood for years and are still standing. Experience of wharf and warehouse fires has led in recent years to the installation of many fire-prevention features formerly unthought of and non-existent in many of the older structures. Despite the presence of these modern fire-prevention features fire still laughs at the contrivances of man and ruthlessly destroys where man has made his best or almost best effort to prevent destruction. To quote assistant-chief De Graves of the city fire department, "Fires are funny things," and as was said by the witness Dowling, chief engineer of the Insurance Underwriters,

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"Fires are unpredictable." We have an illustration in the destruction a few weeks ago in the city of Vancouver of the pier known as Pier D. In that pier, evidence with respect to which was given at the trial, most of the modern fire-prevention features were present and yet in an hour or two a fire of unknown origin completely destroyed the structure.

Upon the evidence it is reasonably clear that the fire commenced about ten or fifteen feet from the north-west corner of the pier. It probably commenced beneath the north apron—so one gathers from the evidence of the witness Aconley who, with his wife and two companions, was coming in a launch from North Vancouver to the south shore. Aconley first saw the fire when he was seven or eight minutes off shore. It was underneath the dock and then only two or three feet in diameter. When the launch arrived at the North Vancouver Ferry slip, just west of the Steamship Company pier, the fire covered approximately 20 square feet. One of Aconley's companions went ashore (he possibly turned in the alarm) then got aboard the launch and they went out into the harbour. As they pulled away from the end of the dock they heard the sirens of the fire department. This was approximately 15 minutes after Aconley first saw the fire. The fire was spreading rapidly. While Aconley could not see above the deck of the pier he saw the flames and smoke above deck—saw the flames reach the warehouse, heard a few explosions and saw the "whole thing afire." He says the west shed went first. The fire was seen by Captain Fatke, the skipper of one of the North Vancouver ferries, and by one of his crew when it was a very small flame not covering more than one or two feet. The captain first saw the flame as he pulled out from the ferry slip for North Vancouver. That was at 3.41. As he said, the blaze was then "trifling." He saw it rapidly creep eastward and developing what he referred to as "quite a blaze." There was an oil-pipe at the north-west corner but it was not then involved. He stopped the ferry and backed up, but he saw a launch coming in between the ferry and the Steamship Company dock and presumed those on the launch would report the fire and went on. The captain says further that within five or six minutes the fire was through the roof at

the south end. Both witnesses agree as to the rapidity of the spread of the fire. Aconley looked at it from below deck and the captain from above deck. It would seem that the fire started at approximately 3.30 in the afternoon, shortly before or after, depending on how long it had smouldered before breaking into flame.

The fire may have been of incendiary origin, it may have started from a cigarette dropped from the farewell gallery above, or it may have started from a spark from the smoke-stack of the ferry which had no spark arrestors. The evidence does not warrant an inference that the fire started from a spark from the ferry, nor any inference as to the cause of the fire. The maxim *res ipsa loquitur* does not apply. As to the application of the maxim to cases widely differing in their essential characteristics, *vide* Sir Lyman Duff, C.J., in *United Motors Service, Inc.* v. *Hutson et al.*, [1937] S.C.R. 294, at 296 *et seq.* In *McAuliffe* v. *Hubbell* (1930), 66 O.L.R. 349; [1931] 1 D.L.R. 835, Middleton, J.A., after discussing the early authorities on the liability of an owner for fire damage, at p. 357 observes:

> . . . in *Filliter* v. *Phippard* (1847), 11 Q.B. 347, Chief Justice Denman and his colleagues determined that an "accidental fire" does not include a fire which had its origin in negligence, but is confined to the case of a fire "produced by mere chance, or incapable of being traced to any cause" (p. 357)—a view which has been ever since universally accepted.

Denman, C.J. was speaking with reference to the statute of 14 Geo. III., 1774 (Imp.), Cap. 78, Sec. 86 [Fires Prevention (Metropolis) Act] which, as Duff, J. (as he then was) says in *Port Coquitlam* v. *Wilson,* [1923] S.C.R. 235, at 243; [1923] 2 D.L.R. 194; [1923] 1 W.W.R. 1025: " . . . no doubt is in force in British Columbia." The section reads:

> No action, suit, or process whatever, shall be had, maintained, or prosecuted, against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall, . . . accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby, any law, usage, or custom, to the contrary notwithstanding.

Beven on Negligence, 4th Ed., Vol. I., p. 624, discussing *Filliter* v. *Phippard, supra,* comments:

> The effect of this decision is to require the plaintiff affirmatively to show negligence before he can recover; unless, indeed, the facts are such as to raise the inference of negligence.

Duff, J., in the *Port Coquitlam* case, *supra,* at pp. 243-4, in

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discussing the *Filliter* v. *Phippard* case and the statute, observes:

On principle, since the statute creates an exception to the general rule, the *onus* ought to be upon the defendant alleging that the statute applies to show that the fire did accidentally begin; but the point is no doubt an arguable one with the weight of *dicta* probably in favour of an answer in the opposite sense,—the view accepted by Macdonald, C.J.A., in this case. It is not necessary I think to pass upon the point for the purposes of this appeal.

Mignault, J. (dissenting) in the same case, at p. 253, observes:

The object of the statute is to relieve a person from liability when the fire begins accidentally, and it is of the nature of an exception to the general rule of liability. It would seem to follow that the onus of showing that the fire did begin accidentally is on the person who claims the benefit of the statute in order to escape from the legal presumption of negligence. In other words, the statute affords a defence, and it is not for the plaintiff to show, in the first instance, that the fire did not begin accidentally; he can rest on the presumption until the defendant has rebutted it by showing that the fire began accidentally.

McAuliffe v. *Hubbell, supra,* was decided some seven years after the *Port Coquitlam* case. It was the unanimous decision of a strong Court. There Middleton, J.A. reviews and scrutinizes the authorities both before and after the statute with the utmost care. At p. 357 he cites with approval the passage from Beven above quoted, and in arriving at the conclusion that the *onus* is upon the plaintiff to prove that the fire was a negligence fire he observes, at p. 359:

I should mention that I have not overlooked the statements made by Mr. Justice Duff in the case of *City of Port Coquitlam* v. *Wilson.*

In the case at Bar no evidence was led to even remotely suggest that the fire had its origin through any act or omission of the defendants, their servants or agents. In my view it was satisfactorily shown that the fire was due to some extraneous circumstance over which the defendants, their servants or agents, had no control. There being no facts proved warranting an inference of negligence in the origin of the fire, and the fire being one incapable of being traced to any cause, the fire was an accidental one within the meaning of the statute. It follows that the concluding portion of section 86 applies and that the defendants are not liable to the plaintiffs in respect of the commencement of the fire.

Having concluded that the Steamship Company was not liable in respect of the commencement of the fire and further that its

liability was that of a warehouseman, it remains to be determined what its liability was, if any, in respect to the spread of the fire. The authorities lay down clearly the general principle which governs, but the application of that general principle is by no manner of means a simple matter in the circumstances of the case in hand.

It was said by Hodgins, J.A., in *McAuliffe* v. *Hubbell, supra,* at pp. 359-60:

> But if, after the fire starts accidentally and evidence is given which shows negligence or some breach of a duty arising out of the circumstances due to the progress of the fire which causes or produces loss and damage to an individual or his property, there is nothing in the statute that prevents recovery—*Bigras* v. *Tasse* (1917), 40 O.L.R. 415; *Port Coquitlam* v. *Wilson* [*supra*]; *Musgrove* v. *Pandelis*, [1919] 2 K.B. 43. The *onus* however in this matter is on the plaintiff.

And in Beven, 4th Ed., Vol. I., p. 626, the learned editor observes:

> A question may arise whether, in the event of a fire happening without negligence, the person responsible for the premises can be rendered liable, because he did not keep at hand at all times proper appliances to put out a fire in case one should accidentally arise. There would seem to be a difference of obligation having respect to the different character of buildings involved. Care must in all cases be proportioned to risk. Since the breaking out of fire in dwelling-houses and buildings used for domestic purposes is of uncommon occurrence, the provision in them of appliances to put out fire would not seem to be necessary. In the use of fire for manufacturing purposes there is a difference; the risk is greater, and constant care is in some cases required to prevent its escape. Accordingly, where fires are liable to originate in engine- and boiler-rooms, and the construction of the building is such that the surroundings are inflammable, an obligation would seem to arise not only to use care in tending the furnaces that are requisite for carrying on the work, but also to have fire-extinguishing appliances at hand; for this is a precaution which every ordinary prudent man would adopt for the preservation of his own property; and the neglect of it would appear to be negligence.

In Beal on Bailments, Can. Ed., at p. 276, it is stated:

> A warehouseman is only obliged to exert reasonable care and diligence in taking care of the things deposited in his warehouse.

and in support of the proposition the learned author of that proposition cites Story, sec. 444, to the same effect. Beven, Vol. II., at p. 1011, speaking of the liability of a warehouseman says:

> Neither is he liable for robbery, accident, or fire, unless in any case there is gross negligence or default.

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and he cites, in support, *Cailiff* v. *Danvers* (1792), Peake, N.P. 155; 170 E.R. 112; *Foster* v. *Essex Bank* (1821), 17 Mass. [479 at] 502; and *Giblin* v. *McMullen* (1869), L.R. 2 P.C. [317 at] 338; 38 L.J.P.C. 25. A warehouseman is not to be held liable as an insurer of goods warehoused with him. Needless to say, a fire-proof structure is not required and the Court is not to be governed in fixing the standard of required care (hereinafter referred to as the "required standard") by standards which may be considered by the fire underwriters as desirable either in the matter of the structure itself or in its equipment. Strictures passed by the insurance branch of the Canadian National System upon the structure and its equipment are not to be regarded in any sense as the test of the required standard.

> The true rule is that a warehouseman must take the same care in the preservation of the things bailed to him which a good and prudent business man would take of his own; . . . He is bound to warehouse the goods entrusted to him in a place reasonably safe, suitable, and usual:

Beven, Vol. II., p. 1008.

Particulars of the negligence alleged by the plaintiffs are set forth in paragraph 8 of the statement of claim. At the outset of the consideration of the plaintiffs' submissions in this respect, I would observe that the *onus* is upon the plaintiffs not only to prove negligence but to establish that the damage which they sustained arose out of negligence proved. In other words, it is idle to establish that the Steamship Company was guilty of this or that act of negligence, if it be not further established that the loss of the plaintiffs reasonably flowed from the negligence proved. While the foregoing is true, nevertheless, the *onus* is upon the defendant to negative the negligent quality of acts or omissions alleged as negligence and proved or, alternatively, to establish that the loss sustained by the plaintiffs did not arise out of those acts or omissions.

It is unnecessary to discuss all of the allegations set up in paragraph 8 of the statement of claim. Consideration will be confined to such of them as were supported by evidence and which, if proved, have to be measured against the required standard.

It was admitted in evidence that the operating of the dock

for freight and passenger purposes during the period of construction might add to the fire hazard. Much was made of the fact that there was dual control of the structure—that is, by the contractor and the owner. Actually very little construction work was going on on the days immediately prior to the fire—there was none on the day of the fire. There was in no true sense dual control of the goods of the plaintiffs—they were in the sole control of the Steamship Company. Officials who testified said the situation gave them anxiety. They realized the danger arising from divided authority and by reason of the fact that other than workmen might be about where work was in progress. But appropriate care was exercised by both the Steamship Company and the contractor. The "No Smoking" rule was strictly enforced and every reasonable measure was taken to keep the dock free of dirt and debris. The evidence does not establish that it was otherwise. There is nothing whatever in the evidence that leads one to the conclusion that the loss sustained by the plaintiffs arose out of the fact that the Steamship Company was operating a dock still in the hands of the contractor. Construction work was not a factor in the spread of the fire.

Terminal docks are classified by Vancouver fire experts and construction engineers as class A, class B and class C. In class A we find the Ballantyne and the Lapointe piers—all-concrete structures—as nearly absolutely fire-proof, perhaps, as can be built. They were built by the government. No private company probably would have built piers like the Ballantyne and Lapointe Piers in Vancouver Harbour at the time they were built. The capital cost would have been deemed out of line with the operating revenue. In this very harbour there are more class C docks than there are class A and class B combined, and there are several class C docks inferior from a fire standpoint to the Steamship Company's dock as it stood at the time of the fire. The Steamship Company's dock which was in course of reconstruction was inferior in both type and equipment to the one destroyed, and yet it had served for many years. Common knowledge tells us that many millions of dollars' worth of merchandise has been safely warehoused on docks in Vancouver

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Harbour inferior to that of the Steamship Company. That affords some guide as to the standard required. The structure in question was referred to as being of a combustible character. That description fits nearly all docks other than concrete ones. I have already directed attention to the fact that the fire hazard is materially lessened by reason of the fact that docks are surrounded on three sides by water.

It was not negligence on the part of the Steamship Company to build the pier on creosoted piles. That was both usual and reasonable. Corrugated steel outside walls for the warehouse shed were fire resistant and met the required standard. The same may be said of the roof. The deck within the warehouse was distinctly more fire resistant than the average and was within the required standard. The depressed trackway presented no fire hazard and the electric haul-back was a safeguarding feature. No fault is to be found with the fire hatchways along the depressed track nor with the man-holes down each side for revolving water-nozzles. The oil-lines were a necessary feature and the evidence did not establish any negligence in their installation. The apron had three-eighths-inch cracks between the planks, but cracks between planks on dock decks are so entirely usual that I do not think it can be said that the required standard was not met in the apron construction. The B.C. District Telegraph installation provided an additional safety feature.

And now I deal with another aspect of the matter: The complaint of the plaintiffs as to alleged omissions by the Steamship Company in the provision of fire-control features. Counsel were not able to assist me with authorities as to the required standard in the matter of such features in a dock warehouse. In *McAuliffe* v. *Hubbell, supra*—an action that arose out of an apartment-house fire—the jury was asked: "After the fire was discovered was there any negligence on the part of the defendants in controlling the fire?" This answer was made: "The defendants were unable to properly control the fire owing to the fact that they did not have adequate equipment to control the fire, such as stand-pipe and hose, fire-pails, ladders and fire-extinguishers." The learned trial judge dismissed the action. In

apartment-houses people live and sleep—sometimes a very large number of people. Middleton, J.A., at p. 353, observes:

> Furthermore, the finding does not justify the maintenance of the action, for there is no duty on the part of the defendants to supply fire-escapes or fire-fighting equipment, either at common law or by virtue of any statute. This aspect of the case need not be further considered.

Beven, Vol. I., at p. 626, states:

> At common law the proprietor of a factory, hotel, or other large building is not liable for the death or injury of any one who may be therein, through fire arising from neglect to provide efficient means of exit or life-saving apparatus.

Life is more valuable than merchandise, and it would seem reasonable that a higher standard ought not to be laid down in the matter of fire-control features for merchandise in a warehouse than for lives in an apartment-house. None of the omissions on the part of the Steamship Company referred to hereunder amounted to a breach of statute.

The installation of many fire-control features on the pier in question had not been completed when the fire occurred, and one conspicuous one, namely, a cross fire-wall and bulkhead, was still only in contemplation. At this point I would observe that it does not follow that because the Steamship Company had certain fire control installations under way that they were necessary for the attainment of the required standard. It is hardly necessary to say that the required standard was not for the company to set. Despite the fact that the required standard has been moving forward, I am not prepared to find that a sprinkler system is an essential of it. Nor am I prepared to say that stand-pipes are necessary. Useful as fire-walls, fire-curtains and bulkheads are in localizing a fire, I think it can scarcely be said that they are usual and I do not think it is the law that they are essential to meet the required standard. As Beven observes, "Care must in all cases be proportioned to risk." But so far as I am aware, the standard applied by the Courts does not make it necessary that the features I have mentioned be provided. The Legislature might easily intervene to fix a standard more definite than the indefinite one which now exists, but it has not done so.

The plaintiff alleges that the Steamship Company watchman service was not adequate. I cannot agree. The company had a

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watchman for each eight-hour shift, as did also the contractor. The structure was a big structure. Had there been more watchmen the fire might have been detected earlier, but that is mere speculation. The fact to be borne in mind in this connection is that dock fires are of rare occurrence. The law does not demand that one guard against extraordinary external hazard. The real hazard was that some member of the public might inadvertently commence a fire while on the dock. While the sheds at the south end were open on August 10th the watchman, a special constable, was there to see that the public did not enter, and the public did not enter; certainly not on the lower deck, and as far as the evidence discloses, not on the upper deck.

Some days prior to the fire oakum was rolled on the north apron for use on one of the company's ships berthed alongside. The evidence is that the dock was swept clean of oakum dust and threads after the workmen had finished—in fact, swept twice, first, by one of the workmen engaged in the rolling of the oakum and, secondly, by the Steamship Company's sweeper. I can draw no inference that oakum dust or threads contributed to the fire.

A number of cars were parked in the north-west corner of the west shed at the time of the fire. It was a reasonable inference that each had gasoline in its tank, and it is also a reasonable inference that when the fire got to them the gasoline exploded and contributed to the conflagration. Cars are parked and stored on piers every day. It is a usual thing. If fire were being used about the dock it would be an unwise thing and probably a negligent thing. I am not prepared to hold that it was negligent in the particular circumstances.

There is no doubt that this fire spread with great rapidity. I think it is almost equally certain that it had its origin where a dock attendant would be least likely to detect it in its early stage unless by mere chance. Two alarms were turned in by company employees, and probably a third was turned in by one of the passengers on the launch above mentioned. The alarms all seem to have gotten in at about 3.52—as nearly as one can determine from the evidence—20 minutes approximately after the fire had started. By the time the dock attendants became

aware of the fire it was beyond their control and, although the fire department seems to have come very promptly, upon their arrival the fire could not be successfully fought. It was said by the assistant fire chief in evidence (and I think it is beyond argument) that pier fires are particularly difficult to fight, and especially so if they start at the water end of the pier. On this particular day there seems to have been a west or a north-west wind blowing which undoubtedly helped to drive the fire towards the south end. A pier fire creates its own draught, and in a pier structure where one must expect creosoted piles a heavy black smoke ensues which adds to the difficulty of fire-fighting.

In my view the destruction of the pier and the contents of the warehouse is accounted for by the fact that the fire had made too much headway before it was detected. That is an old story with fires. There was no waterfront protection in the way of a fire-boat so that the fire could have been fought from the water end where it started. Had there been a fire-boat near the scene, certainly there would have been a much better chance of controlling the fire and putting it out even after the north end of the warehouse had become involved.

Admittedly, the standard of prudence on a water-front structure in Vancouver Harbour is not easy to lay down, but giving the whole of the evidence in this case the very best consideration that I can, I cannot conclude that the loss sustained by the plaintiffs arose out of the negligent acts or omissions of the Steamship Company, its servants or agents, and the action against that defendant must therefore be dismissed.

Action dismissed.

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IN RE R. P. CLARK & COMPANY (VANCOUVER) LIMITED. JUKES'S CASE.

Company — Amalgamation of two companies — Shares — Payment for— Goodwill of director of one of the companies—Consideration—Bankruptcy of new company.

Two stock-brokerage firms agreed to amalgamate their respective businesses. McDonald, Jukes and Graves were directors and sole owners of the common stock of McDonald, Jukes & Graves Ltd., and they agreed to become directors of the other company, namely, R. P. Clark & Company (Vancouver) Limited, and that each of them should receive $30,000 from the Clark company for their goodwill, the $30,000 of each to be used in the purchase of shares in the Clark company, and each of them individually covenanted that for four years he would not engage in the stock and bond brokerage business in Vancouver except with the Clark company. A cheque for $30,000 was given Jukes by the Clark company. He endorsed it to the Clark company and was allotted 300 shares therein as fully paid up. The company became bankrupt and the trustee in bankruptcy, alleging that the transaction was a sham, applied to have Jukes made a contributory.

Held, that the goodwill and the covenant were of substantial value, the transaction was a valid one and Jukes should not be made a contributory.

MOTION by the trustee in bankruptcy of R. P. Clark & Company (Vancouver) Limited to have A. E. Jukes made a contributory in respect of payment for 300 shares of common stock held by him in said company. Heard by MANSON, J. at Vancouver on the 24th of June, 1938.

McPhillips, K.C., and *A. deB. McPhillips*, for trustee in bankruptcy.

Griffin, K.C., for Jukes.

Cur. adv. vult.

1st October, 1938.

MANSON, J.: Motion by the trustee for judgment against Jukes as a contributory, as directed by order of the Honourable the Chief Justice of December 17th, 1937, the issue to be determined upon affidavit evidence and cross-examination upon affidavits filed.

The minute book of the bankrupt is made an exhibit (Exhibit F) to the trustee's affidavit of December 10th, 1937, and since the minutes are of importance it is well that I should at the outset express again the opinion I expressed at the hearing, namely, that minutes of the directors of the bankrupt were recorded in a thoroughly unbusinesslike fashion. Question was raised as to whether the directors met at all on many of the occasions when the minutes (so called) indicated meetings were held. Some of the minutes are not signed and, while others are signed "R. P. Clark," I am clear upon the evidence that several at least of the purported meetings were not held. I do not overlook section 121 (2) of the Companies Act, R.S.B.C. 1924, Cap. 38, the then relevant statute (now R.S.B.C. 1936, Cap. 42, Sec. 170 (2)) but so great a cloud is thrown by the evidence upon the minutes during the relevant period that acceptance of any of them as authentic is rendered hazardous.

R. P. Clark & Company (Vancouver) Limited was incorporated as a private company under the Companies Act, 1921, B.C. Stats. 1921, Cap. 10, on June 15th, 1922, under another name. It was principally a stock-brokerage company with preferred and common shares. On December 3rd, 1927, it had an issued capital of 435 preferred shares and 935 common shares of which the late R. P. Clark personally owned 290 preferred shares and 186 common. Mr. Clark's family seems to have owned 551 common. J. C. Ross and C. W. Erlebach owned a substantial portion of the remaining issued shares. Clark, Ross and Erlebach and one Sweeney were the directors of the company on November 23rd, 1937, and the first-named three continued as directors during the relevant period. Sweeney seems to have retired as a director or to have ceased to act as such about the end of November, 1927. The Clark company had two subsidiaries, R. P. Clark & Company (Victoria) Limited and R. P. Clark & Company (Westminster) Limited.

Jukes, with two associates, H. F. McDonald and N. C. P. Graves, carried on a stock brokerage business under the corporate name of McDonald, Jukes & Graves Ltd. in the period antecedent to December, 1927. These three men owned all the issued common stock of the company. One Haswell owned 20

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preference shares but these were transferred to Jukes shortly after the amalgamation hereinafter referred to and would later seem to have been cancelled (Exhibit 3, Jukes's affidavit, February 15th, 1938). McDonald, Jukes and Graves were the directors of the company.

On November 23rd, 1927, after conversation held, a letter to the Clark company was written (Exhibit 2, Jukes's affidavit, February 15th, 1938) as follows:

With reference our conversation regarding the amalgamation of our respective businesses, our understanding of the conditions is as follows:—

1. That 8% Preferred Stock be issued against actual assets of both firms in the new organization upon a valuation mutually agreed upon. This stock will participate with the common stock up to 10% per annum after the common has received 8%.

2. That out of a total issued capital of $500,000.00 common stock we receive paid-up stock of par value of $75,000.00.

3. That H. F. McDonald, A. E. Jukes and N. C. P. Graves be appointed directors of the company.

4. That the above three gentlemen together with the three present directors of your company shall hold office for at least four years. Any additional directors must be unanimously approved.

5. That the following monthly salaries and allowances be paid:

H. F. McDonald.....Salary $300 Allowance $200
A. E. Jukes.....Salary $300 Allowance $200
N. C. P. Graves.....Salary $275 Allowance $100

6. That in the event of common stock being offered for sale we have the first option of purchasing all or part of the amount so offered at par or better.

7. That the business shall be conducted under your name provided that for a period of not more than six months our present name shall be associated with it in such advertising stationery, etc. as may be desired.

Should the above meet your views we suggest that the business be operated as one as from December 1st next, and that announcement be made to our respective clientele forthwith.

Yours faithfully,
[Sgd.] McDonald Jukes & Graves Ltd.
H. F. McDonald
A. E. Jukes
N. C. P. Graves.

The above-quoted letter was laid before a meeting of the directors of the Clark company on the day of the date thereof. The minutes, page 60 of the minute book, do not disclose who attended the meeting but, assuming the minutes to be accurate, it is recorded that it was

unanimously resolved that this agreement be entered into and that the

secretary-treasurer be instructed to take steps immediately to increase the capital of the company to $250,000 eight-ten per cent. preferred and to $500,000 common stock, also to take any other steps required in the carrying out of this agreement.

The acceptance of the Jukes company proposal was signified by the endorsement of the word "Agreed" on a copy of the Jukes company letter, followed by the signatures " R. P. Clark & Co. (Vancouver) Ltd., R. P. Clark, C. W. Erlebach, J. C. Ross" (Exhibit 2, Jukes's affidavit, February 15th, 1938). On November 23rd, 1927, the following resolution was passed by the directors of the Clark company:

That a sum not exceeding $500,000 be employed in the purchase of goodwill from present members of the company and from Messrs. McDonald, Jukes and Graves, provided the sums paid for such goodwill be invested in the stock of the company.

The minutes of this meeting are unsigned and there is no record of the directors present, but the minutes purport to have been confirmed at a meeting of directors on December 1st, 1927. The latter minutes are signed "R. P. Clark" but do not record the directors present. At the December 1st meeting (if held) McDonald was appointed a director,

it being understood his qualifying shares would be issued as soon as the necessary formalities with regard to the increase of the capital of the company were completed.

At the same meeting Jukes and Graves were appointed directors,

this to take effect as soon as the necessary authority to increase the authorized number of directors is received from the Registrar of Companies.

A further resolution reads:

That all these three gentlemen in the meantime be vested with the authority and power of directors of this company.

The Clark company proceeded to increase its authorized capital and to increase the number of the directors from five to nine. At a meeting of directors held on February 7th, 1928, Jukes and Graves were elected directors and "the balance sheets of the company and of McDonald, Jukes & Graves Ltd. were submitted and approved as a basis for the issue of preferred stock." Further, "Forms of agreements *re* voting for directors and purchase of goodwill were submitted and approved." The minutes of February 7th were signed "R. P. Clark." At page 80 of the minute book there is an unsigned record of a meeting of directors purporting to have been held on February 15th, 1928.

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It is recorded that Clark, McDonald, Ross, Jukes, Erlebach and Graves were present and that the minutes of February 7th, 8th and 13th were read and confirmed. The next minute is of importance. It reads:

Agreements giving effect to the purchase of the goodwill of various members of the company as set forth below were presented and approved and the president and secretary were authorized to affix the seal of the company thereto.

Brig. Gen. R. P. Clark	$262,900
J. C. Ross	71,600
C. W. Erlebach	31,900
Brig. Gen. H. F. McDonald	30,000
A. E. Jukes	30,000
N. C. P. Graves	30,000
	$456,400

An agreement under seal was entered into at about this time as among Clark, McDonald, Ross, Jukes, Graves and Erlebach:

That from and after the date hereof for the period of four (4) years next ensuing each party hereto respectively will vote at all times during the said period for the election of each other party hereto and the retention of each other party hereto on the board of directors of R. P. Clark & Company (Vancouver) Limited, and will at all times during the said period use his respective every influence in securing the votes of other shareholders in the said company to be cast in like manner: Provided . . .:

Exhibit 4 to Jukes's affidavit, February 15th, 1938.

On February 15th, 1928, the six above-mentioned individuals entered into individual agreements with the Clark company under seal to the following effect:

NOW THEREFORE THIS INDENTURE WITNESSETH that in consideration of the premises and of the sum of Thirty thousand Dollars ($30,000) now paid by the party of the second part to the party of the first part (receipt whereof is hereby acknowledged) the party of the first part hereby transfers, assigns and sets over unto the party of the second part for the period of four (4) years from the date hereof his goodwill in the stock and bond-brokerage businesses in the city of Vancouver aforesaid, and all benefit and advantage to be derived therefrom.

The party of the first part covenants and agrees that during the aforesaid period of time he will not engage directly or indirectly in the aforesaid city of Vancouver in the said businesses of stock and bond brokerage save and except with the party of the second part.

The agreements referred to are made exhibits to the affidavit of Shimmin of December 10th, 1937. On February 23rd, 1928 (minute book, page 80), allotments of stock for cash were approved. McDonald, Jukes and Graves were each allotted 350

shares of common stock, and McDonald, Jukes and Graves were allotted jointly 100 shares of preferred stock. They each received certificates for the appropriate number of fully-paid common shares (the matter of the preference shares is not in issue). Upon the evidence it appears that in pursuance of the individual agreements of February 15th the Clark company handed cheques of $30,000 each to McDonald, Jukes and Graves. These three each immediately paid for 300 common shares of the Clark company either by endorsing over the cheques which they had received or by personal cheques.

The trustee says that the transaction was a sham and that McDonald, Jukes and Graves did not pay for the 300 shares each of common stock which they received. (The additional 50 shares each taken up by them are not in issue.) Before dealing with the trustee's submission it would probably be well to follow the history of the Clark company further. [The history of the company was here reviewed.]

The foregoing recital of facts warrants certain definite conclusions. The McDonald company was the *alter ego* of McDonald, Jukes and Graves. They were the company. They were engaged in the stock-brokerage business. It is common knowledge to anyone familiar with the stock-brokerage business that the relationship between broker and client is very much of a personal one, just as it is between a lawyer and client or a doctor and patient. There is not the slightest difficulty in understanding that McDonald, Jukes and Graves each had a substantial personal clientele—a goodwill of their clientele, personal to them—which was valuable. It is conceivable that Jukes might have bought shares in the Clark company and refrained from taking any part in the conduct of its business or that he might even have continued as an independent broker while having a financial interest in the Clark company. The Clark company, in agreeing to the arrangement with the McDonald company, very naturally wanted something more than the mere tangible assets of the McDonald company. They wanted the active participation in the conduct of their business of the three men who had built up the business of the McDonald company and their goodwill and they stipulated that they wanted it

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definitely for a period of years. That, undoubtedly, was the significance of paragraph 4 of the Jukes letter of November 23rd, 1927, and of the minute of directors quoted from the directors' minutes of the Clark company of November 23rd, 1927. The Clark company was willing to pay for the personal goodwill of the individual members of the McDonald company, in the first instance, $75,000 of common stock in the Clark company. It is idle to suggest that there was any particular goodwill attaching to the McDonald company *qua* company. Had the Clark company bought the tangible assets of the McDonald company and had McDonald, Jukes and Graves continued, say, as a partnership in the stock brokerage business, the clientele of the McDonald company would have remained beyond all doubt with the individual members. I have no manner of doubt that the Clark company considered the goodwill of the individuals in the McDonald company as the really important asset. What the parties had in contemplation, in my view, from the very outset was not the bare agreement between the Clark company and the McDonald company, but an agreement as among the Clark company, the McDonald company and McDonald, Jukes and Graves. Everything that followed upon the Jukes letter of November 23rd and its acceptance bears out that view.

It is a fair inference that further negotiations had taken place between November 23rd, 1927, and February 15th, 1928, as a result of which the agreement of November 23rd, 1927, was varied. It will be observed that the letter from the Clark company to the McDonald company of November 24th, 1927 (Exhibit 2, Jukes's affidavit, February 15th, 1938) embodying copy of the McDonald company letter of November 23rd, 1927, discloses that that letter was signed by the McDonald company and by McDonald, Jukes and Graves, and agreed to by the Clark company and by Clark, Erlebach and Ross. I think the document was deliberately intended to constitute not only an agreement as between the two companies but as among the individuals who signed it. That view is borne out by subsequent events. It was very obviously subsequently agreed as among the interested parties that the McDonald company was to receive preferred shares and that McDonald, Jukes and Graves were

individually to subscribe for 300 shares each of the common stock of the Clark company at par and that the Clark company was to buy from McDonald, Jukes and Graves individually their respective goodwills in the stock-brokerage business. The price of $30,000 to Jukes for his goodwill and his covenant as contained in the document of February 15th, 1928, may have been too high or it may have been too low. I am entirely satisfied the goodwill and the covenant were of substantial value and the figure of $30,000 raises no presumption of fraud.

In February, 1928, the parties, acting upon the advice of a solicitor, proceeded to the implementing of the agreement finally arrived at as among them. The agreement as between Jukes and the Clark company of February 15th was an implementing in part of the agreement and, in my view, was both proper and legal. Following upon it Jukes applied for 300 common shares of the capital stock of the Clark company, as he had agreed to do. The shares were allotted to him and he paid for them, it is said, by endorsing back to the company the cheque for $30,000 given to him upon execution of the contract of February 15th. That was a valid transaction. The method of payment was a convenient method and raises no inference whatsoever that the transaction throughout was a sham as contended by the trustee. There was no endeavour on the part of Jukes, or on the part of anyone else for that matter, to resort to subterfuge or camouflage. The whole transaction was open and above board.

Section 25 of 30 & 31 Vict., c. 131 (An Act to amend The Companies Act, 1862) ran thus:

> Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares.

In *Spargo's Case* (1873), 8 Chy. App. 407, Sir W. M. James, L.J., at pp. 411-13, in discussing the question of the payment of cash for shares, which had been considered in *Fothergill's Case* (1873), *ib.* 270, observes:

> . . . , but it was said by the Lord Chancellor, and we entirely concurred with him, that it could not be right to put any construction upon that section [section 25, *supra*] which would lead to such an absurd and unjustifiable result as this, that an exchange of cheques would not be payment in

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cash, or that an order upon a bank to transfer money from the account of a man to the account of a company would not be a payment in cash. In truth, it appeared to me that anything which amounted to what would be in law sufficient evidence to support a plea of payment, would be payment in cash within the meaning of this provision. . . . But if a transaction resulted in this, that there was on the one side a *bona fide* debt payable in money at once for the purchase of property, and on the other side a *bona fide* liability to pay money at once on shares, so that if bank notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property, it did appear to me in *Fothergill's Case*, and does appear to me now, that this Act of Parliament did not make it necessary that the formality should be gone through of the money being handed over and taken back again; but that if the two demands are set off against each other the shares have been paid for in cash. . . . Supposing the transaction to be an honest transaction, it would in a court of law be sufficient evidence in support of a plea of payment in cash, and it appears to me that it is sufficient for this Court sitting in a winding-up matter. Of course, one can easily conceive that the thing might have been a mere sham, or evasion, or trick, to get rid of the effect of the Act of Parliament, but any suggestion of sham, or fraud, or deceit seems to be entirely out of the question in this case, because everybody in the company knew of the transaction; every shareholder of the company was present, and was a party to the resolution; there was no deceit practised on any creditor, nor was there any registration of these shares, except as shares paid up. This seems to me to dispose of the case.

Spargo's Case, supra, has been repeatedly cited with approval and stands as a sound authority. In the view I take of the facts it seems to me to conclude the issue as to payment for the Jukes shares.

Having arrived at the conclusion that the 300 shares of common stock were paid for in full by Jukes, there is no occasion to pursue the matter further. Jukes ought not to be put upon the list of contributories in respect of the 300 shares in question of the Clark company. The trustee's motion is dismissed with costs.

Motion dismissed.

SCOTT v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED.

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Limitation of actions—Collision between automobile and street-car—Claim of damages for injuries—Action brought after expiration of six months —Consolidated Railway Company's Act, 1896, B.C. Stats. 1896, Cap. 55, Sec. 60.

Actions against the British Columbia Electric Railway Company Limited for damages for personal injuries must be brought within six months next after the time when the supposed damage was sustained, as prescribed by section 60 of the Consolidated Railway Company's Act, 1896.

ACTION for damages arising out of a collision between an automobile driven by the plaintiff and a street-car of the defendant company. Tried by MANSON, J. at Vancouver on the 17th of September, 1938.

D. Murphy, for plaintiff.
W. B. Farris, K.C., and *Riddell,* for defendant.

Cur. adv. vult.

24th September, 1938.

MANSON, J.: This action arises out of a collision between an automobile driven by the plaintiff and a street-car, the property of the defendant. The accident occurred on March 12th, 1937, at the corner of Smythe and Granville Streets, in the city of Vancouver. The writ in the action was not issued until March 8th, 1938.

The defendant relies (*inter alia*) upon section 60 of chapter 55 of the Consolidated Railway Company's Act, 1896, B.C. Stats. 1896, and in view of the conclusion at which I have arrived it is unnecessary to deal with the defence to the allegation of negligence.

The Act, the benefit of which is now vested in the defendant, in its relevant sections reads as follows:

5. The provisions of Part I. of the "British Columbia Railway Act," 53 Victoria, chapter 39, being sections four to forty-four, inclusive (with the exception of sections 32, 33, 34, 35, 36, 37, 38, and 40, which shall not

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apply hereto, nor be incorporated herewith), shall, so far as such provisions are applicable and are not inconsistent with nor contrary to the provisions of this Act, or any of the Acts hereinafter mentioned and incorporated herewith and not herein specifically dealt with, apply to the undertaking and be deemed to be incorporated with this Act.

60. All actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the Company, shall be commenced within six months next after the time when such supposed damage is sustained, or if there is continuance of damage, within six months next after the doing or committing of such damage ceases, and not afterwards, . . .

Section 42 of the British Columbia Railway Act, 53 Vict., Cap. 39, reads in part as follows:

42. All actions for indemnity for damage or injury sustained by reason of the railway, shall be instituted within one year next after the time of the supposed damage sustained, or if there be continuation of damage, then within one year next after the doing or committing such damage ceases, and not afterwards; . . .

The Consolidated Railway Company was a railway, tramway, street-railway and power company—*vide* preamble of its special Act, Cap. 55, *supra*, and also section 33 of the same Act.

A new British Columbia Railway Act, chapter 44 of the statutes of 1911, was enacted and section 42, *supra*, substantially appeared in that Act as section 267 (1). The section was made non-applicable in actions upon any breach of contract, express or implied, but that limitation requires no consideration here. Section 267 (1) was carried forward into R.S.B.C. 1911, Cap. 194, as section 269 (1), and into R.S.B.C. 1924, Cap. 218, as section 269 (1), and into R.S.B.C. 1936, Cap. 241, as section 269 (1).

When the new British Columbia Railway Act was passed in 1911 some eight then existing Acts were repealed by section 293 (1). One of the Acts repealed was 53 Vict., Cap. 39. The repeal section was followed by a saving section 293 (2). The saving section in a redrawn form appeared in R.S.B.C. 1911, Cap. 194 (the British Columbia Railway Act) as section 295. The relevant portion of the section reads as follows:

295. Where in any special Act there is a provision which prevents the application of any section in any Act repealed by chapter 44 of 1911 to the undertaking of the company named in the special Act, the similar provision in this Act to the said repealed section shall not apply to the said undertaking; . . .

The section, unaltered in language, has continued in effect and appears in the current Railway Act, R.S.B.C. 1936, Cap. 241, as section 296.

There was, as will be observed, in section 5 of the Consolidated Railway Company's Act, 1896, a provision which specifically prevented the application of section 42 of 53 Vict., Cap. 39, to "suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the Company . . . ;" in that the latter section was inconsistent with section 60 of the Consolidated Railway Company's Act, 1896.

The saving section, 295, above quoted, operated to prevent the section in the new British Columbia Railway Act of 1911, similar to section 42 of the Railway Act of 1890, namely, section 267 (1) (in all the revised statutes since section 269 (1)) from applying to the undertaking of the Consolidated Railway Company. This view was accepted—it would seem without discussion—in *Viney* v. *B.C. Electric Ry. Co.*, 32 B.C. 468; [1923] 3 W.W.R. 329, and in *British Columbia Electric Railway Co.* v. *Pribble*, [1926] A.C. 466; 95 L.J.P.C. 51; [1926] 1 W.W.R. 786, both of which cases were decided upon the statute law as it stood in 1911.

In 1924 the Tramway Inspection Act, theretofore R.S.B.C. 1911, Cap. 229, was consolidated with the Railway Act, and for the first time there appeared in the Railway Act as section 282 thereof, the following section:

282. In this Part, unless the context otherwise requires, "tramway" includes street-railway.

The part referred to is Part XLIII. of the Railway Act and appears under the caption "Tramway Companies."

Section 283 of R.S.B.C. 1924, Cap. 218, reads as follows:

283. Every company incorporated or in anywise empowered under the provisions of any Act to construct, acquire, and operate a tramway, and to carry traffic and to charge tolls, shall be subject to and shall comply with all the provisions of this Act, except those provisions relating to the incorporation of the company, the constitution of the board of directors of the company, and the amount of the initial share capital of such company; and all the provisions of this Act relating to the inspection of railways and with respect to the returns to be made by railway companies shall apply to tramways and the inspection thereof.

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This section was carried into the 1936 Revised Statutes as section 283 of Cap. 241. Section 283 is a consolidation of section 5 of the Tramway Inspection Act and section 284 of the British Columbia Railway Act, R.S.B.C. 1911, Cap. 194. Those two sections severally read as follows:

5. All the provisions of the "Railway Act" relating to the inspection of railways and with respect to the returns to be made by railway companies shall apply to tramways and the Inspectors and inspection thereof under this Act substituting, however, in the "Railway Act," when applied to this Act, the word "tramway" for "railway," and "Attorney-General" for "Minister of Lands."

284. Every company heretofore incorporated or hereafter incorporated, or becoming in anywise empowered under the provisions of any Act to construct, acquire, and operate a tramway, and to carry traffic and to charge tolls, shall be subject to and shall comply with all the provisions of this Act, except those provisions relating to the incorporation of the company, the constitution of the board of directors of the company, and the amount of the initial share capital of such company.

The language of section 284 will be noted:

Every company . . . empowered under the provisions of any Act . . . . . , shall be subject to and shall comply with all the provisions of this Act . . .

That section was in effect when the causes of action in the *Viney* and *Pribble* cases, *supra,* arose and, as pointed out above, in those decisions section 60 of the Consolidated Railway Company's Act, 1896, was applied to the exclusion of the similar provision in the Railway Act.

Counsel for the plaintiff contends that by reason of the definition of tramway to include street-railway inserted in the Railway Act in 1924 and since the decision of the *Pribble* case, the decision in the latter case no longer applies.

Counsel refers to a further section of the Railway Act, R.S.B.C. 1924, Cap. 218 (the Revised Statutes of 1936 came into effect on June 30th, 1937, a date subsequent to that upon which this cause of action, if any, arose). The particular section referred to is section 3 (1), but with it must be read portions of section 2 of the same statute. The relevant portions of the sections are quoted hereunder:

2. In this Act, unless the context other requires:—

. . . . .

"Company" means a railway company incorporated under this Act, and

includes every person and every company by Act of the Legislature authorized to construct, or to own, or to operate a railway within the Province:

. . . . .

"Railway" means any railway which the company is authorized to construct and operate, and includes all branches, sidings, stations, depots, wharves, rolling-stock, equipment, works, property, real or personal, and works connected therewith, and also every railway bridge, tunnel, or other structure connected with the railway and undertaking of the company:

. . . . .

"Special Act" means any Act of the Legislature authorizing the construction and operation of a railway.

. . . . .

3. (1) The provisions of this Act shall apply to every company incorporated before the first day of March, 1911, under special Act, and whether or not such company had or had not at that date constructed its railway, except in so far as the provisions of this Act or any of them are by express provisions in the special Act prevented from applying to the company, and express mention in this behalf in any special Act of any section in any Act repealed by chapter 44 of the Statutes of 1911 shall, for the purposes of this section, be deemed to be an express mention of any corresponding section in this Act.

Section 3 above quoted is in substance the same as section 3 of R.S.B.C. 1911, Cap. 194, and is consistent with the saving section 295.

Plaintiff's counsel in effect contends that, until section 282 was introduced into Cap. 218, R.S.B.C. 1924, section 269 (1) of the Railway Act did not apply to actions for damages for personal injuries against the defendant. The premise to that contention is that the defendant was a street-railway and not a railway. The definition of the word "railway" in the Railway Act extends rather than limits the ordinary meaning of the word. It includes railways generally of companies incorporated under the British Columbia Railway Act or incorporated prior to March 11th, 1911, under special Act. Tramways were within the purview of the British Columbia Railway Act—so too street-railways, which have never been other than a particular type of tramway. The introduction of section 282 into R.S.B.C. 1924, Cap. 218, did not broaden the application of section 283 of Cap. 218 as against that of section 284 of Cap. 194. In my view it was not the fact that tramways and street-railways were not specifically mentioned in section 269 (1) of Cap. 194, R.S.B.C. 1911, that prevented the application of that section to actions

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of the character of the one at Bar against the defendant. It was rather the operation of section 5 of the special Act and of sections 3 and 295 of Cap. 194. Even were the argument of counsel for the plaintiff sound that street-railways came within the ambit of Part XLIII. of the Railway Act in 1924 for the first time, nevertheless the three sections last mentioned, which are specific sections, would operate to prevent section 283, a general section broad and definite in language, from bringing section 269 (1) into operation to the exclusion of section 60 of the special Act. Nothing less than express language in a general Act will serve to nullify an express provision in a special Act. To put the interpretation upon section 283 suggested by counsel would mean an inconsistency with the three sections, 5 of the special Act and 3 and 295 of Cap. 194. Courts avoid, where possible, interpretations leading to inconsistencies.

This action, not having been brought within the period prescribed by section 60, must fail and accordingly be dismissed.

Action dismissed.

C. A.
1938
Sept. 29, 30; Oct. 5.

REX v. MACCHIONE. (No. 2).

Criminal law—Charge of murder—Circumstantial evidence—Judge's charge —Whether misdirection—Appeal—R.S.C. 1927, Cap. 59, Sec. 4, Subsec. 5.

On a trial for murder the judge in his charge said "There are two principles that have to be acted upon and kept in mind by the jury, and the fulfilment of which the jury must require. The first is that every man is presumed to be innocent until he is proven guilty. It is not for the accused to prove his innocence; it is for the Crown to prove his guilt. The Crown has complied with that first principle when it has brought about the accused such a body of evidence as calls for an explanation."

Held, that viewed as it must be in connection with the instructions that preceded, accompanied and followed the above, there is nothing of substance in said charge that militated unfairly against the accused or is contrary to the principle of "explanation" by the accused enunciated by the House of Lords in *Woolmington* v. *The Director of Public Prosecutions*, [1935] A.C. 462 at p. 482.

APPEAL by accused from his conviction on a charge of murder at Vernon on the 18th of June, 1938. On Monday, the 10th of February, 1936, the body of one Mike Hudock was found on the side of a road about four miles west of Fernie, his death being apparently from a gunshot wound on his lower jaw fired at close range. Hudock, his wife and three children lived at Michel, B.C., about ten miles east of Fernie. The accused was an employee of the C.P.R. and lived at Galloway, about ten miles from Michel. He had been a friend of the Hudock family for about two years and Mrs. Hudock was his mistress. On February 8th, 1936, Macchione took Mr. and Mrs. Hudock with two children in his car to Fernie, and they returned to Michel the same night. On the following day he again took them to Fernie where they arrived at about 3.35 in the afternoon and stopped at the Northern Hotel. Accused gave Mr. and Mrs. Hudock some money and they both went to the Royal Hotel where Mrs. Hudock remained. She saw Hudock going up the street and then she saw accused following him in his car. She never saw her husband again. At about 5.30 p.m. accused came to the hotel, and he with Mrs. Hudock and the two children went for supper. She enquired for her husband but he could not be found, and shortly after 8 o'clock the accused, Mrs. Hudock and the two children started for home. On the way they stopped at Hosmer, where Mrs. Hudock's father-in-law lived. She got out of the car, went to her father-in-law's home, and when she came back to the car she heard the accused say "I killed him." They then started for home to Michel. One of the boys in the car gave evidence of seeing an overcoat in the car at Fernie that had some shells in one of the pockets. The accused had been previously twice convicted but on appeal from conviction a new trial was ordered in both cases.

The appeal was argued at Victoria on the 29th and 30th of September, 1938, before MARTIN, C.J.B.C., MACDONALD and MCQUARRIE, JJ.A.

Carmichael (*J. A. Sutherland,* with him), for appellant: The evidence was not sufficient to warrant a conviction. If the evi-

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dence of Benny Evans and Mrs. Hudock (deceased's wife) were taken away, there was no evidence whatever to convict. The boy Evans was seven years of age at the time of the alleged killing, and Mrs. Hudock's evidence was so contradictory that it should not be relied upon. Mrs. Hudock said she heard accused say "I killed him" when he was sitting in the car. Two other persons were in the car at the time and they did not hear it. The evidence does not satisfy the requirements set out in *Hodge's Case* (1838), 2 Lewin, C.C. 227. See also *Rex* v. *J.* (1929), 52 Can. C.C. 72. Doctor Kelman who made the *post-mortem* examination and gave evidence on the first trial, died shortly after, and his evidence given on the first trial should not have been admitted at this trial, as there was no interpreter at the first trial and the accused did not know what he was saying: see *Rex* v. *Lee Kun,* [1916] 1 K.B. 337; *Allen* v. *Regem* (1911), 44 S.C.R. 331; *Rex* v. *Walker and Chinley* (1910), 15 B.C. 100 at p. 104 *et seq.; Reg.* v. *Corby* (1898), 1 Can. C.C. 457 at p. 466. On the question of misdirection the learned judge said "there [were] two principles . . . the fulfilment of which the jury must require. The first is that every man is presumed to be innocent until he is proven guilty. . . . The Crown has complied with that first principle when it has brought about the accused such a body of evidence as calls for an explanation." This is misdirection: see *Woolmington* v. *The Director of Public Prosecutions*, [1935] A.C. 462 at p. 472 *et seq.; Rex* v. *Wann* (1912), 28 T.L.R. 240; *Rex* v. *Brereton* (1914), 10 Cr. App. R. 201 at 203; *Rex* v. *Deal* (1923), 32 B.C. 279 at p. 283; *Rex* v. *Broadhurst* (1918), 13 Cr. App. R. 125 at p. 130; *Rex* v. *Macchione* (1936), 51 B.C. 272; *Chapdelaine* v. *Regem* (1934), 63 Can. C.C. 5; *Rex* v. *Jones* (1922), 16 Cr. App. R. 124.

L. H. Jackson, for the Crown, referred to *Reg.* v. *Puddick* (1865), 4 F. & F. 497, and *Rex* v. *Skelly* (1927), 49 Can. C.C. 179 at p. 180.

Carmichael, replied.

Cur. adv. vult.

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On the 5th of October, 1938, the judgment of the Court was delivered by

MARTIN, C.J.B.C.: In this appeal from the conviction of the appellant for murder at the last Vernon Assizes, *coram* MURPHY, J., three of the grounds of appeal were disposed of during the argument, leaving only that of misdirection for our further consideration. As to that, after reading, and rereading the charge as a whole in the light of the evidence and considering with care the passage complained of, we can only reach the conclusion that, viewed as it must be in connexion with the instructions that preceded, accompanied, and followed it there is nothing of substance in said charge that militated unfairly against the accused, or is contrary to the principle of "explanation" by the accused enunciated by the House of Lords in *Woolmington* v. *The Director of Public Prosecutions*, [1935] A.C. 462 at 482, and it is in accord with the leading decision in this Court of *Rex* v. *Aho* (1904), 11 B.C. 114; 8 Can. C.C. 453, which has been widely adopted as noted in *Rex* v. *Ferrier,* 46 B.C. 136, 140 *et seq.;* [1932] 3 W.W.R. 113.

The appeal therefore is dismissed.

Appeal dismissed.

BILAN *ET AL.* v. CANADIAN FISHING COMPANY LIMITED.

S. C.
1938
June 27;
July 18.

Distd. Mack Fishing Co v UFAW Union. 1 6 DLR (3d) 618 (BCSC)

Workmen's Compensation Act—Plaintiffs working on a "lay" contract as fishermen with defendant—Remuneration a share of proceeds after deducting expenses—Deduction by defendant to meet assessments of Board—Right of action to recover—Employer and employee—R.S.B.C. 1936, Cap. 312, Secs. 13 and 14.

The plaintiffs were engaged from 1927 until 1937 in fishing operations, working on what is called a "lay" under which the workmen received as remuneration a certain share of the proceeds of the operations after certain expenses had been deducted. Boats and nets were provided by the defendant company, and during said period the defendant company deducted from the remuneration payable by it to the plaintiffs the work-

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men's compensation assessments calculated upon the basic rate for each year fixed by the Board, the exact amount deducted from each plaintiff depending on what his gross earnings were. The full amount deducted was not paid to the Board at one time, but the money was paid according to assessments or calls made by the Board from time to time, with an adjustment according to the final pay-roll. For at least eight years of the period the Board collected less than the basic rate. The plaintiffs, alleging contracts of employment, claimed thereunder the total amount of moneys so deducted and relied on sections 13 and 14 of the Workmen's Compensation Act.

Held, that the relationship between the parties was that of employer and employee, and the moneys paid to the Board should be distinguished from those retained by the defendant, and time was no bar to the plaintiffs' action in respect to the moneys retained. The relationship between the parties was created by the contract and not the statute. The plaintiffs are therefore entitled to recover from the defendant the unpaid balance, namely, the total amounts which have been deducted from them during the period in question less the amounts paid to the Board and deducted from earnings payable to plaintiffs more than six years before action was brought and less any sums which have been paid to them by the defendant with respect to the total amounts deducted from them. The claim for interest is disallowed.

ACTION by plaintiffs, alleging contracts of employment, claiming thereunder from the defendant the total amount of the moneys deducted by the defendant from the remuneration payable by the defendant to the plaintiffs, the workmen's compensation assessments fixed by the Workmen's Compensation Board. Tried by FISHER, J. at Vancouver on the 27th of June, 1938.

D. Murphy, for plaintiffs.
Hossie, K.C., and *Ghent Davis*, for defendant.

Cur. adv. vult.

18th July, 1938.

FISHER, J.: From time to time during the period in question herein, *viz.*, from the beginning of 1927 to 1937, the plaintiffs were engaged along with other men in fishing operations working on what is called a "lay" under which the workmen received as remuneration (as I find) a certain share of the proceeds of the operations after certain expenses had been deducted. The boats and nets were owned or chartered by the defendant company and upon the evidence before me I think it is a fair inference, and I find, that during the said period the defendant company deducted

from the remuneration payable by it to the plaintiffs the workmen's compensation assessments calculated upon the basic rate for each year fixed by the Workmen's Compensation Board as stated by the witness Harry Robertson, the exact amount deducted from each plaintiff depending upon what his gross earnings were.

It would appear from the evidence that the basic rate for a certain year having been determined by the Workmen's Compensation Board at the beginning of the year upon the estimated earnings of the workman or "pay-roll," the amount that would be required on such basis was deducted by the defendant from the moneys that would be payable to the crew, *i.e.*, to the plaintiffs and other men engaged in the fishing operations as aforesaid, but that the full amount deducted was not paid to the Board at one time but the money was paid according to assessments or calls made by the Board from time to time with an adjustment according to the final pay-roll. The Board had the right to increase the basic rate (see section 32 of the Workmen's Compensation Act, R.S.B.C. 1936, Cap. 312) but never did in the particular industry concerned here but on the contrary the Board for at least eight years during the said period collected less than the basic rate. The net rate collected for each year was given by Robertson and I accept his evidence.

In this action the plaintiffs, alleging contracts of employment, claim thereunder from the defendant the total amount of the moneys that were so deducted by the defendant from them (less certain amounts paid to them) and rely upon the provisions of the Workmen's Compensation Act, especially sections 13 and 14, reading as follows:

13. It shall not be competent for a workman to agree with his employer to waive or to forego any of the benefits to which he or his dependents are or may become entitled under this Part, and every agreement to that end shall be absolutely void.

14 (1.) Subject to the provisions of subsection (1) of section 34 in respect of medical aid, it shall not be lawful for an employer, either directly or indirectly, to deduct from the wages of any of his workmen any part of any sum which the employer is or may become liable to pay into the Accident Fund or otherwise under this Part, or to require or to permit any of his workmen to contribute in any manner towards indemnifying the employer against any liability which he has incurred or may incur under this Part.

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(2.) Every person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Part, and shall also be liable to repay to the workman any sum which has been so deducted from his wages or which he has been required or permitted to pay in contravention of subsection (1).

The circumstances under which the deductions were made and the terms on which the plaintiffs worked were somewhat unusual and in this connection reference might be made to part of the examination for discovery of R. R. Payne, the production manager of the defendant company, reading as follows:

Well, the way it works out, as I understand it, the company supplies the boat—as far as the ones that are owned by the company are concerned—that are chartered by it, and the crew operates the boat, and the remuneration of the crew is the amount of money they obtain from the company for the fish caught by them. Is that correct? Yes, and from what they sell elsewhere.

Well, it is understood, I suppose, that they must sell their catch to the Canadian Fishing Company if they are working for the Canadian Fishing Company? During certain periods, but at other times they can sell elsewhere.

But if they are on your boats, they must sell—they must take the fish in to you? Not always.

Well, when don't they do that? We contract maybe for a certain season, in a certain place, and then after that they do as they wish.

I see. But as long as they are under contract to you, that is the contract? That is correct.

. . . . .

So that five-twelfths of the proceeds are retained by the company and seven-twelfths are divided among the crew when the company owns the boats? Yes.

Davis: And the nets.

Murphy: That is correct.

And I understand before 1931 that the division was four-twelfths and eight-twelfths? That is right.

And since 1931 that division has been five-twelfths and seven-twelfths? Yes.

Yes, but as far as fishermen working on a boat owned by you or chartered by you, they come under the Workmen's Compensation Act? We are told they are.

. . . . .

Could you tell me the mechanics of getting them under the Workmen's Compensation Act? Place them on our records, collect the dues and pay it into the Compensation Board.

. . . . .

Well, look at that statement No. 8, the men listed in that statement come under compensation, don't they? Yes.

And all the men listed in those statements produced come under compensations? Yes.

Now tell me, how does your company get them under compensation? Pay the dues to the Compensation Board.

. . . . .

No, but you don't wait for a claim before you pay the dues? No, the auditors come in and audit our books and tell us the amount of money we have to pay.

Yes, they have lists of the men working on these boats? Yes.

. . . . .

But you just report that so many men work on so many boats? Yes. Their auditor comes down and checks that.

Yes? Usually the end——

From your records? From the captain, because we don't have these men's names in our records of them at all. We don't know who they are.

. . . . .

You mean the sum of $1,428.34 was called the gross crew's share? Yes, that expense——

And from that is deducted stores, $150, Workmen's Compensation Board medical aid, $2.10? Yes.

And Workmen's Compensation Board assessment, $45.70? That is right.

And the balance is divided amongst the men? The crew's net share.

That is the crew's net share? Yes.

And in connection with Albert Kwasney there is a notation after his name, $6.53. That would represent his proportion of the $45.70 deduction from him? Yes.

And each one of these statements shows the same thing, Mr. Payne? That is the basis of making that up.

Yes, and Workmen's Compensation Board assessment is shown deducted from the crew in each statement? Yes.

And it shows that the plaintiffs come under the provision of the Workmen's Compensation Board as applied to fishermen? They paid their assessments and were paid their claims as they happened.

Wait a minute now. It does show that the plaintiff had Workmen's Compensation deducted from them in each statement? Correct. They get the benefits of the Act.

So that they were under the provisions of the Act, weren't they? Yes.

And those two amounts, Workmen's Compensation medical aid and Workmen's Compensation Board assessments would be paid by the defendant company at the end of the season, I suppose? No, they make three or four assessments. They are paid on estimated pay-roll first and then adjusted to the final pay-roll.

First? Yes.

At the beginning of the season? Well, as the funds in this class 17 need replenishing they call on us for assessments. Usually they divide the amount into four instalments. They come about every three months, but a share of that is prepaid and then adjusted when the final amounts are known.

That is a settlement between the Compensation Board and the company? Yes, they do that——

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The defendant company? Well, they do that, that would——

Well, I am just talking about the defendant company. Nevertheless, that is their policy.

And if you have records, Mr. Payne, say you have records back to 1929—you don't know whether you have or not, but say you do have, it would be quite simple to obtain these records if I gave you the names of an individual fisherman? If we have the records, yes.

Counsel for the parties seem to agree that the plaintiffs did not authorize the defendant to make the deductions but they disagree as to the relationship of the parties and the effect of the deductions. Counsel for the defendant argues that, though cheques were made out by the defendant in favour of the individual members of the crew, the defendant dealt only with the boat captain who hired the crew and that the venture was that of the captain or the captain and his crew, the fish caught being sold either to the defendant or some other purchaser and five-twelfths of the proceeds after deducting certain expenses (less the captain's commission) being retained by the defendant company and seven-twelfths being divided among the crew (including the captain) (see Exhibit 1). In other words it is argued that no relationship of employer and employee existed between the defendant and the plaintiffs and that, if the plaintiffs have any claim, it must be one for a balance due for the price of the fish. Counsel for the defendant further argues that, if such relationship of employer and employee did exist, the claim must be one for a balance due for remuneration so that in either case the action cannot be one upon the said Workmen's Compensation Act, that is, an action upon a specialty to which the limitation period of 20 years would apply, but must be subject to the limitation of six years, in which case a portion of the claims would be statute-barred. On the other hand, counsel on behalf of the plaintiffs argues that the action is one upon the said statute and, therefore, the action being one of debt upon a specialty, if any period of limitation applies to any portion of the claims, the period would be 20 years. Counsel for the plaintiffs argues that the relationship between the defendant and each of the plaintiffs was that of employer and employee arising upon contracts of employment, making the provisions of the Workmen's Compensation Act applicable or, if not, that the

defendant cannot be heard to say that said provisions do not apply to the deductions as aforesaid, as all parties concerned acted under such Act, the Board treating the defendant as employer and the plaintiffs as employees throughout and the deductions being expressly made under said Act (see Exhibit 1). After careful consideration of the evidence and the arguments of counsel I have come to the conclusion that the relationship between the defendant and each of the plaintiffs was that of employer and employee arising upon contracts of employment. I find as a fact that the defendant was carrying on the fishing operations, owning or chartering the boats and controlling the disposal of the fish. Undoubtedly in a few instances the fish were sold to purchasers other than the defendant but I am satisfied that such sales were made with the consent of the defendant and the cash received from such sales was treated as part of the proceeds of the operations (see Exhibit 1). I am satisfied that under the contracts the defendant company could insist upon delivery of the fish to it in which case the fish would be simply valued at the market price and the plaintiffs' remuneration determined accordingly. In some other industries a system prevails under which an employee is paid according to the results of his work measured in a certain way and in the fishing industry concerned here I think there was just a modification of such a system so as to provide that the workman should be paid for his work according to the value of the fish caught. In my view however control of the operations still remained in the owner of the boats and with it the relationship of employer to employee, bringing all parties concerned under the Workmen's Compensation Act as aforesaid.

Although, as I have just intimated, I have come to the conclusion that there were contracts of employment between the defendant and the plaintiffs I have also to say that I have come to the conclusion that a distinction must be made between the deducted moneys that were paid over to the Board and those that were not so paid but retained by the defendant. I am satisfied and find that, when the moneys were deducted from time to time, statements were delivered by the defendant to the boat captains and each of the plaintiffs was shown the statement

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in which he was interested and was satisfied that the deductions should be made for the protection of all concerned including himself. I am also satisfied that the deductions were made by the defendant in good faith under the impression that the deductions should be made on the basic rate and should be charged against the men engaged in the actual fishing operations. As I have already intimated, however, less than the basic rate was collected and it must be admitted that before this action was brought it was apparent that there would be no further assessments made with respect to the plaintiffs for the years now being dealt with. Under the circumstances my view is that, though the situation under which more moneys were deducted than were required by the Board was not due to any fraud on the part of the defendant, it should be considered constructive fraud for the defendant to take advantage of the situation now and retain the moneys not paid over to the Board. See Kerr on Fraud and Mistake, 6th Ed., 5, and *Nocton* v. *Ashburton (Lord)*, [1914] A.C. 932, at 954; 83 L.J. Ch. 784. My view also is that time is no bar in such a case as neither acquiescence nor laches can be imputed to any of the plaintiffs.

With regard to the moneys deducted and paid over to the Board I agree with the submission of counsel on behalf of the defendant that the case of *In re Cornwall Minerals Railway Co.*, [1897] 2 Ch. 74; 66 L.J. Ch. 561, relied upon by counsel on behalf of the plaintiffs is distinguishable from the present case. In *Gutsell* v. *Reeve* (1935), 105 L.J.K.B. 213; [1936] 1 K.B. 272, Lord Wright, M.R. dealt with a great many of the cases that have been referred to by counsel and I therefore set out here a considerable portion from his judgment at pp. 280-85:

The question is whether the action is an action of debt upon a specialty; and if the claim is a claim under the statute it is, within the meaning of the expression, a claim upon a specialty. What is meant by that is very carefully discussed in a leading case, *Cork and Bandon Ry. Co.* v. *Goode*, [(1853)] 13 C.B. 826, on which counsel for the appellant very properly relied. In that case the defendant was the holder of thirty shares in the railway company, and he was sued in respect of nine calls. The declaration set out that an action had accrued to the company by virtue of the Companies Clauses Consolidation Act, 1845, and the Cork and Bandon Railway Act, 1845, "but," the declaration went on, "the defendant had not paid the same, or any part thereof." To that there was a second plea, "that the

action is upon contracts without specialty," and that the alleged causes of action did not accrue within six years before the suit. "To this plea the plaintiffs demurred, the ground of demurrer stated in the margin being, that the Statute of Limitations referred to by the second plea, and therein pleaded, was not pleadable to the causes of action declared on." It was held that that plea was a bad plea, because the proper limitation for such an action was twenty years under the Act of 1833.

I draw attention to the form of the declaration there, which simply sets out that the defendant was the holder of thirty shares whereby an action had accrued to the company by virtue of the two Acts referred to. That is the whole of the case and nothing more. It was held, as I say, that that was an action upon the statute (or statutes) and therefore upon the specialty; and some observations made by the judges in the course of the argument are very significant. I will not refer to them all, but Maule, J. said to the counsel for the plaintiffs (*ibid.* 829): "You say that the facts stated here do not show any contract, except for the statute?" and counsel naturally agreed. Then Cresswell, J. said (13 C.B. 831): "What is the contract between the shareholders and the company? When is it made? and how? By writing, by word of mouth, or by instrument under seal?" Maule, J. asked (13 C.B. 831): "Where is the shareholder's undertaking to pay calls but for the statute?" and it is answered by counsel for the defendant: "It must be conceded that there is none." Maule, J. said: "Then he undertakes by the statute. Is an action brought upon that undertaking an action upon a contract without specialty?" obviously answering it in the negative. There are other passages to the same effect; and in the judgment itself, Jervis, C.J. said (*ibid.* 834): "But for the Act of Parliament, no action could be brought by the company against one of its own members." That, I think, is limited to the matter in debate—namely, an action for calls. "This therefore is an action brought in respect of a liability created by statute, and therefore is an action founded upon the statute." Maule, J. to the same effect, said (*ibid.* 835): "It is manifest, upon reading the declaration, that it is a declaration in debt upon these two statutes. Now, a declaration in debt upon a statute is a declaration upon a specialty; and it is not the less so because the facts which bring the defendant within the liability, are facts *dehors* the statute: that must constantly arise in actions for liabilities arising out of statutes. That appearing to be so, the allegation in the plea, that the action is upon contracts without specialty, is a false allegation of a matter of law." The learned judge there, when he said that the facts which bring the defendant within the liability were facts *dehors* the statute, was merely referring, as I understand it, to the circumstance that the defendant must have become a shareholder. Once he had become a shareholder, then the statute applied and defined the whole of his contract and all the rights and liabilities which flowed from it. Maule, J. went on to say (*ibid.* 835): "There may, undoubtedly, be cases where a statute enables an action to be brought, which nevertheless is not an action on the Act of Parliament. But the question is, whether that state of things exists here. I think it manifestly appears that this is an action of debt, and upon the statute, and

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therefore an action upon a specialty." Those words, as I shall show in a moment, are of first-rate importance. Then the judge pointed out: "Whether *assumpsit* or case would lie, leaves altogether untouched the question whether this plea is an answer to this action." Cresswell, J. said (13 C.B. 836): "This is plainly an action upon a statutory liability to pay the calls"; and Talfourd, J., being of the same opinion, said (13 C.B. 836): "The relation between the shareholders and the company is the creation of the Act of Parliament. The action is in terms founded upon the Act of Parliament, and consequently an action upon a specialty within 3 & 4 Will. 4, c. 42, s. 3."

Does that case cover the present case? In my judgment, it does not. The question here, which can only be determined by looking at the Act in connection with all the circumstances of the case, shows something entirely different . . .

In my judgment, the effect of sub-s. 10 is merely to provide that where there is a contract of employment one item under the terms of that contract is to be, as it were, reconstructed by striking out the rate of wages, where it is lower than it ought to be, and by inserting the proper rate of wages in accordance with the statute. It is not contended that the whole agreement, or the whole employment, is to be abrogated and swept aside. If that is the true position, then I think it is clear that the matter stands outside the ruling of *Cork and Bandon Ry. Co.* v. *Goode* [*supra*]. As I have already said, once the defendant there had become a shareholder the whole scope of his rights and duties and liabilities arose under the statute and nothing else. There was nothing outside the statute to which reference could be made, and, therefore, the claim against him was a claim upon the statute. But here the claim is on the basis of the whole contract of employment, which is a contract involving many terms, and the only effect of the statute on that contract is to insert, against, it may be, the overt agreement of the parties, the proper rate of wages and to eliminate the improper rate of wages, and in that way the worker, suing on the contract and not upon the Act, is able to claim that he should be paid the proper rate of wages. His claim is really for 30s. or 31s. at the various appropriate dates, with a set-off against that of the amounts which he has actually received, and that, as I say, is a claim on the contract as amended by the statute.

. . . In *In re Cornwall Minerals Ry. Co.*, [1897] 2 Ch. 74, the claim was for interest or debenture stock, and it was held, as I read it, on the same principle as that which was laid down in *Cork and Bandon Ry. Co.* v. *Goode*, that the liability was purely statutory and that the period of limitation was twenty years. . . . In this present case, the action for the 30s. or 31s. a week is given in one sense by the statute, because unless the statute had fixed the wages of the employment at those figures no action could have been brought for those figures. But, in my opinion, it is not an action on the statute; it is an action on the contract of employment which is affected in respect of the rate of wages in that manner.

In the case before me I think it may be said, as was said by Lord Wright in the *Gutsell* case, *supra*, that the action is given

in one sense by the statute but is not an action on the statute. Unless the Workmen's Compensation Act had prohibited the deductions no action could have been brought in respect of the moneys deducted and paid over. Nevertheless the claim in each case is really for the unpaid balance of the remuneration due under the contract of employment which has not been abrogated and to which reference has to be made. The relationship between the parties was created by such contract and not by the statute. The liability is therefore not purely statutory but arises out of the contract of employment which is affected in respect of the deductions in the manner set out in the statute. It follows then that the period of limitation, if any applies, would be six years. Under the unusual circumstances existing here I cannot see how there can be any suggestion of fraud of any kind with regard to the moneys deducted and paid over to the Board and my view is therefore that the limitation of six years applies where the moneys deducted were paid over to the Board.

My conclusion on the whole matter therefore is that each of the plaintiffs is entitled to recover from the defendant the unpaid balance of the remuneration due him as aforesaid which will be in each case the total amount which has been deducted from him during the period in question herein on account of the Workmen's Compensation Board assessments less the sums paid to the Board and deducted from earnings payable to him more than six years before the date of the issuance of the writ herein and less also any sums which have been paid to him by the defendant with respect to the total amount deducted from him. The claim for interest is disallowed.

I still have to deal with the question of the gross earnings of each plaintiff for, as pointed out, the exact amount deducted from each plaintiff depended upon what his gross earnings were. On this phase of the matter I have to say that I accept the evidence of each of the plaintiffs as to what his gross earnings were in the years prior to the beginning of 1933 and the amounts deducted for such years would seem therefore to be a mere matter of calculation accordingly. As to the other years I find that the amounts deducted were as shown on Exhibit 1 except as hereinafter stated. I am not satisfied that said Exhibit 1 con-

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tains the complete record with regard to the gross earnings of the plaintiff Kwasney for the year 1933 and I accept the evidence of the said plaintiff with respect to such earnings.

Upon my findings, as above set out, I think counsel should be able to agree upon the amounts for which each plaintiff will be entitled to judgment but if not counsel may speak further to the matter.

As to costs I have to say that I hold that the ordinary relationship of solicitor and client subsisted and that the plaintiffs are entitled to their costs under the County Court tariff on the scale applicable to the total of the amounts for which the plaintiffs obtain judgment. Order accordingly.

I should add that I am not dealing now with the claim of the plaintiff John Martin which was discontinued.

Order accordingly.

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June 20, 24, 30.

Disd
R. v. Joseph
[1939] 3 D.L.R. 22

Agreed with
R. v. Tolhurst
[1939] 3 W.W.R. 559

Apld
R. v. Miller
73 C.C.C. 343

Apld
R. v. Hall (No 2)
81 C.C.C. 31

Apld
R. v. Ungaro
94 C.C.C. 184

REX v. BUSH.

Criminal law—Conspiracy—Fraud in reference to shares of mining company—Accomplice's evidence—Corroboration—Duty of judge as to—Criminal Code, Sec. 835.

On a trial wherein the evidence of an accomplice is concerned, if the judge sees fit to convict on the uncorroborated evidence of that accomplice, he may do so without an accompanying statement showing that he convicts with an appreciation of the law by his so doing.

There is no obligation upon a judge to exemplify his legal qualifications respecting the rules of evidence in trying a case, because his requisite knowledge of the law pertaining to the proper discharge of the duties of his office must be assumed, and it cannot be inferred that he does not possess a sufficient knowledge of the rules of evidence to try a case properly as regards the evidence of accomplices or otherwise, without distinction.

Rex v. *Ambler*, [1938] 2 W.W.R. 225, not followed.

APPEAL by defendant from his conviction by MCINTOSH, Co. J. on the 4th of April, 1938, on a charge that he with one Robert W. McKitrick, did unlawfully conspire together, by

Apld
R. v. Pennell
52 W.W.R. 569
+ 47 C.R. 200

Foll'd
R. v. Sangha
55 W.W.R. 633

Apld
R. v. McMillan
57 W.W.R. 677
(Alta. S.C.)
~~+ Not Foll'd as above~~ Apld
[1967] 2 CCC 12

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deceit and falsehood, to defraud the public, with reference to shares of the National Silver Mines Limited, contrary to section 444 of the Criminal Code. National Silver Mines Limited was incorporated in 1920, Bush being president of the company and McKitrick secretary. The company owned 1,600,000 shares of Bush Mines Limited. In 1928 Bush Mines Limited sold certain mineral claims to an English company known as Sebakwe and District Mines Limited, and received therefor 600,000 shares of the Sebakwe company. The National Silver Mines Limited being a shareholder in the Bush company received as its proportionate share, namely, 330,000 shares of the Sebakwe company, and these shares were distributed *pro rata* among its shareholders. The Southern Investors Limited, a private company, was incorporated for the purpose of taking care of the private holdings and investments of Bush. This company held 1,215,780 shares of National Silver Mines Limited in 1926, and in 1927 this company bought 40,000 more shares of National Silver Mines Limited. In 1931 Bush transferred certain mineral claims to National Silver Mines Limited, for which he received 476,639 shares in the company, these shares carrying rights to certain Sebakwe shares, which came to National Silver Mines Limited in 1930. The shares were turned over by Bush to Southern Securities Limited, making a total of 1,732,419 shares of National Silver held by Southern Securities. The Sebakwe shares having been distributed to the shareholders of National Silver Mines Limited, and there being no market for the Sebakwe shares, an arrangement was made that the shareholders of National Silver Mines Limited, who received their allotment, should bring their shares to the office of the company, and on the share certificates would be placed an endorsement to the effect that the holder of the certificate was entitled to certain shares of Sebakwe in the proportion of 147 shares of Sebakwe to every 1,000 shares of National Silver Mines Limited. The endorsement was known as the green stamp endorsement. These shares of National Silver Mines Limited with the green stamp endorsement, became tradeable on the Vancouver Stock Exchange, and were traded from May, 1926, to October, 1936. In November, 1936, National Silver Mines Limited went into

Aprvd
R. v. Gunn + Ponak
5 CCC (2d) 503
(BCCA)

Retd to
R. v. Killam
12 CCC (2d) 114
(BCCA)

Distd
Reid v. R.
20 CCC (2d) 257
(SC of C)

Consd
R. v. Macdonald
22 CCC (2d) 129
(Ct. Martial App)

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liquidation. The liquidator found that the certificates issued of National Silver Mines Limited were for 2,377,482 shares and the number of Sebakwe shares found in the possession of National Silver Mines Limited and Southern Investors Limited were 172,507 shares, there being a shortage of 182,154 shares of Sebakwe, as in order to cover the certificates issued with the green stamp endorsement, 349,490 shares of Sebakwe should have been to the credit of National Silver Mines Limited. This subjected the holders of National Silver Mines Limited green stamped certificates to a loss of $45,538, being the value of the missing shares. An over issue of green stamped share certificates of National Silver Mines Limited carrying Sebakwe share rights, had taken place, this being the substance of the charge against accused.

The appeal was argued at Vancouver on the 20th and 24th of June, 1938, before MARTIN, C.J.B.C., MCQUARRIE and SLOAN, JJ.A.

O'Brian, K.C., for appellant: The National Silver Mines Limited went into liquidation in November, 1936, and Berry was appointed liquidator. Berry's evidence was hearsay. If admissible at all it would only be on the basis that McKitrick as an accused is making a confession and it must be confined to McKitrick alone. In any event McKitrick is an accomplice. From 1932 to 1936 McKitrick was selling the stock and Bush knew nothing of this. That the evidence is not admissible against Bush see Phipson on Evidence, 7th Ed., 212; *Rex* v. *McIntosh* (1937), 52 B.C. 249 at p. 253; *Rex* v. *Pepper* (1936), 67 Can. C.C. 311; Tremeear's Criminal Code, 4th Ed., 581; Archibold's Criminal Pleading, 29th Ed., 411. Where a confession is made it is only evidence against himself: see Roscoe's Criminal Evidence, 15th Ed., 45. In the circumstances the evidence should be excluded altogether as Berry was appointed liquidator in November, 1936: see *Rex* v. *Hoo Sam* (1912), 1 W.W.R. 1049; *Rex* v. *Martin* (1905), 9 O.L.R. 218 at p. 223. The confession was made to a person in authority: see Phipson on Evidence, 7th Ed., 256; Roscoe's Criminal Evidence, 15th Ed., 44; *Moore's Case* (1852), 2 Den. C.C. 522; *Rex* v. *Royds*

(1904), 10 B.C. 407; *Rex* v. *Roadhouse* (1933), 48 B.C. 10; Tremeear's Criminal Code, 4th Ed., 882; *Ibrahim* v. *Regem,* [1914] A.C. 599; *Rex* v. *Bellos,* [1927] S.C.R. 258; *Sankey* v. *Regem, ib.* 436; *Rex* v. *Kooten* (1925), 35 Man. L.R. 461; [1926] 1 W.W.R. 178; *Rex* v. *De Mesquito* (1915), 21 B.C. 524; *Thiffault* v. *Regem* (1933), 60 Can. C.C. 97 at p. 101; *Rex* v. *Newes,* [1934] 1 W.W.R. 295. Crankshaw's Criminal Code, 6th Ed., 768 to 772. McKitrick was an accomplice and the uncorroborated evidence of an accomplice was accepted: see *Rex* v. *Ambler,* [1938] 2 W.W.R. 225. Extracts and entries in the books of the company by McKitrick, an accomplice, at the request of Berry, the liquidator, a person in authority at a time when the alleged conspiracy had spent itself, should not have been admitted in evidence: see Phipson on Evidence, 7th Ed., 218; Taylor on Evidence, 12th Ed., Vol. I., pp. 376-9, secs. 590 to 596; *Rex* v. *Porter and Marks* (1928), 40 B.C. 361; *Rex* v. *McCutcheon* (1916), 25 Can. C.C. 310; *Reg.* v. *Blake* (1844), 6 Q.B. 126 at p. 137. The learned judge misdirected himself on the question of shares and the disposition of them: see *Rex* v. *Sankey* (1927), 38 B.C. 361; *Rex* v. *Bowen* (1930), 43 B.C. 507. There is no proof of intent to defraud: see *Rex* v. *Harcourt* (1929), 52 Can. C.C. 342.

W. S. Owen, for the Crown: On the objection to receiving in evidence statements made by McKitrick to Berry the liquidator see Harrison on Conspiracy, 152; *Rex* v. *Hammond and Webb* (1799), 2 Esp. 719. The acts of one defendant is evidence against the other when it is shown they were done in pursuance of a common design: see *Rex* v. *Hunt* (1820), 1 St. Tri. (N.S.) 171; *Rex* v. *Stone* (1796), 6 Term Rep. 527; *Regina* v. *Murphy* (1837), 8 Car. & P. 297; *Rex* v. *Brisac and Scott* (1803), 4 East 164; *Rex* v. *Pepper,* [1937] 1 W.W.R. 62; Taylor on Evidence, 12th Ed., Vol. I., p. 377, sec. 593. A declaration made by either conspirator is admissible: see Phipson on Evidence, 7th Ed., 218; *Paradis* v. *Regem* (1933), 61 Can. C.C. 184; Taylor on Evidence, 12th Ed., Vol. I., p. 377, sec. 593. On the amendment of the indictment see *Rex* v. *Loftus* (1926), 45 Can. C.C. 390.

Coady, on the same side: The evidence shows Bush knew

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what the green stamps meant, and reasonable inferences may be drawn from the evidence that he knew of the sales of National Silver Mines stock and of the shortage in Sebakwe stock.

O'Brian, replied.

Cur. adv. vult.

On the 30th of June, 1938, the judgment of the Court was delivered by

MARTIN, C.J.B.C.: This appeal is one of some difficulty, and was argued at very considerable length, and we have reached the conclusion that it must be dismissed. Certain objections on legal grounds were raised, but, with the exception of one to be referred to, we think they are not of such weight as to require further consideration, and on the facts we feel it impossible to say a jury would not be amply justified in finding as the learned judge did find in exercising the functions of a jury pursuant to section 835 of the Code.

The said legal objections, assuming them to be correct, which we do not assume, are, moreover of such a character that we have no doubt they are brought within subsection 2 of section 1014 of the Code, which empowers us to dismiss the appeal if we are "of opinion that no substantial wrong or miscarriage of justice has actually occurred," and therefore we dismiss it. In this relation we adopt what was said by myself in *Rex* v. *Schwartzenhauer* (1935), 50 B.C. 1, at p. 10, *viz.*:

> In conclusion I only add that the fact that the accused "did not avail himself of the opportunity that the law affords him of going into the witness-box" (*Reg.* v. *Woods* (1897), 5 B.C. 585, 589) has always been a circumstance that the Courts of Criminal Appeal of this Province have properly taken into consideration in deciding the final, and now, indeed, paramount question (since 1923, section 1014, subsection 2) as to whether or not a "substantial wrong or miscarriage of justice has actually occurred" so as to entitle the appellant to a new trial.

The above said excepted legal ground which we think it is necessary to say something more on, is Mr. *O'Brian's* submission that this case is within the recent decision of the Appellate Division of the Supreme Court of Alberta in *Rex* v. *Ambler,* [1938] 2 W.W.R. 225, wherein, at p. 236, it was held by two learned judges, one dissenting, that on a trial wherein the evidence of an accomplice is concerned, if the judge sees fit to

convict upon the uncorroborated evidence of that accomplice, he cannot properly do so "without an accompanying statement . . . which shows that he convicts with an appreciation . . . of so doing."

We are of opinion, however, with every respect, that we should not follow that decision because it is in direct conflict with at least two long standing judgments of this Court (though not reported) holding that there is no obligation upon a judge to exemplify his legal qualifications respecting the rules of evidence in trying a case, because his requisite knowledge of the law pertaining to the proper discharge of the duties of his office must be assumed, and it cannot be inferred that he does not possess a sufficient knowledge of the rules of evidence to try a case properly as regards the evidence of accomplices, or otherwise, without distinction: nor can it be presumed that he has fallen into error and misdirected himself unless that error is made manifest, as *e.g.*, it has been in some appeals that have come before us wherein the reasons assigned themselves disclosed the self-misdirection. But there is nothing in this case to warrant such a conclusion and hence the assumption of a proper self-direction must prevail in this Court as heretofore.

Appeal dismissed.

THE CARIBOO GOLD QUARTZ MINING COMPANY LIMITED v. ISLAND MOUNTAIN MINES COMPANY LIMITED.

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Sept. 24, 25;
Nov. 4.

Mines and minerals—Location of claims—Rock in place—Must be found by locator—R.S.B.C. 1924, Cap. 167, Secs. 30 and 41.

The discovery of "rock in place" is the very foundation of the proper location of a mineral claim under section 30 of the Mineral Act. This applies to fractional claims.

APPEAL by plaintiffs in both actions from the decision of McDONALD, J. of the 16th of April, 1936. Each party owns one of the two fractional mineral claims in question. The neces-

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sary assessment work was done on both claims and applications for certificate of work were made in respect of both. They cover substantially the same ground and adverse actions were brought in respect of both of them. The fractional mineral claim "N. M. No. 8" was located on the 23rd of February, 1933, and after a number of transfers became the property of the Island Mountain Mines Company. The fractional mineral claim "Brookford No. 9" was located on the 19th of April, 1934, and this claim was transferred to the Cariboo Gold Quartz Mining Company. Each locator filed his affidavit pursuant to section 41 of the Act, stating that he had found "rock in place" on the fractional claims. The learned trial judge, accepting the evidence of a witness, Cochrane, a prospector, which was strongly verified by the evidence of Dr. Schofield, a well-known geologist, found that the failure to find "rock in place" on the property and to prove such finding by a proper affidavit is not an irregularity and that even if it were, it cannot be cured by the provisions of section 80 of the Mineral Act and that therefore neither party has established title to the ground in controversy.

The appeal was argued at Victoria on the 24th and 25th of September, 1936, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Thomas E. Wilson, for appellant: No rock in place is required on the location of a fractional claim. Fractional claims are located under section 30 of the present Act. In *Collom* v. *Manley* (1902), 32 S.C.R. 371, it was held "rock in place" was required, but that was under the old Act where full claims and fractions were located under the same section, so that that case does not apply. The main point is that in the case of the senior location the locator did not stake the ground in question. The posts were placed over 1,100 feet north of the ground in question. On the construction of general and specific enactments if repugnant, see Craies's Statute Law, 4th Ed., 200; *Ex parte National Mercantile Bank; In re Haynes* (1880), 49 L.J. Bk. 62; *Ontario, Etc., R.W. Co.* v. *Canadian Pacific R.W. Co.* (1887), 14 Ont. 432; *Turner* v. *Vidette Gold Mines Ltd.* (1935), 50 B.C. 202 at p. 210. The locator made no entry on the ground.

Next, as to the sketch on the back of the affidavit, it does not show the size of the fraction in feet, nor does it give the correct boundaries as required by section 42 of the Act. The evidence does not bear out the finding of the trial judge as to there being no "rock in place."

Hossie, K.C. (*J. E. T. McMullen,* with him), for respondent: That "rock in place" must be found on a fraction in the same manner as a full claim, see Craies's Statute Law, 4th Ed., 303 to 307; *In re Eames Estate,* [1934] 3 W.W.R. 364 at 372; *Union Steamship Company of New Zealand* v. *Melbourne Harbour Trust Commissioners* (1884), 9 App. Cas. 365 at p. 369; *Mitchell* v. *Simpson* (1890), 25 Q.B.D. 183 at p. 189; *Fletcher* v. *Birkenhead Corporation,* [1907] 1 K.B. 205 at p. 218; *Snyder* v. *Ransom* (1903), 10 B.C. 182. We had three certificates of work when the junior locator staked. As to locator's name not being on the No. 2 post, this does not invalidate the location. What is on the No. 2 post is of little importance. The No. 1 post is the important one: see *Sandberg* v. *Ferguson* (1903), 10 B.C. 123; 2 M.M.C. 165. A wrong description of an adjoining claim does not invalidate the location: see *Sunshine, Limited* v. *Cunningham* (1899), 1 M.M.C. 286. There is a sketch indicating the boundaries. He could only locate ground not lawfully occupied. We had three certificates of work and he had no right to go there.

Wilson, replied.

Cur. adv. vult.

4th November, 1936.

MACDONALD, C.J.B.C.: This appeal has to do with the ownership of fractional mining claims claimed respectively by the parties in each action, namely, The Cariboo Gold Quartz Mining Company Limited, and the Island Mountain Mines Company Limited. The action originally brought by The Cariboo Gold Quartz Mining Company Limited, against the Island Mountain Mines Company Limited mineral claim adverses the application of the latter for certificate of improvements. There is a neat point in the case which in my opinion disposes of both. In neither location was rock in place dis-

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covered, and since rock in place is the very foundation of lawful locations both claims have been shown to have no title to their respective fractions. This is an answer to the claims of the adverser and the adversed. It was contended that the present Mineral Act does not require discovery of rock in place on a fractional piece of ground, but while section 30 does not in words require that, I think section 30 must be read in connection with the previous law which did require rock in place. In addition the affidavit required for registration requires rock in place to be sworn by the locators. I would, therefore, sustain the judgment of the Court below which found that neither of the claims were lawful mineral claims.

MARTIN, J.A.: After a careful consideration of the statutes and decisions thereupon that have been cited to us, and others, the learned judge below has in my opinion reached the right conclusion herein and therefore both appeals should be dismissed.

MCPHILLIPS, J.A.: I would dismiss the appeals. The learned trial judge rightly and properly, in my opinion and consistent with the provisions of the Mineral Act held that neither of the claims could be said to be lawful mineral claims. It follows that in my opinion the judgment of the learned trial judge should be affirmed.

MACDONALD, J.A.: I agree with my brother MARTIN.

Appeals dismissed.

Solicitor for appellant: *Thomas E. Wilson.*

Solicitor for respondent: *Ghent Davis.*

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March 31; *April* 1, 2; *Sept.* 8.

Refd To. Clelland v. Clelland [1945] 3 DLR. 664

Banks and banking—Joint account of husband and wife—Death of husband—Right of wife to fund—Gift by husband to wife—Corroboration of wife's evidence—R.S.B.C. 1924, Cap. 82, Sec. 11.

In an action for a declaration that certain moneys and bearer bonds in a widow's possession belonged to her deceased husband's estate, the widow's claim that the bonds were given to her was corroborated by a witness who a week before the husband's death heard him tell his wife that the bonds were hers. The money in question was deposited by deceased in the joint account of himself and his wife and transferred by her to her own account shortly before his death. It was

Held, that the bonds and money belonged to the widow.

Held, on appeal, affirming the decision of McDonald, J. as to the bonds but reversing his decision as to the money, that in the special facts of this case the moneys in the joint account did not pass by survivorship but are the property of deceased's estate.

APPEAL by plaintiff from the decision of McDonald, J. of the 8th of October, 1935, in an action brought by Mrs. Robertson, only child of Captain Batchelor, deceased, on behalf of herself and her children against the executors of said Captain Batchelor, deceased, to have it declared that certain moneys and coupon-bearer bonds of the Dominion of Canada in the possession of the widow of said Captain Batchelor, deceased (his second wife) belonged to Captain Batchelor's estate. Captain Batchelor married his second wife about 30 years ago. At that time the plaintiff was five years of age and lived with her father's relatives. Captain Batchelor, who died on January 9th, 1934, left a fortune of about $62,000. The widow claimed that $13,592.62 in bearer bonds and $7,210.96 that was deposited in a joint bank account of her husband and herself at the Bank of Montreal in North Vancouver were transferred to her by deceased within two years previous to his death. For more than one year prior to his death Captain Batchelor could do no business and his wife acted as his business agent and had his keys and full access to his vault. He left the management of his affairs to her. In February, 1933, Mrs. Batchelor removed said bonds to her own box in the Bank of Montreal, and in August, 1933, she transferred the money that was to their joint account to her own account in said bank. By his last will made in September, 1933, Captain Batchelor

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left all his real estate and furnishings to his wife, $500 to each of his three sisters, to his wife a full life interest in the balance of his estate, and after his wife's death he bequeathed the residue, 50 per cent. to his daughter in trust for her children, 10 per cent. to a grandchild, and the balance to various relatives.

The appeal was argued at Vancouver on the 31st of March and the 1st and 2nd of April, 1936, before MARTIN, MACDONALD and MCQUARRIE, JJ.A.

J. W. deB. Farris, K.C., for appellant: Captain Batchelor was stricken with cancer in 1926. He was a sea captain, but in later years worked as a pilot. During his illness his wife had access to his bonds and they had a joint bank account. Mrs. Batchelor and George Hanes were his executors. When in bed he told Hanes he had given his real estate to his wife but made no reference to the bonds. There is only Mrs. Batchelor's statement as to the bonds being given to her. There is no corroboration of this: see section 11 of the Canada Evidence Act. Mrs. Batchelor said that a week before his death he told her she could have the bonds, and her sister Mrs. McDonald who was present and who is very deaf testified that she heard him say so. A Mrs. Shore was called into the room when Captain Batchelor was asked to repeat what he said. Her testimony of what he said was accepted as corroboration by the learned judge. There was error in accepting Mrs. Batchelor's statement. The Captain's condition seven days before he died was such that no statement of his could have any corroborative effect. There was error in holding that the money in the joint bank account passed by survivorship. In February, 1933, Captain Batchelor made a secret will and when his wife heard of this she then proceeded to transfer the bank account and the bonds to herself. There is not a word in the last will about the two gifts to his wife. He was mentally incapable of making an admission seven days before his death, and the burden is on the defendant to show that he had a lucid interval: see *Cartwright* v. *Cartwright* (1793), 1 Phillim. 90 at p. 100. The money is only deposited in the joint account for chequing convenience and no title passed by survivorship: see *Re Daly; Daly* v. *Brown* (1907), 39 S.C.R. 122. The deceased never suggested to anyone

that he had given her the money: see *Stadder* v. *Canadian Bank of Commerce* (1929), 64 O.L.R. 69; *Shortill* v. *Grannan* (1920), 55 D.L.R. 416; *Everly* v. *Dunkley* (1912), 27 O.L.R. 414; *Southby* v. *Southby* (1917), 40 O.L.R. 429; *Marshal* v. *Crutwell* (1875), L.R. 20 Eq. 328; *Mews* v. *Mews* (1852), 15 Beav. 529; *Re Hodgson* (1921), 50 O.L.R. 531.

Donaghy, K.C., for respondents: As to the joint account in the bank, *Re Daly; Daly* v. *Brown* (1907), 39 S.C.R. 122, does not apply, as in that case there is nothing beyond the mere fact of the deposit in the joint names. In the case at Bar there was an absolute agreement, not only with the bank but between husband and wife, whereby the survivor had the right to withdraw all moneys deposited in the account: see *Fowkes* v. *Pascoe* (1875), 10 Chy. App. 343; *Payne* v. *Marshall* (1889), 18 Ont. 488 at p. 493; *Irons* v. *Smallpiece* (1819), 2 B. & Ald. 551; *Marshal* v. *Crutwell* (1875), L.R. 20 Eq. 328; *O'Brien* v. *O'Brien et al.* (1882), 4 Ont. 450; *Standing* v. *Bowring* (1885), 31 Ch. D. 282; *Sayre* v. *Hughes* (1868), L.R. 5 Eq. 376; *Stadder* v. *Canadian Bank of Commerce* (1929), 64 O.L.R. 69; *In re Jones, Deceased. The Royal Trust Co.* v. *Jones* (1934), 49 B.C. 179; *Eldridge* v. *Royal Trust Co.*, [1922] 2 W.W.R. 1068. That there was corroboration of the defendant's testimony, we rely on the evidence of Mrs. Shore who heard deceased's statement made a week before he died: see *Bayley* v. *Trusts & Guarantee Co.*, [1931] 1 D.L.R. 500; *Thompson* v. *Coulter* (1903), 34 S.C.R. 261; *Groat* v. *Kinnaird* (1914), 7 W.W.R. 264; *Dominion Trust Co.* v. *Inglis* (1921), 29 B.C. 213; *Tellier* v. *Dujardin* (1906), 6 W.L.R. 1. An imperfect gift when donee is afterwards appointed executor is made perfect by this recovery of legal title: see *Strong* v. *Bird* (1874), L.R. 18 Eq. 315; *In re James; James* v. *James*, [1935] Ch. 449. The *onus* of proof as to Captain Batchelor's mentality is on the plaintiff: see *Groom* v. *Thomas* (1829), 2 Hag. Ecc. 433; *Clark* v. *The King* (1921), 61 S.C.R. 608; *Sutton* v. *Sadler* (1857), 3 C.B. (N.S.) 87. Surrounding circumstances must be taken into consideration as to whether it is a trust or a gift: see Godefroi on Trusts, 5th Ed., 130; White & Tudor's Leading Cases, 9th Ed., Vol. 2, p. 749. The account was established in 1927 and subsequent acts and

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conditions cannot militate against the rights of the widow: see *Weese* v. *Weese* (1916), 37 O.L.R. 649; *Woolcox* v. *French* (1927), 32 O.W.N. 32; *Re Reid* (1932), 40 O.W.N. 371; *In re Eykyn's Trusts* (1877), 6 Ch. D. 115.

Farris, in reply, referred to *M'Dowell* v. *M'Neilly,* [1917] 1 I.R. 117.

Cur. adv. vult.

8th September, 1936.

MARTIN, J.A., *per curiam*: This appeal, raising two difficult questions, should, we think, on its special facts (which are too lengthy and complicated to attempt to recite), be allowed in part, *i.e.,* as to the moneys in the joint savings account of the deceased and his wife in the Bank of Montreal, which we hold did not pass by survivorship, and are the property of the deceased's estate, and therefore the defendant Helen B. Batchelor must pay the sum of $7,245.11 to the defendant's executors.

With respect to the bearer bonds for $13,592.02, we affirm the judgment below declaring them to be the property of the widow of the deceased, the said Helen B. Batchelor.

MACDONALD, J.A. would dismiss the appeal.

MCQUARRIE, J.A.: I would dismiss the appeal so far as it concerns the coupon bonds and in that respect would adopt the reasons for judgment of the learned trial judge.

The other branch of the appeal is in reference to the money which was in the joint bank account of the deceased and his wife the respondent Helen Bromhead Batchelor and was by her transferred to her own account shortly before the death of the deceased. The learned trial judge held that there was no corroboration of her claim that the deceased had given her this money but that she was entitled to it by survivorship. Counsel for the respondent frankly admitted at the hearing before us that if the depositing of the money in the joint account by the husband had only been intended as a convenient arrangement so that his wife could draw out her husband's money the respondent is out of Court. I think that is what the evidence shows to have been the situation here. It appears to be common ground that the wife drew cheques on this account for their

expenses and did not apply any of the money to her own separate use. Because of her husband's serious and lengthy illness it was only reasonable that he should have made some such arrangement. It is, of course, true that he might have accomplished the same purpose by giving his wife a power of attorney or an order on the bank to honour her cheques but it seems to be quite usual as a matter of banking practice to have a joint account. The document which constituted the joint account was on one of the bank's usual forms drawn essentially for the bank's protection. The money was the husband's. He did not lose the right to take the whole by authorizing his wife also to draw. He could still draw the whole whenever he pleased up to the date of his death and if he did it would all be his own money.

It is to be noted that there is nothing in the document referred to constituting a gift to the wife or giving her title to any of the money. The fact that the husband signed the document does not necessarily mean that the wife would take the balance standing to the credit of the joint account by virtue of her survivorship.

In view of the apparently conflicting decisions cited to us and relied on by counsel for the appellant and respondents respectively I might be permitted to say that in my opinion the matter is correctly stated by Davies, J. (afterwards Sir Louis Davies, C.J.) in *Re Daly; Daly* v. *Brown* (1907), 39 S.C.R. 122 at 131, in the following words:

> There is no general governing principle applicable to questions of the kind I am now considering. In every case it is a question of intention to be gathered from the special facts and circumstances and the family relations or otherwise of the parties.

Applying that principle here I consider that the "special facts and circumstances" in the case before us clearly indicate that the joint account was established as a convenient arrangement so that the wife could draw out her husband's money. In coming to that conclusion I have endeavoured to follow as carefully as possible the decision of the Supreme Court of Canada in the *Daly* v. *Brown* case, *supra*.

I would, therefore, allow this appeal as to the moneys of the said joint account transferred by the said Helen Bromhead Batchelor to her own account. I would declare that such moneys should be restored by her to the estate of the deceased.

Solicitor for appellant: *R. A. Sargent.*
Solicitor for respondents: *E. I. Bird.*

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O'FALLON v. INECTO RAPID (CANADA) LIMITED, W. T. PEMBER STORES LIMITED AND PACIFIC DRUG STORES LIMITED.

Negligence—Dangerous goods—Sale of—Liability of manufacturer, wholesaler or retailer to purchaser—Failure to give adequate warning—R.S.B.C. 1936, Cap. 250, Sec. 21.

The defendant Inecto Rapid (Canada) Limited manufactured a hair dye known to the trade as Inecto Rapid. The defendant W. T. Pember Stores Limited was a wholesale distributor of the product and the defendant Pacific Drug Stores Limited retailed the product from its store in Vancouver. In January, 1938, the plaintiff sent her son to the Vancouver store to purchase a hair dye known as Inecto Rapid. The manager of the store made the sale, wrapped two bottles labelled respectively "A" and "B" in paper and gave the messenger the only copy of instructions he had, and drew his attention to a portion of pages 4 and 5 of the pamphlet in small type. The plaintiff testified that upon receiving the bottles from the messenger she did not receive the instructions. An attendant at a beauty parlour was called by the defendants who testified that the plaintiff had been in her beauty parlour in November, 1937, and discussed hair dyes with her, and said she could not use Inecto Rapid as when she did her skin broke out in a rash. The plaintiff denied that she made the statement and said she had not been in said beauty parlour for two or three years. The result of the use of the dye by the plaintiff was that it caused a rash and blistering that necessitated the services of a physician over quite a period of time, and her condition was such that she was unfit for work for five months. The evidence of two doctors was that the dye was dangerous and the bases of the dye were definitely toxic. On the other hand beauty-parlour operators testified that they had used Inecto Rapid for many years, they always used it with caution but in their experience the number of persons to whom the dye was harmful was not over one in a thousand. In an action for damages, the Pacific Drug Stores Limited submitted that the plaintiff ordered a specific article by its trade name and relied on section 21 of the Sale of Goods Act.

Held, that the action be dismissed as against the Pacific Drug Stores Limited.

Held, further, that while this dye has a harmful effect only in the case of a very few persons, its toxic qualities are such that it is very harmful to a limited number of persons who have a healthy skin. The law demands that a dye containing toxic ingredients such as those contained in Inecto Rapid must be sold only with the clearest warning to the user of the danger involved in its use. The warning ought to have been on the container. A pamphlet warning may very easily not come to

the attention of the user and the written instructions here were not sufficient. The plaintiff knew that Inecto Rapid was harmful to some degree before she used it on the occasion in question. Had there been a proper warning on the container such as the law requires, the probability is that she would not have used it. She is entitled to recover as against the defendants Inecto Rapid (Canada) Limited and W. T. Pember Stores Limited.

ACTION for damages, the plaintiff having suffered extensive injuries to her head, neck and the upper part of her body from the use of a hair dye known as Inecto Rapid. The plaintiff purchased two bottles of Inecto Rapid from the defendant Pacific Drug Stores Limited in February, 1938. Inecto Rapid was manufactured by the defendant Inecto Rapid (Canada) Limited, and the defendant W. T. Pember Stores Limited were the wholesale distributors of the product. The facts are set out in the reasons for judgment. Tried by MANSON, J. at Vancouver on the 13th, 14th and 15th of September, 1938.

Marsden (D. McK. Brown, with him), for plaintiff.

Burnett, for defendants Inecto Rapid (Canada) Limited and W. T. Pember Stores Limited.

G. Roy Long, for defendant Pacific Drug Stores Limited.

Cur. adv. vult.

12th November, 1938.

MANSON, J.: In the evening of a day towards the end of January, 1938, the plaintiff sent her son to a neighbourhood store of the defendant, the Pacific Drug Stores Limited (hereinafter referred to as the "Drug Company") to purchase a hair dye known to the trade as Inecto Rapid. She instructed specifically not just the purchase of a hair dye, but of this particular dye. The dye is manufactured by the defendant, Inecto Rapid (Canada) Limited, hereinafter referred to as the "Inecto Company"). The wholesale distributor of the product is the defendant W. T. Pember Stores Limited (hereinafter referred to as the "Pember Company").

The manager of the Drug Company's store personally made the sale. Giving good reasons for his recollection of the transaction, he says that he sold the two bottles labelled respectively

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"A" and "B" (Exhibits 1 and 2) and wrapped them, not in a box, but in paper. He says that he did not sell the applicator that ordinarily goes with the bottles because he did not have one in stock and, further, that he gave to the plaintiff's messenger the only copy of instructions which he had on hand (Exhibit 9). He further testified that he drew the attention of the messenger to the portion of pages 4 and 5 of the pamphlet in small type. The plaintiff testifies that she received the applicator with the purchase, but not the instructions, and she says further that she had never used a hair dye before, and knew very little with respect to the use of hair dye. She had seen this particular one advertised in a barber shop, and for that reason had bought it. Upon her own account of her application of the dye she, for one who had not read the instructions, seems to have applied it in a fashion surprisingly close to the manner instructed in Exhibit 9. One of the attendants in the Ideal Beauty Parlour, Mrs. Taylor, was called by the defendants and she testified that the plaintiff had been in the Ideal Beauty Parlour about November, 1937, and had discussed hair dyes, and this one in particular. She says that the plaintiff made the statement, "I simply cannot use that, [Inecto] as when I did use it my skin simply broke out in a rash." The plaintiff denies that she made such a statement to the attendant although she admits that she had been in the Ideal Beauty Shop, but she says it was at a time two or three years prior to January of 1938. I find no reason for disbelieving Mrs. Taylor and I find it difficult to believe that the plaintiff was as innocent in the matter of the use of a hair dye as she sought to lead the Court to believe.

Assuming for the moment that printed instructions did not accompany bottles "A" and "B" (Exhibits 1 and 2), it is to be noted that on the label on bottle "A" (Exhibit 1) there is printed in heavy black type, "Directions for use enclosed in the Box." The plaintiff said that she did not read the label on the bottle. She apparently did not enquire from her messenger (her son) as to whether there were any instructions—and I accept the witness Fisher's evidence that he gave the written instructions to the messenger. The plaintiff seems to have used little or no judgment in the use of the dye.

Inecto Rapid contains constituents which are quite harmful to persons with a certain type of skin. The plaintiff was one of these persons. The result of the use of the dye in her case was that it caused a rash and blistering which necessitated the services of a physician over quite a period of time. The physician said in evidence that, upon his examination of the plaintiff on the 29th of January, he found a very severe inflammation of the skin from the scalp down to the neck. He found the face, the neck, the eyelids and the top of the head badly swollen. He said the eyes were practically closed. In the doctor's opinion the plaintiff was unfit for work for a period of approximately five months. He said that she still might suffer from temporary reactions but they would not last for more than a few hours.

Dr. Cleveland, a dermatologist, condemned the dye rather vigorously. He said that it should not be used by anyone without a test being made and that a twelve-hour test was not sufficient. In his opinion it should not be sold in the open market and he doubted if it was safe in the hands of beauty-parlour operators. He expressed the opinion that the container of the dye should bear a warning. Mr. Thomson, an analytical chemist, who seemed well qualified in his profession, made an analysis of the dye, neither a complete quantitative nor qualitative analysis, but in his opinion a sufficient one to enable him to express a definite opinion. He arrived at the opinion that the dye was dangerous. He said that the bases of the dye were definitely toxic. On the other hand, several beauty-parlour operators testified that they had used Inecto for many years, that it was an effective dye and that, while they always used it with caution and after a test, unless they were satisfied that it had been used without harm before, nevertheless, in their experience the number of persons to whom the dye was harmful was not over one in a thousand. I accept their evidence that the dye may be used without harmful effects except in a very few cases. I conclude that it ought never to be used without a proper test being made as to the susceptibility of the customer to the toxic elements in the dye.

The Drug Company takes the position that the plaintiff ordered a specific article by the trade name and relies upon

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section 21 of the Sale of Goods Act, R.S.B.C. 1936, Cap. 250. The pertinent part of section 21 is as follows:

21. Subject to the provisions of this Act and of any Statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—

(*a.*) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose: Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

The plaintiff did not rely on the seller's skill or judgment and she purchased the dye under its trade name, and there was no implied condition as to its fitness for the purpose for which it was to be used. The action against the Drug Company must fail.

While this dye has a harmful effect only in the case of a very few persons, nevertheless, the fact remains that its toxic qualities are such that it is very harmful to a limited number of persons who have a healthy skin. An idiosyncrasy, while abnormal, does not necessarily, as it seems to me, amount to unhealthiness. The evidence here is that the plaintiff's skin was healthy. In my view the law demands that a dye containing toxic ingredients such as those contained in Inecto Rapid must be sold only with the clearest warning to the user of the danger involved in its use. The dye is sold for private use by inexperienced persons, as it was here. The warning ought to have been on the container. A pamphlet warning may very easily not come to the attention of the user and the written instructions here were not sufficient even assuming they were handed to plaintiff's messenger, as I have found they were.

Reference was made by counsel to a number of authorities (*inter alia*) *Farrant* v. *Barnes* (1862), 11 C.B. (N.S.) 553; *George* v. *Skivington* (1869), L.R. 5 Ex. 1 at p. 4; *Clark* v. *Army and Navy Co-operative Society,* [1903] 1 K.B. 155; *In re Inecto, Limited* (1922), 38 T.L.R. 797; *Anglo-Celtic Shipping Company, Limited* v. *Elliott and Jeffery* (1926), 42 T.L.R. 297; *Donoghue* v. *Stevenson,* [1932] A.C. 562 at pp.

611, 612 and 619; *Grant* v. *Australian Knitting Mills, Ltd.*, [1936] A.C. 85; *Parker* v. *Oloxo, Ltd.*, [1937] 3 All E.R. 524, and to the as yet unreported case of *Griffiths* v. *Peter Conway, Ltd.* Counsel were good enough to obtain for my use the reasons for judgment of Branson, J. in the latter case. It was a trial in the King's Bench Division in July of this year. The latter case, in my opinion, may be distinguished from the case at Bar. There the learned judge seems to have found that the plaintiff had an unhealthy skin and that the material in the coat which produced the harmful effects was free from all toxic ingredients which might have a harmful effect to a normal and healthy skin.

The only point which gives real difficulty is that I am satisfied that the plaintiff knew that Inecto Rapid was harmful in some degree at least before she used it on the occasion in question. There is no evidence that she knew that it would produce anything more than a rash. Had there been a proper warning on the container such as the law, in my view, requires, the probability is that she would not have used it. Under these circumstances I think she is entitled to recover as against the defendants, Inecto Rapid (Canada) Limited and W. T. Pember Stores Limited. Special damages are assessed at $130; general damages at $500.

Judgment for plaintiff except as against Pacific Drug Stores Limited.

S. C.
In Chambers
1938
Nov. 21;
Dec. 9.

REX v. NYCHUK.

Municipal Act—By-law providing for building permit—Erection of building without permit—Conviction—Certiorari—Validity of by-law—R.S.B.C. 1924, Cap. 179, Sec. 54, Subsec. (56) (ii)—B.C. Stats. 1933, Cap. 46, Sec. 4.

On October 7th, 1938, the defendant Nychuk applied to the city building inspector for a permit to build upon a lot owned by him in the city of Kelowna. The inspector refused to grant a permit on the grounds that it would depreciate the value of surrounding property. On proceeding to build, Nychuk was convicted for unlawfully erecting part of a building without a permit for such an erection having been first obtained from the inspector as provided in section 2 of the Fire Limits and Building Regulation By-law of said city. Upon *certiorari* proceedings to set aside the conviction:—

Held, that section 54, subsection 56 (ii) of the Municipal Act, R.S.B.C. 1924, authorized the council to pass a by-law "For regulating the erection and construction of buildings." This does not give the power to prohibit. The by-law in question purports to require a permit for the "Construction, erection, . . . of any building or part thereof, within the city limits." The Legislature did not give so broad a power and section 2 (a) of the by-law is invalid. There is nothing in the Municipal Act empowering the council to pass a by-law authorizing its building inspector to refuse a permit upon the grounds on which the refusal was based. Section 2 (a) of the by-law being invalid, the conviction is invalid and must be quashed.

The preliminary objection that the affidavit proving service upon the justice of the peace was insufficient and that the subsequent affidavit was too late was overruled as the absence of the affidavit of service is no ground for discharging the rule *nisi*, as the affidavit may be supplied at any time before the writ is drawn up.

CERTIORARI PROCEEDINGS by the defendant to set aside his conviction that he did unlawfully erect part of a building without a permit for such an erection having been first obtained from the inspector as provided by section 2 of the Fire Limits and Building Regulation By-law being By-law No. 668 of the city of Kelowna, as amended by By-law No. 736 of the said city. Heard by MANSON, J. in Chambers at Vernon on the 21st of November, 1938.

Galbraith, for applicant.
Archibald, and *Weddell,* for the Crown.

Cur. adv. vult.

9th December, 1938.

MANSON, J.: Nychuk was convicted at the city of Kelowna, B.C., before a justice of the peace in and for the county of Yale for that on Friday the 21st of October, 1938, at the city of Kelowna, in the county of Yale he did unlawfully erect part of a building without a permit for such an erection having been first obtained from the inspector as provided in section 2 of the Fire Limits and Building Regulation By-law, being By-law No. 668 of the city of Kelowna as amended by By-law No. 736 of the said city. He now upon *certiorari* proceedings seeks to set aside the conviction.

A preliminary objection was taken that the affidavit proving service upon the justice sworn on the 7th of November, 1938, was insufficient and that the subsequent affidavit proving service sworn on the 9th of November, 1938, was too late. In *Rex* v. *Northumberland* (1907), 71 J.P. 331, it was laid down that the absence of the affidavit of service is no ground for discharging the rule *nisi* as the affidavit may be supplied at any time before the writ is drawn up. The preliminary objection is not well taken and is overruled.

Counsel for the applicant made four submissions: (a) that the by-law in question was *ultra vires* of the municipality in that it authorized a prohibition and not merely a regulation; (b) that the information did not disclose an offence under the by-law; (c) that there was no evidence before the justice that the applicant's land and building was within the city of Kelowna; (d) that there was no evidence before the justice of any act on the part of the applicant in violation of the by-law.

Submissions (b), (c) and (d) are not sustained and the sole question to be determined is that raised by submission (a).

The By-law No. 668 above mentioned was passed by the council of the city of Kelowna on the 28th of September, 1936. It was amended by By-law No. 736 duly passed on the 26th of September, 1938. The former by-law became operative on the 6th of October, 1936, and the latter on the 28th of September, 1938.

The by-law, it is contended, was a valid law under the Municipal Act. By 1933, Cap. 46, Sec. 4, section 54 (56) of the

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Municipal Act was repealed and the following clause substituted:

(56.) (i.) For the appointing of a building inspector and defining his duties:

(ii.) For regulating the erection and construction of buildings, and for prohibiting the erection of wooden buildings, or any addition to or alteration of wooden buildings, within the fire limits of the municipality, except with the authority in writing of the building inspector; and for prohibiting the rebuilding or repairing of a wooden building within the fire limits which has deteriorated by decay or been damaged by fire to the extent of forty per cent. of its value:

(iii.) Where any by-law prohibits the rebuilding or repairing of a wooden building within the fire limits which has been damaged by fire to the extent of forty per cent. of its value, it shall provide for an appeal to the judge of the County Court within the territorial limits of which the property lies from the refusal to grant permission to repair or rebuild any such building. Such appeal shall be by petition and shall be served upon the municipality within five days of such refusal. The judge shall hear and determine the matter of appeal and shall make such order as seems meet to him.

By 1928, Cap. 32, Sec. 10, section 54 (61*d*) of the Municipal Act was repealed and the following clause substituted:

(61*d*.) For requiring contractors, owners, or other persons to obtain and hold a valid permit from the council, or from the proper officials authorized from time to time by resolution or by-law of the council for such purpose, before commencing and at all times during any erection, installation, addition, repair, or alteration of gas pipes and fittings, plumbing, electrical wiring, sewers, drains, tents, signs, gasoline tanks and pumps, and all similar works and things and buildings and structures of the kind, description, or value specified in the by-law; for limiting the time within which any erection, installation, addition, repair, or alteration shall be commenced and completed; for providing during what time such permit shall be valid; for authorizing the inspection of said works and things and for requiring the deposit with application for permit of suitable plans and specifications therefor; for levying and collecting permit fees and inspection charges and fees at the time of issuing the permit.

By-law No. 668 provides (*inter alia*) for the appointing of a building inspector. The question of building permits is dealt with in section 2 of the by-law, which reads in part as follows:

2 (a) The construction, erection, . . . of any building or part thereof, within the city limits, shall not be commenced or carried on by any person until a permit for such work shall first have been obtained from the inspector.

(b) The application for such a permit shall be in writing, . . .

(e) If, however, he considers that such proposed work is not in accordance with this by-law and the statutes of the Province of British Columbia and the Dominion of Canada relating thereto, or any of them, or with any rules, regulations, or ordinances made thereunder, or that sufficient provisions

have not been made in regard to public safety, fire, sanitation, ventilation, or that such work, if carried out, will be a deformity or incongruity or that it is likely to depreciate the assessable value of adjacent property, he shall refuse a permit, . . .

On the 7th of October, 1938, Nychuk applied to the city building inspector for a permit to build upon a lot owned by him in the city of Kelowna. On the 24th of October, 1938, the inspector wrote Nychuk refusing his application "on the grounds that in my opinion it will depreciate the value of surrounding property." (Exhibit D, affidavit Nychuk, 31st October, 1938).

The owner of a parcel of land is entitled to build upon it if he chooses unless by authority of Parliament that right has been taken from him or curtailed—providing, of course, he does not build so as to endanger the occupants of adjoining property. Municipalities have those powers and those only which are given to them by the Legislature.

It will be observed that section 54 (56) (ii) of the Municipal Act authorized the council to pass a by-law "For regulating the erection and construction of buildings." That is not a power to prohibit, and the quoted words are to be read with the later words of the clause, namely, "within the fire limits of the municipality." That, it seems to me, is the natural reading of the clause, and one is confirmed in that view in that both clauses (ii) and (iii) of subsection (56) have to do with fire prevention. The relevant part of section 54 (61*d*) is

For requiring contractors, owners, or other persons to obtain and hold a valid permit . . . before commencement and at all times during any erection, installation, addition, repair, or alteration of . . . buildings and structures of the kind, description, or value specified in the by-law.

The by-law in question purports to require a permit for the

Construction, erection . . . of any building or part thereof, within the city limits, . . .

The Legislature did not give so broad a power—effect must be given to the words "of the kind . . . specified in the by-law." In my view section 2 (a) of the by-law is invalid. It is conspicuous, too, that there is nothing in the Municipal Act empowering the council to pass a by-law authorizing its building inspector to refuse a permit upon the grounds on which the refusal here was based. The portion of the by-law purporting to give the power is *ultra vires*.

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Section 2 (a) of the by-law being invalid, the conviction is invalid and must be quashed.

Conviction quashed.

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O'FALLON v. INECTO RAPID (CANADA) LIMITED, W. T. PEMBER STORES LIMITED AND PACIFIC DRUG STORES LIMITED. (No. 2).

Practice—Costs—Sale of dangerous goods—Injury to purchaser—Action for damages—Finding against two defendants—Action dismissed against third defendant—Liability of unsuccessful defendants for costs of successful defendant—Order LXV., r. 32.

The plaintiff sustained injuries from the use of a hair dye known to the trade as "Inecto Rapid" which she purchased from a retailer, the Pacific Drug Stores Limited. She brought action for damages against the manufacturer, the wholesale distributor and the retailer. She recovered judgment against the manufacturer and wholesale distributor but the action was dismissed as against the retailer. An application by the plaintiff and Pacific Drug Stores Limited for an order directing that the costs of the defendant Pacific Drug Stores Limited be taxed as against the other two defendants under Order LXV., r. 32, was dismissed.

APPLICATION by plaintiff and the successful defendant Pacific Drug Stores Limited for an order directing that the costs of the successful defendant be taxed as against the unsuccessful defendants, namely Inecto Rapid (Canada) Limited and W. T. Pember Stores Limited, manufacturers and distributors respectively of the hair dye in question in the action. Heard by MANSON, J. at Vancouver on the 6th of December, 1938.

Marsden, for plaintiff.

G. Roy Long, for defendant Pacific Drug Stores Limited.

Burnett, for defendants Inecto Rapid (Canada) Limited and W. T. Pember Stores Limited.

Cur. adv. vult.

13th December, 1938.

MANSON, J.: Application by plaintiff and defendant Pacific Drug Stores Limited for an order directing that the costs of the

defendant Pacific Drug Stores Limited be taxed as against the other two defendants under Order LXV., r. 32, which rule reads as follows:

> 32. Where the costs of one defendant ought to be paid by another defendant, the Court may order payment to be made by one defendant to the other directly; and it is not to be necessary to order payment through the plaintiff.

The above rule has been considered in the following cases: *Green* v. *B.C. Electric Ry. Co.* (1915), 9 W.W.R. 75; *Goodell* v. *Marriott* (1929), 44 B.C. 239; *Holt* v. *Holmes & Wilson Ltd.* (1930), 42 B.C. 545; *Rhys* v. *Wright and Lambert* (1931), 43 B.C. 558; *Jarvis* v. *Southard Motors Ltd.* (1932), 45 B.C. 144; *Smith* v. *Kennedy and Thomas* (1936), 51 B.C. 52; *Hampton* v. *Park* (1937), 52 B.C. 294. In considering a similar situation in *Sanderson* v. *Blyth Theatre Company*, [1903] 2 K.B. 533, Romer, L.J., observed at p. 539:

> Of course, in exercising the jurisdiction, a judge should have regard to the circumstances of the case, and be satisfied that it is just that the unsuccessful defendant should, either directly or indirectly, have to pay the costs of the successful defendant.

And Vaughan Williams, L.J., at p. 544 gave expression to a similar warning.

The cases in our own Courts on the point were all collision cases and in all of them question arose as to whether or not the plaintiff was justified in bringing action against all of the several defendants in the uncertainty of just which of the defendants was guilty of the negligence which resulted in the damages. Speaking generally, the submission was, in each case, that the several defendants were all involved and it was not to be expected that the injured plaintiff could know before trial that all of the several defendants did not contribute to the negligence. Furthermore, in several of the cases the defendants by their pleadings blamed each other.

This case does not fall within the class of cases above referred to. Here, the successful defendant was a retailer. The plaintiff bought from the successful defendant a specific article under its trade name. I found that the plaintiff did not rely on the seller's skill or judgment and that she was barred from recovery from Pacific Drug Stores Limited by section 21 of the Sale of Goods Act, R.S.B.C. 1936, Cap. 250. The Drug Stores' defence

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was an entirely different defence from that of the other two defendants. It was urged that the plaintiff by joining the Drug Stores as a defendant really saved costs as against the other two defendants. I cannot accept that submission as a determining factor in disposing of this application. I do not regard this as a case where an order should be made directing that the first two named defendants should pay to the third named defendant its costs of the action. It is entitled to its costs as against the plaintiff.

The judgment in this matter has not been entered. I therefore take this opportunity to reconsider the general damages assessed when I gave my reasons for judgment on the 12th of November. General damages nearly always give difficulty. On reconsideration I feel that I probably did not sufficiently take into account the pain and suffering to which the plaintiff was put. It was very considerable. I therefore assess the general damages at $650 instead of at the figure originally named.

Application refused.

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Sept. 6, 15.

[IN BANKRUPTCY.]

IN RE ESTATE OF H. O. KIRKHAM AND CO., LIMITED.

Bankruptcy—Practice—Application by trustee against third party—Leave of inspector not obtained—Objection to procedure—R.S.C. 1927, Cap. 11, Sec. 43 (c)—Bankruptcy Rule 142.

Section 43, subsection (*c*) of the Bankruptcy Act recites "The trustee may, with the permission in writing of the inspectors, do all or any of the following things:— . . . (*c*) Bring, institute, or defend any action or other legal proceeding relating to the property of the debtor."

On an application by the trustee under Bankruptcy Rule 142 for an order declaring that the payment of $9,000 made by the debtor to The Canadian Bank of Commerce, claimed by the bank to be due by the said debtor to it, was made with a view of giving the three sureties or guarantors of said debt a preference over the other creditors of said debtor, one of the said guarantors raised the preliminary objection

that at the time it was launched the trustee had not obtained the permission in writing of the inspectors as required by the above section of the Bankruptcy Act.

Held, that the obtaining of the consent of the inspector to the taking of proceedings is merely a provision for the protection of the estate and is not one which a defendant in any proceedings by the trustee is entitled to avail himself of in answer to those proceedings.

APPLICATION by the trustee in bankruptcy of the estate of H. O. Kirkham and Co. Limited under rule 142 of the Bankruptcy Rules. Heard by FISHER, J. in Chambers at Victoria on the 6th of September, 1938.

Haldane, for trustee in bankruptcy.
Manzer, contra.

Cur. adv. vult.

15th September, 1938.

FISHER, J.: This is an application in Chambers by the trustee herein under rule 142 (formerly 120) of the Bankruptcy Rules for an order declaring that the payments made by the said debtor to The Canadian Bank of Commerce, Victoria, B.C., amounting in all to the sum of approximately $9,000 in payment of moneys claimed by the said bank to be due by the said debtor to it were payments made with a view of giving to L. Batchelor, F. E. Anderson and T. Milburn (who were sureties for the said debt or guarantors of the said debt) a preference over the other creditors of the said debtor and are fraudulent and void as against the said trustee; and for an order setting aside or avoiding the same pursuant to the provisions of the Bankruptcy Act and Rules and directing payment of the said sums by the said L. Batchelor, F. E. Anderson and T. Milburn to the said trustee.

The first or preliminary objection taken to the application by counsel on behalf of the said L. Batchelor is that at the time it was launched the trustee had not obtained the permission in writing of the inspectors. Counsel refers to section 43 (*c*) of the Bankruptcy Act, reading as follows: [already set out in the head-note].

Counsel relies especially on the following cases: *Stillwater*

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Lumber & Shingle Co. v. *Canada Lumber & Timber Co.* (1923), 32 B.C. 81; 3 C.B.R. 807; and *Re Viscount Grain Growers' Co-Operative Association's Trustee* v. *Brumwell,* 18 Sask. L.R. 599; [1924] 3 D.L.R. 803.

On the other hand counsel for the trustee, while contending that permission in writing of the inspectors had or has since been obtained, submits that in any event the defendant or respondent in these proceedings cannot rely on its absence as a defence and cites Duncan and Reilley on Bankruptcy in Canada, 2nd Ed., 337, 347, and 352, and cases referred to therein, especially *In re Branson, Ex parte The Trustee,* [1914] 2 K.B. 701; *In re Tremblay* (1922), 3 C.B.R. 488, 490; and *In re Grobstein et al.* (1929), 11 C.B.R. 250.

In the *Branson* case the head-note reads as follows:

Sect. 22, sub-s. 9, and s. 57 of the Bankruptcy Act, 1883, and s. 15 of the Bankruptcy Act, 1890, which require a trustee in bankruptcy, before taking any proceedings or employing a solicitor, to obtain the sanction of the committee of inspection or of the Board of Trade, are provisions for the protection of the estate, as between the trustee and the estate, on matters relating to his costs, charges, and expenses, and afford no defence to any proceedings which the trustee, without such sanction, may institute against other parties.

And at pp. 703-4, Horridge, J., says in part as follows:

The question is whether the obtaining of that sanction is a matter for the protection of the estate so that the trustee may not incur solicitors' costs without getting the sanction of the committee, or whether the section creates a condition precedent to the right of the trustee to take proceedings against any third parties. . . . The point may occur again, and therefore I think it as well to give a distinct ruling upon it. My ruling is that the obtaining of the consent of the committee of inspection to the taking of proceedings is merely a provision for the protection of the estate and is not one which the respondent or the defendant in any proceedings by the trustee is entitled to avail himself of in answer to those proceedings.

In the *Tremblay* case, *supra,* Rinfret, J., at p. 490, says in part as follows:

Judgment delivered July 14, 1922, shows that, in his oral pleadings, counsel for plaintiff, in answer to the preliminary exception of trustee, brought up the objection that the latter had not been authorized to sue by the inspectors to the bankruptcy according to sec. 20 of the Bankruptcy Act. [1 C.B.R. 29, sub-sec. (c)].

Counsel for plaintiff also argued "that his action could be taken before the Superior Court and could be heard by any of its judges" according to

the latest amendment to the Bankruptcy Act. [See 1922, Can., ch. 8, secs. 8 and 9, 2 C.B.R. 615, 616].

Martineau, J. refused to hear these two objections; he was of opinion that sec. 20 of the Bankruptcy Act, being the textual reproduction of the English Act, should be interpreted as it is in England; and that the jurisprudence in England is to the effect that the permission of the inspectors is not required to give capacity to the trustee, but merely to protect the estate on matters relating to costs of proceedings made without their knowledge and consent. *In re Branson; Ex parte The Trustee,* [1914] 2 K.B. 701; 83 L.J.K.B. 1316, 21 Manson 160, and other cases cited in his judgment; Duncan's Law and Practice of Bankruptcy in Canada, p. 265. . . .

Plaintiff's counsel urged before this Court, the same objections which he had already brought up during the first hearing in the Superior Court.

The Court dismisses them immediately, because there is *res judicata* between the parties accompanied by acquiescence, and because, at all events, it would adopt the reasons of the judgment delivered July 14 by Martineau, J.

In the *Grobstein* case, *supra,* the head-note in part reads as follows:

Absence of permission in writing of inspectors to authorize trustee to take proceedings is not a fatal defect. The permission of inspectors is not required to give capacity to the trustee, but merely to protect the estate on matters relating to costs, and proceedings made without their knowledge and consent (*In re Tremblay* (1922), 3 C.B.R. 488).

I agree with the submission of counsel on behalf of the said L. Batchelor to this extent that, if the point in issue here has been considered and decided by our Court of Appeal in the *Stillwater* case, *supra,* I am bound to follow such decision. Counsel on behalf of the trustee, however, submits that the point in issue here was not decided in the *Stillwater* case and it becomes necessary therefore to consider the exact nature of the question decided upon the appeal in the *Stillwater* case. Referring to the report of this case in 3 C.B.R. at p. 807, I note that MACDONALD, C.J.A., says as follows (pp. 808-9):

The question to be decided in this appeal is the right of the trustee to proceed by action instead of in the Bankruptcy Court. The learned judge held that the trustee should have proceeded under rule 120 of the Bankruptcy Rules, which provides a summary method of disposing of matters of this kind by a motion in Chambers in the first place, which may afterwards take the form of an issue or trial [1 C.B.R. 213]. If the inspector in this case had consented to the bringing of an action in the Supreme Court, I should have no doubt that it would not be competent for any Court to dismiss the action merely because in its opinion it might have been proceeded with under the provisions of rule 120. When a trustee in bankruptcy is given by statute the right to do a thing no Court has power to

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deny that right. *In re Dominion Trust Company and Critchley* (1916), 23 B.C. 42; 10 W.W.R. 655, 34 W.L.R. 461.

The written consent which the trustee obtained from the inspector in this case does not, however, in terms authorize him to bring an action in the Supreme Court. It reads: "I consent for you to bring, institute, or take such legal proceedings as may be necessary" for the recovery of the moneys in question. I am of opinion that the Bankruptcy Court has jurisdiction to entertain and dispose of the questions involved in this action, notwithstanding that the action when properly authorized, might also have been taken in the Supreme Court. That is to say, there was concurrent jurisdiction. It is really for the inspector to decide in which Court the proceedings shall be taken, and in the absence of his specific authorization to take the proceedings in the Supreme Court, I think the proceedings ought to have been taken in the summary manner provided for in the Bankruptcy Act and Rules. The consent above recited merely authorizes such legal proceedings as may be necessary. There was no necessity for invoking the jurisdiction of the Supreme Court in this matter, and I do not think that the trustee could invoke it without distinct authority in that behalf, which in my opinion he has failed to obtain.

At pp. 810-11 MARTIN, J.A. (now Chief Justice of British Columbia), says in part as follows:

But it is submitted that rule 120 is *ultra vires* because it attempts "to extend the jurisdiction of the Court" which is forbidden by section 66 (2), *supra*, and the trustee relies upon the fact that he has obtained the permission of the inspector to bring this action under section 20 (1) (*c*), which provides that with such permission he may "bring, institute, or defend any action or other legal proceeding relating to the property of the debtor." [1 C.B.R. 29]. The permission he has got empowers him "to bring, institute, or take such legal proceeding as may be necessary," etc., herein, hence I am unable to see why there is any attempted extension of jurisdiction because section 20 only authorizes him to take the appropriate "proceeding" and the effect of rule 120 is simply that in certain specified matters to which it relates, *i.e.*, settlements and preferences, a certain "proceeding" in Chambers shall be followed whatever "action or legal proceeding" might be necessary in other cases.

In the *Grain Growers* case, *supra*, Haultain, C.J.S., says in part as follows at p. 804:

The facts of this case are fully set out in the judgment appealed from which is reported in [1924] 1 D.L.R. 397. The trial judge following the decisions in *Bartley's Trustee* v. *Hill* (1921), 61 D.L.R. 473, 50 O.L.R. 321, and *Stillwater Lumber & Shingle Co.* v. *Canada Lumber & Timber Co.*, 32 B.C. 81; [1923] 2 D.L.R. 900, held that in the absence of the inspectors' specific authorization to proceed by action in the Court of King's Bench the proceedings should have been brought by application in Chambers in accordance with Bankruptcy Rule 120, and dismissed the action accordingly.

In the same case Lamont, J.A., at p. 807 says as follows:

The argument for the trustee is that R. 120 is inconsistent with s. 20 (1) (*c*) of the Act which permits the trustee to institute an action. That section reads:

"20. (1) The trustee may, with the permission in writing of the inspectors, do all or any of the following things. . . . (*c*) Bring, institute, or defend any action or other legal proceeding relating to the property of the debtor."

The same point came before the Court of Appeal in British Columbia in *Stillwater Lumber & Shingle Co.* v. *Canada Lumber & Timber Co., supra.* In that case it was held that the trustee should not have commenced action by way of writ of summons because he had no express authority from the inspectors to proceed in that manner. MARTIN, J.A., in his judgment however expressed the opinion that there was no inconsistency between the section and the rule. I find myself in accord with the opinion expressed by that judge. The section provides that the trustee shall have power to institute actions and other legal proceedings while the rule specifies the manner in which such action or proceeding shall be commenced when the relief sought is the setting aside of any settlement, conveyance, transfer, etc. It is not, in my opinion, necessary that an action should be commenced by a writ of summons although in most jurisdictions the rules direct that it shall be so commenced until otherwise so provided.

There is no doubt that the decision in the *Stillwater* case was followed in the *Grain Growers* case, *supra,* but after some hesitation I have come to the conclusion that the only question that was really before our Court of Appeal and decided in the *Stillwater* case was the right of the trustee to proceed by action instead of in the Bankruptcy Court. It may be noted that the head-note of the case as reported in 32 B.C. 81, says:

Held, on appeal, affirming the decision of MACDONALD, J., that as the written consent of the inspector does not in terms authorize him to bring an action in the Supreme Court he should have taken proceedings in the summary manner provided for in the Bankruptcy Act and Rules.

Though some passages in the judgments in the two cases might seem to indicate otherwise, my view is that neither the *Stillwater* case nor the *Grain Growers* case decided the question as to whether the absence of the permission of the inspectors can be set up as an answer by the defendant or respondent to proceedings taken in Chambers by the trustee under the said Bankruptcy Rule relating to settlements and preferences. Such being my view I think I should follow as I do the decision in the *Branson* case, *supra,* approved as it has been in the *Tremblay* and *Grobstein* cases above referred to.

My ruling therefore is that in any event the said L. Batchelor

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as one of the defendants or respondents in these Chamber proceedings cannot avail himself of the provision in 43 (*c*) as aforesaid in answer thereto as it is merely a provision for the protection of the estate. The first or preliminary objection to the granting of the application is therefore overruled without the necessity of my expressing any opinion as to the contention of counsel for the trustee that the permission in writing of the inspector had or has since been obtained by the trustee. I am therefore expressing no opinion as to such contention.

It is further submitted, however, by counsel in opposition to the application that on the material before me it should not be granted. If I understand aright the argument of counsel on behalf of the trustee he does not argue that on the material before me he would be entitled to have the whole matter finally determined but he submits that the material is sufficient for an order directing an issue. I have to say that I agree that the material is sufficient for such an order and there will be an order accordingly with liberty to counsel to speak to the exact terms of the order.

Order accordingly.

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Feb. 9, 10, 22.

TREWIN v. WAWANESA MUTUAL INSURANCE COMPANY.

Insurance, automobile—Application through agent—Authority of agent to bind company.

The plaintiff insured his car through M., an insurance agent, with the Portage La Prairie Mutual Insurance Co. The policy expired on May 25th, 1935. Before its expiry M. asked the plaintiff if he wanted to renew his policy, and plaintiff replied in the affirmative. M. took plaintiff's application to the defendant company who accepted it, issued a policy and sent it to the plaintiff. This policy expired on the 25th of May, 1936. Before its expiry M. asked the plaintiff if he desired to renew and the plaintiff replied in the affirmative and signed an application. M. then told plaintiff he was covered. M. did not submit the plaintiff's last application to the defendant nor did defendant issue a new policy to the plaintiff. On June 21st, 1936, the plaintiff had an accident with

his car and one Bradley and his wife were injured. The plaintiff immediately notified M. who with one W., another insurance agent, attended the plaintiff and investigated the facts of the accident. The defendant company heard nothing of the accident until September 30th, 1936. In November, 1936, the plaintiff received a policy issued by the Saskatchewan Mutual Insurance Co. by its agent W., showing the policy period as being from June 30th, 1936, to June 30th, 1937. Bradley and his wife brought action for damages against the plaintiff on July 7th, 1936, and he sent the writ to M., who returned it and said the company would not assume responsibility. Bradley and his wife recovered judgment against the plaintiff who then brought this action against the defendant, claiming that it by its agent M. agreed to insure the plaintiff from May 25th, 1936. At the trial the plaintiff did not remember to what insurance company the last application was addressed, and the defendant contends that M. had authority simply to submit applications for the insurance to the defendant for its acceptance or rejection.

Held, that M. did not submit any application for renewal from the plaintiff to the defendant. It is a fair inference that before the 25th of May, 1936, the plaintiff signed an application for insurance in the Saskatchewan Mutual Fire Insurance Co. and no renewal contract was made by the plaintiff with the defendant, further the plaintiff did not prove that M. had authority to contract for the defendant.

THE plaintiff was the owner of an Essex Sedan automobile. In the year 1934 he took out a motor-vehicle liability policy of insurance with the Portage La Prairie Mutual Insurance Company through an insurance agent, G. H. Monk. This policy expired May 25th, 1935. Before its expiry Monk asked the plaintiff if he wanted to renew his policy, and the plaintiff replied in the affirmative. Monk took the plaintiff's application and submitted it to the defendant Wawanesa Mutual Insurance Company, who accepted it, issued a policy and sent it to the plaintiff. This policy expired May 25th, 1936. Before its expiry Monk asked the plaintiff if he desired to renew it. The plaintiff replied in the affirmative and signed an application. Monk then told the plaintiff he was covered. At the trial the plaintiff said he did not remember to what insurance company the application was addressed. In May, 1936, and for some time thereafter Monk was doing business with the defendant, placing insurance with it. He did not submit the plaintiff's application of May, 1936, to the defendant, and the defendant did not issue any new policy to the plaintiff. On June 21st, 1936, the plaintiff

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had an accident with his car and two persons, Mr. and Mrs. Bradley, were injured. He promptly notified Monk of the accident, and Monk, accompanied by another insurance agent, Ben S. Whitaker, attended on the plaintiff and investigated the facts of the accident. On July 7th, 1936, Mr. and Mrs. Bradley sued the plaintiff, who sent the writ to Monk. Monk returned the writ to the plaintiff and told him the company (without naming it) would not assume responsibility and he, the plaintiff, would have to retain his own solicitor. The defendant Wawanesa Mutual Insurance Company heard nothing of the accident until September 30th, 1936, when Monk notified it thereof by letter. It took no part in the action brought by the Bradleys against Trewin. In November, 1936, the plaintiff Trewin received through the mail a motor-vehicle liability policy issued by the Saskatchewan Mutual Insurance Company by its agent Ben S. Whitaker (mentioned above) showing the policy period as being from June 30th, 1936, to June 30th, 1937. These dates were not the original dates, such original dates having been erased and changed. Mr. and Mrs. Bradley obtained judgment against the plaintiff, who then brought this action against the defendant, claiming that it, by its agent G. H. Monk, had agreed to insure the plaintiff from May 25th, 1936. Tried by FISHER, J. at Vancouver on the 9th and 10th of February, 1938.

McAlpine, K.C., and *W. H. Campbell,* for plaintiff.
Tysoe, for defendant.

Cur. adv. vult.

22nd February, 1938.

FISHER, J.: The plaintiff brings this action for, *inter alia,* specific performance of a contract of insurance against motor-vehicle liability alleged to have been made through one G. H. Monk on behalf of the defendant on or about the 25th of May, 1936.

The plaintiff contends that Monk had authority to contract on behalf of the defendant, while the defendant contends that he had authority simply to submit applications for insurance to the defendant for its acceptance or rejection. The defendant company further contends that in any event the plaintiff did

not make any such renewal contract with the defendant as is alleged. The first question to be settled undoubtedly is whether or not the plaintiff has proved that he did make such a contract with the defendant. In this connection reference might be made to what was said by the plaintiff in his examination for discovery. On his discovery he said in part as follows:

Can you tell me when your automobile insurance was first placed with the Wawanesa Insurance Co.? I believe it was in May, 1935.

May, 1935. Just take your time. I believe it was in May, 1935.

Yes. Well now, that was placed through this man Monk? Through Monk, yes.

And before that it had been in the Portage La Prairie? With Monk?

Yes. Yes, with the Portage La Prairie previous to that.

Now would you tell me just what happened between you and Monk when your last policy with the Portage La Prairie expired, or was about to expire? Well, he just came up and asked for a renewal. He asked me if I was renewing my policy with him.

And what did you tell him? I told him yes.

And then what was the next thing that happened? Did he bring you the policy? Well, the policy came along by mail, with a bill or an account for the amount of the insurance.

Have you that policy here? Is that the policy you have reference to? Yes.

You produce a policy of insurance numbered F8199 issued by the Wawanesa Insurance Company to you. Is that the policy you have been speaking about? Yes.

(Policy marked No. 1 for identification.)

And this was the first policy you had had in the Wawanesa? Yes, sure.

I beg your pardon? Yes.

I see this policy runs from the 25th of May, 1935, to the 25th of May, 1936. I take it that the Portage policy which you had had prior to this policy, expired on the 25th of May, 1935. Would that be right? That would be right.

And this policy which has been marked 1 was delivered to you by Monk as a result of the interview you had had with Monk about renewing your other policy—the previous policy? Yes.

That is right is it? Yes.

And did you know, Mr. Trewin, that you were going to get a policy issued by the Wawanesa Insurance Co. instead of the Portage La Prairie? No, I cannot say definitely that I did.

I suppose you simply left it to Monk to put your insurance in whatever company he happened to be representing, is that so? Yes, under the group.

You were not concerned with whether it was the Portage La Prairie, or the Wawanesa or any other company? No, as long as I got an insurance policy.

. . . . .

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I want to show you Mr. Trewin, an application or what purports to be an application for this policy in the Wawanesa, which has been marked 1. Would you just look at that. Is that your signature at the bottom? Yes, that is my signature.

(Document marked No. 4 for identification.)

And that application is in fact the application for this policy which has been marked 1, is it not? Yes.

Do you recollect the circumstances under which you signed that application? Do you remember when you signed it? I signed it up at the hospital.

At the hospital? At the hospital.

Before or after you actually received the policy? Oh, away before.

Before? Yes, away beforehand.

Did Monk bring it to you to sign? Yes.

Monk brought it to you to sign. And I suppose he did that at the time he discussed with you renewing your existing policy? Yes. He just came up and said "Your insurance is up on such and such a date. Are you going to renew it?" and he had all that made out ready for me to sign.

Well then, this policy which has been marked Exhibit 1, ran along until May, 1936, when it was about to expire, and then what happened then, Mr. Trewin? Just the usual procedure. He came up just before the policy expired—I don't know exactly how long before.

When you say he, you mean Monk? Yes, Monk came up to the hospital and asked if I were going to renew it, and I said yes, and I remember signing an application, but that was all there was to it—just the usual.

Well, you mean similar to what had gone on in previous years? Similar to what had happened in previous years.

Did Monk at that time tell you anything about his ceasing to represent the Wawanesa? No.

He never said anything about it? In fact he very rarely mentioned the name of the company.

Well, as I understand it you were not interested in what company it was being placed so long as——it was a *bona fide* company.

——so long as it was a *bona fide* company. And I suppose this last conversation, of which you have been speaking occurred some time in May, 1936? Yes.

And it took place between you and Monk at the hospital? Yes.

It wasn't by telephone? No, no.

Now give me as near as you can—just as nearly as you can the conversation that took place between you and Monk—the words that he used and the words that you used. Well, as near as I can recollect it I was on duty at the time and he came up and told me that my policy ran out on the 25th of May, and was I going to renew it, and I said "Yes, just carry on the same as you did before." Just the usual line that an agent gives, thanking you for your business and that—and that was all there was to it.

And you think you signed an application do you? Oh yes, I signed an application.

Do you remember what company it was in? No, I don't.

. . . . .

I find that Monk did not submit any application for renewal from the plaintiff to the defendant and the plaintiff did not receive from the defendant any renewal policy. The plaintiff's automobile (Essex Sedan—model year 1931) was involved in an accident on the 21st of June, 1936, and some time after that date the plaintiff received a policy in the Saskatchewan Mutual Fire Insurance Company with respect to which the plaintiff, on his examination for discovery, says as follows:

Monk sent you a policy from the Saskatchewan Mutual? Yes.

When did he send you that? It was away on in July sometime.

Covering this very renewal that you had requested? No, it could not have been covering the renewal because it was dated from sometime in July.

What happened to that policy, did you keep it? Yes.

At the trial the plaintiff said that he had received such policy sometime later than July and he would appear to have received the policy by mail about November 30th, 1936 (see Exhibit 15). According to the said policy in the Saskatchewan Mutual Fire Insurance Company, No. M800105 (Exhibit 14) the policy period was from June 30th, 1936, to June 30th, 1937, but the dates would appear to have been changed. At the top of page 1 of said policy, the following words appear:

Whereas an application in writing has been made by the applicant therein mentioned and hereinafter called the insured to the insurer for a contract of insurance in respect of the automobile—described in the said application and the said application forms part of this contract and is as follows:

Such application is thereinafter set out and purports to be by Edwin Trewin, the plaintiff, for the same automobile (Essex Sedan—model year 1931) as was covered by the above-mentioned policy with the defendant company, No. F8199 (marked at the trial Exhibit 5). Counsel on behalf of the defendant has called attention to the fact that under item 5 on the said application there is a statement to the effect that no automobile owned or operated by the applicant has been involved in any accident within the three years preceding the application. Attached to the said policy, No. M800105 (Exhibit 14) is a No Claims Bonus Endorsement, reading, in part, as follows:

The policy of which this endorsement forms a part is issued at a reduction of 20%—because of the following considerations:

. . . . .

2. No private passenger automobile owned by the insured has been involved in an accident as the result of which a claim has been paid or is

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outstanding for personal injury or damage to the property of another while being driven by him or while being driven by anyone with his permission, expressed or implied during a period of 36 months immediately prior to the effective date of the policy.

Prior to the 30th of June, 1936, namely, on the 21st of June, 1936, the said automobile owned and operated by the said Edwin Trewin had been so involved in an accident as aforesaid and this fact was known to Mr. B. S. Whitaker, who apparently had issued the policy, because Mr. Whitaker himself investigated the accident. Attention has already been called to the fact that the date of the policy period had been changed to June 30th, 1936, from some other date and it is argued by counsel on behalf of the defendant that there is only one inference that can be drawn from this, namely, that the original effective date of this policy was prior to the 21st of June, 1936, and that such policy of the Saskatchewan Mutual Fire Insurance Company was issued pursuant to the application which the plaintiff Trewin speaks of in his answers on his discovery as above set out. In other words counsel on behalf of the defendant company argues that the plaintiff made a contract with the Saskatchewan Mutual Fire Insurance Company and not with the defendant, Wawanesa Mutual Insurance Company. It would appear that the said Saskatchewan Mutual Fire Insurance Company was not a licensed insurer until the 30th of June, 1936, but there is in evidence another insurance policy of the said company (Exhibit 19) for which the policy period is stated as running from May 19th, 1936, and attention is called to section 191 of the Insurance Act, R.S.B.C. 1936, Cap. 133, reading as follows:

Subject to this Part, any person may make a contract with an unlicensed insurer.

The said G. H. Monk was not called as a witness at the trial but Mr. Whitaker was called as a witness by the defendant. Mr. Whitaker says that the Saskatchewan Mutual Fire Insurance Company never received any application from the plaintiff and that the policy (Exhibit 14) was issued with no instructions from the plaintiff but with the hope that he might accept it. Having in mind that the first page of such policy (Exhibit 14), issued by Mr. Whitaker himself, sets out an application as aforesaid I would say that this evidence is almost incredible

and having in mind the whole of the evidence I have to say that I find myself unable to accept it. It must be noted that the plaintiff says that Mr. Whitaker was apparently investigating the accident along with Mr. Monk soon after the accident on June 21st, 1936, and that when he went up to see Mr. Whitaker he noticed that Mr. Whitaker was with the Saskatchewan Mutual Fire Insurance Company. It is also worthy of note that Mr. Monk would not appear to have advised the Wawanesa Mutual Insurance Company of the accident until September 30th, 1936, when he wrote the said defendant company as follows (Exhibit 11):

Please be advised that the writer has just learned that you may be involved, as a defendant, through damages incurred in an automobile accident which occurred on June 21st last. Full particulars regarding this matter can be conveyed to you more satisfactorily by Mr. W. H. Campbell, Barrister, 470 Granville St., and we respectfully suggest that you get in touch with him as soon as possible.

In his examination for discovery, as above set out, the plaintiff, referring to his interview with Monk sometime before his policy in the defendant company (Exhibit 5) expired, says that he signed an application but does not remember what company it was in. At the trial he said it might have been in the Saskatchewan Mutual Fire Insurance Company. It must also be noted that in his examination for discovery he said, in answer to questions, as follows:

Well, then, we will come back to this interview with Monk about the renewal, at the time the Portage policy expired. Did he say anything to you at that time about not renewing it with the Portage, and putting it with another company? Not at that time.

Well then did you know at that time whether he was going to renew the policy in the Portage or in some other company? I did not know until I got my policy—the next policy.

You did not know until you got the Wawanesa policy? I did not know until I got the Wawanesa policy.

. . . . .

Now apart from that policy that you got, Exhibit 1, and your payment of the premium to the Wawanesa, was there anything else that led you to think or believe that Monk represented the Wawanesa? Only the policy.

And your payment of the premium? And my payment of the premium and his name on the policy.

Also the fact that he stated to you he represented them, and when he asked you "Did you wish the policy renewed in the company?" what did you understand by that? Well I would not say definitely that he meant

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that he was carrying on the business of the same company as in the previous year.

. . . . .

Upon the whole of the evidence before me I think it is a fair inference and I find that before the 25th of May, 1936, the plaintiff signed an application for insurance in the Saskatchewan Mutual Fire Insurance Company. I express no opinion as to whether or not a contract was made by the plaintiff with such company but I find that no renewal contract was made by the plaintiff with the defendant company, through Monk, even assuming that Monk had authority at the time to contract on behalf of the defendant company. In case this matter should go further I think I should add that I also find that the plaintiff has not proved that Monk had authority to contract for the company or had any more authority than simply to submit applications for insurance to the defendant for its acceptance or rejection.

This action is therefore dismissed.

Action dismissed.

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CHESWORTH v. CANADIAN NORTHERN PACIFIC RAILWAY COMPANY.

Negligence — Damages — Evidence taken for discovery — Rejected by trial judge—Action dismissed—Appeal—Evidence improperly rejected—New trial—Rule 370c (1).

In an action for damages for negligence resulting from a collision between a train of the defendant company and an automobile in which the plaintiff and his wife were passengers, at Colwood crossing, where the tracks of the defendant company cross the Island Highway, the trial judge refused to allow the plaintiff to put in under Rule 370c (1) parts of the examination for discovery of the engineer and brakeman on the train, servants of the defendant company, holding that the decision in *Westminster Woodworking Co.* v. *Stuyvesant Insurance Co.* (1915), 8 W.W.R. 112, was binding upon him.

Held, on appeal, reversing the decision of MURPHY, J., that the above rule under which the application was made was amended after the case

upon which the learned judge relied was decided, by the words "or any part thereof" being inserted in the last sentence thereof, thus permitting the use of "any part of the evidence." The evidence would have substantially supported the plaintiff's case, the appeal should therefore be allowed and a new trial ordered because of the rejection of this evidence.

APPEAL by plaintiff from the decision of MURPHY, J. and a jury in an action for damages resulting from a collision between a train of the defendant company and an automobile driven by one Richard Valentine. The plaintiff and his wife were passengers in the automobile. The accident took place at ten minutes after 10 on the night of the 21st of August, 1937, at Colwood crossing, where the tracks of the defendant company cross the Island Highway about eight miles from the city of Victoria. Valentine was driving the car on the highway towards Victoria. It was a dark rainy night and the visibility was very poor. The driver stopped his car on the track, and six seconds later was struck by the engine of a train that was on its way to Victoria. The plaintiff's wife died from injuries received. The action was dismissed.

The appeal was argued at Victoria on the 20th and 21st of October, 1938, before MARTIN, C.J.B.C., MCQUARRIE and SLOAN, JJ.A.

R. D. Harvey, for appellant: The learned judge erred in not permitting the plaintiff to put in parts of the examination for discovery of the defendant's servants. He followed *Westminster Woodworking Co.* v. *Stuyvesant Insurance Co.* (1915), 8 W.W.R. 112. The rule was substantially changed so that part of the examination can be allowed in: see *Cooil* v. *Clarkson* (1925), 35 B.C. 308; *W. E. Sherlock Ltd.* v. *Burnett and Bullock* (1937), 52 B.C. 345; *Mills* v. *Armstrong* (1888), 13 App. Cas. 1; *Lynam* v. *Dublin United Tramways Co.,* [1919] 2 I.R. 445; *Devlin* v. *Belfast Corporation,* [1907] 2 I.R. 437; *Gaffney* v. *Dublin United Tramways Co.,* [1916] 2 I.R. 472; *The Harvest Home,* [1904] P. 409; *S.S. Devonshire (Owners)* v. *Barge Leslie (Owners),* [1912] A.C. 634; *Oliver* v. *Birmingham and Midland Motor Omnibus Co.,* [1933] 1 K.B. 35; *Evans* v. *South Vancouver and Township of Richmond* (1918), 26

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B.C. 60 at p. 70; *Loach* v. *B.C. Electric Ry. Co.* (1914), 19 B.C. 177; *Field* v. *David Spencer Ltd.* (1938), 52 B.C. 447; *Grand Trunk Rway. Co. of Canada and City of Montreal* v. *McDonald* (1918), 57 S.C.R. 268; *Tollpash* v. *Canadian National Railways,* [1932] 1 W.W.R. 846; *The Canadian Pacific Ry. Company* v. *Smith* (1921), 62 S.C.R. 134; *Coop* v. *Robert Simpson Co.* (1918), 42 O.L.R. 488. Where there is negligence on the part of one vehicle and contributory negligence on the part of another, such contributory negligence may not be imputed to passengers in either vehicle as they have no control. There was error in refusing to allow the plaintiff to introduce evidence of previous accidents at this railway crossing: see Phipson on Evidence, 7th Ed., 157 and 181; *Hales* v. *Kerr* (1908), 77 L.J.K.B. 870. The trial was unsatisfactory and there should be a new trial.

A. Alexander, for respondent: The learned trial judge did not reject the discovery evidence. It can be used as evidence only if so ordered by the trial judge. Wrongful rejection of evidence is not in itself a good ground for reversing a judgment or granting a new trial. It must be shown that the rejected evidence is admissible and material, and its exclusion occasioned a substantial wrong or miscarriage of justice, and that proper objection was made at the time of the ruling: see *Craig* v. *Hamre* (1925), 36 B.C. 1 at pp. 3 and 13; *Wilson* v. *Intercolonial Sales Co.,* [1929] 1 D.L.R. 712. The examinations were rightfully excluded unless put in as a whole: see *Westminster Woodworking Co.* v. *Stuyvesant Insurance Co.* (1915), 8 W.W.R. 112. There was no allegation in the pleadings that there had been any previous accident, and the plaintiff did not apply to amend in order to submit such evidence. There was no error in the charge. Counsel was asked to suggest further matters to be submitted and counsel for appellant not having availed himself of the opportunity cannot be heard to say the charge was deficient: see *British Columbia Electric Ry. Co.* v. *Key,* [1932] S.C.R. 106 at p. 108; *Nevill* v. *Fine Art and General Insurance Company,* [1897] A.C. 76. If a new trial be ordered the appellant should pay the costs of the action and appeal. A proper objection was not taken by counsel for the

appellant at the trial: see *Field* v. *David Spencer Ltd.* (1937), 52 B.C. 447 at p. 459.

Harvey, in reply, referred to *Wabash Railway Co.* v. *Follick* (1920), 60 S.C.R. 375.

Cur. adv. vult.

On the 1st of November, 1938, the judgment of the Court was delivered by

MARTIN, C.J.B.C.: We are of the opinion that this appeal should be allowed and a new trial ordered because of the rejection of evidence—that of two witnesses who were called by the plaintiff and taken for discovery under rule 370c (1) and which was rejected by the learned judge (upon objection taken by the defendant's counsel) who gave effect to that objection on the authority of a case submitted to him in ignorance of the fact that there had been a subsequent change in the rule permitting the use of "any part of the evidence." It was submitted that we should, nevertheless, refuse to direct a new trial because a miscarriage of justice had not actually occurred in that even if said evidence had been admitted it would not support the plaintiff's case. We do not take that view: we think it would have substantially supported it. Therefore we find it unnecessary, having regard to the fact that we think there should be a new trial through rejection of evidence, to consider the second objection taken with respect to misdirection under section 60 of the Supreme Court Act, although no objection was taken at the time, because we think the plaintiff was entitled to have the whole of his case completely submitted to the jury before he was called upon to answer the defendant or called upon to complain of misdirection which had occurred upon an incomplete presentation of his case.

The costs of this appeal will go to the successful appellant and the costs of the first trial will abide the result of the second.

Appeal allowed and a new trial ordered.

Solicitor for appellant: *R. D. Harvey.*
Solicitors for respondent: *Tiffin & Alexander.*

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SMITH & OSBERG LTD. v. HOLLENBECK.

Practice—Option for purchase of shares in Vancouver—Acceptance by telegram to offeror in State of Oregon—No evidence of receipt of telegram—Whether contract concluded—Service ex juris—Rules 6 and 64.

An option for the purchase of shares in a company was written and signed in the plaintiff's office in Vancouver and delivered to plaintiff there. The plaintiff sent a telegram addressed to the defendant at Seaside, Oregon, accepting the option. There was no evidence that the telegram was delivered to the defendant or that he had agreed that the option might be accepted by telegram. The defendant moved for the discharge of an order giving leave to issue a writ of summons for service out of the jurisdiction.

Held, that in the circumstances it could not be found that the offeror had impliedly constituted the telegraph company his agent for the purpose of receiving the acceptance, and the defendant must succeed upon his application.

APPLICATION by defendant to discharge an order made by McDONALD, J. on the 22nd of September, 1938, giving leave to issue a writ of summons for service out of the jurisdiction and to serve notice thereof on the defendant in the State of Oregon, U.S.A., and that the writ and service thereof and all subsequent proceedings in the action be set aside. Heard by MANSON, J. in Chambers at Vancouver on the 17th of October, 1938.

Des Brisay, for the application.
J. A. MacInnes, contra.

Cur. adv. vult.

17th November, 1938.

MANSON, J.: The defendant applies in Chambers that the order of my brother McDONALD, made on September 22nd, 1938, giving leave to issue a writ of summons for service out of the jurisdiction and to serve a notice thereof on the defendant in the State of Oregon, U.S.A., be discharged and that the writ and the service thereof and all subsequent proceedings in this action be set aside on the ground that the action is not founded on any breach or alleged breach within the jurisdiction of any

contract wherever made which, in accordance with the terms thereof, ought to be performed within the jurisdiction. The defendant says that there was no jurisdiction for the making of the said order and that the cause of action is not one within the jurisdiction of this Court. Reference is made to rules 6 and 64, Supreme Court Rules, 1925.

The defendant gave to the plaintiff, on July 13th, 1938, an option as follows:

I hereby give you an option for a period of thirty days from date to purchase all the shares of the Hollenbeck Dollar Co. Ltd. for the sum of $28,000 payable without interest at the rate of $1.00 per thousand ft. on all logs sold from the operation of the company at Harrison Lake subsequent to the execution of this option. All liabilities of the Hollenbeck Dollar Logging Co. Ltd. except A. R. Williams account and the Lawrence Mfg. Co. account (amounting in all to approximately $15,000) at the date of execution of this option will be paid in full by the present shareholders. All logs in the water, cash on hand, accounts receivable etc. shall be taken by the present shareholders or paid for by Smith & Osberg Ltd. Smith & Osberg Ltd. also shall pay for all felled and bucked and cold decked logs on the ground at inventory cost. This option is given in consideration of your examining the property.

Mr. Smith, the president and a director of the plaintiff, in his affidavit of September 21st, paragraph 3, says:

On the 12th day of August, A.D. 1938, the intended plaintiff accepted the aforesaid option by telegram reading as follows:

"To W. B. Hollenbeck,
Seaside, Oregon.

"We hereby accept the offer contained in your option letter to us of July thirteenth Stop letter following."

Smith & Osberg Ltd."

Nothing in the material establishes that the telegram of August 12th was delivered to the defendant, nor does the material suggest that the defendant ever agreed that the option might be accepted by telegram. Although it does not appear from the material, I am advised by counsel that letter of July 13th was not transmitted to the plaintiff by post, but was written and signed in the plaintiff's office on the plaintiff's letter-head and handed to the plaintiff.

In *Henthorn* v. *Fraser,* [1892] 2 Ch. 27; 61 L.J. Ch. 373, H., who lived at Birkenhead, called at the office of a land society in Liverpool to negotiate for the purchase of some houses belonging to the society. The secretary signed and handed to H. a

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note giving him an option to purchase for 14 days. On the next day the secretary posted to H. a withdrawal of the offer. The withdrawal was posted between 12 and 1 o'clock and did not reach H. until after 5 o'clock. In the meantime H. had at 3.50 p.m. posted to the secretary an unconditional acceptance of the offer which was delivered in Liverpool after the society's office had closed and was opened by the secretary on the following morning. It was held that, where the circumstances under which an offer is made are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted; and that, as the parties lived in different towns, an acceptance by post must have been within their contemplation although the offer was not made by post and that therefore a binding contract was made on the posting of H.'s acceptance. (The revocation was too late. It was held to be ineffective until it was brought to the mind of the person to whom the offer was made.) That was the decision of a strong Court of Appeal—Lord Herschell, Lindley, L.J. and Kay, L.J. Counsel directs attention to the language of Lord Herschell at p. 33:

> Although the plaintiff received the offer at the defendants' office in Liverpool, he resided in another town, and it must have been in contemplation that he would take the offer, which by its terms was to remain open for some days, with him to his place of residence, and those who made the offer must have known that it would be according to the ordinary usages of mankind that if he accepted it he should communicate his acceptance by means of the post.

In the course of a careful discussion of the facts Kay, L.J., at p. 36, says:

> "Posting an acceptance of an offer may be sufficient where it can fairly be inferred from the circumstances of the case that the acceptance might be sent by post."

Bruner v. *Moore* (1903), 73 L.J. Ch. 377; [1904] 1 Ch. 305, was also referred to. There Farwell, J. accepts the rule as stated by Lord Herschell in *Henthorn* v. *Fraser, supra,* at p. 316, but he finds as a fact

> That [the] contract obviously contemplates the events that in fact happened —that the two parties would separate and would visit various parts of

Europe, and would communicate with one another constantly by letter and telegram.

He says, further, that

If there ever was a case in which the parties contemplated that "the post might be used as a means of communicating" on all subjects connected with the contract, this is that case.

The option in the *Bruner* case was due to expire on March 29th. The plaintiff on March 28th dispatched a telegram and letter of acceptance which did not reach the defendant until the 30th. Farwell, J. says:

In my opinion this contention fails also, [the contention that the acceptance was too late] for the option was duly exercised when the telegram was sent and the letter posted.

I think that the decision does not assist in the case at Bar as it does not turn upon the sending of a telegram alone. In *Charlebois* v. *Baril,* [1928] S.C.R. 88; [1927] 3 D.L.R. 762, it was held in the Supreme Court of Canada that where an acceptance of a contract is made by mail, the post office only becomes the agent of the offeror where the offer was originally sent by mail but not where the offer was communicated in some other way. In the latter case an acceptor by mail who desires to enforce the contract must prove actual receipt of the letter of acceptance by the offeror.

I have not been referred to any authority which lays down that the telegraph office becomes the agent of the offeror unless the offer has been made by telegram and an acceptance by telegram thereby impliedly authorized or unless the circumstances are such as to warrant the conclusion that an acceptance by telegram was impliedly authorized as in the *Bruner* case, *supra.* It is quite true that it is common practice in business to use the telegraph service for the purpose of carrying on business negotiations, but I am not prepared to hold that the practice has been so thoroughly established as to warrant me in finding that the offeror in the circumstances of the case at Bar had constituted the telegraph office his agent for the purpose of receiving an acceptance. *Cowan* v. *O'Connor* (1888), 20 Q.B.D. 640; 57 L.J.Q.B. 401, to which counsel for the plaintiff refers is not inconsistent with the conclusion at which I have arrived.

Had it been established that the defendant received the plaintiff's telegram, the acceptance would have been effective on

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its receipt and the contract would have been one concluded out of the jurisdiction and our Court would have been without jurisdiction to entertain this action unless upon other grounds. In view of the conclusion at which I have arrived, the defendant must succeed upon his application.

Application granted.

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Oct. 26, 27, 28, 29; *Nov.* 1, 7.

App. Allwd [1940] 2 W.W.R. 241

STAVE FALLS LUMBER COMPANY LIMITED AND AITKEN v. WESTMINSTER TRUST COMPANY *ET AL.*

Lumber company—Debentures—Specific charge on standing timber—Timber cut and sold—Right to proceeds—Assignment of part of proceeds to bank—Bank's rights—Bondholder as plaintiff.

Where a company owning standing timber has created a fixed and specific charge thereon for the benefit of its bondholders, the fact that it is engaged in the timber business and the redemise clause in the trust deed creating the charge authorized it to carry on said business with "all the mortgaged premises" does not entitle it, or the trustee as against the bondholders, to the proceeds of the cutting and sale of said timber.

A bank which has knowledge of the existence of the trust deed and of the identity of the trustee thereunder took from the trustee an assignment of half said proceeds to secure a debt owing it by the company.

Held, to be in no better position than the trustee, although the manager of the bank did not read the deed but assumed that it was a mere floating charge.

In case the judgment herein results in the realization of a greater sum than that required to satisfy the clauses of the bondholders under the mortgage:—

Held, that the trustee, knowing of the existence and terms of the subsequent mortgage, would become under the circumstances, a trustee of such surplus for the trustee under the latter mortgage.

Held, further, that the plaintiff, being a bondholder is a proper person to bring an action on behalf of her fellow bondholders whose rights all ranked *pari passu* with her own.

ACTION brought by Bolivia B. Aitken, a bondholder of a bond issue by the Stave Falls Lumber Company Limited on March 1st, 1923, and of an issue of March 1st, 1931, in her

representative capacity for an accounting. The facts are set out in the reasons for judgment. Tried by McDonald, J. at Vancouver on the 26th of October to the 1st of November, 1938.

Walkem, K.C., for plaintiff.

Griffin, K.C., and *Edmonds, K.C.*, for defendant Westminster Trust Company.

J. W. deB. Farris, K.C., and *E. B. Bull*, for defendant Bank of Toronto.

Bull, K.C., for the defendant Bank of Montreal.

L. St. M. Du Moulin, for defendant Allen McDougall Butler Shingle Company.

Cur. adv. vult.

7th November, 1938.

McDonald, J.: The plaintiff company (hereinafter called the Stave Company) is incorporated in British Columbia with power to carry on the business of lumbermen and manufacturers of lumber and to acquire and dispose of timber lands and timber limits.

By trust deed, dated March 1st, 1923, and duly registered as required by statute, the Stave Company mortgaged all its assets to the defendant Westminster Trust Company as trustee to secure an issue of bonds payable to bearer in the sum of $225,000 and interest. Bonds of this issue in the sum of $37,000, together with several years' interest, are still outstanding and unpaid. The plaintiff, Bolivia B. Aitken, is the holder of one of these bonds in the sum of $100. The trust deed created a fixed and specific first charge upon, *inter alia*, all its real and immovable property and rights, its standing timber and licences and a floating charge upon all its other assets. Among the assets so specifically charged were certain licences granted by the Dominion Government to cut timber upon berths Nos. 346, 106A, 33 Block 2, 150 and 79A, subject, as regards berths Nos. 106A and 79A, to the provisions of certain agreements whereby a company known as Ruskin Operations Limited had the right to cut timber upon said two last-mentioned berths. The rights of Ruskin Operations Limited expired or were abandoned. The five licences above mentioned are referred to throughout the

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case as the Stoltze licences and these licences were duly assigned to the trustee on March 26th, 1923.

Claiming to act in pursuance of the powers contained in its memorandum of association the Stave Company on July 18th, 1927, with the consent of the Westminster Trust Company and pursuant to the advice of its solicitor, entered into an agreement with the Stoltze Manufacturing Company Limited whereby the Stave Company granted to the Stoltze Company as purchaser the right to enter upon the Stoltze timber berths and to cut into shingle bolts and remove all merchantable and accessible cedar timber whether standing or fallen; the price to be paid to vary under varying circumstances but amounting approximately to $1.50 per cord. The Stoltze Company, pursuant to their agreement, proceeded to cut the cedar timber in question and paid to the Stave Company on account of the purchase price the sum of $12,450. During the next year the Stave Company and the principal owners of its shares, Messrs. Abernethy and Lougheed, and the Westminster Trust Company entered into an agreement under the following circumstances: The Stave Company was heavily indebted to Abernethy and Lougheed; they in turn were heavily indebted to the Westminster Trust Company and it was arranged by all parties concerned that the Stave Company should assign to Abernethy and Lougheed who in turn should assign to Westminster Trust Company all moneys accruing due from the Stoltze Company as the purchase price of the shingle bolts above mentioned. This arrangement was duly carried out by assignments bearing date November 17th, 1928. It happened that at the same time the Stave Company and Abernethy and Lougheed were heavily indebted to the defendant, the Bank of Toronto, and it was arranged then or at about the same time that one-half of such moneys should be assigned by the Westminster Trust Company to the defendant bank as security for the bank's said indebtedness. This arrangement was carried out by assignment dated February 22nd, 1930. Subsequent to such first-mentioned assignments the Westminster Trust Company received from the Stoltze Company $12,800 of which sum it has paid $6,400 to the defendant bank. The rights of the Stoltze Company have since been acquired by the defendant

Allen McDougall Butler Shingle Company Limited which company has paid some $1,122 to the receiver of the Stave Company and has paid, and continues to pay, from time to time certain sums into Court on account of the purchase price of shingle bolts cut on the premises in question. It is contended by the plaintiffs that as against the bondholders under the trust deed in question the Stave Company had no right to enter into the agreement with the Stoltze Company and that in any event, assuming such agreement to be valid, the proceeds of the sale of the timber in question belong to such bondholders.

A further item in dispute arises in connection with a life-insurance policy for $25,000 upon the life of the above-mentioned Abernethy. This policy was also under the said trust deed specifically mortgaged as security to the bondholders. Mr. Abernethy died and the Westminster Trust Company received the said insurance moneys and pursuant to the powers contained in the trust deed used the larger portion of same for the general corporate purposes of the Stave Company. As to the sum of $2,545.62, however, the Westminster Trust Company paid to itself the said last-mentioned sum on account of a debt owing to it by Ruskin Operations Limited. It is contended on behalf of the bondholders that the trust company illegally retained this sum and must account for same.

On April 1st, 1929, a further mortgage was given by the Stave Company to the Westminster Trust Company to secure certain notes held by one Reifel in the sum of $150,000 which mortgage was later postponed to the mortgage now about to be mentioned.

On March 1st, 1931, the Stave Compnny issued and executed a further indenture of trust to the defendant Montreal Trust Company, as trustee, to secure an issue of bonds in the amount of $700,000 and interest. Again in this trust deed the Stoltze licences were specifically charged, the only variation in the form of the charge being the following:

> Subject to agreement dated 18th July, 1927, whereby the company granted the Stoltze Manufacturing Company Limited the right to cut shingle bolts upon the terms of the said agreement.

The plaintiff Aitken is the holder of one of the bonds issued pursuant to this last-mentioned trust deed in the sum of $1,000.

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Neither the Montreal Trust Company nor any holder of the bonds last mentioned had any knowledge that the proceeds of the Stoltze agreement had been assigned to the trust company until, at the earliest, sometime in the year 1934.

It was the intention of all the parties concerned that the proceeds of bonds to be sold under the trust deed of March 1st, 1931, should be used in the first instance to retire the outstanding bonds issued under the trust deed of March 1st, 1923, but for various reasons this arrangement was never carried out and, as stated above, bonds of the first issue are still outstanding in the sum of $37,500. One of the first purchasers of bonds under the trust deed of March 1st, 1931, was Western Canada Power Company Limited who purchased $100,000 in bonds for the sum of $90,000 which amount was duly paid to Montreal Trust Company as trustee. As to $45,000 of this amount the Montreal Trust Company properly disbursed the same on behalf of the Stave Company. The remaining $45,000 was remitted by Montreal Trust Company to Westminster Trust Company with the intent that this sum should be used to pay two instalments of sinking fund which fell due respectively on March 1st, 1930, and March 1st, 1931, under the trust deed dated March 1st, 1923. This cheque for $45,000 was handed to Mr. David Lougheed for delivery to Westminster Trust Company for the purpose named but there is no evidence before me as to whether or not Mr. David Lougheed communicated to Westminster Trust Company the terms upon which the cheque was delivered. The Westminster Trust Company did, however, receive this $45,000 and did credit it to sinking fund account. It disbursed certain sums in the purchase of bonds, on the instructions of the Stave Company, but retained, and still retains out of the proceeds of such cheque, the sum of $26,300 and it is contended on behalf of the bondholders under each of the trust deeds in question that, after making the most liberal allowances, at the least $22,966.90 of this sum is being illegally retained and that the Westminster Trust Company must account for same. The latter company contends that it was entitled to apply same toward the payment of debts owing to it by the Stave Company and by Abernethy and Lougheed. The Westminster Trust Company

further contends that by an arrangement with the Stave Company it was entitled to exchange with holders of bonds issued under the first mortgage, bonds issued under the mortgage to Montreal Trust Company, that it has done so and is possessed of bonds of such second issue far over and above the par value of the bonds outstanding under the first issue.

The plaintiffs are met *in limine* with the defence that neither plaintiff can maintain this action, the Stave Company because it has acquiesced in everything which has been done, and Bolivia B. Aitken because she has no right to bring this action in a representative capacity. It is a fact that in some instances the Stave Company did acquiesce, but assuming for the moment that the company's right to sue is thus brought into question, nevertheless the company is a proper party to the action and the receiver, under the order of this Court of October 2nd, 1937, had the right to use the company's name as plaintiff and to ask for the relief sought in this action. So far as Miss Aitken is concerned she is a holder of a bond under each issue and it seems clear to me that she is a proper person to bring the action on behalf of her fellow bondholders whose rights all rank *pari passu* with her own. It is a usual form of action in the circumstances and the objection fails.

It is further objected that the matters in question have been already adjudicated upon by the registrar of the Court who took accounts in the debenture-holder's action brought by Westminster Trust Company against the Stave Company upon its mortgage. This objection is without substance. The matters in question have never been decided and authority to bring an action to decide the very matters in issue was expressly given by the Court.

Now coming to deal with the various items in dispute: As regards the Stoltze licences, I find myself somewhat in the position of counsel for the plaintiffs when he says that the proposition, that a British Columbia Company owning standing timber, and specifically charging same for the benefit of its bondholders, may nevertheless, because it is in the timber business, proceed to denude its tracts of timber and pocket the proceeds, or that the trustee for the bondholders may pocket such

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proceeds, is so startling that one is not surprised that no one has ever before been heard to propound it. Counsel for the defence relies upon the redemise clause in the trust deed to the effect that the

> Trustee shall . . . permit the company to hold and enjoy all the mortgaged premises and to carry on therein and therewith the business or any of the businesses mentioned in the Memorandum of Association of the company.

It is argued that as the company was in the timber business and could obtain the use of its timber only by cutting it or permitting some other person to cut it, therefore it could carry on business only in this way; and that if the security of the bondholders was thus gradually diminished until it finally disappeared this is a result which cannot be helped even though the security turns out to be entirely illusory. Counsel further relies on such cases as *National Provincial Bank* v. *United Electric Theatres* (1915), 85 L.J. Ch. 106; [1916] 1 Ch. 132. Such authorities in my opinion have no application here. Indeed it was expressly held in that case that the mortgage in question constituted a floating and not a specific charge, while in the present case a distinct line is drawn between the properties included in the floating and in the specific charges. The contention that the business of the company could not be carried on except on the basis that the mortgage on the licences be treated as a floating charge only, is untenable. In fact the position taken by plaintiffs' counsel on the trial makes this plain. He says in effect that while the trustee had no right to consent to the sale in question, without the approval of the bondholders, nevertheless he is willing to accept the sale as a *fait accompli;* but he insists that the proceeds of such sale belong to the bondholders. In this contention I think he is clearly right, and that all the proceeds arising from the sale of timber on the Stoltze licences are the property of the bondholders. The Westminster Trust Company must account for these proceeds received by it and would be liable to pay to the plaintiffs the sum of $12,450 received by the Stave Company with the trustee's consent which consent was given in breach of the duty owed by the trustee to its bondholders, were it not for the protection to which I think the trustee is entitled under the limitation provisions contained in section 83

of the Trustee Act, R.S.B.C. 1936, Cap. 292. This I think is the only item in question in this action to which the statute applies. It may possibly apply to the sum of $6,400 in so far as the Westminster Trust Company is concerned but does not apply to the defendant bank, so that it is not necessary for the moment to decide the point.

It will be convenient at this point to deal with the position of the defendant bank. Is this defendant in any better position than the trustee from whom it received an assignment of one-half the proceeds arising from the sale of the timber in question? I think not. The manager of the defendant bank when taking his assignment to secure a debt owing by the Stave Company took the same with full knowledge of the existence of the trust deed of March 1st, 1923, and of the fact that Westminster Trust Company was the trustee thereunder. He did not read this document, but assumed that it constituted a mere floating charge and he claims that the bank is a purchaser for value without notice. Cases such as *Sweeny* v. *Bank of Montreal* (1885), 12 S.C.R. 661, go to show that the manager cannot safely take this position. He must in my view be held to have had express notice of the infirmity of the title of his assignor, and the defendant bank must pay to the plaintiffs the sum of $6,400 and interest at five per cent. from the dates when the respective amounts going to make up that sum came into its hands. It follows that the bank is entitled to no further payments in respect of the timber in question.

As to the life insurance moneys, it seems to me there can be no argument. These moneys were specifically charged, and the trustee as to $2,545.62 thereof, instead of applying this to the use of the bondholders, simply paid it to itself on account of an old debt owing to it by another company. There must be an accounting of this sum.

There remains the question of the sinking fund. Here again the trust company has retained for its own use moneys properly belonging to the bondholders. It received the $45,000 in question, and appropriated it to sinking fund account as it was instructed to do by the Stave Company. I think it cannot afterwards be heard to say that it altered its election and chose to

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credit the money to an old debt of its own and by some sort of manipulation of old and new bonds satisfy its obligations as trustee for the bondholders. There must be an accounting for $22,966.90 on this account.

A further claim against the trustee for having failed to press a claim against the liquidator of the Stoltze Company was not argued and I assume is not pressed.

In case it should result from this judgment that a greater sum should be realized than is sufficient to satisfy the claims of the bondholders under the first mortgage the question will arise as to whether the Westminster Trust Company is a trustee of any such surplus for the Montreal Trust Company as trustee under the second mortgage. I think it is. This is not the ordinary case of a first and second mortgagee. Each mortgagee is a trustee for bondholders and inasmuch as the Westminster Trust Company became aware of the existence and of the terms of the mortgage to the Montreal Trust Company immediately it was arranged, I think under the peculiar circumstances of the case it became a trustee to the extent above suggested.

There will be judgment in accordance with the above findings. All amounts payable by the Westminster Trust Company will bear interest at five per cent., and all moneys in the hands of the receiver as proceeds of the Stoltze timber, and all moneys in Court will be paid to the plaintiffs for the benefit of the bondholders. If there are any difficulties in working out the terms of the judgment the matter may be spoken to at the convenience of counsel.

Judgment accordingly.

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Sept. 30; Oct. 6, 7; Nov. 25.

Assault—Information by injured—Injured man does not appear on hearing—Accused pleads guilty and pays fine—Action for damages—Accused not protected from civil proceedings—Criminal Code, Secs. 732, 733 and 734.

Consd. Rev'd To. Spenet v. Fehr [1943] 2 W.W.R. 1

The defendant having struck the plaintiff with his fist, the plaintiff signed an information charging the defendant with assaulting him. The plaintiff did not appear on the hearing and the defendant pleaded guilty and paid the fine and costs. The plaintiff then brought this action for damages resulting from injuries caused by the assault, and the defendant relies as a defence to the action upon section 734 of the Criminal Code.

Disapprd Nykiforuk v. Kohl 94 C.C.C. 128

Held, that there was no hearing on the merits, the conviction does not assist the defendant, and said section 734 of the Criminal Code is not a defence to the action.

Appld Sharkey v. Robertson 61 W.W.R. 693 (B.C.S.C.) 30 W.W.R. (3d) 745

ACTION for damages owing to injuries suffered by the plaintiff caused by the defendant. The facts are set out in the reasons for judgment. Tried by ROBERTSON, J. at Prince Rupert on the 30th of September, 1938, and at Fort George on the 6th and 7th of October following.

J. T. Harvey, for plaintiff.
J. O. Wilson, for defendant.

Cur. adv. vult.

25th November, 1938.

ROBERTSON, J.: Plaintiff brings this action for damages arising from injuries caused by an assault made on him by the defendant in the early morning of the 22nd of May, 1938, in the Jamieson hotel at McBride, B.C.

The defendant was the proprietor of the hotel. He occupied a bedroom on the second floor. The local liquor vendor had a room on the same floor. The plaintiff did not live at the said hotel. There was a notice posted, I presume, on the wall of the first floor of the hotel that no one was allowed above the ground floor without permission of the hotel proprietor. The plaintiff had no permission. About 1.30 a.m., on the 22nd of May, the plaintiff went up to the vendor's room to endeavour to get some

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whisky. He knocked on the vendor's door. Jamieson told him that the vendor was in bed and that there was no use his bothering about it and that "he had better beat it"; whereupon plaintiff left the hotel. The defendant went to his room. About ten minutes later, when about undressed, he heard the plaintiff "pounding" at the vendor's door. He put on some clothes and came out and found the plaintiff talking to the vendor. The vendor went back to his room. The plaintiff walked with the defendant along the hall to the head of the stairs. The defendant says that the plaintiff raised his arm to strike him and that he, the defendant, then hit him, knocking him down the stairs. He went down stairs, picked him up and put him outside. The plaintiff suffered injuries to which I shall refer later. The defendant illustrated the way in which he said the plaintiff raised his arm. He said he did not raise his arm above his shoulder; "he kind of lifted up his hand." The plaintiff is an elderly man and slightly built while the defendant is a young man and very sturdily built. The defendant says the plaintiff was under the influence of liquor. In view of the condition in which the defendant says the plaintiff was, and the other circumstances which I have related, I do not think the defendant had anything to fear from the plaintiff. There was not the slightest necessity for him using the violence which he did to the plaintiff. I therefore find that the defendant assaulted the plaintiff without just cause.

On the 26th of May, 1938, pursuant to section 732 of the Code, the plaintiff signed an information charging the defendant with assaulting him. The information appears on the face to have been "taken and sworn" before one D. W. Hay, stipendiary magistrate. The plaintiff denies this. Hay had been ill and, at the trial, said his memory was not as good as it had been. He has had considerable experience. He said he would not have put his signature on the information below the "taken and sworn statement" unless Kyle had actually appeared before him and sworn to the information. I have no doubt, and I so find, that the information was "taken and sworn" before Hay. The plaintiff did not appear at the hearing. The defendant pleaded guilty and paid the fine and costs which were imposed upon

him. He now relies, as a defence to this action, upon section 734 of the Criminal Code. Section 733 provides for a certificate of dismissal being given in certain circumstances upon the hearing of a case of assault upon the merits. Sections 732, 733 and 734 were considered by the Court of Appeal for Saskatchewan in *Withers* v. *Bulmer* (1921), 36 Can. C.C. 177. Referring to these sections Turgeon, J.A., who delivered the judgment of the Court, said at p. 178:

> The effect of these three sections, it seems clear to me, is that the accused, in order to avail himself of the protection from civil proceedings provided by sec. 734 must shew (1) that the charge against him was one of common assault the punishment for which is provided by sec. 291; (2) that it was laid under the provisions of sec. 732; (3) that the justice in the exercise of the jurisdiction conferred upon him by sec. 732 tried the case summarily on its merits, and (4) that he obtained a certificate of dismissal or suffered the sentence imposed upon him, as the case may be.

See also *Jude* v. *Archer and Goodman* (1923), 18 Sask. L.R. 32 which followed *Withers* v. *Bulmer*. In my opinion the proceeding before the justice of the peace was a hearing but did not constitute a hearing upon the merits. In *Tunnicliffe* v. *Tedd* (1848), 5 C.B. 533, the facts were as follow:

The defendant had been charged by the plaintiff with assault. The defendant appeared and pleaded "not guilty." The plaintiff declined to proceed, stating he meant to bring an action. The relevant sections of the statute there under consideration, *viz.*, sections 27 and 28 of 9 Geo. 4, c. 31 are similar to sections 733 and 734. Section 27 provided that two justices, upon the hearing of a charge of assault, might, under certain circumstances, dismiss it and give a certificate of dismissal. The justices dismissed the summons and gave a certificate. The plaintiff then brought his action against the defendant who set up section 28 which is practically the same as section 734 and he succeeded, as the proceedings which had taken place before the justice, were held to be a hearing. In a later statute (24 & 25 Vict. c. 100) by section 45 in case of a charge of assault, justices were given leave to dismiss it only after hearing "upon the merits." This section is practically the same as section 733 of the Code. Following the amendment of the statute, the case of *Reed* v. *Nutt* (1890), 24 Q.B.D. 669 was decided. There the prosecutor laid

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a charge of assault but did not attend to prosecute, notifying the accused to this effect and, that he would not offer evidence. The accused appeared and got his certificate of dismissal. The defendant set this up as a defence to an action afterwards brought by the plaintiff for damages for injuries resulting from the same assault. It was held it was not a good defence. Lord Esher, M.R., with whom Lord Coleridge, C.J. agreed, after referring to *Tunnicliffe* v. *Tedd, supra,* and section 27 there under consideration, said at p. 673:

> Coming to the later Act 24 & 25 Vict. c. 100, we find that the language of s. 44 is in a very important respect different; it gives a like power to justices to grant a certificate of dismissal; but it is to be exercised "upon the hearing of any such case of assault or battery *upon the merits.*" How are those additional words "upon the merits" to be interpreted? Can we say that the new section which contains them means the same thing as the old section where they were omitted? Speaking for myself, I cannot help thinking that the strict interpretation which had been placed on s. 27 of the Act of Geo. 4 had been brought to the attention of the Legislature, and that those words were advisedly inserted, the intention being that if the dispute between the parties were really fought out upon the hearing of the summons and the charge dismissed, the certificates should be given and should bar all further proceedings, but that if the charge were withdrawn, so that there was no real trial, it should be left open to the person who had laid the information to be remitted to his common law rights and to maintain an action for the assault notwithstanding the dismissal of his complaint. If that be so, no certificate of dismissal can be given under 24 & 25 Vict. c. 100, s. 44, unless the parties are present before the justices, and the case is argued and is decided upon the facts, or upon the law applicable to the facts. In my opinion, that is the correct view of the law, and the magistrate had, therefore, no jurisdiction to grant this certificate.

As there was no hearing "upon the merits" I am of opinion the conviction does not assist the defendant and section 734 is not a defence.

It remains then to assess the damages. As a result of the blow the plaintiff was in the hospital for six days. He was unable to work for two weeks. He had a cut over his eye one and one-half inches long which required three stitches. His left eye was closed and the left side of his face was swollen. There were bruises about his left elbow and various superficial injuries on his body. He suffered a fracture of the cheek-bone below the left eye. There is a numbness there which at the time of the trial was improving. The doctor in charge said it might

go away "in a matter of months." He still has a slight depressed fracture of the cheek-bone which will be permanent unless an operation is resorted to. Under all the circumstances I assess the general damages at $500 and the special as follows: Doctor's bill, hospital, taking X-ray, $75.

There will be judgment for these amounts, with costs.

Judgment for plaintiff.

FREDERICKSON *ET AL.* v. BURT.

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May 11;
June 10.

Negligence—Damages—Motor-car and bicycle—Collision—Left-hand turn by motor-car at intersection—Bicyclist without head-light—Duty of motorist.

The defendant, driving his truck north on Main Street in Vancouver, made a left turn on reaching the intersection of Georgia Street. When nearly in Georgia Street he struck the infant plaintiff who was riding a bicycle south on Main Street. The accident was at about 8 o'clock on the evening of September 9th, 1937.

Held, that the accident was due solely to the negligence of the infant plaintiff in travelling at night without a head-light and in not keeping as sharp a look-out as he ought to have kept under the circumstances.

Held, further, that the motorist had the right to make a left-hand turn but in doing so, as he did in this case, he should have driven with care and caution and at a very slow speed in proceeding through cross traffic.

ACTION for damages that arose at an intersection of two streets in Vancouver, the defendant making a left turn while going north in his truck on Main Street and running down the plaintiff who was travelling south on Main Street on his bicycle. The facts are set out in the reasons for judgment. Tried by MANSON, J. at Vancouver on the 11th of May, 1938.

McAlpine, K.C., and *Donnenworth*, for plaintiffs.
Maitland, K.C., and *J. G. A. Hutcheson*, for defendant.

Cur. adv. vult.

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10th June, 1938.

MANSON, J.: The accident out of which this action arose occurred at the north-west corner of Main and Georgia Streets, in the city of Vancouver, B.C., at about 8 o'clock on the evening of September 9th, 1937. There is a traffic-light signal overhanging the centre of the intersection of the two streets mentioned, and the north-west corner is lighted more brightly than the average corner. Andrew Frederickson, the infant plaintiff, a messenger boy, was hurrying home on his bicycle, proceeding in a southerly direction on Main Street. The traffic light changed to green, so he says, when he was at the point "F" as indicated on Exhibit 3, in other words, when he was about 60 feet distant from the entrance to the intersection. The defendant driving a truck, his wife in the seat with him, proceeding north on Main Street, came to a stop at the intersection because the red light was against him. When the light changed he put his truck in low gear and signalled a left turn. Both the defendant and his wife testify that he had to wait in making his turn for a car which was going south on Main Street, and, then, for a second car going south on Main. He then proceeded to complete his turn, intending to cross the Georgia Street viaduct. He says that he was still in low gear and proceeding very slowly (five miles per hour at most) when having gotten well into the westerly side of the intersection he noticed the infant plaintiff on his right pedalling very fast and going south on Main. He says that he remembers the traffic-light bell ringing just as he saw the boy. That, doubtless, would be the warning bell, and the statement is consistent with his general account of what occurred. He says that the boy swung to his right from Main to Georgia and then suddenly swerved to his left to pass in front of the truck. The defendant put on his brakes and stopped within five feet but struck the boy. The boy testified that he was struck four or five feet west of the easterly edge of the pedestrian lane across Georgia Street on the westerly side of the intersection (point "B" on Exhibit 3) and he further testified, and indicated on Exhibit 3, that he had swerved from his normal line of travel well to the right. Had he continued west on Georgia Street, if he could have done so, the accident would, doubtless, have been avoided.

The boy had no head-light on his bicycle. His head-light had been stolen sometime before. A bicycle is not easy for a driver to see in the momentary view which a driver, even a good driver, takes in making a turn at a busy intersection. If a driver were able to disregard all else in order to make a searching observation down the street for a bicycle it might well be that he could see it at some distance, but a driver in making a turn at a busy intersection has to have regard to the whole situation, and although he is under clear duty to observe with care oncoming vehicles and pedestrians, nevertheless the law does not demand the impossible or the unreasonable. The law requires that a bicycle carry a head-light at night, and the driver of the truck had a right to presume that any cyclist proceeding along Main Street would have such a light. A head-light on a bicycle at night time catches readily the eye of one driving in the opposite direction to the cyclist, or crossing the line of travel of the cyclist. Furthermore, it enables the cyclist to spot vehicles or pedestrians in front of him. The infant plaintiff did not see the south-bound car ahead of him, and yet it was there. There is no reason why I should disbelieve the evidence of the defendant and his wife that there were two south-bound cars for which they had to wait. The infant plaintiff did not see the defendant's truck nearly as soon as he should have seen it. Upon his examination for discovery (questions 70 and 71) he said that he did not know where the truck came from and that he didn't see it before the accident. At the trial he said that he saw the truck when he was about 10 feet north of the medial line of Georgia Street. Even accepting his statement at the trial, he saw the truck very late, and accepting his evidence for the moment as to the point of impact as he indicated it on Exhibit 3, namely, at point "B" in the pedestrian lane, the logical inference is that the boy had opportunity to see the slowly moving truck for a good deal more than 10 feet. The absence of the head-light added materially to the hazard of travel both for the cyclist and for the defendant. The boy's co-plaintiff, his father, knew that his head-light had been stolen sometime before the accident. He didn't replace it. The absence of a head-light amounted to negligence in the particular circumstances.

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It appears that the two south-bound cars for which the defendant had to wait were travelling not on the westerly street-car track, but to the west thereof. Their progress through the intersection would doubtless obscure for a time the infant plaintiff's view of the defendant's truck, but despite that fact, upon the evidence, it seems clear that the cyclist came into the intersection well after the defendant, and at a time when the second of the two cars had passed out of the intersection and the defendant was well on his way towards the pedestrian lane across Georgia. I can only conclude that the boy did not keep as sharp a look-out as he ought to have done in the circumstances, otherwise he would have seen the defendant in ample time to so manœuvre as to have avoided the accident. His want of care in this respect amounted to negligence.

My conclusion is that the infant plaintiff was guilty of negligence which contributed to the accident in two respects: (a) He was travelling at night time without a head-light and (b) he was not keeping as sharp a look-out as he ought to have kept in the circumstances.

Now as to the alleged negligence of the defendant, I have already dealt with the evidence bearing upon the conduct of the defendant in part, and it only remains to search further to see if there was any evidence of negligence on his part. The defendant was of the opinion that he didn't hit the boy, but rather that the boy hit him when, after swerving to the right, he swerved suddenly to the left to proceed along Main Street. He testifies that the boy, immediately after the accident, told him that he was in a hurry to get home, that he had just started his job and that he was late. The boy admits he was hurrying home. The defendant says that the two south-bound cars which held him up were to the west of the safety zone at the north-west corner, at the points "A" and "B" respectively on Exhibit 8. If that be true—and weighing his evidence as carefully as I can, and that of his wife, I cannot find that his statements in this connection are untrue—those two cars might well occupy his attention and account for the fact that he did not see the boy on the bicycle until after the two cars had gone by, nor until after the boy had swerved round the corner to the west and had

arrived in proximity to the point "D" as indicated on Exhibit 8. He places the point of impact somewhat further west in the pedestrian lane than does the boy. His evidence suggests that the point of impact was five to seven feet east of the westerly line of the pedestrian lane, and he says that he was five to seven feet into the pedestrian lane before he saw the boy. At another point in his evidence he says that the boy was within eight to ten feet of him when he saw him first. The wife gives a very similar account of what occurred and she, too, says that the boy was at the north-west corner when she saw him first, that he swerved to the right, then suddenly to the left and in front of the truck. The boy's manœuvre to the right may easily have misled the defendant and suggested to him that the cyclist intended going west over the viaduct.

The father and sister of the infant plaintiff gave evidence as to a conversation after the accident with the defendant. The defendant was recalled to give his account of that conversation. About the only thing that I can gather with respect to the conversation referred to is that the defendant was sympathetic with the boy, and that while he protested that the fault was not his, he refrained from putting the blame on the boy in his conversation with the father. The sister, Mrs. Bennett, testifies that the defendant said that it was definitely not the boy's fault. She testifies further, as does the father, that the defendant admitted that he had seen the boy half a block away. There was some discussion of the fact that the defendant was insured and the defendant admits that he told the father that he would not like to see the boy lose anything but he did not figure that it was his, the defendant's, fault.

Having regard to the whole of the evidence, taking the boy's own story and his line of travel as he indicated it on Exhibit 3, I can arrive at no other conclusion than that the infant plaintiff's own negligence was at least the major cause of the accident. The only point which gives me difficulty is as to whether the defendant should have seen the boy early enough to have avoided the accident. If there was negligence on his part in the matter of his look-out it certainly, in my view, was of a minor character. The rule of law which governs in circumstances such as prevailed

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here is no different from the rule of common sense. The defendant was under obligation in making his turn to do so with every caution in order to avoid collision with south-bound traffic which had a right to proceed at the moment through the intersection. *Fann* v. *Winnipeg Electric Company,* 41 Man. L.R. 388; [1933] 2 W.W.R. 577, was referred to by counsel for the plaintiff. There both the statute law and the facts were not on all fours with the statute law and facts in the case at Bar, but Dennistoun, J.A. uses language at p. 580 which is apposite. There it was the plaintiff who was making the left turn and it was said:

> The conclusion is that the plaintiff was justified in making his left turn, but that having done so he should with care and caution and at a very slow speed, nose his vehicle through the cross traffic which had the right of way when travelling on green light south on Main St.

The *onus* is on the plaintiff to prove negligence on the part of the defendant and not only can I not say that that *onus* has been discharged but upon the evidence I must find that the defendant did proceed with care and caution and at a very slow speed in crossing the westerly half of Main Street. Even if it be true that the defendant saw the boy when he was half a block away, that was apparently at a time when he had already entered on his left turn, and if the boy was actually that far away when first seen by the defendant he had a right to continue his crossing of the westerly half of Main.

My conclusion is that the accident was brought about solely through the negligence of the infant plaintiff. The co-plaintiff was party to the negligence in that he permitted his son to travel the streets at night on a bicycle without a head-light. The action must be dismissed.

Should I be in error, perhaps, it is better that I assess the damages now. Special damages as claimed totalling $431.70 were established. The boy sustained a fracture of the left femur. The bone was split longitudinally, the fracture extending into the knee-joint. The particular nature of the fracture caused disability for a considerably longer time than would have been the case had the fracture not extended into the knee-joint. It is scarcely likely that there will be any permanent disability. General damages might properly be assessed at $600.

Action dismissed.

IN RE DOCKRILL ESTATE.

S. C.
1938
Sept. 9, 12.

Will—Construction—Annuity part of residue of estate—Gift of income of residue—Annuity part of capital.

P. directed by his will that $200 per month be paid to his daughter D. out of the income arising from his residuary estate, during the life of his wife, who survived D. D. died in 1935, and by will bequeathed her residuary estate (1) in payment of the annual premium upon a policy upon the life of her grand-daughter P. L.; (2) to pay her daughter F. M. during her life the annual sum of $420; (3) to pay the balance of her income arising from her residuary estate to her daughter C. G., and upon the death of said two daughters, the whole of the residuary estate to be divided between the two grandchildren of the testatrix. On a contest as to whether the monthly payments of $200 are to be invested by the trustees and the income thereof be paid to the daughter C. G., or whether the whole amount of $200 is payable to C. G. as income:—

Held, that the trustees should invest the $200 monthly payments and pay the income from it to C. G.

APPLICATION for the interpretation of the will of Mabel Claire Dockrill, deceased. The facts are set out in the reasons for judgment. Heard by McDONALD, J. in Chambers at Vancouver on the 9th of September, 1938.

Bull, K.C., for Mrs. Glover.
Locke, K.C., for infants.
G. S. Clark, for executors.

Cur. adv. vult.

12th September, 1938.

McDONALD, J.: The late E. J. Palmer directed the trustees under his will to pay out of the income arising from his residuary estate the monthly sum of $200 to his daughter, Mabel Claire Dockrill, during the life of his wife who still survives. Mabel Claire Dockrill died in the year 1935 leaving her last will whereby she bequeathed her residuary estate to trustees upon trust (1) to apply the income thereof in payment of the annual premium upon a policy upon the life of her grand-daughter, Priscilla Lomax; (2) to pay to her daughter, Frances Moore, during her life, the annual sum of $420; (3) to pay the balance

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of the income arising from her residuary estate to her daughter, Carol Lomax (now Carol Glover); upon the death of the two daughters above mentioned the whole of the residuary estate to be divided between the grand-daughter and the grandson of the testatrix.

A contest has now arisen between Carol Glover and the two grandchildren as to whether or not the monthly payments of $200 are to be invested by the trustees and the income thereof paid to Mrs. Glover, or whether the whole amount of $200 is payable to Mrs. Glover as income.

With great respect to counsel, it seems to me that the matter is clear. All that Mrs. Glover takes under her mother's will is the income arising from her mother's residuary estate. A part of that residuary estate is the annuity in question, and the duty of the trustees is to invest it and pay the income from it to Mrs. Glover. This, I think, is the clear meaning of Mrs. Dockrill's will, and this ruling is in accord with authority. See *Crawley* v. *Crawley* (1835), 7 Sim. 427; 4 L.J. Ch. 265; 58 E.R. 901; *In re Whitehead* (1893), 63 L.J. Ch. 229; [1894] 1 Ch. 678; and Theobald on Wills, 8th Ed., 630.

Order accordingly.

REX v. HOY'S CRESCENT DAIRY LIMITED.

C. A.
1938
April 20; *Sept.* 13.

Constitutional law—Natural Products Marketing (British Columbia) Act—Property and civil rights—Registration of milk dealers—Licence fee—R.S.B.C. 1936, Cap. 165—B.C. Stats. 1937, Cap. 41.

The registration of milk dealers and the licence fee imposed on them under the provisions of the Natural Products Marketing (British Columbia) Act are within the powers of the Province, and non-compliance with an order of the Lower Mainland Dairy Products Board is an offence under the Act. The Board has the power to require defaulters to pay their fees for old services before being permitted to take the further benefits of new services.

Shannon v. *Lower Mainland Dairy Products Board,* [1938] 2 W.W.R. 604, followed.

APPEAL by defendant from the order of MURPHY, J. of the 25th of February, 1938, on appeal by way of case stated from G. R. McQueen, Esquire, deputy police magistrate, Vancouver. On the 10th of December, 1937, information was preferred against Hoy's Crescent Dairy Limited under the provisions of the Natural Products Marketing (British Columbia) Act, for unlawfully failing to comply with order No. 8 of the Lower Mainland Dairy Products Board, a board constituted to administer the milk-marketing scheme of the lower mainland of British Columbia, established under the Natural Products Marketing (British Columbia) Act, in that being a dealer and not being registered with and holding a current licence issued by said Board, did in the said city of Vancouver on the day aforesaid market milk within the area to which the said scheme relates. It was contended by the defendant that the Natural Products Marketing (British Columbia) Act is *ultra vires,* that order No. 8 of the Lower Mainland Dairy Products Board is *ultra vires,* and that it is not an offence within the meaning of section 12, subsection (1) of the Natural Products Marketing (British Columbia) Act to fail to comply with an order of the Lower Mainland Dairy Products Board, and no penalty can be imposed therefor. The defendant company was convicted and the question submitted for the opinion of the Court was whether the

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magistrate came to a correct interpretation of the law in convicting the defendant. The question was answered in the affirmative by MURPHY, J.

The appeal was argued at Victoria on the 20th of April, 1938, before MARTIN, C.J.B.C., MACDONALD, MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.

Hossie, K.C. (*Salter,* with him), for appellant: The Dairy Products Board issued an order requiring licences, and the prosecution is against sixteen dealers who did not take out licences. The conviction was upheld by MURPHY, J. We say first that the Natural Products Marketing (British Columbia) Act is *ultra vires* the Provincial Legislature. This question is now *sub judice* before the Privy Council. Next we say order No. 8 of the Lower Mainland Dairy Products Board is *ultra vires* of the Board for the reasons, first, that the order is discriminatory because section 2 of the order which says that no licence shall be issued to an applicant who is in arrears on account of any licence fee imposed by the Marketing Board, establishes a condition precedent without the fulfilment of which I cannot get a licence at all. They must treat them all alike. They are not authorized to impose a condition precedent: *Jonas* v. *Gilbert* (1881), 5 S.C.R. 356 at pp. 365-7; *Re Good and Jacob Y. Shankz Son & Co. Limited* (1911), 23 O.L.R. 544 at p. 552; *The King on the Information of Bateman* v. *McDonald* (1935), 8 M.P.R. 558 at pp. 561-2. Unless specifically authorized they cannot refuse to issue a licence. There is an attempt to do indirectly what the Board has not the power to do directly. They forced payment of moneys by putting the licensee out of business unless he paid. It cannot be done in this indirect way. The third point is that they have not classified into groups and made a uniform licence for each group. They can fix the fees in respect of each group but not for each individual.

Maitland, K.C., for respondent: Appellant says that if arrears are considered it is discrimination. It is not discrimination when the rule applies to everybody. It is not discrimination but qualification. If you have power to collect you have power to use the Courts. Paragraph 2 of order 8 is a classification into

groups. The charge was for failing to comply with said order 8. It is no answer to say we did not give him a licence. He must have a licence to do business: see *Rex* v. *Van Norman* (1909), 19 O.L.R. 447. He must try to get a licence but he did not do so: see *Ashton* v. *Wainwright,* [1936] 1 All E.R. 805. He has shown nothing beyond the powers of the Legislature.

Hossie, replied.

Cur. adv. vult.

On the 13th of September, 1938, the judgment of the Court was delivered by

MARTIN, C.J.B.C.: Several grounds of appeal were advanced against the order of MURPHY, J., affirming a conviction for failing to comply with an order of the Lower Mainland Dairy Products Board but the first and principal one, that the statute on which the order of the Board rests is *ultra vires* of the Legislature, has since the argument been disposed of by the decision of the Privy Council in *Shannon* v. *Lower Mainland Dairy Products Board,* [1938] 2 W.W.R. 604. As to the remaining grounds, the only one that, in my view at the end of the argument, required further consideration is the submission that even if the said statute was valid the Board had, for various reasons, no jurisdiction to make order No. 8, as follows:

> That no licence shall be issued to an applicant who is in arrears on account of any licence fee imposed by the Marketing Board.

In determining this question we now have the assistance of the said decision of the Privy Council delivered on the 27th of July last which we awaited, fortunately as it happens, because their Lordships held that these licence fees are also "fees for services rendered by the Province or its authorized instrumentalities," saying at p. 610:

> It cannot, as their Lordships think, be an objection to a licence plus a fee that it is directed both to the regulation of trade and to the provision of revenue. It would be difficult in the case of saloon and tavern licences to say that the regulation of the trade was not at least as important as the provision of revenue. And if licences for the specified trades are valid their Lordships see no reason why the words "other licences" should not be sufficient to support the enactment in question. The impugned provisions can also, in their Lordships' opinion, be supported on the ground accepted by Martin, C.J.B.C. in his judgment on the reference, *viz.,* that they are fees for services rendered by the Province or by its authorized instru-

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mentalities under the powers given by sec. 92 (13) and (16). The Chief Justice refers to fees on land registration, and mining and prospecting certificates. Another example might be the exaction of market tolls on the establishment of a new market. On these grounds the attack upon the Act based on the powers to exact licence fees must be held to fail.

Such being the case, there can be no doubt that the Board has the power to require defaulters to pay their fees for old services before being permitted to take further benefit of new services: were this not so defaulters would obtain an advantage over non-defaulters.

It follows that the appeal is dismissed.

Appeal dismissed.

Solicitors for appellant: *Davis, Pugh, Davis, Hossie & Lett.*

Solicitors for respondent: *Maitland, Maitland, Remnant & Hutcheson.*

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1938
May 31;
June 10.

SCHOFIELD v. ROCHE AND McTAVISH.

Motor-vehicle—Bicycle—Collision at intersection—Acts in emergency—In trying to avoid collision car mounts sidewalk—Pedestrian struck by car—Liability.

The defendant R. was driving her car south on Gilford Street when the defendant M. was riding a bicycle west on Comox Street in Vancouver. They saw one another about the same time, but they were too close to avoid a collision at the intersection. In trying to avoid the bicycle R. swerved to the right but lost control and mounted the sidewalk on the west side of Gilford Street just south of the intersection, where she struck the plaintiff, a pedestrian walking northerly on Gilford Street.

Held, that both defendants were negligent in proceeding too rapidly at that particular intersection, as the growth of a high hedge at the north-east corner of the intersection made it a "blind" corner, and their approach should have been slow enough to stop within ten or fifteen feet at the most. The negligence of each was a factor in the collision between them to the extent of 50 per cent. The defendant R. was not under the circumstances responsible to the plaintiff except to the extent that she was responsible for the collision with the bicycle.

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ACTION arising out of a collision between a motor-car and a bicycle at an intersection, whereby the motor-car in trying to avoid the bicycle mounted the sidewalk and struck the plaintiff, a pedestrian. The facts are set out in the reasons for judgment. Tried by MANSON, J. at Vancouver on the 31st of May, 1938.

A. Bruce Robertson, and *R. A. C. Douglas,* for plaintiff.
Nicholson, and *Yule,* for defendant Roche.
Donaghy, K.C., for defendant McTavish.

Cur. adv. vult.

10th June, 1938.

MANSON, J.: The accident out of which this action arose occurred about noon on September 2nd, 1937. The plaintiff was walking in a northerly direction along the sidewalk in front of the Kenmore Apartments on the west side of Gilford Street in the city of Vancouver, B.C. The defendant Roche was driving a motor-car in a southerly direction on Gilford Street and the defendant Malcolm McTavish was riding a bicycle in a westerly direction on Comox Street. The north-east corner of Comox and Gilford Streets is a "wicked" corner from the standpoint of vehicular traffic southbound on Gilford and westbound on Comox. There is a hedge six feet high—seven feet high at the corner—along the southerly side of the premises at the corner mentioned. The cyclist had been riding near the curb on his right-hand side as he came west on Comox. As he approached the intersection he swung to the left in order to get a better view. The defendant Roche, as she approached the intersection from the north, was probably travelling with her left wheels a little over to the left of the medial line of Gilford Street. It cannot be said that either the cyclist or the defendant Roche were proceeding at more than a very moderate rate of speed. Neither of them, however, was keeping as sharp a look-out as the situation demanded. Each saw the other, but too late to avoid a collision as between the car and the bicycle. Perhaps it would be stating it more accurately to say that the accident really resulted not from carelessness in look-out on the part of either, for I think each saw the other at about as early a moment as was possible

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under the circumstances, but rather by reason of the fact that, despite the fact that they were each proceeding slowly, they were both proceeding more rapidly than they should have been at that particular corner. It is what is commonly called a "blind" corner, and neither of the two defendants mentioned should have been proceeding as they approached that intersection at a speed beyond what would have enabled them to stop within ten of fifteen feet at the most. "Blind" corners are hazards of driving. The law demands that appropriate caution be exercised in approaching an intersection where there is a blind corner. There was default in the exercise of that appropriate caution on the part of the defendant Roche and on the part of the defendant Malcolm McTavish amounting in each case to negligence. The negligence of each was a factor in the accident to the extent of 50 per centum. To attempt to refine the responsibility of the parties beyond that is idle and impossible of accomplishment.

When the defendant Roche saw that an accident was imminent she swerved to the right and she very frankly admits that in the agony of the situation she lost mental control. Her car mounted a rather high curb on the west side of Gilford Street south of the intersection, crossed the sidewalk, straddled a low fence and struck the plaintiff at a point just about the entrance of the Kenmore Apartments. The defendant Roche did not even see the plaintiff and she proceeded some little distance further along the fence before she recovered her composure and applied the brakes and brought her car to a stop (*vide* Exhibit 4).

I have no hesitation in applying the law as laid down in *Tatisich* v. *Edwards; Edwards* v. *Tatisich,* [1931] S.C.R. 167, and in *Fujiwara* v. *Ogawa,* 51 B.C. 388; 52 B.C. 383; [1937] 1 W.W.R. 364; 3 W.W.R. 670; [1938] 1 W.W.R. 377 (affirmed recently in the Supreme Court of Canada [1938] S.C.R. 170). The defendant Roche is not to be held responsible for the injuries to the plaintiff except to the extent that she was responsible for the accident at the intersection.

The plaintiff is 56 years of age. Prior to the accident she had had good health, and, one infers from the evidence, had beeen for her years a rather athletic woman. As a result of the accident she sustained possibly some concussion and several

nasty cuts and bruises. Some of the cuts were on the head and nose. She sustained no fractures. She was in the hospital only a few hours. She was confined to her apartment for a month. Marked neurasthenia developed, manifesting itself in an anxiety neurosis but no definite evidence of any organic change in the body was diagnosed by the doctors. The doctors gave varying estimates of the time which will be required for a complete recovery. Recovery will be hastened by the settlement of this litigation and it is not unreasonable to conclude that complete recovery will be had at the end of 17 to 20 months after the accident.

General damages are assessed at $1,250.00. Special damages are allowed as follows:

Knitted suit	$ 20.00
Shoes	7.00
Hat	7.00
Stockings	1.00
Gloves	3.00
Hospital	5.00
Dr. McKechnie's bill	65.00
Maid	10.00
Victoria trip	50.00
	$168.00

Judgment as indicated above. Costs.

Judgment for plaintiff.

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RENEWO PRODUCTS LIMITED v. MACDONALD & WILSON LIMITED.

Oct. 17, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29; *Nov.* 1, 2, 3, 8.

Sale of goods—Poison delivered instead of corn-starch to manufacturer—Sale by manufacturer to wholesaler who sells to retailer—Death of retailer's customer through use of article—Breach of warranty—R.S.B.C. 1936, Cap. 250, Secs. 20 and 21.

Distd.
akelse Dairy Prod. v. Gen. Dairy Mach. & Supply 10 D.L.R. (3d) 277 (B.C.S.C)
also Not Folld 72 W.W.R. 755

A manufacturer of baking-powder ordered a consignment of ingredients for making baking-powder. The ingredients ordered included 65 pounds of corn-starch, but instead of sending corn-starch the defendant sent 65 pounds of sodium silica fluoride (marked corn-starch) which is a poison. The manufacturer made baking-powder which included this poison, and sold it to a wholesaler who sold to a retailer. The retailer sold a tin to D. D.'s wife made biscuits, using the baking-powder from the tin, and eating some of them she died from the effects of the poison. The plaintiff claims that when these facts were made public its entire business fell off to a point where it could not continue to operate successfully.

Held, that the condition implied by section 20 of the Sale of Goods Act that the goods which were delivered should correspond with the description, had not been fulfilled, and the plaintiff being obliged to treat the implied condition as a breach of warranty was entitled to damages, the damages being the amount which it had paid for the alleged corn-starch, and the value of the materials which had been destroyed by mixing the powder with it. Assuming that there had been a breach of section 21 (*a*) in that the defendant did not comply with the implied condition that the goods should be reasonably fit for the particular purpose for which it was made known to the defendant that they were required:—

Held, that the plaintiff was not entitled to damages for the loss of business it sustained. It was however entitled to recover for the fees paid to two analysts for analyzing the powder after it learned that there was something wrong with it.

Held, further, that the plaintiff was not negligent in not having the materials examined by an expert, and it was entitled to rely upon the defendant supplying it with the material it had ordered.

ACTION for damages. The plaintiff, a manufacturer of baking-powder, ordered from the defendant a consignment of the ingredients used in making baking-powder, the order including 65 pounds of corn-starch. Instead of delivering corn-starch, the defendant delivered 65 pounds of sodium silica fluoride, which is a poison. The package was marked corn-starch. The

facts are fully set out in the reasons for judgment. Tried by ROBERTSON, J. at Vancouver on the 17th of October to the 3rd of November, 1938.

W. S. Owen, and *J. A. MacLennan,* for plaintiff.
Locke, K.C., and *G. A. Grant,* for defendant.

Cur. adv. vult.

8th November, 1938.

ROBERTSON, J.: The plaintiff was at all material times a manufacturer of baking-powder and also some 20 other things, which were not food products.

On December 4th, 1936, the plaintiff ordered from the defendant, *inter alia,* 65 pounds of corn-starch, 36 pounds of acid calcium phosphate and 25 pounds bicarbonate of soda, being the ingredients used by the plaintiff to make baking-powder. The defendant delivered the acid calcium phosphate, bicarbonate of soda and purported to deliver the corn-starch. Instead it delivered 65 pounds of sodium silica fluoride (marked corn-starch) which is a poison. The plaintiff, believing it had received delivery of the three articles which it had ordered, proceeded, that day, to make 160 12-oz. tins of baking-powder.

On December 5th it sold to Plenty For All Products Ltd. several dozen tins with labels bearing the name "Plenty For All" and stating "packed expressly" for it. There was nothing on the label to show by whom it had been packed. Plenty For All sold to Goodrich, a retail grocer. A man named Dunbar purchased one of the tins from this grocer. The same day Dunbar's wife made biscuits, using this baking-powder. She ate some of the biscuits and died from the effects of the sodium silica fluoride poison. These facts were made public with the result, the plaintiff alleges, that its entire business fell off to a point where it could not continue to operate successfully. Dunbar is now suing Goodrich for damages for breach of warranty, loss of service and consortium and Plenty For All Products Ltd. and the plaintiff and defendant for damages for negligence.

Plenty For All Products Ltd. has sued the plaintiff for damages for breach of warranty and the defendant for damages for negligence.

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Pleadings were delivered. In each action the defendant denied all liability.

In each of these actions Plenty For All Products Ltd. and the plaintiff have taken third-party proceedings against Macdonald & Wilson Ltd. for indemnity. These actions have not yet been tried.

The plaintiff now claims damages as follows: (1) The amount which it paid for the alleged corn-starch; (2) the value of the materials which have been destroyed by mixing the poison with it; (3) the damage to its goodwill; and (4) the amounts which it may have to pay to Dunbar and the Plenty For All Products Ltd. in the action brought by them.

The plaintiff bases its claim on sections 20 and 21 (*a*) and sections 58 and 59 of the Sale of Goods Act, R.S.B.C. 1936, Cap. 250. As to section 20, there is no doubt that the implied condition that the goods which were delivered should correspond with the description has not been fulfilled and therefore the plaintiff is entitled to damages in respect of this. The plaintiff has, in this case, to treat the implied condition as a breach of warranty (see section 18). The damages therefore, as provided in section 58 (2), are the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty. I think it is entitled to recover under the first two heads of damage.

As to the third head of damage the plaintiff relies upon sections 21 (*a*), 58 (2) and 59. It alleges that it expressly made known to the defendant the particular purposes for which the goods were required so as to show that it relied on the defendant's skill or judgment and that the goods were of a description which it was in the course of the defendant's business to supply. It submits that the defendant did not comply with the implied condition that the goods should be reasonably fit for such purpose.

The plaintiff company was not formed until 1935. In 1935 Spence who owned the business, which was afterwards transferred to the plaintiff, bought from the defendant the same kind of materials for making baking-powder. He dealt with Koch who was an employee of the defendant. He told him he wanted "pure food grade" and that he required the corn-starch for

manufacturing baking-powder. Koch admits this. Nothing appears to have been said to Koch or the defendant by Spence in 1936 as to the use to which the articles purchased were to be put. Assuming that the communication made in 1935 was sufficient to bring the plaintiff under section 21 (*a*), I am of the opinion that the plaintiff is not entitled to damages for the loss of business it sustained. Assuming, then, a breach of section 21 (*a*), the plaintiff is entitled to "the estimated loss directly and naturally resulting in the ordinary course of events from the breach," and to such damages "as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach," *i.e.*, damages under said sections 58 (2) and 59. As pointed out by Bruce, J. in *Bostock & Co., Limited* v. *Nicholson & Sons, Limited,* [1904] 1 K.B. 725; 73 L.J.K.B. 524, the two sections last mentioned are framed upon the rules laid down in *Hadley* v. *Baxendale* (1854), 9 Ex. 341; 23 L.J. Ex. 179.

In *Bostock & Co., Limited* v. *Nicholson & Sons, Limited, supra,* the defendant, in breach of its contract to supply the plaintiff with pure commercial sulphuric acid, delivered sulphuric acid containing arsenic. The defendant used it to manufacture invert and glucose and sold the produce to brewers for making beer. A number of persons who drank the beer became ill and some of them died. The result was the plaintiffs were unable to continue in business and sued the defendant for negligence and breach of warranty. It was held by Bruce, J. that the plaintiff could not recover damages for the loss of the goodwill of its business. He cited with approval *Fitzgerald* v. *Leonard* (1893), 32 L.R. Ir. 675. In that case the facts were: The defendant sold to the plaintiff, a grocer, adulterated butter with a warranty that the substance was butter. The plaintiff sold some of this to his customers. He was prosecuted under the Margarine Act, 1887, Cap. 29, and fined. After the conviction, the plaintiff's butter business, as well as his general grocery business, fell off. At the trial the plaintiff was awarded damages for loss of business. Holmes, J., delivering the judgment of the Queen's Bench Division, said at pp. 679-80:

Where a merchant has sold goods to a retail dealer, with a broken war-

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ranty, express or implied, that they are of a specific nature or character, and the purchaser, not having discovered the defect, has resold the same goods with the same warranty, the latter is entitled, under ordinary circumstances, to recover from the former the damages to which he has thus become liable to the sub-vendee. This is, I think, now well settled, and is in accordance with the general principle that the true measure of damages is the loss that necessarily or naturally results from the breach of contract, provided such loss be not too remote. In the case before us, the plaintiff claims damages of a wholly different kind. She says that her business was injured by the sale of the adulterated butter purchased by her from the defendant, and that he is bound to compensate her for the falling off in her trade profits thus occasioned.

No authority is to be found in support of this contention; and, as the point must have frequently arisen in transactions both great and small, I should be disposed to think that the absence of authority is in itself decisive. But there is more than the absence of authority. To award such damages would seem to me to involve a disregard of the legal principle to which I have referred, and upon which this branch of our law rests.

Cointat v. *Myham & Son*, [1913] 2 K.B. 220; 82 L.J.K.B. 551, was a decision of Coleridge, J. The defendant had sold diseased meat to a butcher who was convicted under a public health Act of having diseased meat in his premises and he suffered, in consequence, loss of trade. The learned judge distinguished *Bostock & Co., Limited* v. *Nicholson & Sons, Limited, supra,* on the ground, as was the case, that in that case there was no warranty that the article purchased was fit for the purpose for which it was used. He said at pp. 223-4:

The strongest case against the plaintiff's contention is *Fitzgerald* v. *Leonard* (1893), 32 L.R. Ir. 675. That case does not, in my opinion, decide more than that in that particular case the damages for loss of custom in fact arose from the conviction and not from the breach of warranty, and that the conviction of the plaintiff was not what the parties could reasonably have had in contemplation on the facts of that case. If it decides more than this, it is in conflict with the case of *Blake* v. *Fenner* (unreported), and I decline to follow it. That case was decided in the Court of Appeal on October 27, 1911, upholding a decision of mine that on a similar implied warranty damages for loss of custom could be recovered.

He continued at p. 224:

To sum it all up, the sound view appears to me to be this: The loss to a man's business may not be, and perhaps is not, usually in contemplation between the parties as the possible consequence of a breach of contract, but where the party guilty of the breach of contract or warranty knows that the other party is relying on his fulfilment of the contract and knows the possible and probable consequences of such reliance, the damages caused to the other party by breach of his contract are recoverable by him. Where,

as in this case, an article is supplied to a buyer to be used as food for his customers and that is known to the seller and the article is supplied for that purpose, in the absence of negligence on the part of the buyer I think he may recover for the loss of custom due to the breach of the contract by the defendant, under the principle laid down in *Hadley* v. *Baxendale*, [*supra*] on the ground that the special loss was in fact actually in the contemplation, or may be taken to have been in the contemplation, of the seller at the time of making the contract as the reasonable consequence of such breach.

In *Simon* v. *Pawson and Leafs Limited* (1932), 148 L.T. 154, the Court of Appeal had to consider a question of damages arising out of an alleged contract between the plaintiff and the defendant to supply certain materials by a certain date. She claimed, by reason of the defendant's breach, she had lost an appointment as dressmaker to a girls' school. Scrutton, L.J. assumed a contract, breach and resulting loss of appointment. After setting forth principles laid down in *Hadley* v. *Baxendale, supra,* he referred to *Horne* v. *Midland Railway Co.* (1873), L.R. 8 C.P. 131; 42 L.J.C.P. 59; 28 L.T. 312, and *British Columbia Saw-Mill Co.* v. *Nettleship* (1868), L.R. 3 C.P. 499; 37 L.J.C.P. 235. He mentioned that in *Horne's* case Blackburn, J. said he was disposed to agree with the suggestion of Baron Martin that, to be effective, notice of the particular facts relied upon by the plaintiff as giving rise to a claim for damages should be so given that an actual contract arose on the part of the defendant to bear the exceptional loss. He then said a similar suggestion has been made by Willes, J. in the *Nettleship* case, and, at p. 157, says:

In a considerable experience of contracts of sale of goods, I do not remember cases of claim for loss of repeat orders from the customer. We were referred to a case of *Cointat* v. *Myham* (108 L.T. 556; [1913] 2 K.B. 220), where Coleridge, J., on a claim for breach of contract to supply meat, the breach being supply of meat unfit for human food, whereby the plaintiff was convicted and fined, gave damages for "loss of trade owing to conviction." This judgment was set aside and a new trial ordered on quite another ground, the Court of Appeal saying they would say nothing as to other questions argued, leaving them to be determined on the new trial. Coleridge, J. purported to follow an unreported decision of the Court of Appeal in *Blake* v. *Fenner*. Unfortunately the most careful research in these Courts and in the Record Office has failed to discover the pleadings in this case, but from a note of the findings of the jury, it seems to have been a claim for supply of unsuitable oil to a fried fish shop. In the absence of any more exact information as to the circumstances of the case, I am unable to follow it. I follow the principle of the Exchequer Chamber cases

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already referred to, and I prefer the reasoning of Holmes, J. in the Irish case of *Fitzgerald* v. *Leonard*, [*supra*] which appears to agree with the English authorities, to that of Coleridge, J.

Greer, L.J. said at p. 158:

The question as to the true application of the third rule in *Hadley* v. *Baxendale* (*supra*), whereby damages within the contemplation of the parties at the time of making the contract are treated as within the measure of damages recoverable in law, is a very difficult one on which opinions have differed, and I prefer to leave it for decision to a case where it is directly necessary to decide it.

Slesser, L.J. said at p. 159:

In this view of the evidence I find it unnecessary to consider in this case the difficult problem in what circumstances damages may be recovered for loss of prospective custom on the ground that a special loss of custom was in the contemplation of the seller at the time of making the contract.

The weight of judicial opinion seems to be against damages being given for loss of business in the circumstances of this case.

The plaintiff learned about January 11th, 1937, that there was something wrong with the baking-powder. It then employed two analysts, Armstrong and Thomson, to examine it. I think it is entitled to recover for this. See *Richard Holden (Limited)* v. *Bostock and Company (Limited)* (1902), 18 T.L.R. 317. The plaintiff also sought to recover for a solicitor's and physician's bill. There is no evidence as to the necessity for these except what is contained in the bills themselves. Perusing these, I am unable to say that the plaintiff is entitled to recover in respect of them.

As to the 4th head of damages—the plaintiff claimed to be entitled to have these assessed in this action. He conceded that the plaintiff in this action was liable in damages for breach of contract (but not in tort) to the Plenty For All. He relied upon *Randall* v. *Raper* (1858), El. Bl. & El. 84; 27 L.J.Q.B. 266; 120 E.R. 438. The defendant objected that the plaintiff should have brought on the trial of these actions before proceeding with the trial of this action. Counsel for both parties then asked me not to deal with this question—this arrangement to be without prejudice to the rights of the defendant in the other actions under the third-party procedure.

I do not think that the plaintiff was negligent in not having the materials examined by an expert. I think it was entitled to

rely upon the defendant supplying it with the material it had ordered. See *Pinnock Bros.* v. *Lewis and Peat, Ld.*, [1923] 1 K.B. 690, at 698; 92 L.J.K.B. 695; *Mowbray* v. *Merryweather*, [1895] 2 Q.B. 640; 65 L.J.Q.B. 50, and *British Oil and Cake Company, Limited* v. *Burstall and Co.* (1923), 39 T.L.R. 406, at 407.

Accordingly I find the plaintiff is entitled to recover:

(1) The value of the corn-starch which it paid for and did not receive	$ 5.20
(2) The value of the materials which were destroyed by being mixed with fluoride, *viz.*, 160 tins at $1.80 per doz.	24.00
(3) Payments by plaintiff to Armstrong (part only allowed)	56.00
and Thomson	25.00
	$110.20

There will be judgment for the plaintiff for $110.20 and costs.

Judgment for plaintiff.

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Administration of estates—Intestate's estate—Advances to child—Whether "a portion"—Onus of proof—R.S.B.C. 1936, Cap. 5, Sec. 121 (3).

Section 121 (3) of the Administration of Estates Act provides: "The *onus* of proving that a child has been maintained or educated, or has been given money, with a view to a portion shall be upon the person so asserting, unless the advancement has been expressed by the intestate, or acknowledged by the child, in writing."

Moses Seed died intestate. He left him surviving, his widow, two daughters and a grandson Garth Seed, the son of his son George R. Seed, who predeceased him. During his life Moses Seed paid to or on behalf of his son George R. Seed sums of money amounting to $15,625.40. He left an estate valued at $25,831. On originating summons to determine whether the grandson is entitled to share in the estate:—

Held, that the proof required by the above section need not be in writing. The person asserting that a child has been advanced with a view to a

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portion need make out a *prima facie* case only. The evidence here makes out a *prima facie* case that the moneys advanced were advanced by the intestate "by portion" and apart from the evidence there is the presumption that these large sums were advanced "by portion." The grandson is not entitled to a share in the estate.

ORIGINATING SUMMONS to determine whether Garth Seed, a grandson of Moses Seed, deceased, is entitled to share in his grandfather's estate. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Victoria on the 23rd of December, 1938.

Whittaker, K.C., for plaintiffs.
Gordon Cameron, for Garth Seed.

Cur. adv. vult.

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ROBERTSON, J.: This is an originating summons to determine whether

Garth Seed, who is a grandson of the deceased Moses Seed, is entitled to any share in the estate of the deceased Moses Seed, or is the said Garth Seed excluded from any share in the estate of the said Moses Seed by reason of the fact that his father, George Robert Seed, who predeceased the said Moses Seed, was advanced by the said Moses Seed by portion, various sums equal to or greater than the share of the estate of the said Moses Seed which the said George Robert Seed would have been entitled to receive had he survived the said Moses Seed?

Moses Seed died intestate. He left him surviving, his widow and two daughters and a grandson Garth Seed, the son of his son George Robert Seed who predeceased him. During Moses Seed's lifetime he paid to, or on behalf of his son George Robert Seed, sums of money amounting to $15,625.40. He left an estate valued at $25,831.93. The widow takes one-third, the daughters and the grandson take the balance in equal shares unless by reason of section 121 of the Administration Act, the late George Robert Seed was "advanced by the intestate by portion." That section provides that if he were so advanced the portion shall be reckoned, for the purposes of the section only as part of the estate of the intestate distributable according to law; and if the advancement is equal to or greater than the share of the estate he would be entitled to receive as above reckoned, then he is to be excluded from any share in the estate;

but if the advancement is not equal to such share he is entitled to receive so much only of the estate of the intestate as is sufficient to make all the shares of the children in the estate and advancement equal as nearly as can be estimated. Subsection (3) of section 121 reads as follows: [already set out in head-note].

The evidence shows that the advance was not expressed by the intestate, or, acknowledged by the child, in writing. The *onus,* then, is on the persons asserting that the moneys were given with a view to a portion. It is submitted that this *onus* can only be satisfied by something in writing. I do not think so. The section does not say so, and I see no reason why the ordinary rules with regard to the *onus* of proof should not apply. It is sufficient for the person asserting to make out a *prima facie* case and then the *onus,* in the sense of introducing evidence, shifts.

In my opinion the evidence here makes out a *prima facie* case that the moneys advanced (excluding the amount secured by the mortgage of $5,000) were advanced by the intestate "by portion." It is not necessary to decide whether the $5,000 is or is not to be reckoned as part of the estate. In any case the one-third which the grandson would be otherwise entitled to would be less than the balance of the money advanced after deducting the $5,000. Apart from the evidence, there is the presumption that those large sums were advanced "by portion"—see *In re Scott,* [1903] 1 Ch. 1.

The question is answered in the negative, *i.e.,* Garth Seed is not entitled to a share in the estate of the late Moses Seed. Costs of all parties out of the estate.

Question answered in the negative.

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Crown lands—Dominion Railway Belt—Timber licences—Transfer of Railway Belt from Dominion to Province—Liability for dues owing Dominion prior to transfer — Novation — Bankruptcy — Claim of Province as unsecured creditor.

The Abernethy-Lougheed Logging Company Limited carried on business as a logging company for many years in the British Columbia Railway Belt under authority of timber licences issued by the Dominion Government pursuant to timber regulations promulgated under the Dominion Land Act, and licence to log timber berth "W" in said Railway Belt was issued by the Dominion to Miami Corporation for several yearly periods prior to May 1st, 1930. On this date a licence was issued for one year for timber berth "W" to Miami Corporation, and certain timber berths other than "W" were also covered by yearly licences issued by the Dominion to the Abernethy Company on May 1st, 1930. On the 10th of June, 1930, Miami Corporation assigned the licence covering timber berth "W" to Abernethy Company, and the assignee agreed to assume and pay all royalties and other charges respecting the timber cut on timber berth "W" at or prior to the date thereof. By agreement between the Dominion and the Province that became operative on August 1st, 1930, the lands situate in the Railway Belt were transferred from the Dominion to the Province, and on this date there was owing to the Dominion on all the licences in question $30,515.61. On and after August 1st, 1930, the administration of Crown lands within the Railway Belt reverted to the Province. On the 13th of October, 1932, the Abernethy Company, in sending rentals and licence fees to the Forest Branch of the Province, enclosed the assignment of timber berth "W" from the Miami Corporation to itself, and requested transfer of the licences for 1931 and 1932 covering this berth, and two licences were issued to the Abernethy Company covering timber berth "W," one from May 1st, 1931, and the other from May 1st, 1932. Licences covering the other berths were also issued yearly to the Abernethy Company. On the 8th of June, 1934, the Abernethy Company went into bankruptcy. There was owing by the Abernethy Company to the Province on all the licences from August 1st, 1930, to date of bankruptcy, the sum of $22,173.89. On January 10th, 1936, the Crown filed a claim as an unsecured creditor against the trustee for the amount owing the Dominion up to August 1st, 1930, and the amount owing the Province after that date, being in all $52,689.50. The disallowance of the claim by the trustee was upheld by MURPHY, J.

Held, on appeal, that with relation to all the licences the Railway Belt Re-transfer Agreement did operate as an assignment from the Dominion

to the Province of the moneys owing to the Dominion at the time the agreement became effective, and the right to sue was transferred to the Province.

Held, further, that with relation to timber berth "W" there was a complete *novation on the part of all the parties concerned, and a carrying out of* the intention to substitute Abernethy Company as debtor in place of Miami Corporation.

Held, further, that the licences expire at the end of every licence year without the necessity of action by anyone. At the date of bankruptcy the Abernethy Company was logging pursuant to authority conferred by licences issued on May 1st, 1934, and expiring on April 30th, 1935. On January 10th, 1936, when the Province filed its claim the bankrupt was not the holder of any subsisting licences. It follows that the Crown cannot be regarded as a secured creditor. The Province is therefore entitled to claim as an unsecured creditor against the estate for $52,689.50, and the appeal is allowed.

APPEAL by the Attorney-General of British Columbia from the decision of MURPHY, J. of the 20th of December, 1937, in which he upheld the disallowance by the trustee in bankruptcy of Abernethy-Lougheed Logging Company Limited of a claim made by the Department of Lands of British Columbia against the estate of the bankrupt for $52,689.50, to be paid in priority to all other creditors under the prerogative right of the Crown. The timber in question lay within the Dominion Railway Belt and was governed by the regulations issued and enforced by the Dominion Government. Said regulations provided for the sale of timber berths in the Railway Belt on certain terms and conditions. Among the berths sold was timber berth "W" which was sold to Miami Corporation. Although the amount claimed by the Government arises out of several timber berths, by agreement of counsel timber berth "W" was alone considered, and the decision in that regard is to govern the whole matter at issue. After timber berth "W" was sold by the Crown Dominion to Miami Corporation, that berth was assigned by Miami Corporation to the Abernethy-Lougheed Logging Company Limited on June 10th, 1930. By agreement between the Dominion and the Province the lands in the Dominion Railway Belt were transferred to the jurisdiction of the Province on August 1st, 1930. It was a term of the agreement that all rights heretofore granted by the Dominion should be recognized by the Province and

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renewal licences were afterwards issued by the Province. The agreement between the two Governments did not contain an assignment of moneys then due the Dominion. On August 1st, 1930, arrears of dues under Dominion licences held by the bankrupt was $27,888.72, which together with interest, scaling fees and expenses, totalled $30,515.61. Since then the Province claims against the bankrupt $10,990.66 for dues which with interest, scaling fees and expenses to June 8th, 1934, amounts to $22,173.89. On June 8th, 1934, Abernethy-Lougheed Logging Company Limited made an assignment in bankruptcy and G. L. Salter was in due course appointed trustee in bankruptcy of the company. The Province submitted a proof of claim in bankruptcy as an unsecured creditor and claimed to be paid in priority to all other creditors by virtue of the prerogative right of the Crown. The trustee disallowed the claim of the Crown.

The appeal was argued at Vancouver on the 6th, 7th and 8th of June, 1938, before MARTIN, C.J.B.C., MCQUARRIE and SLOAN, J.J.A.

Pepler, D. A.-G., for appellant: The learned judge held there was no novation under which the liability of the Miami Corporation was transferred to the bankrupt; that the Crown was a secured creditor and even if a common creditor, the Crown had no prerogative right to priority over other common creditors. First as to novation, under the assignment from Miami Corporation to the bankrupt the assignee agreed to pay all royalties or other charges due in respect of timber cut from berth "W" prior to the assignment. The assignment was executed by the bankrupt on October 13th, 1932. This document was recorded in the Lands Department and receipt thereof acknowledged on the 19th of October, 1932: see *Bilborough* v. *Holmes* (1876), 5 Ch. D. 255; *Hoag* v. *Kloepfer* (1918), 26 B.C. 181; *Morton's Case* (1873), L.R. 16 Eq. 104; *Rich* v. *North America Lumber Co.* (1913), 18 B.C. 543. The bankrupt was the operator and liable for the dues under the Dominion Regulation No. 24: see *Simms* v. *Registrar of Probates*, [1900] A.C. 323 at p. 334; *Bullivant* v. *Attorney-General for Victoria*, [1901] A.C. 196.

The facts do not make the Crown a "secured creditor" within the meaning of the expression in section 2 of the Bankruptcy Act. Where the Crown is a creditor it has priority over other creditors of a like degree: see *New South Wales Taxation Commissioners* v. *Palmer,* [1907] A.C. 179; *In re Henley & Co.* (1878), 9 Ch. D. 469 at pp. 471-2; *In re Sid B. Smith Lumber Co., Ltd.* (1917), 25 B.C. 126. The timber dues are "tax rates or assessments" within the meaning of section 125 of the Bankruptcy Act: see *Re F. E. West & Co.* (1921), 50 O.L.R. 631 at p. 640; *City of Halifax* v. *Nova Scotia Car Works Limited,* [1914] A.C. 992; *La Cite de Montreal* v. *Les Ecclesiastiques du Seminaire de St. Sulpice de Montreal* (1889), 14 App. Cas. 660; *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction,* [1931] S.C.R. 357 at pp. 362-3; *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ld.,* [1933] A.C. 168 at pp. 175-6; *In re Imperial Clothing Co., Ltd.* (1930), 13 C.B.R. 184. The case of *Re Hardy* (1928), 63 O.L.R. 246; 10 C.B.R. 288, is distinguishable as it was admitted in that case that the so-called "rates" were in fact part of the purchase price.

Hossie, K.C. (*Salter,* with him), for respondent: There is no obligation to pay the Dominion dues accrued up to July 31st, 1930. Regulation 24 provided for recovery by suit where payment is "evaded" and there was no evasion here. If there was any obligation to pay it was that of the Miami Corporation. There was no novation such as to entitle either Dominion or Province to sue the bankrupt. The Province has no right to claim against the bankrupt for moneys claimed by the Dominion because the Dominion could not have claimed. There was no assignment of the moneys to the Province and there was no privity of contract between the Province and the bankrupt as to the arrears. If the bankrupt is indebted to the Crown in the right of the Province the Crown is not an unsecured creditor and is not entitled to prove as such for the amount claimed. The Crown has rights in the timber and can exercise the rights of cancellation provided in the agreement and the licences, and the timber has value in excess of the claim: see *In re Hayes, McKay and Sharp Ltd.* (1934), 16 C.B.R. 10; *In re H.*

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Robinson Corporation Ltd. (1937), 19 C.B.R. 222. The Crown has no prerogative right to be paid in priority to other creditors. The right is taken away by sections 123 and 188 of the Bankruptcy Act: see *In re Cardston District U.F.A. Co-operative Ass'n* (1925), 7 C.B.R. 413; *In re Standard Pharmacy Ltd.* (1926), *ib.* 424; *The King* v. *Trustee of Leach* (1929), 11 C.B.R. 214 at pp. 218-9; *In re General Fireproofing Company* (1937), 18 C.B.R. 159 at p. 168; *Re Hardy* (1928), 10 C.B.R. 107, and affirmed on appeal, *ib.* 288. The Crown Costs Act does not apply to bankruptcy proceedings. This is a Dominion Court and the costs are in the discretion of the Court: see *Valin* v. *Langlois* (1879), 3 S.C.R. 1 at pp. 15 and 18, and on appeal, 5 App. Cas. 115; *Cushing* v. *Dupuy* (1880), 5 App. Cas. 409 at p. 415; *In re Letters Patent No. 139,207; In re Carbonit Aktiengesellschaft,* [1924] 2 Ch. 53 at p. 69; *In re Reid* (1922), 2 C.B.R. 308; *Rex* v. *Lam Joy* (1920), 28 B.C. 253; *Rex* v. *Tronson,* [1932] 1 W.W.R. 537 at p. 544. In all cases under the Bankruptcy Act in which the Crown has been involved, costs have been awarded for and against the Crown except where special reason applied: see *Larue* v. *Royal Bank of Canada,* [1926] S.C.R. 218; 7 C.B.R. 285; *In re Silver Brothers Limited* (1925), 7 C.B.R. 515; (1927), 8 C.B.R. 467; [1929] S.C.R. 557; 11 C.B.R. 103; [1932] A.C. 514; 13 C.B.R. 223; *The King* v. *Trustee of Leach* (1929), 11 C.B.R. 214 at pp. 218-9.

Pepler, replied.

Cur. adv. vult.

On the 10th of September, 1938, the judgment of the Court was delivered by

SLOAN, J.A.: This is an appeal by the Attorney-General from a judgment of Mr. Justice MURPHY sitting as a Judge in Bankruptcy. The learned judge upheld the disallowance by the trustee in bankruptcy, of a claim filed by the Forest Branch of the Department of Lands of the Province against the estate of Abernethy-Lougheed Logging Company Limited, in bankruptcy.

We are invited by the appellant to say that the trustee was in error in disallowing the claim and that the learned judge below was also in error in his determination of the questions herein.

I have not found the questions easy of solution and in order to reach an understanding of the matter it is necessary to examine the facts.

It appears that the Abernethy-Lougheed Logging Company Limited (hereinafter called the Abernethy Company) carried on business as a logging company for many years in British Columbia in the area known as the Railway Belt. This operation was carried on under the authority terms and conditions of timber licences issued by the Dominion Government, pursuant to Timber Regulations promulgated under the Dominion Lands Act (R.S.C. 1927, Cap. 113). For the purposes of this inquiry it will be convenient if such licences were to be described as covering timber berth "W" and "those other than 'W,' " for it so happens that different as well as common considerations apply to these two groups.

From the material before us it seems that the licence to log timber berth "W" was issued by the Dominion to Miami Corporation for several yearly periods prior to May 1st, 1930, and on May 1st, 1930, a licence issued for the period of the one year expiring on the 30th of April, 1931. Those timber berths other than "W" were also covered by licences issued by the Dominion to the Abernethy Company for yearly periods prior to May 1st, 1930, and on that date a similar yearly licence was issued covering these berths expiring on the 30th of April, 1931.

On the 10th of June, 1930, Miami Corporation assigned the licence covering timber berth "W" to Abernethy Company and the assignee therein agreed to assume and pay "all royalties or other charges due in respect of any timber cut from timber berth 'W' at or prior to the date" thereof. There is a suggestion that this document was acted upon by the assignee in 1930 by entry into timber berth "W" although the evidence upon this point does not seem clear. It is certain, however, that the signature of the Abernethy Company was not affixed thereto until the 13th of October, 1932.

Returning to 1930 we find that by an agreement between the Dominion and the Province—the Railway Belt Re-transfer Agreement—the lands situate in the Railway Belt were retransferred from the Dominion to the Province. This agreement was

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given statutory effect by the Province (B.C. Stats. 1930, Cap. 60), by the Dominion (Can. Stats. 1930, Cap. 37) and confirmed by an amendment to the British North America Act by the Imperial Parliament (1930, 20 & 21 Geo. V. Cap. 26). The agreement became operative on the 1st of August, 1930.

On the 1st of August, 1930, there was owing to the Dominion on all the licences in question the sum of $27,896.34 for arrears of dues and an additional amount for scaling fees, expenses, and interest computed to July 31st, 1930, which brought the total owing at that date to $30,515.61.

On and after the 1st of August, 1930, the administration of the Crown lands in the Railway Belt reverted to the Province by virtue of the terms of the re-transfer agreement.

On the 13th of October, 1932, the Abernethy Company wrote to the Forest Branch of the Provincial Department of Lands with respect to timber berth "W," enclosing cheque for $744.85 made up as follows:

Rental due May 1st, 1931 (2,585 acres)	$258.50
Interest from May 1st, 1931, to date....	25.63
Licence fee	2.00
1930 fire guarding charge.....	142.72
Rental due May 1st, 1932.....	258.50
Interest	18.10
Licence fee	2.00
1931 fire guarding charge.....	20.68
Transfer fee	16.72
	$744.85

The letter also enclosed the assignment of timber berth "W" from Miami Corporation to the Abernethy Company and requested the transfer of the licence and "licences for 1931 and 1932 covering this berth."

The reply to this communication was dated the 19th of October, 1932, and is (in part) as follows:

A transfer of the area from Miami Corporation to Abernethy Lougheed Logging Company Limited has been filed, but in filing this transfer, the Department accepts no responsibility as to title or otherwise.

We are also enclosing herewith licences for 1931-1932 and 1932-1933, all of which we shall be obliged if you will have signed by the proper officials

of your company, the company's seal attached, and returned to this office so that they may be completed and one copy of each forwarded to you.

Following this letter two licences were issued to the Abernethy Company by the Province covering timber berth "W." The one (Exhibit 4) was for the period from the 1st of May, 1931, to the 30th of April, 1932. The other (Exhibit 5) covered the period from the 1st of May, 1932, to the 30th of April, 1933. Both licences were dated the 21st of October, 1932.

Licences covering the timber berths other than "W" were also issued yearly by the Province to the Abernethy Company.

On the 8th of June, 1934, the Abernethy Company went into bankruptcy.

There was owing by the Abernethy Company to the Province on all the licences for the period from the 1st of August, 1930, to the date of the bankruptcy, the sum of $22,173.89, made up of dues, interest on dues, scaling fees and expenses.

On the 10th of January, 1936, the Crown (Provincial) filed its claim as an unsecured creditor against the trustee in bankruptcy for the sum of $52,689.50 made up as follows:

Amount owing to Dominion up to August 1st, 1930, and assigned to Province under re-transfer agreement	$30,515.61
Amount owing to Province from August, 1930, up to 8th of June, 1934	22,173.89
	$52,689.50

On the 10th of February, 1937, the trustee disallowed the claim. The notice of disallowance addressed to the Forest Branch of the Department of Lands reads (in part) as follows:

1. Abernethy Lougheed Logging Company Limited is not in any way indebted to you.

2. Alternatively if the said company is indebted to you it is not indebted in the amount claimed.

3. Alternatively if the said company is indebted to you, which is not admitted, but denied, then you have security for the whole of such indebtedness.

The Attorney-General unsuccessfully appealed to Mr. Justice MURPHY from this disallowance by the trustee and now comes to us.

The trustee, in support of his disallowance of the claim

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advanced submissions some of which relate exclusively to timber berth "W" and others which relate to all the licences. It would perhaps be convenient at the outset to deal with submissions relative to all the licences.

In this connection it is submitted by the trustee that the Railway Belt Re-transfer Agreement did not operate as an assignment from the Dominion to the Province of moneys owing the Dominion at the date the agreement became effective, *i.e.*, the 1st of August, 1930. When we turn to the agreement which is a schedule to the Provincial Act hereinbefore referred to (B.C. Stats. 1930, Cap. 60) we find that there are four paragraphs which are relevant to this submission, *viz.*, paragraphs 1, 2, 3, and 4. They are as follows:

1. Subject as hereinafter provided, all and every interest of Canada in the lands granted by the Province to Canada as hereinbefore recited are hereby re-transferred by Canada to the Province and shall, from and after the date of the coming into force of this agreement, be subject to the laws of the Province then in force relating to the administration of Crown lands therein.

2. Any payment received by Canada before the coming into force of this agreement in respect of any interest in the said lands shall continue to belong to Canada, whether paid in advance or otherwise, without any obligation on the part of Canada to account to the Province therefor, and the Province shall be entitled to receive and retain any such payment made after the coming into force of this agreement without accounting to Canada therefor.

3. The Province will carry out in accordance with the terms thereof every contract to purchase or lease any interest in any of the lands hereby transferred and every other arrangement whereby any person has become entitled to any interest therein as against Canada, and will perform every obligation of Canada arising by virtue of the provisions of any statute or order in council or regulation affecting the said lands hereby transferred to any person entitled to a grant of lands by way of subsidy for the construction of railways or otherwise, or to any railway company for grants of land for right of way, roadbed, stations, station grounds, workshops, buildings, yards, ballast pits or other appurtenances.

4. Any power or right which, by any agreement or other arrangement relating to any interest in the lands hereby transferred or by any Act of the Parliament of Canada relating to the said lands, or by any regulation made under any such Act, is reserved to the Governor in Council, or to the Minister of the Interior or any other officer of the Government of Canada, may be exercised by the Lieutenant-Governor of the Province in Council or by such officer of the Government of the Province as is authorized to exercise similar powers or rights under the laws of the Province relating to the administration of Crown lands therein.

The learned judge below in dealing with this branch of the trustee's submission said in his reasons for judgment:

This argument I think is answered by paragraph 4 of the agreement between the Dominion and the Province set out in B.C. Stats. 1930, Cap. 60, where the agreement appears as a schedule. Said paragraph 4 transfers to the Province any power or right which by any agreement or other arrangement relating to any interest in the lands the Dominion possessed and such power or right is made exercisable or enforceable by the proper officer of the Province as fully as could be done by the Dominion. If I am right in holding that the Dominion had the right to sue the licensee for arrears of dues it follows I think from this provision that that right was transferred to the Province.

While it may well be that paragraph 4 bears the meaning put upon it by the learned judge below I prefer to base my conclusion upon another ground: the result, of course, is the same. In my view paragraph 1 of the agreement is the primary one to be considered in this connection. The language used is, I think, intended to be inclusive of all matters with the exception of the payments referred to in paragraph 2. What is to be retransferred from Canada to the Province under paragraph 1? It is "all and every interest of Canada in the lands . . ." In my view the dues and other moneys owing the Dominion under the licences in question were owing in respect to an

interest in the land—that is, in respect of the trees which till cut were part of the freehold and in respect of their sale off the land:

In re Refund of Dues under Timber Regulations, [1935] A.C. 184 at 193. Paragraph 1 then operating as an effective statutory assignment to the Province of the moneys owing the Dominion I am in agreement with the learned judge below that the right to sue for such moneys owing was transferred to the Province not only under paragraph 4, but under section 3 of Cap. 60, B.C. Stats. 1930, which reads as follows:

3. So far as the Legislature has power to enact, the Lieutenant-Governor in Council is authorized and empowered to do all such acts as may be necessary in order to give full effect to the agreement.

There may be other reasons for holding that the right to sue was transferred to the Province by the agreement but it is, in my view, unnecessary to enter into a further elaboration of the matter.

This brings me to the submission of the trustee with respect to timber berth "W." He contends that even if the agreement

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did operate as an assignment, the debt assigned was that of Miami Corporation and not that of the Abernethy Company. He submits that "there is no privity of contract between the Province and the bankrupt" with regard to those sums owing the Dominion by Miami Corporation prior to August 1st, 1930, and that if the Province has any claim in relation to timber berth "W" it is not against the bankrupt but against Miami Corporation. The learned judge below held that this point was well taken.

The Attorney-General contended that the learned judge below was in error in so finding and advanced the argument that

> there was a complete novation, an "*animus novandi*," on the part of all three parties concerned and a carrying out of the intention to substitute the Abernethy-Lougheed Logging Company Limited as debtor in place of the Miami Corporation.

Whether there has been novation in any particular case is a question of fact but I find no embarrassment in reviewing the finding of the learned judge below on this issue, in this case, because the determination of it depends upon the construction of documents, letters and uncontradicted evidence.

First of all what are the essential elements necessary to establish a complete novation? The answer to that is to be found in the terse and explicit language of BEGBIE, C.J., in *Polson* v. *Wulffsohn* (1890), 2 B.C. 39 at 43 (affirmed on appeal). While I can find no mention of this case in my notes of argument of counsel I think that neither the earlier nor later cases cited contain any better definition. To bring about a complete novation he said:

> . . . three things must be established: first, the new debtor must assume the complete liability; second, the creditor must accept the new debtor as a principal debtor, and not merely as an agent or guarantor; third, the creditor must accept the new contract in full satisfaction and substitution for the old contract; one consequence of which is that the original debtor is discharged, there being no longer any contract to which he is a party, or by which he can be bound.

He added:

> All these matters are in our law capable of being established by external circumstances: by letters, receipts, and payments, and the course of trade or business.

In other words in the absence of an express agreement the inten-

tion of the parties may be inferred from external circumstances including conduct.

In this case we have the Abernethy Company assuming complete liability under the terms of the assignment (Exhibit 19) for the debt of Miami Corporation. This assignment was recorded in the Department of Lands on or about the 19th of October, 1932 (Exhibit 21). To my mind there can be no question but that the first element necessary to be established has been proved. Also, to my way of thinking the facts indicate the second condition or element fulfilled; that is to say the Province accepted the Abernethy Company as its principal debtor and not merely as agent or guarantor.

S. W. Barclay an official of the Forest Branch of the Department of Lands was called as a witness and gave the following testimony relative to this matter:

On August 1st, 1930, we took over from the [Dominion] Crown Timber Agent, New Westminster, the records and books showing that the Abernethy Lougheed Logging Company on timber berth W owed approximately $30,000. We went to work and checked up with the Dominion books and also the books of the Abernethy Lougheed Logging Company, showing that there was approximately $30,000 due to the Department for logs cut by the Abernethy Lougheed Logging Company on timber berth W. Then a check was made with the company books showing that they owed to the Department of the Interior the amount which was transferred over to the Province under the Re-transfer Act. The assignment was received in 1932, showing that the Abernethy Lougheed Logging Comany was liable.

Pepler: That is the assignment from the —— From the Miami Corporation to the Abernethy Lougheed Logging Company, showing that the Abernethy Lougheed Logging Company assumed liability for the past, present and future dues. We just went after the company for the payment of the charges.

On cross-examination:

Did you make any application to the Miami Corporation to obtain payment of any of your dues? No.

You didn't know about the assignment of timber berth W until 1932? No.

From 1932 until the date of the assignment and during 1931 and during 1930 from the 1st of August, that is probably about two years, you didn't attempt to make any collection from the Miami Corporation? No.

Nor did you, as a matter of fact, make any attempt to make collection from the Abernethy Lougheed Logging Company until the bankruptcy occurred, did you? Oh, yes.

You wrote letters to them, did you? No, we took it up with the company.

Spoke to the company about it? Spoke to the company about it.

Spoke to some officer of the company? Yes.

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Didn't you write any letters? There would be letters written, and then there would be interviews with the company in regard to the arrears.

In my view this evidence is also material upon the third element and is a clear indication of the intention of the Province to accept the new contract in substitution for the old. Additional weight is given this evidence by the fact that the Province acknowledged its intention to look to the Abernethy Company and not the Miami Corporation by filing its claim with the Trustees in Bankruptcy. *Rich* v. *North America Lumber Co.* (1913), 18 B.C. 543.

It is also a matter of some significance that when the Province took over the records and books of account from the Dominion in August of 1930 these documents indicated that the Abernethy Company was liable for the moneys owing to the Dominion on timber berth "W." (Barclay's evidence and Exhibit 30). It is not clear to me why the accounts were in that form and therefore I did not give much credit to those items when dealing with the other issues raised but on this aspect of the case it may be mentioned as having some weight in relation to the intention of the Province to look to the Abernethy Company as its debtor in the place of Miami Corporation.

In the consideration of this matter a further fact must not be lost to sight. From the material before us it appears that the "Lougheed" of Abernethy-Lougheed Logging Company Limited was the Honourable Nelson Seymour Lougheed, Minister of Lands for the Province. He was charged with the administration of the Department of Lands during material times and while there is no evidence upon the subject I do not think it unreasonable to deduce that he would see to it that the covenant of the Abernethy Company, in the assignment, was accepted by the Province in lieu of the obligation of Miami Corporation. That result was clearly intended by the parties and I think we may draw the inference that the Honourable Mr. Lougheed would on the part of the Province, and as responsible Minister, give full effect to the assignment, the covenants therein, and what was intended thereby. But be that as it may, and apart from it, in my opinion and with the utmost deference novation has been established, the consequence of which is Miami Corpora-

tion is discharged from liability, "there being no . . . contract to which [it] is a party, or by which [it] can be bound"—*Polson's* case, *supra.*

I have not overlooked the somewhat curious phraseology of the letter of the 19th of October, 1932 (reproduced above), but have concluded, with respect, that it does not contain anything inconsistent with the intention of the Province to treat the Abernethy Company as its debtor in place of Miami Corporation. The reference to "responsibility as to title" I think possibly arises from the fact that the Province was recording, in 1932, the transfer of a licence issued by the Dominion in 1930 prior to the date when the administration of the lands in the Railway Belt vested in the Province. There is no such reference to the titles in relation to licences issued for 1932-1933.

To sum up at this point I am satisfied, with respect, that the Abernethy Company is indebted to the Province in the amount claimed, *i.e.,* $52,689.50.

This brings me now to the consideration of a question affecting this total claim which total, of course, comprises everything owing on all the licences. The question is whether or not the Province is a secured or common creditor of the bankrupt company. It claimed in its proof of debt as a common or unsecured creditor. The trustee disallowed the claim upon the ground (*inter alia*) that the Province had "security for the whole of such indebtedness." In this he was upheld by the learned judge below who was of the opinion that the rights reserved to the Province, *e.g.,* right of cancellation, right to refuse to renew licence, right of seizure for arrears, "constitute something which the Province holds in addition to the licensee's mere promise to pay, something whereby it can either compel payment or failing that resume ownership of that which it parted with under the licence . . . " and in consequence he held the Province to be in the position of a secured creditor.

Before us the trustee sought to uphold this finding of the learned trial judge and as an additional ground to support his contention that the Crown was a secured creditor submitted it was secured as well by reason of the statutory charge or lien of the Crown arising out of section 59 of the Dominion Lands Act

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(R.S.C. 1927, Cap. 113), sections 128-129 of the Forest Act (R.S.B.C. 1936, Cap. 102), paragraphs 22, 23 and 27 of the Dominion Timber Regulations and the conditions and terms contained in the licences. I do not propose to express any opinion on these submissions except to say that they are not relevant to the facts of the case because in the view I take the licences were not in existence on the 10th of January, 1936, when the Crown filed its claim with the trustees.

The relationship between the Crown and the bankrupt at that time was that of creditor and debtor and not that of licensor and licensee.

We are not concerned with cut timber and upon expiry of the licences all uncut timber became revested in the Crown. It would be idle to suggest that the Crown was entitled to a charge or lien on its own property and as the licences were no longer in existence there could be no existing rights of cancellation and repossession which led the learned judge below to hold the Crown a secured creditor.

I base this conclusion upon my understanding of the relevant sections of the Dominion Lands Act, the Forest Act, Timber Regulations and form of the licences.

In examining this aspect of the case I feel some diffidence because counsel for both appellant and respondent maintained that the licences, when issued, remained in force until cancelled and no doubt took that same position below.

With deference I feel bound to state that I cannot find any statutory or other basis upon which that position can be supported.

The relevant section of the Dominion Land Act reads as follows:

51. The license shall be for a term not exceeding one year, but shall be renewable from year to year while there is on the berth timber of the kind and dimension described in the license, in sufficient quantity to make it commercially valuable, such renewal being subject to the payment of such dues and to such terms and conditions as are fixed by the regulations in force at the time the renewal is made.

2. The Minister shall be the judge as to whether the terms and conditions of the license and the provisions of this Act and of the regulations made hereunder respecting timber berths have been fulfilled.

Paragraphs 9 and 11 of the Dominion Regulations read as follow:

9. All timber licences shall expire on the thirtieth day of April next after the date on which they are granted.

11. A licence shall be renewable from year to year while there is on the berth timber of the kind and dimensions described in the licence in sufficient quantity to be commercially valuable, if the terms and conditions of the licence and the provisions of the Dominion Lands Act and of the regulations affecting the same have been fulfilled:

Provided that such renewal shall be subject to the payment of such rental and dues and to such terms and conditions as are fixed by the regulations in force at the time renewal is made.

The licences, the form of which is identical whether issued by the Dominion or Province, contain the following clauses (I take Exhibit 5 as an example):

LICENCE TO CUT TIMBER

KNOW ALL MEN BY THESE PRESENTS, that by virtue of the authority vested in me by the Dominion "Lands Act" and by an Order of His Excellency the Governor-General in Council of the twenty-sixth day of March, 1924, and subsequent amending Orders in Council, and in furtherance of the agreement made the twentieth day of February, 1930, between the Dominion of Canada and the Province of British Columbia on the subject of the transfer of the Railway Belt and the Peace River Block, I, The Honourable Nelson Seymour Lougheed the Minister of Lands of the Province of British Columbia, do hereby, in consideration of the sum of Two hundred and fifty-eight dollars and fifty cents ($258.50) ground-rent now paid to me for the use of His Majesty King George VI., and in consideration of the dues hereinafter mentioned, give unto ABERNETHY LOUGHEED LOGGING COMPANY LIMITED (hereinafter called the "licensee"), his executors and administrators, full right, power, and licence, subject to the conditions hereinafter mentioned and contained, and such other conditions and restrictions as are in that behalf contained in the Dominion "Lands Act" and the amendments thereto, and in the regulations respecting timber passed by the Governor-General in Council and in any regulations affecting licensed timber berths issued under authority of the Provincial "Forest Act," to cut timber on the following tract of land (hereinafter called the "berth" or "berths"), that is to say:—

Timber berth "W" situate in the Province of British Columbia, [etc.] (here follows description) and to take and keep exclusive possession of the said lands, except as hereinafter mentioned, for and during the period of one year from the first day of May, 1932, to the thirtieth day of April, 1933, and no longer.

I cannot escape the conclusion that the licences expire at the end of every licence year without any necessity for action by anyone.

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I would point out, as I view the matter, that to the contrary of what both counsel maintained, it requires a ministerial act to renew the licences not to cancel them. The licences automatically expire at the termination of the licence year but to renew them the applicant for renewal must satisfy the Minister of his right thereto and the Minister by reason of section 51 (2) of the Dominion Lands Act

> shall be the judge as to whether the terms and conditions of the license and the provisions of this [said] Act and of the regulations made thereunder respecting timber berths have been fulfilled.

The Abernethy Company at the date of the bankruptcy (the 8th of June, 1934) was logging pursuant to the authority conferred by licences issued on May 1st, 1934, expiring on April 30th, 1935. These licences were not renewed and in consequence at the date on which the Province filed its claim herein (the 10th of January, 1936) the bankrupt was not the holder of any subsisting licences in which it or the Province had any rights of any kind.

It follows in my view on the facts of this case that the Crown cannot be regarded as a secured creditor.

There remains but one other point to be determined. The Attorney-General submitted that if the Crown was held to be an unsecured creditor then the timber dues in question are "taxes, rates, or assessments" within section 125 of the Bankruptcy Act and in consequence the Crown is entitled to payment of this part of its claim in priority to other creditors of equal degree. In my view this contention, with respect, is unsound.

I am in agreement with the learned judge below on this phase of the dispute and am of the opinion that the obligation to pay the dues arises *ex contractu*. I do not feel that I can add anything to what he has said.

In the result I would allow the appeal because in my opinion, with respect, the Province is entitled to claim as an unsecured creditor against the estate of the Abernethy Company in the sum of $52,689.50.

Costs to be spoken to.

Appeal allowed.

Solicitor for appellant: *Eric Pepler.*
Solicitor for respondent: *Ghent Davis.*

Revsd
54 B.C.R. 48

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Nov. 16, 17, 18, 21, 22; Dec. 5.

Apld
[1948] 3 D.L.R. 114

Refd To
Campbell Motors v. Gordon [1946] 4 D.L.R. 36.

Dist'd
B.C. Power v. A.G. (No 2) 38 W.W.R. 577

Refd to
Canex Placer v. A-G BC 56 D.L.R. (3d) 592 (BCSC)

HOME OIL DISTRIBUTORS LTD. *ET AL.* v. ATTORNEY-GENERAL OF BRITISH COLUMBIA *ET AL.*

Constitutional law—Coal and Petroleum Products Control Board Act—Validity—Purpose and effect of Act—Evidence as to—Report of Royal Commission—Admissibility as evidence—Injunction—Continuance to trial—B.C. Stats. 1937, Cap. 8.

For the purpose of examining the effect of legislation which is attacked as *ultra vires*, the Court must take into account any public general knowledge of which it would take judicial notice, and may in a proper case be informed by evidence as to what the effect of the legislation will be.

Held (McQuarrie, J.A. dissenting), that the report of a Royal Commission which was laid before the Legislature before the passing of the impugned Act (namely the Coal and Petroleum Products Control Board Act), was admissible in evidence in so far only as it found facts which were relevant to the ascertainment of the alleged real purpose and effect of the enactment, namely, the attempt to regulate the international oil industry and to foster the native coal industry at the expense of foreign petroleum, said purpose being alleged to be an indirect attempt to encroach upon Federal jurisdiction, namely, "The regulation of trade and commerce."

An order was made granting an injunction restraining until the trial, the enforcement of an order made by the defendant board (created by the Coal and Petroleum Products Control Board Act), which order fixed the price for gasoline sold within the Province on and from October 26th, 1938. The order was granted on the plaintiffs' contention that said Act was *ultra vires* because it encroached upon "The regulation of trade and commerce."

Held, on appeal, McQuarrie, J.A. dissenting, that it is both just and convenient to continue the injunction to the trial, as the plaintiffs have shown that there is "a substantial question to be investigated" and a probability that they are entitled to relief" but in view of the exceptional public importance of the matter, and the obvious need for all possible expedition, there was made a term of the order that the plaintiffs give their undertaking to speed the cause in every possible way in all its stages to a final decision.

Appeal by defendants from the order of Manson, J. of the 1st of November, 1938, whereby it was ordered that the defendants be restrained and enjoined until after the trial of this action, from fixing the price, prices, maximum price or prices, minimum price or prices at which gasoline or other petroleum products

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may be sold in British Columbia, either at wholesale or retail or otherwise, for use in the Province, and from making any order, rules or regulations in respect of such price or prices, and from taking any steps or proceedings to compel the plaintiffs to comply with the provisions of the said Act, or any order or regulation made thereunder with respect to the said prices.

The appeal was argued at Vancouver on the 16th to the 22nd of November, 1938, before MARTIN, C.J.B.C., MCQUARRIE and SLOAN, JJ.A.

Wismer, K.C., A.-G. (*J. P. Hogg,* with him), for appellants: With respect to *interim* injunctions restraining public bodies, there is no basis in fact or law for making the order: see Kerr on Injunctions, 5th Ed., 173. The order in question makes no reduction in wholesale prices but only in retail prices. The report by the Commission is not admissible at all in construing the statute. The case of *Shannon* v. *Lower Mainland Dairy Products Board,* 54 T.L.R. 1090; [1938] 2 W.W.R. 604 is complete authority in support of this Act: see also *Eastman Photographic Materials Company* v. *Comptroller General of Patents, Designs and Trade-marks,* [1898] A.C. 571 at p. 573. The report cannot in any way be confused with the Act: see *Gosselin* v. *Regem* (1903), 33 S.C.R. 255 at p. 263; *Hollinshead* v. *Hazleton,* [1916] 1 A.C. 428 at p. 438; *Ouellette* v. *C.P.R. Co.,* [1925] 2 D.L.R. 677 at p. 681; *City of Fredericton* v. *The Queen* (1880), 3 S.C.R. 505; *Proprietary Articles Trade Association* v. *Attorney-General for Canada,* [1931] A.C. 310; *Union Colliery Company of British Columbia* v. *Bryden,* [1899] A.C. 580 at p. 583. On the merits this report cannot be looked at. The respondents say the pith and substance of the Act is that the companies are forced to sell at a loss. We have the right to fix the prices of anything we like. He says we interfere with international relations, but even if the Act interferes with entry of gas into the Province, it is merely an incidence: see *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association,* [1902] A.C. 73; *Canadian Pacific Wine Company, Limited* v. *Tuley* (1921), 37 T.L.R. 944; *Reference re Natural Products Marketing Act, 1934,* [1937] 1 W.W.R. 328 at p. 330;

Shannon v. *Lower Mainland Dairy Products Board,* 54 T.L.R. 1090; [1938] 2 W.W.R. 604. This Act is identical with the Milk Marketing Act. The Legislature has jurisdiction over property and civil rights within the Province: see *Electric Telegraph Company* v. *Nott* (1847), 47 E.R. 1040; *Bain* v. *Bank of Canada and Woodward* (1935), 50 B.C. 138; *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96.

J. W. deB. Farris, K.C. (*Symes,* and *T. E. H. Ellis,* with him), for respondents: As to proceeding with due diligence, we cannot be asked to take action until our rights are affected. The Imperial Oil Limited lost $105,000 last year in their operations under the prices then charged. He says the order only affects retailers, but the loss must fall on the industry and not on the individual retailer: see *Dyson* v. *Attorney-General,* [1911] 1 K.B. 410 at p. 421; *Eastern Trust Company* v. *McKenzie, Mann & Co., Limited,* [1915] A.C. 750 at p. 759. As to the right of a judge to make an order affecting a public body see Halsbury's Laws of England, 2nd Ed., Vol. 18, p. 27, sec. 41, and p. 33, sec. 48; *Bain* v. *Bank of Canada and Woodward* (1935), 50 B.C. 138; *Bank of Montreal* v. *Robertson* (1892), 31 N.B.R. 653 at p. 659; *Miller* v. *Campbell* (1903), 14 Man. L.R. 437 at p. 448. The report should properly be allowed in as evidence on this application. The legislation is directed against a business that is international in its nature, and comes within trade and commerce. It is found by the report that this is a disintegrated business. The purpose of the Act is to pass the reduction in price on to the primary producer of crude oil in California, and to force the importation of a different kind of crude oil in order to protect the coal industry. This is trade and commerce within section 91 of the British North America Act: see *Proprietary Articles Trade Association* v. *Attorney-General of Canada* (1931), 100 L.J.P.C. 84 at p. 87; *Farley* v. *Bonham* (1861), 2 J. & H. 177; 70 E.R. 1019 at p. 1020; *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co.,* [1930] A.C. 357 at p. 376; *Rex* v. *Jeanotte,* [1932] 2 W.W.R. 283 at pp. 285-6; *Eastman Photographic Materials Company* v. *Comptroller General of Patents, Designs,*

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and Trade-marks, [1898] A.C. 571 at p. 573; *Taff Vale Railway* v. *Amalgamated Society of Railway Servants* (1901), 70 L.J.K.B. 905 at p. 911; *Assam Railways and Trading Co.* v. *Inland Revenue Commissioners* (1934), 103 L.J.K.B. 583. In the case of *Reference re Alberta Bills; Attorney-General for Alberta* v. *Attorney-General for Canada,* [1938] 3 W.W.R. 337 at p. 339, it was held they were controlling the banks and not taxation. The fixing of prices is in itself a dealing with trade and commerce. *Shannon* v. *Lower Mainland Dairy Products Board,* 54 T.L.R. 1090; [1938] 2 W.W.R. 604 at p. 608, does not apply, as there is no attack on the Legislature there: see also *Gallagher* v. *Lynn,* [1937] A.C. 863 at p. 869. They are making an attempt to regulate prices for the purpose of helping out another commodity: see *Attorney-General of British Columbia* v. *Attorney-General of Canada,* [1924], A.C. 222 at p. 225; *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96 at pp. 112-3; *Hodge* v. *The Queen* (1883), 9 App. Cas. 117 at pp. 130-1; *Attorney-General for Ontario* v. *Attorney-General for the Dominion,* [1896] A.C. 348 at p. 368. It is an Act to regulate and control commerce to make the foreign producer sell crude oil at a cheaper price and making them sell gasoline cheaper to force up the price of fuel-oil. If the price of fuel-oil is forced up it will help the coal industry: see *Attorney-General for Ontario* v. *Reciprocal Insurers,* [1924] A.C. 328; *In re Insurance Act of Canada; Attorney-General of Quebec* v. *Attorney-General of Canada and Others* (1931), 101 L.J.P.C. 26; [1932] A.C. 41 at pp. 46-7; *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction,* [1931] S.C.R. 357 at p. 371; *Attorney-General for British Columbia* v. *Attorney-General for Canada,* [1937] A.C. 377; *Reference re Alberta Bills; Attorney-General for Alberta* v. *Attorney-General for Canada,* [1938] 3 W.W.R. 337 at p. 342; *Electrical Development Co. of Ontario* v. *Attorney-General of Ontario* (1919), 88 L.J.P.C. 127 at pp. 129-30.

Wismer, in reply, referred to *Attorney-General of British Columbia* v. *Kingcome Navigation Co. Ltd.,* [1934] 1 D.L.R. 31 at p. 42; *In re Grain Marketing Act, 1931,* [1931] 2 W.W.R. 146 at p. 150.

Cur. adv. vult.

5th December, 1938.

MARTIN, C.J.B.C.: This is an appeal by the defendants from an interlocutory order of Mr. Justice MANSON granting, on the 1st instant, an injunction restraining till the trial the defendant Board, created by the Coal and Petroleum Products Control Board Act of this Province, 1937, Cap. 8, from enforcing its order fixing the prices at which gasoline may be sold, wholesale or retail, within this Province on and from October 26th last. The injunction was granted on the plaintiffs' submission that the said Act is *ultra vires* of the Legislature of this Province in that it is not, as it appears *ex facie* to be, a lawful exercise of admitted Provincial powers over "Property and civil rights in the Province" (section 92 (13) B.N.A. Act, 1867) but is in reality an indirect attempt to encroach upon the Federal field of "The regulation of trade and commerce" (B.N.A. Act, Sec. 91 (2)).

The learned judge founded his order upon facts disclosed in the report of the "sole Commissioner" appointed on November 29th, 1934, by the Lieutenant-Governor in Council under the Public Inquiries Act, now R.S.B.C. 1936, Cap. 131, to inquire into certain "matters respecting petroleum products . . . imported into or refined or produced in British Columbia . . . " and also certain "matters respecting coal mined or imported into British Columbia . . . " and the report was made to the Lieutenant-Governor in Council on October 21st, 1936, and laid before the Legislative Assembly (pursuant to section 9 (2) of the said Act) before the passing of the said impugned Coal and Petroleum Products Control Board Act on December 10th, 1937.

It is submitted by appellants' counsel that this report cannot be admitted to supply facts to support an attempt to show what was in the mind of the Legislature in passing a statute valid *ex facie,* and the objection is one of primary importance because it is conceded by respondents' counsel that, if the report cannot be resorted to, then there are no facts before us to support an attack upon the validity of the Act. But it is submitted by respondents' counsel that the report should be admitted as being that of a commission finding facts not yet contradicted going to

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show that the real purpose and effect of the Act is an attempt to regulate the international oil industry and to foster our native coal industry at the expense of that of foreign petroleum. Many cases were cited, *pro* and *con.*, which have received careful consideration with the result that we think the report should be admitted in evidence in so far only as it finds facts which are relevant to the ascertainment of the said alleged purpose and the effect of the enactment. This view is in accord with the course that was adopted in the first case respecting fuel-oil in this Province, *viz., Attorney-General of British Columbia* v. *Canadian Pacific Ry. Co.,* 37 B.C. 481 at 488; [1926] 3 W.W.R. 154, at 157, where many cases are cited; [1927] S.C.R. 185, at 188; [1927] 3 W.W.R. 460, at 462; [1927] A.C. 934, at 938; 96 L.J.P.C. 149, at which pages some of the facts are recited by their Lordships of the Privy Council to show the "close fashion" of "association" of fuel-oil companies in California and British Columbia and their "practice" in carrying on the fuel-oil business in this Province, in order to decide the question of a tax imposed being direct or indirect. Also, in the second fuel-oil case in this Province, *viz., Attorney-General for British Columbia* v. *Kingcome Navigation Co.,* [1933] 3 W.W.R. 353, at 362; [1934] A.C. 45, at 60; 103 L.J.P.C. 1, their Lordships recognized the right of the respondent to "rely upon extrinsic circumstances such as the competition of coal in the fuel market" in deciding the same question that is raised here, *i.e.,* invasion of the Federal field of trade and commerce; and very recently in *Reference re Alberta Bills; Attorney-General for Alberta* v. *Attorney-General for Canada,* [1938] 3 W.W.R. 337, at 344, the Privy Council said:

> The next step in a case of difficulty will be to examine the effect of the legislation: *Union Colliery Company of British Columbia* v. *Bryden,* [1899] A.C. 580; 68 L.J.P.C. 118. For that purpose the Court must take into account any public general knowledge of which the Court would take judicial notice, and may in a proper case be informed by evidence as to what the effect of the legislation will be.

It is, however, submitted by appellants' counsel that even if the report be admitted the facts that it discloses do not afford any substantial ground for questioning the validity of this statute, and numerous extracts from the first volume of the report

(containing 332 pages) were read in support of this submission, and also by the respondents' counsel to rebut it. It is not practical, even if it were desirable, on an interlocutory application of this kind, to attempt to set out the passages relied upon and so we confine ourselves to saying that we have considered them in the light of the general principles which are well laid down in, *e.g.*, High on Injunctions (1905) p. 8, sec. 5:

> It is to be constantly borne in mind that in granting temporary relief by interlocutory injunction, courts of equity in no manner anticipate the ultimate determination of the questions of right involved. They merely recognize that a sufficient case has been made out to warrant the preservation of the property or rights in issue *in statu quo* until a hearing upon the merits, without expressing, and indeed without having the means of forming a final opinion as to such rights. And in order to sustain an injunction for the protection of property *pendente lite* it is not necessary to decide in favour of plaintiff upon the merits, nor is it necessary that he should present such a case as will certainly entitle him to a decree upon the final hearing, since he may be entitled to an interlocutory injunction, although his right to the relief prayed may ultimately fail.

And in Halsbury's Laws of England, 2nd Ed., Vol. 18, p. 27, sec. 41, it is said:

> In cases of interlocutory injunctions in aid of the plaintiff's right, all the Court usually has to consider is whether the case is so clear and free from objection on equitable grounds that it ought to interfere without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the discretion of the Court ought in all cases to be regulated. It is not necessary that the Court should find a case which would entitle the plaintiff to relief at all events; it is quite sufficient if the Court finds a case which shows that there is a substantial question to be investigated, and that matters ought to be preserved *in statu quo* until that question can be finally disposed of.

There is also an oft-quoted passage in Lord Justice Cotton's judgment in *Preston* v. *Luck* (1884), 27 Ch. D. 497, at 505-6, *viz.*:

> Of course, in order to entitle the plaintiffs to an interlocutory injunction, though the Court is not called upon to decide finally on the right of the parties, it is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing, and that on the facts before it there is a probability that the plaintiffs are entitled to relief.

This passage we recently applied in *Hollywood Theatres Ltd.* v. *Tenney*, September 19th, 1938 (unreported)* and also the leading decision of the Manitoba Full Court *per* Chief Justice

* Since reported *post*, p. 385.

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Killam, in *Miller* v. *Campbell* (1903), 14 Man. L.R. 437 (cited in *Davidson* v. *North Western Dredging Co.* (1925), 35 B.C. 534, at 539) wherein he said, p. 448:

> I do not think it necessary that each member of the Court should now determine individually whether he would or would not have decided to grant the injunction. An order of this kind is in a large measure one of discretion, with which an appellate Court will not lightly interfere, and I think it best to avoid a discussion of the evidence at this stage.

The reluctance of appellate Courts to interfere with the exercise of a discretion of this kind, referred to by Chief Justice Killam, is further exemplified by the decision of the Court of Appeal in *Baker* v. *White* (1884), 1 T.L.R. 64.

In the very unusual circumstances of the present case we have come to the conclusion, upon the evidence now before us, that the plaintiffs have shown that there is "a substantial question to be investigated" and a "probability that they are entitled to relief," and it follows that in our opinion it is both "just and convenient" to continue the injunction to the trial, but in permitting this to be done we shall, in view of the exceptional public importance of the matter and the obvious need for all possible expedition, require as a term for such permission that the plaintiffs give their undertaking to speed the cause in every possible way in all its stages to a final decision.

Finally, it is to be observed that this case stands alone in the jurisprudence of this Province in that, so far as present legal memory runneth, it is the only one in which an *interim* injunction has been sought to restrain proceedings had and taken under the authority of a statute of this Province on the ground, and the only ground, that the statute is *ultra vires,* with the unexpected result that all Provincial Courts are debarred by the express prohibition of the Constitutional Questions Determination Act, R.S.B.C. 1936, Cap. 50, Sec. 9, from "adjudicating" against the statute unless the Attorney-General of Canada as well as the Attorney-General of this Province have been duly notified as therein provided. The effect of this provision is to narrow, in the absence of the Attorney-General of Canada, the scope of our present interlocutory consideration of the constitutional question raised herein, because the parties concerned felt unable to adopt our suggestion, advanced to enable this Court

to give a speedy and final decision, to turn this interlocutory motion into one for final judgment, which would have enabled the Attorney-General of Canada to be notified and give us the benefit of his views upon this exceptionally difficult and important question.

However, that obstacle will be removed at the trial and doubtless further light, both as regards the facts and the law, will then be shed upon the controversy, in addition to that which we have already profited by from the manner, both able and expeditious, in which counsel have presented their opposing arguments.

It follows that the appeal must be dismissed.

McQUARRIE, J.A.: I have had an opportunity to consider the judgment of the majority of the Court as delivered by the learned Chief Justice and, as promised, I now submit my reasons for dissenting therefrom.

With many of the well-established principles of law stated by the learned Chief Justice I entirely agree. I agree that the only reason for continuing the *interim* injunction granted by the learned judge below (in case there is any real question to be tried) is to preserve the property or rights involved *in statu quo* until a hearing may be had upon the merits or to protect the property *pendente lite*. I also agree that to entitle the plaintiffs to an interlocutory injunction, although the Court is not called upon to decide finally on the rights of the parties, it is necessary that it should be satisfied that there is a serious question to be tried and that on the facts before it there is a probability that the plaintiffs are entitled to relief. With all deference I must hold that the respondents have not made out such a case for the continuation, even temporarily, of the injunction, on the short ground, particularly after the recent decision of the Judicial Committee in *Shannon* v. *Lower Mainland Dairy Products Board,* [1938] 2 W.W.R. 604, that the Act is clearly *intra vires* and there is no probability that the Court will hold otherwise. It would be strange indeed if the Courts after holding that the products of the farmer or dealer in milk or vegetables or fruit are subject to price-control legislation, although imported into the Province, yet the product of the oil companies, *viz.,* gasoline,

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wholly manufactured at refineries in this Province, is not subject to such control. The law must be applied fairly and equitably to all classes coming within it. Further, I cannot agree that the report of the Macdonald Commission is relevant to the matter before us. Even if it were a final report, which it is not, I would still be of that opinion, doubly so where it is clear from the report itself that it is not complete. Even however if it is admissible which I, with deference, dispute, how can we rely on the disjointed extracts cited at random from a lengthy report and say with authority that the legislation now under review was based on those extracts or fragments placed before us or that they disclose the purpose and intention of the Act? To understand the full significance of the findings and recommendations of the Commissioner the whole report, which, as I said, has not been completed, should be studied before the Court undertakes to advise the Legislature of its real intention in enacting this legislation. For one body (the Court) to undertake to tell another body (the Legislature) what the purpose and intention in passing any Act was is at least a doubtful and uncertain procedure. May I pause to say that, from the cursory survey I have been able to make of the report, it would appear to be a credit to the industry, thoroughness and skill of the Commissioner and from an informative standpoint of great interest and worth not only to the Government but to the public of this and the other Provinces of Canada. A complete study of it, however, even if it were necessary, is clearly beyond the capacity of this Court in the limited time at its disposal. It is not for this Court to consider it; it is essentially for the information of the Legislature, to use it, or to decline to use it, as it sees fit. The Legislature has jurisdiction to pass legislation controlling the price of gasoline or other commodities grown in, imported into or manufactured in this Province and it would be strange indeed to find that this power can be destroyed and its legislative capacity thwarted because one or several commissioners investigate the subject-matter of the legislation before the enactment. Where the words in an Act are unambiguous, and provide for something that may be validly enacted, statements even by members of Parliament before it was passed, as to its meaning, cannot be

used to affect its true construction; nor statements by any one else in any form. My brothers, the Chief Justice and Mr. Justice SLOAN, say that it can be used to a limited extent, *viz.*, "in so far only as it finds facts which are relevant to the ascertainment for the said alleged purpose and the effect of the enactment." While I say that it is not admissible at all, if I am wrong in that respect, I would suggest that the whole report would have to be looked at for this purpose and then only after it was finally completed. However, it is impossible to say that the Legislature could be affected by an incomplete report. It is not improper or illegal for the Legislature, before passing a statute of this nature, to gather or to attempt to gather all available information and facts that may or may not be useful to it. The Government have a perfect right, if they see fit to do so, to appoint a dozen or more Royal Commissions to inquire into various matters on which they wish to have information. Does that mean that they are bound to follow all recommendations? Certainly not. There might even be conflicting recommendations from several commissioners. The Legislature or the Government has to decide what action, if any, is to be taken and if the Court wishes to ascertain the intent and purpose of the Legislature it should look to the Act itself and no place else. By doing so we have a degree of certainty and finality that cannot otherwise be obtained; certainly not from a reliance, divorced from context or extracts, in an incomplete report. The Court cannot determine the policy of the Government.

It is only a question of jurisdiction. If the statute is within the jurisdiction of the Legislature and if there is anything objectionable about it the remedy is to put the Government out of office. It is not for us to say whether the statute is fair or reasonable or just. On the hearing before us counsel for the respondents argued that it might be inferred from the Macdonald report that if the Act under review be held *intra vires* the next natural step to be anticipated would be for the Government to proceed to regulate the price of fuel-oil which is also sold in large quantities by the respondent companies. That does not enter into the matter. We are only now concerned with an order fixing

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the price of gasoline. If the Government wishes to fix the price of heavy fuel-oil it may do so.

It was argued by counsel for the respondents that the granting of the injunction by the learned judge who made the order appealed from was discretionary and should not be interfered with except for very good reasons. I shall only say that the sole ground for an *interim* injunction is a reasonable probability that the Act might be held to be *ultra vires* of the Provincial Legislature and in the absence of such a probability it should at once be set aside. Further, in the absence of this probability, an order giving the respondents more than one million dollars in a single year, to which they are not entitled, is a grave and important reason for dissolving the injunction. In giving judgment the majority of the Court stipulated that the plaintiffs give their undertaking to speed the cause in all the stages to a final decision. It now appears the respondents have given notice of trial for January 9th. There may be another appeal to this Court and also to the Judicial Committee of the Privy Council. It will mean unusual expedition if it is finally disposed of within a year. If the injunction is continued in the meantime the respondents will benefit to the extent of a million dollars or more. Then if their Lordships finally decide that the Act is *intra vires* the respondents will retain the amount which they have received in the meantime and the public will suffer to that extent. To avoid unnecessary delay, the learned Chief Justice suggested that this interlocutory motion be turned into one for final judgment. The parties concerned felt unable to adopt this suggestion. I presume it is rather obvious why the respondents would not agree to the course suggested because so long as the injunction stands, even if the final decision goes against them, they will gain to the extent of several thousand dollars a day. But what about the purchasing public who are compelled to pay the extra three cents per gallon which will be illegally taken from them contrary to a statute and order finally declared to be valid? They will never get the money back. I admit that if the injunction were now dissolved and the new price went into effect and the Act was on the final decision declared to be invalid the purchasing public would gain to the extent of three cents per

gallon for all gasoline purchased during the period when the injunction remained dissolved and the oil companies would not recover the deficiency. The question before us is of course whether the injunction should be continued or not. I think it should not be continued. However if a majority think otherwise, to meet the situation, I took the liberty of suggesting in that event a proposal which I still consider to be fair. It is not just that the oil companies or the purchasing public should obtain any advantage to which they are not entitled. I suggested that a receiver might be appointed who would receive and hold the extra three cents per gallon on all gasoline purchased while, in the view of the majority, the uncertain condition existed. If the oil companies were finally successful the receiver would pay over to them the accumulated sum which might amount to a million dollars or more. If the Act and order were finally declared to be *intra vires* the accumulated fund would be returned to the purchasing public. My proposal was not entertained; it was said to be impracticable. It might be thought that this is so and that the expense of the bookkeeping entailed would amount to more than the total of the accumulated fund. It would, however, be quite feasible. The machinery for collecting the extra three cents per gallon is now in operation and could be put in force at once in the same manner that an increased Government tax on gasoline could be collected. Some Government official could be appointed as receiver without remuneration and when the Government collected its tax plus the extra three cents per gallon the sum of the latter could be paid over to the receiver. The only extra expense involved would be in providing for the return of the extra three cents per gallon to the purchasing public and even that would be fairly small. A record is now kept of the sale of every gallon of gasoline sold in the Province and if it were not the case the Government could not collect its gasoline tax from the purchasers. All that would be required, if my proposal had been accepted, would have been to give sales slips to the purchasers which would be redeemable as to the three cents per gallon upon the Act and order being finally declared to be valid. The purchasers could keep their sales slips until the time for redemption arrived or, if they lost or destroyed

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any in the meantime, the surplus could be paid over by the receiver to the Government for general purposes. The mechanics for the refund are already available and are now used to make refunds to fishermen, loggers and farmers who are entitled to exemption from the gasoline tax. It seems to me that without some such arrangement the property or rights of the parties cannot be preserved *in statu quo*. Having declined to entertain either of the suggestions outlined I cannot see that the respondents are entitled to any special consideration.

The argument before us as to the validity of the Act was lengthy and exhaustive. Possibly I had better deal first with the attack on the Act. All grounds were based on the view that the Macdonald report is admissible. This in my opinion is not so. I shall, however, examine the contentions submitted on the basis that it is admissible. Counsel for the respondents submitted the following, among other grounds: (1) That the Act is directed against an international business. The answer is that it is confined to the Provincial aspects only of the oil business. It cannot be said that the Government may fix the price of A's potatoes, if they are grown here or imported into British Columbia, but cannot do so in respect to B's potatoes, also grown here or imported, if the latter happens to be engaged in the potato business all over the world. The Legislature's only concern is with the local aspects of this business. If that is not so one might find A's potatoes and B's potatoes offered for sale over the same counter in this Province, one subject to the Act but not the other. (2) Its effect will be to enforce the importation of a different kind of crude oil and to protect coal. The answer is that the report finds gasoline prices should be reduced regardless of the type of crude oil imported and as far as I can see it does not place coal in a favoured position. (3) The Province is interfering with trade and commerce reserved to the Dominion by section 91 of the B.N.A. Act, 1867. That is not so. It deals with fixing the price of separate detached commodities manufactured in this Province. (4) It is an attempt to protect coal from a foreign product and that is within the jurisdiction of the Dominion as a regulation of trade and commerce. This is answered in No. 3.

The Attorney-General of British Columbia, as counsel for the appellants, contended: (1) That there was no material on which the injunction could be based; (2) that the report of the Macdonald Royal Commission was not admissible; (3) that the Act was not *ultra vires;* (4) that except as to a transportation section it was similar to the marketing Act which had been approved by the Privy Council; (5) that an Act to the same effect has been in force for some years in the Province of Nova Scotia without being declared invalid—N.S. Stats. 1934, Cap. 2, and more particularly section 26 as re-enacted by 1937, Cap. 56; (6) that there was no proof that the Government is now implementing the Macdonald report; (7) if the Macdonald report were admissible, which he denies, there is nothing in it to support the interpretation given to it by counsel for the respondents. The report only deals with matters outside the Province to throw light on the question of proper costs within the Province; (8) there is no intention on the part of the Provincial Legislature to interfere with matters in the exclusive jurisdiction of the Dominion; (9) even if the Act interferes with importation (which it does not) it is only incidental to the undoubted power of the Legislature which in that respect is similar to Provincial legislation dealing with the sale of liquor; (10) the Act deals with individual trades within the Province, that is to say, it provides for fixing the price at which gasoline is to be sold within the Province of British Columbia and is confined in its operation to matters entirely within the Province of British Columbia; (11) that section 14 of the Act under which the order of the Board was made is confined to fixing the price of commodities sold in British Columbia and does not affect interprovincial trade or international trade; (12) that motive is no concern of the Courts; (13) that the Courts are not concerned with the justice of the Act; (14) that the amount, if any, which certain oil companies may lose is not material here; (15) that wasteful and extravagant distribution of oil companies in British Columbia is responsible for the high cost of gasoline; (16) that the opposition to the Act is not a *bona-fide* attempt to set aside the legislation but rather the oil companies desire to retain, by an improper use of the Courts, the extra $4,000 or $5,000 a day,

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that otherwise would go to the public, as long as possible; (17) that the Dominion has no power to pass legislation for the control of gasoline prices in British Columbia and that must be done, if at all, by the Province of British Columbia. I think a mere statement of these propositions is enough to demonstrate that they are sound.

Numerous authorities were cited, but it is not necessary to review them. That there is jurisdiction to pass such an enactment either in the Dominion Parliament or in the Provincial Legislature is clear. It is also so clear to my mind that the Dominion Government cannot step into this Province and fix the price of a commodity manufactured here that I would at once dissolve the injunction. The enactment relates to matters which are in substance Provincial and local in their nature. It is confined to transactions that take place wholly within the Province of British Columbia (not elsewhere throughout the world) *i.e.*, sales of gasoline within the Province and the price which purchasers in British Columbia are required to pay for it. It is an Act to regulate particular business entirely within the Province. For all these reasons it is, in my opinion, *intra vires* of the Province. I refer to the following decisions: *In re Constitutional Questions Determination Act and re Natural Products Marketing (British Columbia) Act*, 52 B.C. 179; [1937] 3 W.W.R. 273; *Reference re The Natural Products Marketing Act, 1934, and Its Amending Act, 1935*, [1936] S.C.R. 398; affirmed *sub nom. Attorney-General for British Columbia* v. *Attorney-General for Canada*, [1937] A.C. 377; 106 L.J.P.C. 64; [1937] 1 W.W.R. 328; *Shannon* v. *Lower Mainland Dairy Products Board, supra.*

In my opinion *Reference re Alberta Bills; Attorney-General for Alberta* v. *Attorney-General for Canada*, [1938] 3 W.W.R. 337, may be distinguished for the reason that in that case the tax on banks proposed by Alberta was prohibitive and if applied in the other Provinces of Canada as well as in Alberta would prevent the banks from carrying on business and would interfere with Dominion jurisdiction to regulate and control banks and banking.

I have come to the conclusion that there is no serious question

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to be tried and on the facts before us there is no probability that the plaintiffs are entitled to relief. I would therefore allow the appeal and dissolve the injunction.

SLOAN, J.A. agreed with MARTIN, C.J.B.C.

Appeal dismissed, McQuarrie, J.A. dissenting.

Solicitor for respondents: *T. E. H. Ellis.*
Solicitor for appellants: *H. Alan Maclean.*

IN RE PAVICH *ET AL.* v. TULAMEEN COAL MINES LIMITED *ET AL.* (No. 2).

S. C.
In Chambers
1939
Jan. 11, 12, 23.

Prohibition—Judgments or orders passed and entered—Power of County Court judge to review, alter or amend.

A judgment or order once passed and entered can be reviewed, altered or amended only on appeal, save where the slip rule applies. Prohibition will lie even where there is a concurrent remedy by way of right to apply to the judge to set aside the order in question.

Refd to Mattoon v. M. 13 RFL 160 (BCSC)

APPLICATION by way of Chamber summons (issued by leave) for an order for issue of a writ of prohibition to the judge of the County Court of Yale at Princeton and the registrar of the said Court, restraining all proceedings in such Court upon or under an order made on the 15th of December, 1938, by the learned judge of the Court. The order in question appeared on its face to have been made on the application of the registrar of said Court for directions as to the construction of order made in mechanics' lien proceedings on the 29th of November, 1938, and of the judgment in an action dated 9th July, 1936, of His Honour Judge BROWN, then judge of said Court, duly entered of record. None of the parties in the mechanics' lien action was notified of the application, nor were they aware of the order until after same had been made and entered. The order in question purported to make substantial variation in and amendment to both the judgment of the 9th of July, 1936, and the order for sale

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entered the 29th of November, 1938. There was no suggestion of attempt to apply the slip rule; the order on its face purported to amend this judgment, and the order for sale, because of difference in the circumstances existing on the 9th of July, 1936, and those on the 29th of November, 1938. Representations in two letters (from the County Court judge and from the registrar of the County Court at Princeton) addressed to the registrar of the Supreme Court at Vancouver, were considered. Heard by FISHER, J. in Chambers at Vancouver on the 11th, 12th and 23rd of January, 1939.

J. A. MacInnes, for the application: There is no jurisdiction apart from the slip rule, in the learned County Court judge, to vary or amend a judgment or order once made and entered: see 23 Cyc. 868; *Reeves* v. *Gerriken* (1880), Cass. Dig. 1893, p. 689; *Glasier* v. *Rolls* (1889), 38 W.R. 113; *Gabriel* v. *Mesher* (1894), 3 B.C. 159; *Port Elgin School Board* v. *Eby* (1895), 17 Pr. 58; *Preston Banking Company* v. *William Allsup & Sons,* [1895] 1 Ch. 141 at p. 144; *Sweetland* v. *The Turkish Cigarette Company* (1899), 80 L.T. 472; *The Turret Court* (1901), 84 L.T. 331; *Murray* v. *Gold* (1924), 34 B.C. 489. Even if the slip rule is invoked, notice to the parties affected is required: see *Blake* v. *Harvey* (1885), 29 Ch. D. 827. Prohibition will be granted in a proper case, even if there be a concurrent or alternative remedy by way of application to the judge to set aside his own order: see *Channel Coaling Company* v. *Ross,* [1907] 1 K.B. 145.

No one, *contra.*

FISHER, J. found that the order in question on its face, (a) Was not made at the instance of or upon notice to any of the parties to the mechanics' lien action; (b) purported to vary in substance the judgment in the action pronounced by His Honour Judge BROWN on the 9th of July, 1936, and duly entered; (c) purported to vary in substance the order for sale and distribution of proceeds of such sale made by himself and entered the 29th of November, 1938; (d) was not an application of the slip rule; and made an order directing the issue of a writ of prohibition.

Application granted.

LAMMERS v. CITY OF VANCOUVER.

S. C.
1936
Feb. 27.

Negligence—Damages—Highways—Sidewalk—Hole in pavement—Injury to pedestrian—Reasonable repair.

At the place in question there was a small hole where one of the blocks with which the sidewalk was paved, had a chip out of it. The plaintiff alleged that while walking on the sidewalk she inadvertently stepped into the hole and was injured.

Held, that the defendant had not been negligent in constructing the pavement and the sidewalk was in a state of "reasonable repair" and therefore the defendant city had not failed in the duty imposed upon it by its charter.

ACTION for damages resulting from injuries sustained by the plaintiff owing to a defective sidewalk in the City of Vancouver. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 27th of February, 1936.

J. A. MacInnes, for plaintiff.
Lord, for defendant.

FISHER, J.: The plaintiff alleges that on June 8th, 1934, while she was lawfully using the paved sidewalk in the 800 block on the westerly side of Granville Street in the city of Vancouver, she inadvertently stepped into a broken and uneven portion of the sidewalk and was seriously injured. So far as her claim to recover damages for such injuries is based upon alleged negligent construction of the pavement, I have no hesitation in finding, as I do, that the plaintiff has not proved any negligence on the part of the defendant in connection with the construction of the pavement. The plaintiff further claims however that there was a want of reasonable repair of the sidewalk and consequent negligence on the part of the defendant in failing to carry out its statutory duty as set out in the Vancouver Incorporation Act, 1921, B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 320 (1) as re-enacted by B.C. Stats. 1928, Cap. 58, Sec. 38, as follows:

Every public street, road, square, lane, bridge, and highway in the city shall, save as aforesaid, be kept in reasonable repair by the city.

Counsel on behalf of the plaintiff relies especially upon *Wood-*

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Fisher, J.

cock v. *City of Vancouver,* 39 B.C. 288; [1927] 3 W.W.R. 759, and *City of Vancouver* v. *Cummings* (1912), 46 S.C.R. 457; 2 W.W.R. 66, therein referred to. It must be noted however that at the time of the *Woodcock* decision the word "reasonable" was not in the section above set out but has since been inserted by an amendment in 1928, Cap. 58, Sec. 38. In my view, therefore, the plaintiff, in order to succeed, must prove that the street was not in reasonable repair and that the accident was occasioned thereby.

This brings me to the consideration of the condition of the sidewalk and I think it must first be noted that in her letter of July 14th, 1934 (Exhibit 2) addressed to the defendant's solicitor, the plaintiff complained only that the sidewalk was "uneven" but later on in her examination for discovery and at the trial she went further and stated that there was a chip out of one of the blocks of the uneven sidewalk and her heel slid on the high block down into the hole made by the chip. She states that the size of the chip or hole was about half the size of a small apple. Shortly after the defendant city had received notice of the accident from the plaintiff, two of its employees, Messrs. *Chose* and MacKinnon, visited the scene of the accident and made observations as to the condition of the pavement. They also made observations as to its condition at the time the Court took a view on February 27th, 1936, the day of the trial, and they gave evidence at the trial as to what they observed on each visit. Upon all the evidence before me I find that at the time and place of the accident the greatest difference in level between the two blocks of pavement was not more than one-half of an inch, and though it may be said that there was a hole made by one of the blocks having a chip out of it, I am satisfied that it was very small and not so large as the plaintiff says. On the question as to whether or not the sidewalk under the circumstances was in a state of "reasonable repair" I think reference might well be made to what was said by Hagarty, C.J. in *Boyle et ux.* v. *Corporation of Dundas* (1875), 25 U.C.C.P. 420, at 426:

> We all know that small breaches in the surface of sidewalks are of everyday existence in every town.

It is unreasonable to hold that a corporation neglects its duty, merely because such a breach or hole may be found in some street.

Reference might also be made to *Anderson* v. *Toronto* (1908), 15 O.L.R. 643, where Boyd, C. said, at pp. 644-5:

Upon the merits, the want of repair in this case consisted of a depression of the granolithic pavement where two large cross-blocks were joined. One block had, apparently, in course of years, sunk to some extent below the edge of the other, so as to make a difference in level of between three-quarters and half an inch. At the edge of the higher block this had been bevelled down by wear and tear one-fourth of an inch, leaving a direct half-inch space of fall from the bevelled edge to the surface of the lower block. The place had been as now for many years (eight or ten), and no complaint made, and no evidence of any other mishap having arisen at that place. The city officials did not consider it to be dangerous, though one admits it would be better to amend it by chiselling off the surface. The place was on King Street, north side, near Church Street, and is, no doubt, considerably frequented by people. However, I think, the proper conclusion is that this slight depression is not sufficient evidence of want of repair to make the city liable. The burden upon the city authorities is to see that the walks are in a reasonably safe condition for travel; they are not obliged to keep every part accurately level, and slight inequalities of the surface, which may lead to an exceptional slip and fall, are not, therefore, to be accounted chargeable with negligence. It is all a question of degree as to what is or is not an actional impediment to travel on the highway or sidewalk. An inequality of over an inch was held to be excusable in *Ewing* v. *City of Toronto* (1898), 29 Ont. 197; though this decision is binding on me, it was not held in favour by Burton, C.J.O., in *Ewing* v. *Hewitt* (1900), 27 A.R. 296, 299. In an unreported case of *Fitten* v. *City of Toronto*, February 10th, 1905, Mr. Justice Street held that a difference in the level of two planks, amounting to half an inch or a little more, was not evidence of an unreasonable state of repair.

Before indicating my conclusion on the question I pause here to state that I am not overlooking the fact that the witness MacKinnon, while giving evidence at the trial to the effect that upon his examination of the pavement shortly after the accident he was unable to find any part which in his judgment called for repair, nevertheless frankly admitted that in his opinion the pavement at the point in question now requires "a little attention" and he would repair it by putting in filling so as to eliminate what he called "that abrupt difference in level." Obviously some considerable time has elapsed since the accident and I have no doubt that it has made some change in the situation but in any event I think it may be said here as was said by Fitzpatrick, C.J. in *Fafard* v. *City of Quebec* (1917), 39 D.L.R. 717, at 718:

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There is no limit to what might be done for ensuring greater safety. . . . A municipal corporation is not an insurer of travellers using its streets.

My conclusion on the question, as to the condition of the sidewalk, is that at the time and place of the accident the street was in reasonable repair so that, if the *onus* is on the defendant to prove that it was, I find it has satisfied such *onus*. It must be admitted that some accidents happen for which no one is to blame and in the present case I hold that the charge of actionable negligence against the defendant has not been made out and there is no liability on the part of the city for the damages sustained by the plaintiff by reason of the accident. Judgment accordingly.

Action dismissed.

S. C.
In Chambers
1939
Jan. 12.

IN RE NOTARIES ACT AND HERCULES WORSOE.

Notaries—Application for order for enrolment—Need of notary public within applicant's district—R.S.B.C. 1936, Cap. 205, Secs. 4 and 5.

An applicant for an order for enrolment under the Notaries Act has to show that there is a need of a notary public in the place where he desires to practise, and an application under the Act should be decided upon the particular exigencies and necessities of each case.

The fact that there are a number of Norwegians having business with the office in which the applicant is employed and also other Norwegian people within the district, and that the applicant can speak their language:—

Held, to be a sufficient ground for granting the application.

In re Notaries Act and J. A. Stewart (1929), 41 B.C. 467, followed.

APPLICATION for an order for enrolment under sections 4 and 5 of the Notaries Act. Heard by FISHER, J. in Chambers at Vancouver on the 12th of January, 1939.

Griffin, K.C., for the application.
Dixon, for the Law Society of British Columbia.

FISHER, J.: My view is that one has to show that there is a need of a notary public in the place where the applicant desires to practise. I think that in *In re Notaries Act and J. A. Stewart* (1929), 41 B.C. 467, a certain interpretation has been put upon

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In Chambers
1939

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Fisher, J.

the meaning of these words as used in the Act, and that I followed that in a case which was before me from either Trail or Rossland a year or two ago. I think an application under the Act should be decided upon the particular exigencies and necessities of each case, as stated in the *Stewart* case. It might easily be contended that, where there was a large number of residents speaking a certain language and being of a certain race in a large city, there would be many amongst them who could easily interpret or act as interpreter between the others and the notary public, but there is the matter of convenience to be considered. It would undoubtedly be a great convenience to certain people to have a notary public who speaks their own language, and I would be disposed from the beginning to see that the Norwegian people had every opportunity, and in this particular case I would hold that it is within the *Stewart* case. Not only would the applicant render necessary aid at a minimum of cost, convenience and expense to people having business with the office in which he is employed, but to other Norwegian people also. I would find, therefore, that there is a need for having a notary public in the place where the applicant desires to practise, and the application should be granted.

I take it that Mr. Taylor will surrender his seal as a notary public.

Griffin: Yes, my Lord, that will be carried out.

Application granted.

Revsd
54 BCR. 101

McDONALD v. UNITED AIR TRANSPORT, LIMITED.

S. C.
In Chambers
1939
Jan. 20.

Practice—Discovery—Examination of officer of company—Pilot of aeroplane—Aeroplane operated by defendant company—Whether pilot an "officer"—Rule 370u.

One Tweed was a pilot of an aeroplane owned and operated by the defendant company. An application by the plaintiff under rule 370u for an order for the examination for discovery of Tweed as an officer of the defendant company, was refused.

APPLICATION by the plaintiff under rule 370u for an order for the examination for discovery of one Charles Tweed,

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In Chambers
1939

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the pilot of an aeroplane operated by the defendant company, as an officer of that company. Heard by FISHER, J. in Chambers at Vancouver on the 20th of January, 1939.

L. P. Macdonald, for the application.
Tysoe, contra.

FISHER, J.: This is an application on behalf of the plaintiff for an order for leave to examine for discovery as an officer of the defendant company one Charles Tweed, the pilot mentioned in paragraph 3 of the statement of claim herein.

In paragraph 10 of the affidavit of Bert McDonald it is stated that Tweed resides in the City of Edmonton in the Province of Alberta, and it is sought to examine him under rule 370u as an officer of the defendant company residing outside of the Province of British Columbia. In paragraph 7 of the affidavit it is stated in effect that Charles Tweed was pilot of the aeroplane and the aeroplane was under the sole management and control of Tweed as pilot of the said aeroplane and as the servant or agent of the defendant company.

I might say that my first impression would have been that there would be no question about the matter. I would have thought that the pilot was obviously not an officer of the company, but my attention has been drawn to what has been called during the argument, the *Leitch* case: *Leitch* v. *Grand Trunk R.W. Co.* (1890), 13 Pr. 369, and it might be noted that in *Elliott* v. *Holmwood & Holmwood* (1915), 22 B.C. 335 MACDONALD, J. refers to the *Leitch* case, apparently with approval. It must be particularly noted, however, if I may say so with all respect, that in the case of *Nichols & Shephard Co.* v. *Skedanuk* (1912), 5 Alta. L.R. 110 reference is made to the case of *Morrison* v. *Grand Trunk R.W. Co.* (1902), 5 O.L.R. 38 and a reference to the head-note of the *Nichols* case shows that the *Morrison* case was held in that case to dispose of the authoritative value of the earlier Ontario cases including the *Leitch* case, in interpreting the Alberta rule. The *Nichols* case was dealing with an application for an order to examine an agent of the plaintiff company for discovery as an officer thereof and referring to the *Morrison* case I would say,

if I may say so with all respect, that I would agree with the statement in the *Nichols* case that *Morrison* v. *Grand Trunk R.W. Co.* disposes of the authoritative value of the earlier Ontario cases in interpreting the rule. I have noted what Osler, J.A. and Maclennan, J.A. say in the *Morrison* case, they being two of the Justices who dealt with the *Leitch* case, and it may also be noted that in the *Leitch* case there was an equally divided Court.

It does not seem to me, therefore, I can now accept the *Leitch* case as an authority in support of the application now put forward for the examination of Tweed, the pilot, as an officer of the defendant company, and I would call attention to the distinction propounded in *Speakman* v. *City of Calgary* (1908), 9 W.L.R. 264 by Mr. Justice Beck apparently concurred in by the other members of the Court. Beck, J.A. refers to it in *Powell* v. *Edmonton, Yukon and Pacific R.W. Co.* (1909), 11 W.L.R. 613, at 614, in which he states as follows:

> The answer to the question whether a person is or is not an officer within the Rule seems to me to depend upon the point I have suggested, that is, whether the person in question is engaged merely to perform certain services for the company, although as a mere incident in the performance of his duties he may become in some sense an agent of the company, or engaged in such a capacity that the primary purpose and effect of his engagement is to delegate to him a portion of the company's authority, and constitute him its agent to deal with third parties within the general scope of his employment.

In my opinion, Tweed in the present case is a person, so far as I can judge from the material before me, engaged merely to perform certain services for the company, and it could not be said that the primary purpose and effect of his engagement is to constitute him its agent to deal with third parties within the general scope of his employment, although as a mere incident in the performance of his duty he may become in some sense an agent of the company.

My view is that Tweed is not an officer of the company for the purpose of examination under the rule, and I dismiss the application.

Application dismissed.

S. C.

1938

Oct. 27; Nov. 17.

Folld
Mitchell v. Reg. Motor Veh.
[1949] 2 W.W.R. 35

Ref'd to
Chila v. Stevenson
37 D.L.R. (3d) 429
(B.C.C.A.)

MOSHER v. PARKER.

Motor-vehicle—Running down pedestrian at intersection—Traffic-control lights—Negligence—Damages—Death of plaintiff's husband—Administration Act—Families' Compensation Act—R.S.B.C. 1936, Caps. 5, Sec. 71 (2), and 93.

At about 6 o'clock in the evening of the 30th of December, 1937, one Mosher, the plaintiff's husband, was walking westerly on the north side of Robson Street in Vancouver. There were traffic-control lights at the intersection of Burrard Street, and marked on the pavement by parallel yellow lines on the north side of the intersection was a pedestrian crossing twelve feet wide running east and west. When Mosher was about two-thirds of the way across, just after the north and south lights turned green, he was struck by the defendant's car which was proceeding south on Burrard Street, and badly injured. He died on the 17th of June following. Deceased's wife sued under section 71 (2) of the Administration Act, and for her own benefit under the Families' Compensation Act.

Held, that the defendant's negligence was the cause of the accident and the deceased was entitled to assume the defendant saw him and would allow him to complete his crossing of the street.

Held, further, that the plaintiff is entitled to recover (1) his wages from the date of the accident to the date of his death; (2) medical and hospital bills; (3) damages for his loss from shortening his expectation of life. Under the Families' Compensation Act she is also entitled to such damages as the Court may think proportionate to the injury resulting to her from her husband's death.

ACTION by Mrs. Mosher for damages owing to the death of her husband from being struck by an automobile driven by the defendant. The facts are set out in the reasons for judgment. Tried by ROBERTSON, J. at Vancouver on the 27th of October, 1938.

Housser, and *Merritt,* for plaintiff.
G. Roy Long, for defendant.

Cur. adv. vult.

17th November, 1938.

ROBERTSON, J.: The plaintiff, as administratrix of the estate of her husband, the late J. F. Mosher, sues under section 71 (2) of the Administration Act, R.S.B.C. 1936, Cap. 5, and the Families' Compensation Act, R.S.B.C. 1936, Cap. 93, for

damages for the death of her husband by reason of his having been struck at the intersection of Burrard and Robson Streets in Vancouver by a motor-car driven by the defendant about 6 o'clock on the night of December 30th, 1937. Burrard Street runs north and south and is 65 feet from kerb to kerb. Robson runs east and west. The two streets cross each other at right angles. At the time of the accident there were traffic-control lights at this intersection. For a period of 30 seconds a green light showed north and south on Burrard Street and during the same period a red light showed east and west on Robson Street. Then for three and one-half seconds the lights all around were red; and then for a period of 20 seconds, the lights would be green, east and west, on Robson Street and red, north and south, on Burrard Street, etc. When the lights were green on Burrard Street pedestrians and cars could proceed north and south on the intersection and when green on Robson Street they could proceed east and west. There was at the time of the accident, marked on the pavement by parallel yellow lines on the north side of the intersection on Robson Street, a pedestrian crossing, twelve feet wide, running east and west. Mosher was crossing Burrard, going west, on this crossing. When about two-thirds of the way over, just after the north and south lights on Burrard Street had turned green, he was struck by the defendant's car, which was proceeding south on Burrard Street, and badly injured. I find that, as a result of this injury Mosher died on June 17th, 1938. The night was dark and there was a slight drizzle. Two witnesses, Scott and Collyer, called for the plaintiff, saw the accident happen. Scott had stopped his car just north of the north line of the pedestrian crossing in question as the light was against him. His car, which was five and one-half to six feet wide, was then about eighteen feet from the west kerb of Burrard Street. He saw Mosher crossing. He says that just as Mosher got in front of the centre of his car, the Burrard Street traffic light turned green; that just at this moment he started his car forward a trifle and then stopped to allow Mosher to proceed; that Mosher stepped beyond, that is, to the west of Scott's car, hesitated for a second and tried to step back, but it was too late, the defendant's car struck him. It stopped at a very short distance. He says

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there was nothing to prevent the defendant seeing Mosher except when Mosher was in front of his (Scott's) car. There was no traffic to Scott's left; in fact I find there does not appear to be any other traffic there except the Scott and Collyer cars and the defendant's car and Mosher. Collyer was in his car just behind Scott's car. He was waiting for the light to turn green. He saw Mosher crossing Burrard Street. He says he could see him clearly until he was in front of Scott's car; that the defendant could have seen Mosher if he had looked; and that Scott's car moved ahead a foot and then stopped. He drove his car about the same distance and struck the rear bumper of Scott's car with the front bumper of his car and stopped. Scott and Collyer's cars were each about eleven feet long. Just when his car last stopped he saw the defendant's car come up alongside his car at a speed which he estimates at fifteen to eighteen miles per hour. The defendant admits he was very familiar with this intersection. He says that after he passed the lane shown on Exhibit 6, which is 138.9 feet north of the north line of the crossing, he saw the traffic light on Burrard Street was green. He threw his car out of gear and let it coast until it came "practically to a stop" at which time there would be two car lengths between the front of his car and the north line of the pedestrian crossing. He saw the wheels of the Scott and Collyer cars revolving and took it from this that the way was clear. He then looked to his right and proceeded ahead in low gear. He saw Mosher for the first time when Mosher appeared in front of his car. He felt the impact and stopped his car in a very short distance. He was asked as to whether he had looked to the left. His evidence upon this point was most unsatisfactory. I find he did not look. I further find that if he had he should have seen Mosher. Merely looking in the direction of the crossing of the pedestrian and failing to see him, although clearly visible, and failing to observe him is negligence. See *Swartz Bros.* v. *Wills*, [1935] S.C.R. 628, at 634. Again, in view of the short distance the Scott and Collyer cars proceeded I do not see how the defendant could have been misled into thinking the way was clear; in fact, in view of the short distance these cars proceeded, and the sudden stopping, I should have thought this would have put him on his guard. It

should have told him there was something holding up these cars and therefore he should not have proceeded until he made sure what it was. Further I think it was his duty to make sure there was no pedestrian on the crossing, with whom his car might collide, before he proceeded; or to proceed at such speed that he could stop his car at once without there being any danger of his running into anyone. I find the defendant was negligent and his negligence caused the accident.

The defendant submits that Mosher also was guilty of contributory negligence; that if he (the defendant) should have seen Mosher, so Mosher should have seen him. No one knows whether or not Mosher looked. Mosher must have been very close to the left side of Scott's car at the time the defendant's car came practically to a stop two car lengths from the north line of the crossing. If then Mosher did look, on the defendant's own evidence, he would have seen the defendant's car slowing up as it approached Robson Street and come practically to a stop two car lengths from the crossing, just before Scott's or Collier's car would shut out his view of the defendant's car. He would be entitled to assume the defendant saw him and would permit him to complete the crossing. It was the defendant's duty before attempting to proceed to make sure the way was clear. I do not think there was any contributory negligence.

Then as to damages: Mosher was 65 years of age. The parties agreed Mosher's "expectation years" should be taken to be in accordance with Schedule "B" of the Succession Duty Act, R.S.B.C. 1936, Cap. 270, *viz.*, 10.65 years. His health was good. His wife says for 40 years he had not been ill. He had steady employment and was making about $25 a week. He and his wife occupied a flat with their daughter and son-in-law. The rent of the flat was $40 a month and the living expenses of the four were $25 to $30 a month. Mosher paid his half share of these expenses. I think therefore his wife's estimate of his wages is fairly accurate. Under the Administration Act, Sec. 71 (2), the plaintiff is entitled to the same rights and remedies as Mosher would, if living, have been entitled to except she cannot recover: (1) Damages in respect of physical disfigurement; (2) pain or suffering caused to Mosher; and (3) damages

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in respect of expectancy of earnings subsequent to his death. What he could have recovered if living is set out at p. 724 of Halsbury's Laws of England, 2nd Ed., Vol. 23, sec. 1016. She can therefore recover: (1) Mosher's wages up to the time of his death; (2) medical and hospital bills; and (3) damages for Mosher's loss from shortening his expectation of life. See *Rose* v. *Ford,* [1937] A.C. 826; 106 L.J.K.B. 576; [1937] 3 All E.R. 359. The plaintiff is entitled under these three heads:

(1)	Wages from December 30th 1937, to June 17th, 1938, at $25 per week	$600.00
(2)	Hospital and medical bills—Vancouver General Hospital	581.85
(3)	Dr. A. W. Hunter	79.00
(4)	Dr. J. R. Naden	350.00

Taking all necessary things into consideration I fix the damages for shortening Mosher's expectation of life at $1,000.

Under the Families' Compensation Act the plaintiff who sues, for her own benefit alone, is entitled to such damages as the Court may think proportioned to the injury resulting to her from Mosher's death. I think the plaintiff had a reasonable expectation of pecuniary benefit, should her husband have lived. Of course there is always a chance that the husband might have been killed in an accident or die from some illness. Having all these matters in view I assess the damages at $2,500.

There will be judgment then for the plaintiff for $5,110.85 with one set of costs.

Judgment for plaintiff.

HOLLYWOOD THEATRES LIMITED v. TENNEY *ET AL.*

C. A.
1938
Sept. 16, 19.

Injunction—Operation of theatre—Projectionist—Trade union—Employment of its members—Picketing, watching and besetting—Discretion of trial judge—Appeal—R.S.B.C. 1936, Cap. 289.

The defendants, claiming that the owners of the Hollywood Theatre in Vancouver were violating an agreement with them in that they did not employ one of the defendants' projectionists, distributed hand-bills and carried on a system of picketing, watching and besetting operations in front of the entrance to the theatre. In an action for damages and an injunction, the plaintiff obtained an *interim* injunction restraining the defendants from so operating until the trial.

Held, on appeal, affirming the decision of McDonald, J., that an order of this kind is in a large measure one of discretion, with which an appellate Court will not lightly interfere. There was at least some evidence of acts on the part of the defendants not within the protection of the Trade-unions Act that justifies the order and the appeal should be dismissed.

APPEAL by defendants from the order of McDonald, J. of the 21st of June, 1938, in an action for a declaration that the defendants unlawfully damaged the plaintiff by publishing defamatory statements of or concerning the plaintiff and its business, and by creating a nuisance adjacent to the plaintiff's theatre, and molesting, threatening and seeking to intimidate the plaintiff's patrons by watching and besetting the plaintiff's premises, with a view to compelling the plaintiff to do something that it is not compelled to do, for damages and for an injunction. The Hollywood Theatre is on West Broadway in Vancouver and was owned and operated by Mr. and Mrs. Fairleigh and their son. The regulations under the Fire Marshal Act require the presence of two projectionists in the booth. Mr. Fairleigh was a duly-qualified projectionist and prior to March 21st, 1938, he and a duly-qualified projectionist, who was a member of the British Columbia Projectionists, Local No. 348, worked in said booth. In October, 1937, an agreement was entered into between Mrs. Fairleigh, as manager of Hollywood Theatre, and the said British Columbia Projectionists, Local No. 348, whereby she agreed to employ only projectionists supplied by said union,

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"except and only when members of the family of Mrs. Fairleigh are not available." On the 26th of March, 1938, Mrs. Fairleigh's son, David Fairleigh, who had been studying to become a projectionist, obtained a projectionist's licence and took the place of one Nichol as a projectionist in the theatre. Nichol was a member of the union. The union complained that it was the intention and understanding between the parties that only one member of the family would act at a time, and that one union member would always be employed. On May 7th, 1938, pickets appeared outside the theatre and began to watch and beset before the entrance. They also distributed hand-bills complaining of unfairness to organized labour. On the application of the plaintiff, an *interim* injunction was granted.

The appeal was argued at Victoria on the 16th and 19th of September, 1938, before MARTIN, C.J.B.C., MACDONALD and SLOAN, JJ.A.

J. A. Campbell, for appellants: The Fairleighs, owners of the theatre, entered into a contract with the British Columbia Projectionists' Union to employ only union men. Their son was qualifying to become a projectionist. When he qualified they discharged the union man they had previously employed. It was understood and agreed that the father and son would work alternately and never together, and would then require a union man, but when the son became qualified father and son worked together. Upon the union picketing the theatre the Fairleighs obtained an *interim* injunction. Sections 2, 3 and 4 of the Trade-unions Act provide that this cannot be done. We are met by *Schuberg* v. *Local No. 118, International Alliance Theatrical Stage Employees* (1927), 38 B.C. 130, but there was an equal division of the Court in that case, and we rely on the judgments of MARTIN and MACDONALD, JJ.A. If that case was rightly decided it defeats the object of the Act: see *Clarkson* v. *Attorney-General of Canada* (1889), 16 A.R. 202 at p. 210. The understanding was that there should always be one union man in the projectionist room, and on one occasion a non-union man was employed, contrary to the contract. Further they had apprentices in the projectionist room: see *Wright* v. *Calgary Herald, Ltd.*, [1938] 1

W.W.R. 1 at pp. 7 and 8; *Ziger* v. *Shiffer and Hillman Co. Ltd.*, [1933] O.R. 407. Even at common law we have the right of peaceful picketing: see *Allied Amusements Ltd.* v. *Reaney*, [1937] 3 W.W.R. 193 at p. 207. That the injunction should not be granted see Halsbury's Laws of England, 2nd Ed., Vol. 18, p. 27; *Baker* v. *White* (1884), 1 T.L.R. 64. There is no substantial evidence submitted that brings us outside the Trade-unions Act: see *Sorrell* v. *Smith*, [1925] A.C. 700.

Bull, K.C., for respondent: Peaceful picketing is not legal at common law: see *J. Lyons & Sons* v. *Wilkins*, [1899] 1 Ch. 255, and in the case of *Allied Amusements Ltd.* v. *Reaney* (1937), 45 Man. L.R. 371, the majority of the Court held it was illegal. We do not have to show there was violence. The Trade-unions Act contemplates trouble between master and servant. That does not arise in this case. The case does not fall within section 4 of said Act. All that is necessary is to show we have a *prima facie* case, and the learned judge found upon the facts that an *interim* injunction should be granted: see *Rex* v. *Richards and Woolridge* (1933), 48 B.C. 381. The case of *Ollendorff* v. *Black* (1850), 4 De G. & Sm. 209, should be read with *Baker* v. *White* (1884), 1 T.L.R. 64. The trial judge having exercised his discretion, this Court should not interfere.

Campbell, in reply, referred to *W. L. Macdonald & Co.* v. *Casein, Ltd.* (1917), 24 B.C. 218; *Vancouver Island Milk Producers' Association* v. *Alexander* (1922), 30 B.C. 524; *B.C. Poultry Association* v. *Allanson*, [1922] 2 W.W.R. 831; *W. Edge & Sons, Limited* v. *W. Niccolls & Sons, Limited*, [1911] 1 Ch. 5, and on appeal [1911] A.C. 693; *Auto-Mart (London), Limited* v. *Chilton* (1927), 43 T.L.R. 463; *Ware and De Freville, Ld.* v. *Motor Trade Association*, [1921] 3 K.B. 40 at p. 75; High on Injunctions, 3rd Ed., Vol. 1, p. 60; *Haile* v. *Lillingstone* (1891), 35 Sol. Jo. 792; *Dwyre* v. *Ottawa* (1898), 25 A.R. 121.

MARTIN, C.J.B.C.: We are all of opinion that the appeal should be dismissed.

Speaking for myself, my understanding of the general principles which should govern an application of this kind is admir-

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Martin, C.J.B.C.

ably set forth in the old but still leading authority, which I have often found very useful in former days when I was a trial judge, *i.e.*, High on Injunctions (1905), Vol. 1, 4th Ed., page 8, paragraph 5. The passage is a long one and I shall not take the time to read it now. To that I add the case of *Baker* v. *White* (1884), 1 T.L.R. 64, a decision of the Court of Appeal. And I venture also to refer to some remarks of my own, in *Davidson* v. *North-Western Dredging Co.* (1925), 35 B.C. 534 at 539, wherein I adopted the judgment of that most eminent judge, Chief Justice Killam, who delivered the judgment of the Court, in Manitoba, in *Miller* v. *Campbell* (1903), 14 Man. L.R. 437. It is true that the Court here was equally divided in *Davidson's* case, but it contains the enunciation of the general principle, which during the argument herein I said I felt sure must have been found adopted by this Court, and I was very glad to be able to find the case. The whole of Chief Justice Killam's judgment in that leading case, wherein very distinguished counsel were engaged, is worthy of perusal. Just here I shall only refer to what he says particularly at pp. 447-9. To which I might also add the case that was referred to by our brother SLOAN, *Preston* v. *Luck*, a leading one in England on the subject (1884), 27 Ch. D. 497, at p. 506, wherein will be found a statement of the law that has often been applied in the English Courts.

MACDONALD, J.A.: I agree. The judge below exercising a discretion must have held that on the facts before him there was at least some evidence of acts on the part of the defendants not within the protection of the sections of the Act under consideration (R.S.B.C. 1936, Cap. 289). I would not at this stage, without the further evidence that will be adduced at the trial, conclude that he was so clearly wrong that we should interfere. We do not of course decide the issue by dismissing this appeal.

SLOAN, J.A.: I agree, and have nothing to add.

MARTIN, C.J.B.C.: If I may add, in confirmation of what our brother MACDONALD has just said, that is really, in effect, what Chief Justice Killam said at p. 448, to which I referred, *viz.*:

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An order of this kind is in a large measure one of discretion, with which an appellate Court will not lightly interfere, and I think it best to avoid a discussion of the evidence at this stage.

Appeal dismissed.

Solicitors for appellants: *McCrossan, Campbell & Meredith.*

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

HOLLYWOOD THEATRES LIMITED v. TENNEY *ET AL.* (No. 2).

S. C.
1938
Dec. 13, 14, 15, 19, 20, 21, 28.

Aff'd
54 BCR. 247

Trade unions—Contract between theatre owners and union—Dispute as to interpretation of—Watching and besetting theatre—Object to compel acceptance of union's interpretation of contract—Nuisance—Right to injunction and damages.

Mrs. Fairleigh acted as manager, and her husband as a qualified projectionist, of the Hollywood Theatre in Vancouver, of which they were the owners. The regulations under the Fire Marshal Act require the presence of two projectionists in a booth. In October, 1937, Mrs. Fairleigh entered into an agreement with the British Columbia Projectionists' Union whereby she agreed to employ only projectionists supplied by the union, "except and only when members of her family are not available." At this time Mrs. Fairleigh's son was studying to become a projectionist, and on March 26th, 1938, he became qualified and took out a projectionist's certificate. The union projectionist who was employed as second projectionist in the theatre was then dismissed and the son took his place. The union protested that it was understood that only one member of the family would act at a time, and that one union man would always be employed. The union picketed the theatre and carried on a system of watching and besetting before the entrance. In an action for damages and an injunction:—

Held, that the defendants acted in concert on a prearranged plan and in pursuance thereof, without lawful jurisdiction, were attempting to compel the plaintiff to do what it was not legally obligated to do in conducting its business. The plaintiff is entitled to an injunction and damages.

ACTION for a declaration that the defendants unlawfully damaged the plaintiff by publishing defamatory statements of or concerning the plaintiff and its business, and by creating a

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nuisance adjacent to the plaintiff's theatre and molesting, threatening, and seeking to intimidate the plaintiff's patrons by watching and besetting the plaintiff's premises with a view to compelling the plaintiff to do something that it is not compelled to do, for damages and an injunction. Tried by McDONALD, J. at Vancouver on the 13th to the 21st of December, 1938.

Bull, K.C., and *Ray,* for plaintiff.
J. A. Campbell, and *Beckett,* for defendants.

Cur. adv. vult.

28th December, 1938.

McDONALD, J.: The plaintiff is a private company whose shareholders are R. E. Fairleigh, M. E. Fairleigh his wife, and their son David Fairleigh. Mrs. Fairleigh owns the building in which the company operates a moving-picture theatre on Broadway in this city. In the summer of 1937 difficulties arose between the operators of moving-picture theatres in Vancouver and the Projectionists' Union. These difficulties resulted in a strike of the projectionists and the closing of the theatres for some days. Finally an agreement was arrived at on October 5th, 1937, and it being important that the theatres should open that evening to save further loss, the Projectionists' Union sent out to the various operators contracts to be signed covering a period extending over the next two years. One Pollock, president of the union and one Boothe, the owner of the Dunbar Theatre, who, of course, were both interested in effecting a settlement of the existing troubles, brought a printed form of contract to R. E. Fairleigh who represented his wife, the manager of the theatre. This contract, in the form presented, provided that Mrs. Fairleigh should employ only projectionists supplied by the union and at the wages set out in the schedule. Fairleigh, immediately on receiving the form for his signature, stated to Pollock and Boothe that he could only sign it, subject to a provision which he would and did insert in typewriting, *viz.*, "except and only when members of the family of the party of the first part are not available." Fairleigh explained that his reason for this provision was that his son David would shortly be licensed

as a projectionist and when that time arrived he, being a projectionist himself, would, with his son, operate the theatre. In the result, of course, this would mean that a union man would be required only when either the father or son might be off duty. With the amendment so inserted, Fairleigh signed the contract in duplicate, on behalf of his wife. Pollock took it away and some five or six weeks later one copy was duly returned, executed by the officers of the union. I may say at once that in my opinion the meaning of that contract is plain, and by no twisting of words or language can its meaning be distorted. Having regard to the context, the words "except and" are meaningless and hence innocuous. The Projectionists' Union takes a contrary view and states that the meaning is that, whether members of the family are available or not, at least one member of the union shall at all times be employed as a projectionist in the Hollywood Theatre, and that, in any event, there was an "understanding" to that effect. My own view was and is that any evidence to attach any such condition or "understanding" is inadmissible. If there should be any doubt about this, such doubt would seem to be dispelled by the last clause in the contract, which reads as follows: "All previous contracts are hereby cancelled and this contract is not subject to any other understanding or agreement either written or verbal." How verbal evidence can be introduced in the face of this provision is beyond my comprehension. However, counsel for the defendants pressed strongly to have the evidence admitted, and on this point, as well as upon another point to be mentioned later, I acceded to this request in the hope that, if I should be wrong, a new trial might be avoided. It may be convenient to state now, that there was nothing in the demeanour of any of the witnesses, which would assist me in arriving at a conclusion as to their veracity. If the evidence should be admitted on this branch of the case, I have only this to say, that in my opinion it falls far short of establishing any understanding or any agreement contrary to that expressed by the written document.

At the time of the signing of the contract one Nichols, a member of the union, was in the plaintiff's employ under a contract which might be terminated by either party on two

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McDonald, J.

weeks' notice. I am satisfied that Nichols understood quite well that when David Fairleigh became qualified, he (Nichols) would be relieved of his duties. In any event, on March 8th, 1938, David Fairleigh was duly authorized to work as a projectionist and on March 12th Nichols was notified that his services would be dispensed with in two weeks. The matter came at once before the executive board of the union, and a committee composed of Messrs. Smith and Leslie was appointed to visit Fairleigh. They did visit him and asked him if the plaintiff would retain Nichols in its employ. Fairleigh replied that they could not afford to do so, and that he and his son David would carry on. There was no suggestion at this meeting that the contract was subject to any "understanding" or collateral agreement. Early in April Mr. and Mrs. Fairleigh were obliged to be absent for a week and, under government regulations, David Fairleigh would require a projectionist to assist him during his father's absence. There is a conflict of evidence as to whether or not Fairleigh, before going away on April 11th, asked Graham, the business agent of the union, to supply a man during his absence. Having regard to all the evidence offered on this matter I am of opinion that such a request was made and that Graham, in the multiplicity of detail involved in his various duties, has forgotten it. In addition it may be said that, at this stage, the relationship between the parties was strained, and it is unlikely that either would exert any effort to accommodate the other. In any event, David Fairleigh did expect, on the evening of April 11th, that a projectionist from the union would be on hand to assist him. No such man came, and David Fairleigh procured as his assistant one Robinson who had been trained as an apprentice in the Hollywood Theatre, was not a member of the union and was unemployed. He was frequently about the theatre where he came almost every night to accompany a young lady who was employed as an usher. David Fairleigh, during the week beginning April 11th, asked Robinson to assist him. This Robinson did, not as a paid employee but as a friend of the Fairleigh family. I mention this incident in order to dispose of it now, because much has been made of it during the trial and in my opinion it is a trifling matter. It was not a

breach of the contract and it was not considered as such by the executive of the union until very recently.

There seem to have been no further communications of importance between the parties until the morning of May 7th, 1938, when Graham telephoned Fairleigh and asked if he intended to engage a projectionist from the union. Fairleigh replied in the negative, and that evening at 6 o'clock the union began to watch and beset the plaintiff's theatre, employing in the first instance two pickets and later four, who marched up and down in front of the theatre wearing white coats, on the backs of which was printed:

NOTICE
Hollywood Theatre Does Not Employ Members of the
B.C. Projectionist's Union.
Affiliated with
THE VANCOUVER, NEW WESTMINSTER
TRADES AND LABOR
COUNCIL.

About the same time the executive of the union employed persons to distribute near the theatre, as well as at points several blocks away, two hand-bills in the words following:

(1)

NOTICE
Hollywood Theatre Does Not Employ Members of the
B.C. Projectionist's Union
Affiliated With
The Vancouver,
New Westminster Trades
and Labor Council.

(2)

To Hollywood Theatre
Patrons:

THE TRUE STORY

Last October a contract was signed with the Hollywood Theatre for two years to employ one union man. The owner inserted a clause to the effect that his son would be permitted to work there when he was successful in procuring a Government Projectionist Licence, this was satisfactory to the union, with the understanding that he, the owner, would himself leave the projection room and still employ one union man. Contrary to this agreement, when his son was able to go to work he locked the union man out, while the owner was holding down two jobs by conducting an Equipment and Supply Store on Davie Street during the daytime and working as a projectionist and managing the Hollywood Theatre at night.

This union was not responsible for the colored people marching in front

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of the Hollywood Theatre. It was an attempt to ridicule our pickets and a Dominion Act of Parliament which permits peaceful picketing.

Would you call this fair to organized labor?

B.C. Projectionist Society,
Local No. 348,
I.A.T.S.E. & M.P.M.O.

On May 14th the secretary of the Union wrote to the various affiliated local unions in the city asking them to place the Hollywood Theatre on their "We Do Not Patronize" list, and on May 16th wrote to the secretary of the defendant Trades and Labor Council, stating that it had been found necessary to place pickets in front of the Hollywood Theatre. On May 17th, the council having this letter before it, referred the question to a grievance committee whose members saw Fairleigh, but with no practical result. At this point I may mention the further evidence which appears on the record, by reason of the insistence of counsel for the defence, against the protest of counsel for the plaintiff, and contrary to my own opinion as to its admissibility. This evidence relates at considerable length to various interviews, negotiations and correspondence which took place between the parties with a view to arriving at a settlement. I am not regarding this evidence, but I allowed it to appear upon the record for the reason stated earlier in this judgment. All efforts at settlement having failed the picketing continued and the defendant union decided to adopt stronger methods. An appeal was sent out to the defendant Trades and Labor Council and the various trade unions in the city, calling for pickets to serve on Saturday evening, June 11th, 1938. On that evening at 7 o'clock some 60 men appeared wearing sashes on which were printed the names of their respective trades with, in most cases, the numbers of their respective unions. These men marched in pairs, the files being about a yard apart, back and forth in front of the theatre and for some distance to the east and west. At certain periods of the march four people would be marching abreast, one pair going in each direction. The parade lasted for about an hour during the time when patrons were in the habit of entering the theatre. The result of this demonstration was that the plaintiff applied for and obtained an injunction and the picketing was discontinued on June 21st, 1938.

By way of amendment and, as I am convinced, as an afterthought, the defendants set up as a further reason for their actions the fact that Fairleigh was training apprentices in his theatre and that this was contrary to clause 7 of the written contract. In my opinion, there is no substance in this claim; the clause in question has no direct reference to the matter and, even if it has, there is no evidence to prove that any breach took place. The question of training apprentices and the question of the plaintiff having procured the services of Robinson for one week in April were not and are not the substantial reasons why this attack upon the plaintiff's business was made. The real matter which was in issue, has continued throughout to be in issue, and is still in issue, is that the defendants insist upon a construction of the contract which the plaintiff insists the contract cannot possibly bear. In my opinion that is the issue and the only issue of substance which has given rise to this litigation. In this connection I cannot do better than to apply to the facts here, and to quote *verbatim* the language of Donovan, J. in *Allied Amusements Ltd.* v. *Reaney,* [1936] 3 W.W.R. 129, at 134; 67 Can. C.C. 94:

> There can on the evidence be no doubt that the defendants acted in concert in reference to a prearranged plan, and that what was subsequently done was in pursuance of that plan. The defendants, without lawful justification, were attempting to compel the plaintiff to do what it was not legally obliged to do in conducting its business.

And at p. 135:

> To say that the general intention of the defendants was the furtherance of labour interests does not excuse unlawful means to achieve the immediate intention, which here was to so annoy, coerce and injure the plaintiff that there would be a surrender of a part of the conduct of its business.

I think no language could more clearly express what is exactly the situation here.

The judgment of Donovan, J., above mentioned, was affirmed by the Court of Appeal in Manitoba (see [1937] 3 W.W.R. 193; 45 Man. L.R. 371; 69 Can. C.C. 31) and the members of that Court approved of the judgment of the Court of Appeal for British Columbia (*Schuberg* v. *Local No. 118, International Alliance Theatrical Stage Employees,* 38 B.C. 130; 47 Can. C.C. 213; [1927] 1 W.W.R. 548) wherein the judgment of GREGORY, J. was affirmed on an equal division of the Court. By

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this last-mentioned decision I think I am bound. The dissenting judges, MARTIN, J.A. (as he then was) and MACDONALD, J.A., held that the defendants were protected by the Trade-unions Act, now R.S.B.C. 1936, Cap. 289. I think it is inappropriate that I should discuss this phase of the matter, for, as mentioned above, I think I am bound to follow the decision as it stands. Nothing is to be gained by a review of the authorities which have been reviewed from time to time for more than 40 years.

As to damages, I find the same difficulty as did the learned judges in other cases of a similar nature. There is no doubt at all that the plaintiff did suffer serious loss and I think I am keeping well within the mark in fixing the damages at $2,000. The injunction will go and there will be judgment for damages in this amount together with costs.

The defendants, E. Smith, Fordyce, W. Stewart and Hughes were added shortly before the trial, having become members of the executive of the Trades and Labor Council after the acts complained of took place. They were simply added so that the action might not fail for want of parties. No remedy is sought against them. The only costs incurred by reason of their being parties are the costs of the motion to add them. These costs will be costs to these defendants.

On the opening of the trial I dealt with a motion for a representative order. This motion had been referred to the trial judge by the judge in Chambers before whom the application came, some four days preceding the trial. It is contended that the defendants should in any event have the costs of the first day of the trial, which was occupied in the hearing of this motion. This contention, I think, is not sound. The plaintiff is entitled to these costs along with the general costs of the action.

Judgment for plaintiff.

PEARSON v. VINTNERS LIMITED AND CHAPMAN.

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1939
Feb. 6, 7, 13.

Disth
Hesse v. Laurie 38 WWR 321 + 35 DLR (2d) 413

Negligence—Damages—Hotel elevator—Injury to guest—Intoxicated men in elevator—Interfering with operator—Care to be taken by operator.

The elevator in the defendant company's hotel is operated by a central lever, which when moved to the right causes the elevator to ascend, and when moved to the left causes it to descend. It is moved by means of a horizontal shaft, and when the elevator is at rest the shaft is at the top of the circle in which is a notch about an inch deep into which the shaft rests. To move the elevator the shaft is pulled forward out of the notch and moved to the right or left in order to ascend or descend. At about midnight on the 3rd of September, 1937, when the defendant C. was operating the elevator, two unknown men, who were intoxicated, entered the elevator and they were followed into the elevator by two men who were also intoxicated, named Sorensen and Carlson. Sorensen stood from twelve to fifteen inches from C. who kept his hand on the handle of the shaft. After the four men had entered, C. saw the plaintiff, who was a guest in the hotel, coming towards the elevator obviously intending to go to his room. Just as he stepped in, Sorensen lurched against C., causing him to release the handle and push the lever violently to the right, and the elevator shot up, throwing the plaintiff upward, outward and backward. He fell on the floor of the lobby and was permanently injured.

Held, that the defendant C. could have closed the gates and prevented other passengers from entering, and ascended with the intoxicated men alone. Knowing Sorensen's condition he could at least have placed him at the back of the elevator or caused him to leave it. He took no precautions in a situation which required not only extaordinary caution but most anxious care. The plaintiff is entitled to recover from both defendants.

ACTION for damages owing to injuries suffered by the plaintiff resulting from the defective operation of an elevator in the Balmoral Hotel in Vancouver by the defendant Chapman when acting as elevator boy. The facts are set out in the reasons for judgment. Tried by McDonald, J. at Vancouver on the 6th and 7th of February, 1939.

Tysoe, and *E. J. C. Stewart,* for plaintiff.
Locke, K.C., and *McFarlane,* for defendants.

Cur. adv. vult.

13th February, 1939.

McDonald, J.: On the 3rd of September, 1937, the plaintiff was a guest at the Balmoral Hotel which is owned and operated

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CHAPMAN

McDonald, J.

by the defendant company. The defendant Chapman is the hotel clerk and elevator operator. At about midnight on the said date the plaintiff was about to enter the elevator and as he had placed one foot on the floor of the elevator the latter suddenly began to ascend, throwing the plaintiff upward, outward and backward so that he fell upon the floor of the lobby and suffered very severe and permanent injuries. Obviously the defendants are called upon to explain how such an accident could have happened and the only explanation we have is from the defendant Chapman himself. The elevator is operated by a control lever which, when moved to the right, causes the elevator to ascend and moved to the left causes it to descend. When the elevator is at rest the lever is situate at the top of the circle. It is moved by means of a short horizontal shaft which is surrounded by a movable wooden handle. At the top of the circle is a notch and the wooden handle rests in this notch. To move the lever it is necessary to pull the wooden handle from half an inch to an inch toward the operator and out of the notch, thus making it possible to move the lever either to the right or to the left. The wooden handle is kept in position by a spring and only a slight effort is required to pull it from the notch and move the lever. Chapman's explanation is that as he stood in his elevator in his ordinary position with his right hand on the handle two men under the influence of liquor, whose names are unknown, entered the elevator and stood at the back. They were followed by two other men, one Sorensen and one Carlson, who were obviously intoxicated and staggering. As they stepped into the elevator Sorensen stood about twelve or fifteen inches from Chapman at his left and slightly to the rear. He was making some noise and Chapman told him to keep quiet. Chapman says that he kept his hand on the lever for fear that Sorensen might interfere with it for, as he says, when men are drinking they "do peculiar things." Later, in his cross-examination, he says that he kept his hand on the handle in order to save time. After the four men had entered Chapman saw the plaintiff coming toward the elevator, obviously with a view to going up to his room, and just as plaintiff stepped in, Sorensen lurched against Chapman causing him to release the handle and push

the lever violently to the right with the result above stated. Chapman states that, although he knew the men were under the influence of liquor and were staggering, he took no precautions other than those he would have taken had the men been sober.

The duty of the defendants in the premises is defined by MARTIN, J.A. (as he then was) in a careful and considered judgment in *Gordon* v. *The Canadian Bank of Commerce* (1931), 44 B.C. 213. His Lordship states that (p. 227):

> The construction and operation of an electric passenger elevator in a building is something that requires "anxious care" because the passengers in its cage are completely under the control and in the custody of the person who is carrying them vertically through a narrow shaft. . . .

His Lordship quotes with approval several American authorities, all going to show that in such a case the law requires extraordinary care and diligence. It is true that in the *Gordon* case the Court was dealing with a defect in the elevator itself but I think the judgment clearly applies to the operation of the elevator as well as to its construction and maintenance. This obviously must be so for the danger to a passenger is equally great in either case.

It is contended on behalf of the plaintiff, that not only did Chapman not take any extraordinary care, but that he took no care at all and counsel relies, by way of analogy, on cases involving the duty of a carrier of passengers to protect such passengers from the acts of intoxicated persons allowed upon the carrier's premises, and refers to *Murgatroyd* v. *The Blackburn and Over Darwen Tramway Company* (1887), 3 T.L.R. 451 and *Adderley* v. *Great Northern Railway Co.*, [1905] 2 I.R. 378. The law seems to be clearly laid down by Wright, J. at pp. 386-7 in the latter case:

> To put a man whom their servants saw to be drunk into a carriage with other passengers, would admittedly render the company liable for any injury or evil consequences to the other passengers naturally resulting, or which might be expected to ensue, from such wrongful act.

I am unable to see any reason why that rule should not apply to the operator of a passenger elevator as well as to the operator of a tramcar or of a passenger train.

But it is contended for the defendants that the intervening act of Sorensen saves the defendants from liability. The rule to be

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applied in this connection is I think that laid down by Fitz-Gibbon, L.J. in *Sullivan* v. *Creed,* [1904] 2 I.R. 317 at p. 339:

> Where an injury has been suffered which would not have happened but for the action of more than one person, no one of the several persons whose action led up to the injury will be answerable in damages for it unless his action caused it; and it should be held to have caused it, if a man of ordinary prudence, having regard to all the circumstances, ought to have anticipated the injury as a not improbable—"likely" is too strong—consequence of his action. If so, he is responsible, notwithstanding that the injury would not have happened but for the independent act of a third party.

On the whole case I think the defendants are clearly responsible for the accident which happened.

When defendants' counsel asks what Chapman, as a reasonably careful man, could have done in the situation it may be answered that, if he decided to admit the intoxicated persons to the elevator, he could immediately have closed his gates to prevent other passengers from entering; he could have ascended with his intoxicated passengers and having left them at their destination, he could have returned for the plaintiff and any other passengers desiring to use the elevator. At least, knowing what he did know of Sorensen's condition, and what might likely happen, he could have moved his hand from the handle and have either placed Sorensen at the back of the elevator or caused him to leave it entirely. The fact is, he took no precautions whatever in a situation which required not only extraordinary caution but most "anxious care."

There will be judgment against the defendants for $1,660.65 special damages and $5,000 general damages.

Judgment for plaintiff.

AUSTRALIAN DISPATCH LINE (INCORPORATED) v. ANGLO-CANADIAN SHIPPING COMPANY LIMITED.

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Jan. 17;
Feb. 2.

Charterparty—Loading in British Columbia for Shanghai—Hostilities break out between China and Japan—Charterparty declared cancelled by charterer—Action for damages—Defence of frustration.

The defendant chartered the ship "Sheaf Crown" on the 25th of June, 1937, to load at berths in British Columbia for ports in Japan, or in charterer's option, Shanghai direct. On August 17th, 1937, the defendant notified the plaintiff that it chose Shanghai. Lay days were not to commence before August 1st, 1937. If the ship was not ready to load by noon of September 15th, 1937, the defendant had the option of cancelling the charterparty. The ship was in Japan and started for British Columbia on August 20th, 1937, but before the ship had sailed hostilities broke out between China and Japan. Trouble had been brewing for some time previously which was known to the parties hereto. As hostilities increased, on the 20th of August, 1937, the defendant notified the plaintiff in writing as follows: "We hereby notify you that on account of the war between China and Japan, our charterparty on the S.S. "Sheaf Crown" dated San Francisco June 25th has become impossible of performance and we hereby declare it cancelled." In an action for damages for breach by the defendant of the charterparty, the defendant pleaded frustration.

Held, that both parties were on an equal footing and one had no advantage over the other as to knowledge of conditions along the North China littoral. The ship did not belong to either of the contesting parties in the hostilities and was proceeding to a foreign concession. There was no actual restraint. On the evidence there appears to have been no ground for frustration. The plaintiff is entitled to recover.

ACTION for damages owing to the defendant's breach of a charterparty of the Steamship "Sheaf Crown," dated the 25th of June, 1937. The facts are set out in the reasons for judgment. Tried by MORRISON, C.J.S.C. at Vancouver on the 17th of January, 1939.

Macrae, K.C., and *Clyne*, for plaintiff.
Griffin, K.C., and *Sidney A. Smith*, for defendant.

Cur. adv. vult.

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2nd February, 1939.

MORRISON, C.J.S.C.: The plaintiff claims damages for breach by the defendant of a charterparty of the Steamship "Sheaf Crown," dated June 25th, 1937. The defendant pleads frustration.

It appears from the facts, put compendiously, that the defendant chartered the ship "Sheaf Crown" on the 25th of June, 1937, to load at berths in British Columbia for ports in Japan or in charterer's option Shanghai direct. On or about the 17th of August, 1937, the defendant notified the plaintiff that they chose Shanghai. Lay days were not to commence before 9 a.m. on August 1st, 1937. If the ship was not ready to load by noon of the 15th of September, 1937, the defendant had the option of cancelling the charterparty. In August, 1937, before the ship, which was then in Japan, had sailed to carry out the various charterparties, hostilities broke out between what I might term, for the purposes of the narration, China and Japan. There was no declaration of war at any material time. Trouble had been brewing for some appreciable time which was known to the parties hereto and it was only an intensification with which ships were confronted when the letter hereinafter recited was sent (Exhibit 1). The ship proceeded to British Columbia from Japan on the 20th of August, 1937, but before the expiration of the lay days, the defendant notified the plaintiff in writing as follows:

> We hereby notify you that on account of the war between China and Japan, our charterparty on the S.S. Sheaf Crown dated San Francisco June 25th has become impossible of performance and we hereby declare it cancelled.

As the main point about which "the battle raged" at the trial was frustration or no frustration, I do not think I need enumerate the various other parties who may be interested in the "Sheaf Crown" whose owner in June, 1937, was the Sheaf Steam Shipping Co. Ltd. with head office in England, but no place of business in British Columbia. Nor do I think it necessary to spread out the material terms of the charterparty except perhaps paragraph 47, which has been referred to as the War Risks clause:

> No bills of lading to be signed for any blockaded port and if the port of discharge be declared blockaded after bills of lading have been signed, or if the port to which the ship has been ordered to discharge either on signing

bills of lading or thereafter be one to which the ship is or shall be prohibited from going by the Government of the Nation under whose flag the ship sails or by any other Government, the owner shall discharge the cargo at any other port covered by this charterparty as ordered by the charterers (provided such other port is not blockaded or prohibited port as above mentioned) and shall be entitled to freight as if the ship had discharged at the port or ports of discharge to which she was originally ordered.

The ship shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery or otherwise howsoever given by the Government of the Nation under whose flag the vessel sails or any department thereof, or any person acting or purporting to act with the authority of such Government or any department thereof, or by any committee or person having under the terms of the War Risks Insurance on the ship, the right to give such orders or directions and if by reason of and in compliance with any such orders or directions anything is done or is not done, the same shall not be deemed a deviation, and delivery in accordance with such orders or directions shall be a fulfilment of the contract voyage and the freight shall be payable accordingly.

Mr. *Griffin* and Mr. *Smith* for the defendant submitted *in limine* that the various charterparties contained an implied term safeguarding themselves against outbreak of war or the commencement of hostilities, which would or might be expected to prevent the vessel from proceeding to Shanghai pursuant to the contract which shall be deemed to be a cause frustrating the intended commercial purpose involved; that this contingency, having eventuated the charterparties and other associate contracts, should terminate and come to an end; that all notices deemed to be necessary were given.

I find there were hostilities at times material to the issues herein; that all parties were aware of the state of affairs in that respect as affecting the China littoral. As affecting the contestants they were of a grave nature. Hostilities were proceeding within range of the port of Shanghai and the foreign concessions and profoundly affected the normal life of the ubiquitous cosmopolitan traders both on land and water. The priorities of the knowledge, as between the parties hereto, of the hostilities are immaterial in the consideration of their nature and extent. The interest in that point of view lies in whether the events were of such a character as to put them in one or other of the categories which have been adjudicated as justifying frustration. There is no doubt it was dangerous ground, which, apart from contractual obligation, had better have been more conveniently

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passed by. The ship at material times was in existence and afloat and not under seizure. There was no effective blockade. It could have entered the designated port although in so doing it would be a dangerous and doubtless romantic experience. The significance of the term "surrounding circumstances" is pointed out in an exhaustive judgment of Williams, J. in *Behn* v. *Burness* (1863), 32 L.J.Q.B. 206. The law, as to frustration, has been decanted from a long list of cases of somewhat ancient vintage into those of recent date to which I have been referred by both counsel in support of their respective and conflicting submissions, *viz., Dahl* v. *Nelson, Donkin & Co.* (1881), 6 App. Cas. 38, 59 and in *Hirji Mulji* v. *Cheong Yue Steamship Co.*, [1926] A.C. 497 at pp. 509-10 I find this:

> Language is occasionally used in the cases which seems to show that frustration is assimilated in the speaker's mind to repudiation or rescission of contracts. The analogy is a false one. Rescission (except by mutual consent or by a competent Court) is the right of one party, arising upon conduct by the other, by which he intimates his intention to abide by the contract no longer. It is a right to treat the contract as at an end if he chooses, and to claim damages for its total breach, but it is a right in his option and does not depend in theory on any implied term providing for its exercise, but is given by the law in vindication of a breach. Frustration, on the other hand, is explained in theory as a condition or term of the contract, implied by the law *ab initio*, in order to supply what the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable, having regard to the mutual interests concerned and of the main objects of the contract: see *per* Lord Watson in *Dahl* v. *Nelson, Donkin & Co.*, [(1881)] 6 App. Cas. 38, 59. It is irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances. It is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands.

In *Geipel* v. *Smith* (1872), L.R. 7 Q.B. 404, at 407 counsel, *arguendo*, made this submission:

> In *Spence* v. *Chodwick* (1847), 10 Q.B. 517 . . . it was held that inability, incapacity, or impossibility of performance is no excuse, according to the law of England, unless caused by something expressly excepted by the contract; . . . [Blackburn, J.: No doubt that is the English law; *Hills* v. *Sughrue* (1846), 15 M. & W. 253 is to the same effect].

The distinct species of contract herein vested in the charterer the right to the possession of the ship for a given space of time. The carrying capacity of the ship was let. It contains the agreement and the terms and conditions thereof by which each party consents to be bound. It settles the bargain as to the

nature, extent and quality of the cargo, leaving it to the bill of lading to define its quantity, condition, weight and appropriation.

The general rule broadly running through these cases appears to be that if the merchant covenant to do a particular act, which afterwards become impracticable, he must answer for his default unless the act be or became contrary to the law of his country, or impossible by the Act of God, etc. *Beswick* v. *Swindells* (1835), 3 A. & E. 868; *Baily* v. *De Crespigny* (1869), L.R. 4 Q.B. 180. Ordinarily express agreements are construed strictly and parol evidence is not allowed to contradict or vary their terms, and the rule *Expressum facit cessare tacitum* is enforced—*Leer* v. *Yates* (1811), 3 Taunt. 387; *Paradine* v. *Jane* (1647), Aleyn 26; 82 E.R. 897. This last case is authority for this rule that a stipulation, which is clearly in accordance with the intention of the parties, must be enforced though ever so unreasonable. As one learned text-writer has said:

> Intention being the guiding principle, and the next being the language in which presumably that intention has been expressed, we are met at the threshold by the apparent conflict of language employed in reference to this rule of interpretation, as well as by the seeming discordance of the rules themselves.

Then he quotes what Lord Ellenborough says of mercantile contracts in *Robertson* v. *French* (1803), 4 East 130, 135-36.

The English law uniformly has made a man liable on his contract, for all its consequences and casualties; and if he contracts expressly as to time and without qualification and no law interposes to prevent its performance, or it does not become physically impossible, he is bound by his promise; and where the delay was from unforeseen circumstances in "procuring a cargo wherewith to load" this was held to be the rule—*Paradine* v. *Jane, supra; Baily* v. *De Crespigny, supra; Clifford* v. *Watts* (1870), L.R. 5 C.P. 577; *Hills* v. *Sughrue* (1846), 15 M. & W. 253.

A "safe port" does not mean a port naturally safe by situation or position or in reference to navigation merely, but must be a port into which a ship can enter—*Ogden* v. *Graham* (1861), 31 L.J.Q.B. 26. As to the boom or barrier see *Metcalfe* v. *Britannia Ironworks Company* (1876), 1 Q.B.D. 613; *Shield* v. *Wilkins* (1850), 19 L.J. Ex. 238.

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The expression "Act of God" impliedly includes, among the instances of *vis major* which falls within the denomination storms and tempests and it excludes all those acts, misfortunes or casualties which are attributable to the mal- or misfeasance or non-feasance of man, and which are independent to that extent of the agency of natural forces—generally the term is equivalent to that of the "perils of the sea" which is limited to such perils as are of an extraordinary nature or which arise from some irresistible force or to calamities caused by or from inevitable accident, or from some overwhelming power which cannot be guarded against by ordinary exertions of human skill and prudence. *Geipel* v. *Smith* (1872), L.R. 7 Q.B. 404. It must be established that the Act of God alone or in combination with an excepted act formed in their conjunction the sole direct and irresistible cause of the loss: *Nugent* v. *Smith* (1876), 1 C.P.D. 423, at 437. Even two such eminent authorities as Story and Mansfield are not agreed as to terms. Story defines it as "an accident produced by physical causes which are irresistible." He considers it equivalent of "inevitable accident" and as including perils of the sea and therefore pirates. *Pickering* v. *Barkley* (1648), Sty. 132; 82 E.R. 587. Lord Mansfield, on the other hand, considers it must be something "in opposition to the act of man." "Broom" (Maxims) considers it must be "an inscrutable accident." It does not include the violence of a mob, or a riot, or civil commotion of any nature, and is limited to the act of an enemy in public war and capture and robbery by pirates.

If a merchant hire a ship to go to a foreign port, and covenant to furnish a lading there, a prohibition by the Government of that country to furnish the intended articles neither dissolves the contract nor absolutely excuses a non-performance of it:

Abbott's Treatise on Merchant Ships and Seamen, 339-40, cited by counsel in *Touteng* v. *Hubbard* (1802), 3 Bos. & P. 291, at pp. 297-8. See also *Blight* v. *Page* (1801), *ib.* 295 (*n*). Also *Atkinson* v. *Ritchie* (1809), 10 East 530, 535. Where some extraordinary circumstance arises which is not within the contemplation of either party at the time of making the contract, or, if contemplated, was not provided against, the loss falls on the charterer, who has not protected himself in making the

agreement, if he thereby detains the vessel either in loading or unloading beyond a reasonable time—*Paradine* v. *Jane, supra.* Instances of implied terms are the promise of the shipowner that his ship shall be seaworthy; that she will proceed without deviation; that he will deliver upon being paid freight, etc. 3 Salk. 112; *Steel* v. *State Line Steamship Company* (1877), 3 App. Cas. 72. The terms are stringent:

As near thereto as she may safely get.

A delivery at Kertch which was as near "as the ship could safely get" was held no fulfilment—*Metcalfe* v. *Britannia, supra,* and *Parker* v. *Winlo* (1857), 27 L.J.Q.B. 49.

In many of the cases cited there was either effective blockade or seizure or destruction of the ship.

It was slow freight—not perishable, not contraband.

Both parties were on an equal footing and one had no advantage over the other as to knowledge of conditions along the North China littoral. The ship did not belong to either of the contesting parties in the hostilities. It was proceeding to a foreign concession. *Becker, Gray and Company* v. *London Assurance Corporation,* [1918] A.C. 101.

I find there was no actual restraint within the meaning of the authorities.

The ship did not proceed to her designated place and what would have happened if she had tried is left to surmise.

In short, without further elaboration, I find that on the evidence there appears to have been no ground for frustration. I shall hear counsel as to the *quantum* of damages, if any.

Judgment for plaintiff.

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1939
Feb. 6, 9.

AUSTRALIAN DISPATCH LINE (INCORPORATED) v. ANGLO-CANADIAN SHIPPING COMPANY LIMITED. (No. 2).

App. Allwd
[1940] 2 W.W.R. 266

Apld.
Robins v. Wilson
[1944] 3 W.W.R. 255, 625

Charterparty—Cancellation of charter—Mitigation of damages—Burden of proof—Quantum of damages.

On the trial of the action for damages for breach by the defendant of a charterparty, it was *held* that the plaintiff was entitled to recover. On a subsequent hearing as to *quantum* of damages it appeared that the plaintiff had chartered the ship from the owners in London, and in turn chartered her to the defendant. Upon receipt of the letter of cancellation from the defendant, the plaintiff without delay notified the owners and relinquished the charter. The owner promptly succeeded in rechartering the ship and thus mitigated the damages.

Held, that the plaintiff acted reasonably under the circumstances and took the most reasonable course to mitigate the damages. The burden of proving breach of duty to mitigate damages is on the party who alleges such failure. The plaintiff suffered the loss as set out in the particulars of the statement of claim, for which there will be judgment.

JUDGMENT having been given in favour of the plaintiff in this action, counsel were subsequently heard on the question of *quantum* of damages by MORRISON, C.J.S.C. at Vancouver on the 6th of February, 1939.

Macrae, K.C., and *Clyne*, for plaintiff.
Griffin, K.C., and *Sidney A. Smith*, for defendant.

Cur. adv. vult.

9th February, 1939.

MORRISON, C.J.S.C.: The plaintiff had chartered the ship from the owners in London and in turn chartered her to the defendant. Upon receipt of the letter of cancellation it was obliged to take alternative measures to safeguard itself and, without delay, it notified the owners and relinquished its charter. The owners promptly succeeded in rechartering and thus mitigated the damages. The plaintiff acted reasonably under the stress of the circumstances of this case, and it took the earliest and most reasonable course to mitigate and minimize

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the damage. A person wronged need not act with perfect knowledge or ideal wisdom—*Jones* v. *Watney, Combe, Reid and Co. (Limited)* (1912), 28 T.L.R. 399; Gahan on Damages, p. 141. There was no room for a *locus pœnitentiæ*. The burden of proving breach of duty to mitigate damages is on the party who alleges such failure—*Roper* v. *Johnson* (1873), L.R. 8 C.P. 167. The plaintiff chose the course which meant least loss.

> Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales. . . . The law is satisfied if the party . . . has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken:

Banco de Portugal v. *Waterlow & Sons, Ld.*, [1932] A.C. 452, at 506.

I find that the plaintiff has suffered loss as set out in the particulars of the statement of claim by reason of the precipitate cancellation and the refusal of the defendant to perform the terms of its contract with the plaintiff—the terms of the charterparty.

There will be judgment accordingly for the plaintiff for $9,837.50 with costs.

Judgment for plaintiff.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA v. KANDAHAR CONSOLIDATED GOLD MINES LIMITED (N.P.L.).

S. C.
In Chambers
1939
Jan. 26; Feb. 3.

Apld. Central Canada Pot Co. Ltd. & A.G. V. A.G. of Sask. et [1974] 6 WWR 3 (Sask CA)

Mines and minerals—Right to discovery against Attorney-General—Right of Attorney-General to sue for declaration certificates of work procured through fraud without joining an adverse claimant as co-plaintiff—R.S.B.C. 1936, Cap. 181, Sec. 80.

The rules of practice do not take away or lessen the prerogative right of the Crown to refuse discovery. Precise words must be shown to take away that prerogative.

APPLICATION by the defendant to dismiss the action by reason of the plaintiff's refusal to file an affidavit of documents

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1939

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v.
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and submit to examination for discovery, and on the further ground that the plaintiff has no *status* to bring the action in the absence of an adverse claimant being joined as co-plaintiff. Heard by FISHER, J. in Chambers at Vancouver on the 26th of January and 3rd of February, 1939.

Baird (*McDiarmid,* with him), for the application: When the Attorney-General comes into Court by commencing an action, he is subject to the Rules of Court and must give discovery in the same manner as a subject. There is no adverse claimant here as co-plaintiff or as relator. This is therefore a mere action of ejectment and the Crown Procedure Act, R.S.B.C. 1936, Cap. 68, applies, in which event His Majesty should be plaintiff: *The Queen* v. *Farwell* (1887), 14 S.C.R. 392. If there is no adverse claimant no action can be brought (*Cleary* v. *Boscowitz* (1902), 32 S.C.R. 417; *Attorney-General* v. *Dunlop* (1900), 7 B.C. 312), since there is no "dispute as to title."

McFarlane, contra: The Crown has a prerogative right to refuse discovery, but a list of documents has been supplied: *Attorney-General* v. *Newcastle-upon-Tyne Corporation,* [1897] 2 Q.B. 384; *In re La Societe Les Affreteurs Reunis and The Shipping Controller,* [1921] 3 K.B. 1. This right has not been destroyed by express words in British Columbia: see Interpretation Act, R.S.B.C. 1936, Cap. 1, Sec. 35; *Crombie* v. *The King* (1922), 52 O.L.R. 72. Where as here, the Attorney-General directly attacks certificates of work as having been procured through fraud, it cannot be said that there is no "dispute as to title." The Mineral Act, R.S.B.C. 1936, Cap. 181, Sec. 80, authorizes this form of suit. No co-plaintiff or relator is necessary: *Attorney-General of Ontario* v. *Hargrave* (1906), 11 O.L.R. 530.

FISHER, J. *held* (1) The prerogative right of the Crown to refuse discovery has not been taken away by express words, and the principles of *Attorney-General* v. *Newcastle-upon-Tyne Corporation,* [1897] 2 Q.B. 384, *In re La Societe Les Affreteurs Reunis and The Shipping Controller,* [1921] 3 K.B. 1, and *Crombie* v. *The King* (1922), 52 O.L.R. 72, apply.

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(2) It cannot be said in the present action that there is no "dispute as to the title" within the meaning of section 80 of the Mineral Act, and if authority be required for the form of the action, it is found in *Attorney-General* v. *Dunlop* (1900), 7 B.C. 312, and in what was said by DRAKE, J. in *Cleary* v. *Boscowitz* (1901), 8 B.C. 225; 1 M.M.C. 506, and dismissed the application.

Application dismissed.

MAY *ET AL.* v. HARTIN *ET AL.*

C. A.
1938
Oct. 5, 6; Dec. 2.

Companies—Representative action by shareholders—Two actions dismissed—Third action company added as party plaintiff—Same cause of action—Application by defendant to dismiss action—Frivolous and vexatious and an abuse of the process of the Court—Jurisdiction—Appeal.

Apld
Erickson v Fisher [1942] 2 DLR. 43

Held inapplicable
Bushe v Bryson 38 WWR 476

Ref'd to
Dieleman Planer Co v. Elizabeth Townhouses Ltd, [1972] 4 WWR 236 (BCCC)
also
27 DLR (3d) 692

Apld
Hamilton v. Berger & Glass [1972] 5 WWR 766 (BCSC)

Following actions in the State of Oregon, Mr. and Mrs. May brought action in British Columbia in 1928, suing on their own behalf and on behalf of all shareholders of Gibson Mining Company Limited against several defendants, including the Daybreak Mining Company Limited, now represented by the appellant Hartin as trustee. Various declarations were sought, based on fraud, the objective being a declaration that the Daybreak was a trustee *ex maleficio* for the Gibson Company of mining property claimed by the latter, although acquired by the Daybreak. The action was dismissed by MURPHY, J., who found the Daybreak's title was tainted with fraud, but the plaintiffs, with knowledge, stood by while large sums were spent on the property and they were not entitled to the relief sought. No appeal was taken from this judgment. In 1933 the same plaintiffs brought a second action against the same defendants, the Daybreak being then represented by one Kane as trustee. The action was in effect made to have the said judgment of MURPHY, J. set aside on the ground that it was procured by fraud and perjury committed in the course of the hearing. After trial MCDONALD, J. set aside the judgment of MURPHY, J. on the ground that it was procured by fraud. He held that as it was only because of false evidence that MURPHY, J. held that innocent shareholders and creditors acquired rights, the ground for his decision in the 1928 action disappeared. This judgment of MCDONALD, J. was set aside on appeal to the Court of Appeal. An order was then made in the matter of the wining up of the Gibson Company that its liquidator have leave to bring action against the same defendants, and this action was then launched, with the same plaintiffs as in the 1928 and 1933 actions, but the

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Gibson Company added as a party plaintiff. The plaintiffs ask, as in the former actions, for many declarations, culminating in the claim for the transfer to the Gibson Company of the same property as in the other actions. The defendant the trustee of the Daybreak, then applied for an order dismissing the action, his main ground being that the original plaintiffs discovering that they had no *status* to sue, the proper plaintiff (the Gibson Company) should not be allowed to recommence the action when the same issues were all finally determined in the former two actions. The application was dismissed.

Held, on appeal, reversing the decision of FISHER, J. (MARTIN, C.J.B.C. dissenting), that it is not suggested that the whole case was not brought forward or that some new issues necessarily arise consequent upon the change of parties, but even if new facts may now be placed in evidence they might with reasonable diligence have been adduced in the earlier actions. In view of the facts and circumstances it would not only be frivolous and vexatious but also futile to permit this action to proceed.

APPEAL by the trustee of Daybreak Mining Company (N.P.L.), one of the defendants herein, from the order of FISHER, J. of the 5th of April, 1938, dismissing the motion of the said trustee for an order against the plaintiffs that this action be stayed on the grounds that the same is frivolous and vexatious and an abuse of the process of the Court, and that the statement of claim in the said action be struck out as against the said defendant on the ground that it discloses no reasonable cause of action against said defendant. The defendants claim that the action is in substance an action between the same parties and for the same relief as actions numbered M.1267/1928 and M.1308/1933, in the Supreme Court, both of which came on for trial and were dismissed as against D. P. Kane, the then trustee of Daybreak Mining Company Limited in bankruptcy. This action has not been shown to be based on any new facts or any facts unknown to the plaintiff at the trial of the first two actions above mentioned, and which facts were adjudicated upon in favour of the said D. P. Kane. That the plaintiffs David Kind May and Minnie Mead May have no *status* and are not entitled to maintain this action either on their own behalf or on behalf of the shareholders of the Gibson Mining Company Limited, in liquidation, was wound up and dissolved in proceedings in the Vancouver registry of the Supreme Court, and has no *status* and is not entitled to maintain this action. The mineral claims and

assets of said company were sold in pursuance of orders made in the winding-up proceedings above mentioned, and the sale so made was confirmed by order therein and such orders are in full force and effect and the title of the Daybreak Mining Company Limited in and to the said mineral claims and assets is based upon such orders and cannot be questioned by the plaintiffs in this action. There has been undue delay on the part of the plaintiffs in bringing this action.

The appeal was argued at Victoria on the 5th and 6th of October, 1938, before MARTIN, C.J.B.C., MACDONALD and MCQUARRIE, JJ.A.

H. C. Green (*Eades,* with him), for appellant: This is a third action. The first started in 1928 and the second in 1933, in both of which my client was successful. The actions are all the same, the plaintiffs seeking possession of the Gibson mines. The Daybreak Mining Company has owned the claims for the last fifteen years (seven claims in all). A three-quarter interest in the claims was owned originally by the Gibson Company and a one-quarter interest by one Wolbert. In 1920 the Gibson Company got into difficulties and its liquidator sold the three-quarter interest to one Roberts, who sold to the Daybreak Company, and shortly after the Wolbert one-quarter interest was sold to the Daybreak Company. Mrs. May is the moving spirit in the action and she alleges fraud and conspiracy on the part of the defendants. The issues were all decided in our favour by Mr. Justice MURPHY in 1932, and the only difference in this case is that the Gibson Company is added as a party plaintiff. He allows the plaintiffs to raise the technicality that the judgments are not binding on the Gibson Company: see *Ferguson* v. *Wallbridge,* [1935] 1 W.W.R. 673; *Lloyd-Owen* v. *Bull,* [1936] 3 W.W.R. 146. The action is frivolous and vexatious and an abuse of the process of the Court. Under the inherent jurisdiction of the Court the action can be dismissed: see *Reichel* v. *Magrath* (1889), 14 App. Cas. 665; Annual Practice, 1938, p. 432; *Macdougall* v. *Knight* (1890), 25 Q.B.D. 1, at p. 6; *Stephensen* v. *Garnett,* [1898] 1 Q.B. 677, at p. 682; *Metropolitan Bank* v. *Pooley* (1885), 10 App. Cas. 210, at p. 214

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et seq.; Henderson v. *Henderson* (1843), 3 Hare 100, at p. 115; *Green* v. *Weatherill,* [1929] 2 Ch. 213, at p. 221; *In re May* (1885), 28 Ch. D. 516, at p. 518; *Phosphate Sewage Company V. Molleson* (1879), 4 App. Cas. 801, at 814; *Birch* v. *Birch,* [1902] P. 130, at p. 139; *Humphries* v. *Humphries,* [1910] 2 K.B. 531; *Hoystead* v. *Commissioner of Taxation,* [1926] A.C. 155 at p. 165; *West* v. *Automatic Salesman, Ld.,* [1937] 2 K.B. 398. The title to the property having been decided, it must stand: see Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 405, secs. 459 and 460; *Wakefield Corporation* v. *Cooke,* [1904] A.C. 31 at pp. 36 and 38; *Outram* v. *Morewood* (1803), 3 East 345; *Fracis, Times, and Co.* v. *Carr* (1900), 82 L.T. 698, at p. 701; *Ord* v. *Ord,* [1923] 2 K.B. 432 at p. 439. There is no possibility of the plaintff succeeding so the action should be stayed. They add the Gibson Company as a party but they ask the same thing now that they asked before. The Mays could not succeed on the merits and the Gibson Company is in no better position: see *Lawrance* v. *Norreys* (1890), 15 App. Cas. 210, at pp. 219 and 222; *Salaman* v. *Secretary of State for India,* [1906] 1 K.B. 613. The Gibson Company was dissolved in 1924 and nothing has been done to revive it: see *Re Clarke and Union Fire Ins. Co.* (1887), 14 Ont. 618, and on appeal (1890), 17 S.C.R. 265; *In re Eldorado Union Store Co.* (1886), 18 N.S.R. 514; Wegenast on Companies, 101; *Coxon* v. *Gorst,* [1891] 2 Ch. 73; *In re Higginson & Dean,* [1899] 1 Q.B. 325.

Lennie, K.C., for respondents: There are two outstanding facts: first, there is a judgment against all the defendants except Hartin, the trustee of the Daybreak Mining Company, and secondly, the appellant is merely a statutory trustee of the Daybreak Mining Company. He has no interest except in his capacity as a trustee: see *St. Thomas's Hospital (Governors)* v. *Richardson,* [1910] 1 K.B. 271 at p. 284. As there is no judgment against Hartin the case must at least go to trial: see *Eastman* v. *Pacific Forwarding Co. Ltd.* (1934), 48 B.C. 197 at p. 200; *Goodson* v. *Grierson,* [1908] 1 K.B. 761; *Lloyd-Owen* v. *Bull* (1936), 50 B.C. 370. Two judges have exercised their discretion in our favour: see also *Electrical Development Company of Ontario* v. *Attorney-General for Ontario and*

Hydro-Electric Power Commission of Ontario, [1919] A.C. 687, at pp. 693-4. It is admitted there is inherent jurisdiction to strike out the statement of claim: see *Reichel* v. *Magrath* (1889), 14 App. Cas. 665. If the Gibson Company should be a party *res judicata* does not apply: see *Chassy and Wolbert* v. *May and Gibson Mining Co.* (1920), 29 B.C. 83.

Green, replied.

Cur. adv. vult.

2nd December, 1938.

MARTIN, C.J.B.C.: The judgment of the Court is that the appeal should be allowed, I dissenting. I have the misfortune not to be able to take the same view that my learned brothers take.

I may mention briefly my reason, which is that I do not think the case comes within rule 284, which provides that

> The Court or a Judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

We had the benefit of a very long and full argument and many of the leading cases were cited on the subject and I shall only add a few to those cited by the learned judge below.

First, it was well said by the Court of Appeal in *Evans* v. *Barclays Bank and Galloway,* [1924] W.N. 97, at 98 that

> the "power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure."

In that case the master had struck out the statement of claim, but on appeal the judge reversed his order, and the appeal from the judge was dismissed because "the existence (of the cause of action) was not so unarguable as to justify the Court in striking out the claim."

In so holding the Court followed its prior decision in the leading case of *Dyson* v. *Attorney-General,* [1911] 1 K.B. 410, wherein at p. 418, Fletcher Moulton, L.J. used the language last cited, and also very aptly said:

> Now it is unquestionable that, both under the inherent power of the Court and also under a specific rule to that effect made under the Judicature Act, the Court has a right to stop an action at this stage if it is wantonly brought

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without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless.

This is in accord with another earlier decision in *Attorney-General of the Duchy of Lancaster* v. *London and North Western Railway Co.*, [1892] 3 Ch. 274, wherein at p. 277 Lindley, L.J., said:

> It appears to me that the object of the rule is to stop cases which ought not to be launched—cases which are obviously frivolous or vexatious, or obviously unsustainable; . . . If an application under this rule involves such a discussion as the question in this case would involve, I should say the application ought not to be listened to.

And in the preceding month Lindley, L.J. had already laid down in *Kellaway* v. *Bury* (1892), 66 L.T. 599, at 602:

> That is a very strong power, and should only be exercised in cases which are clear and beyond all doubt. It is not because the statement of claim is demurrable from a pleader's point of view that the Court is justified in stamping the action out. It must not only be demurrable, but the Court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendment.

In *Reichel* v. *Magrath* (1889), 14 App. Cas. 665, the defence was only struck out because, as Lord Halsbury, L.C., said at p. 668, it raised the "very same question" which the Court had already decided, and, *per* Lord Herschell at p. 669, there was "not a shadow of defence."

This case does not, in my opinion, come within that reasoning.

In *Roberts* v. *Charing Cross, Euston & Hampstead Railway Co.* (1903), 87 L.T. 732, it was held by Farwell, J. under this rule that:

> Demurrer has been done away with, and an action, in order that the procedure under this rule may be applicable, must be worse than demurrable. There must be nothing to argue. Here clearly there is something to argue.

And later in *Gilleghan* v. *Minister of Health*, [1932] 1 Ch. 86, at 91, the same learned judge said:

> It was not the practice of the Court to stop actions *in limine* under Order XXV., r. 4, unless satisfied that the action could under no possibility succeed.

To my mind it cannot be said herein, as it was in *Metropolitan Bank* v. *Pooley* (1885), 10 App. Cas. 210, at 225, *per* Lord FitzGerald, that

> upon the face of the proceedings it is manifest that the action never can be maintained.

If the element of "bringing the action in good faith" is to be considered, as it was by the Court of Appeal in the noteworthy case of *Lee* v. *Thursby* (1904), 90 L.T. 265, then it is due to these plaintiffs to say that there is no reason to think that they are not asserting their conceived rights with sincerity even though they may find ultimately that they have misconceived them.

In concluding these citations I adopt as entirely appropriate to this case the language of their Lordships of the Privy Council in *Electrical Development Company of Ontario* v. *Attorney-General for Ontario and Hydro-Electric Power Commission of Ontario,* [1919] A.C. 687 at 695, *viz.*:

> . . . 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.

The result of the presentation by Mr. *Green* of his careful argument, which placed the position of his client before us to the best advantage, has, so far as I am concerned, no more than created in my mind a doubt as to the question as to whether it could be said within the meaning of rule 284 that "no reasonable cause of action" was disclosed, or that the action was "shown by the pleadings to be frivolous or vexatious," or otherwise "an abuse of the process of the Court" as alleged in appellant's notice of motion. But the creation of that doubt is not sufficient because, as the cases I have cited abundantly establish, I must at this stage, before I can reverse the learned judge below, be entirely free from any doubt and be prepared to go so far as to hold that there is now the existence of a certainty that no reasonable cause of action is disclosed, or that frivolity, or vexation, or abuse alone found this action. But decidedly I am not at present prepared to go that extreme length, and to say the learned judge took the wrong view of the present aspect of this very difficult case. He wrote a careful and lengthy judgment in which he reviewed its most unusual and complicated questions in all relevant aspects, and, without adopting all its reasoning, I feel that judgment rightly presents the matter in its conclusion that at this stage of the proceedings the order moved for below

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was properly refused and that conclusion ought not, in my opinion, to be disturbed by this Court.

I close by adopting, as very appropriate to this case as a whole, what Lord Justice Fletcher Moulton said in *Dyson's* case, *supra*, at p. 419, *viz.*:

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

I would, therefore, dismiss this appeal.

MACDONALD, J.A.: The present appellant Hilyard Hartin, trustee of the Daybreak Mining Company Limited in bankruptcy (called hereafter the Daybreak) and one of the defendants in this action, applied under our local rules of practice, upon service of the statement of claim, to dismiss the action and stay further proceedings on the ground that it is frivolous and vexatious, discloses no reasonable cause of action, and is an abuse of the process of the Courts. FISHER, J. dismissed his application. The short point is that, although the issues in the action were the subject of lengthy litigation for many years in several separate actions, all carried to a final conclusion, it now appears that the wrong parties were plaintiffs. Now the proper plaintiff appears and claims the right to traverse the same ground. This appellant submits that as all the issues that can arise in the present action have already been finally determined it is frivolous and vexatious to permit it to proceed.

Briefly, the relevant facts follow:

In 1928, following actions in the State of Oregon, suit was brought in British Columbia by the plaintiff in the present action, *viz.*, David K. May and Minnie M. May, suing on their own behalf and on behalf of all the shareholders of Gibson Mining Company Limited (N.P.L.) (hereinafter called the Gibson Company) against several defendants including the Daybreak, now represented by the present appellant as trustee. Varied declarations were sought based on fraud the objective being a declaration that the Daybreak was a trustee *ex maleficio* for the Gibson Company of mining property claimed by the latter although acquired by the Daybreak. This action was dismissed

by MURPHY, J. The learned judge held that while the Daybreak's title was originally tainted with fraud plaintiffs, with knowledge, stood by while large sums were expended and were not entitled to the relief sought. It was dismissed against all the defendants except one J. C. Roberts who was held to be a trustee for the plaintiffs in respect to certain interests not necessary to define except to say that this declaration did not affect the title of the Daybreak. No appeal was taken from this judgment.

In 1933, the same plaintiffs brought a second action against the same defendants (some changes in parties due to death, etc.) including the Daybreak, at that time represented by D. P. Kane, as trustee. In the 1933 action an effort was made to have the judgment of MURPHY, J. in the 1928 action set aside on the ground that it was procured by fraud and by perjury committed in the course of the hearing. An injunction was asked for restraining Kane, the trustee, from selling any of the mining properties and a declaration that assets acquired by J. C. Roberts from the liquidator of the Gibson Company was the property of the plaintiffs.

In default of a defence judgment was entered against some of the defendants. After trial MCDONALD, J., set aside the judgment of MURPHY, J. on the ground that it was procured by fraud. The learned judge held that as it was only because of false evidence MURPHY, J. held that innocent shareholders and creditors acquired rights the ground for his decision in the 1928 action disappeared. That judgment was set aside on appeal to this Court: it was held that the learned trial judge was in error in finding that the judgment of MURPHY, J. in 1928 was based on the false evidence of one Roberts. An application to extend the time to give leave to appeal to the Supreme Court of Canada from the judgment of this Court was dismissed: also a further application of the same kind to the Judicial Committee.

It is of some significance to point out that in the 1933 action, while the plaintiffs sued, as stated, on their own behalf and as shareholders of the Gibson Company by the formal judgment following the decision of MCDONALD, J., it was declared that the assets acquired by Roberts were the property of the Gibson

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Company: in other words by the formal judgment agreed upon between the parties the property was vested in the Gibson Company in the same manner as if it had been a party to the action.

The alleged justification for this third action, as intimated, is that, for the first time, the proper party, the Gibson Company, is the plaintiff. Following the decisions in *Ferguson* v. *Wallbridge,* [1935] 1 W.W.R. 673 and *Lloyd-Owen* v. *Bull,* [1936] 3 W.W.R. 146, it is now submitted that Minnie Mead May and her husband, suing on their own behalf and on behalf of shareholders of the Gibson Company, were not competent plaintiffs. I may add that they still insist upon remaining as parties on the record. As stated the judgment of McDONALD, J., under which the Gibson Company, the present rightful plaintiff, actually acquired title, was set aside by this Court. The present action therefore (the third) is now launched with the plaintiffs in the 1928 and 1933 actions still remaining plaintiffs but with the Gibson Company added. I would also add that the point was taken in the 1933 action that the then plaintiffs had no *status* to sue.

On the 11th of May, 1937, an order was made by ROBERTSON, J., in the matter of the winding up of the Gibson Company that its liquidator should have leave to bring an action against the present defendants. Following that order the present action was commenced in February, 1937. I need not refer to a further order made by McDONALD, J., giving leave to sue the present appellant Hilyard Hartin as trustee of the Daybreak Company in liquidation or the appeal therefrom to this Court which was dismissed. I agree with FISHER, J., that it does not stand in the way of the present proceedings.

In the reconstructed action now under consideration the plaintiffs ask, as in all prior actions, for many declarations culminating in the claim for the transfer to the Gibson Company of the same property. A statement of claim containing 80 paragraphs, and in the main covering the ground traversed in all actions and proceedings in the Courts during the past 15 years or more, was delivered, whereupon, as stated, an application was made by this appellant for an order dismissing the action. His main ground is that merely because the original plaintiffs,

professing to act for shareholders of the Gibson Company, now discover that they had no *status* to sue, the proper plaintiff, should not be allowed to recommence the action, when the same issues are raised already the subject of several actions, all finally determined, more particularly when the point was taken that the then plaintiffs had no *status* to sue and also that in the only judgment given in their favour (the 1933 action later reversed on appeal) the Gibson Company was awarded the property in the formal judgment. With deference I think the learned judge below proceeded on a wrong principle. He holds, in effect, that as the only party competent to bring an action did not do so and prior decisions were therefore *coram non judice* this application must be treated on the same basis as if the action were now instituted for the first time by the present plaintiff.

We are not, in my view, precluded from taking into consideration prior proceedings on the ground suggested, or on any other ground nor are we obliged under the rules, respecting frivolous and vexatious actions, to disregard all that transpired hitherto as if *non est*. Had this new plaintiff brought the action originally no other relief could be sought. It is not suggested that the whole case was not brought forward or that some new issues necessarily arise consequent upon the change of parties. Even if new facts may now be placed in evidence (we were not so advised) they might with reasonable diligence have been adduced in the earlier actions.

This point does not arise as in the Pioneer case in the course of the litigation. It arises after the litigation has been finally determined and after the Supreme Court of Canada and the Judicial Committee refused leave to appeal. In view of these facts and circumstances it would, in my opinion, not only be frivolous and vexatious but also futile to permit this action to proceed.

I would allow the appeal.

McQUARRIE, J.A.: On the 2nd of November, 1937, judgment was delivered by this Court in a previous appeal in this matter as appears at p. 500 of the appeal book herein. The said judgment so far as I am aware was not reported. I dissented

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from the judgment of the majority of the Court. On that occasion my reasons for such dissent as appears as pp. 501-503 of the appeal book herein were as follows:

This is an appeal from an order of McDONALD, J., dated the 5th of July, 1937, granting leave to David Kind May and Minnie Mead May, his wife, suing personally and suing as well on their own behalf as on behalf of all shareholders of the Gibson Mining Company Limited (N.P.L.) (in liquidation) on the conditions therein set forth to bring action against Hilyard Hartin, trustee of Daybreak Mining Company Limited (N.P.L.) in bankruptcy by joining or adding the said Hilyard Hartin as such trustee as a defendant in action No. M156/1937 commenced on the 2nd of February, 1937, in the Vancouver registry of the Supreme Court of British Columbia, for the purpose of recovering from the said Daybreak Mining Company Limited (N.P.L.) in bankruptcy and from the said trustees thereof the seven mineral claims named respectively "Winthrop," "Butte," "Jennie," "Ida," "Oxide," "Frances," and "Spokane," situated in the Ainsworth Mining Division of the Province of British Columbia, or interests in the said mineral claims and all other assets of the Gibson Mining Company Limited (N.P.L.) in liquidation, allegedly fraudulently obtained from the said Company and allegedly fraudulently held by the said Daybreak Mining Company Limited (N.P.L.) in bankruptcy, subject to the directions of the Court in the said action No. M. 156/1937.

The learned trial judge apparently did not give any reasons for judgment. It is common ground that the facts in the proposed claim against the said Hartin, trustee as aforesaid of the said Daybreak Mining Company Limited (N.P.L.) in bankruptcy, will be the same as in the two previous actions which were decided in favour of said Daybreak Mining Company.

It is also admitted that the said mineral claims and other assets were sold in pursuance of orders made in winding-up proceedings—numbered 855/20—and that the sale so made was confirmed by order therein.

The matter of the title to the said mineral claims and assets has been in litigation for some 17 years and now for the first time the Gibson Mining Company Limited (N.P.L.) in liquidation is brought in as a plaintiff. Counsel for the respondents contends that the previous actions were not properly constituted because the Gibson Company was not a party and that the addition of such company as a plaintiff enables him to reopen the whole matter although the question of title as between that company and the Daybreak Company was twice in issue and was twice decided against the Gibson Company in favour of the Daybreak Company. He relies on the Pioneer cases: *Ferguson* v. *Wallbridge*, [1935] 1 W.W.R. 673 and *Lloyd-Owen* v. *Bull*, [1936] 3 W.W.R. 146. In my opinion, with all deference, those cases are of no assistance to him since in the judgments therein the merits were not dealt with as occurred in the previous actions herein involving the title to the said mineral claims and assets.

I consider that there should be an end to this litigation and that no good reason has been shown why the whole matter should be gone into again. I would therefore allow the appeal and discharge the order of McDONALD, J.

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I consider that the same reasons may be applied in the present appeal. I would, therefore, allow the appeal.

Appeal allowed, Martin, C.J.B.C. dissenting.

Solicitors for appellant: *Brown & Dawson.*

Solicitor for liquidator of Gibson Mining Company Limited: *R. S. Lennie.*

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RE HERBERT HENRY BECK, DECEASED AND THE SUCCESSION DUTY ACT. ATTORNEY-GENERAL OF BRITISH COLUMBIA v. UNION TRUST COMPANY LIMITED AND HUGH HERBERT BECK.

Succession duty—Deceased domiciled in British Columbia—A portion of estate in Ontario—Allowance for duty paid in Ontario—Costs—B.C. Stats. 1907, Cap. 39, Sec. 4 (7); B.C. Stats. 1934, Cap. 61, Sec. 9—R.S.B.C. 1936, Cap. 1, Sec. 13 (1) (a).

H. H. Beck died on the 21st of June, 1931, domiciled in British Columbia. His estate was valued at $465,220. On February 1st, 1933, the executors paid British Columbia $10,000 an account of succession duty. On February 8th, 1938, the assessor of succession duties for British Columbia assessed the succession duties for the whole estate at $29,413. The part of the estate that was in Ontario was valued at $254,441.26, of which $217,236.76 was personal property. On March 10th, 1936, the executors paid $7,000 in Ontario on account of succession duties payable in that Province. The proper officer in Ontario assessed the total succession duties payable in Ontario on personal property at $20,214.87, and the executors paid the balance payable in Ontario, namely, $13,214.57 with interest, on the 19th of January, 1938. When the $7,000 was paid on account in Ontario those in authority in British Columbia agreed that the executors were entitled to an allowance for this amount, and the executors now claim they are entitled to an additional allowance by British Columbia of $13,214.57, and are only liable in British Columbia for the difference between the succession duty so paid in Ontario and the succession duty assessed in British Columbia in respect of the transmission of the personal property in Ontario. The persons entitled to the personalty in Ontario were at the time of Beck's death domiciled in British Columbia. On July 15th, 1908, an order in council was passed in British Columbia "That the provisions of subsection (7) of section 4 of the Succession Duty Act as to the allowance of succession

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duties by this Province be and are hereby extended so as to apply to the Province of Ontario upon the Government of Ontario informing this Government that an order in council has been passed extending a similar allowance to the Province of British Columbia." A similar order in council was passed in Ontario on August 28th, 1908, and an order in council of April 3rd, 1934, which took the place of the order in council of August 28th, 1908, provided for the like allowance. The reciprocal arrangement allowing a reduction of duty was rescinded by both Provinces by order in council in 1937. It was *held* that the order in council of July 15th, 1908, was a regulation within the meaning of section 13 (1) (*a*) of the Interpretation Act, and said section preserved the privilege of the beneficiaries and they were entitled to the allowance in respect of the principal moneys paid to Ontario.

Held, on appeal, reversing the decision of ROBERTSON, J. (MCQUARRIE, J.A. dissenting), that on February 4th, 1934, the Succession Duty Act was declared *ultra vires* [see *Attorney-General for British Columbia* v. *Col* (1934), 48 B.C. 171]. It follows that any order in council based upon a statute which never had any existence must be regarded as a thing of naught. Sections 50 and 52 of the new Succession Duty Act, passed on the 29th of March, 1934, do not assist the respondents and the appeal is allowed.

Held, further, that as the appellant succeeds upon a point not taken below and by virtue of the discretion vested in this Court by section 44 of the Succession Duty Act, the proper order is that there be no costs awarded to either party here and below.

APPEAL by the Attorney-General of British Columbia from the decision of ROBERTSON, J. of the 12th of July, 1938 (reported *ante*, p. 120), on a petition brought under section 40 of the Succession Duty Act to determine the amount of duty payable by the estate of the late Herbert Henry Beck, who died on the 21st of June, 1931, domiciled in the Province of British Columbia. The net value of the whole of the property passing on the death of deceased was $465,226.09. A portion of the property was situate in Ontario, the net value thereof being $254,441.26, of which $217,236.76 consisted of personalty. On the 10th of March, 1936, $7,000 was paid on account of succession duty in Ontario. On the 6th of October, 1937, the amount of succession duty payable in Ontario was fixed at $20,214.87, and the balance due was paid on January 19th, 1938. On the 1st of February, 1933, the sum of $10,000 was paid towards the succession duty payable in British Columbia. The balance of succession duties alleged to be payable in British

Columbia with interest on July 10th, 1938, amounted to $21,671.26. If full allowance were made pursuant to section 9 of the Succession Duty Act for the succession duty paid in Ontario, the balance of succession duty payable in British Columbia would be $8,089.59. An allowance was made in Ontario for succession duty paid under the Succession Duty Act of British Columbia on property situate in British Columbia passing on the death of any person domiciled in Ontario, by orders in council of August 28th, 1908, and April 3rd, 1934, and by Ontario order in council of May 27th, 1937, the order in council of the 3rd of April, 1934, was revoked as of the 1st of June, 1934. British Columbia order in council of July 15th, 1908, extended the provisions of the Succession Duty Act of British Columbia as to the allowance provided by section 9 of said Act so as to apply to Ontario, and by order in council of the 11th of June, the allowance for deduction of duty by virtue of section 9 of the Succession Duty Act was rescinded as and from the 1st of June, 1937.

The appeal was argued at Vancouver on the 2nd and 3rd of November, 1938, before MARTIN, C.J.B.C., MCQUARRIE and SLOAN, JJ.A.

H. Alan Maclean, for appellant: The order in council of 1908 is based on the 1907 statute and they claim this order is still in force. The 1907 statute was carried forward into the Revised Statutes of 1924, being chapter 244. In 1934 this Act was repealed following the decision in *Provincial Treasurer of Alberta* v. *Kerr,* [1933] A.C. 710. The Act being repealed, the order in council is repealed with it. The order in council of June 11th, 1937, clearly revokes the order in council of 1908. It rescinds a reciprocal arrangement with Ontario allowing for a deduction of duty by virtue of the provisions of section 9 of the Act. Next they say assuming there was revocation it does not affect this estate, as its rights are preserved by virtue of section 13 (*a*) of the Interpretation Act. The only right that can accrue to a person under section 9 is the right to an allowance after the duty in Ontario has been paid, but the duty was not paid until after the repeal: see *Abbott* v. *Minister for Lands,*

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[1895] A.C. 425, at p. 431. Next they say the order in council of June 11th, 1937, is invalid because it purports to have a retrospective effect. The order has no retrospective effect. On May 27th, 1937, an order was passed in Ontario rescinding the right to receive an allowance with respect to duty paid in British Columbia. When this came into force the allowance here automatically ceased. The order in council is not invalid even if it is retrospective. Under section 9 (*c*) of the 1934 Act an existing order may be revoked when the law of another Province has so changed that it would not justify the making of an original order.

Copeman, for respondents: The subject should not be taxed except on clear words: see *Commissioner of Stamp Duties* v. *Munro,* [1933] 3 W.W.R. 505, at p. 510; *Gosling* v. *Veley* (1850), 12 Q.B. 328 at p. 407. The deceased died on June 21st, 1931, and the right to receive the allowance under section 9 (1) was established prior to the order of 11th June, 1937. The tax to which the Crown is entitled, depended on the circumstances existing at the time of the death of deceased. The valuation of the property is "as at the date of the death of the deceased." If a right has been acquired by virtue of a statute it will not be taken away by the repeal of the statute under which it was acquired. This estate emerged from the category of an inchoate right upon the death of the testator and is distinguished from *Abbott* v. *Minister for Lands,* [1895] A.C. 425: see *Lambton and Hetton Collieries* v. *Secretary for Board of Trade Mines Department,* [1923] 1 Ch. 586; *Chadwick* v. *McCrie* (1924), 56 O.L.R. 143 at p. 146; *Barnes* v. *Eddleston* (1876), 1 Ex. D. 102. The second submission is that the wording of the order of 11th June, 1937, is irrelevant and insufficient to revoke the order of 1908. Express and unambiguous language appears to be absolutely indispensable in statutes passed for imposing a tax or charge and conferring or taxing any local rights, whether public or private: see *Simms* v. *Registrar of Probates,* [1900] A.C. 323, at p. 335; *Oriental Bank Corporation* v. *Wright* (1880), 5 App. Cas. 842, at 856. The order of 11th June, 1937, is invalid in that it purports to have a retroactive effect: see *Johnson* v. *Sargant and Sons* (1917), 118 L.T. 95. The Succession Duty Act confers no authority for retrospective

legislation by order in council: see *Upper Canada College* v. *Smith* (1920), 61 S.C.R. 413, at p. 416. The direction as to when the order comes into force being invalid, it vitiates the whole order: see *Oriental Bank Corporation* v. *Wright* (1880), 5 App. Cas. 842; *Dyson* v. *London and North Western Railway Co.* (1881), 7 Q.B.D. 32 at p. 37; *The King* v. *The Company of Fishermen of Faversham* (1799), 8 Term Rep. 352, at p. 356; Halsbury's Laws of England, 2nd Ed., Vol. 8, p. 48, sec. 82; *Smith* v. *Great Yarmouth Port Commissioners* (1919), 88 L.J.K.B. 1190, at p. 1192. The order of 11th June, 1937, is invalid as the power to revoke the order of 1908 is limited to the conditions and limitations prescribed in section 9 (3) of the Succession Duty Act, and the order affects to legislate beyond the conditions and limitations so prescribed: see *Chester* v. *Bateson,* [1920] 1 K.B. 829 at p. 836; *Rex* v. *Halliday,* [1917] A.C. 260 at p. 287; *Gagnon* v. *Corporation de la Pointe-au-Pic* (1902), 22 Que. S.C. 396, at p. 420. The right to the allowance under the order in council of 1908 is preserved by section 50 (2) which prescribes the rates of duty and exemptions applicable. If the order in council of 1908 was *ultra vires* it was validated by section 9 (2) which must refer to orders in council passed or purporting to have been passed before the Act of 1934.

Maclean, replied.

Cur. adv. vult.

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MARTIN, C.J.B.C.: In this difficult matter we have come to the conclusion, by a majority opinion, that despite the carefully prepared and well presented argument of Mr. *Copeman* on behalf of the respondents, the appeal should be allowed. Our brother McQUARRIE is dissenting, and will hand down his reasons. The reasons of the majority of the Court will be found set out in the opinion of our brother SLOAN, which is being handed down.

McQUARRIE, J.A.: I have read the judgment of my brother SLOAN herein which I understand is concurred in by the Chief Justice. The facts are not in dispute and are sufficiently set out, with reviews of the relevant enactments, regulations and orders in council, in the reasons for judgment of my brother SLOAN

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and the learned judge below. The only point at issue is as to whether the respondents are entitled to an allowance or exemption in the full amount paid by them to the Province of Ontario ($20,214.87) or only in the amount of $7,000, being the payment made on account thereof on March 10th, 1936. The appellant states that the latter amount is allowed as a matter of grace and not under any legal obligation of the appellant to make such allowance. I am inclined to think that my learned brother SLOAN makes too much of the difference which he claims exists between "allowance" and "exemption" in the Act and must say that I agree with counsel for the respondents that "allowance" and "exemption" in this connection both mean practically the same thing, *viz.*, immunity from taxation under the Act.

I am also of opinion that the amount of succession duty should be calculated as of the date of the death of the deceased. Counsel for the respondents asserts that the estate has a vested right to exemption or allowance to the extent of the full payment to Ontario because that was the position existing at the date of the death of the deceased.

With all deference I cannot agree with the judgment of the majority of the Court herein. In the first place I am of opinion, so far as the issues involved here are concerned, that it is not necessary to draw a fine distinction between "allowance" and "exemption" as used in the Succession Duty Act. As I see it such distinction disappears in the main question as to what is the amount of the succession duty payable by the estate to the Province of British Columbia.

The deceased died on the 21st of June, 1931. It is, I think, common ground that if the duty in British Columbia and in Ontario had been paid immediately after the death of the deceased, in determining the amount payable in British Columbia, the estate would have been credited with the total duty paid in Ontario, but it is contended by the appellant that because such a course was not followed the respondents can be and are affected by the changes which have since taken place in the legislation and orders in council in this Province and in Ontario, so that the respondents are no longer entitled to any credit for the amount of succession duty paid to the Province of

Ontario over and above the $7,000 which is allowed as a matter of grace by the Province of British Columbia.

The points in dispute are set out in the appellant's factum, from which I quote as follows:

In the Court below the respondents advanced four submissions as to why the order of June 11th, 1937, does not affect their right to an allowance under section 9 of the Succession Duty Act (1934):—

(1) The order in council of the 11th of June, 1937, does not revoke the 1908 order in council.

(2) Assuming there was revocation, it does not affect this estate as its rights are preserved to it by virtue of section 13 (*a*) of the Interpretation Act.

(3) The 1937 order in council is invalid because it purports to have a retrospective effect.

(4) The 1937 order in council is invalid as the power to revoke must be exercised in accordance with section 9 (3) which was not done.

In his judgment the learned judge decided in the respondents' favour on the second point and did not deal with any of the other points. On the assumption that the respondents will make the same argument before this Court, the four points will hereafter be dealt with.

The appellant contests all the arguments advanced by the respondents and makes the following submissions:

(1) That upon the repeal of the 1924 statute (the successor of the 1907 statute) the order in council of 1908 was repealed with it; (2) alternatively, even if the order in council of 1908 was not repealed with the repeal of the Succession Duty Act, Cap. 244, R.S.B.C. 1924, it is still submitted that the respondents are not entitled to the allowance claimed; (3) that the order in council of June 11th, 1937, read as a whole makes it quite clear that no further "allowances" are authorized under section 9; (4) that the respondents overlooked the fact that what the order in council purports to rescind is "a reciprocal arrangement with Ontario allowing for a deduction of duty by virtue of the provisions of section 9"; (5) that section 9 (1) of the Succession Duty Act (1934) makes it clear that the only privilege or right which can accrue to a person under that section is the right to obtain an allowance after the duty in Ontario has been paid. If that statute had said that an allowance would be granted to any person "liable to pay" duties in Ontario, the learned judge's decision would have been correct; (6) that the respondents, as at the date of the repeal of the reciprocal arrange-

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ment, had an opportunity to obtain a "privilege" by paying duty in Ontario. They did not pay in Ontario until after repeal, so they had not earned any "privilege" which section 13 (*a*) of the Interpretation Act could save; (7) regarding the respondent's contention that the order in council of June 11th, 1937, is invalid because it purports to have a retrospective effect, the appellant submits (a) that the order in council *per se* has no retrospective effect. Subsection (1) of section 9 describes the nature of the allowance that may be made; subsection (2) makes the granting of the allowance subject to two conditions—(1) the allowance may be made only as to any country, etc., where an allowance is made for the succession duty paid under this Act; (2) the Lieutenant-Governor in Council by order has extended the provisions of this Act to such allowance. Respondents submit that as soon as the rescinding order became effective in Ontario the right to an allowance here automatically ceased, as the condition noted in paragraph (1) above as a condition precedent no longer existed. Therefore, the words contained in the order of June 11th "as and from the first of June" are explanatory only of the provisions of the statute. (b) In the alternative even if the order can be said to have a retrospective effect, there is no authority for the proposition that the order in council is invalid on that account. Section 7 of the Interpretation Act is referred to. (c) In the further alternative if the order in council is invalid as retroactive, the invalid part of the order is severable, and the order should be left to its operation as and from the day it was passed; (8) that the state of the law in Ontario as of June 11th, 1938, was not such as to justify the making of a reciprocal order here and that the Lieutenant-Governor in Council was entitled to revoke the existing order.

It will be seen that many points were discussed but, like the learned judge below, I do not consider it necessary for me to deal with them all. As I see it section 13 (1) (*a*) of the Interpretation Act, R.S.B.C. 1936, Cap. 1 and section 50 (2) of the Succession Duty Act, B.C. Stats. 1934, Cap. 61, establish the right of the respondents to have the duty payable in British

Columbia fixed as stated in the judgment appealed from, which in my opinion is correct.

I would therefore dismiss the appeal.

SLOAN, J.A.: The late Herbert Henry Beck died at the City of Victoria on the 21st of June, 1931, domiciled and resident in this Province. His estate consisted of property situate in British Columbia and Ontario. The point at issue in this appeal is whether or not his beneficiaries, having paid Succession Duty in Ontario, are entitled to an "allowance" therefor in British Columbia under section 9 of the Succession Duty Act, B.C. Stats. 1934, Cap. 61 (now section 9, Cap. 270, R.S.B.C. 1936).

Section 9 reads as follows:

9. (1.) In the case of personal property situate without the Province in respect of the transmission of any beneficial interest in which any person is liable for the payment of duty imposed by this Act, if there has been paid in respect of that property any estate, succession, or legacy duty or tax elsewhere than in the Province, an allowance may be made therefor; and the person liable for the payment of the duty so imposed by this Act shall be liable only for the payment of the amount (if any) by which the duty so imposed exceeds the duty or tax so paid elsewhere.

(2.) The allowance under subsection (1) shall be made only as to any country, State, or British province or possession where an allowance is made for the succession duty paid under this Act on property situate in this Province passing on the death of any person domiciled in such country, State, or British province or possession, and the Lieutenant-Governor in Council, by Order, has extended the provisions of this Act as to such allowance by this Province so as to apply to such country, State, or British province or possession.

(3.) The Lieutenant-Governor in Council may, by Order, revoke any such order, where it appears that the law of such country, State, British province or possession has been so altered that it would not authorize the making of an order hereunder.

(4.) In the case of any other Province of the Dominion the Order provided for in subsection (2) may be made whether or not an allowance is made in that other Province for the succession duty paid under this Act on property situate in this Province passing on the death of any person domiciled in that other Province, and any Order so made may be revoked by the Lieutenant-Governor in Council.

It is common ground that no order in council has been passed under section 9 of the 1934 Act extending (to paraphrase the language of the statute) the provisions of the Act as to such

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allowance by this Province so as to apply to Ontario, but the claim for the "allowance" is based upon the alleged continued existence of an order in council dated July 15th, 1908, passed pursuant to the provisions of subsection (7) of section 4 of the Succession Duty Act of 1907 (B.C. Stats. 1907, Cap. 39). This order in council is as follows:

> That the provisions of subsection (7) of section 4 of the Succession Duty Act as to the allowance of succession duties by this Province be and are hereby extended so as to apply to the Province of Ontario upon the Government of Ontario informing this Government that an order in council has been passed extending a similar allowance to the Province of British Columbia.

On August 28th, 1908, the Lieutenant-Governor in Council of Ontario, pursuant to the section of the Ontario Succession Duty Act corresponding to section 4 (7) of the British Columbia Act of 1907, passed the following Order:

> Upon consideration of the report of the Honourable the Provincial Treasurer, dated 25th August, 1908, the Committee of Council advise that the provisions of subsection (9) of section 6 of The Succession Duty Act be extended to the Province of British Columbia as to an allowance by this Province of any succession duty on property locally situate in the Province of British Columbia, owned by a person who dies domiciled here, and brought into this Province for administration or distribution, such allowance to apply to any duty payable to this Province in any estate where such payment is made since the 20th day of April, 1907.

Subsection (7) of section 4 of the 1907 Succession Duty Act was carried forward and incorporated in the 1924 Succession Duty Act as sections 12, 13, and 14 (R.S.B.C. 1924, Cap. 244).

In 1934, however, by a series of decisions (*Provincial Treasurer of Alberta* v. *Kerr*, [1933] A.C. 710; *Attorney-General for British Columbia* v. *Col* (1934), 48 B.C. 171, and *Godson* v. *Attorney-General of British Columbia* (1934), 49 B.C. 131) the 1924 Succession Duty Act was declared *ultra vires*, and as our brother MACDONALD said in *Godson* v. *Attorney-General of British Columbia, supra*, at p. 138—"If a statute is declared *ultra vires* it disappears. . . ."

It follows that any order in council based upon a statute which never had any existence must be regarded as a thing of naught. Thus in 1934 the slate was wiped clean. There was no Succession Duty Act of any kind upon the statute books of this Province from the 20th day of February, 1934 (the date of the decision

in *Attorney-General for British Columbia* v. *Col, supra*) until the 29th of March, 1934, when the Legislature enacted a Succession Duty Act (B.C. Stats. 1934, Cap. 61) designed to overcome those constitutional difficulties which had led to the destruction of the preceding Acts. On April 3rd, 1934, Ontario also repealed and re-enacted its Succession Duty Act and by Cap. 55 of the Statutes of Ontario 1934 introduced a new basis of succession duty. Pursuant to this enactment Ontario passed another order in council on the 3rd of April, 1934, in the following form:

Upon the recommendation of the Honourable the Provincial Treasurer, the Committee of Council advise that the provisions of subsection (1) of section 8 of The Succession Duty Act, 1934, be extended to the Province of British Columbia, so that an allowance shall be made by the Province of Ontario on account of duty paid to the Province of British Columbia on personal property locally situate in British Columbia and owned by a person at the time of his death, when such person died domiciled in the Province of Ontario, and when there is a transmission within Ontario with respect to such personal property, such allowance to apply only to the duty paid or payable to Ontario on such transmission and in estates where decedent died on or after July 2nd, 1908.

This Province, as already pointed out, did not pass any order in council under section 9 of its 1934 Act.

Counsel for respondents now seeks to supply this deficiency by relying, in part, on two sections of the 1934 Act, *i.e.*, sections 50 and 52. Section 50 (1) declared the Act of 1934 to have a retrospective application and subsection (2) thereof read as follows (now section 50 (2), R.S.B.C. 1936, Cap. 270):

(2.) In the case of any property of a person so dying before the commencement of this Act, in respect of which the duty heretofore payable or purporting to be payable under any Act of the Legislature then in force or purporting to be in force respecting succession duty has not been fully paid and satisfied, the rates of duty and exemptions from duty set out in that Act shall be adopted and applied as the rates and exemptions for the purpose of the application of this Act in respect of that property, instead of the rates and exemptions set out in this Act; and credit shall be given under this Act for the amount (if any) heretofore paid on account of the duty so payable or purporting to be payable.

It was submitted by counsel for the respondents that the phrase "exemptions from duty" in this subsection (2) has relation to the "allowances" referred to in sections 12 and 13 of the 1924 Act, and that the relevant 1908 order in council must be

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taken as continued in existence for the purpose of working out the extent of liability for succession duty. It is suggested that if the 1924 rates and exemptions are incorporated by reference then everything that related to the method of determining or computing the amount of duty payable must be deemed to be incorporated by reference as well. I could see the force of this contention if the term "allowances" had been used in section 50 (2) but to my mind "exemptions from duty" and "allowances" are separate and distinct matters. The expression "exemptions from duty" is to be found defined in section 4 of the 1924 Act; in section 5 of the 1934 Act and in section 5 of the present (1936) Act and means what the expression indicates, *i.e.,* total exemptions from duty in certain specified cases. In my opinion when the Legislature incorporated by reference only the 1924 duties, and exemptions therefrom, as part of the 1934 statute, we must assume that the exclusion of "allowances" from the computation of duty was intended. Section 50 (2) therefore does not assist the respondents.

With reference to section 50 (1) which provides that the 1934 Act shall be retroactive, I fail to see any ground upon which this section can be deemed to relate to and to have continued the 1908 order in council in existence.

That brings me to the consideration of an argument based upon section 52 of the 1934 Act. That section read as follows:

52. The "Succession Duty Act" being Chapter 244 of the "Revised Statutes of British Columbia, 1924," is repealed.

It is submitted by counsel for the respondents that section 13 (1) of the Interpretation Act (R.S.B.C. 1936, Cap. 1) is in point and preserves to the respondents a right or privilege of claiming the "allowance."

This section provides that:

The repeal of an Act in whole or in part or the revocation of a regulation at any time shall not affect:—

(*a.*) Any act done, or any right, privilege, right of action, obligation, or liability existing, accrued, accruing, incurred, or established, under the Act or regulation repealed or revoked.

This contention is, in my view, with respect, untenable for several reasons, I am unable to see how by the unnecessary and mere purported repeal of a non-existent statute any rights or

privileges may be acquired or preserved. To give effect to this argument would mean that alleged rights purporting to arise from an *ultra-vires* statute could in some manner be recreated and continued by its repeal. To my mind the suggestion of counsel for the appellant that the repeal section (section 52) was inserted in the 1934 Act for the sole purpose of "keeping the statutory record straight" (or to phrase it perhaps more appropriately: to expunge dead matter formally from the statute books) is the only proper reason that can be assigned for its enactment and hence its insertion affords no assistance to the respondents.

I come now to the only other point with which I consider it necessary to deal.

On the 10th of March, 1936, the respondents made a payment of $7,000 to Ontario on account of succession duties payable in that Province. On May 27th, 1937, the Province of Ontario passed the following order in council:

> Upon the recommendation of the Honourable the Prime Minister and Provincial Treasurer, the Committee of Council advise that the order in council approved on the third day of April, 1934, extending the provisions of subsection (1) of section 8 of the Succession Duty Act, 1934, to the Province of British Columbia, be revoked as of the first day of June, 1937.
>
> The Committee further advise that such revocation apply to all estates wherein the death shall take place on or after the said first day of June, 1937.

Following the revocation of the Ontario order the Lieutenant-Governor in Council of this Province on the 11th day of June, 1937, passed an order in council in the following form:

> That the reciprocal arrangement with the Province of Ontario allowing for a deduction of duty by virtue of the provisions of section 9, subsections (1), (2), (3) of the "Succession Duty Act," being chapter 61 of the Statutes of 1934, be rescinded as and from the 1st day of June, 1937, being the date on which cancellation of the arrangement was made effective by the Province of Ontario.

In my view this order in council was a work of supererogation; there was no "reciprocal arrangement" nor any statutory arrangement in existence to cancel for as pointed out above no order in council had ever been passed under the provision of section 9 of the 1934 Act.

On January 19th, 1938, the respondents paid the sum of $19,627.43 to Ontario which amount was the balance due to that Province for succession duty.

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It follows from what I have previously pointed out that in my opinion the respondents are not entitled to claim any "allowance" for any sum paid Ontario because of the absence of an order in council extending the provisions of section 9 of the 1934 Act to that Province; but assuming the existence of an order in council and an arrangement contemplated by section 9 it does not assist the respondents in their claim for an "allowance" for this sum paid in January, 1938.

Before a claim for "allowance" can be made under section 9 it is my view that the condition precedent to the exercise of that right must be fulfilled, *i.e.*, the duty or tax for which the allowance is sought must have been paid to the extraprovincial taxing authority and paid prior to the cancellation of the arrangement.

In my view a payment after the date upon which the so-called "reciprocal arrangement" was cancelled cannot be made the basis of a claim for an "allowance." Section 13 (1) of the Interpretation Act, *supra*, can be of no assistance to respondents in relation to the cancellation of this assumed "reciprocal arrangement." Even if this statute could be applied there was no act of the respondents prior to the cancellation of the "reciprocal arrangement" which would earn for them a "right accrued" within the meaning of the said section. See *Abbott* v. *Minister for Lands*, [1895] A.C. 425, at 431.

As I am unable to give effect to the submissions of the respondents I therefore, with respect, allow the appeal but as the Crown as a matter of grace is prepared to give the respondents the benefit of the $7,000 payment made to Ontario prior to the 11th day of June, 1937, I content myself by saying that, in my view, the respondents are not entitled to claim an "allowance" for that amount of duty which they paid to Ontario on the 19th of January, 1938.

The appellant succeeds upon a point not taken below and by virtue of the discretion vested in this Court by section 44 of the Succession Duty Act the proper order to be made in relation to costs is, in my opinion, that there be no costs awarded to either party here and below.

Appeal allowed, McQuarrie, J.A. dissenting.

Solicitor for appellant: *H. Alan Maclean.*
Solicitor for respondents: *J. Y. Copeman.*

HOOK v. DAVIES.

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Negligence—Gift of air-gun by father to infant son—Shooting at targets—Injures boy who comes on defendant's premises—Liability of father.

The defendant gave his son, who was eighteen years of age, an air-gun as a present. Shooting then took place at targets on the defendant's premises. There was a shed or small erection on the premises with a flap of rough material in the doorway. H., an infant, who sues by his mother as next friend, strolled on to the defendant's premises and entered the shed unknown to the defendant's son. While he was there the defendant's son shot at the shed and hit H., injuring his eye, but not permanently. In an action for damages:—

Held, that it is necessary to show a breach of some legal duty from the defendant to the plaintiff. There must be some affirmative proof of negligence in the defendant in respect of a duty owing to the plaintiff. Even if there was any negligence on the part of the defendant in providing the gun for the amusement of his sons, it is not connected with the damage of which the plaintiff complains, and the action is dismissed.

Cox v. *Burbridge* (1863), 13 C.B. (N.S.) 430, applied.

ACTION for damages resulting from the alleged negligence of the defendant's son in the use of an air-gun given to him by his father. The facts are set out in the reasons for judgment. Tried by MORRISON, C.J.S.C. at Vancouver on the 10th of January, 1939.

Bray, and *Bradshaw,* for plaintiff.
Durrant, for defendant.

Cur. adv. vult.

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MORRISON, C.J.S.C.: The defendant gave one of his boys an air-gun as a present. Full use appears to have been made of it by the boys. Other boys in the neighbourhood were attracted to the defendant's enclosure and shooting at targets took place. On the occasion in question, a neighbouring boy, Jack Edgar Hook, who sues by his mother as plaintiff, came into the defendant's yard where there was a shed or some sort of small erection with a flap of rough material in the doorway, and into which, unknown to the defendant's son, the boy had gone. The defend-

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ant's son, a lad of about eighteen years old and accustomed to the use of guns, began to shoot at this building and unfortunately hit the Hook boy, who was out of his sight, causing injury to his eye. The injury was not serious and is not permanent. The defendant, whose work kept him away from home during the day, was not aware of what happened. He did not invite the plaintiff to his premises on this occasion. The boys were all old and intelligent enough to understand and realize what they were doing with the gun. I refrain from making comments upon the prudence of parents putting such an instrument at the disposal of young people or as to the alleged complaints of neighbours as well as the intervention of the police on several previous occasions. I am confining myself to the particular occasion upon which the case is based.

To entitle the plaintiff to maintain the action, it is necessary to show a breach of some legal duty due from the defendant to the plaintiff; . . . there must be some affirmative proof of negligence in the defendant in respect of a duty owing to the plaintiff:

Cox v. *Burbridge* (1863), 13 C.B. (N.S.) 430, at 436. Even if there were any negligence on the part of the defendant, in providing the gun for the amusement of his sons, I do not think it is connected with the damage of which the plaintiff complains. I do not think that in the circumstances of this case the plaintiff ought to succeed.

Action dismissed.

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McDONALD v. NEARY.

Practice—Appeal—Appeal books—Settlement of—Appeal from registrar's settlement—Jurisdiction.

A single judge of the Court of Appeal has no jurisdiction to entertain an appeal from the registrar on his settlement of an appeal book. The matter should be brought before the Court for the exercise of its inherent jurisdiction to see that the record of the appeal brought before it is complete and true for the purposes of the appeal.

MOTION *ex parte* for an appointment to fix a time to bring an appeal in Chambers from the registrar at Victoria on his

settlement of the appeal book herein. Heard by MARTIN, C.J.B.C. in Chambers at Victoria on the 13th of February, 1939.

D. M. Gordon, for the application, referred to the Rules and Court of Appeal Act, Sec. 23, and to the Court of Appeal Chamber Book and certain reported cases before this Court, including *Robertson* v. *Latta* (1915), 21 B.C. 597; *Tobin* v. *Commercial Investment Co.* (1916), 22 B.C. 481, at 485; *Morton* v. *Vancouver General Hospital* (1922), 31 B.C. 141, and also *Union Bank of Manchester, Ld.* v. *Grundy*, [1924] 1 K.B. 833.

MARTIN, C.J.B.C.: I adhere to my ruling given in *Manson* v. *Campbell* on the 25th of May, 1920, Court of Appeal Chamber Book, p. 5, that a single judge of this Court has no jurisdiction to entertain such an appeal, and whatever remedy is sought respecting appeal books after settlement by the registrar, who is the special statutory authority for that purpose, the matter should be brought before the Court for the exercise of its inherent jurisdiction (which has often been resorted to and acted on) to see that the record of the appeal brought before it, as contained in the settled appeal book, is complete and true, and not incomplete and false, for the purposes of this appeal. Motion refused.

Motion refused.

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App. Allowed + Judgment of Robertson J. Restored [1941] 3 W.W.R. 401

CANADA RICE MILLS LIMITED v. THE UNION MARINE AND GENERAL INSURANCE COMPANY LIMITED.

Insurance, marine—Damage to cargo on voyage—Lack of ventilation owing to closing of ventilators and hatches—Weather conditions—"Perils of the sea"—Construction of.

The plaintiff, engaged in the manufacture and wholesale trade of rice on the Fraser River, purchased 5,000 tons of rice for delivery at Rangoon, where the plaintiff entered into a freight engagement for its carriage by the motor vessel "Segundo" from Rangoon to the plaintiff's docks on the Fraser River. The loading of the cargo commenced on April 13th, 1936, and the vessel sailed on April 24th following. The discharge of cargo on the Fraser River commenced on May 29th, 1936. The defendant insured the plaintiff against loss or damage to shipments of rice imported by the plaintiff as from time to time declared under the policy where the loss arose, *inter alia,* from perils of the sea. During the voyage between May 8th and 11th, for 55 hours the weather was severe, necessitating the closing of hatches and cowl ventilators, thereby shutting off all ventilation of the cargo, and other stoppages of ventilation occurred during the voyage. The log of the "Segundo" showed that the ventilators were frequently closed because of rain and fog. Upon the discharge of the cargo it was discovered that one lot of rice of 750 tons had been damaged by heating. The jury found that the proximate cause of the damage was the closing of the ship's ventilators and hatches, and judgment was given for the plaintiff.

Held, on appeal, reversing the decision of ROBERTSON, J. (MCQUARRIE, J.A dissenting), that according to the evidence the voyage in question was regarded by sea-faring men as a fine voyage for that time of year, the weather was normal and what was to be anticipated. The closing of the hatchways and ventilators under the circumstances of this case was an act which falls not within but without the *indicia* of the quoted definition of "perils of the sea."

Held, further, that in cases of marine insurance the proximate cause is the last event in time preceding and directly producing the damage except in those cases where the efficient cause while not last in time, is of such an overpowering and irresistible nature that its course and predictable result cannot be materially affected by subsequent intervening acts or events. The appeal should be allowed and the action dismissed.

APPEAL by defendant from the decision of ROBERTSON, J. of the 31st of May, 1938, in an action for a loss under an insurance policy of the defendant company. The plaintiff was engaged in

the business of buying, milling and marketing rice. It imports rice from rice-growing countries, in most cases by sea. The rice imported is either in the form known as "paddy" or "brown rice." "Paddy" is the form in which it usually comes from the grower and is rice from which the husk has not been removed. "Brown rice" is rice from which the husk has been removed. In February, 1936, the plaintiff purchased 5,000 tons of rice for delivery at Rangoon and entered into a freight engagement for its carriage by the motor vessel "Segundo" from Rangoon to the plaintiff's dock on the Fraser River. A cover note was issued by the insurance company's agent and the certificate of insurance was issued on June 4th, 1936, insuring 50,600 bags of "brown rice" for $191,992 against, *inter alia,* "perils of the sea," being the only risk insured against in question in this action. The loading of rice commenced on April 13th, 1936, and the vessel sailed April 24th, 1936, and discharge of cargo on the Fraser River commenced on the 29th of May, 1936. The vessel carried no other cargo. There were four holds. The rice in question, 7,500 bags (750 tons), and referred to as Lot 163, was stowed in holds 2 and 3. A surveyor of the Board of Marine Underwriters inspected the cargo and found that the rice marked Lot 163 showed excessive heat. The plaintiff presented a claim to the insurance company with respect only to the rice marked Lot 163. The plaintiff claimed that during the voyage the ship encountered heavy seas, rains and weather amounting to a gale, and by reason thereof it was necessary to batten down all hatches and ventilators. As a result thereof the said shipment was damaged by sweat and heat, and alternatively by moistening, and the plaintiff suffered loss thereby exceeding three per cent. on each package. The plaintiff claimed the rice was in good condition when shipped, but when it arrived at the plaintiff's dock on the Fraser River it was damaged and the damage resulted from heating which had occurred during the voyage and caused by closing the ventilators and hatches, made necessary by the weather conditions. The defendant claimed that the portion of the shipment damaged resulted from the damage sustained prior to shipment, or from inherent vice or want of power in the rice to bear the ordinary rigours of the voyage.

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The appeal was argued at Vancouver on the 7th to the 10th of November, 1938, before MARTIN, C.J.B.C., MCQUARRIE and SLOAN, JJ.A.

J. W. deB. Farris, K.C. (*Des Brisay,* with him), for appellant: The sole cargo of the ship "Segundo" was 5,000 tons of rice. The dispute is in relation to 750 tons of this shipment. The burden of proof that the rice was in good condition when it left Rangoon is on the plaintiff. We say there was no "peril of the seas" and if there was it was not the proximate cause of the damage: see *British and Foreign Marine Insurance Co.* v. *Gaunt,* [1921] 2 A.C. 41; *Creeden & Avery, Ltd.* v. *North China Insurance Co.* (1917), 24 B.C. 335, at p. 338. The evidence established that the rice in Lot 163 had suffered damage before shipment. The evidence that the rice was in good condition when shipped was hearsay. The correspondence with reference to the shipment should have been admitted: see Taylor on Evidence, 11th Ed., 413; *The Canada Atlantic Ry. Co.* v. *Moxley* (1888), 15 S.C.R. 145 at pp. 153 and 163; *Canada Central Railway Co.* v. *McLaren* (1884), 21 C.L.J. 114 at p. 117; *Coates* v. *Bainbridge* (1828), 5 Bing. 58. The loss claimed for was not caused by a "peril of the sea." As to its definition see *Creedon & Avery, Ltd.* v. *North China Insurance Co.* (1917), 24 B.C. 335 at p. 341; *Tatham* v. *Hodgson* (1796), 6 Term Rep. 656; *Taylor* v. *Dunbar* (1869), L.R. 4 C.P. 206. The perils of the sea must be the "proximate cause": see *The Stranna,* 107 L.J.P. 33; [1938] P. 69; *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (1918), 87 L.J.K.B. 395; *Winspear* v. *Accident Insurance Co.* (1880), 50 L.J.Q.B. 292; *Fenton* v. *Thorley & Co.* (1903), 72 L.J.K.B. 787; *In re Etherington and Lancashire &c. Accident Insurance Co.* (1909), 78 L.J.K.B. 684, at p. 690; *Pink* v. *Fleming* (1890), 59 L.J.Q.B. 559; *Ionides* v. *The Universal Marine Association* (1863), 32 L.J.C.P. 170 at p. 176; *Clan Line Steamers* v. *Board of Trade* (1929), 98 L.J.K.B. 408 at p. 414; *Wilson, Sons & Co.* v. *Owners of Cargo of the Xantho* (1887), 56 L.J. P. 116 at p. 119; *Lawrence* v. *Accident Insurance Co.* (1881), 50 L.J.Q.B. 522; *Taylor* v. *Dunbar* (1869), 38

L.J.C.P. 178; *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1887), 57 L.J.Q.B. 24. Dealing with the cases where the antecedent cause is the proximate cause see *Lind* v. *Mitchell* (1928), 98 L.J.K.B. 124; *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1887), 57 L.J.Q.B. 24; *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* (1916), 85 L.J.K.B. 550; *Becker, Gray & Co.* v. *London Assurance Corporation* (1917), 87 L.J.K.B. 69; *The Thrunscoe* (1897), 66 L.J. P. 172; *Donkin, Creeden & Avery, Ltd.* v. *Steamship "Chicago Maru"* (1916), 23 B.C. 551. The rice was damaged when shipped, and secondly the loss resulted from an "inherent vice" in the matter insured: see *F. O. Bradley and Sons Lim.* v. *Federal Steam Navigation Co. Lim.* (1927), 17 Asp. M.C. 265 at p. 267. As to want of power in cargo to bear the ordinary transit in a ship see *The Freedom* (1871), 1 Asp. M.C. 136; *British and Foreign Marine Insurance Co.* v. *Gaunt,* [1921] 2 A.C. 41 at p. 57; Halsbury's Laws of England, 2nd Ed., Vol. 18, p. 300, sec. 425. Only 750 tons out of over 5,000 were damaged. The damage was not caused by a fortuitous accident or casualty of the seas. The voyage was not an unusually rough one, and the interruption of ventilation was not sufficient to cause damage. The respondent claimed the loss exceeded three per cent. The *onus* is on it: see Bullen & Leake's Precedents of Pleading, 3rd Ed., 182; *Dawson* v. *Wrench* (1849), 3 Ex. 359; *Munro, Brice & Co.* v. *War Risks Association,* [1918] 2 K.B. 78 at p. 82. As to the method of computing see Arnould on Marine Insurance, 10th Ed., secs. 892 to 900; Halsbury's Laws of England, 2nd Ed., Vol. 18, pp. 366-7; Eldridge on Marine Policies, 3rd Ed., pp. 110 to 113. Evidence of loss was not submitted. The underwriter is entitled to the advantage of every right of the assured: see *Castellain* v. *Preston* (1883), 11 Q.B.D. 380 at p. 388; *Assicurazioni Generali de Trieste* v. *Empress Assurance Corporation, Limited,* [1907] 2 K.B. 814 at 820; *West of England Fire Insurance Company* v. *Isaacs,* [1896] 2 Q.B. 377; *Phœnix Assurance Company* v. *Spooner,* [1905] 2 K.B. 753; *Williams* v. *Atlantic Assurance Co.,* [1933] 1 K.B. 81 at p. 90.

Bull, K.C. (*Merritt,* with him), for respondent: There was abundant evidence to justify the verdict: see *Walton* v. *B.C.*

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Electric Ry. Co. (1925), 35 B.C. 119; *Toronto Power Company, Limited* v. *Paskwan,* [1915] A.C. 734; *Cousineau* v. *City of Vancouver* (1926), 37 B.C. 266 at 275; *Staley* v. *British Columbia Electric Railway Company, Limited* (1937), 51 B.C. 499; *Metropolitan Railway Co.* v. *Wright* (1886), 11 App. Cas. 152; *C.N.R.* v. *Muller,* [1934] 1 D.L.R. 768; *McCannell* v. *McLean,* [1937] S.C.R. 341. The rice in question was in good condition when shipped. The rice was damaged during the voyage by a peril of the sea. The shipment was damaged by heat caused by the closing of the ventilators and hatches during the voyage. The loss to the plaintiff exceeded three per cent. per package. As to the principles upon which the gross sound and gross damaged values of the commodity are to be calculated see *Cator* v. *Great Western Insurance Co. of New York* (1873), L.R. 8 C.P. 552 at 559. The underwriter's liability depends on the value of the goods upon arrival: see *J. Lysaght, Limited* v. *Coleman,* [1895] 1 Q.B. 49 at p. 53; *Lewis* v. *Rucker* (1761), 2 Burr. 1167 at p. 1170. The jury agreed with the plaintiff's method of calculation and this Court will not interfere: *Mount Royal Assurance Co.* v. *Cameron Lumber Co.,* [1934] A.C. 313 at pp. 321-2; *Morrison et al.* v. *Nova Scotia Marine Insurance Co., Ltd.* (1896), 28 N.S.R. 346 at p. 354; *Crofts* v. *Marshall* (1836), 7 Car. & P. 597; *Welch* v. *Home Insurance Co. of New York* (1930), 43 B.C. 78; *Mount Royal Assurance Co.* v. *Cameron Lumber Co.,* [1934] A.C. 313. The report of the port warden as to the condition of the cargo is admissible in evidence: see Phipson on Evidence, 7th Ed., 328; *Sturla* v. *Freccia* (1880), 5 App. Cas. 623; *The Irish Society* v. *The Bishop of Derry* (1846), 12 Cl. & F. 641; Taylor on Evidence, 12th Ed., p. 1002, sec. 1591 *et seq.* Certificates as to the condition of the rice before shipment, signed by one Shaw who had died before the trial were marked as exhibits on the trial. They were admissible as they were not objected to when tendered as evidence on the commission: see Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 780; *Richards, Tweedy and Co.* v. *Hough* (1882), 51 L.J.Q.B. 361; *Robinson* v. *Davies* (1879), 5 Q.B.D. 26; Phipson on Evidence, 7th Ed., 481-2. It is a declaration made in the course of duty by a deceased

person: see Cockle on Evidence, 5th Ed., 163 and 203-4. The letters from the London brokers to the plaintiff were not admissible. They are hearsay: see *Healy* v. *Jacobs* (1827), 5 L.J.K.B. (o.s.) 180; *Williams* v. *Spowers* (1882), 8 V.L.R., L. 82; *H. S. Wright and Webb* v. *Annandale* (1930), 46 T.L.R. 239; *Rex* v. *Drew*, [1933] 2 W.W.R. 243 at p. 249.

Farris, in reply, referred to *Wilson, Sons & Co.* v. *Owners of Cargo of the Xantho* (1887), 56 L.J. P. 116 at p. 119; *Donkin, Creeden & Avery, Ltd.* v. *Steamship "Chicago Maru"* (1916), 23 B.C. 551; *Hemelryck* v. *William Lyall Shipbuilding Co.*, [1921] 1 A.C. 698 at p. 701; *Whittle* v. *Mountain* (1919), 89 L.J.K.B. 210 at p. 212; Beven on Negligence, 4th Ed., pp. 38 and 41; *Scott* v. *Fernie* (1904), 11 B.C. 91; *Jones* v. *Great Western Railway Co.* (1930), 47 T.L.R. 39 at p. 41; *Stone* v. *Rossland Fuel and Ice Co.* (1906), 12 B.C. 66 at p. 71; *McGovern (Pauper)* v. *James Nimmo & Co.* (1938), 107 L.J.P.C. 82.

Cur. adv. vult.

1st February, 1939.

MARTIN, C.J.B.C.: The judgment of the Court, that is to say my brother SLOAN and myself, our brother MCQUARRIE dissenting, is that the appeal should be allowed, because in our opinion the jury did not find that the proximate cause of the damage was a peril of the sea, and therefore that damage is not covered by the policy.

This view renders it unnecessary for us to give further consideration to the other substantial grounds of appeal, though they would otherwise require careful consideration. My brother SLOAN is handing down his reasons and I agree with them and think it desirable to add thereto only a further reference to *Donkin, Creeden & Avery, Ltd.* v. *Steamship "Chicago Maru"* (1916), 23 B.C. 551 (because I tried that case in the Admiralty Court) *viz.*, that the negligence alleged therein as "the cause of the deterioration of the cargo" of maize "was the improper stowage of the same causing insufficient ventilation," and so to that "principal one" (question) I first addressed myself (p. 552) and my judgment must be read largely in that light, and

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in the other different circumstances, but there is no allegation of improper stowage in the present case. Furthermore, the log of the "Segundo" shows that the ventilators and hatches were frequently closed because of rain and fog, though nothing of that kind occurred in *Donkin's* case, wherein the stoppage of ventilation occurred solely "as a matter of good seamanship (and one) of necessity imposed by the state of the weather" (554) as described on p. 553, which shows a very exceptional state of affairs—the worst in a long series of 24 voyages to the East—the wind "reaching the maximum" (as it then was) and the sea much higher than the ship had ever experienced, causing her to labour and strain and "shipping much water constantly and flooded at times" and "heavy seas washing over all constantly," thus creating beyond question a truly "perilous" state of affairs and one not paralleled in the present case. It should be added that, as counsel pointed out, the head-note to *Donkin's* case is not wholly accurate thereby tending to misconception.

McQUARRIE, J.A.: This is an appeal from ROBERTSON, J., dated the 31st of May, 1938, arising from the verdict of a special jury, whereby the respondent was awarded the sum of $8,071.64 for damage to a portion of a cargo of rice shipped on the M.V. "Segundo" from Rangoon to respondent's dock on the Fraser River.

As to the facts and points in dispute I quote from the appellant's factum as follows:

2. The action was brought by writ of summons dated the 23rd day of July, 1937, for a loss under an open policy, No. 1703, of the appellant—Exhibit 1.

3. The respondent engages in the business of buying, milling and marketing rice and rice products. It imports rice from rice-growing countries, in most cases by sea. The large bulk of rice imported is either in the form known as "paddy" or "brown rice." Paddy is the form in which it usually comes from the grower and is rice from which the husk has not been removed. "Brown rice" is rice from which the husk has been removed and is known in Burma as Loonzain.

4. In February, 1936, the respondent purchased 5,000 tons of rice for delivery to it in Rangoon and entered into a freight engagement (Exhibit 33) for its carriage by the motor vessel "Segundo" from Rangoon to the respondent's dock on the Fraser River. The cargo of rice was insured by the appellant under the terms of a contract of marine insurance (Exhibit 1) dated 19th December, 1929.

5. A cover note (Exhibit 5) holding the cargo covered under the contract of insurance was issued by the appellant's agent and a certificate of insurance (Exhibit 3) was issued on June 4th, 1936, insuring 50,600 bags of brown rice for the sum of $191,992 against, *inter alia*, "perils of the sea," being the only risk insured against in question in this action.

6. The loading of the cargo of rice comprising 50,600 bags, totalling 5,060 tons, on board M.V. "Segundo" commenced April 13th, 1936, and after some delay from lack of cargo alongside was completed April 23rd and the vessel sailed April 24th.

7. The M.V. "Segundo" has four holds and five hatches, Hold No. 2 having two hatches which are referred to as hatches Nos. 2 and 3. A plan of the ship is Exhibit 15. The rice was stowed in all four holds and she carried no other cargo. The rice in question, being 7,590 bags marked 163 and 102, and referred to as 163, was stowed in holds Nos. 2 and 3 together with large quantities of other rice which was stowed on it and around it.

8. Discharge of cargo commenced on May 29th at 8.00 a.m. During the course of that morning it was found that some of the bags of rice showed signs of heating. Captain Watson, Surveyor for the Board of Marine Underwriters of San Francisco, Inc., attended at the vessel, inspected the cargo, and took temperatures on that day and on each subsequent day of the unloading. He found that the rice known as Interco Brose and marked with the number 163 showed excessive heat but that rice of other marks was not heated except to the extent that some stowed adjacent to or so as to come in contact with rice 163 had become heated by reason of the spread of the heat from the rice marked 163.

9. The respondent presented a claim to the appellant with respect only to the rice marked 163, and no claim was made in respect of the balance of the cargo, nor was any loss suffered in respect of it. The claim as to the cause of the damage as set forth in the statement of claim is:

"Par. 9. . . . During the said voyage the said steamship (Segundo) encountered heavy seas, rains and weather amounting to a whole gale and by reason of such heavy seas, rains and weather it was necessary to batten down all hatches and ventilators.

"Par. 10. As a result thereof, the said shipment was damaged by sweat and heat and alternatively by moisture and the plaintiff has suffered loss thereby exceeding 3 per cent. on each package."

10. The respondent's case was that the rice was in good condition when shipped; that when it arrived at the respondent's dock it was damaged, and that the damage had resulted from heating which had occurred during the voyage and was caused by the closing of the "Segundo's" ventilators and hatches made necessary by weather conditions encountered during the voyage; that the loss sustained exceeded 3 per cent. on each package; and that the amount of the loss was a sum ascertained upon estimates made by the respondent of the gross sound value and the gross damage value of the rice.

11. The appellant's case was—

(a) That the respondent had failed to establish that the loss was by a peril insured against.

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(b) That the respondent did not prove that the rice was in good condition when shipped and that as a fact the rice had been damaged prior to shipment.

(c) That the damage (if any) during the voyage resulted from the damage sustained prior to shipment or from inherent vice or want of power in the rice to bear the ordinary rigours of the voyage. In this connection it is significant that of a total cargo of 5,060 tons, all of which was exposed to identical conditions and of which 2,000 tons of rice known as "Kalagyee" was admittedly a poor carrier, loss was suffered and claimed only in respect of the lot marked 163 of 750 tons.

(d) That the "Segundo" had a fine voyage and that the closing of ventilators shown by the evidence was quite normal and what was to be expected and did not arise from a peril of the sea.

(e) That there was no interference with ventilation sufficient to cause damage, and that the damage claimed could not have arisen therefrom.

(f) That there was no evidence that a loss was sustained exceeding 3 per cent. on each package.

(g) That there was no evidence upon which the loss (if any) could be properly ascertained in accordance with the provisions of the Marine Insurance Act and that evidence available to the respondent to enable the proper ascertainment of such values had not been presented.

12. The following questions were put and the following answers given by the jury:

"1. Was a cargo of rice of 50,600 bags loaded on board the motor vessel 'Segundo' at Rangoon between April 13th and 23rd, 1936, for carriage to the plaintiff's dock on the Fraser River, B.C., included in which were 7,500 bags of rice marked Interco Brose 163? Yes.

"2. Did the defendant insure the said cargo under policy of insurance marked Exhibit 1 in this action? Yes.

"3. Was the said rice in good and sound condition when shipped? Yes.

"4. *If the answer to No. 3 is in the negative, in what respect was such* rice not in good and sound condition? [No answer.]

"5. Was the value of the said shipment, 7,500 bags, including freight, declared by the plaintiff to the defendant at $30,798? Yes.

"6. Was the said shipment damaged by heat caused by the closing of the cowl ventilators and hatches from time to time during the voyage? Yes.

"7. If the answer to No. 6 is in the affirmative, was the closing of the ventilators and hatches the proximate cause of the damage? Yes.

"8. Was the weather and sea during the time the cowl ventilators and hatches were closed such as to constitute a peril of the sea? Yes.

"9. If the answer to No. 8 is in the affirmative, what were the conditions of the weather and sea? Heavy winds from 8th to 11th May, with high seas; from 11th to 17th, moderate weather and moderate seas, after which latter date, strong gales and very rough seas up to 20th; variable seas and weather after that date.

"10. Did the plaintiff thereby suffer loss exceeding 3 per cent. on each package? No. Only on 163.

"11. If the answer to No. 10 is in the negative, how many packages were damaged less than 3 per cent.? The remaining three.

"12. What was the gross sound value of the 7,500 bags? Twenty-eight thousand, seven hundred and forty-eight dollars and thirty-five cents.

"13. What was the gross damaged value of the same 7,500 bags? Twenty-one thousand, two hundred and eleven dollars."

Arising from the answers is the point that the jury did not find that the closing of the cowl ventilators was caused by a peril of the sea.

I am inclined to the opinion that the main points which we have to consider are regarding the findings of the jury answering questions 3 and 6, the latter in conjunction with questions 7, 8, and 9.

It appears to me subject to one other feature—proximate cause—that if those questions were properly submitted to the jury and there is evidence to support the findings of the jury the appeal must fail.

As I see it the questions were submitted after a full discussion by the learned trial judge with counsel for the appellant and the respondent and were the cumulative result of that discussion. My understanding is that at the suggestion of the learned trial judge counsel for both sides submitted questions for submission to the jury which were whipped into shape so as to embody the learned judge's ruling on the drafts so presented to him eliminating duplications and unnecessary or objectional matter. It might even be said that the questions were presented to the jury by agreement of counsel as reviewed and revised by the trial judge in a manner which was fair and reasonable, to the fullest extent. In any event there was no real objection to the questions at the time they were submitted to the jury.

Dealing first with question 3 and the answer thereto. The jury found that the rice with which we are concerned was in good and sound condition when shipped. In that connection I take it that the obvious intention of the jury in forming the answer was that the rice was in good and sound condition when shipped so far as any damage claimed by the respondent herein was concerned. It is contended by counsel for the appellant that "it is in any event admitted that the rice was damaged prior to shipment and the evidence of the Rangoon witnesses is entirely displaced thereby."

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The position taken by counsel for the respondent in that connection is that the respondent was able to recover from the shippers on a collateral guarantee at the time of purchase the sum of $875 with respect to the part of the shipment which is the subject-matter of this action. That was in regard to yellow grains and quite a different thing from the damage caused to that rice during the voyage. Here reference might be made to the appeal book (p. 272), where I quote from the evidence of Duncan Gavin, president of the respondent company, as follows:

Is it a common experience to find yellow grains in rice? It is one of the things we are very careful to guard against in rice contracts, and guard against it especially with rice from that district.

What distinction do you draw between yellow grains and the damage which you are claiming in this action? Quite a different matter. The grain we are making claim for is a dull muddy-looking appearance with kernels throughout with that appearance. The milling would not take it out of it; it accentuates the poor colour, no connection with yellow grains.

Did you in fact make a claim for yellow grains to the shipper? We did.

Did you settle that? Yes.

At what amount? $1,750 for the 1,500 tons.

How much of that should be for yellow grains in the 163? Half, $875.

The respondent says the claim for yellow grains was discussed with the appellant. The respondent's explanation appears to have satisfied the jury and I think properly so.

It cannot be successfully asserted that there is no evidence to support the answer of the jury to question No. 3. The evidence taken on the Rangoon commission alone would warrant the finding.

Regarding the answers to questions Nos. 6, 7, 8, and 9, I think it is clear that there is sufficient evidence to support the findings of the jury.

The insurance covered by the policy and certificate of insurance was on this particular cargo of rice carried by this designated ship. It may be that the ship was not strictly modern as to its ventilating system and that ships having what is known as "forced draught" ventilation would have been safer and more suitable for the transportation of a dangerous cargo such as rice on a voyage of the duration and nature contemplated but that in my opinion does not make any difference here. It is common ground that the policy of insurance on which this action is

founded covered the rice in question when in this ship and on this voyage. See also Exhibits numbered 2 and 5 and the certificate of insurance dated 4th June, 1936, Exhibit 3, in respect to the whole shipment. It is noted that in those documents "brown rice" is referred to as being insured.

It seems to be admitted that the rice with which we are concerned was damaged before it reached its destination and there is no real objection to the amount of damages allowed. Counsel for the appellant, as previously mentioned, contends that the respondent has failed to establish that the loss was a peril insured against even if the answers to questions 6, 7, 8, and 9 are accepted. That involves consideration of what is included in "perils of the sea," which is the only risk insured against. The appellant also submits that arising from the answers that the jury did not find that the closing of the cowl ventilators was caused by a peril of the sea. Counsel for the appellant very carefully and patiently took the Court on a voyage from Rangoon to the Fraser River by way of the ship's log and explained the recorded conditions of weather experienced on the trip which the "Segundo" made. He pointed out that to come under the terms of the insurance the respondent must have shown that the damage was done by a "peril of the sea" and not a "peril on the sea." I do not think it incumbent on me to go into all the features of the voyage discussed by counsel and would limit myself to saying that in my opinion the answers to questions numbered 6, 7, 8, and 9 in their cumulative effect constitute a finding that the damages claimed by the respondent arose from a peril of the sea and come within the provisions of the insurance. I have reached this conclusion after careful consideration of the authorities cited to us by counsel on both sides. The appellant referred to rule 7 of the Rules for Construction of Policy set out in the Schedule to the Marine Insurance Act, R.S.B.C. 1936, Cap. 134, which reads as follows:

> 7. The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.

The respondent's case regarding this feature is that the rice was damaged during the voyage by a peril of the sea. I quote from the respondent's factum as follows:

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To support the finding of the jury that the shipment was damaged by heat caused by the closing of the ventilators and hatches during the voyage, on account of weather such as amounted to a peril of the sea, the respondent refers to the translation of the Log Book of the vessel, Exhibit 7, particularly at pp. 794, 798, and 802-804; the evidence of Capt. Reid, the harbour master in Vancouver, that he would expect from a perusal of the weather conditions shown in the Log Book and from the fact that ventilation was restricted, that the rice cargo would out-turn damaged through dampness caused by restriction of ventilation. He was also of the opinion that excessive rolling and pitching of the vessel would heat up the rice; and the evidence of Mr. Eldridge, the chemist called by the respondent. He gives his opinion as to the cause of the damage in particular at p. 315, line 19 to p. 317, line 9. Indeed, he is supported by the appellant's expert, Capt. Watson, who stated that the hatches were closed for the safety of the cargo, to prevent it getting wet, and that a cargo of grain should have as much ventilation as possible. He stated also that Mr. Eldridge's opinion as to what would happen when the ventilators were closed and then later opened, coincided more or less with his opinion.

It should be remembered too, it is submitted, that Capt. Watson's opinion that the damage was not caused by heating *en route* is based upon the two reasons referred to under 1 (a) of the respondent's argument herein, the ground for which has been cut from under his feet by the evidence hereinbefore referred to, and accepted by the jury.

In coming to my conclusion that the findings of the jury constitute damage from or by a "peril of the sea" I have gained considerable enlightenment from a case cited by the appellant in its factum—*The Stranna,* [1938] P. 69, where several other cases are reviewed. I cannot see why the repeated closing of the ventilators and hatches, which we must presume was properly done, owing to fortuitous weather conditions encountered, was not a peril of the sea which was in this case insured against.

The majority of the Court has held that the appeal should be allowed, because in their opinion the jury did not find that the proximate cause of the damage was peril of the sea, and therefore that damage is not covered by the policy.

With all due deference I am afraid I cannot agree with them. It seems to me that the findings of the jury previously referred to and more particularly the answers to questions numbered 6, 7, and 8 are conclusive on this point in favour of the respondent.

I would therefore dismiss the appeal.

SLOAN, J.A.: This is an appeal by the appellant (defendant below) from a judgment of Mr. Justice ROBERTSON in a jury

action, wherein the respondent (plaintiff below) recovered the sum of $8,071.64 for damage to a shipment of rice under a valued floating policy of marine insurance.

In February of 1936, the respondent purchased 5,000 tons of rice and entered into a freight engagement for its carriage by the motor vessel "Segundo," from Rangoon to the respondent's dock in the Fraser River. This cargo was insured by the appellant against (*inter alia*) "perils of the sea" and it is this risk and none other with which we are concerned in this appeal.

The "Segundo" sailed from Rangoon on April 24th, 1936, and on May 28th, 1936, arrived at its British Columbia destination. Discharge of cargo commenced on the morning of May 29th, when it was discovered that one lot of rice had been damaged by heating.

The appellant having denied liability to make good the loss or damage caused by the heating, the respondent brought this action claiming that the rice was in good condition when shipped; that it arrived at its destination in a damaged condition and that the damage had resulted from heating during the voyage because of the closing of the ship's ventilators and hatches necessitated by weather conditions at sea.

The appellant's position was that the rice was not in a sound condition when shipped, but in any event if the rice had suffered damage during the voyage such damage was not caused by an insured risk, *i.e.*, a peril of the sea. It is upon this last submission, in my opinion, that the appellant is entitled to succeed, and while there is much to be said in support of the contention that the rice was unfit for the journey and had been damaged before loading on ship, I find it unnecessary to come to any decision on that or any other aspect of the appeal.

To my mind this appeal falls to be determined by the construction proper to be placed upon the answers of the jury to questions and the "legal result of the facts so found": *McGovern (Pauper)* v. *James Nimmo & Co.* (1938), 107 L.J.P.C. 82, 83.

The relevant questions [6 to 9] and answers are as follows: [already set out in the judgment of McQuarrie, J.A.]

Now as Lord Hailsham said in *Clan Line Steamers, Ld.* v. *Board of Trade*, [1929] A.C. 514 at 524:

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. . . it is a well settled principle of marine insurance law that *causa proxima non remota spectatur.*

That principle has been embodied in the Marine Insurance Act, R.S.B.C. 1936, Cap. 134, Sec. 57 (1), which reads as follows:

57. (1.) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

Two familiar cases are illustrative of this principle, *viz., Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1887), 12 App. Cas. 518, and *Pink* v. *Fleming* (1890), 25 Q.B.D. 396.

In *Hamilton, Fraser & Co.* v. *Pandorf & Co., supra,* rice was damaged by sea water which found its way into the hold of the vessel through a hole gnawed by a rat, in a leaden pipe connected with the bath-room of the vessel. It was held by the House of Lords that such damage resulted from the entry of the sea-water —a peril or accident of the sea—and the act of the rat was immaterial for the proximate cause only was to be considered.

In *Pink* v. *Fleming, supra,* a vessel on which insured goods were shipped came into collision with another vessel and sustained damage necessitating repairs in port. In order to make such repairs the cargo, consisting of fruit, was discharged into lighters. Upon completion of repairs the cargo was reshipped but at the port of destination the fruit had gone bad. The damage had been caused partly by the delay and partly by the handling of the fruit. The Court of Appeal applying the "*proxima*" principle held that the collision was not the proximate cause of the loss. Bowen, L.J., at p. 399, said:

The proximate cause of the loss was not the collision or any peril of the sea. It was the perishable character of the articles combined with the handling in the one case and delay in the other.

In this case it will be at once observed the jury found (in answer to a leading question) that the proximate cause of the damage to the rice "was the closing of the ventilators and hatches." To my mind there can be no escape from that finding of fact, neither, in my understanding of the authorities, is it of any moment, at this stage of the case, to go behind that finding to search for remote causes; for links in the chain of causation, which may have led to the proximate, *i.e.,* the efficient and direct cause of the damage.

Lord Sumner in *Becker, Gray and Company* v. *London Assurance Corporation,* [1918] A.C. 101, 116, refers to an early judgment of Lord Mansfield (*Jones* v. *Schmoll* (1785), 1 Term Rep. 130, n), to indicate "at how early a date a strict construction was applied to causation in policies of insurance." At p. 112, he said:

> Proximate cause is not a device to avoid the trouble of discovering the real cause or "common-sense cause," and, though it has been and always should be rigorously applied in insurance cases, it helps the one side no oftener than it helps the other.

Lord Shaw of Dunfermline in *Leyland Shipping Company* v. *Norwich Union Fire Insurance Society,* [1918] A.C. 350 at 370, said:

> . . . proximate causes is an expression referring to the efficiency as an operating factor upon the result. Where various factors or causes are concurrent, and one has to be selected, the matter is determined as one of fact, and the choice falls upon the one to which may be variously ascribed the qualities of reality, predominance, efficiency.

It is of some interest to compare what the text-books have to say upon the rule to be applied. Eldridge on Marine Policies, 3rd Ed., at pp. 53-4, says:

> The principle which prevails is that the loss must be attributed to the actual and direct cause, so that where there are a number of events successive in order of time, each producing the one which follows it, the last event preceding and producing the loss is held to be the cause of such loss. . . . Often it may appear that one of the earlier events is the dominant cause in producing the damage: it may be the *causa sine qua non*, while the actual *causa causans* may seem to be comparatively insignificant. Nevertheless, the law does not regard the relative importance of causes in the production of loss, . . .

In Smith's Mercantile Law, 13th Ed., at p. 459, we find the following comment apparently based upon the judgment of Lord Shaw of Dunfermline in the *Leyland* case, *supra*:

> This theory has, however, now been displaced by a very different view of the matter. The notion that there was a chain of causes was shown to be inaccurate. "Causation is not a chain but a net," and consequently it becomes necessary to find not the last cause in point of time, but the cause which "is proximate in efficiency." The rule must therefore be restated in the following form, *i.e.*, that where there is a loss due to a combination of causes operating at or about the same time, the proximate cause of the loss will be the cause which is the dominant or effective cause, and this is not necessarily the cause which occurs last in point of time.

In my view, as I have said, it is really a matter of no moment

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in this case by what process of reasoning the jury arrived at the conclusion expressed in the answers, unassisted, I am constrained to say, with respect, by the direction of the learned trial judge on this aspect of the case. Whether they viewed the closing of the ventilators and hatches as a "last event preceding and producing the loss" or whether they regarded this event as the proximate cause because they were satisfied it was "proximate in efficiency" as well as the last event, one thing is clear and beyond dispute: there is a finding by the jury of what, in this case, was the proximate cause of the damage.

The jury having found that the proximate cause of the damage was the closing of the ship's ventilators and hatches, it is then necessary to consider the consequences of such finding. That inquiry involves the determination of this question: Can the damage to the rice consequent upon the closing of the ventilators and hatches be said to result from a peril of the sea? In order to answer that question it is first proper to examine the authorities to find what is meant by the term "perils of the sea."

The Marine Insurance Act does not attempt a definition but some assistance is found in Rule 7 of the Schedule to that Act. The rule reads as follows:

> The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.

Scrutton on Charterparties and Bills of Lading, 13th Ed., at p. 261, defines the term as follows:

> The term "Perils of the Sea," whether in policies of insurance, charterparties, or bills of lading, has the same meaning and includes:—
>
> Any damage to the goods carried caused by sea-water, storms, collision, stranding, or other perils peculiar to the sea or to a ship at sea, which could not be foreseen and guarded against by the ship-owner or his servants as necessary or probable incidents of the adventure.

This definition was accepted by the Supreme Court of Canada in *Canadian National Steamships* v. *Bayliss*, [1937] S.C.R. 261 at 263. See also *Bunge North American Grain Corp. et al.* v. *Steamer Skarp and Owners*, [1932] Ex. C.R. 212, at 216 (affirmed [1933] Ex. C.R. 75). Other and like definitions are to be found in Eldridge on Marine Policies, 3rd Ed., pp. 84-5, and Arnould on Marine Insurance, 10th Ed., Vol. II., p. 1040.

I am unable to see how the closing of the ventilators and

hatchways, the proximate cause of the damage, can be said to be a peril of the sea within the meaning of the quoted definition.

Assuming that it is useful to consider the reasons for their closing an examination of the ship's log discloses that the primary reason for this action was rain or at most rain and wind. Rain and wind are not "peculiar to the sea," nor are they ineluctable perils. A parcel of rice in a freight car moving on rails across the Canadian prairies might suffer from heat damage resulting from closing the car's ventilators because of rain and wind (see Lord Haldane's comments in *Stott (Baltic) Steamers, Limited* v. *Marten*, [1916] 1 A.C. 304 at p. 309). The peril must be a peril "of" the sea as well as a peril "on" the sea. *The Xantho* (1887), 12 App. Cas. 503 at p. 509. I do not consider the closing of the ship's ventilating system because of weather conditions which are reasonably to be expected and experienced on a normal voyage of this character is, in its result, a peril that could not be foreseen and guarded against.

Then, too, in this case, there intervened between the weather and the damage voluntary acts on the part of the responsible ship's officer. The damage to the rice was caused by consequences directly flowing from those intervening acts. The loss was not caused by a peril of the sea but (assuming weather conditions constituted a peril of the sea) as the result of a successful attempt of the ship's officer to avoid damage to the rice by a peril of the sea. In the words of Lord Reading in *Kacianoff* v. *China Traders Insurance Company, Limited,* [1914] 3 K.B. 1121 at p. 1127, the closing of the ventilators was a fact "preventing the peril from operating; it was making it impossible that the peril should operate" and see *British and Foreign Marine Insurance Company, Limited* v. *Samuel Sandy & Co.*, [1916] 1 A.C. 650 at p. 665.

A voluntary action taken in expectation or apprehension of peril is not a peril of the sea. *Becker, Gray and Company* v. *London Assurance Corporation, supra.*

In my view, therefore, as I have said, I cannot come to any other conclusion, in my understanding of the authorities, than that the closing of the hatchways and ventilators, under the circumstances of this case, was an act which falls not within but

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without the *indicia* of the quoted definition of "perils of the sea."

There have been cases in which damage resulting from closing the ship's ventilators has been held to be damage caused by a peril of the sea, *viz., The Thrunscoe* (1897), 66 L.J.P. 172; *Donkin, Creeden & Avery, Ltd.* v. *Steamship "Chicago Maru"* (1916), 23 B.C. 551, but in my view such cases are distinguishable in fact from the present one.

In the *Thrunscoe* case, *supra,* the ventilators were closed because of "extraordinary weather" and "in a storm of exceptional severity and duration" and "they were necessarily closed for the safety of the ship." In addition "the servants of the shipowner were compelled to close the ventilators for a period which nobody could possibly contemplate."

In the *"Chicago Maru"* case, *supra,* the vessel was on her twenty-fourth voyage East and "the sea became much higher than the ship ever experienced." Excerpts from the log follow (p. 553):

> Whole gale and ugly weather, high sea causing ship to labour and strain. Shipping much water constantly and flooded at times. . . . Heavy seas washing over all constantly.

In these cases the over-riding necessity of taking action to save the ship from sinking as a result of extraordinary weather conditions, which could not have been anticipated as the normal incidents of the voyage cannot be regarded as a voluntary act of the ship's officer intervening between the peril and the damage. Closing the ventilators was an act of extreme necessity and not of mere choice. The peril was immediate and operating—the ship endangered—and so high was the obligation of her officers to take every means of saving her that to adopt the language of Lord Sumner in *Becker, Gray and Company* v. *London Assurance Corporation, supra,* at p. 116 "an act done in performance of it did not causally bear the character of a voluntary act or of a new intervening cause."

The principle applicable to the facts of *The Thrunscoe* and *"Chicago Maru"* cases can have no application here.

As Lord Macnaghten pointed out in *Thames and Mersey Marine Insurance Company* v. *Hamilton, Fraser, & Co.* (1887), 12 App. Cas. 484 at p. 502, when referring to "perils of the sea":

I think that each case must be considered with reference to its own circumstances, and that the circumstances of each case must be looked at in a broad common sense view and not by the light of strained analogies and fanciful resemblances.

According to the evidence the voyage in question here was regarded by seafaring men as a fine voyage for that time of the year; the weather encountered was normal and what was to be anticipated. No weather was encountered rendering it necessary to close the ventilators for the safety of the ship nor for that matter were the ventilators closed for a longer period than what would be in the contemplation of the parties to the contract of insurance; that is to say it was a normal voyage for that time of the year with all the normal incidents thereof. If the shipper wished to protect himself against possible loss due to probable incidents of the voyage (*e.g.*, heat, sweat and mould) then by the payment of an extra premium he could have had that protection.

He does not get it by alleging a loss by a peril of the sea when in fact his loss was caused by heat engendered by the closing of ventilators when circumstances were such that such action was a necessary and probable result of normal weather conditions: a result which could have been foreseen and guarded against. It appears to me that the only element which could not be foreseen was the delicate constitution of the rice, and its lack of resistance to the normal hardships of the voyage.

Counsel for the respondent submitted that questions 6, 7, 8 and 9 when read together formed a "chain of causation"; that as the weather was the cause of the closing of the ventilators and hatches and as the jury found the weather and sea during the time the ventilators and hatches were closed a peril of the sea therefore a peril of the sea was the efficient and dominant, *i.e.*, the proximate cause of the damage.

This argument, with respect, does not appear to me to be sound. In the first place as it has been said by Lord Shaw of Dunfermline in *Leyland Shipping Company* v. *Norwich Union Fire Insurance Society, supra,* at p. 369:

Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but—if this metaphysical topic has to be referred to—it is not wholly so. The chain of causation is a handy expres-

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sion, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause.

The jury as "a matter of fact" did "declare which of the causes . . . was the proximate" cause.

I cannot substitute for that specific and direct finding a fresh and totally different one declaring the closing of the ventilators a *causa sine qua non* and the condition of the weather the *causa causans.* As Lord Atkin said in *McGovern (Pauper)* v. *James Nimmo & Co., supra,* at p. 83:

> The Court cannot itself supply an answer to a missing question, nor if the verdict in itself answers the issue can the Court either set aside a particular answer or supply others.

At the risk of tiresome repetition I would again stress the point that the long-established rule is that the proximate cause alone is to be considered. This principle as Lord Sumner observed in *Becker's* case, *supra,* at p. 112 " . . . has been and always should be rigorously applied in insurance cases." Or as Lord Justice Scrutton said in *Leyland Shipping Company, Limited* v. *Norwich Union Fire Insurance Society, Limited,* [1917] 1 K.B. 873 at 894:

> This strict rule has been applied in all classes of insurance cases.

Or as Lord Loreburn said in *British and Foreign Marine Insurance Company, Limited* v. *Samuel Sanday & Co., supra,* at p. 659:

> The maxim *Causa proxima non remote spectatur* has been strictly applied in marine insurance cases.

And again:

> . . . this maxim is pushed to considerable lengths in marine insurance law.

I am not unmindful of the observation of Lord Shaw of Dunfermline in the *Leyland* case, *supra,* [1918] A.C. at 369, when he said:

> To treat *proxima causa* as if it was the cause which is proximate in time is, . . . , out of the question. The cause which is truly proximate is that which is proximate in efficiency.

And because counsel for the respondent pressed it upon us I wish to consider the *Leyland* case for a moment. It is cited as

illustrative of the principle that a cause antecedent to that which is the last event preceding the loss may be regarded, in certain circumstances, as the proximate cause. The vessel there was insured against marine risks excepting "consequences of hostilities or warlike operations." She was fatally injured by an enemy torpedo (a "doomed ship" p. 364) and was brought to harbour in an effort to salve her. As Lord Findlay said at p. 355:

> The injuries received from the torpedo made it impossible for the vessel to keep the sea.

(And see Lord Atkinson at p. 366.) When at anchorage she grounded forward at ebb tide and floated again with the flood. This straining broke her weakened back and she sank. It was held that the injury suffered by the ship from the effects of the torpedo was the proximate cause of her loss. It is clear that the dominant and efficient cause of her sinking was unbroken and operated throughout as an overpowering agency. She was in imminent risk of sinking from the moment of the torpedoing ("all the time in the grip of the casualty" p. 371) and the grounding was not a *novus actus interveniens*. Lord Haldane said at p. 360: "Had she remained out at sea she would have sunk" and was of opinion that (p. 362):

> The fact that attempts were made to obviate the natural consequences of the injury inflicted by the torpedo does not introduce any break in the direct relation between the cause and its effect which culminated in the damage sustained.

The other judgments in that case are of a like effect. I fail to see how that case is of assistance to the respondent. There the ship suffered a mortal wound and anything done subsequent to that could not be said to be the efficient cause of her loss.

I venture to say, from my reading of the relevant authorities to date, that in cases of marine insurance the proximate cause is the last event in time preceding and directly producing the damage except in those cases where the efficient cause, while not last in time, is of such an overpowering and irresistible nature that its course and predictable result cannot be materially affected by subsequent intervening acts or events.

Before leaving this branch of the appeal I would make a passing reference to *"The Stranna,"* [1938] P. 69. I can find no similarity either in fact or principle between that case and

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this. There a ship in port while loading a deck cargo of timber took a sudden and unexplained list causing a portion of the deck load to fall overboard into the sea where it was carried away by the tide and lost. It was held that the loss was caused by a peril of the sea. I think it will suffice if I refer to two passages in the judgments. Lord Justice Slesser, at p. 77, said:

> The list of the ship which caused the cargo to fall overboard was certainly a fortuitous accident, not a necessary or even a probable incident of the adventure.

Lord Justice Scott said at p. 83:

> . . . the event was wholly unexpected, it was just an unfortunate accident. But it was also a peril *of* the sea and not merely a peril *on* the sea.

Turning once more to the submission of counsel for the respondent that the answers to questions 6, 7, 8, and 9 must be read together and construed in their cumulative effect I can only say that, if forced by authority to that position, I would have had great difficulty in upholding, as proper, the finding of the jury (assuming without deciding it to be a matter of fact for the jury) that the weather conditions as disclosed in the ship's log constituted a peril of the sea. I mention this question as a ponderable one without expressing a final opinion thereon as I find it unnecessary to do so in the determination of this appeal and in that respect I bear in mind what Lord Justice Vaughan Williams in *Maas* v. *Gas Light and Coke Company,* [1911] 2 K.B. 543 at p. 548, described as "a wise and astute rule," *i.e.,* "not to decide anything more than was necessary to decide the case before the Court."

Counsel for the respondent complained that the appellant, if correct in his submission to us, ought to have taken the position at the trial that the questions submitted to the jury did not include all those elements concerning which a finding of fact was necessary in order to support the respondent's cause of action, and in support of his submission relied upon *Scott* v. *Fernie* (1904), 11 B.C. 91 (recently approved in *Field* v. *David Spencer Limited,* [1939] 1 D.L.R. 129).

I do not think those cases are in point here. It is not my view that appellant's counsel was charged in the Court below with the responsibility of conducting his opponent's case. Counsel for the respondent had his day in Court on terms of his own

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choosing and if anyone is to suffer by reason of the form in which the case went to the jury then it cannot, in fairness, be the appellant. Any objection he did have to the form of the questions was overruled by the learned trial judge.

In the result, then, I would allow the appeal, set aside the judgment below and dismiss the action, for as Lord Macnaghten said in *Thames and Mersey Marine Insurance Company* v. *Hamilton, Fraser & Co., supra,* at p. 502:

> In marine insurance it is above all things necessary to abide by settled rules and avoid anything like novel refinements or a new departure.

Appeal allowed, McQuarrie, J.A. dissenting.

Solicitors for appellant: *Bourne & Des Brisay.*

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

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June 25, 26, 27, 30; *Sept.* 20.

Mortgage — Sawmill plant — Fixtures — Chattels — Tools, machinery and equipment — Crane — Standing on platform outside the freehold— Attached to premises by stiff legs and guy wires—Trade fixture— Conversion.

The Brunette Lumber Company Limited, owner of a sawmill premises on the shore of the Fraser River, executed a mortgage in 1927 in favour of the Westminster Trust Company, to secure the payment of $125,000. In June, 1929, the Brunette Company made an assignment in bankruptcy, and one Beach was appointed trustee. On the 24th of June, 1933, the defendant company obtained a final order of foreclosure, and shortly after went into possession. On the 31st of July, 1933, Beach as trustee transferred to the plaintiff North West Terminals Ltd. all the chattels on that portion of the premises east of a canal that divided the property, and at the same time transferred to the plaintiff North West Lumber & Shingles Ltd. the chattels located upon the lands lying west of the canal. The plaintiff Westminster Mills Limited sued as owner of certain lumber carriers and an Atlas engine, its title to same having been acquired through Beach. The three last mentioned companies were companies operated by Beach and under his control. The defendant Westminster Trust Company acted in the capacity of trustee for the defendants the Lewis family. The plaintiff companies brought action for possession of all goods and chattels transferred to them by Beach and for damages for conversion. At the time the mortgagees took over the premises the main portion of the goods and chattels that

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admittedly belonged to the plaintiffs were stored in the box factory, but two years later the box factory was destroyed by fire. It was found on the trial that neither Beach nor the plaintiff companies ever made demand for delivery of these chattels or were ever refused delivery or ever desired to take possession of them or the other loose chattels on the premises, and their claim with relation thereto could not succeed. An Atlas engine that was affixed to the premises was claimed but the defendants admitted the plaintiffs were entitled to this engine, and it was held that no damages for delay in removal was claimed or proven. A derrick crane was claimed as a chattel. The crane was sunk in the bed of the river through the centre of a platform 24 feet square built on piles adjoining the wharf on the premises, seven feet of which was on the freehold and seventeen feet on a water lot leased from the Dominion Government (the lease having been cancelled prior to the commencement of this action). The top of the crane was attached to the freehold by two stiff legs and several guy wires. It was held that the crane was a fixture, and the action was dismissed.

Held, on appeal, varying the decision of McDONALD, J., that as far as the goods and chattels in the box factory and other loose chattels and the Atlas engine are concerned, the Court agrees with the findings of the trial judge, but as to the crane it was *held* that considering the structure of the crane and the purpose of its erection, it should be classed as a trade fixture and one which the tenant had the right to sever from the freehold during the tenancy. On the 31st of July, 1933, Beach as trustee gave a bill of sale of chattel property, including the crane, to the plaintiff North West Terminals Ltd., and this bill of sale operated not only as a document of title thereto but in law as a severance of the crane from the freehold. The plaintiff North West Terminals Ltd. is entitled to possession of the crane and nominal damages for its conversion.

APPEAL by plaintiffs from the decision of McDONALD, J. of the 8th of July, 1937, in an action in which the plaintiffs claim they are entitled in their respective interests to all the chattels and all the machinery and equipment, whether lying loose upon or affixed to the lands formerly owned by the Brunette Lumber Company Limited. On April 1st, 1927, the Brunette Lumber Company Limited, being the owner of certain lands, occupied as a sawmill site, executed a mortgage upon such lands in favour of the defendant company in the sum of $125,000. The defendant company was acting in the capacity of trustee for the other defendants. The Brunette Company had operated the mill for nearly 60 years. One G. W. Beach was the moving spirit and had control of the Brunette Company when he applied to the

defendant L. A. Lewis for the loan secured by the above mentioned mortgage. In June, 1929, the Brunette Company made an authorized assignment under the Bankruptcy Act, and in November, 1929, Beach became its trustee in bankruptcy. In July, 1930, Beach as such trustee borrowed from the defendant Cutler $60,000 to pay arrears of interest upon the mortgage, taxes and insurance premiums, and as security for the loan Beach executed a second mortgage on the property, and as collateral thereto executed a mortgage on certain chattels on the premises. On the 24th of June, 1932, the defendant company obtained a final order of foreclosure under its mortgage, and shortly after entered into possession of the premises. It was held on the trial that as to the chattels claimed neither the defendants nor Beach ever made any demand for delivery nor were they ever refused delivery by the defendants, and that this claim cannot succeed. It was further held that all the other articles claimed were fixtures and formed part of the security granted by the mortgage, and the action was dismissed.

The appeal was argued at Vancouver on the 25th, 26th, 27th and 30th of June, 1938, before MARTIN, C.J.B.C., MACDONALD and SLOAN, JJ.A.

McAlpine, K.C., for appellants: This is an action for conversion. The goods and chattels we claim were on the Brunette property. The crane in question was on a 24-foot square platform or wharf that extended into the water. Seven feet of the platform was on Brunette property and seventeen feet outside was on a water lot leased from the Crown. The lease of the water lot was forfeited for non-payment of rent prior to this action. We say first the crane was a chattel and not a fixture, and secondly, if a fixture we have a right to take it away. The Atlas engine, valued at $2,500, belonged to the Westminster Mills Ltd., and is admittedly a chattel. The defendants converted it to their own use.

J. W. deB. Farris, K.C. (on the same side): The chattels on the property are ours and they exercised control over them. First, there is the equipment in the box factory and the lumber carriers. The box factory was burned in 1935 but before the fire

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they exercised authority and we could not take them away. The next issue is in regard to the loading crane. The mill is along the bank of the Fraser River and the crane rests on a platform outside the wharf that is 24 feet square. Two stiff legs go from the top of the crane and are attached to the mill premises, and there are two guy wires that go from the top of the crane and are attached to the premises in different places. The crane is attached to the platform by iron casting. We say the structure is not on the mortgaged premises as it rests on that portion of the platform that is on the water lot and the water lot has reverted to the Crown. It is an appurtenance: see 4 C.J. 1468; English & Empire Digest, Vol. 44, p. 689, No. 5300; *Lister* v. *Pickford* (1865), 34 Beav. 576. The crane is not even on the land; it is a chattel: see *Canadian Credit Men's Trust Association, Ltd.* v. *Ingham* (1932), 46 B.C. 300; *Liscombe Falls Gold Mining Co.* v. *Bishop* (1905), 35 S.C.R. 539; *Canadian Credit Men's Trust Association* v. *Ingham* (1933), 47 B.C. 358; *Hoppe* v. *Manners* (1931), 66 O.L.R. 587. To be a fixture it must be for the permanent improvement of the freehold.

Griffin, K.C., for respondents: Beach, who was trustee in 1929, transferred the chattels to the defendant companies. The plaintiffs left the chattels on the company's lands without any objection whatever and for their own convenience, and Lewis let them encumber the property in this way. The defendants thought they were of little value and believed the plaintiffs thought the same. The defendants never claimed to own the chattels. The fire in 1935 was only in the box factory where the plaintiffs' chattels were, and the plaintiffs never asked the defendants for delivery of the chattels until April, 1936. There was no claim of negligence on the part of the defendants in relation to the fire. We claim the crane is a fixture attached to the mill and the plaintiffs have no right to it. They make a statement as to the value of the various chattels and put the total value at $375,000. This valuation is simply preposterous. Lewis never claimed the chattels, the plaintiffs did not claim the chattels, and there was no demand made for them. When the Atlas engine was attached to the premises it became a fixture and was included in the mortgage security. There is no evidence of

damages for delay in being deprived of the engine for two years. There was no unlawful retention of the property: see Clerk & Lindsell on Torts, 9th Ed., 319. Mere taking possession of a site is not taking possession of the articles on it: see *Forman & Co. Proprietary* v. *The Ship "Liddesdale,"* [1900] A.C. 190 at p. 204. The fixtures pass by the conveyance: see *Colegrave* v. *Dias Sontos* (1823), 2 B. & C. 76; *Nixon* v. *Sedger* (1890), 7 T.L.R. 112; Halsbury's Laws of England, Vol. 27, p. 894, sec. 1575. The plaintiffs were told in fact that they could have the Atlas engine and there was never any conversion of it. The crane is attached to the mill by two stiff-legs going from the top of the crane to the mill, where they are both firmly attached. There is also guy wiring going from the top of the crane to the mill where they are firmly attached. As to the water lot on which the platform rests on piles, it is Crown property. They allow us to use it and it gives us an easement of right. It is part of the mill building. The lease to the water lot was cancelled two years after the order absolute. There was no specific demand for the crane and in law they can only recover on their own title and not on their opponents' lack of title. You cannot transfer a chattel when it is a fixture, it must first be severed: see *Lee* v. *Gaskell* (1876), 1 Q.B.D. 700; *Sam Sick Hong* v. *Mah Pon* (1934), 48 B.C. 362; *Lancaster* v. *Eve* (1859), 28 L.J.C.P. 235. All rights previously acquired can be brought in: see *Hoare* v. *Metropolitan Board of Works* (1874), L.R. 9 Q.B. 296; *Moody* v. *Steggles* (1879), 12 Ch. D. 261 at p. 265; *Francis* v. *Hayward* (1882), 20 Ch. D. 773, and on appeal 22 Ch. D. 177; *International Tea Stores Company* v. *Hobbs,* [1903] 2 Ch. 165 at p. 171. The rule as to ships applies: see *Dundee* (1823), 1 Hag. Adm. 109; *Gale* v. *Laurie* (1826), 5 B. & C. 156; *Coltman* v. *Chamberlain* (1890), 25 Q.B.D. 328. A declaration as to ownership should not be made: see *Guaranty Trust Company of New York* v. *Hannay & Company,* [1915] 2 K.B. 536 at p. 575; *New York Life Insurance Co.* v. *Public Trustee,* [1924] 2 Ch. 101 at p. 122.

McAlpine, in reply, referred to Salmond on Torts, 9th Ed., 314; *Wansborough* v. *Maton* (1835), 4 L.J.K.B. 154; *Walker* v. *Clyde* (1861), 10 C.B. (N.S.) 381 at p. 396; *Van Toll* v.

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Wall (1859), 1 F. & F. 504; Halsbury's Laws of England, 2nd Ed., Vol. 11, p. 275: *Hiort* v. *Bott* (1874), L.R. 9 Ex. 86 at p. 89; *London Jewellers, Limited* v. *Sutton* (1934), 50 T.L.R. 193 at p. 194; *Philpott* v. *Kelley* (1835), 3 A. & E. 106; *Greenslade* v. *Evans* (1848), 12 L.T. Jo. 124; *Petre (Lord)* v. *Heneage* (1701), 12 Mod. 519; *Atkin* v. *Slater* (1844), 1 Car. & K. 356; *Poulton* v. *Wilson* (1858), 1 F. & F. 403; *Baldwin* v. *Cole* (1704), 6 Mod. 212.

Cur. adv. vult.

20th September, 1938.

MARTIN, C.J.B.C.: In this difficult and perplexing case we have all arrived at the same conclusion, which will be found set out in the reasons of our brother SLOAN, which is the judgment of the Court, after very careful consideration given to all aspects of the case.

It is unnecessary for me to add anything to what our brother SLOAN has said, except that I venture to do so on one aspect of the case, *viz.*, that I felt much impressed by the submission which was made to us by the appellant's counsel with respect to the finding of fact, at p. 800 of the appeal book, of the learned trial judge, in which he reflected very strongly upon the witness Beach, saying that "Beach was wily, evasive, and disengenuous; Lewis was candid, careful, and meticulous in his desire not to deceive." And he preceded that by saying that Beach had formed "the scheme of building up a claim against the defendants for heavy damages." It was submitted to us very strongly that this was a wrong approach to the facts of the case. And I must say that after giving it very anxious consideration I feel that that submission is very largely justified. The importance of the proper approach to a case is set out in a very recent decision of the Supreme Court of Canada, in *Logan* v. *The King*, [1938] 3 D.L.R. 145, in which, in the judgment of Mr. Justice Davis, which is the judgment of the majority of the Court, he draws attention at pp. 148 and 149 to the importance of a proper approach. It took me some trouble, I may say, to find a case that I thought would be appropriate to this present one and enable me to say it is a guide to me, and it is gratifying to have

so late a decision of the Supreme Court of Canada on this very important question of "approach." The result of it was that I felt that, in considering the matter of the present finding of fact, the learned judge's observations were not, I say it with respect, justified by the evidence to a very large extent; to such an extent, indeed, that I felt it incumbent upon me to view the matter very largely without that assistance of his finding of fact which I would have had the benefit of if he had approached the matter entirely in what, I venture to think, would have been the proper way.

The result is this, that after approaching it in what I think is the proper way, and without giving more weight to the learned judge's conclusions than I think they merit, I still am left in a position of such doubt in this very difficult case on the question of fact, that I find it impossible to say that the wrong conclusion was reached, and therefore I do not feel justified in differing from it. I might say again I would like it to be understood that I do not, with all respect, adopt the language he has used.

I do not think it desirable for me to add anything more, except to say that we give leave to speak to the question of costs.

The judgment of the Court was delivered by

SLOAN, J.A.: This is an appeal from a judgment of Mr. Justice McDONALD dismissing an action of the plaintiffs for damages for conversion of certain chattels. The appeal involves the determination of three separate issues, *viz.*, questions relating to (a) the material in the box factory; (b) the Atlas engine; and (c) the crane. It so happens that each group of this classification has little, if anything, in common with the others and each presents its own separate problem of fact and law.

The issue relating to the material in the box factory is a narrow one of fact, and the determination of it depends upon which of two major contestants in the action—Beach or Lewis—is to be believed.

It so happens that in August of 1935 the material in the box factory was virtually destroyed by fire. Beach (who was the real plaintiff) strenuously affirmed that he had demanded it of Lewis (the real defendant) and had been refused delivery of the

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material prior to its destruction. Lewis, while admitting that the material in the box factory was the property of Beach (or his companies) stubbornly denied the demand and refusal alleged by Beach and said, in effect, that when he acquired the mill premises and box factory from Beach's company—Brunette Lumber Company Limited—by mortgage foreclosure in 1933 (by his trustee the Westminster Trust Company) the chattels in question were considered to be of little value by all parties and they had remained in the box factory for the convenience of Beach. His suggestion was, in effect, that Beach had evidenced no interest in this material until the fire had consumed it.

It is apparent that both of these gentlemen cannot be right. The learned trial judge believed Lewis.

Counsel for Beach sought to convince us that the learned trial judge was in error in disbelieving Beach. He asked us to grant a new trial upon the ground that the learned trial judge, because of an improper prejudice against Beach, had failed to scrutinize, judicially, the evidence of Lewis. He submits that there has not been a proper adjudication upon this issue now being considered.

In support of this contention that the learned trial judge was unjustifiably prejudiced against Beach counsel drew to our attention the language of the learned trial judge who after describing Beach as "a man of deep laid schemes and long laid plans" said in his reasons for judgment:

> In the witness box, Beach was wily, evasive and disingenuous. Lewis was candid, careful, and meticulous in his desire not to deceive.

I must confess my inability to discover upon what testimony the learned judge based these opprobrious epithets. If I might hazard my own opinion of these two men founded upon my reading of the testimony I would think that it was a question of diamond cut diamond or as Mr. Justice Farwell said in *Broughton* v. *Snook* (1937), 107 L.J. Ch. 204 at 210, both of these gentlemen were equally " . . . quick on what is sometimes called the uptake."

However, the learned trial judge had the advantage of seeing these witnesses before him at the trial and as Lord Sumner said in *S.S. Hontestroom* v. *S.S. Sagaporack*, [1927] A.C. 37 at 47:

The higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.

While, as I have said, I find it difficult to justify the somewhat harsh terms in which the learned trial judge records his impressions of Beach I cannot say that he is wholly in error in the conclusion to which he came because if we strip from his reasons those terms to which objection was taken nevertheless the basic finding still remains that Lewis is believed a truthful witness and Beach an untruthful one. I do not consider it within my province to dispute that conclusion neither can I undertake to say that because of his disbelief of Beach the learned trial judge failed to scrutinize the evidence of Lewis with judicial impartiality. With deference I feel obliged to refuse to accede to the submission of appellants' counsel on this branch of the appeal. Before leaving it I would add one observation. It was argued by appellants' counsel that the learned trial judge did not attach sufficient weight to the letter of the 24th of October, 1933, from Lewis's solicitors to Beach, wherein the following paragraph appears:

We have informed you before and we now formally notify you again that the Westminster Trust Company contends that it is the owner of all the fixed plant, machinery and equipment situated on the property comprised in the foreclosure action. Further, it intends to deal with the said fixed plant, machinery and equipment as the owner thereof and it does not recognize your contention in respect of the same.

It is submitted that this letter should be interpreted to mean that in October of 1933 the Westminster Trust Company (trustee for Lewis) was exercising dominion over not only the fixed plant but the chattels included in the term "machinery and equipment." It is my opinion that when this letter is read in the light of the evidence the expression "fixed plant, machinery and equipment" is to be interpreted to mean "*fixed* plant, *fixed* machinery and *fixed* equipment." That is the construction which the learned judge below must have put upon it.

I now turn to consider the Atlas engine. This piece of machinery was purchased by the plaintiff Westminster Mills Limited in 1909 and it was loaned to the Brunette Lumber Company Limited in 1926 to be used by that company for the

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purpose of driving the headsaw in the mill premises in question. It is common ground that the Atlas engine was in place in the mill in April of 1927 when the Brunette Company mortgaged the mill premises to the Westminster Trust Company. This engine was operated by steam and was fastened down through cement beams and bolted into the mill. Generally speaking a fixture of this kind would in all probability pass to the mortgagee. *Hobson* v. *Gorringe,* [1897] 1 Ch. 182; *Reynolds* v. *Ashby & Son,* [1904] A.C. 466.

The Westminster Trust Company, however, did not seek to apply this principle below but on the contrary took the position, at the trial, that the Westminster Mills Limited could remove the Atlas engine as its property, and in consequence the learned trial judge made his adjudication accordingly.

The Westminster Mills Limited claimed "damages for trespass" in respect to this engine (paragraph 21 of the statement of claim) but such claim was not persisted in at the trial as appears from the reasons for judgment wherein the learned trial judge said "No damages for the delay in its removal have been claimed or proven" (*i.e.,* before him).

The Westminster Mills Limited, however, by amendment to its notice of appeal (December 2nd, 1937) complained to us that

> the learned trial judge erred in holding that the defendants had not converted the said Atlas engine, or in the alternative erred in not awarding damages for loss of use thereof.

After a full consideration of this matter, and not without some hesitation, I have come to the conclusion that, in the special circumstances of this case, I cannot say the learned judge was in error in the manner in which he dealt with this aspect of the case below and I am unable to accede to the submissions of counsel for the Westminster Mills Limited based upon the said amendment.

This brings me to a consideration of the questions relating to the crane. It is a large loading one, electrically motivated and was built by the Brunette Lumber Company Limited as part of a wharf which in turn is supported by piles driven into the bed and foreshore of the Fraser River upon property leased in 1927 by the Brunette Company from the Dominion Government "for

the purpose of erecting a wharf in connection with its lumber-manufacturing business."

In 1929, the Brunette Company made an assignment in bankruptcy, and Beach, who was appointed trustee, gave a bill of sale of the chattel property of the bankrupt company to the plaintiff North West Terminals Limited. This document is dated the 31st of July, 1933, and includes the crane.

In the meantime on June 27th, 1933, the Westminster Trust Company had obtained a final order of foreclosure of the properties of the Brunette Company. The mortgage did not cover that area (except for a small fraction thereof) upon which the wharf and crane were erected but the crane was attached to the mill buildings by two heavy "stiff legs" and guy wires.

The plaintiff North West Terminals Limited, relying upon whatever title it acquired to the crane under the bill of sale now seeks to recover damages from the Westminster Trust Company for alleged conversion of the crane or alternatively damages for preventing it from severing the crane from the freehold during the tenancy.

The learned trial judge had the advantage of a view and in his reasons for judgment said "I am strongly of the opinion that this crane is a fixture . . ." From a consideration of the evidence relating to the structure of the crane and the purpose of its erection I am of the opinion that it should be classed as a trade fixture and one which the tenant had the right to sever from the freehold during the tenancy. If that is so then the tenant had the right to sell the crane during the tenancy. The respondents urged upon us that as the crane was part of the freehold title could not be acquired thereto by bill of sale and while it is true that unsevered tenants' fixtures are not to be regarded as "goods and chattels," *Lee* v. *Gaskell* (1876), 1 Q.B.D. 700, nevertheless they can be sold by the tenant and by reason of a decision of this Court—*Sam Sick Hong* v. *Mah Pon* (1934), 48 B.C. 362—I feel bound to hold that the bill of sale of the crane operated not only as a document of title thereto but, in law, as a severance of the crane from the freehold.

In that case Sam Sick Hong erected a laundry on premises which he owned and during construction installed certain

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laundry machinery. He then borrowed $3,500 from one Dawson and gave as security two mortgages, one on the real estate, the other a chattel mortgage on chattels and fixtures each expressed to be collateral to the other and to secure the same advance. The chattel mortgage was assigned to one Mah Pon, who was a competitor of Sam Sick Hong, and he lost no time in seizing the effects and machinery included in the chattel mortgage. Sam Sick Hong thereupon brought his action alleging the seizure was illegal upon the ground that the chattel mortgage covering fixtures was one affecting lands and that in consequence it fell within the provisions of the Mortgagors and Purchasers Relief Act, 1932, and that Mah Pon had neglected to secure an order under that Act entitling him to enforce his security. Mah Pon answered this by saying, *inter alia,* that the chattel mortgage operated as a severance of the fixtures from the freehold and that consequently all that he seized were chattels.

The action came to trial before ROBERTSON, J., who held that Sam Sick Hong was right and that the chattel mortgage, on the special facts of the case, did not operate to sever the fixtures from the freehold and that the seizure was illegal. In his reasons for judgment he made two pronouncements of importance here. In the first place following *Meux* v. *Jacob* (1875), 44 L.J. Ch. 481; L.R. 7 H.L. 481, he concluded that he "must consider the question apart from the provision of the Bills of Sale Act" and after a careful consideration of the relevant authorities as to the effect of the chattel mortgage he said:

> In my opinion the authorities show that when the question is whether fixtures have ceased to be part of the freehold the test is has there been actual severance or does the contract provide for immediate severance?

He was of the opinion that the chattel mortgage did not provide for immediate severance.

Mah Pon appealed to this Court and the appeal was dismissed. MACDONALD, C.J.B.C. (as he then was), at p. 373, said:

> I have read the very careful and illuminating reasons for judgment of Mr. Justice ROBERTSON, the trial judge, and can add nothing to what he has so well said.

MARTIN, J.A. (now Chief Justice of British Columbia), dis-

sented holding that the chattel mortgage did have the effect of severance. He said at p. 373:

> . . . under the two concurrent instruments in question there was a severance in law from the land of the articles set out in the chattel mortgage which should be regarded as just as effective as though there had been a physical severance: . . .

Later he expressed the view that the cases do not indicate that the contract in order to operate as a severance must "provide for immediate severance."

McPHILLIPS, J.A., indicated his entire agreement with ROBERTSON, J., in "his conclusions upon fact and law."

MACDONALD, J.A. said at p. 376:

> In my view it is immaterial whether or not the learned trial judge was right in holding that in the absence of physical severance such a contract to effectuate a change in the character of the property must provide for, or contemplate immediate severance. It is enough to dispose of the case on the basis of appellant's submission, *viz.*, that by contract the parties agreed to treat these articles as chattels. If that is not so the appeal fails.

Later at p. 379, after reviewing the authorities, he said:

> I find therefore nothing in the cases to overrule the view I venture to express, *viz.*, that on the specific facts, with "fixtures" included in both documents there was no severance by contract as intention cannot be definitely ascertained.

McQUARRIE, J.A. said at p. 380:

> In my opinion, after consideration of the authorities cited by counsel, on behalf of both parties, if Exhibit 5 [the chattel mortgage] stood alone it might be argued by appellants that the parties by executing that document had converted what would otherwise be part of the freehold into chattels, or, to put it another way, that they had by executing Exhibit 5 provided that fixed chattels should lose their character as a portion of the realty but in the case at Bar that is not open to them as both Exhibit 5 and Exhibit 6 [the land mortgage] were made concurrently, are collateral to each other and both cover the fixtures.

This Court was unanimously of the view, as I read that case, that parties by contract, may sever fixtures from the freehold and thus convert them into chattels just as effectively as if an actual physical severance had been made in fact.

To my mind the bill of sale from the trustee in bankruptcy of the Brunette Company to the plaintiff North West Terminals Limited must be regarded in law as an act of severance of the crane from the freehold during the tenancy. That such a severance by contract is effective not only between the parties to the contract but as against third parties follows I think from

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Rose v. *Hope et al.* (1872), 22 U.C.C.P. 482, wherein it was held that a subsequent mortgage of land cannot prejudice a prior chattel mortgage security on fixtures ordinarily passing with the freehold.

Once the crane is converted into a chattel by a contract of sale it follows that an action for conversion can be maintained.

The question therefore now to be considered is whether or not the plaintiff North West Terminals Limited has made out a case of conversion. In my view it has. The defendant L. A. Lewis not only disputed the title of the plaintiff North West Terminals Limited but asserted his own title to the crane claiming that it passed to his trustee Westminster Trust Company as appurtenant to the mortgage.

The following appears in the evidence of Lewis:

Well, do you know that [the crane] is not upon any of the property that was mortgaged to your company? I don't know.

But you claim it is yours? Yes, I claim it is mine.

And you will not allow us to take it away? Not unless the judge says so.

And at pp. 429-30:

About that crane that is out in the river, on the land not mortgaged? Yes?

Do you claim your mortgage extends there? Yes. . . . You see, that crane is all fastened and connected with the mill. . . . And there is a ladder up to it, and it is all wired to the mill. So, why shouldn't I claim it?

To my mind the defendant L. A. Lewis, by himself, and through his trustee Westminster Trust Company improperly exercised dominion over the crane and thus is liable in damages for the conversion of it. *Hiort* v. *Bott* (1874), L.R. 9 Ex. 86; *Canadian Orchestraphone Ltd.* v. *British Canadian Trust Co.*, [1932] 2 W.W.R. 618.

The learned judge below was of opinion that the crane passed to the mortgagee under the mortgage but as I understood the submission of counsel for respondent before us he conceded that such a conclusion could not be supported and that as he considered the crane a fixture which was not severed during the tenancy the title to it vested in the Crown in 1935, as owner of the freehold. He resisted the claim of the North West Terminals Limited for damages for conversion by denying its title and right to possession claiming that the bill of sale was ineffective to transfer title: that trover would not lie for an unsevered

fixture: that from 1933 to 1935 the Westminster Trust Company had acquired at least a right of user in the nature of an easement and that this easement gave the Westminster Trust Company some sort of right to possession. He further added that in any event no demand has ever been made for delivery. When once it is determined that the bill of sale was effective to pass title and operated in law as a severance of the crane from the freehold then the submissions of counsel for the respondents, with deference, cannot be supported. I do not consider that a demand prior to action is necessary to found this branch of this action in the circumstances of this case.

Counsel for the appellant also took the position that the title to the crane, if a fixture, was now in the Crown, as part of the freehold but in my opinion the crane was effectively severed by the bill of sale in July of 1933 and in consequence, as between the parties to this action, the Crown not having been joined, the crane, being a chattel after severance, is the property of the plaintiff North West Terminals Limited and did not pass to the Crown on the termination of the tenancy in 1935.

Beach testified that the value of the crane was $2,500 and I do not think that this figure has been disputed. If I am in error in so assuming counsel may speak to it.

The proper order in my opinion to make under the circumstances is that the plaintiff North West Terminals Limited recover this sum provided, however, that if the plaintiff North West Terminals Limited wishes to take possession of the crane it should be at liberty to remove it and if it does so then I would reduce the damages to the nominal sum of $10—*Argles* v. *M'Math* (1895), 26 Ont. 224; affirmed (1896), 23 A.R. 44.

The appeal should be allowed to the extent indicated and upon the other issues the appellants fail.

Costs to be spoken to.

Appeal allowed in part.

Solicitors for appellants: *Farris, Farris, McAlpine, Stultz, Bull & Farris.*

Solicitors for respondents: *Cassady & Lewis.*

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April 19, 26.

MERCER v. THE MOLER SYSTEM OF BARBER SCHOOLS.

Negligence—Hairdresser—Permanent wave—Plaintiff insisted on having treatment after warning—Damages—"Volenti non fit injuria."

The plaintiff purchased a preparation or lotion and treated her hair herself by bleaching it and changing it from a dark hue to a light colour. Shortly after she came to Vancouver and went to defendant's beauty parlour for further treatment, and particularly to have treatment for a permanent wave. She was cautioned by the defendant's employee that her hair would break off at the ends owing to its bleached condition, and upon her insisting that the treatment be given the defendant requested her to sign the following document, which she did: "On the 5th day of Dec. 1938, I take this permanent wave giving at the Moler Beauty Parlour entirely at my own risk owing to its bleached condition." The treatment was then administered, and on combing her hair when she arrived home the hair came out to an alarming extent and changed to its original colour. In an action for damages:—

Held, that there was no negligence on the defendant's part and no defect in the equipment used. The plaintiff deliberately took the risk and must take the consequences. It was a foolhardy and unreasonable act to expose herself to the risk, and having done so she did it at her own cost.

ACTION for damages resulting from the negligence of the defendant in giving a permanent wave to the plaintiff's hair at the Moler Beauty Parlour in Vancouver on the 5th of December, 1938. Tried by MORRISON, C.J.S.C. at Vancouver on the 19th of April, 1939.

Elder, for plaintiff.
P. A. White, for defendant.

Cur. adv. vult.

26th April, 1939.

MORRISON, C.J.S.C.: This is an action for the recovery of damages for an injury committed.

The plaintiff is a comparatively young woman whose hair had been of a dark hue, but, at some juncture, she decided to change the colour and to become what in the vernacular is termed a "blonde." Whilst on tour of Rhode Island with her husband, who is a professional hockey player, she purchased a preparation

or lotion and treated her hair herself by bleaching it. Upon her return to Vancouver she went to the defendant's concern to get further treatment and particularly to have treatment for a permanent wave. The treatment was duly administered. After getting back to her home she apparently did what was usual, she began to comb or check up the result of the operation and found to her chagrin that her hair came out or off as the case may be. She had been cautioned by the defendant's employee that her hair would break off at the ends. That she understood, but she did not expect it would "come out" nor that what was left would be restored to its original natural colour. It was certainly a misadventure for her. It appears that after being warned of the danger or risk and upon her insisting that the treatment be given, the defendant requested her to sign and she did sign the following document:

Dec. 5, 1938.

On this 5th day of Dec. 1938 I take this permanent wave giving at the Moler Beauty Parlor entirely at my own risk owing to its bleached condition.

Signed Mrs. L. Mercer.

Witness—Miss R. Platt.

The defendant's counsel submits that that is an effective answer to her claim against his client. He distinguishes the case of *Sanford* v. *Hemphill Diesel Engineering Schools Ltd.* (1936), 51 B.C. 268 as in that case McDONALD, J. found negligence.

The plaintiff impressed me as a forthright sophisticated young woman who, knowing exactly what she wanted, came to the defendant for treatment and not for advice. She deliberately took this risk and must also take the consequences. I find there was no negligence on the defendant's part. The employee who treated her hair is a middle-aged experienced hairdresser who went, short of refusing to administer the treatment, as far as was reasonably necessary, and used sufficient care and skill in the performance of it. I find there was no defect in the equipment used.

The plaintiff pleads *res ipsa loquitur.*

The rule that it is for the plaintiff to prove negligence, and not for the defendant to disprove it, is in some cases one of considerable hardship to the plaintiff; . . . This hardship is avoided to a considerable extent by the rule of *res ipsa loquitur*:

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Salmond on Torts, 467. If, where the *onus* is thus cast upon the defendant to prove negligence, he produces a reasonable explanation equally consistent with negligence and no negligence, the burden of proving the affirmative, that the defendant was negligent and that his negligence caused the accident, still remains with the plaintiff. *The Kite*, [1933] P. 154. The plaintiff has not, in my opinion, discharged the *onus* which I find was upon her of proving negligence.

The defendant pleads the defence of consent and invokes the maxim *volenti non fit injuria*.

"No act is actionable as a tort at the suit of any person who has expressly or impliedly assented to it: *Volenti non fit injuria.* No man can enforce a right which he voluntarily waived or abandoned":

Slesser, L.J. in *Chapman* v. *Ellesmere (Lord)*, [1932] 2 K.B. 431 at 463.

The question is not whether he knew of the danger, but whether in fact he agreed to run the risk:

Salmond, p. 40.

Was the conduct of the plaintiff reasonable, having regard to the magnitude of the risk and the urgency of the occasion? I find it was a foolhardy and unreasonable act to expose herself to the risk and having done so she did it at her own cost. The maxim, *supra*, in its wide sense covers three distinct classes:

(a) Those in which the plaintiff has agreed expressly or impliedly to suffer harm or to run the risk of it;

(b) Those in which, because the plaintiff knows of the danger, the defendant has done no wrong in causing it;

(c) Those in which, because the plaintiff knows of the danger, his act in voluntarily exposing himself to it is an act of contributory negligence, and so deprives him of an action:

Salmond, pp. 42-3.

The references to Salmond are in the 8th edition.

The action is dismissed.

Action dismissed.

STAVE FALLS LUMBER COMPANY LIMITED AND AITKEN v. WESTMINSTER TRUST COMPANY *ET AL.* (No. 2).

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Jan. 31;
Feb. 7.

Judgment—Appeal—Security for payment of judgment—Appellant a trust company—Security given under Trust Companies Act—Effect of—R.S.B.C. 1936, Cap. 45, Sec. 47 (3); Cap. 57, Sec. 30.

When an appellant required to give security for payment of the judgment is a trust company which has given the Minister of Finance the security required by section 47 (3) of the Trust Companies Act, the effect of the said Act must be taken into consideration in construing section 30 of the Court of Appeal Act.

Held, that said security given under the Trust Companies Act was security within the meaning of section 30 of the Court of Appeal Act, and the Court had jurisdiction to declare it satisfactory, and that in the present case said security and additional security of $10,000 by cash or bond, accompanied by a declaration that the additional security had been given without prejudice to the rights of the respondents as creditors under said section 47 (3), should be declared satisfactory within the meaning of section 30 of the Court of Appeal Act, and accordingly execution should be directed to be stayed.

APPLICATION by defendant Westminster Trust Company for an order declaring that the security offered by the said defendant to the plaintiff as security for the payment of the judgment herein (the sum being approximately $50,000) is satisfactory. The facts are set out in the reasons for judgment. Heard by FISHER, J. at Vancouver on the 31st of January, 1939.

Walkem, K.C., for plaintiffs.

Griffin, K.C., and *Edmonds, K.C.,* for defendant Westminster Trust Co.

J. W. deB. Farris, K.C., and *E. B. Bull,* for defendant Bank of Toronto.

L. St. M. Du Moulin, for defendant, Allen McDougall, Butler Shingle Co.

Bull, K.C., for defendant Montreal Trust Company.

Cur. adv. vult.

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STAVE FALLS LUMBER CO. LTD. AND AITKEN v. WESTMINSTER TRUST CO.

7th February, 1939.

FISHER, J.: This is an application on behalf of the defendant Westminster Trust Company for an order declaring or directing that the security offered by the said defendant to the plaintiffs as security for the payment of the judgment herein, which is for the sum of approximately $50,000, is satisfactory to a judge of this Court within the meaning of section 30 of the Court of Appeal Act, R.S.B.C. 1936, Cap. 57, or declaring or directing what security is satisfactory. Counsel for the said defendant stated that he was instructed to offer the following security:

1. The company will give a registrable declaration to the effect that the mortgage for $200,000 given by the Trust Company to the Minister of Finance pursuant to section 47 of the Trust Companies Act upon their building in New Westminster is held by him in accordance with the statute as security for the company's creditors in the Province and in particular for the plaintiffs. The property is: Lot 1, city block 13, in the city of New Westminster, being the property at the corner of Columbia Avenue and Begbie Street. It is assessed for $215,000 and is carried in the company's balance sheet at $222,744.

2. In the alternative the company will give to the plaintiffs a first mortgage on certain parcels of land which are clear of encumbrances and are assessed for a total amount of $85,935.00.

The relevant sections of the Court of Appeal Act are as follows:

29. (1.) The appellant shall deposit with the Registrar of the Court appealed from, as security for the costs to be occasioned by any appeal, such sum, not exceeding two hundred dollars, as may be fixed by a Judge of the Court appealed from. . . .

30. Upon the perfecting of such security, execution shall be stayed in the original cause: Provided that:—

(*d.*) If the judgment appealed from directs the payment of money, either as a debt or for damages or costs, the execution of the judgment shall not be stayed until the appellant has given security to the satisfaction of the Court appealed from, or of a Judge thereof, that if the judgment or any part thereof is affirmed the appellant will pay the amount thereby directed to be paid, or the part thereof as to which the judgment is affirmed, if it is affirmed only as to part, and all damages awarded against the appellant on such appeal.

The said Trust Companies Act provides in said section 47 (3) as follows:

47. (3.) The Minister shall hold the deposit of a trust company as security for its depositors and creditors in the Province, and for the faithful execution of all trusts accepted by or lawfully imposed upon it in the Province, and for its obligations generally within the Province.

In his affidavits filed on this application Mr. W. D. Bowden, secretary and manager of the defendant company, says, in part, as follows:

Under the provisions of subsection (3) of section 47 of the Trust Companies Act the said defendant, Westminster Trust Company issued a mortgage in favour of the Minister of Finance securing the sum of $200,000 on its Westminster Trust Building and site situate on the corner of Columbia and Begbie Streets, in the City of New Westminster and such mortgage is still held by the Minister of Finance as security for its depositors and creditors in the Province and for the faithful execution of all trusts accepted by or lawfully imposed upon it in the Province and for its obligations generally within the Province. . . .

I have conferred with Mr. McTavish, assistant manager of the Vancouver office of Canadian Surety Company, another very large surety and guaranty company in Canada, who advised me that it was the general practice of surety companies to only issue appeal bonds on having cash or easily marketable bonds deposited as collateral to same.

That as all the bonds and practically all the cash owned by Westminster Trust Company is allocated and earmarked in respect of the deposit department and trust department of said Westminster Trust Company it is impossible for said Westminster Trust Company to provide either the cash or bonds as collateral security for an appeal bond of a surety company as required by such companies or on the other hand to deposit same in Court pending the appeal herein.

I have already held in this matter that I have jurisdiction to approve of security other than cash or a security company bond.

In his statement as aforesaid counsel for the said defendant apparently offers as security the said mortgage or deposit held by the Finance Minister. I think in any event the plaintiffs share along with others the benefit of the said mortgage deposited as security under the subsection as aforesaid and I do not think that the declaration offered would make the position under the statute any better for the plaintiffs except in this way that if necessary it would make it clear that any specific security held by the plaintiffs was without prejudice to the rights of the plaintiffs as creditors under said section 47 (3).

I think the real issue is whether the security offered can be said to be security within the meaning of said section 30. It must of course be admitted by the said defendant that the mortgage for $200,000 to the Minister of Finance as aforesaid does not contain any specific reference to the judgment herein and therefore does not state in the words of said section 30 "that

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Fisher, J.

if the judgment or any part thereof is affirmed the appellant will pay the amount thereby directed to be paid." If the said section must be literally construed altogether apart from the Trust Companies Act therefore it might reasonably be argued that such security, even if deemed ample by the Court or a judge, would not be security given within the meaning of the section. I think, however, that, where the appellant required to give security is a trust company under the Trust Companies Act, the effect of such Act must be taken into consideration and the provision of said section 30, Court of Appeal Act, construed by what appears to have been the intention of the Legislature. In *Hawke* v. *Dunn,* [1897] 1 Q.B. 579, 66 L.J.Q.B. 364, Hawkins, J. said at p. 586:

> Acts of Parliament ought, like wills or other documents, to be construed so as to carry out the object sought to be accomplished by them, so far as it can be collected from the language employed.

See also *Baumwoll Manufactur von Carl Scheibler* v. *Furness* (1892), 62 L.J.Q.B. 201; [1893] A.C. 8, at p. 20, where Lord Herschell, L.C. said:

> It seems to me that in order to determine the effect of legislation one must look at the object which it had in view.

I think that the object which the legislation had in view was to ensure that sufficient security for payment of the judgment should be given by the appellant before execution should be stayed. Under the provisions of the Trust Companies Act as aforesaid an appellant trust company has already given security approved by the inspector of trust companies as protection for its creditors and the respondent, so long as the judgment stands, is one of its creditors and entitled to share in such protection. In some cases the giving of such security might make it difficult, perhaps impossible, for an appellant trust company to duplicate the security by sureties or otherwise and I cannot think that the Legislature intended to impose such a burden or handicap upon a trust company. Looking therefore at the object sought to be accomplished by the legislation I reject the contention of counsel on behalf of the plaintiffs that in considering the security to be given under said section 30 the security already given by the appellant under the Trust Companies Act must be entirely ignored. I therefore hold that in the present case such security

already given can be said to be security within the meaning of said section 30 and that I have jurisdiction to declare it satisfactory.

I have still to consider whether I should declare such security satisfactory either by itself or along with other security. I have affidavits as to the present value of the assets of the said defendant company and the balance sheet of the company as at December, 1937, has also been placed before me. After careful consideration of all the material, I have to say that the security deposited with the Finance Minister and additional security in the sum of $10,000 by cash and/or a bond of a security company or other sureties, satisfactory to the district registrar of this Court, would seem ample security to me and, if the appellant in one week will give to the plaintiffs such additional security and also a declaration to the effect suggested, making it clear that such additional security has been given without prejudice to the rights of the plaintiffs as creditors under said section 47 (3), I will make an order declaring that appellant has given security to my satisfaction within the meaning of said section 30 of the Court of Appeal Act and directing that execution should be stayed accordingly. In the meantime execution will be stayed for one week.

Application granted.

TRAPP MOTORS LIMITED v. PAWSON.

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Nov. 24, 25.
1939
Feb. 1.

Insurance, automobile—Motor repairers insured—Defendant's car left for repairs—Loan of car to defendant in meantime—Accident—Insurance company settle amount of damages and pay injured—Whether "owner's policy"—Subrogation—Liability of defendant—R.S.B.C. 1936, Cap. 133, Secs. 153, 165 (1) and 168; Cap. 195, Sec. 74 (1); B.C. Stats. 1937, Cap. 45, Sec. 11 (1).

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Defendant left his motor-car in the plaintiff's garage for repairs. The plaintiff allowed the defendant to use one of its cars while his car was being repaired. The defendant, while driving the plaintiff's car, ran into and injured one Mrs. Lyons. Under section 11 (1) of the Motor-vehicle Act Amendment Act, 1937, the defendant was deemed to be driving the

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plaintiff's car at the time of the accident as the agent or servant of the plaintiff and in the course of his employment, so that the plaintiff was thus jointly liable with the defendant for any negligent action of the defendant while driving his car. The plaintiff was insured against public liability by a policy of insurance with The Merchants' Marine Insurance Company Limited and upon Mrs. Lyons instructing her solicitor to take action, the adjuster of the insurance company arranged a settlement and paid Mrs. Lyons $250 for damages and $44.50 expenses, and obtained a release from her of all liability. The insurance company then brought this action under section 165 (1) of the Insurance Act in the name of the plaintiff, claiming $294.50 from the defendant. It was *held* on the trial that the policy in question was an "owner's policy" within section 153 of the Insurance Act, and as section 168 of said Act applies in the defendant's favour, the action was dismissed.

Held, on appeal, reversing the decision of WHITESIDE, Co. J. (O'HALLORAN, J.A. dissenting), that the policy is not an "owner's policy" within the statutory definition thereof nor is the defendant covered under Item 4 (*b*) of the policy. It therefore follows that the defendant cannot claim its protection.

By virtue of section 165 (1) of the Insurance Act, the insurance company is subrogated to all the "rights of recovery" of the plaintiff, and as the plaintiff could recover from the defendant, therefore this action may be maintained by the insurance company in the name of the plaintiff.

APPEAL by plaintiff from the decision of WHITESIDE, Co. J. of the 11th of July, 1938, dismissing the plaintiff's action to recover from the defendant the sum of $294.50, the amount paid by the plaintiff in respect of a settlement of a damage claim resulting from an accident through the driving of an automobile by the defendant. The Merchants' Marine Insurance Company Limited issued to Trapp Motors an insurance policy covering their cars driven by the company's customers. The defendant had his own motor-car in the garage of the plaintiff for repairs. While it was being repaired the plaintiff allowed the defendant to take and use another car that belonged to the plaintiff. During the time the plaintiff was effecting repairs to the defendant's car, namely, on the 27th of January, 1938, the defendant, while driving the car loaned him by the plaintiff in an easterly direction along Marine Drive, struck and injured one Elizabeth Lyons. Mrs. Lyons demanded compensation and the insurance company, through its adjuster, interviewed the defendant and asked him to sign the following document:

I, the undersigned, Harry Pawson, hereby request and authorize you to

settle the claim of Mrs. Jas. Lyons against me, arising out of the accident which occurred on the 27th day of January, 1938, for such amounts as you see fit, or if you deem it advisable to defend any action or actions that may be instituted by her against me.

I agree that any such settlement or defence shall in no way be deemed to be an admission of liability on your part under your policy of automobile insurance No. 130, issued to Trapp Motors Ltd. and covering the Oldsmobile Sedan involved in the accident aforementioned, nor a waiver of any breach of any statutory condition or of any of your rights under the policy or the "Insurance Act." Any settlement that may be made by you shall be deemed to have been made after judgment against me in an action by the said Mrs. Jas. Lyons and your and my respective rights and obligations to each other shall be based accordingly.

And I hereby expressly agree that any settlement effected or any steps taken to effect a settlement or any defence of any action or actions which may be instituted against me shall be without prejudice to any and all of your rights under the aforesaid automobile insurance policy or the "Insurance Act."

IN WITNESS WHEREOF I have hereunto set my hand and seal this 12th day of February, 1938.

H. Pawson. [Seal]

Witness:
A. E. Howard.

After the defendant signed the document the Insurance Company paid Mrs. Lyons's solicitor $250, $15 for medical fees and $29.50 as adjuster's fees, making the total claim against the defendant $294.50.

The appeal was argued at Vancouver on the 24th and 25th of November, 1938, before MARTIN, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

McAlpine, K.C., for appellant: The plaintiff entrusted Pawson with one of its cars while Pawson's car was being repaired. He ran into a Mrs. Lyons and injured her. She threatened action. Trapp Motors Limited had insurance covering the accident. Before negotiating settlement the insurance adjusters obtained from Pawson an authority to settle. A settlement was then made and the Insurance Company paid $294.50. Demand was made on Pawson to pay this amount. He refused. The learned judge decided the policy covered both parties and dismissed the action. Pawson was responsible for the accident and he should pay as the policy did not cover him.

C. D. McQuarrie, for respondent: This is an unusual policy

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and requires approval under section 174 of the Act, but in any event the policy covers the defendant: see *Continental Casualty Co.* v. *Yorke*, [1930] S.C.R. 180 at p. 185.

McAlpine, in reply, referred to *McFee* v. *Joss* (1925), 56 O.L.R. 578.

Cur. adv. vult.

1st February, 1939.

MARTIN, C.J.B.C.: This case, though small in amount, has given us a great deal of difficulty, largely from the lack of precise evidence before us on the more important points, due apparently to inadequate examination of the witnesses and the scantiness of the learned judge's notes, thereby rendering certain matters of fact somewhat obscure which should have been made quite plain. However, doing the best we can under the unsatisfactory circumstances, we have reached the conclusion, that is to say my brother SLOAN and myself, our brother O'HALLORAN dissenting, that the appeal should be allowed for reasons which will be handed down by my brother SLOAN.

SLOAN, J.A.: This is an appeal from a judgment of WHITESIDE, Co. J., dismissing the plaintiff's action.

The facts are as follows: The appellant company (plaintiff below) carries on a garage business at the City of New Westminster. The respondent left his automobile with the appellant for extensive repairs which took over a month to complete. While his automobile was in the repair shop the respondent visited the premises to see how the work was progressing. In consequence of a conversation with an officer or employee of the appellant the respondent was loaned an automobile of the appellant to drive during the remaining time his own car would not be available.

On the 27th of January, 1938, the respondent, whilst driving the appellant's automobile, struck and injured one Elizabeth Lyons.

By reason of section 74A (1) of the Motor-vehicle Act, R.S.B.C. 1936, Cap. 195 (as enacted by section 11 of the Motor-vehicle Act Amendment Act, 1937, Cap. 54, B.C. Stats. 1937) the respondent was deemed to be driving the appellant's automobile at the time in question as the agent or servant of the

appellant and in the course of his employment. The appellant, by reason of the statute, was thus jointly liable with the respondent for any negligent action of the respondent whilst he was driving the appellant's automobile.

Mrs. Lyons instructed her solicitor to take appropriate action against "the proper parties," *i.e.,* the appellant and respondent.

The appellant was insured against public liability by a policy of insurance with The Merchants' Marine Insurance Company Limited, and its adjuster, Mr. Howard, arranged a settlement with Mrs. Lyons for $250 and obtained from her a release of the appellant and respondent from any cause of action arising out of the accident. To my mind it is an irresistible inference that such payment was made by the insurance company because of its obligations under the policy in question. The insurance company thereupon brought this action in the name of the insured (appellant) against the respondent under section 165 (1) of the Insurance Act, R.S.B.C. 1936, Cap. 133, claiming $294.50 made up of the $250 paid to Mrs. Lyons plus $44.50 for expenses incurred incident to the settlement.

The respondent resisted the claim alleging (*inter alia*) that the appellant's policy of insurance covered him as well as the appellant and in consequence no right of subrogation under said section 165 (1) could arise. He was successful on this issue below. The learned trial judge held that the policy in question was an "owner's policy" as defined in section 153 of the Insurance Act, and that in consequence section 168 of that Act applied. Section 168 is, in part, as follows:

> Every owner's policy shall insure the person named therein, and every other person who, with his consent, uses any automobile designated in the policy, . . .

The first question for determination by us is whether or not the policy in question here is an "owner's policy" within the statutory definition thereof. The relevant provision in section 153 reads as follows:

> "Owner's policy" means a motor vehicle liability policy insuring a person named therein in respect of the ownership operation or use of any automobile owned by him and designated in the policy.

In my opinion the policy in question here does not, with respect,

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Sloan, J.A.

fall within that definition, neither, in the form in which it is can the respondent claim its protection.

The policy describes "the applicant" as "Trapp Motors Limited." Item 4 of the policy reads as follows:

> The operations of the applicant to be insured are limited or restricted as follows:
>
> (a) The use and maintenance, including ordinary repair of that portion only of the premises at the location(s) described in Item 1, which portion is used in the applicant's business, of an automobile sales agency, public garage, automobile service station, repair or paint shop, including the sidewalks or roadways immediately adjacent to such premises, and the conduct at the said location of such business and
>
> (b) The use or operation of any automobile, tractor or trailer, whether owned by the applicant or not, for all purposes of such business, and for pleasure use within Canada, Newfoundland, or the United States of America, or upon a vessel plying between the ports within those countries, but excluding the use or operation of any such automobile, tractor or trailer, for the carrying of passengers, goods or materials for compensation, or while rented or hired to others.

The respondent claims to be included in the language of Item 4 (b). It seems to me that Item 4 (b) to have any meaning at all must be considered as if it read:

> The use or operation by the applicant of any automobile . . . whether owned by the applicant or not. . . .

If that is so then Item 4 (b) affords no assistance to the respondent.

I do not view this contract as an "owner's policy" because I cannot find any particular automobile "designated in the policy." It is a form of open policy (although described as "restricted") designed to protect the applicant from liability arising out of the specified use or operation of automobiles by the applicant and certain of its nominated officers and employees (Item 3). The insurance company does not, under this contract undertake to insure everyone to whom the applicant may at its pleasure see fit to loan gratuitously, an automobile "whether owned by the applicant or not."

As, in my view, the policy is not an "owner's policy" within the statutory definition thereof nor is the respondent covered under Item 4 (b) thereof, it follows that the respondent cannot claim its protection.

It was not any part of the contract for repairing his car that

he should be furnished *interim* transportation by the appellant neither is it suggested that he contemplated purchasing the car loaned to him.

Counsel for the respondent submitted as an additional argument that the appellant has no right of recovery against the respondent and in consequence the insurance company, for whose benefit this action was brought, cannot succeed in its claim under section 165 (1) of the Insurance Act, which reads as follows:

The insurer, upon making payment or assuming liability therefor under a contract of automobile insurance, shall be subrogated to all rights of recovery of the insured against any person, and may bring action in the name of the insured to enforce such rights.

This submission of the respondent is based upon his contention that said section 74A (1) of the Motor-vehicle Act could be invoked only in an action brought by Mrs. Lyons; that she did not bring action and that the said section was never intended to apply to an action of this character brought in reality by the insurance company. If he is right in this submission then the insurance company cannot set up the relationship of principal and agent or of master and servant between the appellant and respondent as the foundation of "the right(s) of recovery" of the insured (appellant) and hence he contends the basic element necessary to found its own claim under section 165 (1) has no existence.

With respect I cannot put such a limited construction upon section 74A (1) of the Motor-vehicle Act, the apposite wording of which is as follows:

74A (1.) In an action for the recovery of loss or damage sustained by any person by reason of a motor-vehicle on any highway, . . . every person driving or operating the motor-vehicle who acquired possession of it with the consent, express or implied, of the owner of the motor-vehicle, shall be deemed to be the agent or servant of that owner and to be employed as such, and shall be deemed to be driving and operating the motor-vehicle in the course of his employment; but nothing in this section shall relieve any person deemed to be the agent or servant of the owner and to be driving or operating the motor-vehicle in the course of his employment from the liability for such loss or damage.

This is, in form, an action for the recovery of loss or damage sustained by the appellant by reason of the respondent's operation of a motor-vehicle with its consent and in my opinion it is an action within the meaning of section 74A (1). It follows that

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the respondent (by the said section) is deemed to be the agent or servant of the appellant and operating the motor in the course of his employment. As the section renders the appellant liable for the negligence of the respondent by reason of the artificial and statute-created relationship of principal and agent or of master and servant I see no valid reason for holding that the principal or master is not entitled to exercise those common law rights incident to that relationship and maintain its action against its agent or servant for indemnity for damage sustained by it by reason of the negligent action of its agent or servant. *Stumore, Weston & Co.* v. *Breen* (1886), 12 App. Cas. 698; *Baxter* v. *Capp* (1938), 55 T.L.R. 131; *Savage* v. *Walthew* (1707), 11 Mod. 135; *Sagar* v. *H. Ridehalgh & Son, Ld.*, [1931] 1 Ch. 310; Macdonell on Master and Servant, 2nd Ed., 161; Halsbury's Laws of England, 2nd Ed., Vol. 22, sec. 307, pp. 183-4; Charlesworth's Law of Negligence, 66. And see *McFee* v. *Joss* (1925), 56 O.L.R. 578.

By virtue of section 165 (1) of the Insurance Act (quoted above) the insurance company is subrogated to all the "rights of recovery" of the appellant and as the appellant could recover from the respondent therefore this action may be maintained by the insurance company in the name of the appellant.

Before leaving this appeal I would refer to Exhibit 3, which reads as follows: [already set out in statement].

It appears from the evidence that Mr. Howard, the insurance adjuster, presented this document to the respondent for signature but the respondent refused to sign "until he had seen Messrs. Frank and Tom Trapp of Trapp Motors Limited." The meeting requested by the respondent was held and "after considerable discussion of the contents of Exhibit 3," the respondent signed the same. What was discussed at that meeting was not disclosed at the trial.

I am not at all clear as to why Exhibit 3 was drawn up and signed. The insurance company put it in at the trial as part of its case and seemed to view it with some favour but I fail to see how it advances the matter because if the insurance company wished to found its claim upon the theory of moneys advanced at the request and for the benefit of the respondent no action

could be maintained (in the absence of an assignment) on this document in the name of a nominal plaintiff. The insurance company, if suing upon it, would have to do so in its own name. The relationships of the parties to this action are dependent upon the statutory provisions to which I have made reference. Exhibit 3 cannot change those statutory relationships and I put this document to one side as of no importance in the determination of the relevant issues. I feel convinced that if the appellant had not been insured the insurance company would not have paid any moneys in settlement of the threatened action at the mere request of the respondent. In my view the moneys were paid to Mrs. Lyons not because of Exhibit 3 but because of the contractual obligation of the insurance company to indemnify its assured, the appellant, under the terms of the policy of insurance, *i.e.*, "against the liability imposed by law upon the insured."

That leaves but one aspect of this case to mention, *i.e.*, proof of the negligence of the respondent at the time of the accident. The learned judge below in his reasons said:

> . . . a reference to Exhibit 3 shows that the defendant has agreed that "Any settlement . . . shall be deemed to have been made after judgment against me in an action by the said Mrs. Lyons," and as such a judgment could not have been recovered without proof of negligence against the defendant, I think that for the purpose of this action negligence of the defendant must be assumed in favour of the plaintiff and against the defendant.

With respect I prefer to base my conclusion on this issue upon the evidence of Mrs. Lyons, Leonard Clayton Gilley and Clara Crosata. The evidence of these witnesses, to my mind, proves negligence beyond a doubt. The respondent did not avail himself of the opportunity to testify on his own behalf and thus the evidence to which I have referred stands uncontradicted.

In my opinion, with respect, for the reasons I have herein set forth the respondent fails in his contentions. The appeal should be allowed and judgment entered for the appellant.

O'HALLORAN, J.A.: The respondent Pawson injured a pedestrian Mrs. Lyons while driving a motor-car loaned him by Trapp Motors Limited, the appellant, while his own car was under repair at its garage. The legal responsibility for Mrs. Lyons's

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injuries was never determined. Trapp Motors Limited held a "Standard Garage and Sales Agency Policy Automobile and Premises Risk (Payroll Basis Form)" in The Merchants' Marine Insurance Company Limited. In this policy the insurance company agreed:

> to indemnify only the insured named in the policy [*viz.*, Trapp Motors Limited] his executors or administrators, against the liability imposed by law upon the insured.

for loss or damage arising from and resulting from the "operations of the insured" but limited or restricted to:

> (a) The use and maintenance, including ordinary repair, of that portion only of the premises at the location(s) described in Item 1, [of the policy] which portion is used in the applicant's business, of an automobile sales agency, public garage, automobile service station, repair or paint shop, including the sidewalks or roadways immediately adjacent to such premises, and the conduct at the said location of such business and
>
> (b) The use or operation of any automobile, tractor or trailer, whether owned by the applicant or not, for all purposes of such business, and for pleasure use within Canada, Newfoundland, or the United States of America, or upon a vessel plying between ports within those countries, but excluding the use or operation of any such automobile, tractor or trailer, for the carrying of passengers, goods or materials for compensation, or while rented or hired to others.

The perils insured against were restricted to legal liability to a third party for (1) bodily injury or death; and (2) damage to property of others not in the care, custody or control of the insured.

Shortly after the accident on the 27th of January A. E. Howard the adjuster of the insurance company requested Pawson to sign the underquoted document: [already set out in statement].

The learned county court judge found that Pawson refused to sign this document until he had discussed it with Messrs. Frank and Tom Trapp of Trapp Motors Limited. After he had discussed the matter with them and the insurance company adjuster (the nature of the discussion does not appear as neither the Messrs. Trapp nor Pawson gave evidence in the Court below) he signed the document on the 12th of February. Pursuant to this document the insurance company on the 3rd of March effected a settlement and paid to the solicitor for Mr. and Mrs. Lyons the sum of $250 and obtained a release from them of

all their claims against both Pawson and Trapp Motors Limited arising and resulting from the accident.

On the 7th of March Pawson for the first time received a demand for payment; it was from the insurance company. On his failure to pay, suit was entered against him by Trapp Motors Limited on the ground that (1) under section 11 of the Motor-vehicle Act Amendment Act, 1937, B.C. Stats 1937, Cap. 54, he was driving or operating the motor-car as its agent or servant and in the course of his employment, and by virtue thereof liability was imposed on it for the damages to Mrs. Lyons resulting from his alleged negligent driving; and that (2) at the request and by the authority of Pawson, Trapp Motors Limited had effected a settlement with Mr. and Mrs. Lyons in the sum of $250 and had obtained a release from them discharging both Trapp Motors Limited and Pawson from liability for all injuries resulting from the said accident. In answer to the demand for particulars of such request and authority Trapp Motors Limited said in reply:

> The said request and authority were made and given in the City of New Westminster to The Merchants' Marine Insurance Company Limited, which company had insured the plaintiff Trapp Motors Limited, and for the benefit of which company this present action is brought.

The learned county court judge dismissed the action on the ground that both Trapp Motors Limited and Pawson were insured by the above-mentioned policy.

It is unquestioned that this action was brought against Pawson by the insurance company in the name of its insured Trapp Motors Limited. But it is unquestioned also that it was brought not for the benefit of Trapp Motors Limited, but for the benefit of the insurance company. It was so pleaded and the action went to trial on that basis. But to enable the insurance company to bring an action of this character it must first be subrogated to its insured Trapp Motors Limited. It could not be subrogated, however, unless and until it had indemnified its insured Trapp Motors Limited under the policy. *Vide* Scrutton, L.J., *Page* v. *Scottish Insurance Corporation* (1929), 98 L.J.K.B. 308, at 311 and cases there cited. Refer section 165 (1) of the Insurance Act, Cap. 133, R.S.B.C. 1936.

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In *Simpson* v. *Thomson* (1877), 3 App. Cas. 279, Lord Cairns, L.C., said at p. 284 (cited in *Page* v. *Scottish Insurance Corporation, supra*):

> I know of no foundation for the right of underwriters, except the well-known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss. . . . But this right of action for damages they must assert, not in their own name but in the name of the person insured.

But on the facts before us the insurance company was not subrogated to its insured the Trapp Motors Limited and therefore had no right of action against Pawson in the name of its insured. The insurance company had settled the Lyons claim, it is true, but not under the Trapp policy; the Lyons claim was settled at the request of Pawson contained in the above-quoted agreement of the 12th of February prepared by the insurance company, wherein Pawson requested it "to settle the claim of Mrs. Jas. Lyons against me."

Pawson agreed therein that any such settlement should in no way be deemed to be an admission of liability on the insurance company's part under the Trapp Motors policy and also that any such settlement

> shall be deemed to have been made after judgment against me in an action . . . by the said Mrs. Jas. Lyons and your and my respective rights and obligations to each other shall be based accordingly.

The agreement with Pawson was based on the premise that Pawson was liable and that Trapp Motors Limited was not. The insurance company acted thereon and the Lyons settlement was effected accordingly.

If the insurance company had paid the Lyons claim under the Trapp policy and then had sued Pawson in the name of its insured Trapp Motors Limited, to enforce any remedy the latter had against Pawson, subrogation might have arisen. But the insurance company did not elect to take that course; instead it elected to act as agent of Pawson and as such to enter into an agreement with him to settle the Lyons claim on his behalf. And pursuant to such agreement it did settle the Lyons claim on his behalf. Upon these facts it is clear that the Lyons settlement was a matter arranged entirely between Pawson and the

insurance company and completely outside the insurance policy. Under such circumstances the insurance company could not be subrogated to Trapp Motors Limited.

Another incident of subrogation is that although the insurance company by settlement of a claim under a policy may sue in the name of its insured yet its rights are only the rights of the insured. It cannot enforce in the name of the insured legal rights which it may possess but which its insured does not—*vide Page* v. *Scottish Insurance Corporation, supra.* The insurance company having settled the Lyons claim not under the Trapp Motors Limited policy but under a separate and distinct agreement with Pawson cannot claim to be recouped by Pawson except in a suit in its own name. The Trapp Motors Limited was not a party to the agreement of the 12th of February; the settlement with Lyons was effected pursuant to that agreement; that agreement shows plainly on its face that it was made by the insurance company not as an agent of Trapp Motors Limited but as the agent of Pawson. This being so Trapp Motors Limited had no right of action against Pawson on that agreement; accordingly the insurance company when suing in the name of its insured could have no greater rights against Pawson than Trapp Motors Limited had; as Trapp Motors Limited had none it had none.

These conclusions dispose of the appeal. I find it unnecessary therefore to consider other interesting points raised.

I would dismiss the appeal.

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

Solicitors for appellant: *Farris, Farris, McAlpine, Stultz, Bull & Farris.*

Solicitor for respondent: *Harry J. Sullivan.*

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Mar. 15, 16; *April* 1, 12.

Criminal law—Living in part on the earnings of prostitution—Speedy trial —No averment in charge of previous conviction—Exercise of the power to whip—Criminal Code, Secs. 216, 833, 963 and 1014.

Apld
Regina v Robinson (No. 2) 14 C.R. 258

Qtd
R. v. Johnson [1941] 2 W.W.R. 190

Apld
R. v. Golub 77 C.C.C. 173

Not Folld
R. v. Tapp 79 C.C.C. 258

Consd
R. v. Dupont 133 C.C.C. 33

Aprvd
R. v. Enders [1963] 2 C.C.C. 172

On speedy trial under Part XVIII. of the Criminal Code on a charge under section 216 of the Criminal Code, accused was convicted of living in part upon the earnings of prostitution, and sentenced to three years' imprisonment and to be whipped three times with three strokes each time. The information and complaint upon which the appellant was tried and convicted contained no averment of a previous conviction, and after the judge pronounced his judgment convicting the accused he, before passing sentence, asked the convict if he had been previously convicted of an offence of the same kind, and (without putting the Crown to the proof) the convict admitted the fact that he had been, upon which express admission the judge imposed the additional penalty of whipping. On appeal from sentence it was submitted that a condition precedent to the exercise of the power to whip is that the commission of the prior offence must be formally averred in the charge.

Held, on appeal, that in the light of all the relevant sections of the Code there is nothing to prevent the Court from regarding the language of section 216 as conferring upon the judge in speedy trials an enlarged discretionary power to sentence to whipping after proof, at the proper stage (*i.e.*, after judgment) of a previous conviction, and not as creating a distinct offence founded on a previous conviction. And this view is confirmed by the Court of Criminal Appeal in *Rex* v. *Hunter*, [1921] 1 K.B. 555, at pp. 559-61. In the absence of any statutory provision imperatively requiring an averment of previous conviction to be made in the charge there is no need to make one because it can serve no useful purpose where there is no jury as there is in cases covered by section 963. The sentence of imprisonment for three years stands, but the order that the appellant shall "be whipped three times with three strokes each time" is reduced to one whipping of five strokes.

Held, further, that section 963 of the Criminal Code does not apply to proceedings under Part XVIII.

Rex v. *Edwards* (1907), 13 Can. C.C. 202, not followed.

APPEAL from sentence by Mah Chee who was convicted by LENNOX, Co. J. on a speedy trial under Part XVIII. of the Criminal Code on a charge that being a male person unlawfully lived in part upon the earnings of prostitution. He was sentenced to three years' imprisonment and to be whipped three times with three strokes each time.

The appeal was argued at Vancouver on the 15th and 16th of March, and the 1st of April, 1938, before MARTIN, C.J.B.C., McQUARRIE and SLOAN, JJ.A.

Mellish, for appellant: The learned judge had no power to inflict whipping on the accused. It can only be inflicted on a second conviction. The charge must include that there was a previous conviction: see *Rex* v. *Edwards* (1907), 13 Can. C.C. 202. The learned judge misdirected himself because he introduced the element of race. On proof of former conviction see Russell on Crimes, 7th Ed., 1958; Archbold's Criminal Pleading, 19th Ed., 1033; Taschereau's Criminal Code, 2nd Ed., 766; *Reg.* v. *Maria Fox* (1866), 10 Cox, C.C. 502. At common law there was no extra penalty for a previous conviction: see *Reg.* v. *Willis* (1872), 12 Cox, C.C. 192; *Reg.* v. *Summers* (1869), 11 Cox, C.C. 248. The charge of a former offence should appear on the information: see *Rex* v. *Cruikshanks* (1914), 23 Can. C.C. 23. You must not give the jury any knowledge of the previous conviction until after the verdict.

W. S. Owen, for the Crown: Section 568 of the Code was not carefully considered in *Rex* v. *Edwards* (1907), 13 Can. C.C. 202. The provisions of sections 851 and 963 were followed, and see Crankshaw's Criminal Code, 6th Ed., p. 1252; *Rex* v. *Schier* (1932), 59 Can. C.C. 180; *Rex* v. *Rowluk* (1915), 8 W.W.R. 995; 24 Can. C.C. 127; *Rex* v. *Bonnevie* (1906), 10 Can. C.C. 376; *Faulkner* v. *Regem,* [1905] 2 K.B. 76 at p. 82; *Rex* v. *Ollech,* [1938] 1 W.W.R. 651.

Mellish, replied.

Cur. adv. vult.

12th April, 1938.

MARTIN, C.J.B.C.: We are all of opinion that this appeal from the sentence passed upon the appellant after his conviction for living in part upon the earnings of prostitution (Criminal Code, Sec. 216 (1)) by LENNOX, Co. J. (on a speedy trial under Part XVIII. of the Code) should be allowed in part, *viz.,* that as regards the imprisonment for three years the sentence shall stand, but as regards the order that the appellant shall "be

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whipped three times with three strokes each time," that is reduced to one whipping of five strokes.

We may say that during the argument it became so apparent that there was no sound objection to the term of imprisonment that it was practically conceded by appellant's counsel that we should not interfere with it, and therefore it was not necessary for us to call upon counsel for the Crown on that point, which left the question of the whippings only for our consideration.

We have considered that matter very carefully in the light of the principles laid down in the leading case in this Province, *i.e., Rex* v. *Zimmerman* (1925), 37 B.C. 277, and have arrived at the conclusion that the interests of public justice will be fully met by the reduction of the sentence of three whippings to one whipping of five strokes. In so reducing it, we bear in mind that counsel for the Crown did not seek to support that part of the sentence which directed three successive whippings; in fact it was admitted that there is no case in the history of this Province, within the memory of counsel and ourselves at least, where such a thing has been done, though the statute does authorize it—section 1060. It must be understood that in giving this judgment we have excluded from our minds all differences of colour or of race, and also it must not be overlooked that if coloured men may be whipped three successive times, so may white men also, because the Criminal Code of Canada does not contain any provision that the Courts of our country shall take cognizance of a particular man's colour, or his race, in imposing the general penalties prescribed by Parliament, and therefore we have refrained from so doing.

That leaves for consideration the submission that the learned county judge had no jurisdiction to impose any sentence of whipping at all because that power can only for this offence be exercised under section 216, which provides that:

> Every one is guilty of an indictable offence and shall be liable to ten years' imprisonment and on any second or subsequent conviction shall also be liable to be whipped in addition to such imprisonment who . . .

It is submitted that a condition precedent to the exercise of that power to whip is that the commission of the prior offence must be formally averred in the charge upon which the judge must,

after arraignment, "proceed to try" the accused under section 833, "and if he be found guilty, sentence as aforesaid shall be passed upon him." In the present case the "information and complaint for an indictable offence" upon which the appellant was tried and convicted contained no averment of a previous conviction, and what occurred is that after the judge had pronounced his judgment convicting the accused, who was represented by counsel, he, before passing sentence, asked the convict if he had been previously convicted of an offence of the same kind and (without putting the Crown to the proof, as he could have done) the convict admitted the fact (section 978) that he had been, upon which "express admission" (*cf. Rex* v. *Turner* (1924), 18 Cr. App. R. 161) the judge imposed the additional penalty of whipping which is now objected to.

On behalf of the appellant Mr. *Mellish* presented a careful and elaborate argument dealing in an informative way with the history of the matter and relying, finally and largely, upon section 963 and the decision of the Manitoba Court of Appeal in *Rex* v. *Edwards* (1907), 17 Man. L.R. 288, which is the nearest case to this that has been brought to our attention. But it is, with every respect, not a satisfactory decision, the reasons given being in part obscure and largely inharmonious, and I find myself unable to apprehend them entirely or follow their result, whatever it may be, for the reason given by my brother SLOAN, and also because Mr. Justice Perdue based, p. 292, his judgment upon the supposed principle that it is

> improper for a judge or magistrate to ask a prisoner questions with a view of obtaining an answer which may justify the judge or magistrate in passing a more severe sentence than he would upon a first offender. Under our criminal laws, as is well known, an accused person cannot be called upon to answer any question which would incriminate him unless he voluntarily make himself a witness in his own behalf.

But that supposed "improper" question is precisely that which the Code expressly directs the accused "shall . . . be asked" after he is found guilty by a jury—section 963—and if he admits the previous conviction then the "Court may proceed to sentence him accordingly, but if he denies [it] . . . , the jury shall then be charged to inquire concerning" it.

As to the judgment of the Supreme Court of Alberta *in banco*

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in *Rex* v. *Cruikshanks* (1914), 23 Can. C.C. 23, that is not a decision on an offence under this Criminal Code but on convictions under the Provincial Dental Association Act of Alberta, and therefore the reasoning is not of assistance.

We were also referred to several English cases dealing with the question of previous conviction and the origin of the procedure thereupon at common law, and later development by statute, but it is to be remembered that our system of "speedy trial" is a special procedure under our Code and a purely statutory creation, unknown, and indeed contrary to the common law, and so it must be considered and made as effective as possible in that light.

As to the said invocation of section 963 to support the submission that it is imperative that the previous conviction must be averred, I agree with my brother SLOAN that it has no application to these speedy trials, and the object of the passing of the legislation in England corresponding to section 963 is given by Chief Justice Whiteside in *Reg.* v. *Maria Fox* (1866), 10 Cox, C.C. 502, that my brother cites, and I venture to add that the King's Bench Division in *Faulkner* v. *Regem,* [1905] 2 K.B. 76, at 82, adopted the said view of that eminent judge.

There is one English case, however, of much importance and assistance which was not cited to us, *viz.,* the unanimous decision of the Court of Crown Cases Reserved in *Clark's Case* (1853), 1 Dears. C.C. 198, wherein it was expressly held that the reference to a previous conviction in an indictment is not a charge of an offence, but it is of a different nature, *i.e.,* a mere averment made "only to influence the judge on the *quantum* of punishment": during the argument Lord Campbell, C.J., made this very clear, at p. 200, and also at p. 201, saying:

> A statement of a previous conviction does not charge an offence. It is only the averment of a fact which may affect the punishment. The jury do not find the person guilty of the previous offence: they only find that he was previously convicted of it as an historical fact.

And in pronouncing the judgment of the Court, of five judges, and to meet the objection that two previous convictions had been averred in the indictment, he said, p. 202:

> . . . there may be several previous convictions lawfully set out in one indictment. They do not vary the offence; they only affect the *quantum* of

punishment. There is no rule against alleging several previous convictions, . . .

And Maule, J. added:

There is no rule that redundancy of allegation is prejudicial to an indictment. It may be that if several offences are charged, those offences may not have been committed, but if several previous convictions are charged, it is highly improbable that they should not have occurred, and even if one were stated that had not occurred, it would not prejudice the prisoner.

These entirely apt statements conclude in principle the present question, and the result is that after a careful consideration of all the relevant sections of the Code in the light of them, I can find nothing to prevent me from regarding the language of section 216 as conferring upon the judge in speedy trials an enlarged discretionary power to sentence to whipping after proof, at the proper stage (*i.e.*, after judgment) of a previous conviction and not as creating a distinct offence founded upon a previous conviction. And this view is confirmed by the decision of the Court of Criminal Appeal in *Rex* v. *Hunter*, [1921] 1 K.B. 555, at 559-61. In the absence of any statutory provision imperatively requiring an averment of previous conviction to be made in the charge there is no need to make one because it can serve no useful purpose where there is no jury, as there is in cases covered by said section 963. I am not unaware that there are, undoubtedly, some cases in which the averment of a previous conviction is a necessary ingredient of the offence (*cf. e.g.*, *Rex* v. *Penfold*, [1902] 1 K.B. 547 and *Turner's Case* (1824), 1 Mood. C.C. 41, as explained by Maule, J. in *Clark's Case*, *supra*, p. 201 but this one is not of that nature.

It is also to be remembered that since the cases most relied upon by appellant's counsel were decided we have now to consider the matter in the light of the change brought about by the new provision of our Code in section 1014, subsection 2, which confers upon us the power of dismissing an appeal where we are "of opinion that no substantial wrong or miscarriage of justice has actually occurred," and since appellant's counsel was unable to suggest any way in which his client has been prejudiced, if the judge had jurisdiction, as we think he had, then this appeal should be dismissed because the alleged defect complained of is, if it exists, no more, at worst, than a procedural irregularity in its true nature.

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The length to which the Court of Criminal Appeal in England has gone in frequently applying the corresponding section 4 (from which ours is taken) to defects in trial procedure is well illustrated by the recent case of *Rex* v. *Davis* (1936), 26 Cr. App. R. 15 wherein it was held that the failure to get the "assent in writing" of both the accused and the prosecutor to the discharge of a juror as required by section 15 of the Criminal Justice Act, 1925, and the continuation of the trial by eleven jurors by verbal agreement only, was not a fatal error, the Court saying, p. 16:

> It is desirable, and indeed essential, that the provisions of that section should be strictly observed.

Nevertheless it went on to say, in refusing the application for leave to appeal:

> In the present case it is plain that there is no suspicion of any miscarriage of justice and that the failure to observe the strict terms of the section had not any result which could be harmful to the accused person. The section ought, however, to be strictly observed.

That decision goes much farther than we are invited by the Crown to go herein.

It is not to be overlooked that while the adoption of a certain course of procedure may be neither proper nor desirable yet, if there be jurisdiction, that "does not in the least invalidate the conviction"—*Rex* v. *Davis (Philip)* (1937), 26 Cr. App. R. 95, and it is one because, p. 97:

> It is, . . . , one thing to say that a certain course is undesirable and another thing to say that it goes to the root of the jurisdiction.

The test adopted by the same Court in the very recent case of *Rex* v. *Muir*, [1938] 2 All E.R. 516, seems to be that "on the whole no miscarriage of justice has occurred": see also *Rex* v. *Darke* (1937), 26 Cr. App. R. 85, wherein a "quite irregular" course has been followed but no miscarriage had resulted. In *Rex* v. *Williams and Woodley* (1920), 14 Cr. App. R. 135, it had held that despite "a serious irregularity" (p. 137) the same view should be taken.

It is often a difficult question, being one of degree, as it was in a leading case on the subject in the same Court, *Rex* v. *Lee Kun*, [1916] 1 K.B. 337, 340, 342-3, 345, to decide as to whether or no "an irregularity had been committed at the trial which would

justify the quashing of the conviction," and it was held therein that though a course had been adopted with respect to the translation of the evidence at the trial which was not safe or wise, yet since the accused was (as herein) defended by counsel the irregularity was not one "which vitiates the proceedings" (p. 344), and therefore said section 4 was applied.

In *Davies v. Griffiths* (1937), 157 L.T. 23, a Divisional Court held unanimously that the irregularity complained of, in inquiring into a previous conviction, was not "sufficient to invalidate the conviction," and the subsequent decision on the same day in *Murray* v. *Barnwell,* cited in the note on p. 23, merits attention: it is to be observed that these two cases are not founded on the said curative section 4 of the English Criminal Appeal Act, 1907, which increases their effect.

The result of the application of the preceding authorities to the circumstances herein is that which was reached in *Lee Kun's* case, *supra,* p. 340, *viz.,* that even

> assuming there was irregularity [which we do not] . . . , this Court is satisfied that no substantial miscarriage of justice has actually occurred,"

and therefore we are all of opinion that this appeal should be dismissed.

McQUARRIE, J.A.: On the hearing of this appeal counsel for the appellant, in answer to a question submitted to him by the learned Chief Justice admitted that the only matter for consideration by the Court was as to the whipping included in the sentence. Counsel for the Crown was therefore directed to confine his argument to two questions (1) whether the learned trial judge had power to impose same; and (2) whether the whipping ordered should be allowed to stand or to be modified. I agree that the first question should be answered in the affirmative. As to the second question I also agree that five lashes should be substituted for the nine lashes ordered by the learned trial judge.

SLOAN, J.A.: This is an appeal from the sentence imposed upon the appellant by His Honour Judge LENNOX at the conclusion of a speedy trial under Part XVIII. of the Criminal Code.

The appellant was convicted under section 216, subsection 1

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of the Criminal Code for that he "being a male person, unlawfully lived in part upon the earnings of prostitution. . . ." The learned trial judge sentenced him to "a term of imprisonment of three (3) years in the B.C. Penitentiary, and to be whipped three times each with three (3) strokes." The appellant had been previously convicted of a similar offence and had served a sentence of one year therefor. He had not been long at liberty before returning to the pursuit of those activities that had previously led to his incarceration.

Before us the appellant claimed that his sentence ought not to stand and advanced two reasons in support of this submission. The one because it was excessive; the other because the learned trial judge had no jurisdiction to order him whipped.

During the hearing counsel for the appellant did not make any serious attempt to argue that the three-year sentence was excessive; in fact he was frank enough to concede that so far as that aspect of the case was concerned he had no real complaint to make.

The real issue in the appeal was whether or not the learned trial judge had jurisdiction to order the appellant whipped and it is this submission of the appellant that has given rise to considerable difficulty. The appellant's argument may be stated in brief terms as follows: The learned trial judge had no jurisdiction to order the whipping because of the failure of the Crown to charge the accused as a second offender.

This submission involves consideration of several sections of the Criminal Code.

The section under which the charge was laid reads as follows:

> 216. Every one is guilty of an indictable offence and shall be liable to ten years' imprisonment and on any second or subsequent conviction shall be liable to be whipped in addition to such imprisonment who . . .

Section 851 defines the form of the indictment when a previous conviction is charged. Section 963 outlines the proceedings to be adopted when a previous offence is charged and section 982 deals with proof of a previous conviction.

The question to my mind to be decided is this: Does section 963 apply to proceedings under Part XVIII. of the Code? If it does then the whipping is an illegal addition to the sentence,

being imposed without jurisdiction, because of the failure to comply with the statutory condition precedent to the exercise of that jurisdiction. If it does not apply then the whipping is legally imposed in the exercise of a discretion based upon an admission by the accused, or proof, of a previous conviction.

I have come to the conclusion that section 963 does not apply to proceedings under Part XVIII. of the Code.

In *Reg.* v. *Maria Fox* (1866), 10 Cox, C.C. 502, the Court of Queen's Bench of Ireland, upon an appeal of the Crown, had occasion to consider 24 & 25 Vict. c. 96, s. 116, which enactment is identical in principle with section 963. In that case Maria Fox was sentenced to five years' penal servitude upon conviction on an indictment charging a previous conviction and subsequent felony. The Crown appealed upon the ground that as the accused had been convicted as a second offender she should have been sentenced to seven years' penal servitude which was the minimum sentence which could be passed upon her as such second offender. It appeared from the record however that she had been arraigned upon the whole indictment and not upon that part alone which dealt with the subsequent offence, and upon that ground the Crown appeal failed.

Chief Justice Whiteside said at p. 504 *et seq.*:

We should have exercised at once the power which we undoubtedly possess to amend the record in the case by increasing the sentence passed on the prisoner from five years to seven; but, upon inspecting the record, it appears to us that the section (116) of the 24 & 25 Vict. c. 96, regulating the proceeding upon indictment for an offence subsequent to a previous conviction, has not been complied with. The indictment charges, as directed by the Act, both the previous conviction and subsequent offence. But the record states that the prisoner was brought to the bar, and, "having heard the indictment aforesaid read," was arraigned upon it, and she was "demanded if she was guilty of the felony in the indictment aforesaid charged and specified," and then the jury were charged to inquire whether the prisoner "be guilty of the premises in said indictment or any part thereof." The only meaning of all this must be that the whole indictment was read in presence of the jury, and the prisoner arraigned upon it, and the whole indictment sent to the jury to be inquired into in both parts, at the same time in direct violation of sect. 116 of the statute, which directs that the prisoner shall be arraigned "upon so much only of the indictment as charges the subsequent offence; and, if he plead not guilty, or if the Court shall order a plea of not guilty to be entered on his behalf, the jury shall be charged to inquire in the first instance concerning such subsequent

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offence only; and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he has been previously convicted as alleged in the indictment," and then it provides for a finding of the jury on the previous conviction. The importance of attending closely to the provision of the statute is pointed out by the very learned editor of "Russell on Crimes," Mr. Greaves, in his note upon this section (Russell on Crimes 4th edit. vol. 2, p. 48). He says that this enactment was intended to prevent the previous conviction being "mentioned even by accident before a verdict of guilty of the subsequent offence was delivered." If this were not attended to a fair trial could not be secured for the prisoner. I remember a case where the jury were a long time in deliberation over the offence charged, and when at last they brought in a verdict of guilty, and were directed to inquire into the previous conviction, the foreman said, "Oh, why were we not told of that at first, it would have saved us a world of trouble!" In *Reg.* v. *Clark* (1 Dears, C.C. 198), Lord Campbell says: "The statement of a previous conviction is not properly matter of charge, as it is not to be laid before the jury to induce them to convict." As we must infer from this record that the provisions of the Act have not been complied with, the indictment must be quashed.

It is because I base my opinion, to a large extent, upon this judgment that I have reproduced it here in full.

If the intent and meaning of section 963 is to secure a fair trial to the accused before a jury by preventing it from knowing that the indictment charges a previous conviction what possible reason can there be for suggesting that in order to secure a fair trial of the accused before a county court judge, sitting as a jury, that he should be informed of the fact of the previous conviction by the form of the indictment? I can see none; and, in point of fact, to my mind, there is no distinction in principle between the necessity of keeping the knowledge of the previous record of an accused from a jury, before conviction, and that of keeping such knowledge from being thrust, by the form of the indictment, upon the learned county court judge sitting as a jury. In my opinion to hold otherwise would be to place the accused in a position of manifest prejudice: a result certainly never contemplated nor intended by Parliament.

It is well settled law that "it is undoubtedly not competent for the prosecution to adduce evidence 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." *Makin* v.

Attorney-General of New South Wales (1893), 63 L.J.P.C. 41, at 43; *Rex* v. *Fisher,* [1910] 1 K.B. 149; *Rex* v. *Morrison* (1923), 33 B.C. 244.

There can be no question, to my mind, that had the prosecution, before conviction, in this case, tendered evidence of the previous conviction of the accused we would have felt bound to order a new trial. I am unable to conclude that Parliament intended to make any alteration in that principle for it would be fantastic to assume that the prosecution, while barred from adducing evidence of bad character in contravention of the principle in *Makin's* case, *supra,* could circumvent that time-honoured and prudent course of conduct by placing the previous criminal record of the accused before the trial judge in the form of the indictment. And yet that would result if section 963 were held to apply to proceedings under Part XVIII. of the Code. I cannot subscribe to an interpretation which would lead to that result.

Counsel for the appellant cited *Rex* v. *Edwards* (1907), 13 Can. C.C. 202 in support of his submission. That is a decision of the Court of Appeal for Manitoba and, of course, commands respect. It was held there that, "by analogy," sections 851, 963, and 982 of the Code apply to a summary trial before a magistrate. I think I am correct in saying that the observations of Richards, J.A., indicate the reasoning that lead to that conclusion. He says at p. 204 *et seq.*:

It may be that it was intended that the need for alleging former convictions on the record, where it is intended to charge the accused with them, should only apply to proceedings by indictment. At any rate there is no provision in the Code for alleging them on the record, or for proving them, when a person, brought before a magistrate for a preliminary inquiry as to an indictable offence, elects to be tried by such magistrate.

For the above reason a magistrate is placed in a doubtful position with regard to his power of considering previous convictions when such an election is made. If he cannot, after convicting a person for the offence for which he is trying him, refer to, and have proved before him, previous convictions against that person, then his power of dealing with the case is not so great in all respects as the power of a Court where the trial is had on an indictment. On the other hand, the particularity of the above quoted sections of the Code and the care they show in providing that the accused and his counsel shall know that he is to be charged with them, and that the accused shall be protected from any mistake as to his identity with

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other persons previously convicted, or as to the existence of such previous convictions prove such an intention on the part of Parliament to require those provisions, that it is difficult to find an intention to dispense with them on trials before a magistrate.

With reference to the first ground stated, with deference, I cannot agree that unless the previous convictions are charged in the indictment the magistrate (or county court judge) cannot "refer to, or have proved before him, previous convictions."

It is a well-established practice that previous convictions, although not pleaded in the indictment, may be proved as an element leading to the determination of the appropriate sentence to be imposed, when such sentence is in the discretion of the Court. Such convictions, unless admitted by the accused, may be proved as provided by section 982 of the Code.

This procedure has in fact been followed in Manitoba since the *Edwards* case—see *Rex* v. *Rowluk* (1915), 24 Can. C.C. 127, and see *Rex* v. *Lim Gim* (1928), 39 B.C. 457; 49 Can. C.C. 255; *Rex* v. *Schier* (1932), 59 Can. C.C. 180. On a sentence appeal we confirmed this practice in *Rex* v. *Charlebois* (Vancouver, March 24th, 1938).

If, however, section 963 is applicable then, unless the previous conviction is pleaded in the indictment, no proof may be adduced of such previous conviction for the reason I have already given, *viz.*, the matter is not one of discretion but of jurisdiction. But, with deference, I am unable to say with Richards, J.A., that unless it is held applicable the hands of the magistrate (or county court judge) are tied for it seems to me that such a conclusion cannot be supported by authority.

The other ground for the judgment in the *Edwards* case appears to be that it was thought the accused should be informed he is being tried as a second offender "and that the accused shall be protected from any mistake as to his identity."

So far as identity is concerned I am satisfied that, if the accused denies the previous convictions, the requirements of section 982 of the Code completely remove any misgivings in that regard because under that section proof of the identity of the person of the offender is an essential element in the proof required of his previous conviction. With respect, I can see no particular reason why an accused person should be informed

that he is being tried as a person with an existent record. That fact is well known to him. If, however, there is any unfairness to him in not so informing him then it seems to me it is outweighed by the prejudice that might well arise when the trial judge is put in possession of facts at the opening of the trial that are relevant only to the consideration of sentence after conviction.

In this case the appellant was asked after conviction if the previous record produced by the prosecution was correct and he admitted the facts alleged. Upon this admission the learned trial judge passed sentence upon him as a second offender. I am satisfied that the learned trial judge was not in error in adopting this procedure. The indictment did not disclose the previous conviction but as I have concluded section 963 does not apply herein, such an omission was not an error but an essential to the fair trial of the accused.

With reference to the severity of the sentence I can add nothing to what was said by my Lord the Chief Justice when oral reasons were given.

In the result I would allow the appeal upon the ground that, although the learned trial judge has a discretionary jurisdiction to impose the whipping, the interests of justice would be met by reducing that part of his sentence from three whippings of three strokes to one whipping of five strokes.

Appeal allowed in part.

[1941] 2 W.W.R. 360

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Sept. 14, 15, 16; Nov. 29.

WHITEHEAD v. CORPORATION OF THE CITY OF NORTH VANCOUVER.

Negligence—Contributory negligence—Ferry slip—Lack of guard when ferry is out—Driver of car intending to catch ferry—Drives into slip—Lack of care—Ultimate negligence—R.S.B.C. 1936, Cap. 52, Sec. 2; Cap. 93.

Consd Kennedy v. Union Estates [1940] 1 D.L.R. 662

Consd Lind v. C.P.R. [1942] 4 D.L.R. 659

Consd Eggins v. Beesley [1943] 1 W.W.R. 682

Apld Hoe v. Tracey [1949] 4 D.L.R. 207

Apld Nisson v. District of Powell River 66 D.L.R. (2d) 226 (B.C.C.A.) & Folld as above 62 W.W.R. 707

Philip Whitehead was last seen alive when he left the Army & Navy Veterans' Rooms on Kingsway in the City of Vancouver in his car at 11.20 on the night of the 14th of January, 1936, to catch the ferry going to North Vancouver where he lived. On the afternoon of the 16th of January following, his body was found in his car in the water on the sea bottom just off the ferry slip on the Vancouver side of the harbour. On the night of the 14th of January, 1936, it was raining, there was no guard or barrier on the approach to the ferry slip, but the approach and ferry slip were well lighted. In an action by the wife and children of the deceased for damages under the Families' Compensation Act, the jury found that both defendant and deceased were guilty of negligence, and under section 2 of the Contributory Negligence Act they found that the degree of fault attributable to the defendant was sixty per cent. and to the deceased forty per cent. The damages were assessed at $20,000 and judgment entered accordingly. The defendant appealed.

Held, dismissing the appeal and affirming the decision of MURPHY, J. (MARTIN, C.J.B.C. dissenting would allow the appeal and grant a new trial and SLOAN, J.A. dissenting would allow the appeal and dismiss the action), that the negligent act of the deceased in not maintaining a proper look-out continued until the end, when in conjunction with the continuing negligence of the defendant in not maintaining a guard, the accident occurred. At common law each would properly have been guilty of negligence which contributed to causing the accident so the Contributory Negligence Act applies. The accident could not possibly occur without the two concurrent acts of negligence. That was the finding of the jury and as there is evidence to support it this Court should not interfere.

APPEAL by defendant from the decision of MURPHY, J. of the 17th of June, 1937, in an action under Lord Campbell's Act, for damages for the death of Philip Whitehead. On the 14th of January, 1936, Philip Whitehead, who was 43 years of age, and a broker in the City of Vancouver, left the Army & Navy Veterans' Rooms on Kingsway in Vancouver in his car at 11.20 in the evening for the North Vancouver ferry. The

next ferry, according to the time-table, left the Vancouver slip twenty minutes later. He did not return home that night, and not turning up the next day a search was made for him. At about 5 o'clock in the afternoon of the 16th of January his car was found in the water off the Vancouver ferry slip. No person saw the car go into the water and there was no guard or obstruction on the approach to the slip.

The appeal was argued at Victoria on the 14th, 15th and 16th of September, 1937, before MARTIN, C.J.B.C., MCPHILLIPS, MACDONALD, MCQUARRIE and SLOAN, JJ.A.

J. W. deB. Farris, K.C., for appellant: Deceased drove his car off the slip into the water at night after the ferry had left. We say the action should be dismissed on the finding of the jury, as in law there was no liability. On the facts of the case, including the jury's findings, we committed no breach of obligation to Whitehead, and in any event deceased's negligence was of necessity "ultimate negligence": see *Swadling* v. *Cooper*, [1931] A.C. 1; *Indermaur* v. *Dames* (1867), 36 L.J.C.P. 181 at p. 183. If he comes on to our dock and does not take reasonable care we owe him no obligation to prevent him from doing something that a man taking reasonable care would not do: see *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685 at p. 694; *Norman* v. *Great Western Railway* (1914), 84 L.J.K.B. 598, at pp. 602 and 607; *Hillen and Pettigrew* v. *L.C.I. (Alkali) Ld.*, [1936] A.C. 65. Assuming we had an obligation to take care, the deceased was guilty of ultimate negligence, the slip was well lighted, and he should have seen the ferry was not there in plenty of time to stop his car: see *McLaughlin* v. *Long*, [1927] S.C.R. 303, at p. 305. In the case of ultimate negligence you cannot recover under the Contributory Negligence Act: see *Nixon* v. *Ottawa Electric Ry. Co.*, [1933] S.C.R. 154 at p. 160; *Radley* v. *London & North Western Rail. Co.* (1876), 46 L.J. Ex. 573; *Gillingham* v. *Shiffer-Hillman Clothing Manufacturing Co. et al.*, [1933] O.R. 543 at pp. 552 and 564, and on appeal, [1934] S.C.R. 375 at pp. 379 and 386; *Headford* v. *The McClary Manufacturing Company* (1895), 24 S.C.R. 291; *Ramsden* v. *King Edward Hotel Co. Ltd.* (1929), 37 O.W.N.

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179; *Kempil* v. *Bruder* (1923), 25 O.W.N. 417; *Fairman* v. *Perpetual Investment Building Society,* [1923] A.C. 74. We are under no obligation to prevent a man from doing what he wants to do: see *Ottawa Electric Ry. Co.* v. *Letang,* [1924] S.C.R. 470; *Wilkinson* v. *Fairrie* (1862), 1 H. & C. 633; *Guilfoil* v. *T. McAvity & Sons Ltd.,* [1927] 3 D.L.R. 672; *Robertson* v. *Blue Diamond Coal Co. Ltd.,* [1926] 1 D.L.R. 789; *Mondor* v. *Luchini* (1925), 56 O.L.R. 576; *Johnston* v. *McMorran* (1927), 39 B.C. 24 at p. 26.

Maitland, K.C., for respondents: In this case there was an unusual danger that arises on a wet, rainy night. There was a dangerous condition: see *Ottawa Electric Ry. Co.* v. *Letang,* [1924] S.C.R. 470, and on appeal, [1926] A.C. 725. There is ample evidence of negligence on the part of the company and the jury has so found: see *Grand Trunk Rway. Co.* v. *Griffith* (1911), 45 S.C.R. 380. He must have a finding of ultimate negligence on the part of the deceased to defeat the Contributory Negligence Act. The evidence shows extreme carelessness on the part of the company: see *C.N.R.* v. *Muller,* [1934] 1 D.L.R. 768. That the Contributory Negligence Act applies see *McLaughlin* v. *Long,* [1927] S.C.R. 303; *Littley* v. *Brooks and Canadian National Ry. Co.,* [1932] S.C.R. 462 at p. 475; *Canadian National Ry. Co.* v. *Saint John Motor Line Ltd.,* [1930] S.C.R. 482. There should be a barrier or some such contrivance to protect those who approach from going into the slip when the ferry is out: see *London, Tilbury, and Southend Railway* v. *Annie Paterson* (1913), 29 T.L.R. 413. They can only rely on the jury finding ultimate negligence against us: see *Davies* v. *Mann* (1842), 10 M. & W. 546. That the finding of the jury in this regard must be sustained see *Jones* v. *Great Western Railway Company* (1930), 144 L.T. 194; *S.S. Maplehurst* v. *Hall Coal Co.,* [1923] S.C.R. 507; *British Columbia Electric Ry. Co.* v. *Key,* [1932] S.C.R. 106, at p. 110.

Farris, in reply: *British Columbia Electric Ry. Co.* v. *Key,* [1932] S.C.R. 106 is in our favour. See also *Brenner* v. *Toronto R.W. Co.* (1907), 13 O.L.R. 423, at p. 439. It is not incumbent on us to put up a barrier to prevent another from doing damage

to himself resulting from his own fault and negligence: see *Johnston* v. *McMorran* (1927), 39 B.C. 24; *British Columbia Electric Ry. Co.* v. *Key,* [1932] S.C.R. 106, at p. 109. "Proximate cause" is what one should do at the last moment when by reasonable care he could have avoided the accident. He should have seen the open water when about to come on the float: see *Admiralty Commissioners* v. *S.S. Volute,* [1922] 1 A.C. 129; *Radley* v. *London & North Western Rail. Co.* (1876), 46 L.J. Ex. 573.

Cur. adv. vult.

29th November, 1937.

MARTIN, C.J.B.C.: In this unusually difficult case I have had the benefit of the views of my learned brothers, as expressed in their reasons for judgment, wherein the facts and opposing submissions are so fully set out that it is unnecessary for me to restate them. The result of my long and careful consideration of the matter is that in my opinion, and with every respect to contrary views, there should be a new trial because, primarily, there should, on the facts of the case, have been a direction upon the question of ultimate negligence of the deceased which the learned judge below, erroneously, with every respect, withdrew from the jury though the defendant's counsel had asked for its submission to them when the questions were being prepared.

With regard to those questions, it would have been better, in my opinion, if they had been submitted in the usual order instead of placing the one assuming the defendant's negligence at the head of the list for primary consideration, though the defendant's counsel objected to that unusual, and I think hazardous (despite the caution of the learned judge), course being taken as forming a wrong approach to the rights of the controversy.

I join in the view that the decision in *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274; (1867), L.R. 2 C.P. 311, whatever may be its exact scope, must now be read in this Province to conform to the change in the common law effected by our Contributory Negligence Act, Cap. 52, R.S.B.C. 1936, but the operation of that Act is excluded in cases where the facts bring it within the ambit of the decision of the Supreme Court of

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Canada in *McLaughlin* v. *Long*, [1927] S.C.R. 303, and therefore it was necessary that the jury should pass upon the question of "last opportunity" herein—*cf., e.g.,* Charlesworth on Negligence (1938), 432 *et seq.*; Salmond on Torts, 9th Ed., 480 *et seq.*

It is only necessary, in the view I take, to add that though the defendant's (appellant) counsel did not renew his application after the charge to a direction upon ultimate negligence, yet by section 60 of the Supreme Court Act, Cap. 56, R.S.B.C. 1936, he is saved from the former consequences of that omission to take "exception" at the trial, subject to the special penalty of costs thereby imposed.

The judgment of the Court, by a majority, is that the appeal is dismissed with costs.

McPHILLIPS, J.A. would dismiss the appeal.

MACDONALD, J.A.: The respondents, widow and children of the deceased, obtained a verdict from a jury under section 2 of the Contributory Negligence Act, R.S.B.C. 1936, Cap. 52, reading as follows:

> Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault.

Damages in the sum of $20,000 were awarded, and the appellant (defendant in the action) was held liable for 60 per cent. of this amount, the "degree of fault" of the deceased being placed at 40 per cent.

The jury did not answer all the questions submitted to them; it would probably be more accurate to say that, based upon the questions submitted, a general verdict was returned. For example when the degree of negligence on the part of the appellant and the deceased respectively was found the jury had before them question number 6 and acted upon it. (All the questions and answers are given by my brother McQUARRIE. It is reasonable to assume that all the questions submitted were considered in reaching a conclusion. The appellant was found guilty of negligence. With the questions before them, particularly numbers 1 and 2, that finding probably was made after deciding

that a negative answer should be returned to question number 1. These considerations are important when considering the question of ultimate negligence as it is now said, for the first time, that this aspect of the case was not submitted to the jury; in fact that it was withdrawn from their consideration.

After a proper charge by the trial judge (with one possible exception) in respect to the applicability of, and the method of applying the provisions of the Contributory Negligence Act, the jury, as indicated, found "both parties guilty of negligence." Although no exception was taken to the charge below it is now submitted that the Act referred to (although pleaded by appellant in its statement of defence), has no application to the special facts of this case; or at all events, with a finding of negligence on the part of the deceased, the action must be dismissed, regardless of its provisions. The further submission is made, in the alternative, that the finding of negligence on the part of the deceased should be treated as ultimate negligence.

I have had great assistance from a perusal of the reasons of my brother SLOAN, but find, after careful consideration of the questions raised, that I am unable to reach the same conclusion.

Appellant's submission based upon *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274, is, as intimated, that the jury, having found the deceased negligent, the respondents, plaintiffs in the action, cannot succeed or obtain the benefit of our Contributory Negligence Act, because the appellant, however negligent it may be, owes no duty to a plaintiff who fails to use "reasonable care on his part for his own safety." An oft-quoted passage on which this submission is based is found in the judgment of Willes, J., at p. 288. It reads as follows:

> 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, 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 a jury as matter of fact.

I may say, in passing, that the question whether reasonable care was taken by "guarding" or otherwise and whether there was contributory negligence on the part of the invitee was determined

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by the jury in this case. That finding cannot be set aside unless wholly insupportable nor should some other finding by this Court (*e.g.*, ultimate negligence) be substituted for it. The jury found "fault" or negligence on the part of the occupier and the invitee causing the loss. Whether or not that finding can stand calls for examination.

The passage referred to forms part of the reasons for judgment of Willes, J., on a motion to enter a non-suit or for a new trial, the plaintiff having secured a verdict from a jury against the owner of a sugar refinery. The jury in *Indermaur* v. *Dames,* unlike the case at Bar, negatived contributory negligence on the plaintiff's part. The reasons for judgment should be read in the light of the facts and findings in the case. If the jury had found the occupier guilty of negligence or breach of duty and the plaintiff guilty of negligence, as in our case, the latter could not succeed at common law, apart altogether from any question arising out of the special relationship existing between the parties in respect to which a proposition of law (not a finding of fact) was laid down by the Court. To say that a certain act or omission is an act of negligence causing or partly causing a loss is to state a fact; to say, as Willes, J., said, if appellant's construction of the passage referred to is right—and it is not necessary to dispute it—that the occupier owes no duty under the circumstances referred to is to state a conclusion of law. To put it another way—the Court was not enquiring whether or not, as a fact, the omission to guard could, or could not, wholly or in part, be an efficient cause of the accident.

If our Contributory Negligence Act had been part of the statutory law of England at the time of the decision referred to the failure of the occupier to guard the pit would have to be inquired into by the jury to find if it caused the accident or contributed to it. The Act could not be ignored: its possible applicability would at least have to be considered. The Court could not refuse to consider it on the ground that before its enactment a special law, as laid down by the Court in *Indermaur* v. *Dames* applied to all actions brought against an occupier of premises by a customer or by an invitee and that in actions belonging to that class we need not go further afield after it is

found that the plaintiff did not use reasonable care for his own safety. Our Contributory Negligence Act alters, not only the common law but also any proposition of law, judge made or otherwise, that may stand in its way. It applies to all cases, without any exception where the loss arises through the "fault" or negligence of both parties (questions of fact for the jury) whatever the law may have been before its enactment.

If, of course, the true conclusion is that the damage or loss was caused solely by the final fault of one only the Act, as I view it, would not apply. That is a matter for further consideration. For the present I merely say that on the finding by the jury of joint negligence the action cannot be dismissed on the ground that before its enactment a negligent invitee could not recover damages from an occupier because he failed in his duty to use "reasonable care on his part for his own safety."

What is meant by the submission based upon *Indermaur* v. *Dames* that an occupier who leaves a shaft unfenced is under no duty or obligation to a negligent invitee? Does it mean, viewing it as a question of fact, that whether or not an occupier can commit a negligent act that may, at least in part, be an efficient cause of the loss, depends upon the kind of finding that is made in respect to the invitee? I would say, clearly not. The acts and conduct of each party may, in the first instance, be considered by the jury independently. If leaving the ramp without a barrier was a "fault" or an act of negligence in itself, causing or partly causing the accident—and I think it was negligence of the grossest sort—the jury might so find before embarking on the further task of determining whether or not the deceased was also negligent. In so far as the application of our Act is concerned therefore, I do not agree with the submission that because under *Indermaur* v. *Dames* and other cases based upon it, it is said there can be no breach of duty by a negligent occupier where a negligent invitee is concerned, that therefore there can be no independent act of negligence on the former's part causing or contributing to the loss.

My brother SLOAN in his reasons quoted from the charge to the jury of Earl, C.J., before whom the action in *Indermaur* v. *Dames* was tried. Breach of duty was not mentioned. He

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referred to negligence (on the part of the occupier) towards strangers lawfully coming on the premises in the course of their business. In my opinion, and we ought to assume that of the jury, the deceased was not in the same position as, for example, an employee of the appellant working in and about this wharf or ramp, familiar with conditions and having all the employer's knowledge of the absence of a barrier and the existence of danger. He was in reality in the position of a stranger, at all events, in respect to knowledge of the presence or absence of a barrier, the only thing that mattered. Notwithstanding evidence of frequent use there is no ground for saying that the deceased must have known, or ought to have known, that he would not be stopped by a barrier or by some other appropriate and effective means after the ferry gradually drew away from the wharf. He may always have had made close connections with the ferry on former occasions in which event he would not know that there was no barrier erected to stop him if he failed to do so. He was not in the same position as the plaintiff in *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685, at 699, regarding whom Bowen, L.J., said:

> Knowledge, as we have seen, is not conclusive where it is consistent with the facts that, from its imperfected character or otherwise, the entire risk, though in one sense known, was not voluntarily encountered, but here, on the plain facts of the case, knowledge on the plaintiff's part can mean only one thing. For many months the plaintiff, a man of full intelligence, had seen this vat—known all about it—appreciated its danger—elected to continue working near it. It seems to me that legal language has no meaning unless it were held that knowledge such as this amounts to a voluntary encountering of the risk.

I venture to think hundreds of people who used this ferry for years paid no attention to the fact that no barrier was erected after the ferry left. There is no obligation on users of premises of this sort or upon reasonably careful men to make any inspection to see that a wharf is safe before using it or while using it. They assume it is safe.

However, in view of my conclusion that the Contributory Negligence Act applies to any state of facts that come within its four corners whatever the law may have been hitherto it is not necessary to discuss *Thomas* v. *Quartermaine* or other cases, applying the rule in *Indermaur* v. *Dames,* such as *Hillen* v.

I.C.I. (Alkali), Ltd. (1935), 104 L.J.K.B. 473, and many others to which we were referred, except in so far as they may assist in determining the real question in this appeal, *viz.*, have we a finding of ultimate negligence in respect to the deceased or should it be so regarded? In fact the real question is, should the Court itself take judicial notice of certain facts (the function of a jury) and make such a finding? I refer to decisions therefore only as an aid in determining, to some extent, by a process of exclusion, what the real negligence of the deceased may have been in the view of the jury. Lord Atkin at p. 475, in *Hillen* v. *I.C.I. (Alkali) Ltd.* said:

> In my opinion this duty to an invitee only extends so long as, and so far as, the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purposes for which he has been invited. He is not invited to use any part of the premises for purposes which he knows are wrongfully dangerous and constitute an improper use. As Scrutton, L.J., has pointedly said: If I invite a man to go down my staircase I do not invite him to slide down the banisters. So far as he sets foot on so much of the premises as lie outside the invitation or uses them for purposes which are alien to the invitation he is not an invitee but a trespasser, and his rights must be determined accordingly. In the present case the stevedores knew that they ought not to use the covered hatch in order to load cargo from it; for them for such a purpose it was out of bounds; they were trespassers. The defendants had no reason to contemplate such a use; they had no duty to take any care that the hatch when covered was safe for such a use; they had no duty to warn anyone that it was not fit for such use. I know of no duty to a trespasser owed by the occupier of land other than when the trespasser is known to be present, abstaining from doing an act which if done carelessly must reasonably be contemplated as likely to injure him, and, of course, abstaining from doing acts which are intended to injure him. The owners of the barge therefore were not guilty of any breach of duty to the plaintiffs.

That is not this case. The deceased was not making an unreasonable use of the driveway and ramp by merely driving over it. Whatever his act or acts of negligence may have been it was not that. The stevedores were trespassers, upon a forbidden area; they used, as a base of operations, a hatch-cover not intended for such use. On that state of facts no negligent act was committed by the defendant. In the illustration given by Scrutton, L.J., the man invited to use the stairway was injured because he departed from the terms of the invitation and slid down the banister. We have no reason to believe the jury found that the deceased made an unreasonable use of the way leading to the

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ferry slip outside the scope of his invitation. His only act of negligence may have been committed, in the opinion of the jury, under such circumstances that no effort to extricate himself would be of any avail. I will refer to this feature later. The deceased's act of negligence therefore, whatever it may have been did not consist in making an improper use of the way over which he was invited to travel. The negligent act or acts will be found in a more limited area.

No other view than that expressed herein, *viz.*, that our Contributory Negligence Act applies can, in my opinion, be taken by this Court since the decision of the Supreme Court of Canada in *Greisman* v. *Gillingham*, [1934] S.C.R. 375, binding upon us. It can no longer be said that a Contributory Negligence Act —I am not now concerned with its terms—cannot apply to an action by a negligent invitee against a negligent owner or occupier of premises; or that some special law applies to cases of that character beyond the reach of the statute. There the plaintiff was engaged in cleaning an office building before a lessee vacated it. While proceeding backward on an upper floor with an armful of debris he fell down an unguarded elevator shaft. If a locking device had been in proper order the accident would not have happened as a gate would have moved into place; in other words a barrier would be in place to guard the careless against injury, such as should have been erected when the ferry, in the case at Bar, left the wharf. Whatever difficulty may be experienced in appreciating the grounds for the decision, in view of the findings by the jury, it is clear that, based upon a finding of negligence by the occupier and upon what at all events is called a finding of contributory negligence on the part of the plaintiff, all Courts held that the Ontario Contributory Negligence Act (Ont. Stats. 1930, Cap. 27) applied.

The suggestion is that the answers to questions 5 and 6 submitted to the jury, found in the report of the trial ([1933] O.R. 543, at p. 547) amounts to a finding of ultimate negligence on the part of the plaintiff and if so, following the decision in *McLaughlin* v. *Long*, [1927] S.C.R. 303 the Act should not have been applied. If, as the jury found, the plaintiff had been "a little more careful" and looked where he was going it is

suggested, not only that the accident would not have happened but that he was solely responsible for the loss. But however we may view the matter it was not treated as a finding of ultimate negligence.

Wright, J., at the trial, notwithstanding the relationship (invitor on the one hand and licensee with an interest, in the same position as an invitee on the other) said at p. 552:

> Counsel for the defendant Griesman has urged [as it was urged in the case we are considering] that as the plaintiff could, by the exercise of reasonable care, have avoided the accident, the defendant is not liable, but in view of the Negligence Act, 1930, and amendments, this argument cannot prevail. *To allow it to prevail would be to defeat the express provisions* of the Negligence Act.

It is not necessary at this stage to discuss the effect of sections 3 (amended by 1931 Act, Cap. 26) and 4 of the Ontario Act. My only purpose, at present, is to show that this decision, affirmed finally by the Supreme Court of Canada, supports the view that in cases where this relationship exists, a Contributory Negligence Act similar to that in Ontario will apply if the findings of the jury warrant it. To put it another way: if the submission made to us based on *Indermaur* v. *Dames* is sound, *viz.*, that an invitor, however negligent, owes no duty to a negligent invitee and that because in law no breach of duty takes place there can be no negligence on the invitor's part the inquiry in the *Gillingham* case should have ended at that point.

Based, I assume, upon the wording of questions 5 and 6, presently referred to, and the answers thereto, the findings of the jury in the decision referred to were, as stated, treated by the Ontario Court of Appeal and by the Supreme Court of Canada, as a finding, not of ultimate, but of contributory negligence; or at all events negligence within the meaning of the phrase in section 4 of the Ontario Act, *viz.*, "fault or negligence —on the part of the plaintiff which contributed to the damages." In the marginal note to this section it is called "contributory negligence." "Contributed" is not an apt word to describe ultimate negligence. In the Court of Appeal [1933] O.R. at 556, where the decision of Wright, J., giving effect to the findings of the jury was affirmed, Latchford, C.J., in delivering

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the judgment of the Court, after stating that in respect to the plaintiff the condition was a concealed danger, said:

> The jury also found that the accident was caused by that hidden condition of the elevator, and that the plaintiff contributed negligently to the accident by not being a little more careful than he was before he stepped back to where he assumed the elevator to have remained.

His Lordship does not say that the plaintiff's negligence was the sole cause of the accident. If that view had been taken the Act, I think, would not have been applied. His reference is based on the findings of the jury as contained in questions 4, 5 and 6, reading as follows:

> (4) Was the accident to the plaintiff caused by the defective condition of the elevator? Yes.
>
> (5) If your answer to number 4 is "Yes" then state if the plaintiff could by the exercise of reasonable care have avoided the accident? Yes.
>
> (6) If your answer to number 5 is yes, then state what the plaintiff should have done which would have avoided the accident? By being a little more careful in looking before stepping, presumably on the elevator joist floor.

This is taken by the Court to mean "negligence" by the plaintiff that "contributed to the accident." At p. 564, it is again made clear that his Lordship treats it as contributory negligence. He said, referring to the Ontario Act:

> Mere contributory negligence is not now in this Province a bar to the right of a plaintiff to recover damages, and the extent of Gillingham's contributory negligence has been determined by the jury, and allowed for by the judge.

I think it is clear that, subject to a later reference to differences, if any, between the Ontario and British Columbia Contributory Negligence Acts, this decision, affirmed by the Supreme Court of Canada, binding upon us, should lead to the dismissal of this appeal.

In the judgment of the Supreme Court of Canada reported in [1934] S.C.R. 375, the earlier judgment in *McLaughlin* v. *Long, supra,* was not referred to. Its authority is not, I am sure, questioned. There, where a New Brunswick Contributory Negligence Act, similar to the British Columbia Act, was considered it was held that it did not apply as one party only was at fault. If the proper interpretation of the answers given to questions put to the jury in the *Gillingham* case is that the plaintiff was guilty of ultimate negligence—and it was so regarded by the Courts—that decision could only be explained on the ground

that the special wording of section 4 in the Ontario Act, differing from the British Columbia Act, and the New Brunswick Act, called for different treatment. However, as already stated, it was not treated by the Courts as ultimate negligence. It was regarded as negligence similar in character to that found against the deceased in the case at Bar.

The judgment of the Supreme Court of Canada was delivered by Hughes, J. As to relationship he agreed with the Court of Appeal for Ontario (p. 385) "that the plaintiff was a licensee with an interest" having (p. 384) "the same right as an invitee." The only reference to the question of the plaintiff's negligence or to the Ontario Act is found at p. 386, where it is said:

> It was also contended on behalf of the appellant, Henry Greisman, that the plaintiff was not entitled to recover because there was negligence on his part; but we agree with the Court of Appeal that the contributory negligence of the plaintiff was not a bar to his right to recovery in the Province of Ontario.

The question now arises—are there any material differences between the British Columbia and the Ontario Act? Section 4 of the latter Act (1930, Cap. 27) reads as follows:

> In any action for damages which is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff which contributed to the damages, the Court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

Substantially, although the wording is different, I cannot see that this section, in its effect, differs from section 2 of our Act *ante*. Certainly it does not provide that where a plaintiff is the author of his own wrong he may recover damages from a defendant who although originally negligent is excused because of the subsequent and final negligence of the plaintiff. The reference to "degree of fault" together with the word "contributed" shows that negligence on the part of both parties is contemplated. Nor can it be said that the intention was to permit a plaintiff guilty of ultimate negligence to recover against a defendant originally negligent because such a plaintiff would not merely "contribute" to the damage: he would be the sole cause of the loss. Apt words would be necessary to enable one, treated by settled law as the author of his own loss, to recover

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damages against any defendant. The fact is both parties must be found to be negligent before the Act can apply because

> the Court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

It is therefore concerned with the respective fault or negligence of both parties; so it is in our Act.

My conclusion therefore is that in the *Gillingham* case the answers given by the jury read together were interpreted to mean, not ultimate negligence on the plaintiff's part, but negligence on the part of the defendant and contributory negligence on the part of the plaintiff (in which case there would be no liability at common law) and based upon that finding having regard to the provisions of an Ontario Act, in its material aspects not differing from our Act or the New Brunswick Act considered in *McLaughlin* v. *Long,* the plaintiff was held entitled to succeed. Indeed, Rinfret, J., in *Littley* v. *Brooks and Canadian National Ry. Co.,* [1932] S.C.R. 462, at 473, in discussing the Contributory Negligence Act of Ontario as it is found in R.S.O. 1927, Cap. 103 (differing in terms but not in effect from the Ontario 1930 Act in so far as the questions under review are concerned) said:

> The Chief Justice of this Court had occasion to examine a similar question under the British Columbia statutes. These statutes, although not identical in terms, are substantially the same as the Ontario Acts.

The reference, in part, is to the Contributory Negligence Acts of both Provinces. It is clear too from his Lordship's remarks, on p. 475, that he interpreted the Ontario Contributory Negligence Act in the same way as we have interpreted our Act. I observe too that *C. F. Davie, K.C.,* in his book on Common Law and Statutory Amendment in relation to Contributory Negligence (1936) states in a foot-note at p. 42, that:

> The relevant provisions of the Ontario statute whilst not identical in wording, have been held by the Supreme Court of Canada to be similar in effect.

He refers to a statement by Crocket, J., in *Koeppel* v. *Colonial Coach Lines Ltd.,* [1933] S.C.R. 529, at p. 543. The individual opinion there expressed that the provisions of the New Brunswick Act (and therefore our Act) are in their relevant provisions, similar to that of Ontario is correct, although it appears in a dissenting judgment.

In *Craig* v. *Glasgow Corporation,* [1919] S.C. (H.L.) 1 at pp. 10-11, Lord Finlay said:

> No inquiry is more idle than one which is devoted to seeing how nearly the facts of two cases come together. The use of cases is for the propositions of law they contain; and it is no use to compare the special facts of one case with the special facts of another for the purpose of endeavouring to ascertain what conclusion you ought to arrive at in the second case.

While not unmindful of the wisdom of this observation, if it is applied within reasonable limits, I find it difficult, from the nature of the case, and the answers of the jury to reach any other conclusion than this—that since with answers less favourable to the plaintiff in the *Gillingham* case the verdict of the jury was upheld by the Supreme Court of Canada, this appeal, *a fortiori* ought to be dismissed. Certainly at least the proposition of law is established that in cases of this character the Contributory Negligence Act will apply if the facts and findings of the jury warrant it.

However, even apart from the *Gillingham* decision I am not prepared to set aside the verdict of the jury. We must assume from the directions given, that they found, not ultimate but primary negligence on the part of the deceased, an efficient cause of the accident. They also found appellant guilty of negligence. The latter finding gives us no concern. It cannot be attacked. Appellant's counsel submitted that the finding of negligence against the deceased, however we may view it, or however a jury may designate it, is in fact ultimate negligence, the sole cause of the accident.

As the jury did not specify the negligent act or acts of the deceased we may find it in one or more of the particulars of negligence charged against him in the pleadings. The jury might have selected any one of the number of acts of negligence there assigned. I said they would be justified in believing that the deceased drove across the wharf and ramp, following the usual route, without knowledge that there was no barrier to stop him after the ferry got under way, leaving a space of water, slowly increasing in area, between the ferry slip and the ship. The jury might also believe that he was making a reasonable use of the roadway. These considerations at least serve to limit the scope of the inquiry in respect to his negligent act or acts.

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I am of the opinion also, notwithstanding some evidence to the effect that one or more deckhands on the ship after "winding up the apron," testified that they were, for a time at least, at the end nearest to the wharf and therefore in a position to see the accident, if it occurred about that time, that the car did in fact plunge into the Inlet while the ferry was not more than, say ten, fifteen or twenty feet from the slip. The jury might draw that inference from all the evidence. They may not have accepted the suggested inference flowing from the negative evidence of the deckhands. The jury might also reasonably reach the conclusion that the deceased, as he approached the waterfront (because of atmospheric conditions, the lights and the weather—a wet night) thought, that the ferry was still at the wharf when in fact it was some feet away and that he discovered his mistake too late to prevent the accident. This explanation is reasonable, highly probable and open to acceptance. It has this further fact to support it. A floating-dock rises and falls with the tide. What is called in the evidence a "hump" or elevation would appear between the deceased and the ferry as he drove along making it at least difficult, if not impossible to know whether or not a space of water intervened between the ship and the wharf until he passed it. For example one witness said this:

> You cannot see the ferry when you are approaching the ramp whether it is tied up or whether it is leaving.

Another witness said:

> You cannot tell until you get pretty close up and in fact when it is dark at night you cannot tell until you are right there that the ferry is leaving.

He had good reasons for saying so. In 1928, after an unpleasant personal experience, he wrote a letter to the appellant complaining that a short time before (also on a dark wet night) he and his wife nearly drove into the Inlet. He said in his letter:

> Neither my wife nor I noticed that the ferry was about to leave until I was down the incline and close to the water.

When "no answer was received" he felt so keenly about the matter that he wrote again. Nothing however was done about it by the municipality until recently after this tragedy occurred. The letter of course was only evidence of knowledge of conditions on the part of the appellant. However, this witness

testified to the same effect at the trial, *viz.,* in respect to the difficulty of seeing clearly, or of appreciating the true situation under the conditions referred to. Having regard to this evidence or even without it, it is obvious, with the "hump" before him that the deceased could see the upper part of the ship but not the space of water between it and the wharf.

What is meant by the "hump" is this: Due to the state of the tide, the ramp, supported on pontoons, assumed the shape of the roof (not a steep one) of a building. First an ascent to the highest point had to be made, followed by a descent to the waterfront nearby. As the deceased was in the act of making the ascent in his motor-car while, as stated, he would be able to see part of the ship he would not necessarily appreciate that it had already pulled out a short distance from the slip. Keen observation—and the jury called failure to observe negligence—might have enabled him to realize the true situation. However, it was only, apparently, after he got beyond the ascent and started to descend that his eyes were focussed directly upon the intervening space of water. In fact, accepting the purport of the evidence of the last witness quoted, as the jury might, he may have "got pretty close up" to the water before he knew that the ferry had pulled out from the slip. This was negligence, but the point arises, was it primary or ultimate? On this view of the facts too have we perchance, the position outlined in *Swadling* v. *Cooper,* [1931] A.C. 1, where the negligence of both parties to the collision was treated as contemporaneous? There the question of ultimate negligence was not put to the jury. The distance between the defendant and the rider on the motor-cycle, when the former became aware of the latter's approach was eleven yards. In the case at Bar the distance between the ramp and the waterfront was twenty yards, but if the deceased "got pretty close up" to the water by his own fault before he became aware of the true situation that distance would be less. The deceased in *Swadling* v. *Cooper* also got into that position of danger, *viz.,* eleven yards from the driver of the motor-car by his own negligence. He failed to give any warning of his approach; at all events he was charged with negligence in that respect, and as all the witnesses testified that they did not hear

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any warning the jury may have so found. The judgment of the House of Lords as, I think, correctly stated by Scrutton, L.J. (1931), 71 L. Jo. 255) should be regarded as a decision based solely upon its own facts. It does not follow that in all collision cases or in cases of the character under review the question of ultimate negligence need not be referred to. It does appear to follow that the Court may take "judicial notice" of certain facts which in its opinion preclude the application of that doctrine and if so it need not be referred to by the trial judge in his charge to the jury. Nor do I think that the principle of the decision must be confined to collision cases. However, I only raise the point for consideration: in my opinion the jury did consider the question of ultimate negligence in the case at Bar. That will be discussed later.

The foregoing facts indicate that the act of negligence assigned to the deceased by the jury as charged in paragraph 10, subsection (2) of the statement of defence was—we may assume—failure to keep any, or in the alternative a proper look-out. It may be said with great force that if the deceased had been keeping an effective look-out, after appellant's negligence in failing to erect a barrier had spent itself, the accident would not have happened. It may also be said that the existence of an elevation partially obstructing his view placed upon him the obligation to approach it with his car under a measure of control that would enable him to stop if he found the situation beyond it made it incumbent upon him to do so. On the other hand it is difficult to believe that the appellant might refuse to erect a barrier and escape liability for future losses, that would, in that event, doubtless occur, on the grounds advanced in this case.

I am not convinced that the negligent act of the deceased was subsequent in time to that of the appellant. The latter's negligence in failing to erect a barrier was a continuing act extending as a general act of neglect up to the last moment when the accident occurred. It became at that time—and only then—in respect to the deceased, not a failure to carry out an "abstract obligation" to erect a barrier for the general protection of the public but rather a concrete breach of duty, or an act of negligence, an

efficient cause of the accident. In this view the negligent acts of the deceased and appellant were contemporaneous.

The failure of the deceased to look, or to look effectively, was a negligent act of omission commencing after he entered upon the wharf and continuing for some appreciable time after the "hump" was crossed. That may be regarded as primary negligence. After crossing the elevation and advancing beyond it, as already intimated he realized that the ferry had left the wharf but at that stage he could do nothing to prevent the accident. The fact that when the car was found the gear shift was in "second" is some evidence that he tried to save himself. If at that stage he could, or should have been able to save himself and did not do so, he would be guilty of ultimate negligence. Not, in the opinion of the jury, having been able to do so—and it was a question of fact for them—the position was the same as if his primary act or omission continued up to the time the accident occurred.

If this may properly be regarded as contributory negligence the verdict must stand. As the late Viscount Birkenhead, L.C., said in the *S.S. Volute* case ([1922] 1 A.C. 129 at 144)

> the question of contributory negligence must be dealt with somewhat broadly . . . as a jury would probably deal with it.

A jury may not readily appreciate subtle distinctions or understand fully the different aspects of the law of negligence, so admirably stated in the judgment referred to, but on a question of fact—and whether or not an act of negligence is ultimate or primary is a question of fact—it is not the function of a Court to review their findings, if on a fair interpretation they can be supported upon a reasonable view of the evidence adduced and without applying "a too rigorous critical method" (Duff, C.J.C., in *C.N.R.* v. *Muller,* [1934] 1 D.L.R. 768, at 769). *Metropolitan Railway Co.* v. *Wright* (1886), 11 App. Cas. 152, at 156, was referred to by the Chief Justice. There it was said:

> If reasonable men might find (not "ought to" as was said in *Solomon* v. *Bitton* (1881), 8 Q.B.D. 176) the verdict which has been found, I think no Court has jurisdiction to disturb a decision of fact which the law has confided to juries, not to judges.

A jury would appreciate the unfairness of excusing the gross neglect of the appellant, continued for years in the face of

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warning, by placing the whole responsibility on the deceased through a finding of ultimate negligence. That it refused to do. We have to decide if in law, based on all the facts, inferences and probabilities founded on evidence open to their consideration, they were justified in doing so. It does not follow because the negligence of a defendant consists of a rigid act of neglect (failure to fence) that cannot be remedied after the plaintiff's failure to exercise care takes place, that the latter's negligence must always be treated as ultimate.

It was said, it is wholly unavailing to say, that after failing originally to keep a proper look-out the deceased was not able to extricate himself from the dangerous situation in which he found himself because within the meaning of the decision in *British Columbia Electric Railway Company, Limited* v. *Loach,* [1916] 1 A.C. 719, he "incapacitated himself by his previous negligence from exercising such care as would have avoided the result," in this case—of appellant's negligence in failing to erect a guard. That is not so. One cannot apply a statement of law based on one set of facts to an entirely different set of facts. We are concerned with the *Loach* decision in so far as it may throw light upon the position of the plaintiff in that action. We may then compare it with the alleged negligent acts of the deceased herein. The controversy arises solely in respect to properly classifying his negligent acts. On that point the *Loach* decision is at least of some assistance, if not conclusive. It would appear to support the view that the negligence of the deceased in the case at Bar was as the jury found contributory negligence. The deceased, Sands, in the *Loach* case was found guilty of contributory, not ultimate negligence. Lord Sumner pointed out that there was no suggestion that he could have done any good by trying to jump off the cart and clear the rails at the last moment. The deceased in that case got upon the rails because of a negligent act of omission—failure to look—just as the deceased in this case reached a position of danger negligently beyond the "hump" and close to the water because of the same neglect. After he got there he, like the deceased Sands, was powerless to do anything effective; at all events the jury were entitled to say so in view of the conditions and the evidence relating thereto.

A perusal of the questions and the answers of the jury on p. 720 discloses that the deceased Sands's negligence was also failure to keep a proper look-out; or as it is stated failure to take "extraordinary precautions to see the road was clear." At pp. 722 and 723 Lord Sumner said:

> Clearly if the deceased had not got on the line he would have suffered no harm, in spite of the excessive speed and the defective brake, [on the street-car] and if he had kept his eyes about him he would have perceived the approach of the car and would have kept out of mischief.

Similarly if the deceased Whitehead had "kept his eyes about him" he "would have perceived" the position of the ferry and "would have kept out of mischief." Lord Sumner proceeded:

> If the matter stopped there, his administrator's action must have failed, for he *would certainly have been guilty of contributory negligence* [the italics are mine]. He would have owed his death to his own fault, [*i.e.*, at common law] and whether his negligence was the sole cause or the cause jointly with the railway company's negligence would not have mattered.

I refer also to the following excerpt:

> It was for the jury to decide which portions of the evidence were true, and, under proper direction, to draw their own inferences of fact from such evidence as they accepted. No complaint was made against the summing-up, and there has been no attempt to argue before their Lordships that there was not evidence for the jury on all points. If the jury accepted the facts above stated, as certainly they well might do, there was no further negligence on the part of Sands after he looked up and saw the car, and then there was nothing that he could do. There he was, in a position of extreme peril and by his own fault, and after that he was guilty of no fresh fault.

That was the position of the deceased in the case at Bar on essentially a similar state of facts. Even on the question of obstruction of the view by a "hump" on the ramp, in the *Loach* case, on approaching the railway, the view was partially obstructed by an orchard. Sands's original negligence in not looking brought him on to the tracks in a position of danger but a finding of ultimate negligence was not made against him because "there was nothing that he could do" after that. He was not guilty of any fresh fault and only his original negligence could be charged against him. That it was treated as contributory negligence is clear from this statement at pp. 724-5:

> The consequences of the deceased's contributory negligence continued, it is true, but, after he had looked, there was no more negligence, for there was nothing to be done, and, as it is put in the classic judgment in *Tuff* v. *Warman* (1858), 5 C.B. (N.S.) 573, 585, his contributory negligence will not disentitle him to recover "if the defendant might by the exercise of

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care on his part have avoided the consequences of the neglect or carelessness of the plaintiff."

We are not concerned with the last part of the extract. There was also no further negligence on Whitehead's part after he finally looked effectively, having reached a position where he could clearly do so, and saw the abyss before him. He was then "in a position of extreme peril by his own fault" (failure to watch) but he could not do anything about it.

If the *Loach* case should be reconsidered in the light of our Contributory Negligence Act the findings in so far as the deceased Sands was concerned would bring him within the Act if there was also a finding of primary negligence, not ultimate, on the part of the motorman as an efficient cause of the accident.

The negligence of the deceased Whitehead, as pointed out, brought him into a position of peril but having brought him there no fresh act could help or benefit him. The result therefore was the same as if his negligent act in not maintaining a proper look-out continued until the end when in conjunction with the continuing negligence of the appellant in not maintaining a guard, the accident occurred.

At common law each would properly have been held guilty of negligence which contributed to causing the injurious occurrence:

McLaughlin v. *Long,* [1927] S.C.R. 303, at 311 and hence the Act applies. The accident could not possibly occur without these two concurrent acts of negligence. That was the finding of the jury, and as there is evidence to support it, we should not interfere.

Finally I think, in any event the question of ultimate negligence was considered by the jury. It is true that when dealing specifically with the Contributory Negligence Act the trial judge did not discuss it. It is also true that at an earlier stage his Lordship told the jury "It is not a question of ultimate negligence at all." He was then, however, referring to the principle of law established in *Indermaur* v. *Dames, viz.,* that if the invitee was found to be negligent it put an end to the case. This single sentence, without any reference to the process of reasoning the jury would have to resort to, to enable it to decide whether or not an act of negligence was primary or ultimate would have little meaning to them. He did not say that ultimate negligence was not a

factor in deciding upon the applicability of the Contributory Negligence Act. While this question is not always put to the jury (*e.g.*, see *Littley* v. *Brooks and Canadian National Ry. Co.*, [1932] S.C.R. 462, at 646) it would have been better to call it to the jury's attention. But a new trial does not necessarily follow because one or more objections may be raised unless substantial wrong occurs. The point was in fact before the jury in a concrete form. The first question asked was:

> If the defendant was guilty of negligence, could the deceased by the exercise of ordinary care have avoided the accident?

An affirmative answer to that question would be a finding of ultimate negligence whatever the trial judge may have said when discussing *Indermaur* v. *Dames* and the jury I am satisfied clearly understood its purport and the consequences that would flow from such an answer. They knew too, we ought to assume, that a finding that both parties were jointly guilty of effective negligence causing the accident was incompatible with an affirmative answer to question (1).

While it was true, as stated, that question numbered (1) was submitted to the jury in connection with that part of the charge dealing with the case referred to, the trial judge may have had in mind that he proposed later to deal with the Contributory Negligence Act, and that it would not be necessary to repeat it. This would appear to be so from the report of a discussion between the Court and counsel in the absence of the jury concerning proposed questions for submission to them. When counsel for appellant stated that "Whitehead might have been guilty of ultimate negligence" the trial judge said "Whitehead yes but I had provided for that as you see in my first question." True, at another point in the discussion, his Lordship said "There cannot be any ultimate negligence arising here," but in the absence of the context and the questions considered it is not possible to properly interpret this observation. Whatever the explanation may be, the statement that Whitehead might be guilty of ultimate negligence and that a question distinctly covering that point was put to the jury was not withdrawn. While it would have been better to have discussed it in its proper place when dealing with the Contributory Negligence Act the

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oversight does not assume sufficient importance to warrant a new trial.

In *British Columbia Electric Ry. Co.* v. *Key,* [1932] S.C.R. 106, at 108, Anglin, C.J.C. said:

> Counsel can never, as of right, ask for a new trial for mere non-direction. The granting of a new trial on that ground is purely discretionary; a request for that relief should only be acceded to by the Court where the interests of substantial justice require that course to be taken.

Also at pp. 110 and 111, Cannon, J., referring to the alleged insufficiency of instructions to the jury on the question relating to ultimate negligence, said:

> If the appellant desired a more complete direction as to question 8, or a fuller answer to it, it ought to have applied for it when it was possible to obtain it. Having been silent during the trial and when the answers were given, it waived the objection, if any, which it had a right to make and cannot now be allowed to urge such grounds for a new trial.
>
> In the case of *Williams* v. *Wilcox* (1838), 35 E.C.L.R. 609, at 620, Lord Denman observed:
>
> "It is the business of counsel to take care that the judge's attention is drawn to any objection, on which he intends afterwards to rely.
>
> In the present case the jury gave a unanimous verdict to which no objection was made at the time and now all this labour is to be set aside in order, at the cost and delay of a new trial, to get fuller answers which might have been obtained without delay, trouble or expense when the jury were in the box. I am therefore of opinion that we ought not now to maintain such objections to the questions or to the answers of the jury.

I think the foregoing observations are applicable here. For reasons stated I would not usurp the function of the jury by substituting a finding they refused to make, *viz.,* that the deceased was guilty of ultimate negligence, although, as in the *Loach* case, it is close to the line.

I would dismiss the appeal.

MCQUARRIE, J.A.: The defendant is the appellant herein and the plaintiffs are the respondents.

The plaintiffs in their statement of claim herein (paragraph 6) alleged that the deceased came to his death owing solely to the negligence of the defendant as set out therein and in their answer to the defendant's demand for particulars.

The defendant in its statement of defence, on the other hand, denies that such is the case and alleges that the death of the deceased was due solely to the negligence, carelessness, fault or

condition of the deceased and that the defendant was not responsible therefor. In the alternative the defendant pleads the Contributory Negligence Act. See paragraph 8 of the statement of defence. The defendant's counsel on the hearing of this appeal, contended that on the findings of the jury it was not liable, because clearly on such findings there was ultimate negligence on the part of the deceased and that the appeal should be allowed and the action dismissed. Certain questions were submitted to the jury which were as follow:

1. If the defendant was guilty of negligence, could the deceased by the exercise of ordinary care have avoided the accident?

2. If you answer No. 1 in the negative, was the defendant guilty of negligence which was the proximate cause of the accident?

3. If so, in what did such negligence consist?

4. Was the deceased guilty of negligence which contributed to the accident?

5. If so, in what did such negligence consist?

6. If both the defendant and the deceased were guilty of negligence which was the proximate cause of the accident, state in terms of percentage of total fault the degree of fault which you find attributable to the deceased and to the defendant respectively.

7. Damages, if any:

8. Apportionate of said damages:

(a) To widow

(b) To Isabelle

(c) To Barbara

(d) To Patricia.

The jury did not answer the questions except in so far as their verdict may be interpreted as an answer to some of said questions. The verdict of the jury is as follows:

We the jury find both parties guilty of negligence. The defendant to the extent of sixty per cent., and the deceased to the extent of forty per cent. We award damages to the extent of $20,000, apportioned as follows:

To the widow $8,000, Isabelle $2,700, Barbara $3,800, and Patricia $5,500. Of this amount the defendant is responsible for sixty per cent.

There is no direct proof of negligence on the part of the deceased and no specific act of negligence was found by the jury. There were no witnesses to his entry on to the ferry landing. No one to suggest that he drove at an unreasonable or improper speed or without his car lights burning or illuminated sufficiently or effectively. There is no evidence or suggestion that the deceased was intoxicated or in any way mentally or physically incapable of handling his car efficiently and safely. There is no

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evidence that his automobile was out of order in any particular and in fact the evidence was the other way. Then arises the question: What did the deceased do that he should not have done or what did he omit to do which he should have done? Negligence on the part of the deceased could only be based on inference, *i.e.,* from the fact that he drove or allowed his motor-car to run or slip into the water. Under the circumstances prevailing at the time of the unfortunate accident, weather conditions, the lighting of the ferry slip, etc., whether he was negligent at all must be very uncertain. It is true that when the submerged motor-car was located it was found that the lights were out but I think it is quite clear that no weight can be attached to that as any movement of the deceased's body, after the car struck the water, might easily have turned off the lights of the car. Then the gear lever was found to be in second. That, instead of being evidence of his negligence, could only have been construed as indicating an intelligent effort by the deceased to do what he could to avert disaster when he realized what was happening. I am inclined to the opinion that if the jury had found that there had been no negligence on the part of the deceased such a finding could have been supported by the evidence. However, the jury found negligence on the part of the deceased and no one is attacking that finding. I realize that under the circumstances we cannot question the verdict and I merely make the above observations because of my inability to determine what act of negligence the jury imputed to the deceased. Possibly I might be permitted to add that, in my opinion, the negligence of the defendant was obvious and glaring. There was a presumably proper barrier ready to be dropped into place when the ferry was about to leave the dock, the watchman on the premises or in the vicinity might have seen that the barrier was properly fixed so that no intending user of the ferry could drive on to the ferry slip after the ship had left the dock or was about to do so. If these reasonable precautions had been taken by the defendant or if any warning had been given of the danger which existed to a person driving on to the slip at the time no such accident could have occurred. Not only did the defendant fail to take these reasonable measures to protect

persons ready to drive on to the ferry but such failure was recklessly deliberate on the defendant's part. It was the duty of the defendant to provide every reasonable protection for its patrons from just such an event as happened that night and the jury must have found it was negligent at least in that regard.

Judgment was delivered in accordance with the verdict.

The appellant is not disputing the findings of the jury nor are the respondents who are supporting the verdict and the judgment.

The appellant also contends that as negligence was found on the part of the deceased such negligence must have been ultimate negligence and consequently, notwithstanding said paragraph 8 of the defence, the Contributory Negligence Act does not apply.

The question of ultimate negligence was practically taken away from the jury by the learned trial judge in his charge. He said: "It is not a question of ultimate negligence at all." The learned judge might have explained the law regarding ultimate negligence somewhat differently to the jury but even so I cannot see that that is a sufficient ground for a new trial, particularly in view of the questions submitted to the jury and the verdict. No objection was taken on the trial to the judge's charge in this respect.

At common law the liability or otherwise of the defendant would be settled by the leading case of *Davies* v. *Mann* (1842), 10 M. & W. 546, which is as stated by Parke, B. at p. 548:

This subject was fully considered by this Court in the case of *Bridge* v. *The Grand Junction Railway Company*, 3 M. & W. 246, where, as appears to me, the correct rule is laid down concerning negligence, namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could, by ordinary care, have avoided the consequences of the defendant's negligence. I am reported to have said in that case, and I believe quite correctly, that "the rule of law is laid down with perfect correctness in the case of *Butterfield* v. *Forrester*, that, although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong." In that case of *Bridge* v. *Grand Junction Railway Company* there was a plea imputing negligence on both sides; here it is otherwise; and the judge simply told the jury, that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway, was no answer to the action, unless the donkey's being there was the immediate cause of the

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injury; and that, if they were of opinion that it was caused by the fault of the defendant's servant in driving too fast, or, which is the same thing, at a smartish pace, the mere fact of putting the ass upon the road would not bar the plaintiff of his action. All that is perfectly correct; for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road.

In the case at Bar, however, we have to consider the applicability of the Contributory Negligence Act, R.S.B.C. 1936, Cap. 52. Section 2 reads as follows:

Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault:

Provided that:

(*a.*) If, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and

(*b.*) Nothing in this section shall operate so as to render any person liable for any damage or loss to which his fault had not contributed.

The jury, following the judge's charge, clearly came to their verdict on the authority of said section 2. The jury, as they were directed by the learned trial judge, were bound to take his statement of the law as being correct. Hence they must have applied the Contributory Negligence Act and did not consider ultimate negligence at all.

As to the judge's charge, it appears that there was no substantial objection to it by the defendant at the trial. The jury clearly had no intention of finding ultimate negligence on the part of the deceased. I am of opinion that the matter was properly put to the jury in the charge of the learned trial judge. In any event I fail to appreciate how the defendant can escape from such authorities as *British Columbia Electric Railway Company, Limited* v. *Loach,* [1916] 1 A.C. 719; *Greisman* v. *Gillingham,* [1934] S.C.R. 375; *London, Tilbury and Southend Railway* v. *Annie Paterson* (1913), 29 T.L.R. 413; *Jones* v. *Great Western Railway Company* (1930), 144 L.T. 194, and *British Columbia Electric Ry. Co.* v. *Key,* [1932] S.C.R. 106, at 110. I might also refer to Salmond on Torts, 9th Ed., 483-4, from which I quote the following:

5. The decision of the Judicial Committee of the Privy Council, however,

in *British Columbia Electric Railway Company* v. *Loach*, [1916] 1 A.C. 719, would seem to show that this rule, although an approximation to the truth, is not a complete and adequate statement of it. The law, as applied in this case, is more favourable to a negligent plaintiff than the unqualified doctrine of the last opportunity as above formulated. It appears that there are instances in which a plaintiff guilty of contributory negligence may succeed, notwithstanding the fact that he, and not the defendant, had the last opportunity of avoiding the accident by due care. The facts of the case so decided by the Privy Council were as follows: An action was brought against a railway company by the administrator of a man who, while being driven in a waggon across a level-crossing, was run down and killed by an electric car. The deceased was guilty of contributory negligence in failing to look out for the car before entering upon the line. The company was also guilty of negligence in running the car at an excessive speed and with a defective brake. The driver saw the horses as they came into view from behind a shed, when they were ten or twelve feet from the nearest rail, and he at once applied his brake. He was then 400 feet from the crossing, and if the brake had been in good order he could have stopped the car in 300 feet. In fact, however, the brake was out of order, and the car overran the crossing and ran the waggon down. On these facts, after much conflict of judicial opinion in the Courts of British Columbia, the Judicial Committee held the railway company liable, notwithstanding the contributory negligence of the deceased.

Now in this case it is clear that it was the deceased, and not the driver of the electric car, who had, in fact, the last opportunity of avoiding the accident. The deceased, proceeding in a slowly moving vehicle, might, after all possibility had ceased of stopping the car in time, have avoided the accident by stopping the waggon in which he was a passenger before entering on the crossing. The power of determining the issue remained in his hands after it had ceased to be in the hands of the company, yet this was held an ineffectual defence. From this decision, therefore, it appears either that the test of the last opportunity is not the true test at all, or else that it requires qualification.

6. It is suggested, though with much hesitation, that the doctrine of the last opportunity is still the true guide through this logical and legal labyrinth, but that it is subject to several qualifications.

Reference might also be had to the foot-note on p. 484. I would also quote from p. 485, as follows:

In the first place, it would seem from *Loach's* case that a last opportunity which the defendant would have had but for his own negligence is equivalent in law to one which he actually had. He will not be suffered to say that he had not the last opportunity if he would have had it had he not disabled himself by some prior act of negligence. He who drives a cart when drunk, and collides with another vehicle, which he would have had the last opportunity of avoiding if he had been sober, will not be allowed to excuse himself on the plea that in fact he had no such opportunity, because at the critical time he was lying helplessly drunk and asleep at the bottom of his cart. So in *Loach's* case the deceased's waggon

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got upon the crossing, and the deceased had become helpless accordingly, at a time when the electric car was still so far distant that it could have been stopped if the brake had been in order; the company would actually have had the last opportunity but for its own negligence in sending out a car with a defective brake. Accordingly, the Judicial Committee held the company liable, as if, in fact, it had possessed the opportunity which it ought to have possessed.

Reference might be had to the remarks of Anglin, J., in another case which were approved by the Privy Council in the *Loach* case, at pp. 726-7, as follows:

"Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence, may, in some cases, though anterior in point of time to the plaintiff's negligence, constitute "ultimate" negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff. . . ."

Their Lordships are of opinion that, on the facts of the present case, the above observations apply and are correct.

Counsel for the plaintiff cited to us numerous authorities which I have read very carefully. The most favourable to the appellant, as I see it, is *Hillen and Pettigrew* v. *L.C.I. (Alkali) Ld.*, [1936] A.C. 65, but I do not think that even that case is of any material assistance to him. Lord Atkin in his judgment (pp. 69-70) puts it this way:

The rights of the parties appear to me to be ascertained when reference is made to the admission of the plaintiff Hillen: "I know it is not the right thing to do to load off hatch covers. . . I have seen cargoes put on hatch covers, it is wrongfully dangerous, and should not be done." . . . In the present case the stevedores knew that they ought not to use the covered hatch in order to load cargoes from it; for them for such a purpose it was out of bounds; they were trespassers. The defendants had no reason to contemplate such a use; they had no duty to take any care that the hatch when covered was safe for such use.

Lord Atkin proceeds to deal with another point as follows:

It is said, however, that whatever may have been the scope of the general invitation of the owners to the stevedores' men, in this case the owners' servants, the crew, extended a special invitation to the plaintiffs to use the hatch for the particular purpose, and neglected to warn them of the danger which they knew and the plaintiffs did not. I am far from satisfied that any one so invited the plaintiffs; I think the engineer's part was confined to a friendly suggestion that they should all do something irregular together. But, whether there was an invitation by the crew or any member of the crew, I am quite satisfied that it was wholly without the authority of the owners, and quite outside the ostensible scope of the authority of the crew. The owner of a barge does not clothe the crew with apparent authority to use it or any part of it for purposes which are known to be extraordinary and dangerous. The crew could not within the scope of their

employment convert it into a dancing hall or drinking booth. They could not invite stevedores to work the engines or take part in the navigation. The most that could be said of the engineer is that, if he saw a trespasser unwittingly entering into danger upon the employer's property, he might owe a moral duty to the trespasser to warn him. But for breach of a servant's moral duty an employer is not vicariously liable. In the circumstances of this case it matters not whether the fore and aft beams had or had not been at any time in position: any action of the crew in respect of them imposed no liability upon the respondents. I am of opinion that the facts proved disclosed no cause of action against the owners of the barge, and that this appeal fails and should be dismissed with costs, and I move your Lordships accordingly.

Lord Alness in his judgment (read by Lord Tomlin) says at pp. 71-2:

My Lords, in my judgment the plaintiffs' claims fail.

In the first place, I am of opinion that they have not proved negligence on the part of the defendants. The evidence demonstrates that the hatch was put by the plaintiffs to a use which the defendants had no reason to anticipate, and against which they were therefore not bound to provide. No duty having been left undischarged by the defendants, no liability attaches to them.

As regards the invitation which the engineer is alleged to have given, I am of opinion that that invitation is not proved, and further, that if it had been proved to have been given, it was outside the scope of the engineer's authority to give it.

If these views be sound, no negligence on the part of the defendants is established, and that in itself is sufficient for the disposal against the appellants of the case.

But, in the second place, on the evidence of the plaintiff Hillen—and the other plaintiff Pettigrew, who was too ill to be examined, was taken as concurring with Hillen's evidence—a case of contributory negligence, persisting up to the time of the accident, is disclosed. Said the plaintiff Hillen: "I know it was not the right thing to do to load off hatch covers. . . . I have seen cargoes put on hatch covers; it is wrongfully dangerous, and should not be done." That, in my opinion, is an unqualified admission of contributory negligence on the part of Hillen.

It is to me a novel doctrine of law that an employer in the position of the defendants is bound to foresee and provide against a course of conduct on the part of an employee of another employer which is admitted by him to be wrong and dangerous. The plaintiff Hillen's admission, in my judgment, puts him out of Court, and disentitles him from recovering damages from the defendants. To hold otherwise would be to subvert the principles upon which, as I apprehend, the law of reparation is based. The plaintiff Pettigrew's case must, in the circumstances, share the same fate as that of the plaintiff Hillen.

I find it difficult to understand why the learned trial judge neither dealt in his opinion with the plea of contributory negligence, nor submitted it to the adjudication of the jury. The plea is none the less effective, even

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at this late hour, on that account. It furnishes, I think, a complete answer to the plaintiffs' claims.

I therefore arrive at the same conclusion as my noble and learned friend on the Woolsack, and I concur in the motion which he has moved.

I think the case at Bar is clearly distinguishable on the facts. It might be said that, by leaving the barrier raised and the vehicle entrance wide open, the defendant held out a special invitation to the deceased, and all others desiring to do so, to use the ferry slip and dock, and impliedly represented to him and them that the said slip and dock were in a safe and proper condition for use. Whereas, in truth, under the weather and light conditions prevailing at the time, the dangerous arrangement of the ways and the slippery condition of the runway, no one should have been permitted to pass the entrance, particularly when the ship had left or was about to leave the dock. It might further be said that by leaving the barrier up and the entrance open the defendant impliedly represented to the deceased that the ferry was in place ready to receive him and his motor-car. I think that it cannot be successfully disputed that the deceased was fully justified in driving on to the slip and dock in the usual way, without first making a complete or any inspection or examination to ascertain whether the ferry was at the dock or not.

I cannot see that the deceased knew that he was doing anything improper or dangerous in attempting to get on to the ferry that night.

It must be apparent that the defendant knew that the place was dangerous. In his charge to the jury the learned judge in this connection said:

There was evidence given here by two people who said that they had found this situation dangerous, and one of them had written to the defendant corporation calling their attention to the danger. That evidence, gentlemen of the jury, was allowed before you because, again, of the breach of duty that is alleged here. You will remember that in the definition I read you it was stated that the danger must be such that the occupier either knew of it, or should have known of it, and that evidence was allowed in, because if you believe it, it shows that the defendant corporation did now of the danger, but you are not to deduce negligence from it or to use it at all in any other way than for that purpose. It does not follow because other people found the place dangerous at another time that it was dangerous on this occasion. We would have to try that issue out to find out. That would be a separate case, and therefore you must not use that evidence

as proof that the place was dangerous. You use it as proof, if you believe it, that the defendant knew that it was dangerous, but so far as answering this second question is concerned, as to whether the defendant was guilty of negligence or not, you will have regard only to the evidence that bears on the conditions at that particular time, the night that this accident is alleged to have occurred.

There is no contention on the part of the defendant that the deceased voluntarily assumed the risk which it was alleged he knew to exist from extensive user of the ferry slip or dock. On the hearing of this appeal counsel for the appellant stated that he was not arguing *"volens"* and did not do so on the trial. There was no other way for intending users to get on board the ferry. In my opinion the verdict amounts to a finding that the jury found that the place was dangerous and that the defendant knew it. I would not disturb the verdict and would therefore dismiss the appeal.

SLOAN, J.A.: This is an appeal by the Corporation of the City of North Vancouver from a judgment of Mr. Justice MURPHY entered, consequent upon a verdict of a jury, in favour of the plaintiffs who are the widow and children of Philip Whitehead deceased and who sue under the provisions of the Families' Compensation Act (R.S.B.C. 1936, Cap. 93).

The facts are somewhat meagre and lie largely in the realm of conjecture and as the point in the appeal turns upon the interpretation of the findings of the jury a brief outline will suffice.

On the 14th of January, 1936, the late Philip Whitehead left the Army & Navy Veterans' Club premises on Kingsway in his motor-car at approximately 11.20 p.m., with the intention (so far as we know) of returning to his home across Burrard Inlet in North Vancouver, by the ferry operated by the defendant corporation. On the 16th of January he was located in his car in the water on the sea floor at the foot of the ferry slip. Sometime during the night of the 14th of January he drove down the approach to the ferry and then into the water where, trapped in his car, he came to his death by drowning.

The plaintiffs sued the defendant corporation alleging negligent operation of the ferry wharf or slip. They pleaded that

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the defendant corporation was negligent *(inter alia)* in not having an effective barrier and in not adequately lighting the premises.

The defendant corporation by its pleadings, after denying negligence on its part, alleged that the deceased was negligent in *(inter alia)* driving upon the wharf or slip at an excessive rate of speed and not taking proper care. Alternatively the defendant pleaded the Contributory Negligence Act.

I take it to be conceded by counsel there was some evidence led by both sides in support of the various allegations of negligence in the pleadings and on the facts the finding of the jury could not be disturbed as perverse. Before considering the verdict of the jury I wish to refer to the directions of the learned judge in his charge to the jury. The passages relevant to the question before us are as follow:

> The plaintiffs' case here is that the deceased was an invitee; that he went on the defendant's premises on their invitation and on business; that he went there proposing to be a passenger on their ferry; that they were running a ferry and held out an invitation to any person wanting to go to North Vancouver by water, to use that ferry. If those facts are established, and they are scarcely disputed here, then the deceased was an invitee. You remember what I told you, that this action is the same as if the deceased himself were bringing it, in the sense that if he could not succeed plaintiffs cannot. . . .
>
> The law is that an invitee, using reasonable care on his part for his own safety—that is the feature of the definition that the defendant requests your attention to—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 that occupier knows or ought to know to exist, and that where there is a question of the existence of some unusual danger, it is for the jury to decide whether the occupier used reasonable care to warn the invitee of the existence of such danger either by notice, lighting, guarding or otherwise. That is the duty an occupier owes to an invitee. It is a breach of that duty which is the foundation of this action. . . .
>
> With regard to the duty of an occupier to an invitee, I might further state that an occupier must, as regards an invitee, make his premises reasonably safe, or must at least use care to ascertain the existence of dangers and either remove them or give the invitee due warning of their existence.

The learned judge had prepared eight questions for submission to the jury, which are as follow: [already set out in the judgment of McQUARRIE, J.A.]

Concerning these questions he said (in part):

The first question is this, if the defendant was guilty of negligence, could the deceased by the exercise of ordinary care have avoided the accident?

That question is put to you first, gentlemen of the jury, because I again impress upon you that an action for negligence is based upon a breach of duty which the law recognizes, and as I told you, the breach of duty here is towards an invitee, and that duty—let me repeat it to you, and this is the reason why that question appears first—is, that the invitee using reasonable care on his part for his own safety—that is how the law opens, and only when that is the case is he entitled as an invitee to expect that the occupier on his part shall use reasonable care to prevent damage from unusual danger, which he knows or ought to know to exist. You are not to assume for an instant that because that question appears first that the defendant is to be taken to be guilty of negligence. It is put there first because of the duty an occupier owes to an invitee, and that duty is contingent on the invitee using reasonable care on his part for his own safety. Of course if you answer that question yes, that is the end of the case, because there has been no breach of duty. The real cause of this accident, if you take that view, is not at all that the place was unsafe—the real cause of it is—and that is the main contention of the defendant—that he did not take proper care for his own safety, and in order for him to recover as an invitee it must be shown that he used reasonable care for his own safety. . . . The fourth question is, was the deceased guilty of negligence which contributed to the accident? That is altogether different from the first question. The defence of contributory negligence applies in every case based on negligence. The necessity for a person taking care, for his own safety on the other hand arises primarily in a case such as this of invitee and occupier. Formerly if a defendant were negligent and if a plaintiff were negligent, and if both pieces of negligence were the proximate cause of the accident, then the plaintiff failed, because the law was if the plaintiff was guilty of contributory negligence as the lawyers call it, he failed, no matter how negligent the defendant had been, providing that contributory negligence was one of the immediate factors which brought about the accident which caused the damage. That also was felt to be an improper state of the law, and so the Legislature of British Columbia has altered it, and the law now is as follows: [Here the learned judge directed the jury on the provisions of the Contributory Negligence Act and then continued.] If you find it impossible to decide the degree of fault, then you attribute it 50-50; 50 per cent. to each of them. I want to warn you, gentlemen of the jury, now against a compromise in a case of this character. It might occur to you that here is a way out of it. We will find the defendant guilty of negligence and the deceased guilty of contributory negligence. That would be an entirely improper thing for you to do. That is why I have been endeavouring to make clear the difference between number 1 and question number 4. . . . If you find the defendant guilty of contributory negligence then you will apply the law I have just stated.

The verdict of the jury was as follows: [already set out in the judgment of McQuarrie, J.A.]

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Counsel for the defendant corporation did not object below to the charge of the learned trial judge nor to the questions put to the jury and before us submitted the charge was right in law (except he maintained that there was no direction on ultimate negligence—a position described by him of one of last resort) but contended that on the finding of the jury the action should have been dismissed. Two reasons are advanced for this submission. First it is contended that on the proper interpretation to be put upon *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274 (affirmed (1867), L.R. 2 C.P. 311) an occupier of premises owes a duty only to an invitee who uses reasonable care on his part for his own safety: that there is no duty owing to a negligent invitee and as there is no duty owing there can be no breach of duty and consequently no negligence on the part of the occupier. It follows then if there is no negligence on the part of the occupier the action must fail. It is contended when the jury found negligence on the part of the deceased the learned trial judge should have dismissed the action. Secondly, the argument was advanced, in the alternative, that as the negligence of the deceased was subsequent in time to that of the defendant the negligence on the part of the deceased on the facts here can only be ultimate negligence, *i.e.*, the effective and sole cause of the accident and on that ground the action should be dismissed.

The conclusion I have reached renders it unnecessary for me to give consideration to the second submission. I propose to deal now with the first contention.

It is common ground the deceased was an invitee of the defendant corporation on the night of the tragic event. The learned trial judge, it has been seen, based his direction to the jury on *Indermaur* v. *Dames*. It becomes necessary then to consider this often-quoted authority. The passage in question will bear repeating. Mr. Justice Willes, at p. 288, says:

> 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, 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 a jury as matter of fact.

Mr. Justice Willes was defining the standards of duty to be discharged by an occupier and invitee when the invitee was a stranger to the premises. The obligation on the occupier was "to use reasonable care to prevent damage from unusual danger"; that on the visitor to use "reasonable care on his part for his own safety." This passage has given rise to conflict of judicial opinion in relation to the duty of the occupier.

In *Brackley* v. *Midland Railway* (1916), 85 L.J.K.B. 1596, the Court of Appeal expressed the opinion that the duty of the occupier was to warn of hidden danger. This view was described by Scrutton, L.J., in *Hillen* v. *I.C.I. (Alkali) Ld.*, [1934] 1 K.B. 455, at 466, as "the generally accepted view." See also *Guilfoil* v. *T. McAvity & Sons, Ltd.*, [1927] 3 D.L.R. 672.

The view was taken, however, in *Norman* v. *Great Western Railway*, [1915] 1 K.B. 584, that the duty of the occupier was to take care to make the premises reasonably safe and not merely a duty to warn the invitee of any danger. I think it is clear this opinion was expressed in *Norman's* case because that was regarded as the rule in *Indermaur* v. *Dames*. (For an interesting criticism of the *Norman* case see 32 L.Q.R. 255.)

The view taken in *Norman's* case is seemingly supported by *Mersey Docks and Harbour Board* v. *Procter*, [1923] A.C. 253 at p. 260; *Letang* v. *Ottawa Electric Ry. Co.*, [1926] A.C. 732; *Hambourg* v. *The T. Eaton Co. Ltd.*, [1935] S.C.R. 436; *Robert Addie & Sons (Collieries)* v. *Dumbreck* (1929), 98 L.J.P.C. 119; *Weigall* v. *Westminster Hospital*, [1936] 1 All E.R. 232, and *Schlarb* v. *London & North Eastern Railway Co.*, *ib.* 71, while in *Hillen and Pettigrew* v. *I.C.I. (Alkali) Ld.*, [1936] A.C. 69, Lord Atkin leaves the question open. See also *Kester* v. *The City of Hamilton*, [1937] O.R. 420, and the judgment of our own Court in *Gordon* v. *The Canadian Bank of Commerce* (1931), 44 B.C. 213, at 223.

It is to be noted Mr. Justice MURPHY in his charge said this:

> With regard to the duty of an occupier to an invitee, I might further state that an occupier must, as regards an invitee, make his premises reasonably safe, or must at least use care to ascertain the existence of dangers and either remove them or give the invitee due warning of their existence.

The learned judge, with respect, put an alternative obligation

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upon the occupier and it is impossible to know which duty or duties the jury considered the occupier has failed to discharge. This aspect of his charge however is not of importance in the conclusion to which I have come but I cannot pass it over without expressing the view that, so far as the Courts of this Province are concerned, authorities binding on us decide that the duty of an occupier to an invitee is to take reasonable care that the premises are safe.

In *Letang* v. *Ottawa Electric Ry. Co., supra,* Lord Shaw of Dunfermline in delivering the judgment of the Board said at p. 732:

> Unless, however, the defendant company, who had invited the woman to use that access and were accordingly bound to keep it reasonably safe, could establish that she fully knew and understood the nature and the extent of the danger and resolved voluntarily to undertake the risk, the defence fails.

In *Robert Addie & Sons (Collieries)* v. *Dumbreck, supra,* Lord Hailsham, L.C., in defining the duty of an occupier to an invitee, said at p. 121:

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

In *Gordon* v. *The Canadian Bank of Commerce, supra,* MARTIN, J.A. (now Chief Justice of British Columbia) in delivering the judgment of this Court, and referring to the observations of Lord Hailsham in *Robert Addie & Sons (Collieries)* v. *Dumbreck,* said at p. 223:

> This declaration of duty of the occupier to the invitee at last clears up the "unfortunate ambiguity" in *Indermaur* v. *Dames, supra,* pointed out by Salmond.

And at p. 224:

> Upon the facts of the case before us it must be taken on the footing that the plaintiff was an invitee and so "the highest duty exists towards" him which is that "of taking reasonable care that the premises are safe."

In *Hambourg* v. *The T. Eaton Co., Ltd., supra,* Crocket, J., in delivering the judgment of the Court, said at p. 436:

> . . . the duty on the part of the invitor to the invitee, to quote the words of Willes, J., in *Indermaur* v. *Dames* [is] to "use reasonable care to prevent damage from unusual danger, which he (the invitor) knows or ought to know," or, as Lord Hailsham, L.C., put it in *Addie* v. *Dumbreck,* "the duty of taking reasonable care that the premises are safe." Apart from contractual obligations, this is the highest duty the law imposes upon proprietors of premises towards those who go upon them, and applies only where persons go upon the premises as invitees of the proprietors.

Turning now to the obligation of the invitee, it is to be noted, as Lawrence, L.J., said in *Hillen* v. *I.C.I. (Alkali) Ld.*, [1934] 1 K.B. 455, at 470:

Neither in *Norman's* case nor in *Brackley's* case is any doubt cast on the statement of the law by Willes, J., in *Indermaur* v. *Dames*, that an invitee must use reasonable care on his part for his own safety.

That brings me to the real question in this appeal. What does that mean? Does it relate not only to the duty of the invitee but also to the obligation of the occupier? Does the obligation of the occupier extend only to an invitee who makes reasonable use of the premises or does unreasonable use raise a defence of contributory negligence?

The learned judge below in his direction to the jury as quoted above, charged upon contributory negligence after advising the jury (in effect) that the occupier owed no duty to an invitee who did not take reasonable care for his own safety. I suppose, if his interpretation of *Indermaur* v. *Dames* is correct, we may regard the charge of contributory negligence as mere surplusage. But is that interpretation correct? Counsel for the defendant corporation submits it is. Counsel for the plaintiffs conceded that if that interpretation is right he is out of Court but contended it is not the correct interpretation. It appears to me counsel for the plaintiffs is in a difficult position from which he made a gallant, but, to my mind, with respect, unsuccessful attempt to escape. If the learned judge below was right this action should be dismissed; if he was wrong then counsel for the plaintiffs is endeavouring to uphold a verdict consequent upon a charge which is erroneous in law in that there is misdirection on a point of law vital to the result and non-direction amounting to misdirection upon the issue of ultimate negligence, and a new trial should be ordered.

Were I free to follow my own course I would hold the learned trial judge was in error and direct a new trial (a course open to us under section 60 of the Supreme Court Act) but authority which we should follow (in the absence of binding authority to the contrary) forces me to find, as the law now stands, his direction as to the obligation, or lack of it, on the part of an occupier is correct.

It is my own opinion Willes, J., in *Indermaur* v. *Dames*

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defined two duties, that of the occupier and invitee, and then left their respective obligations to one another to be governed by the ordinary common law consequences of negligence and contributory negligence. When we turn to the summing up of Erle, C.J., we find it reported as follows (L.R. 1 C.P. 277-8):

In his summing-up, the Lord Chief Justice stated in substance as follows: The plaintiff has to establish that there was negligence on the part of the defendant; that the premises of the defendant, to which he was sent in the course of his business as a gas-fitter, were in a dangerous state; and that, as between himself and the defendant, there was a want of due and proper precaution in respect of the hole in the floor. To my mind, there would not be the least symptom of want of due care as between the defendant and a person [permanently] employed on his premises, because the sugar-baking business requires a lift on the premises, which must be as well known to the persons employed there as the top of a staircase in every dwelling-house. But that which may be no negligence towards men ordinarily employed upon the premises, may be negligence towards strangers lawfully coming upon the premises in the course of their business. And, after observing upon the facts, he told the jury, that, if they found that there was no negligence on the part of the defendant, or that there was want of reasonable care on the part of the defendant, but that there was also want of reasonable care on the part of the plaintiff which materially contributed to the accident, the plaintiff was not entitled to recover; but that, if there was want of reasonable care in the defendant, and no want of reasonable care in the plaintiff, then the plaintiff was entitled to a verdict.

Two things are of interest in that summing up. The first is the distinction he makes between the defence of "*volenti non fit injuria*" and contributory negligence—the second and more important, in this case, is the use of the phrase

that [if] there was want of reasonable care on the part of the defendant but that there was also want of reasonable care on the part of the plaintiff which materially contributed to the accident, the plaintiff was not entitled to recover.

Willes, J., at p. 289, held that "the jury were properly directed," and I once more reproduce the language at p. 288 (which is of course the judgment of the Court) as follows:

And that, 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 a jury as matter of fact.

When affirming this decision in the Exchequer Chamber (L.R. 2 C.P. 311) Kelly, C.B., delivering the judgment of the Court, said at p. 313:

It was so determined in this case, and though I am far from saying there

was not evidence that the plaintiff largely contributed to the accident by his own negligence, yet that was for the jury.

In *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685, at 697, Bowen, L.J., defines contributory negligence in the sense I think the term was used by Willes, J., in *Indermaur* v. *Dames* as follows:

Contributory negligence arises when there has been a breach of duty on the defendant's part, not where *ex hypothesi* there has been none. It rests upon the view that though the defendant has in fact been negligent, yet the plaintiff has by his own carelessness severed the causal connection between the defendant's negligence and the accident which has occurred; and that the defendant's negligence accordingly is not the true proximate cause of the injury.

In *Mersey Docks and Harbour Board* v. *Procter,* [1923] A.C. 253, at 259-60, Viscount Cave, L.C., in an action by the widow of a man who while working on the docks fell into the water and was drowned, says:

In the present case it is not disputed that the deceased man came within the class described by Willes, J. He came upon the dock property and passed to and from the vessel where he was engaged upon business which concerned both the dock company and himself; and he was entitled, subject to using reasonable care on his part, to expect that the dock company should use reasonable care to protect him from any unusual danger known to the company and not known to or reasonably to be expected by him. If so, the questions of fact which arise or may arise are three—namely, (1.) Were the appellants guilty of negligence or want of reasonable care for the safety of the deceased? (2.) If so, was their negligence or want of care the cause of his death? and (3.) Was there any contributory negligence or want of reasonable care on his part for his own safety?

As I read the last question it appears to me that Viscount Cave, L.C., was using the expression "want of reasonable care on his part for his own safety" as synonymous with "contributory negligence." That case went off on grounds that do not afford much assistance on this branch of this case but to my mind the phrasing of the third question is of significance and points the way to the proper interpretation of the language of Willes, J., in *Indermaur* v. *Dames.*

In my own judgment, when *Indermaur* v. *Dames* is read in the light of the change in the common law brought about by the Contributory Negligence Act, where the jury has found negligence as here on the part of the defendant it cannot be said as the result of a concurrent finding that the deceased was also guilty of negligence the defendant escapes entirely the conse-

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quences of its neglect unless the facts indicate that the deceased could have avoided the result of the defendant's negligence and failed to avail himself of the last clear chance open to him—*Butterfield* v. *Forrester* (1809), 11 East 60; *McLaughlin* v. *Long,* [1927] S.C.R. 303.

It is with considerable hesitation I feel driven to concede my own judgment must be in error and that the Contributory Negligence Act has no application to the circumstances of this case for contributory negligence does not arise where there has been no breach of duty on the part of the defendant. The authorities which have overborne my own judgment follow:

Lord Wright in *Lochgelly Iron and Coal Co.* v. *M'Mullan,* [1934] A.C. 1, at p. 25 defines negligence in the following terms:

> In strict legal analysis negligence means more than needless or careless conduct whether in omission or commission: it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing.

In *Haynes* v. *Harwood,* [1935] 1 K.B. 146, at p. 152, Greer, L.J. says:

> Negligence, in order to give a cause of action, must be the neglect of some duty owed to the person who makes the claim.

In *Hall* v. *Brooklands Auto Racing Club,* [1933] 1 K.B. 205, at p. 231, Slesser, L.J. says:

> But no person can be under a legal obligation to guard against that which he has no legal duty to anticipate unless, indeed, he is an insurer of the safety of his invitees. . . . The obligation is to guard against dangers which might reasonably be anticipated—not against all and every danger.

It is to be especially noted that there is no duty on the occupier to anticipate the invitee will be negligent nor is he under any duty to avoid that negligence by anticipation. *Compania Mexicana de Petroleo "El Aguila"* v. *Essex Transport and Trading Co.* (1929), 141 L.T. 106.

In *Hillen and Another* v. *I.C.I. (Alkali) Ld.,* [1934] 1 K.B. 455, at p. 470, Lawrence, L.J., says:

> An invitee who makes an unreasonable use of the premises and in consequence of such unreasonable use sustains an injury cannot recover damages against the invitor.

In the House of Lords, Lord Atkin in *Hillen's* case, [1936] A.C. 65, at p. 69, after dealing with the duty of an occupier to an invitee continues his speech as follows:

> My Lords, in my opinion this duty to an invitee only extends so long as

and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purposes for which he has been invited. He is not invited to use any part of the premises for purposes which he knows are wrongfully dangerous and constitute an improper use. As Scrutton, L.J. has pointedly said: "When you invite a person into your house to use the staircase you do not invite him to slide down the banisters." *The Calgarth*, [1926] P. 93, 110. So far as he sets foot on so much of the premises as lie outside the invitation or uses them for purposes which are alien to the invitation he is not an invitee but a trespasser, and his rights must be determined accordingly.

Lord Tomlin at p. 71 concurred in all respects with Lord Atkin and Lord Alness at p. 71 said:

The evidence demonstrates that the hatch was put by the plaintiffs to a use which the defendants had no reason to anticipate, and against which they were therefore not bound to provide. No duty having been left undischarged by the defendants, no liability attaches to them.

I think it is clear that the obligation of the defendant corporation must be measured in terms of its duty to the deceased at the time of the occurrence in question. As Duff, J. (as he then was) said in *W. J. McGuire Co.* v. *Bridger* (1914), 49 S.C.R. 632, at p. 645:

. . . the responsibility of the occupier must be considered in relation to [the] responsibility of the invitee.

The authorities to which I have referred may, in my opinion, be summed up to mean an occupier of premises, no matter what the standard of his duty is to an invitee using reasonable care owes to that invitee, who becomes a trespasser because he does not make "what can reasonably be contemplated as an ordinary and reasonable use of the premises," the slight obligations owing to a trespasser and no more. That result, in my opinion, with great deference, cannot be based on the decision in *Indermaur* v. *Dames* but it is the law on this aspect of the matter as it has developed according to my understanding of the cases.

The jury found the deceased negligent in his use of the premises and a finding of negligent use cannot, in my opinion, be anything else than the direct negation of "an ordinary and reasonable use." The defendant corporation owes no duty in law to an invitee who deprives himself of his own *status* by a use alien to the invitation (except that duty owing to a trespasser as defined in *Robert Addie & Sons (Collieries)* v. *Dumbreck, supra),* and therefore the jury in finding the defendant corporation guilty of a breach of duty in the circumstances here,

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could only do so by perversely ignoring the direction of the learned trial judge on the law relative to the respective obligations and duties of an occupier and invitee.

The apportionment by the jury of the respective degrees of fault under the Contributory Negligence Act is of no moment because the Act cannot apply in circumstances like those before us.

Such then is the conclusion I feel compelled to reach.

Before leaving this case I would like to mention that counsel for the appellant and respondents took the firm position before us that no contractual relationship existed between the deceased and the defendant corporation at the time in question and consequently no question of an implied warranty arises.

I am not unmindful of the decision in *Greisman* v. *Gillingham*, [1934] S.C.R. 375, wherein it was held that the contributory negligence of a "licensee with an interest" was not a bar to his right of recovery and that the Contributory Negligence Act of Ontario could properly be applied. In *Greisman's* case, however, the trend of the trial and the arguments on appeal were such that the questions of law for decision there came to be of a substantially different nature than those before us. I therefore feel, with deference, that *Greisman's* case cannot be regarded as a binding authority in the determination of a point of law not before the Court in that case for direct decision.

In this case we are asked to interpret the finding of the jury in the light of the law governing this class of case. This I have done, as I see it, and, with great respect to the contrary view of my brothers, I would allow the appeal, set aside the judgment below and, not without considerable regret, dismiss the action.

Appeal dismissed, Martin, C.J.B.C. and Sloan, J.A. dissenting. Martin, C.J.B.C. would order a new trial; Sloan, J.A. would allow appeal and dismiss action.

Solicitors for appellant: *Farris, Farris, Stultz, Bull & Farris.*
Solicitor for respondents: *T. E. Lawrance.*

REX *EX REL.* GARDINER v. DOMINION CONSTRUCTION COMPANY LIMITED.

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Architect—Registration under Architects Act—Practice by unqualified person—"Person"—Includes corporation—R.S.B.C. 1936, Cap. 1, Sec. 24 (31); Cap. 14, Sec. 32.

The defendant company, not registered under the Architects Act, practised as an architect for gain by preparing plans and supervising in the erection of the Bay Theatre in Vancouver. On a charge for practising as an architect and not holding a certificate of registration, it was *held*, that under the Architects Act a corporation could not be convicted and the charge was dismissed. On appeal by case stated:—

Held, that a corporation is amenable to conviction under said Act and that the case be remitted to the magistrate for further hearing.

APPEAL by way of case stated from the order of police magistrate George R. McQueen, Esquire, dismissing a charge against the defendant which was as follows:

For that Dominion Construction Company Limited, not holding a certificate of registration under the provisions of the Architects Act, R.S.B.C. 1936, chapter 14, to practise within the Province as an architect, unlawfully did at the said city of Vancouver between the 20th day of June, 1938, and the 14th day of September, 1938, practise within the Province of British Columbia as an architect, in that the said company did, between the dates last aforesaid for gain, plan and supervise for others the erection of buildings for persons other than itself, to wit, the Bay Theatre at Denman and Barclay Streets in the city of Vancouver, in the Province of British Columbia, contrary to the form of the statute in such case made and provided.

The magistrate held that under the Architects Act a corporation could not be convicted on the above charge. The appeal was argued before MORRISON, C.J.S.C. at Vancouver on the 23rd of February, 1939.

Maitland, K.C., and *Remnant*, for appellant.
Hossie, K.C., for respondent.

Cur. adv. vult.

15th March, 1939.

MORRISON, C.J.S.C.: This is a "case stated" sent up by His Worship, the deputy police (Court) magistrate, from which I gather that the respondent, Dominion Construction Company,

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is a body corporate under the laws of British Columbia. That they are not registered under the Architects Act, R.S.B.C. 1936, Cap. 14. That in the course of erecting the Bay Theatre in this city they practised as the architects for gain by preparing plans and by supervision in contravention of the Act. An information was laid at the instance of the Architects Institute and the case came on for hearing before the magistrate and was dismissed.

The Interpretation Act, Cap. 1, R.S.B.C. 1936, Sec. 24, Subsec. (31) provides as follows:

"Person" includes any corporation, partnership, or party, and the heirs, executors, administrators, or other legal representatives of such person, to whom the context can apply according to law.

There is no preamble to the Act. A preamble serves as a "key to open the minds of the makers of the Act, and the mischiefs which they intended to redress"—*Stowell* v. *Lord Zouch* (1569), Plowd. 353*a* at p. 369—and would go a long way to show whether the action of the respondent came within the mischief the statute was intended to remedy—*Twyne's Case* (1601), 2 Co. Rep. 212.

Section 2 of the Act:

In this Act, unless the context otherwise requires:—

"Architect" means any person who is engaged for hire, gain, or hope of reward in the planning or supervision for others of the erection, enlargement, or alteration of buildings for persons other than himself; but shall not include any draughtsman, student, clerk of works, superintendent, or other employee of a registered architect, nor any superintendent of buildings paid by the owners thereof acting under the directions and control of a registered architect.

"Building" means a structure consisting of foundations, walls, or roof, with or without other parts.

3 (1):

No corporation shall be registered to practise architecture within this Province or be granted a certificate of registration under this Act, but it shall be lawful for a corporation to have prepared, drawings, plans, and specifications for buildings as defined in this Act which are to be and are constructed, erected, built, or their construction supervised by the corporation, if the drawings, plans, and specifications are prepared under the personal supervision of a registered architect under this Act (whether such architect is in the employ of the corporation or not) and bear his official seal.

32 (1):

Save as in this Act otherwise provided, it shall be unlawful for any person not holding a certificate of registration under the provisions of this Act to practise within the Province as an architect or to advertise or put out any

signs, cards, or other device for the purpose of or with a view to indicating to the public that he is an architect; but where a person is registered as a professional engineer under the "Engineering Act" nothing in this subsection shall apply to him in respect of the practice by him of professional engineering or in respect of the doing by him of anything mentioned in subsection (7) of section 33.

(2) Any person who contravenes the provisions of subsection (1) shall be liable, on summary conviction, to a fine not exceeding twenty-five dollars for the first offence and not exceeding two hundred dollars for every subsequent offence.

33 (1):

33. (1.) Nothing in this Act shall prevent any person, firm, or corporation from making plans or specifications for or supervising the erection, enlargement, or alteration of buildings or any parts thereof to be constructed for their exclusive use and occupancy by themselves or their own employees or by contractors employed by them, if the working drawings of such construction are signed by the authors thereof, with a true statement thereon of their relation to such construction and that the makers thereof are not architects.

If the words "any person" were meant not to include "corporation," then *cadit quæstio.*

In my view the paramount object of the Legislature was to safeguard the public who resort to public buildings, such as theatres, churches, hotels, etc. If the erections are to be used exclusively by the corporation in question or where the structures do not cost more than $10,000 or where they are for storage of produce of agricultural associations then corporations are excepted, thus protecting the public against the exploitation of contractors and builders by the erection of unsafe structures—an additional security to those already existing by way of government or municipal inspection. The good old maxim *"Salus populi est suprema lex"* still survives.

In construing the Act a sound principle is that more regard should be had to the policy which dictated the Act, if one can penetrate it that far, than to the words used (Broom, p. 433).

In *Pharmaceutical Society* v. *London and Provincial Supply Association* (1880), 5 App. Cas. 857 at pp. 861-2, Lord Chancellor Selborne said this:

There can be no question that the word "person" may, and I should be disposed myself to say *prima facie* does, in a public statute, includes a person in law: that is, a corporation, as well as a natural person. But although that is a sense which the word will bear in law, and which, as I said, perhaps ought to be attributed to it in the construction of a statute unless there

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should be any reason for a contrary construction, it is never to be forgotten, that in its popular sense and ordinary use it does not extend so far.

To show that the word "person" was not intended to be used in its popular or colloquial sense, the Legislature interpreted the word by expressly declaring it shall extend to a corporation. It seems to me that if the submission of respondent's counsel were to prevail the public would be exposed to the danger which the Act was passed to prevent. In the *Pharmaceutical* case *(supra)* the learned Lord Chancellor further said:

> If, . . . , there had not been adequate safeguards against the sale of poisonous drugs, . . . then I think the argument would have been extremely strong against corporations being permitted to carry on the business at all; . . . , I am unable to conclude that the purposes and objects of the Act require a larger construction to be placed upon the word "person."

In my opinion, having regard to the full scope of the Act, it may be taken that the word "person" was intended by the Legislature to extend to and include a corporation.

The cases cited and relied upon by counsel are the *Pharmaceutical* case *(supra); Attorney-General* v. *George C. Smith, Limited,* [1909] 2 Ch. 524; *Law Society* v. *United Service Bureau, Ld.,* [1934] 1 K.B. 343 (before a single judge). The English Acts considered in those cases, and our Architects Act, are not, as far as I can make out, in *pari materia.*

It was pointed out to me that the Legal Professions Act of British Columbia had been amended to meet the alleged obscurity of this kind of legislation. Doubtless the amendment was made *ex abundanti cautela.*

The question submitted is whether the learned magistrate came to a correct determination in point of law in dismissing the said information. The answer, with respect, is in the negative. I direct that the case be remitted to the magistrate in order that he may proceed further with the case, I having found that a corporation is amenable to conviction under the Act.

Order accordingly.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada:

ATTORNEY-GENERAL FOR BRITISH COLUMBIA *ex rel.* THE COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA v. COWEN (p. 50).—Affirmed by Supreme Court of Canada, 12th December, 1938. See [1939] S.C.R. 20; [1939] 1 D.L.R. 288.

Cases reported in 52 B.C. and since the issue of that volume appealed to the Supreme Court of Canada, or to the Judicial Committee of the Privy Council:

BURNS v. BURNS (p. 4).—Decision of Court of Appeal (unreported) affirming decision of ROBERTSON, J., affirmed by the Judicial Committee of the Privy Council, 17th October, 1938. See [1938] 4 All E.R. 173; 82 Sol. Jo. 969; [1938] 4 D.L.R. 513; [1938] 3 W.W.R. 477.

CANADIAN BANK OF COMMERCE, THE v. THE YORKSHIRE & CANADIAN TRUST LIMITED AS ADMINISTRATOR OF THE ESTATE OF NELLIE GRACE SILK, DECEASED (p. 438).—Affirmed by Supreme Court of Canada, 12th December, 1938. See [1939] S.C.R. 85.

FIELD AND FIELD v. DAVID SPENCER LIMITED (p. 447).—Reversed by Supreme Court of Canada, 5th December, 1938. See [1939] S.C.R. 36; [1939] 1 D.L.R. 129.

REX v. SHIN SHIM (p. 79).—Reversed by Supreme Court of Canada, 23rd June, 1938. See (1938) S.C.R. 378; [1938] 4 D.L.R. 88; 70 Can. C.C. 321.

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ADMINISTRATION OF ESTATES—*Intestate's estate—Advances to child—Whether "a portion"—Onus of proof—R.S.B.C. 1936, Cap. 5, Sec. 121 (3).*] Section 121 (3) of the Administration of Estates Act provides: "The *onus* of proving that a child has been maintained or educated, or has been given money, with a view to a portion shall be upon the person so asserting, unless the advancement has been expressed by the intestate, or acknowledged by the child, in writing." Moses Seed died intestate. He left him surviving, his widow, two daughters and a grandson Garth Seed, the son of his son George R. Seed, who predeceased him. During his life Moses Seed paid to or on behalf of his son George R. Seed sums of money amounting to $15,625.40. He left an estate valued at $25,831. On originating summons to determine whether the grandson is entitled to share in the estate:—*Held*, that the proof required by the above section need not be in writing. The person asserting that a child has been advanced with a view to a portion need make out a *prima facie* case only. The evidence here makes out a *prima facie* case that the moneys advanced were advanced by the intestate "by portion" and apart from the evidence there is the presumption that these large sums were advanced "by portion." The grandson is not entitled to a share in the estate. BLAKENEY v. SEED. - - **335**

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ARCHITECT—*Registration under Architects Act—Practice by unqualified person—"Person"—Includes corporation—R.S.B.C. 1936, Cap. 1, Sec. 24 (31); Cap. 14, Sec. 32.*] The defendant company, not registered under the Architects Act, practised as an architect for gain by preparing plans and supervising in the erection of the Bay Theatre in Vancouver. On a charge for practising as an architect and not holding a certficate of registration, it was *held*, that under the Architects Act a corporation could not be convicted and the charge was dismissed. On appeal by case stated:—*Held*, that a corporation is amenable to conviction under

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said Act and that the case be remitted to the magistrate for further hearing. REX *ex rel.* GARDINER v. DOMINION CONSTRUCTION COMPANY LIMITED. - - - - **557**

ASSAULT — *Information by injured — Injured man does not appear on hearing—Accused pleads guilty and pays fine—Action for damages—Accused not protected from civil proceedings—Criminal Code, Secs. 732, 733 and 734.*] The defendant having struck the plaintiff with his fist, the plaintiff signed an information charging the defendant with assaulting him. The plaintiff did not appear on the hearing and the defendant pleaded guilty and paid the fine and costs. The plaintiff then brought this action for damages resulting from injuries caused by the assault, and the defendant relies as a defence to the action upon section 734 of the Criminal Code. *Held*, that there was no hearing on the merits, the conviction does not assist the defendant, and said section 734 of the Criminal Code is not a defence to the action. KYLE v. JAMIESON. - - - **309**

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2.——*First execution creditors—Costs—Priority—Directions—R.S.C. 1927, Cap. 11, Secs. 24, 25, 26, 29 and 121—Can. Stats. 1932, Cap. 39, Secs. 9, 12 and 13—R.S.B.C. 1936, Cap. 91, Secs. 33 and 35.*] S. recovered judgment against the executors of the Gordon Drysdale estate for debt and costs. The assets of the estate consisted only of

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lands and equities in land. The judgment creditor filed certificate of judgment in the Land Registry under the provisions of the Execution Act. Upon proceeding to enforce the judgment a receiving order in bankruptcy was made against the executors of the estate, and the creditors' execution proceedings were stayed. S., as first execution creditor then claimed priority for costs of action and execution under sections 25 (2), 29 and 121 of the Bankruptcy Act. The trustee in bankruptcy declined to admit the claim on the ground that no execution process had been lodged with the sheriff. On the creditors' application for directions that this application should be admitted:—*Held*, that the intention of the Act was to provide for priority for such costs, and in a Province where writs of *eligit* and *fieri facias de terris* are abolished, the failure of the Act to deal with the different methods of execution in the respective Provinces should not deprive the first judgment creditor of the rights intended to be given him. Lodgment of execution with the sheriff is not necessary to entitle the first execution creditor to priority for costs. *In re* EXECUTORS OF GORDON DRYSDALE, DECEASED. - **155**

3.——*Practice — Application by trustee against third party—Leave of inspector not obtained — Objection to procedure — R.S.C. 1927, Cap. 11, Sec. 43 (c)—Bankruptcy Rule 142.*] Section 43, subsection (*c*) of the Bankruptcy Act recites "The trustee may, with the permission in writing of the inspectors, do all or any of the following things:— . . . (*c*) Bring, institute, or defend any action or other legal proceeding relating to the property of the debtor." On an application by the trustee under Bankruptcy Rule 142 for an order declaring that the payment of $9,000 made by the debtor to The Canadian Bank of Commerce, claimed by the bank to be due by the said debtor to it, was made with a view of giving the three sureties or guarantors of said debt a preference over the other creditors of said debtor, one of the said guarantors raised the preliminary objection that at the time it was launched the trustee had not obtained the permission in writing of the inspectors as required by the above section of the Bankruptcy Act. *Held*, that the obtaining of the consent of the inspector to the taking of proceedings is merely a provision for the protection of the estate and is not one which a defendant in any proceedings by the trustee is entitled to avail himself of in answer to those proceedings. *In re* ESTATE OF H. O. KIRKHAM AND CO., LIMITED. **278**

BANKS AND BANKING — *Forged cheques cashed by the bank—Delay in notifying bank by customer after knowing of forgeries—Further forgeries after customer knew of forgeries — Extent of liability of bank—Estoppel.*] The plaintiff had a savings account with the defendant bank. On the 28th of April, 1936, he had his passbook made up and he then found that six cheques amounting to $510 to which his name was forged were charged up against him. Instead of pointing this out to the bank or asking to see the cheques, he told the manager not to honour any more cheques on his account; that when he wanted money he would come to the bank. On the bank requesting him to put this in writing he refused to do so. Between the 28th of April and the 8th of June, 1936, ten more forged cheques were charged against his account. He then notified the bank of the forgeries and the forger was prosecuted and convicted. There was no evidence of the bank being prejudiced as to the cheques cashed prior to April 28th, 1936, owing to the plaintiff not telling of the forgeries when he discovered them. *Held*, that there was no estoppel against the plaintiff in respect of the cheques drawn prior to April 28th, 1936, and the plaintiff is entitled to judgment for the amount of those cheques. KEECH v. THE CANADIAN BANK OF COMMERCE. - - - **77**

2.——*Joint account of husband and wife —Death of husband—Right of wife to fund —Gift by husband to wife—Corroboration of wife's evidence—R.S.B.C. 1924, Cap. 82, Sec. 11.*] In an action for a declaration that certain moneys and bearer bonds in a widow's possession belonged to her deceased husband's estate, the widow's claim that the bonds were given to her was corroborated by a witness who a week before the husband's death heard him tell his wife that the bonds were hers. The money in question was deposited by deceased in the joint account of himself and his wife and transferred by her to her own account shortly before his death. It was *held*, that the bonds and money belonged to the widow. *Held*, on appeal, affirming the decision of MCDONALD, J. as to the bonds but reversing his decision as to the money, that in the special facts of this case the moneys in the joint account did not pass by survivorship but are the property of deceased's estate. ROBERTSON v. BATCHELOR AND HANES. **261**

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CHARTERPARTY—*Cancellation of charter —Mitigation of damages—Burden of proof —Quantum of damages.*] On the trial of the action for damages for breach by the defendant of a charterparty it was *held* that the plaintiff was entitled to recover. On a subsequent hearing as to *quantum* of damages it appeared that the plaintiff had chartered the ship from the owners in London, and in turn chartered her to the defendant. Upon receipt of the letter of cancellation from the defendant, the plaintiff without delay notified the owners and relinquished the charter. The owner promptly succeeded in rechartering the ship and thus mitigated the damages. *Held*, that the plaintiff acted reasonably under the circumstances and took the most reasonable course to mitigate the damages. The burden of proving breach of duty to mitigate damages is on the party who alleges such failure. The plaintiff suffered the loss as set out in the particulars of the statement of claim, for which there will be judgment. AUSTRALIAN DISPATCH LINE (INCORPORATED) v. ANGLO-CANADIAN SHIPPING COMPANY LIMITED. (No. 2). **408**

2.——*Loading in British Columbia for Shanghai — Hostilities break out between China and Japan — Charterparty declared cancelled by charterer—Action for damages —Defence of frustration.*] The defendant chartered the ship "Sheaf Crown" on the 25th of June, 1937, to load at berths in British Columbia for ports in Japan, or in charterer's option, Shanghai direct. On August 17th, 1937, the defendant notified the plaintiff that it chose Shanghai. Lay days were not to commence before August 1st, 1937. If the ship was not ready to load by noon of September 15th, 1937, the

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defendant had the option of cancelling the charterparty. The ship was in Japan and started for British Columbia on August 20th, 1937, but before the ship had sailed hostilities broke out between China and Japan. Trouble had been brewing for some time previously which was known to the parties hereto. As hostilities increased, on the 20th of August, 1937, the defendant notified the plaintiff in writing as follows: "We hereby notify you that on account of the war between China and Japan, our charterparty on the S.S. "Sheaf Crown" dated San Francisco June 25th has become impossible of performance and we hereby declare it cancelled." In an action for damages for breach by the defendant of the charterparty, the defendant pleaded frustration. *Held*, that both parties were on an equal footing and one had no advantage over the other as to knowledge of conditions along the North China littoral. The ship did not belong to either of the contesting parties in the hostilities and was proceeding to a foreign concession. There was no actual restraint. On the evidence there appears to have been no ground for frustration. The plaintiff is entitled to recover. AUSTRALIAN DISPATCH LINE (INCORPORATED) v. ANGLO-CANADIAN SHIPPING COMPANY LIMITED. - **401**

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4.——*Motor-car and bicycle—Left-hand turn by motor-car at intersection—Bicyclist without head-light — Duty of motorist—Damages.* - - - - - - **313**
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COMPANIES—*Amalgamation of two companies—Shares—Payment for—Goodwill of director of one of the companies—Consideration—Bankruptcy of new company.*] Two stock-brokerage firms agreed to amalgamate their respective businesses. McDonald, Jukes and Graves were directors and sole owners of the common stock of McDonald, Jukes & Graves Ltd., and they agreed to become directors of the other company, namely, R. P. Clark & Company (Vancouver) Limited, and that each of them should receive $30,000 from the Clark company for their goodwill, the $30,000 of each to be used in the purchase of shares in the Clark company, and each of them individually covenanted that for four years he would not engage in the stock and bond brokerage business in Vancouver except with the Clark company. A cheque for $30,000 was given Jukes by the Clark company. He endorsed it to the Clark company and was allotted 300 shares therein as fully paid up. The company became bankrupt and the trustee in bankruptcy, alleging that the transaction was a sham, applied to have Jukes made a contributory. *Held*, that the goodwill and the covenant were of substantial value, the transaction was a valid one and Jukes should not be made a contributory. *In re* R. P. CLARK & COMPANY (VANCOUVER) LIMITED. JUKES'S CASE. **224**

2.——*Representative action by shareholders — Two actions dismissed — Third action company added as party plaintiff—Same cause of action—Application by defendant to dismiss action—Frivolous and vexatious and an abuse of the process of the Court—Jurisdiction — Appeal.*] Following actions in the State of Oregon, Mr. and Mrs. May brought action in British Columbia in 1928, suing on their own behalf and

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on behalf of all shareholders of Gibson Mining Company Limited against several defendants, including the Daybreak Mining Company Limited, now represented by the appellant Hartin as trustee. Various declarations were sought, based on fraud, the objective being a declaration that the Daybreak was a trustee *ex maleficio* for the Gibson Company of mining property claimed by the latter, although acquired by the Daybreak. The action was dismissed by MURPHY, J., who found the Daybreak's title was tainted with fraud, but the plaintiffs, with knowledge, stood by while large sums were spent on the property and they were not entitled to the relief sought. No action was taken from this judgment. In 1933 the same plaintiffs brought a second action against the same defendants, the Daybreak being then represented by one Kane as trustee. The action was in effect made to have the said judgment of MURPHY, J. set aside on the ground that it was procured by fraud and perjury committed in the course of the hearing. After trial McDONALD, J. set aside the judgment of MURPHY, J. on the ground that it was procured by fraud. He held that as it was only because of false evidence that MURPHY, J. held that innocent shareholders and creditors acquired rights, the ground for his decision in the 1928 action disappeared. This judgment of McDONALD, J. was set aside on appeal to the Court of Appeal. An order was then made in the matter of the winding up of the Gibson Company that its liquidator have leave to bring action against the same defendants, and this action was then launched, with the same plaintiffs as in the 1928 and 1933 actions, but the Gibson Company added as a party plaintiff. The plaintiffs ask, as in the former actions, for many declarations, culminating in the claim for the transfer to the Gibson Company of the same property as in the other actions. The defendant the trustee of the Daybreak, then applied for an order dismissing the action, his main ground being that the original plaintiffs discovering that they had no *status* to sue, the proper plaintiff (the Gibson Company) should not be allowed to recommence the action when the same issues were all finally determined in the former two actions. The application was dismissed. *Held*, on appeal, reversing the decision of FISHER, J. (MARTIN, C.J.B.C. dissenting), that it is not suggested that the whole case was not brought forward or that some new issues necessarily arise consequent upon the change of parties, but even if new facts may

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now be placed in evidence they might with reasonable diligence have been adduced in the earlier actions. In view of the facts and circumstances it would not only be frivolous and vexatious but also futile to permit this action to proceed. MAY *et al.* v. HARTIN *et al.* - - - **411**

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CONSTITUTIONAL LAW—*Coal and Petroleum Products Control Board Act—Validity —Purpose and effect of Act—Evidence as to —Report of Royal Commission — Admissibility as evidence—Injunction—Continuance to trial—B.C. Stats. 1937, Cap. 8.*] For the purpose of examining the effect of legislation which is attacked as *ultra vires*, the Court must take into account any public general knowledge of which it would take judicial notice, and may in a proper case be informed by evidence as to what the effect of the legislation will be. *Held* (McQUARRIE, J.A. dissenting), that the report of a Royal Commission which was laid before the Legislature before the passing of the impugned Act (namely the Coal and Petroleum Products Control Board Act), was admissible in evidence in so far only as it found facts which were relevant to the ascertainment of the alleged real purpose and effect of the enactment, namely, the attempt to regulate the international oil industry and to foster the native coal industry at the expense of foreign petroleum, said purpose being alleged to be an indirect attempt to encroach upon Federal jurisdiction, namely, "The regulation of trade and commerce." An order was made granting an injunction restraining until the trial the enforcement of an order made by the defendant board (created by the Coal and Petroleum Products Control Board Act), which order fixed the price for gasoline sold within the Province on and from October 26th, 1938. The order was granted on the plaintiffs' contention that said Act was *ultra vires* because it encroached upon "The regulation of trade and commerce." *Held*, on appeal, McQUARRIE, J.A. dissenting, that it is both just and convenient to continue the injunction to the trial, as the plaintiffs have shown that there is "a substantial question to be investigated" and a "probability that they are entitled to relief" but in view of the exceptional public importance of the matter, and

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the obvious need for all possible expedition, there was made a term of the order that the plaintiffs give their undertaking to speed the cause in every possible way in all its stages to a final decision. HOME OIL DISTRIBUTORS LTD. *et al.* v. ATTORNEY-GENERAL OF BRITISH COLUMBIA *et al.* - **355**

2.——*Municipal corporation—Extra-provincial rights—Non-resident bondholders—Interest—Whether the Victoria City Debt Refunding Act, 1937, is ultra vires of the Legislature of British Columbia—B.C. Stats. 1937, Cap. 77.*] The plaintiff brought this action on behalf of himself and all other debenture holders of the City of Victoria, for a declaration that the Victoria City Debt Refunding Act, 1937, is *ultra vires* of the Legislature of British Columbia, on the grounds: (a) that it is legislation relative to and affecting debentures that have been sold outside the Province that are negotiable and payable and owned by persons and corporations living and domiciled outside the Province; (b) that the Act purports to legislate in regard to civil rights of such holders of debentures that subsist outside the Province; (c) that section 4 of the Act is *ultra vires* as it prohibits actions being brought in the Courts of the Province against the defendant corporation by debenture holders; (d) that section 25 is *ultra vires* as it confiscated property belonging to debenture holders outside the Province; (e) that said Act is in conflict with the Interest Act. It was held that the pith and substance of the Act was to destroy the civil right of debenture holders outside the Province to return of principal at the mature date and arbitrarily to fix the rate of interest payable during the extended period, which was beyond the power of the Province. *Held*, on appeal, reversing the decision of ROBERTSON, J., that the Provincial Legislature was competent to enact this statute under the powers conferred by the B.N.A. Act under the specific heads (8) and (13) of section 92, *i.e.*, "Municipal Institutions in the Province," "Property and Civil Rights in the Province." *Ladore* v. *Bennett*, [1938] O.R. 324, applied. DAY v. THE CORPORATION OF THE CITY OF VICTORIA, MCGAVIN AND MCMULLEN. - - - - - **140**

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Products Marketing (British Columbia) Act are within the powers of the Province, and non-compliance with an order of the Lower Mainland Dairy Products Board is an offence under the Act. The Board has the power to require defaulters to pay their fees for old services before being permitted to take the further benefits of new services. *Shannon* v. *Lower Mainland Dairy Products Board*, [1938] 2 W.W.R. 604, followed. REX v. HOY'S CRESCENT DAIRY LIMITED. - **321**

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CRIMINAL LAW—*Bawdy-houses—Accused rents room in house—Carries on business of common prostitute there — Charged with keeping a common bawdy-house — Criminal Code, Sec. 225.*] The accused occupied a room in a rooming-house, where she had been living some months. The rear of the rooming-house was directly opposite the rear door of a beer parlour. She solicited men in the beer parlour and took them to her room in the rooming-house for the purposes of prostitution. A charge against her under section 225 of the Criminal Code of keeping a common bawdy-house was dismissed. *Held*, on appeal, reversing the decision of police magistrate Wood, that this case comes within the provisions of section 225 of the Criminal Code, the judgment of acquittal is set aside and a new trial ordered. *Rex* v. *Richards*, [1938] 2 D.L.R. 480; [1938] O.W.N. 139, followed. *Rex* v. *Sorvari*, [1938] O.R. 9; [1938] 1 D.L.R 308 not followed. REX v. MIKET. - - **37**

2.——*Charge — "Wound and hunt big game"—Conviction — Certiorari — Power to amend conviction and reduce penalty—Summary Convictions Act—R.S.B.C. 1936, Caps. 271 and 108, Sec. 18 (a) (ii).*] The accused was convicted on a charge that he "unlawfully did, during the close season, wound and hunt big game, to wit, a doe deer, contrary to section 18, subsection (*a*) (ii) of the Game Act." Upon *certiorari* proceedings: —*Held*, that the conviction as set out is for two separate offences and is not within the saving provisions of section 64 of the Summary Convictions Act, but this case is within the terms of section 101 of said Act and the conviction should be amended by striking out one of the charges, *viz.*, that of wounding and by inserting the time and place as set out in the information. *Held*, further, that as under said section 101 the Court has like powers to deal with the case as seemed just, as are by section 82 of said Act conferred upon the Court to which an appeal is taken under section 77 thereof, the penalty imposed of $25 and costs should be reduced to $10 and costs. REX v. ADVENT. - - - - - - - - - **9**

3.——*Charge of conducting a lottery—Queensland State Lottery—Sale of "interim receipts" in British Columbia—Forwarded to Queensland — Criminal Code, Secs. 69 and 236 (c).*] The accused was convicted on a charge laid under the first part of section 236 (*c*) of the Criminal Code, namely: that he "unlawfully did conduct a scheme for the purpose of determining who, the holders of tickets were the winners of property proposed to be disposed of by a mode of chance." The accused was the North American representative of the "Queensland State Lottery" conducted and drawn under Government supervision in aid of Queensland public hospitals. He received from Queensland books of "interim receipts" with stubs attached. These he sent to sub-agents throughout Canada and the United States, the sub-agents upon making sales sent the stubs and money to the accused who forwarded the same to headquarters in Queensland, and in due course each purchaser would receive a ticket direct from Queensland which entitled him to a chance for a prize in the "draw" which was wholly controlled and managed by the "Queensland State Lottery" officials in Australia. *Held*, on appeal, reversing the decision of police magistrate Wood, that the above section of the Criminal Code is primarily aimed at those who have the power of control over the scheme complained of to select, by whatever means, the winners in the lottery and not at those who merely act as their servants or agents in affording persons in this country an opportunity, by means of receipts or tickets, to try their luck in a draw in a foreign country. *Held*, further, that section 69 of the Criminal Code is of no assistance to the Crown in the circumstances of this case. REX v. RANKINE. - - - **109**

CRIMINAL LAW—*Continued.*

4.——*Charge of living on the earnings of prostitution—Proof — No visible means of support—Evidence of—Criminal Code, Sec. 216, Subsecs. 1 (l) and 2, and Sec. 1014.*] The accused was convicted on a charge of being a male person, unlawfully did live in part upon the earnings of prostitution. The evidence disclosed that about two years previous to his arrest he came to Vancouver from Bridge River, where he had been working for some years, first as a miner and for the last year as a bartender in a beer parlour. He had $2,400 when he arrived in Vancouver, but about a year after he arrived in Vancouver he was taken down with appendicitis, was operated on and remained in a doctor's care for a month, and during his illness he received financial assistance from a brother. Shortly after coming to Vancouver he came in contact with a girl with whom he lived from time to time, and it appeared that this girl was during this period kept by two men, the accused being one of them. There was no evidence that the woman practised prostitution during the times she was living with the two men. The accused had $18 when he was arrested. *Held*, on appeal, reversing the decision of police magistrate Wood, that there has not been that certainty or reasonable proof of the lack of visible means of support that the law required, and the conviction must be set aside as it cannot be supported in the record of the evidence within section 1014 of the Criminal Code. REX v. ZELKY. - **151**

5.——*Charge of murder—Circumstantial evidence — Judge's charge — Whether misdirection — Appeal — R.S.C. 1927, Cap. 59, Sec. 4, Subsec. 5.*] On a trial for murder the judge in his charge said "There are two principles that have to be acted upon and kept in mind by the jury, and the fulfilment of which the jury must require. The first is that every man is presumed to be innocent until he is proven guilty. It is not for the accused to prove his innocence; it is for the Crown to prove his guilt. The Crown has complied with that first principle when it has brought about the accused such a body of evidence as calls for an explanation." *Held*, that viewed as it must be in connection with the instructions that preceded, accompanied and followed the above, there is nothing of substance in said charge that militated unfairly against the accused or is contrary to the principle of "explanation" by the accused enunciated by the House of Lords in *Woolmington* v. *The Director of Public Prosecutions*, [1935] A.C. 462 at p. 482. REX v. MACCHIONE. (No. 2). - **238**

CRIMINAL LAW—*Continued.*

6.——*Conspiracy—Fraud in reference to shares of mining company—Accomplice's evidence—Corroboration—Duty of judge as to —Criminal Code, Sec. 835.*] On a trial wherein the evidence of an accomplice is concerned, if the judge sees fit to convict on the uncorroborated evidence of that accomplice, he may do so without an accompanying statement showing that he convicts with an appreciation of the law by his so doing. There is no obligation upon a judge to exemplify his legal qualifications respecting the rules of evidence in trying a case, because his requisite knowledge of the law pertaining to the proper discharge of the duties of his office must be assumed, and it cannot be inferred that he does not possess a sufficient knowledge of the rules of evidence to try a case properly as regards the evidence of accomplices or otherwise, without distinction. *Rex* v. *Ambler*, [1938] 2 W.W.R. 225, not followed. REX v. BUSH. - - - - - - - **252**

7.——*Indecent assault upon a male person—Two charges of same offence—Pleads guilty to both charges—Sentenced to three years on each charge — Sentences to run consecutively—Appeal from sentence—Criminal Code, Secs. 773, 774 and 779.*] On two charges that the accused "being a male person unlawfully did indecently assault another male person," he pleaded guilty to both and voluntarily admitted nine other similar offences which he asked to be taken into consideration. He was sentenced to serve three years on each charge, the sentences to run consecutively. On appeal from sentence:—*Held*, affirming the sentence, that the magistrate had jurisdiction to impose the sentence, and under the circumstances no ground appeared upon which the Court would be justified in reducing it. REX v. BELT. - - - - - - **118**

8.——*Living in part on the earnings of prostitution—Speedy trial—No averment in charge of previous conviction—Exercise of the power to whip—Criminal Code, Secs. 216, 833, 963 and 1014.*] On speedy trial under Part XVIII. of the Criminal Code on a charge under section 216 of the Criminal Code, accused was convicted of living in part upon the earnings of prostitution, and sentenced to three years' imprisonment and to be whipped three times with three strokes each time. The information and complaint upon which the appellant was tried and convicted contained no averment of a previous conviction, and after the judge pronounced his judgment convicting the accused

CRIMINAL LAW—*Continued.*

he, before passing sentence, asked the convict if he had been previously convicted of an offence of the same kind, and (without putting the Crown to the proof) the convict admitted the fact that he had been, upon which express admission the judge imposed the additional penalty of whipping. On appeal from sentence it was submitted that a condition precedent to the exercise of the power to whip is that the commission of the prior offence must be formally averred in the charge. *Held*, on appeal, that in the light of all the relevant sections of the Code there is nothing to prevent the Court from regarding the language of section 216 as conferring upon the judge in speedy trials an enlarged discretionary power to sentence to whipping after proof, at the proper stage (*i.e.*, after judgment) of a previous conviction, and not as creating a distinct offence founded on a previous conviction. And this view is confirmed by the Court of Criminal Appeal in *Rex* v. *Hunter*, [1921] 1 K.B. 555 at pp. 559-61. In the absence of any statutory provision imperatively requiring an averment of previous conviction to be made in the charge there is no need to make one because it can serve no useful purpose where there is no jury as there is in cases covered by section 963. The sentence of imprisonment for three years stands, but the order that the appellant shall "be whipped three times with three strokes each time" is reduced to one whipping of five strokes. *Held*, further, that section 963 of the Criminal Code does not apply to proceedings under Part XVIII. *Rex* v. *Edwards* (1907), 13 Can. C.C. 202, not followed. REX v. MAH CHEE. - - - **498**

9.——*Practice — Costs — Appeal — Dismissed on "preliminary proceeding"—Criminal Code, Sec. 1021, Subsec. 8.*] Section 1021, subsection 8 of the Criminal Code declares: "On the hearing and determination of an appeal, or any proceedings preliminary or incidental thereto, under this Part, no costs shall be allowed on either side." On the question of costs upon motion by the prosecution (respondent) therefor, after the appeal was dismissed for lack of jurisdiction on a "preliminary proceeding" taken in the proper form of a motion to do so at the opening of the hearing:—*Held*, that this comes exactly within the prohibition of the above section, and the motion is refused. REX v. CROWE. (No. 5). - **173**

10.——*Summary conviction — Appeal by Crown — Security for costs—Whether required—Criminal Code, Sec. 750 (c).*] On an application for an order that an appeal from the dismissal of a charge by a justice of the peace be quashed on the ground that the justice of the peace did not fix an amount as security for costs sufficient to cover the respondent's costs of appeal it was held that section 750 (*c*) of the Criminal Code applies only to an appeal by the accused and on an appeal from the dismissal of a charge the appellant is not bound to give security for the accused's costs. *Held*, further, that in the present case the justice of the peace fixed $50 as security and he is the judge of the sufficiency of the amount. The County Court judge had no jurisdiction to quash the appeal on ground that the amount was not sufficient. REX v. CROWE. (No. 3). - - - - **75**

11.——*Summary conviction — Dismissal of complaint—Appeal by Crown successful—Rights of appellant to costs of appeal.*] A charge against the accused that while intoxicated he did unlawfully have control of an automobile was dismissed by a justice of the peace. An appeal by the informant was successful and accused was convicted. *Held*, that the informant is entitled to the costs of the appeal. REX v. CROWE. (No. 4). **86**

CROWN—Appeal by—Security for costs—Whether required—Criminal Code, Sec. 750 (*c*). - - - **75**
See CRIMINAL LAW. 10.

2.——*Appeal by successful — Rights of appellant to costs of appeal—Summary conviction—Dismissal of complaint.* - **86**
See CRIMINAL LAW. 11.

CROWN LANDS—*Dominion Railway Belt —Timber licences—Transfer of Railway Belt from Dominion to Province—Liability for dues owing Dominion prior to transfer—Novation—Bankruptcy—Claim of Province as unsecured creditor.*] The Abernethy-Lougheed Logging Company Limited carried on business as a logging company for many years in the British Columbia Railway Belt under authority of timber licences issued by the Dominion Government pursuant to timber regulations promulgated under the Dominion Land Act, and licence to log timber berth "W" in said Railway Belt was issued by the Dominion to Miami Corporation for several yearly periods prior to May 1st, 1930. On this date a licence was issued for one year for timber berth "W" to Miami Corporation, and certain timber berths other than "W" were also covered by yearly licences issued by the Dominion to the Aber-

CROWN LANDS—*Continued.*

nethy Company on May 1st, 1930. On the 10th of June, 1930, Miami Corporation assigned the licence covering timber berth "W" to Abernethy Company, and the assignee agreed to assume and pay all royalties and other charges respecting the timber cut on timber berth "W" at or prior to the date thereof. By agreement between the Dominion and the Province that became operative on August 1st, 1930, the lands situate in the Railway Belt were transferred from the Dominion to the Province, and on this date there was owing to the Dominion on all the licences in question $30,515.61. On and after August 1st, 1930, the administration of Crown lands within the Railway Belt reverted to the Province. On the 13th of October, 1932, the Abernethy Company, in sending rentals and licence fees to the Forest Branch of the Province, enclosed the assignment of timber berth "W" from the Miami Corporation to itself, and requested transfer of the licences for 1931 and 1932 covering this berth, and two licences were issued to the Abernethy Company covering timber berth "W," one from May 1st, 1931, and the other from May 1st, 1932. Licences covering the other berths were also issued yearly to the Abernethy Company. On the 8th of June, 1934, the Abernethy Company went into bankruptcy. There was owing by the Abernethy Company to the Province on all the licences from August 1st, 1930, to date of bankruptcy, the sum of $22,173.89. On January 10th, 1936, the Crown filed a claim as an unsecured creditor against the trustee for the amount owing the Dominion up to August 1st, 1930, and the amount owing the Province after that date, being in all $52,689.50. The disallowance of the claim by the trustee was upheld by MURPHY, J. *Held*, on appeal, that with relation to all the licences the Railway Belt Re-transfer Agreement did operate as an assignment from the Dominion to the Province of the moneys owing to the Dominion at the time the agreement became effective, and the right to sue was transferred to the Province. *Held*, further, that with relation to timber berth "W" there was a complete novation on the part of all the parties concerned, and a carrying out of the intention to substitute Abernethy Company as debtor in place of Miami Corporation. *Held*, further, that the licences expire at the end of every licence year without the necessity of action by anyone. At the date of bankruptcy the Abernethy Company was logging pursuant to authority conferred by licences issued on May 1st, 1934, and expiring on April

CROWN LANDS—*Continued.*

30th, 1935. On January 10th, 1936, when the Province filed its claim the bankrupt was not the holder of any subsisting licences. It follows that the Crown cannot be regarded as a secured creditor. The Province is therefore entitled to claim as an unsecured creditor against the estate for $52,689.50, and the appeal is allowed. ATTORNEY-GENERAL OF BRITISH COLUMBIA v. SALTER. **338**

DAMAGES. - - - **292, 478**
See NEGLIGENCE. 4, 13.

2.——*Action for.* - - **309, 401**
See ASSAULT.
CHARTERPARTY. 2.

3.——*Automobiles — Head-on collision—Rule of the road—Driving on left side—Emergency.* - - - - - **125**
See NEGLIGENCE. 3.

4.——*Goods stored on dock for shipment destroyed by fire — "Accidentally begun"—Spread of fire—Extent of duty of warehouseman.* - - - - - - **207**
See NEGLIGENCE. 5.

5. —— *Highways — Sidewalk — Hole in pavement—Injury to pedestrian—Reasonable repair.* - - - - - - **373**
See NEGLIGENCE. 9.

6.——*Hotel elevator—Injury to guest—Intoxicated men in elevator — Interfering with operator—Care to be taken by operator.* - - - - - - - **397**
See NEGLIGENCE. 6.

7.——*Injuries—Collision between automobile and street-car—Action brought after expiration of six months — Consolidated Railway Company's Act, 1896, B.C. Stats. 1896, Cap. 55, Sec. 60.* - - **233**
See LIMITATION OF ACTIONS.

8.——*Mitigation of—Burden of proof—Quantum.* - - - - - - **408**
See CHARTERPARTY. 1.

9.——*Motor-car and bicycle—Collision—Left-hand turn by motor-car at intersection—Bicyclist without head-light — Duty of motorist.* - - - - - **313**
See NEGLIGENCE. 7.

10.——*Negligence — Injuries—Death of injured—Actions by widow under Administration Act and Families' Compensation Act—Damages for shortened expectation of life—Apportionment of part of said damages to deprivation of privilege of caring for defendants—Abatement — R.S.B.C. 1936, Caps. 5,*

DAMAGES—*Continued.*

Sec. 71 (2), and 93.] In attempting to drive his car past a street-car which had stopped at an intersection, the defendant H. struck and injured the plaintiff's husband as he stepped from the street-car, which resulted in his death a month later. The plaintiff brought action in which she pleaded the Administration Act and claimed special damages and costs. She then brought a second action in which she pleaded the Families' Compensation Act and general damages and costs. The actions were consolidated. The deceased was 25 years old, a boiler-maker or tinsmith by trade and logging-camp employee by occupation. With slight interruptions he had had steady employment. The plaintiff was 24 years old and there were no children. *Held,* that despite the omission of the plaintiff to specifically claim more than she did, under the authorities she is entitled to the full benefit of the provisions of section 71 (2) of the Administration Act and to recover, *inter alia,* damages in the first action for the loss by the deceased of his expectancy of life. These damages were assessed at $15,000 of which $10,000 was allocated to the element of deprivation of the privilege of caring for dependants. In the second action general damages of $10,000 were awarded. It was also ordered that the general damages allowed under the Administration Act should be abated to the extent that the plaintiff was a beneficiary under the administration of the portion of the $15,000 ascribed to the deprivation of the privilege of caring for dependants. MACKENZIE v. HARBOUR AND BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED. - - - **88**

11.—*Negligence — Injury to gratuitous passenger.* - - - - - **98**
See MOTOR-VEHICLES. 3.

12.——*Running down pedestrian at intersection—Traffic-control lights—Negligence —Death of plaintiff's husband—Administration Act—Families' Compensation Act.* **380**
See MOTOR-VEHICLES. 5.

13.——*Window cleaner falls from window to street—Injures passerby—Liability —Inevitable accident—Workmen's Compensation Act, R.S.B.C. 1936, Cap. 312—Applicability.* - - - - - - **30**
See NEGLIGENCE. 10.

DEBENTURES. - - - - **300**
See LUMBER COMPANY.

DECEASED—Domiciled in British Columbia —A portion of estate in Ontario— Allowance for duty paid in Ontario Costs. - - - **120, 423**
See SUCCESSION DUTY.

DENTIST—Foreign—Advertising in British Columbia — Right of action — Appeal. - - - - - **50**
See INJUNCTION. 2.

DEPORTATION—Order for. - **179**
See IMMIGRATION.

DISCOVERY—Evidence taken for—Rejected by trial judge—Action dismissed— Appeal — Evidence improperly rejected—New trial—Rule 370c (1). - - - - - - - - **292**
See NEGLIGENCE. 4.

2.——*Examination of officer of company —Pilot of aeroplane—Aeroplane operated by defendant company — Whether pilot an "officer"—Rule 370u.* - - - - **377**
See PRACTICE. 9.

3.——*Right to against Attorney-General.* - - - - - - - - - **409**
See MINES AND MINERALS. 2.

DIVORCE—*Decree obtained in the Canton of Neuchatel in Switzerland — Petitioner never domiciled in said Canton—Whether domiciled in Canada—Entry of pleading by respondent in Swiss Court—Authorization of—Acquirement of domicil by choice—Evidence.*] Respondent is a native of Switzerland. He has lived in Canada since 1927 and he married the petitioner in Canada in 1929. In 1935 respondent went to Switzerland where he obtained a decree of divorce from the petitioner and immediately returned to his farm in British Columbia. The Swiss Consul in Vancouver, who had sent notice of the proceedings in Switzerland to the petitioner herein, was informed in writing by her that she denied the jurisdiction of the Swiss Court. It was found on the evidence that the Canton of Neuchatel where the decree of divorce was obtained, was never the domicil of the respondent herein and the petitioner herein did not in fact submit to the jurisdiction of the Court thereof. *Held,* that even if the entry of a plea and cross-demand in the Courts of Neuchatel on behalf of the petitioner herein had been authorized by her, it would not preclude her from denying the validity of the Swiss decree. *Held,* further, that the contention that because the decree granted by the Courts of the Canton of Neuchatel was one which would be recognized as valid by

DIVORCE—*Continued.*

the Courts of the Swiss domicil of origin of the respondent herein it must be recognized as valid here, cannot be upheld, as, in order to sustain the contention it must be established that when he launched the proceedings in Switzerland he had a domicil in one of the Republics of Switzerland. Upon the evidence it must be found that he had abandoned his domicil of origin and acquired a new domicil in Canada which he had during the pendancy of the Swiss proceedings, it was immaterial what view the Courts of his domicil of origin held as to the validity of the Neuchatel decree, it had no extra-territorial effect at any time and must be regarded in Canadian Courts as an invalid decree. CHATENAY v. CHATENAY. - - - - - - - - - **13**

DOMICIL—Acquirement of by choice—Evidence. - - - - - **13**
See DIVORCE.

DOMINION RAILWAY BELT — Timber licences—Transfer of Railway Belt from Dominion to Province—Liability for dues owing Dominion prior to transfer. - - **338**
See CROWN LANDS.

DUTY—Paid in Ontario—Allowance for. - - - - - - **120, 423**
See SUCCESSION DUTY.

EAST INDIAN—Domicil. - - **179**
See IMMIGRATION.

EMPLOYER AND EMPLOYEE. - **241**
See WORKMEN'S COMPENSATION ACT.

ENROLMENT—Application for order for—Need of notary public within applicant's district. - - **376**
See NOTARIES.

ESTATE—Partly in Ontario. - **120, 423**
See SUCCESSION DUTY.

ESTOPPEL. - - - - **77, 161**
See BANKS AND BANKING. 1.
MOTOR-VEHICLES. 1.

EVIDENCE — Discovery — Improperly rejected by trial judge—New trial—Rule 370c (1). - - - **292**
See NEGLIGENCE. 4.

EXECUTION CREDITORS—Priority. **155**
See BANKRUPTCY. 2.

EXECUTORS—Foreign. - - **190**
See PRACTICE. 12.

FALSE STATEMENTS. - - **195**
See INSURANCE, FIRE.

FATHER—Gift of air-gun to infant son—Shooting at targets—Injures boy who comes on defendant's premises—Liability of father. - **437**
See NEGLIGENCE. 12.

2.——*Right of action against.* - **161**
See MOTOR-VEHICLES. 1.

FERRY SLIP—Lack of guard when ferry is out. - - - - - **512**
See NEGLIGENCE. 2.

FIRE—Spread of. - - - - **207**
See NEGLIGENCE. 5.

FIRE INSURANCE. - - -
See under INSURANCE, FIRE.

FIXTURES. - - - - - **463**
See MORTGAGE.

FORGED CHEQUE—Cashed by bank—Delay in notifying bank by customer after knowing of forgeries—Further forgeries after customer knew of forgeries—Extent of liability of bank—Estoppel. - - **77**
See BANKS AND BANKING. 1.

FRAUD — Certificates of work procured through, without joining an adverse claimant as co-plaintiff. - **409**
See MINES AND MINERALS. 2.

2.——*Shares in mining company—Accomplice's evidence — Corroboration — Duty of judge as to.* - - - - - **252**
See CRIMINAL LAW. 6.

FRIVOLOUS AND VEXATIOUS. - **411**
See COMPANY. 2.

FRUSTRATION—Defence of. - **401**
See CHARTERPARTY. 2.

GAME — Wound and hunt — Conviction—*Certiorari*—Power to amend conviction and reduce penalty. - **9**
See CRIMINAL LAW. 2.

GIFT—By husband to wife—Corroboration of wife's evidence. - **261**
See BANKS AND BANKING. 2.

GOODS—Dangerous—Sale of—Liability of manufacturer, whoesaler or retailer to purchaser—Failure to give adequate warning. - - **266**
See NEGLIGENCE. 11.

GOODWILL—Director of company. - **224**
See COMPANY. 1.

GRATUITOUS PASSENGER—Injury to. - - - - - - - **98**
See MOTOR-VEHICLES. 3.

GUARD—To ferry slip. - - **512**
See NEGLIGENCE. 2.

GUEST—In hotel—Injured in elevator. - - - - - - - **397**
See NEGLIGENCE. 6.

HABEAS CORPUS—*Certiorari.* - **179**
See IMMIGRATION.

HAIRDRESSER. - - - - **478**
See NEGLIGENCE. 13.

HOSTILITIES. - - - - **401**
See CHARTERPARTY. 2.

HOTEL ELEVATOR—Injury to guest—Intoxicated men in elevator—Interfering with operator—Care to be taken by operator—Damages. **397**
See NEGLIGENCE. 6.

HUSBAND AND WIFE—Joint account in bank—Death of husband—Right of wife to fund—Gift by husband to wife—Corroboration of wife's evidence. - - - - - **261**
See BANKS AND BANKING. 2.

ILLEGALITY—Plea of. - - **157**
See MONEY HAD AND RECEIVED.

IMMIGRATION — *East Indian — Canadian domicil — Surreptitious entry into United States and return by stealth into Canada—Arrest—Board of Inquiry—Order for deportation—Release on habeas corpus with certiorari in aid—Appeal—R.S.C. 1927, Cap. 93, Secs. 2, 33, Subsec. 7, 40 and 42.*] Jawala Singh, born in India in 1885, came to Vancouver in March, 1908, and remained in the Province until 1926, and attained Canadian domicil. He then entered the United States by stealth. He came back to the Province by stealth a number of times, owing to fear of the American authorities, but on each occasion stayed a short time and returned to the United States again. He finally came back to Canada by stealth in April, 1935, and stayed in the Province until arrested in February, 1937. On being examined by a Board of Inquiry it was ordered that he be deported on the ground that he had made a surreptitious entry into Canada, and an appeal to the minister was dismissed. On *habeas corpus* proceedings with *certiorari* in aid, he was released. *Held*, on appeal, reversing the decision of MANSON, J., that being in Canada from 1908 until 1926 he had acquired Canadian

IMMIGRATION—*Continued.*

domicil, but going to the United States in 1926 where he remained until 1935, he lost it. The case falls directly within the provisions of section 33, subsection 7 of the Immigration Act, and the appeal is allowed. THE KING v. JAWALA SINGH. - **179**

INDECENT ASSAULT—Upon a male person—Two charges of same offence—Pleads guilty to both charges—Sentenced to three years on each charge—Sentences to run consecutively—Appeal from sentence. - - - - - - - **118**
See CRIMINAL LAW. 7.

INEVITABLE ACCIDENT. - - **30**
See NEGLIGENCE. 10.

INFANT—Shooting at targets—Injures boy. - - - - - - - **437**
See NEGLIGENCE. 12.

INFORMATION—By injured—Injured man does not appear on hearing—Accused pleads guilty and pays fine—Action for damages—Accused not protected from civil proceedings—Criminal Code, Secs. 732, 733 and 734. - - - - - **309**
See ASSAULT.

INJUNCTION—Continuance to trial. **355**
See CONSTITUTIONAL LAW. 1.

2.——*Foreign dentist — Advertising in British Columbia—Right of action—Appeal —R.S.B.C. 1936, Cap. 72.*] The defendant, a dentist practising his profession in the City of Spokane in the State of Washington, advertised in the Trail, Nelson and Fernie newspapers and on radio broadcasts over the Trail and Kelowna stations in respect of his practice of dentistry in Spokane. In an action at the instance of the College of Dental Surgeons of British Columbia an injunction was granted restraining the defendant from so advertising in British Columbia in respect of his practice of dentistry in Spokane. *Held*, on appeal, reversing the decision of MCDONALD, J. (O'HALLORAN, J.A. dissenting), that the learned judge below has given a more extended application to the Dentistry Act than is justified because it is concerned alone with the practice of dentistry within this Province and the prohibition there of acts relating to the practice of dentistry does not extend to those carried on outside it, as in this case by the appellant who practises in the city

INJUNCTION—*Continued.*

of Spokane. ATTORNEY-GENERAL FOR BRITISH COLUMBIA *ex rel.* THE COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA v. COWEN. - - - - - - - - - - **50**

3.——*Operation of theatre—Projectionist—Trade union—Employment of its members—Picketing, watching and besetting—Discretion of trial judge — Appeal — R.S.B.C. 1936, Cap. 289.*] The defendants, claiming that the owners of the Hollywood Theatre in Vancouver were violating an agreement with them in that they did not employ one of the defendants' projectionists, distributed hand-bills and carried on a system of picketing, watching and besetting operations in front of the entrance to the theatre. In an action for damages and an injunction, the plaintiff obtained an *interim* injunction restraining the defendants from so operating until the trial. *Held,* on appeal, affirming the decision of MCDONALD, J., that an order of this kind is in a large measure one of discretion, with which an appellate Court will not lightly interfere. There was at least some evidence of acts on the part of the defendants not within the protection of the Trade-unions Act that justifies the order and the appeal should be dismissed. HOLLYWOOD THEATRES LTD. v. TENNEY *et al.* **385**

INSOLVENT PLAINTIFF—Costs—Security for. - - - - - - **1**
See PRACTICE. 7.

INSURANCE, ACCIDENT—*Wife owner of car—Name of husband inserted in policy by mistake—Effect of—Driver of car without licence—Breach of statutory condition—Insurer's knowledge—Continuation of defence in action against insured—Waiver.*] The plaintiff held a policy of insurance to indemnify her against liability for injury to others by her car. The policy ran out in July, 1935, and her husband applied to the agents of the defendant company for a like policy to cover said car. The agents sent him an application and he signed it without noticing that his name appeared as applicant and owner of the car instead of the name of his wife, and the policy was duly issued in his name. On the 5th of November, 1935, while the car was driven by one Hanbury, a boy of seventeen years of age, it struck and injured one Hughes. The next day plaintiff's husband notified the defendant's agents in writing of the accident, that Hanbury, a boy of seventeen years was driving the car, and that he had no licence. On February 19th, 1936, Hughes brought action against the plaintiff and Hanbury for damages. The defendant company was immediately notified of the action and of the defence that in fact a boy named Kennedy was entrusted with the car and not Hanbury, but Kennedy had allowed Hanbury to drive the car after they had left the plaintiff's house. The defendant company then undertook the defence of the action and carried through to judgment, but the trial judge declined to accept plaintiff's evidence and found she had entrusted the car to Hanbury and gave judgment in favour of Hughes. The plaintiff then brought this action that the defendant company indemnify her against the Hughes judgment. Two defences were raised, first that the policy was not issued in her name and there was no contract between herself and the defendant company; secondly, there was breach of a statutory condition in that Hanbury who drove the car, had no driver's licence. It was held on the trial that the case must be decided on the same basis as it would be had the plaintiff been named in the policy, and that if it were necessary to do so the evidence establishes estoppel. Further, that the defendant had full knowledge of the breach of the statutory condition and elected to proceed with the defence, thereby waiving any right to dispute liability on this ground. *Held,* on appeal, reversing the decision of MURPHY, J., that as it was not until the trial judge in the former action found that the car had been entrusted to Hanbury that the insurance company knew that to have been the fact, the company did not undertake the defence of the first action with full knowledge of the breach of the statutory condition and therefore did not, by undertaking the defence, waive the right to set up said breach as a ground for repudiating liability under the policy. ANDERSON v. CALEDONIAN INSURANCE COMPANY. - **41**

INSURANCE, AUTOMOBILE—*Application through agent—Authority of agent to bind company.*] The plaintiff insured his car through M., an insurance agent, with the Portage La Prairie Mutual Insurance Co. The policy expired on May 25th, 1935. Before its expiry M. asked the plaintiff if he wanted to renew his policy, and plaintiff replied in the affirmative. M. took plaintiff's application to the defendant company who accepted it, issued a policy and sent it to the plaintiff. This policy expired on the 25th of May, 1936. Before its expiry M. asked the plaintiff if he desired to renew and the plaintiff replied in the affirmative and signed the application. M. then told

INSURANCE, AUTOMOBILE—*Continued.*

plaintiff he was covered. M. did no submit the plaintiff's last application to the defendant nor did defendant issue a new policy to the plaintiff. On June 21st, 1936, the plaintiff had an accident with his car and one Bradley and his wife were injured. The plaintiff immediately notified M. who with one W., another insurance agent, attended the plaintiff and investigated the facts of the accident. The defendant company heard nothing of the accident until September 30th, 1936. In November, 1936, the plaintiff received a policy issued by the Saskatchewan Mutual Insurance Co. by its agent W., showing the policy period as being from June 30th, 1936, to June 30th, 1937. Bradley and his wife brought action for damages against the plaintiff on July 7th, 1936, and he sent the writ to M., who returned it and said the company would not assume responsibility. Bradley and his wife recovered judgment against the plaintiff who then brought this action against the defendant, claiming that it by its agent M. agreed to insure the plaintiff from May 25th, 1936. At the trial the plaintiff did not remember to what insurance company the last application was addressed, and the defendant contends that M. had authority simply to submit applications for the insurance to the defendant for its acceptance or rejection. *Held*, that M. did not submit any application for renewal from the plaintiff to the defendant. It is a fair inference that before the 25th of May, 1936, the plaintiff signed an application for insurance in the Saskatchewan Mutual Fire Insurance Co. and no renewal contract was made by the plaintiff with the defendant, further the plaintiff did not prove that M. had authority to contract for the defendant. TREWIN v. WAWANESA MUTUAL INSURANCE COMPANY. - - - - - - - **284**

2.——*Motor repairers insured—Defendant's car left for repairs—Loan of car to defendant in meantime — Accident — Insurance company settle amount of damages and pay injured — Whether "owner's policy"—Subrogation — Liability of defendant — R.S.B.C. 1936, Cap. 133, Secs. 153, 165 (1) and 168; Cap. 195, Sec. 74 (1); B.C. Stats. 1937, Cap. 45, Sec. 11 (1).*] Defendant left his motor-car in the plaintiff's garage for repairs. The plaintiff allowed the defendant to use one of its cars while his car was being repaired. The defendant, while driving the plaintiff's car, ran into and injured one Mrs. Lyons. Under section 11 (1) of the Motor-vehicle Act Amendment Act, 1937,

INSURANCE, AUTOMOBILE—*Continued.*

the defendant was deemed to be driving the plaintiff's car at the time of the accident as the agent or servant of the plaintiff and in the course of his employment, so that the plaintiff was thus jointly liable with the defendant for any negligent action of the defendant while driving his car. The plaintiff was insured against public liability by a policy of insurance with The Merchants' Marine Insurance Company Limited and upon Mrs. Lyons instructing her solicitor to take action, the adjuster of the insurance company arranged a settlement and paid Mrs. Lyons $250 for damages and $44.50 expenses, and obtained a release from her of all liability. The insurance company then brought this actoin under section 165 (1) of the Insurance Act in the name of the plaintiff, claiming $294.50 from the defendant. It was *held* on the trial that the policy in question was an "owner's policy" within section 153 of the Insurance Act, and as section 168 of said Act applies in the defendant's favour, the action was dismissed. *Held*, on appeal, reversing the decision of WHITESIDE, Co. J. (O'HALLORAN, J.A. dissenting), that the policy is not an "owner's policy" within the statutory definition thereof nor is the defendant covered under Item 4 (*b*) of the policy. It therefore follows that the defendant cannot claim its protection. By virtue of section 165 (1) of the Insurance Act, the insurance company is subrogated to all the "rights of recovery" of the plaintiff, and as the plaintiff could recover from the defendant, therefore this action may be maintained by the insurance company in the name of the plaintiff. TRAPP MOTORS, LIMITED v. PAWSON. - - - - - **485**

INSURANCE, FIRE—*Proof of loss—Policy covering house and furniture—False statements as to furniture—Statutory conditions 15 and 16.*] The plaintiff's husband held an insurance policy in the defendant company for $950 on his dwelling-house, and $1,600 on his household furniture and personal effects. He assigned the policy to his wife after the house and furnishings were destroyed by fire. In an action to recover on the insurance policy, the defendant company alleged that the statements made by the husband in his statutory declaration in relation to the particulars required by statutory condition No. 15 as to the value of the dwelling and as to the values and dates and places of purchase of the furniture and contents, and as to the actual loss or damage thereto caused by the said fire, were false to his knowledge and were made wilfully and

INSURANCE, FIRE—*Continued.*

with fraudulent intent of inducing the defendant to pay the maximum amount of said insurance. *Held*, that in determining whether there was "fraud or wilfully false statement" within statutory condition 16 by an insured in respect to particulars required by statutory condition 15, consideration must be given as to whether the actual loss sustained was less than the sum insured, where the full insurance is claimed, whether in case of over-valuation the excess claim has arisen from *bona fide* mistake or from a deliberate attempt to mislead, and whether the claim has been made or included in respect of goods which to the knowledge of the insured had no existence. A finding of "fraud or wilfully false statement" in said particulars in respect to household furniture vitiates the whole claim for loss of house and furniture, where both are insured by the one policy, although no fraud or wilfully false statement has been proved in respect to the house. On the facts of this case the whole claim is vitiated by reason of the fraud and wilfully false statements in the statutory declaration, and the action is dismissed. SOKOLOWSKY v. FIRE ASSOCIATION OF PHILADELPHIA. - - **195**

INSURANCE, MARINE—*Damage to cargo on voyage—Lack of ventilation owing to closing of ventilators and hatches—Weather conditions—"Perils of the sea"—Construction of.*] The plaintiff, engaged in the manufacture and wholesale trade of rice on the Fraser River, purchased 5,000 tons of rice for delivery at Rangoon, where the plaintiff entered into a freight engagement for its carriage by the motor vessel "Segundo" from Rangoon to the plaintiff's docks on the Fraser River. The loading of the cargo commenced on April 13th, 1936, and the vessel sailed on April 24th following. The discharge of cargo on the Fraser River commenced on May 29th, 1936. The defendant insured the plaintiff against loss or damage to shipments of rice imported by the plaintiff as from time to time declared under the policy where the loss arose, *inter alia*, from perils of the sea. During the voyage between May 8th and 11th, for 55 hours the weather was severe, necessitating the closing of hatches and cowl ventilators, thereby shutting off all ventilation of the cargo, and other stoppages of ventilation occurred during the voyage. The log of the "Segundo" showed that the ventilators were frequently closed because of rain and fog. Upon the discharge of the cargo it was discovered that one lot of rice of 750 tons had

INSURANCE, MARINE—*Continued.*

been damaged by heating. The jury found that the proximate cause of the damage was the closing of the ship's ventilators and hatches, and judgment was given for the plaintiff. *Held*, on appeal, reversing the decision of ROBERTSON, J. (MCQUARRIE, J.A. dissenting), that according to the evidence the voyage in question was regarded by seafaring men as a fine voyage for that time of year, the weather was normal and what was to be anticipated. The closing of the hatchways and ventilators under the circumstances of this case was an act which falls not within but without the *indicia* of the quoted definition of "perils of the sea." *Held*, further, that in cases of marine insurance the proximate cause is the last event in time preceding and directly producing the damage except in those cases where the efficient cause while not last in time, is of such an overpowering and irresistible nature that its course and predictable result cannot be materially affected by subsequent intervening acts or events. The appeal should be allowed and the action dismissed. CANADA RICE MILLS LIMITED v. THE UNION MARINE AND GENERAL INSURANCE COMPANY LIMITED. - - - - - - - - - **440**

INTESTATE'S ESTATE—Advances to child—Whether "a portion"—*Onus* of proof. - - - - - **335**
See ADMINISTRATION OF ESTATES.

INTOXICATED DRIVER. - - **98**
See MOTOR-VEHICLES. 3.

INTOXICATED MEN—In elevator—Interfering with operator. - **397**
See NEGLIGENCE. 6.

JUDGMENT—*Appeal—Security for payment of judgment—Appellant a trust company—Security given under Trust Companies Act—Effect of—R.S.B.C. 1936, Cap. 45, Sec. 47 (3); Cap. 57, Sec. 30.*] When an appellant required to give security for payment of the judgment is a trust company which has given the Minister of Finance the security required by section 47 (3) of the Trust Companies Act, the effect of the said Act must be taken into consideration in construing section 30 of the Court of Appeal Act. *Held*, that said security given under the Trust Companies Act was security within the meaning of section 30 of the Court of Appeal Act, and the Court had jurisdiction to declare it satisfactory, and that in the present case said security and additional security of $10,000 by cash or bond, accompanied by a declaration that the additional

JUDGMENT—*Continued.*

security had been given without prejudice to the rights of the respondents as creditors under said section 47 (3), should be declared satisfactory within the meaning of section 30 of the Court of Appeal Act, and accordingly execution should be directed to be stayed. STAVE FALLS LUMBER COMPANY LIMITED AND AITKEN v. WESTMINSTER TRUST COMPANY *et al.* (No. 2). - - **481**

2.——*Unsatisfied.* - - - **161**
See MOTOR-VEHICLES. 1.

JURY—Questions and answers. - **98**
See MOTOR-VEHICLES. 3.

LICENCE FEE—Registration of milk dealers. - - - - - - - **321**
See CONSTITUTIONAL LAW. 3.

LIMITATION OF ACTIONS—*Collision between automobile and street-car—Claim of damages for injuries—Action brought after expiration of six months—Consolidated Railway Company's Act, 1896, B.C. Stats. 1896, Cap. 55, Sec. 60.*] Actions against the British Columbia Electric Railway Company Limited for damages for personal injuries must be brought within six months next after the time when the supposed damage was sustained, as prescribed by section 60 of the Consolidated Railway Company's Act, 1896. SCOTT v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED. - **233**

LOTTERY. - - - - - **109**
See CRIMINAL LAW. 3.

LUMBER COMPANY—*Debentures—Specific charge on standing timber—Timber cut and sold—Right to proceeds—Assignment of part of proceeds to bank—Bank's rights—Bondholder as plaintiff.*] Where a company owning standing timber has created a fixed and specific charge thereon for the benefit of its bondholders, the fact that it is engaged in the timber business and the redemise clause in the trust deed creating the charge authorized it to carry on said business with "all the mortgaged premises" does not entitle it, or the trustee as against the bondholders, to the proceeds of the cutting and sale of said timber. A bank which has knowledge of the existence of the trust deed and of the identity of the trustee thereunder took from the trustee an assignment of half said proceeds to secure a debt owing it by the company. *Held*, to be in no better position than the trustee, although the manager of the bank did not read the deed but assumed that it was a mere floating charge. In case

LUMBER COMPANY—*Continued.*

the judgment herein results in the realization of a greater sum than that required to satisfy the clauses of the bondholders under the mortgage:—*Held*, that the trustee, knowing of the existence and terms of the subsequent mortgage, would become under the circumstances, a trustee of such surplus for the trustee under the latter mortgage. *Held*, further, that the plaintiff, being a bondholder is a proper person to bring an action on behalf of her fellow bondholders whose rights all ranked *pari passu* with her own. STAVE FALLS LUMBER COMPANY LIMITED AND AITKEN v. WESTMINSTER TRUST COMPANY *et al.* - - - - - - **300**

MANUFACTURER, WHOLESALER OR RETAILER TO PURCHASER—Liability of—Dangerous goods—Sale of—Failure to give adequate warning. **266**
See NEGLIGENCE. 11.

MARINE INSURANCE. - -
See under INSURANCE, MARINE.

MILK—Sale of without licence—Conviction—Second sale without a licence—Plea of *autrefois convict*—Not a good defence—Appeal. - **174**
See NATURAL PRODUCTS MARKETING (BRITISH COLUMBIA) ACT.

MILK DEALERS—Registration of—Licence fee. - - - - - **321**
See CONSTITUTIONAL LAW. 3.

MINES AND MINERALS—*Location of claims—Rock in place—Must be found by locator—R.S.B.C. 1924, Cap. 167, Secs. 30 and 41.*] The discovery of "rock in place" is the very foundation of the proper location of a mineral claim under section 30 of the Mineral Act. This applies to fractional claims. THE CARIBOO GOLD QUARTZ MINING COMPANY LIMITED v. ISLAND MOUNTAIN MINES COMPANY LIMITED. - - - - - **257**

2.——*Right to discovery against Attorney-General—Right of Attorney-General to sue for declaration certificates of work procured through fraud without joining an adverse claimant as co-plaintiff — R.S.B.C. 1936, Cap. 181, Sec. 80.*] The rules of practice do not take away or lessen the prerogative right of the Crown to refuse discovery. Precise words must be shown to take away that prerogative. ATTORNEY-GENERAL FOR BRITISH COLUMBIA v. KANDAHAR CONSOLIDATED GOLD MINES LIMITED (N.P.L.). **409**

MISDIRECTION. - - - **98**
See MOTOR-VEHICLES. 3.

2.——*Judge's charge—Murder—Circumstantial evidence—Appeal.* - - **238**
See CRIMINAL LAW. 5.

MONEY HAD AND RECEIVED—*Action to recover—Money taken from bank to avoid succession duty—Plea of illegality—Public policy.*] The plaintiff and her aunt had a joint bank account in the Carrol and Hastings Streets branch of the Bank of Montreal in Vancouver. The aunt died on the 9th of January, 1936, when the account stood at $6,367.62. On the 15th of January following the plaintiff and her sister (the defendant) went to the bank and the plaintiff withdrew by cheque $6,350. She and her sister then went to the Canadian Bank of Commerce where they leased a safety-deposit box in their joint names and deposited the money in the box, the defendant taking both keys. On the following day the defendant took all the money out of the safety-deposit box and took it to Seattle where she lived. Not being able to recover the money, the plaintiff brought action against her sister for money had and received. No objection was taken in the pleadings against the legality of the transaction as being one to defraud the Provincial receiver in the way of succession duty, but during the trial defendant's counsel drew it to the attention of the trial judge as being contrary to public policy. The trial judge did not pass upon it in his reasons for judgment but gave judgment for the plaintiff. *Held*, on appeal, affirming the decision of MCDONALD, J., that it would only be in a case of a very clear kind that it would be the duty of the Court of Appeal to investigate such a matter on the ground of public policy after the trial judge had declined to do so. WINTER v. SCHULTE. - - - - - - **157**

MORTGAGE — *Sawmill plant—Fixtures—Chattels—Tools, machinery and equipment—Crane—Standing on platform outside the freehold—Attached to premises by stiff legs and guy wires—Trade fixture—Conversion.*] The Brunette Lumber Company Limited, owner of a sawmill premises on the shore of the Fraser River, executed a mortgage in 1927 in favour of the Westminster Trust Company, to secure the payment of $125,000. In June, 1929, the Brunette Company made an assignment in bankruptcy, and one Beach was appointed trustee. On the 24th of June, 1933, the defendant company obtained a final order of foreclosure, and shortly after went into possession. On the 31st of July,

MORTGAGE—*Continued.*

1933, Beach as trustee transferred to the plaintiff North West Terminals Ltd. all the chattels on that portion of the premises east of a canal that divided the property, and at the same time transferred to the plaintiff North West Lumber & Shingles Ltd. the chattels located upon the lands lying west of the canal. The plaintiff Westminster Mills Limited sued as owner of certain lumber carriers and an Atlas engine, its title to same having been acquired through Beach. The three last mentioned companies were companies operated by Beach and under his control. The defendant Westminster Trust Company acted in the capacity of trustee for the defendants the Lewis family. The plaintiff companies brought action for possession of all goods and chattels transferred to them by Beach and for damages for conversion. At the time the mortgagees took over the premises the main portion of the goods and chattels that admittedly belonged to the plaintiffs were stored in the box factory, but two years later the box factory was destroyed by fire. It was found on the trial that neither Beach nor the plaintiff companies ever made demand for delivery of these chattels or were ever refused delivery or ever desired to take possession of them or the other loose chattels on the premises, and their claim with relation thereto could not succeed. An Atlas engine that was affixed to the premises was claimed but the defendants admitted the plaintiffs were entitled to this engine, and it was held that no damages for delay in removal was claimed or proven. A derrick crane was claimed as a chattel. The crane was sunk in the bed of the river through the centre of a platform 24 feet square built on piles adjoining the wharf on the premises, seven feet of which was on the freehold and seventeen feet on a water lot leased from the Dominion Government (the lease having been cancelled prior to the commencement of this action). The top of the crane was attached to the freehold by two stiff legs and several guy wires. It was held that the crane was a fixture, and the action was dismissed. *Held*, on appeal, varying the decision of MCDONALD, J., that as far as the goods and chattels in the box factory and other loose chattels and the Atlas engine are concerned, the Court agrees with the findings of the trial judge, but as to the crane it was *held* that considering the structure of the crane and the purpose of its erection, it should be classed as a trade fixture and one which the tenant had the right to sever from the freehold during

MORTGAGE—*Continued.*

the tenancy. On the 31st of July, 1933, Beach as trustee gave a bill of sale of chattel property, including the crane, to the plaintiff North West Terminals Ltd., and this bill of sale operated not only as a document of title thereto but in law as a severance of the crane from the freehold. The plaintiff North West Terminals Ltd. is entitled to possession of the crane and nominal damages for its conversion. NORTH WEST TERMINALS LTD. *et al.* v. WESTMINSTER TRUST COMPANY *et al.* - **463**

MOTOR-CAR—Driver without licence. **41**
See INSURANCE, ACCIDENT.

MOTOR-CAR AND BICYCLE—Collision—Left-hand turn by motor-car at intersection — Bicyclist without head-light—Duty of motorist—Damages. - - - **313**
See NEGLIGENCE. 7.

MOTORIST—Duty of. - - - **313**
See NEGLIGENCE. 7.

MOTOR-VEHICLES — *Accident—Judgment against minor—Unsatisfied—Statutory right of action against father of minor—Estoppel —Inapplicability of — B.C. Stats. 1926-27, Cap. 44, Sec. 12.*] In 1928 the plaintiff recovered judgment against the defendant's daughter for damages owing to a collision between two automobiles. On the last day of the trial it was disclosed that the daughter was a minor, but no application was made to join a guardian *ad litem*. The judgment remained wholly unsatisfied and the plaintiff brought the present action against the father under section 12 of the Motor-vehicle Act Amendment Act, 1927. *Held,* that the plaintiff is given by the statute a clear right against the parent in addition to her right against the minor and the statutory right is not to be taken away by estoppel. It would be, however, a proper term in the judgment against the father that the judgment should abate to the extent that the plaintiff recovers against the daughter. VANDEPITTE v. BERRY. **161**

2.——*Bicycle—Collision at intersection—Acts in emergency—In trying to avoid collision car mounts sidewalk — Pedestrian struck by car—Liability.*] The defendant R. was driving her car south on Gilford Street when the defendant M. was riding a bicycle west on Comox Street in Vancouver. They saw one another about the same time, but they were too close to avoid a collision at the intersection. In trying to avoid the

MOTOR-VEHICLES—*Continued.*

bicycle R. swerved to the right but lost control and mounted the sidewalk on the west side of Gilford Street just south of the intersection, where she struck the plaintiff, a pedestrian walking northerly on Gilford Street. *Held,* that both defendants were negligent in proceeding too rapidly at that particular intersection, as the growth of a high hedge at the north-east corner of the intersection made it a "blind" corner, and their approach should have been slow enough to stop within ten or fifteen feet at the most. The negligence of each was a factor in the collision between them to the extent of 50 per cent. The defendant R. was not under the circumstances responsible to the plaintiff except to the extent that she was responsible for the collision with the bicycle. SCHOFIELD v. ROCHE AND MCTAVISH. - - - - - - - - **324**

3.——*Damages—Negligence — Injury to gratuitous passenger—Driving in fog—Insurance company third party — Separate defence of driver being intoxicated — Misdirection alleged—Questions and answers by jury—B.C. Stats. 1935, Cap. 50, Sec. 53; 1932, Cap. 20, Sec. 5, (159M).*] The plaintiff brought action for damages for injuries sustained in an accident when a gratuitous passenger in a car driven by the defendant and The General Accident Assurance Company of Canada was added as a third party by order pursuant to section 159M of the Insurance Act as enacted by B.C. Stats. 1932, Cap. 20, Sec. 5. The jury answered questions and found the defendant guilty of negligence which contributed to the accident consisting of "excessive speed at the time of the accident." To the question, "At the time of the accident, was there a fog there of such density as to prevent the defendant from having a proper or sufficient view of the highway or of the traffic thereon so as to render driving on the highway in question hazardous and dangerous?" the answer was "Yes." To the question, "Did the driving of the defendant in such fog contribute to the accident?" the answer was "Yes." To the question, "Did the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk she ran impliedly agree to incur it?" the answer was "Yes." It was held that the plaintiff voluntarily incurred the risk and the action was dismissed. *Held,* on appeal, affirming the decision of ROBERTSON, J. (O'HALLORAN, J.A. dissenting), that although the trial judge misdirected the jury in respect to the *onus* of

MOTOR-VEHICLES—*Continued.*

proof as to the existance of fog at the time of the accident, nevertheless since the misdirection could not have been prejudicial to the appellant a new trial should not be ordered. *Held*, further, that the mere fact of driving a motor-vehicle in a fog does not constitute negligence provided it is at a speed consistent with the control of the car within the limits of visibility. McDERMID v. BOWEN: THE GENERAL ACCIDENT ASSURANCE COMPANY OF CANADA, THIRD PARTY. (No. 3). - - - - - - **98**

4.——*Negligence—Making right turn at intersection—Child crossing intersection—Contributory negligence.*] The defendant driving his car westerly on Georgia Street in Vancouver turned to his right to go north on Hornby Street at about 5.30 p.m. on a dark winter day. As he turned into Hornby Street at from ten to twelve miles an hour, passing through a space which had been opened up for him by pedestrians, the infant plaintiff, nine years old, who was going westerly on the north side of Georgia Street, ran out into the open space just in front of the oncoming car, and was struck and injured. The defendant had not sounded his horn or given any other warning. *Held*, that in the circumstances the defendant was negligent in going at too high a speed and not making it known to the infant plaintiff that he was turning through the pedestrian traffic on the north side of Georgia Street. The plaintiff was also negligent and both were equally guilty of negligence contributing to the accident. DOBROSKI v. MACKAY. - - - - - - - - **32**

5.——*Running down pedestrian at intersection—Traffic-control lights—Negligence—Damages — Death of plaintiff's husband—Administration Act — Families' Compensation Act—R.S.B.C. 1936, Caps. 5, Sec. 71 (2), and 93.*] At about 6 o'clock in the evening of the 30th of December, 1937, one Mosher, the plaintiff's husband, was walking westerly on the north side of Robson Street in Vancouver. There were traffic-control lights at the intersection of Burrard Street, and marked on the pavement by parallel yellow lines on the north side of the intersection was a pedestrian crossing twelve feet wide running east and west. When Mosher was about two-thirds of the way across, just after the north and south lights turned green, he was struck by the defendant's car which was proceeding south on Burrard Street, and badly injured. He died on the 17th of June following. Deceased's wife

MOTOR-VEHICLES—*Continued.*

sued under section 71 (2) of the Administration Act, and for her own benefit under the Families' Compensation Act. *Held*, that the defendant's negligence was the cause of the accident and the deceased was entitled to assume the defendant saw him and would allow him to complete his crossing of the street. *Held*, further, that the plaintiff is entitled to recover (1) his wages from the date of the accident to the date of his death; (2) medical and hospital bills; (3) damages for his loss from shortening his expectation of life. Under the Families' Compensation Act she is also entitled to such damages as the Court may think proportionate to the injury resulting to her from her husband's death. MOSHER v. PARKER. - - - - - - **380**

MUNICIPAL ACT — *By-law providing for building permit—Erection of building without permit—Conviction—Certiorari—Validity of by-law—R.S.B.C. 1924, Cap. 179, Sec. 54, Subsec. (56) (ii)—B.C. Stats. 1933, Cap. 46, Sec. 4.*] On October 7th, 1938, the defendant Nychuk applied to the city building inspector for a permit to build upon a lot owned by him in the city of Kelowna. The inspector refused to grant a permit on the grounds that it would depreciate the value of surrounding property. On proceeding to build, Nychuk was convicted for unlawfully erecting part of a building without a permit for such an erection having been first obtained from the inspector as provided in section 2 of the Fire Limits and Building Regulation By-law of said city. Upon *ceritorari* proceedings to set aside the conviction:—*Held*, that section 54, subsection 56 (ii) of the Municipal Act, R.S.B.C. 1924, authorized the council to pass a by-law "For regulating the erection and construction of buildings." This does not give the power to prohibit. The by-law in question purports to require a permit for the "Construction, erection . . . of any building or part thereof, within the city limits." The Legislature did not give so broad a power and section 2 (*a*) of the by-law is invalid. There is nothing in the Municipal Act empowering the council to pass a by-law authorizing its building inspector to refuse a permit upon the grounds on which the refusal was based. Section 2 (*a*) of the by-law being invalid, the conviction is invalid and must be quashed. The preliminary objection that the affidavit proving service upon the justice of the peace was insufficient and that the subsequent affidavit was too late was overruled as the absence

MUNICIPAL ACT—*Continued.*

of the affidavit of service is no ground for discharging the rule *nisi*, as the affidavit may be supplied at any time before the writ is drawn up. REX v. NYCHUK. - **272**

MUNICIPAL CORPORATION—Extra-provincial rights—Non-resident bondholders — Interest — Whether the Victoria City Debt Refunding Act, 1937, is *ultra vires* of the Legislature of British Columbia. - **140**
See CONSTITUTIONAL LAW. 2.

MUNICIPAL LAW—*Licensing by-law—Employee of a foreign company — "A person carrying on a business"—Sections 5 (2) and 68 of the Summary Convictions Act, R.S.B.C. 1936, Cap. 271 — Applicability.*] C. was employed by a Seattle, U.S.A. company as its representative in Vancouver. The company rented desk room for him in Vancouver and his duty was to see that orders for the purchase of lumber made by the compay from its Seattle office were filled and the lumber shipped from British Columbia. He did not obtain orders for the purchase or sale of goods. He was convicted under by-law No. 1954 for that he being a person carrying on business within said city failed to obtain a licence in respect thereof and pay the specified fee. On a case stated:—*Held*, that C. was not a person within the meaning of said by-law and that said facts did not constitute the carrying on a business or maintaining an office by him within the meaning of the by-law, and the Court would not be justified in inferring from the case stated that the company was not registered under the Provincial Companies Act. On the contention that the conviction should be sustained by construing the by-law along with the provisions of the Summary Convictions Act, which make aiders and abettors guilty of the offence:—*Held*, that the charge implied the carrying on a business without a licence and since it was not apparent from the case stated that the accused knew that the company was carrying on business or maintaining an office without a licence, a guilty knowledge on his part was not shown. REX v. COY. - - - - - **3**

MURDER—Charge of—Circumstantial evidence — Judge's charge — Whether misdirection—Appeal. - **238**
See CRIMINAL LAW. 5.

NATURAL PRODUCTS MARKETING (BRITISH COLUMBIA) ACT—*Order No. 8, Lower Mainland Dairy Products Board—Sale of milk without a licence—Conviction—*

NATURAL PRODUCTS MARKETING (BRITISH COLUMBIA) ACT—*Cont'd.*

Second sale without a licence—Plea of autrefois convict—Not a good defence—Appeal—R.S.B.C. 1936, Cap. 165.] On the 13th of January, 1938, the Crystal Dairy Limited was convicted under the provisions of the Natural Products Marketing (British Columbia) Act and amending Acts for unlawfully failing to comply with Order No. 8 of the Lower Mainland Dairy Products Board, and being a dealer and not being registered with and holding a current licence issued by the said Board, did on the 3rd of December, 1937, market milk within the area to which said scheme relates. On the 18th of January following, a second information was preferred against Crystal Dairy Limited for failing to comply with said Order No. 8, in that being a dealer and not being registered with and holding a current licence issued by the said Board, did on the 18th of January, 1938, market milk within the area to which said scheme relates. It was *held* by the magistrate that the plea of *autrefois convict* was not a good defence, and the company was convicted. An appeal to a single judge was dismissed. *Held*, on appeal, affirming the decision of MURPHY, J., that on the facts each act done was a complete offence in itself, and the learned judge appealed from was right in holding that every act in marketing milk without a licence required by the Board's order was "a distinct offence." REX v. CRYSTAL DAIRY LIMITED. - - - - - - **174**

NEGLIGENCE—*Apartment-house — Injury to tenants—Entrance to suites from balcony—Defective railing — Fall from balcony—Licensees—Knowledge of defect by owner—Liability.*] The plaintiff husband rented a two-room suite on the second floor of an apartment-house where he and his wife lived, the house belonging to the defendant. A balcony ran the full length of the east side of the building and ten suites were entered from the balcony, the plaintiffs' being one of them. A staircase led from the ground floor to a hall on the second floor from which the balcony was reached through a door in the centre, five suites being on each side of this door. The plaintiffs' suite was No. 17 to the north of the door and suites 18 and 19 were further to the north. On the evening in question the plaintiffs visited a friend in suite 19, and while chatting to the friend both husband and wife leaned against the railing on the outside of the balcony just opposite the entrance to suite 19. The railing suddenly gave way, precipitating

NEGLIGENCE—*Continued.*

both plaintiffs to the ground below. In an action for damages it was held on the trial that the defective railing constituted a trap and both plaintiffs were awarded damages. *Held*, on appeal, reversing the decision of FISHER, J. (O'HALLORAN, J.A. dissenting), that both plaintiffs were in respect to the use of that part of the balcony in front of suite 19 mere licensees, as suite 19 was farther away from the entrance to the balcony than their own suite, and that part of the balcony was not necessary for ingress and egress to their own suite. That the defendant did not know of the concealed danger and the duty of a licensor to a licensee should be limited to not exposing him to a concealed danger known to the licensor but not apparent to the licensee. POWER AND POWER v. HUGHES. - **64**

2.——*Contributory negligence — Ferry slip—Lack of guard when ferry is out—Driver of car intending to catch ferry—Drives into slip—Lack of care—Ultimate negligence—R.S.B.C. 1936, Cap. 52, Sec. 2; Cap. 93.*] Philip Whitehead was last seen alive when he left the Army & Navy Veterans' Rooms on Kingsway in the City of Vancouver in his car at 11.20 on the night of the 14th of January, 1936, to catch the ferry going to North Vancouver where he lived. On the afternoon of the 16th of January following, his body was found in his car in the water on the sea bottom just off the ferry slip on the Vancouver side of the harbour. On the night of the 14th of January, 1936, it was raining, there was no guard or barrier on the approach to the ferry slip, but the approach and ferry slip were well lighted. In an action by the wife and children of the deceased for damages under the Families' Compensation Act, the jury found that both defendant and deceased were guilty of negligence, and under section 2 of the Contributory Negligence Act they found that the degree of fault attributable to the defendant was sixty per cent. and to the deceased forty per cent. The damages were assessed at $20,000 and judgment entered accordingly. The defendant appealed. *Held*, dismissing the appeal and affirming the decision of MURPHY, J. (MARTIN, C.J.B.C. dissenting would allow the appeal and grant a new trial and SLOAN, J.A. dissenting would allow the appeal and dismiss the action), that the negligent act of the deceased in not maintaining a proper lookout continued until the end, when in conjunction with the continuing negligence of the defendant in not maintaining a guard, the accident occurred. At common law each would properly have been guilty of negligence which contributed to causing the accident so the Contributory Negligence Act applies. The accident could not possibly occur without the two concurrent acts of negligence. That was the finding of the jury and as there is evidence to support it this Court should not interfere. WHITEHEAD v. CORPORATION OF THE CITY OF NORTH VANCOUVER. - - - - - - **512**

3.——*Damages —Automobiles — Head-on collision—Rule of the road—Driving on left side—Emergency—R.S.B.C. 1936, Cap. 116, Sec. 19.*] On the 8th of July, 1937, at about nine o'clock in the morning, the plaintiff was driving a loaded truck north-easterly on the Cariboo Road on his way to Prince George. He was on a straight portion of the road, a hill rising abruptly on his right side and a steep fall in the left, when he saw the defendant driving an Austin motor-car coming round a sharp bend towards him about 150 feet away. The defendant in coming round the curve was close to the bank on his left and continued on the left side of the road. Both cars were travelling at about 25 miles an hour. Upon seeing the defendant the plaintiff continued on, expecting him to turn to his right side of the road, but when 30 feet away, seeing a collision was imminent, as the defendant continued on his left side, he turned sharply to his left to the clear side of the road, but he had barely started doing so when the defendant turned to his right and the cars collided. It was held on the trial that the defendant was solely responsible for not keeping on his proper side of the road. *Held*, on appeal, affirming the decision of MURPHY, J. (O'HALLORAN, J.A. dissenting), that the defendant should have gone to his own side of the road in good time, and having chosen to hold on his course on the wrong side until the cars were in imminent danger of collision, the plaintiff had reasonable grounds for concluding that the defendant was going to continue on his course, and he could not be reasonably held at fault for endeavouring at the last moment to avoid a collision by leaving his own side of the road. WOOD AND FRASER v. PAGET. - - - - **125**

4.——*Damages—Evidence taken for discovery — Rejected by trial judge — Action dismissed — Appeal — Evidence improperly rejected—New trial—Rule 370c (1).*] In an action for damages for negligence resulting from a collision between a train of the

NEGLIGENCE—*Continued.*

defendant company and an automobile in which the plaintiff and his wife were passengers, at Colwood crossing, where the tracks of the defendant company cross the Island Highway, the trial judge refused to allow the plaintiff to put in under Rule 370c (1) parts of the examination for discovery of the engineer and brakeman on the train, servants of the defendant company, holding that the decision in *Westminster Woodworking Co.* v. *Stuyvesant Insurance Co.* (1915), 8 W.W.R. 112, was binding upon him. *Held*, on appeal, reversing the decision of MURPHY, J., that the above rule under which the application was made was amended after the case upon which the learned judge relied was decided, by the words "or any part thereof" being added into the last sentence thereof, thus permitting the use of "any part of the evidence." The evidence would have substantially supported the plaintiff's case, the appeal should therefore be allowed and a new trial ordered because of the rejection of this evidence. CHESWORTH v. CANADIAN NORTHERN PACIFIC RAILWAY COMPANY. - - - **292**

5.——*Damages—Goods stored on dock for shipment destroyed by fire—"Accidentally begun"—Spread of fire—Extent of duty of warehousemen—14 Geo. III. (Imp.), Cap. 78, Sec. 86.*] The plaintiffs stored 1,588 cases of canned salmon on the dock of the Canadian National Steamship Company Limited in Vancouver pending shipment. While so stored the dock and contents were destroyed by fire. In an action for damages against the owners and operators of the dock:—*Held*, as to the origin of the fire that the maxim *"res ipsa liquitur"* did not apply and as no evidence of negligence had been adduced and no facts proved warranting an inference of negligence, and the cause of the fire was incapable of being traced, it was one which had "accidentally" begun within the meaning of section 88, chapter 78, of the statutes of Geo. III., 1774 (Imp.), and the defendants were not liable in respect of the commencement of the fire, nor were they liable in respect of the spread of the fire, there being no proof of negligence in respect to the construction of the warehouse or its management or in the fact that it was not equipped with certain means of fire control which the plaintiffs contended should have been installed. A warehouseman is not to be held liable as an insurer of goods warehoused with him. A fireproof structure is not required and the Court is not to be governed in fixing the standard of required

NEGLIGENCE—*Continued.*

care by standards which may be considered by fire underwriters as desirable either in the matter of the structure itself or in its equipment. The rule of law is that the warehouseman is bound to warehouse the goods in a place reasonably safe. With respect to the provision of fire control features, a higher standard should not be laid down for a warehouseman than has been required of an apartment-house proprietor. DES BRISAY *et al.* v. CANADIAN GOVERNMENT MERCHANT MARINE LIMITED AND CANADIAN NATIONAL STEAMSHIP COMPANY LIMITED. - **207**

6.——*Damages—Hotel elevator — Injury to guest—Intoxicated men in elevator—Interfering with operator—Care to be taken by operator.*] The elevator in the defendant company's hotel is operated by a central lever, which when moved to the right causes the elevator to ascend, and when moved to the left causes it to descend. It is moved by means of a horizontal shaft, and when the elevator is at rest the shaft is at the top of the circle in which is a notch about an inch deep into which the shaft rests. To move the elevator the shaft is pulled forward out of the notch and moved to the right or left in order to ascend or descend. At about midnight on the 3rd of September, 1937, when the defendant C. was operating the elevator, two unknown men, who were intoxicated, entered the elevator and they were followed into the elevator by two men who were also intoxicated, named Sorensen and Carlson. Sorensen stood from twelve to fifteen inches from C. who kept his hand on the handle of the shaft. After the four men had entered, C. saw the plaintiff, who was a guest in the hotel, coming towards the elevator obviously intending to go to his room. Just as he stepped in, Sorensen lurched against C., causing him to release the handle and push the lever violently to the right, and the elevator shot up, throwing the plaintiff upward, outward and backward. He fell on the floor of the lobby and was permanently injured. *Held*, that the defendant C. could have closed the gates and prevented other passengers from entering, and ascended with the intoxicated men alone. Knowing Sorensen's condition he could at least have placed him at the back of the elevator or caused him to leave it. He took no precautions in a situation which required not only extraordinary caution but most anxious care. The plaintiff is entitled to recover from both defendants. PEARSON v. VINTNERS LIMITED AND CHAPMAN. - **397**

NEGLIGENCE—*Continued.*

7.——*Damages—Motor-car and bicycle—Collision—Left-hand turn by motor-car at intersection—Bicyclist without head-light—Duty of motorist.*] The defendant, driving his truck north on Main Street in Vancouver, made a left turn on reaching the intersection of Georgia Street. When nearly in Georgia Street he struck the infant plaintiff who was riding a bicycle south on Main Street. The accident was at about 8 o'clock on the evening of September 9th, 1937. *Held*, that the accident was due solely to the negligence of the infant plaintiff in travelling at night without a head-light and in not keeping as sharp a look-out as he ought to have kept under the circumstances. *Held*, further, that the motorist had the right to make a left-hand turn but in doing so, as he did in this case, he should have driven with care and caution and at a very slow speed in proceeding through cross traffic. FREDERICKSON *et al.* v. BURT. - - **313**

8.——*Damages — Running down pedestrian at intersection—Traffic-control lights —Death of plaintiff's husband—Administration Act—Families' Compensation Act.* **380**
See MOTOR-VEHICLES. 5.

9.——*Damages — Highways—Sidewalk—Hole in pavement—Injury to pedestrian—Reasonable repair.*] At the place in question there was a small hole where one of the blocks with which the sidewalk was paved, had a chip out of it. The plaintiff alleged that while walking on the sidewalk she inadvertently stepped into the hole and was injured. *Held*, that the defendant had not been negligent in constructing the pavement and the sidewalk was in a state of "reasonable repair" and therefore the defendant city had not failed in the duty imposed upon it by its charter. LAMMERS v. CITY OF VANCOUVER. - - - - - - **373**

10.——*Damages — Window-cleaner falls from window to street—Injures passerby—Liability — Inevitable accident—Workmen's Compensation Act, R.S.B.C. 1936, Cap. 312 —Applicability.*] Woodward Stores Limited, who owned the Selkirk Block on Hastings Street West in Vancouver, rented the ground floor and the storey immediately above to the defendant "Sweet Sixteen." "Sweet Sixteen" sub-leased the upper storey to one Le Fohn, who carried on a beauty parlour. Le Fohn employed a window-cleaner to clean three windows facing on the street. The window-cleaner went through one window and walked along a ledge about 18 inches wide and somewhat sloping, to reach the other windows. He finished cleaning the windows, but on the way back to the first window he fell, and striking the plaintiff, a passerby, injured him. In an action for damages:—*Held*, that the *onus* is on the plaintiff, and as the evidence does not disclose that the property was in a state of disrepair or that it was in a dangerous condition, the action fails. *Held*, further, that the Workmen's Compensation Act and the Accident Prevention Regulations have no applicability to the facts here. They were passed for the protection of a certain class of workmen. STROMME v. WOODWARD STORES LIMITED AND SWEET SIXTEEN LIMITED. - - - - - - - **30**

11.——*Dangerous goods—Sale of—Liability of manufacturer, wholesaler or retailer to purchaser — Failure to give adequate warning—R.S.B.C. 1936, Cap. 250, Sec. 21.*] The defendant Inecto Rapid (Canada) Limited manufactured a hair dye known to the trade as Inecto Rapid. The defendant W. T. Pember Stores Limited was a wholesale distributor of the product and the defendant Pacific Drug Stores Limited retailed the product from its store in Vancouver. In January, 1938, the plaintiff sent her son to the Vancouver store to purchase a hair dye known as Inecto Rapid. The manager of the store made the sale, wrapped two bottles labelled respectively "A" and "B" in paper and gave the messenger the only copy of instructions he had, and drew his attention to a portion of pages 4 and 5 of the pamphlet in small type. The plaintiff testified that upon receiving the bottles from the messenger she did not receive the instructions. An attendant at a beauty parlour was called by the defendants who testified that the plaintiff had been in her beauty parlour in November, 1937, and discussed hair dyes with her, and said she could not use Inecto Rapid as when she did her skin broke out in a rash. The plaintiff denied that she made the statement and said she had not been in said beauty parlour for two or three years. The result of the use of the dye by the plaintiff was that it caused a rash and blistering that necessitated the services of a physician over quite a period of time, and her condition was such that she was unfit for work for five months. The evidence of two doctors was that the dye was dangerous and the bases of the dye were definitely toxic. On the other hand beauty-parlour operators testified that they had used Inecto Rapid for many years, they always used it with caution but in their

NEGLIGENCE—*Continued.*

experience the number of persons to whom the dye was harmful was not over one in a thousand. In an action for damages, the Pacific Drug Stores Limited submitted that the plaintiff ordered a specific article by its trade name and relied on section 21 of the Sale of Goods Act. *Held*, that the action be dismissed as against the Pacific Drug Stores Limited. *Held*, further, that while this dye has a harmful effect only in the case of a very few persons, its toxic qualities are such that it is very harmful to a limited number of persons who have a healthy skin. The law demands that a dye containing toxic ingredients such as those contained in Inecto Rapid must be sold only with the clearest warning to the user of the danger involved in its use. The warning ought to have been on the container. A pamphlet warning may very easily not come to the attention of the user and the written instructions here were not sufficient. The plaintiff knew that Inecto Rapid was harmful to some degree before she used it on the occasion in question. Had there been a proper warning on the container such as the law requires, the probability is that she would not have used it. She is entitled to recover as against the defendants Inecto Rapid (Canada) Limited and W. T. Pember Stores Limited. O'FALLON v. INECTO RAPID (CANADA) LIMITED, W. T. PEMBER STORES LIMITED AND PACIFIC DRUG STORES LIMITED. - - - - - - **266**

12.——*Gift of air-gun by father to infant son—Shooting at targets—Injures boy who comes on defendant's premises—Liability of father.*] The defendant gave his son, who was eighteen years of age, an air-gun as a present. Shooting then took place at targets on the defendant's premises. There was a shed or small erection on the premises with a flap of rough material in the doorway. H., an infant, who sues by his mother as next friend, strolled on to the defendant's premises and entered the shed unknown to the defendant's son. While he was there the defendant's son shot at the shed and hit H., injuring his eye, but not permanently. In an action for damages:—*Held*, that it is necessary to show a breach of some legal duty from the defendant to the plaintiff. There must be some affirmative proof of negligence in the defendant in respect of a duty owing to the plaintiff. Even if there was any negligence on the part of the defendant in providing the gun for the amusement of his sons, it is not connected with the damage of which the plaintiff complains, and the action is dismissed. *Cox* v. *Burbridge* (1863), 13 C.B. (N.S.) 430, applied. HOOK v. DAVIES. - - - - - - **437**

13.——*Hairdresser — Permanent wave—Plaintiff insisted on having treatment after warning — Damages — "Volenti non fit injuria."*] The plaintiff purchased a preparation or lotion and treated her hair herself by bleaching it and changing it from a dark hue to a light colour. Shortly after she came to Vancouver and went to defendant's beauty parlour for further treatment, and particularly to have treatment for a permanent wave. She was cautioned by the defendant's employee that her hair would break off at the ends owing to its bleached condition, and upon her insisting that the treatment be given the defendant requested her to sign the following document, which she did: "On the 5th day of Dec. 1938, I take this permanent wave giving at the Moler Beauty Parlour entirely at my own risk owing to its bleached condition." The treatment was then administered, and on combing her hair when she arrived home the hair came out to an alarming extent and changed to its original colour. In an action for damages:—*Held*, that there was no negligence on the defendant's part and no defect in the equipment used. The plaintiff deliberately took the risk and must take the consequences. It was a foolhardy and unreasonable act to expose herself to the risk, and having done so she did it at her own cost. MERCER v. THE MOLER SYSTEM OF BARBER SCHOOLS. - - - - - - - **478**

14.——*Injuries—Death of injured.* **88**
See DAMAGES. 10.

15.——*Injury to gratuitous passenger—Damages.* - - - - - - **98**
See MOTOR-VEHICLES. 3.

16.——*Making right turn at intersection—Child crossing intersection—Contributory negligence.* - - - - - **32**
See MOTOR-VEHICLES. 4.

NOTARIES—*Application for order for enrolment—Need of notary public within applicant's district — R.S.B.C. 1936, Cap. 205, Secs. 4 and 5.*] An applicant for an order for enrolment under the Notaries Act has to show that there is a need of a notary public in the place where he desires to practise, and an application under the Act should be decided upon the particular exigencies and necessities of each case. The fact that there are a number of Norwegians having business

NOTARIES—*Continued.*

with the office in which the applicant is employed and also other Norwegian people within the district, and that the applicant can speak their language:—*Held* to be a sufficient ground for granting the application. *In re Notaries Act and J. A. Stewart* (1929), 41 B.C. 467, followed. *In re* NOTARIES ACT AND HERCULES WORSOE. **376**

NOTICE OF APPEAL—Application to extend time for—"Special circumstances"—Costs. - - **7**
See PRACTICE. 8.

NOVATION. - - - - **338**
See CROWN LANDS.

NUISANCE. - - - - **389**
See TRADE UNIONS. 1.

OFFENCE—Two charges of same—Pleads guilty to both charges. - **118**
See CRIMINAL LAW. 7.

OFFICER—Company—Examination of. - - - - - - - **377**
See PRACTICE. 9.

ONUS OF PROOF. - - - **335**
See ADMINISTRATION OF ESTATES.

OPTION—For purchase of shares—Acceptance by telegram—No evidence of receipt of telegram—Whether contract concluded. - - **296**
See PRACTICE. 10.

PARTIES—Counterclaim—Joinder of third party as defendant to counterclaim—Relief claimed against third party as alternative one. - **35**
See PRACTICE. 11.

PEDESTRIAN—Run down at intersection—Traffic-control lights—Negligence—Damages—Death of plaintiff's husband—Administration Act—Families' Compensation Act. - **380**
See MOTOR-VEHICLES. 5.

2.——*Struck by motor-car—Liability.* - - - - - - - **324**
See MOTOR-VEHICLES. 2.

PERMANENT WAVE. - - - **478**
See NEGLIGENCE. 13.

PICKETING, WATCHING AND BESETTING. - - - - - - **385**
See INJUNCTION. 3.

PILOT OF AEROPLANE—Whether an "officer" of company. - **377**
See PRACTICE. 9.

PLEADING—Entry of by respondent in Swiss Court—Authorization of. **13**
See DIVORCE.

POLICY—Husband's name inserted in by mistake—Effect of. - **41**
See INSURANCE, ACCIDENT.

2.——*Loss—Proof of.* - - **195**
See INSURANCE, FIRE.

POSTHUMOUS CHILD—Right of to share in estate. - - - **81**
See WILL. 2.

PRACTICE—*Appeal—Appeal books—Settlement of—Appeal from registrar's settlement—Jurisdiction.*] A single judge of the Court of Appeal has no jurisdiction to entertain an appeal from the registrar on his settlement of an appeal book. The matter should be brought before the Court for the exercise of its inherent jurisdiction to see that the record of the appeal brought before it is complete and true for the purposes of the appeal. MCDONALD v. NEARY. - - - - - - - **438**

2.——*Appeal to Supreme Court of Canada—Application to the Court of Appeal for leave—Matter of public interest—R.S.C. 1927, Cap. 35—R.S.B.C. 1936, Cap. 72.*] A dentist practising his profession in the city of Spokane in the State of Washington advertised in the Trail, Nelson and Fernie newspapers and by means of radio broadcasts over the Trail and Kelowna stations of the Canadian Broadcasting Corporation. An injunction was granted at the instance of The College of Dental Surgeons of British Columbia, restraining him from so advertising. An appeal to the Court of Appeal was allowed and the injunction was set aside. On motion to the Court of Appeal, leave to appeal to the Supreme Court of Canada was granted. ATTORNEY-GENERAL FOR BRITISH COLUMBIA *ex rel.* THE COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA v. COWEN. (No. 3). - - - - **87**

3.——*Application by trustee against third party—Leave of inspector not obtained—Objection to procedure—Bankruptcy Rule 142.* - - - - - - **278**
See BANKRUPTCY. 3.

4.——*Costs—Appeal—Dismissed on "preliminary proceeding."* - - - **173**
See CRIMINAL LAW. 9.

5.——*Costs—Appendix N, item 27—Cost of preparation of appeal books and factums—Whether a disbursement or a fee—Application of tariff.*] On an application to

PRACTICE—*Continued.*

review the taxation of the successful appellant's costs of appeal, it was *Held*, that the cost of preparation of the appeal books and factums should be regarded as a disbursement and not a fee. WORTH v. WEBER. **170**

6.——*Costs—Sale of dangerous goods—Injury to purchaser—Action for damages—Finding against two defendants—Action dismissed against third defendant—Liability of unsuccessful defendants for costs of successful defendant—Order LXV., r. 32.*] The plaintiff sustained injuries from the use of a hair dye known to the trade as "Inecto Rapid" which she purchased from a retailer, the Pacific Drug Stores Limited. She brought an action for damages against the manufacturer, the wholesale distributor and the retailer. She recovered judgment against the manufacturer and wholesale distributor but the action was dismissed as against the retailer. An application by the plaintiff and Pacific Drug Stores Limited for an order directing that the costs of the defendant Pacific Drug Stores Limited be taxed as against the other two defendants under Order LXV., r. 32, was dismissed. O'FALLON v. INECTO RAPID (CANADA) LIMITED, W. T. PEMBER STORES LIMITED AND PACIFIC DRUG STORES LIMITED. (No. 2). - - **276**

7.——*Costs — Security for — Insolvent plaintiff as nominal plaintiff.*] On an application by the defendant for security for costs when it is shown that the plaintiff is an insolvent company, a nominal plaintiff for the benefit of somebody else and not suing either as a trustee in bankruptcy or as an executor:—*Held*, that security must be given. VICTORIA COLD STORAGE AND TERMINAL WAREHOUSE COMPANY LIMITED AND PORTER v. CITY OF VICTORIA. - - **1**

8.——*Courts—Appeal to Supreme Court of Canada—Section 65 of Supreme Court Act, R.S.C. 1927, Cap. 35—Notice of appeal—Application to extend time for—"Special circumstances"—Costs.*] On a motion for extension of time to serve the notice of appeal required by section 65 of the Supreme Court Act, the grounds submitted for the extension were that the question raised was one of general public importance and the delay was due to the necessity of receiving instructions from the head office of the Bank in Toronto. *Held*, in the circumstances that extension of time for service of the notice of appeal should be granted. *Anweiler* v. *Grand Trunk Pacific Ry. Co.*, [1928] 3 W.W.R. 13, applied. THE CANADIAN BANK OF COMMERCE v. THE YORKSHIRE & CANADIAN TRUST COMPANY. - - - - - **7**

PRACTICE—*Continued.*

9.——*Discovery—Examination of officer of company—Pilot of aeroplane—Aeroplane operated by defendant company—Whether pilot an "officer"—Rule 370u.*] One Tweed was a pilot of an aeroplane owned and operated by the defendant company. An application by the plaintiff under rule 370u for an order for the examination for discovery of Tweed as an officer of the defendant company, was refused. MCDONALD v. UNITED AIR TRANSPORT, LIMITED. - **377**

10.——*Option for purchase of shares in Vancouver — Acceptance by telegram to offeror in State of Oregon—No evidence of receipt of telegram—Whether contract concluded—Service ex juris—Rules 6 and 64.*] An option for the purchase of shares in a company was written and signed in the plaintiff's office in Vancouver and delivered to plaintiff there. The plaintiff sent a telegram addressed to the defendant at Seaside, Oregon, accepting the option. There was no evidence that the telegram was delivered to the defendant or that he had agreed that the option might be accepted by telegram. The defendant moved for the discharge of an order giving leave to issue a writ of summons for service out of the jurisdiction. *Held*, that in the circumstances it could not be found that the offeror had impliedly constituted the telegraph company his agent for the purpose of receiving the acceptance, and the defendant must succeed upon his application. SMITH & OSBERG LTD. v. HOLLENBECK. - - - - **296**

11.——*Parties — Counterclaim—Joinder of third party as defendant to counterclaim—Relief claimed against third party an alternative one—County Court Rules, Order V., r. 23.*] The plaintiff's car when driven by his wife collided with the defendant's car and he brought action against the defendant for damages. The defendant disputed liability and counterclaimed alleging that the plaintiff's wife was the plaintiff's servant and agent and engaged in the course of her duties as such and the collision was the result of her negligence. The defendant claimed against both the plaintiff and his wife the sum of $491.42 being the cost of repairing his car and against the wife contribution under the Contributory Negligence Act for any damages and costs which may be awarded to the plaintiff against the defendant. An application by the defendant under Order V., r. 23, of the County Court Rules, to have the plaintiff's wife made a defendant to his counterclaim was dismissed. SPENCER v. DEANE. - **35**

PRACTICE—*Continued.*

12.——*Will — Foreign probate — Three executors—Application for ancillary probate in British Columbia—Grant to one of the foreign executors.*] A testator domiciled in California died there leaving a will whereby he appointed three executors, one of them being his widow. Probate of the will was granted by the Court in California to all the executors. The widow filed a petition in the Victoria registry asking that ancillary probate of said will be granted to her in this Province. *Held*, that there is a discretion in the Court to be exercised after consideration of the particular circumstances of the case before it, and under the circumstances shown in the material submitted, this is a case where the application should be granted, with power reserved to make the like grant to the other executors. *In re* ESTATE OF A. M. KAIME, DECEASED. - - - - - - - **190**

PROBATE—Foreign—Will—Three executors —Application for ancillary probate in British Columbia—Grant to one of the foreign executors. - **190**
See PRACTICE. 12.

PROHIBITION—*Judgment or orders passed and entered—Power of County Court judge to review, alter or amend.*] A judgment or order once passed and entered can be reviewed, altered or amended only on appeal, save where the slip rule applies. Prohibition will lie even where there is a concurrent remedy by way of right to apply to the judge to set aside the order in question. *In re* PAVICH *et al.* v. TULAMEEN COAL MINES LIMITED *et al.* (No. 2). - - **371**

PROJECTIONIST—Operation of theatre—Trade union—Employment of its members—Picketing, watching and besetting—Discretion of trial judge —Appeal. - - - **385**
See INJUNCTION. 3.

PROPERTY AND CIVIL RIGHTS. - **321**
See CONSTITUTIONAL LAW. 3.

PROSTITUTION—Charge of living on the earnings of—Proof — No visible means of support—Evidence of. - - - - - - **151**
See CRIMINAL LAW. 4.

2.——*Living in part on the earnings of—Speedy trial—No averment in charge of previous conviction—Exercise of the power to whip.* - - - - - **498**
See CRIMINAL LAW. 8.

PUBLIC INTEREST—Matter of. - **87**
See PRACTICE. 2.

PUBLIC POLICY. - - - **157**
See MONEY HAD AND RECEIVED.

REASONABLE REPAIR—Sidewalk—Hole in pavement—Injury to pedestrian. - - - - - - - **373**
See NEGLIGENCE. 9.

REGISTRAR—Settlement of appeal books—Appeal from—Jurisdiction. **438**
See PRACTICE. 1.

REGISTRATION—Under Architects Act—Practice by unqualified person—"Person" includes corporation. - - - - - - **557**
See ARCHITECT.

REPRESENTATIVE ACTION — By shareholders. - - - **411**
See COMPANY. 2.

RESIDUE OF ESTATE—Annuity—Gift of income of residue—Annuity part of capital. - - - **319**
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ROCK IN PLACE—Must be found by locator—Location of claims. - **257**
See MINES AND MINERALS. 1.

ROYAL COMMISSION—Report of—Admissibility as evidence. - **355**
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RULE OF THE ROAD. - - **125**
See NEGLIGENCE. 3.

RULES AND ORDERS—Bankruptcy Rule 142. - - - - - - **278**
See BANKRUPTCY. 3.

2.——*County Court Rules, Order V., r. 23.* - - - - - - - - **35**
See PRACTICE. 11.

3.——*Order LXV., r. 32.* - **276**
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4.——*Supreme Court Rule 370c (1).* - - - - - - - - **292**
See NEGLIGENCE. 4.

5.——*Supreme Court Rule 370u.* - **377**
See PRACTICE. 9.

SALE OF GOODS—*Poison delivered instead of corn-starch to manufacturer — Sale by manufacturer to wholesaler who sells to retailer — Death of retailer's customer through use of article—Breach of warranty —R.S.B.C. 1936, Cap. 250, Secs. 20 and 21.*] A manufacturer of baking-powder ordered a

SALE OF GOODS—*Continued.*

consignment of ingredients for making baking-powder. The ingredients ordered included 65 pounds of corn-starch, but instead of sending corn-starch the defendant sent 65 pounds of sodium silica fluoride (marked corn-starch) which is a poison. The manufacturer made baking-powder which included this poison, and sold it to a wholesaler who sold to a retailer. The retailer sold a tin to D. D.'s wife made biscuits, using the baking-powder from the tin, and eating some of them she died from the effects of the poison. The plaintiff claims that when these facts were made public its entire business fell off to a point where it could not continue to operate successfully. *Held*, that the condition implied by section 20 of the Sale of Goods Act that the goods which were delivered should correspond with the description, had not been fulfilled, and the plaintiff being obliged to treat the implied condition as a breach of warranty was entitled to damages, the damages being the amount which it had paid for the alleged corn-starch, and the value of the materials which had been destroyed by mixing the powder with it. Assuming that there had been a breach of section 21 (*a*) in that the defendant did not comply with the implied condition that the goods should be reasonably fit for the particular purpose for which it was made known to the defendant that they were required:—*Held*, that the plaintiff was not entitled to damages for the loss of business it sustained. It was however entitled to recover for the fees paid to two analysts for analyzing the powder after it learned that there was something wrong with it. *Held*, further, that the plaintiff was not negligent in not having the materials examined by an expert, and it was entitled to rely upon the defendant supplying it with the material it had ordered. RENEWO PRODUCTS LIMITED v. MACDONALD & WILSON LIMITED. - - - - **328**

SAWMILL PLANT. - - - - **463**
See MORTGAGE.

SECURITY—For payment of judgment—Appellant a trust company—Security given under Trust Companies Act—Effect of. - - **481**
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SENTENCE—Three years on each charge to run consecutively — Appeal from sentence. - - - - **118**
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SHARES—Payment for. - - **224**
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SIDEWALK—Hole in pavement—Injury to pedestrian—Reasonable repair. - - - - - - **373**
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STATUTES—14 Geo. III. (Imp.), Cap. 78, Sec. 86. - - - - **207**
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B.C. Stats. 1896, Cap. 55, Sec. 60. - **233**
See LIMITATION OF ACTIONS.

B.C. Stats. 1907, Cap. 39, Sec. 4 (7). - - - - - **120, 423**
See SUCCESSION DUTY.

B.C. Stats. 1926-27, Cap. 44, Sec. 12. **161**
See MOTOR-VEHICLES. 1.

B.C. Stats. 1932, Cap. 20, Sec. 5 (159M). - - - - - - **98**
See MOTOR-VEHICLES. 3.

B.C. Stats. 1933, Cap. 46, Sec. 4. - **272**
See MUNICIPAL ACT.

B.C. Stats. 1934, Cap. 61, Sec. 9. - - - - - - **120, 423**
See SUCCESSION DUTY.

B.C. Stats. 1935, Cap. 50, Sec. 53. - **98**
See MOTOR-VEHICLES. 3.

B.C. Stats. 1937, Cap. 8. - - **355**
See CONSTITUTIONAL LAW. 1.

B.C. Stats. 1937, Cap. 41. - **321**
See CONSTITUTIONAL LAW. 3.

B.C. Stats. 1937, Cap. 45, Sec. 11 (1). **485**
See INSURANCE, AUTOMOBILE. 2.

B.C. Stats. 1937, Cap. 77. - - **140**
See CONSTITUTIONAL LAW. 2.

Can. Stats. 1932, Cap. 39, Secs. 9, 12 and 13. - - - - - - - **155**
See BANKRUPTCY. 2.

Criminal Code, Secs. 69 and 236 (*c*). **109**
See CRIMINAL LAW. 3.

Criminal Code, Sec. 216, Subsec. 1 (*l*) and 2, and Sec. 1014. - - **151**
See CRIMINAL LAW. 4.

Criminal Code, Secs. 216, 833, 963 and 1014. - - - - - - - **498**
See CRIMINAL LAW. 8.

Criminal Code, Sec. 225. - - **37**
See CRIMINAL LAW. 1.

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Criminal Code, Secs. 732, 733 and 734. - - - - - - - **309**
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Criminal Code, Sec. 750 (*c*). - **75**
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Criminal Code, Secs. 773, 774 and 779. - - - - - - - **118**
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Criminal Code, Sec. 835. - - **252**
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R.S.B.C. 1924, Cap. 82, Sec. 11. - **261**
See BANKS AND BANKING. 2.

R.S.B.C. 1924, Cap. 167, Secs. 30 and 41. - - - - - - - **257**
See MINES AND MINERALS. 1.

R.S.B.C. 1924, Cap. 179, Sec. 54, Subsec. (56) (ii). - - - - **272**
See MUNICIPAL ACT.

R.S.B.C. 1936, Cap. 1, Sec. 13 (1) (*a*). - - - - - - **120, 423**
See SUCCESSION DUTY.

R.S.B.C. 1936, Cap. 1, Sec. 24 (31). - **557**
See ARCHITECT.

R.S.B.C. 1936, Cap. 5, Sec. 71 (2). - - - - - - **88, 380**
See DAMAGES. 10.
MOTOR-VEHICLES. 5.

R.S.B.C. 1936, Cap. 5, Sec. 121 (3). - **335**
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R.S.B.C. 1936, Cap. 14, Sec. 32. - **557**
See ARCHITECT.

R.S.B.C. 1936, Cap. 45, Sec. 47 (3). **481**
See JUDGMENT. 1.

R.S.B.C. 1936, Cap. 52, Sec. 2. - **512**
See NEGLIGENCE. 2.

R.S.B.C. 1936, Cap. 57, Sec. 30. - **481**
See JUDGMENT. 1.

R.S.B.C. 1936, Cap. 72. - - **50, 87**
See INJUNCTION. 2.
PRACTICE. 2.

R.S.B.C. 1936, Cap. 91, Secs. 33 and 35. - - - - - - - - **155**
See BANKRUPTCY. 2.

R.S.B.C. 1936, Cap. 93. - **88, 380, 512**
See DAMAGES. 10.
MOTOR-VEHICLES. 5.
NEGLIGENCE. 2.

STATUTES—*Continued.*

R.S.B.C. 1936, Cap. 108, Sec. 18 (*a*) (ii). - - - - - - - **9**
See CRIMINAL LAW. 2.

R.S.B.C. 1936, Cap. 116, Sec. 19. - **125**
See NEGLIGENCE. 3.

R.S.B.C. 1936, Cap. 133, Secs. 153, 165 (1) and 168. - - - **485**
See INSURANCE, AUTOMOBILE. 2.

R.S.B.C. 1936, Cap. 165. - **321, 174**
See CONSTITUTIONAL LAW. 3.
NATURAL PRODUCTS MARKETING (BRITISH COLUMBIA) ACT.

R.S.B.C. 1936, Cap. 181, Sec. 80. - **409**
See MINES AND MINERALS. 2.

R.S.B.C. 1936, Cap. 195, Sec. 74 (1). **485**
See INSURANCE, AUTOMOBILE. 2.

R.S.B.C. 1936, Cap. 205, Secs. 4 and 5. **376**
See NOTARIES.

R.S.B.C. 1936, Cap. 250, Secs. 20 and 21. - - - - - - - **328**
See SALE OF GOODS.

R.S.B.C. 1936, Cap. 250, Sec. 21. - **266**
See NEGLIGENCE. 11.

R.S.B.C. 1936, Cap. 271. - - **9**
See CRIMINAL LAW. 2.

R.S.B.C. 1936, Cap. 271, Secs. 5 (2) and 68. - - - - - - - **3**
See MUNICIPAL LAW.

R.S.B.C. 1936, Cap. 289. - - **385**
See INJUNCTION. 3.

R.S.B.C. 1936, Cap. 312. - - **30**
See NEGLIGENCE. 10.

R.S.B.C. 1936, Cap. 312, Secs. 13 and 14. - - - - - - - - **241**
See WORKMEN'S COMPENSATION ACT.

R.S.C. 1927, Cap. 11, Secs. 24, 25, 26, 29 and 121. - - - **155**
See BANKRUPTCY. 2.

R.S.C. 1927, Cap. 11, Sec. 43 (*c*). - **278**
See BANKRUPTCY. 3.

R.S.C. 1927, Cap. 35. - - - **87**
See PRACTICE. 2.

R.S.C. 1927, Cap. 35, Sec. 65. - **7**
See PRACTICE. 8.

R.S.C. 1927, Cap. 59, Sec. 4, Subsec. 5. **238**
See CRIMINAL LAW. 5.

R.S.C. 1927, Cap. 93, Secs. 2, 33, Subsec. 7, 40 and 42. - - - **179**
See IMMIGRATION.

STATUTORY CONDITION—Breach of. **41**
See INSURANCE, ACCIDENT.

STATUTORY CONDITIONS. - **195**
See INSURANCE, FIRE.

SUCCESSION DUTY—*Deceased domiciled in British Columbia—A portion of estate in Ontario—Allowance for duty paid in Ontario—Costs—B.C. Stats. 1907, Cap. 39, Sec. 4 (7); B.C. Stats. 1934, Cap. 61, Sec. 9—R.S.B.C. 1936, Cap. 1, Sec. 13 (1) (a).*] H. H. Beck died on the 21st of June, 1931, domiciled in British Columbia. His estate was valued at $465,220. On February 1st, 1933, the executors paid British Columbia $10,000 on account of succession duty. On February 8th, 1938, the assessor of succession duties for British Columbia assessed the succession duties for the whole estate at $29,413. The part of the estate that was in Ontario was valued at $254,441.26, of which $217,236.76 was personal property. On March 10th, 1936, the executors paid $7,000 in Ontario on account of succession duties payable in that Province. The proper officer in Ontario assessed the total succession duties payable in Ontario on personal property at $20,214.87, and the executors paid the balance payable in Ontario, namely, $13,214.57 with interest, on the 19th of January 1938. When the $7,000 was paid on account in Ontario those in authority in British Columbia agreed that the executors were entitled to an allowance for this amount, and the executors now claim they are entitled to an additional allowance by British Columbia of $13,214.57, and are only liable in British Columbia for the difference between the succession duty so paid in Ontario and the succession duty assessed in British Columbia in respect of the transmission of the personal property in Ontario. The persons entitled to the personalty in Ontario were at the time of Beck's death domiciled in British Columbia. On July 15th, 1908, an order in council was passed in British Columbia "That the provisions of subsection (7) of section 4 of the Succession Duty Act as to the allowance of succession duties by this Province be and are hereby extended so as to apply to the Province of Ontario upon the Government of Ontario informing this Government that an order in council has been passed extending a similar allowance to the Province of British Columbia." A similar order in council was passed in Ontario on August 28th, 1908, and an order in council of April 3rd, 1934, which took the place of the order in council of August 28th, 1908, provided for the like allowance. The reciprocal arrangement allowing a reduction of duty was rescinded by both Provinces by order in council in 1937. It was *held* that the order in council of July 15th, 1908, was a regulation within the meaning of section 13 (1) (*a*) of the Interpretation Act, and said section preserved the privilege of the beneficiaries and they were entitled to the allowance in respect of the principal moneys paid to Ontario. *Held*, on appeal, reversing the decision of ROBERTSON, J. (MCQUARRIE, J.A. dissenting), that on February 4th, 1934, the Succession Duty Act was declared *ultra vires* [see *Attorney-General for British Columbia* v. *Col* (1934), 48 B.C. 171.] It follows that any order in council based upon a statute which never had any existence must be regarded as a thing of naught. Sections 50 and 52 of the new Succession Duty Act, passed on the 29th of March, 1934, do not assist the respondents and the appeal is allowed. *Held*, further, that as the appellant succeeds upon a point not taken below and by virtue of the discretion vested in this Court by section 44 of the Succession Duty Act, the proper order is that there be no costs awarded to either party here and below. *Re* HERBERT HENRY BECK, DECEASED AND THE SUCCESSION DUTY ACT. ATTORNEY-GENERAL OF BRITISH COLUMBIA v. UNION TRUST COMPANY LIMITED AND HUGH HEBBERT BECK. - - - **120, 423**

SUBROGATION. - - - **485**
See INSURANCE, AUTOMOBILE. 2.

SUPREME COURT OF CANADA—Appeal to—Application to the Court of Appeal for leave—Matter of public interest. - - - - - **87**
See PRACTICE. 2.

TELEGRAM—Acceptance by—No evidence of receipt of telegram—Option for purchase of shares—Whether contract concluded. - **296**
See PRACTICE. 10.

TENANTS—Injury to—Apartment-house—Entrance to suites from balcony—Defective railing—Fall from balcony—Licensees—Knowledge of defect by owner—Liability. - **64**
See NEGLIGENCE. 1.

THEATRE—Operation of — Projectionist—Trade union — Employment of its members—Picketing, watching and besetting—Discretion of trial judge —Appeal. - - - - **385**
See INJUNCTION. 3.

THIRD PARTIES. - - - **35**
See PRACTICE. 11.

TIMBER CUT AND SOLD—Right to proceeds—Assignment of part of proceeds to bank—Bank's rights. - - - - - - - **300**
See LUMBER COMPANY.

TIMBER LICENCES. - - **338**
See CROWN LANDS.

TIME—Extension of for notice of appeal to Supreme Court of Canada—Section 65 of Supreme Court Act, R.S.C. 1927, Cap. 35—"Special circumstances"—Costs. - - **7**
See PRACTICE. 8.

TRADE FIXTURES. - - - **463**
See MORTGAGE.

TRADE UNIONS—*Contract between theatre owners and union—Dispute as to interpretation of—Watching and besetting theatre—Object to compel acceptance of union's interpretation of contract—Nuisance—Right to injunction and damages.*] Mrs. Fairleigh acted as manager, and her husband as a qualified projectionist, of the Hollywood Theatre in Vancouver, of which they were the owners. The regulations under the Fire Marshal Act require the presence of two projectionists in a booth. In October, 1937, Mrs. Fairleigh entered into an agreement with the British Columbia Projectionists' Union whereby she agreed to employ only projectionists supplied by the union, "except and only when members of her family are not available." At this time Mrs. Fairleigh's son was studying to become a projectionist, and on March 26th, 1938, he became qualified and took out a projectionist's certificate. The union projectionist who was employed as second projectionist in the theatre was then dismissed and the son took his place. The union protested that it was understood that only one member of the family would act at a time, and that one union man would always be employed. The union picketed the theatre and carried on a system of watching and besetting before the entrance. In an action for damages and an injunction:—*Held*, that the defendants acted in concert on a prearranged plan and in pursuance thereof, without lawful jurisdiction, were attempting to compel the plaintiff to do what it was not legally obligated to do in conducting its business. The plaintiff is entitled to an injunction and damages. HOLLYWOOD THEATRES LIMITED v. TENNEY *et al.* (No. 2). - - - - - **389**

TRADE UNIONS—*Continued.*

2.——*Employment of its members—Operation of theatre—Projectionist—Picketing, watching and besetting—Discretion of trial judge—Appeal.* - - **385**
See INJUNCTION. 3.

ULTIMATE NEGLIGENCE. - **512**
See NEGLIGENCE. 2.

VENTILATORS AND HATCHES—Lack of ventilation owing to closing of—Weather conditions—"Perils of the sea"—Construction of. - **441**
See INSURANCE, MARINE.

WAREHOUSEMEN—Extent of duty of. - - - - - - **207**
See NEGLIGENCE. 5.

WARNING—Sale of dangerous goods—Liability of manufacturer, wholesaler or retailer to purchaser. - **266**
See NEGLIGENCE. 11.

WATCHING AND BESETTING. - **389**
See TRADE UNIONS. 1.

WIDOW—Actions by under Administration Act and Families' Compensation Act. - - - - - - **88**
See DAMAGES. 10.

WHIPPING. - - - - - **498**
See CRIMINAL LAW. 8.

WILL—*Construction—Annuity part of residue of estate—Gift of income of residue—Annuity part of capital.*] P. directed by his will that $200 per mnoth be paid to his daughter D. out of the income arising from his residuary estate, during the life of his wife, who survived D. D. died in 1935, and by will bequeathed her residuary estate (1) in payment of the annual premium upon a policy upon the life of her granddaughter P. L.; (2) to pay her daughter F. M. during her life the annual sum of $420; (3) to pay the balance of her income arising from her residuary estate to her daughter C. G., and upon the death of said two daughters, the whole of the residuary estate to be divided between the two grandchildren of the testatrix. On a contest as to whether the monthly payments of $200 are to be invested by the trustees and the income thereof be paid to the daughter C. G., or whether the whole amount of $200 is payable to C. G. as income:—*Held*, that the trustees should invest the $200 monthly payments and pay the income from it to C. G. *In re* DOCKRILL ESTATE. - - - - - - **319**

WILL—*Continued.*

2.——*Construction—Child en ventre sa mere—Beneficiaries named in will—Intention of testator—Right of posthumous child to share in estate.*] A testator by his will gave all his property "unto my wife Monica Alexandria Sloan and three infant children, David Alexander Sloan, John Kenneth Sloan and Monica Marjorie Sloan, or such of my said children as shall attain the age of twenty-one years, in equal shares with power to my executors to pay over to my said wife as guardian of my infant children, the income of the expectant share of any such child or such part thereof as my said wife shall think necessary for the maintenance and education of such child during minority." Five months after testator's death a fourth child was born. Upon originating summons an order was made declaring that the posthumous child was entitled to share equally in the estate with the other three children. *Held,* on appeal, reversing the decision of MANSON, J., that the beneficiaries under the will were described as *personæ designatæ* and not as a class and therefore the child born after testator's death is not entitled to share in the estate. BULL v. SLOAN. - - - - - **81**

3.——*Foreign probate—Three executors—Application for ancillary probate in British Columbia — Grant to one of the foreign executors.* - - - - - - **190**
See PRACTICE. 12.

WORDS AND PHRASES—"A person carrying on a business"—Meaning of. **3**
See MUNICIPAL LAW.

2.——*"Lay" contract—Meaning of.* **241**
See WORKMEN'S COMPENSATION ACT.

3.——*"Owner's policy"—Interpretation.* - - - - - - - - **485**
See INSURANCE, AUTOMOBILE. 2.

4.——*"Perils of the sea"—Interpretation.* - - - - - - - - - **440**
See INSURANCE, MARINE.

5.——*"Person"—Includes corporation.* - - - - - - - - - **557**
See ARCHITECT.

6.——*"Special circumstances."* **7**
See PRACTICE. 8.

WORDS AND PHRASES—*Continued.*

7.——*"Volenti non fit injuria"—Interpretation.* - - - - - - **478**
See NEGLIGENCE. 13.

WORKMEN'S COMPENSATION ACT—*Plaintiffs working on a "lay" contract as fishermen with defendant—Remuneration a share of proceeds after deducting expenses—Deduction by defendant to meet assessments of Board—Right of action to recover—Employer and employee—R.S.B.C. 1936, Cap. 312, Secs. 13 and 14.*] The plaintiffs were engaged from 1927 until 1937 in fishing operations, working on what is called a "lay" under which the workmen received as remuneration a certain share of the proceeds of the operations after certain expenses had been deducted. Boats and nets were provided by the defendant company, and during said period the defendant company deducted from the remuneration payable by it to the plaintiffs the workmen's compensation assessments calculated upon the basic rate for each year fixed by the Board, the exact amount deducted from each plaintiff depending on what his gross earnings were. The full amount deducted was not paid to the Board at one time, but the money was paid according to assessments or calls made by the Board from time to time, with an adjustment according to the final pay-roll. For at least eight years of the period the Board collected less than the basic rate. The plaintiffs, alleging contracts of employment, claimed thereunder the total amount of moneys so deducted and relied on sections 13 and 14 of the Workmen's Compensation Act. *Held,* that the relationship between the parties was that of employer and employee, and the moneys paid to the Board should be distinguished from those retained by the defendant, and time was no bar to the plaintiffs' action in respect to the moneys retained. The relationship between the parties was created by the contract and not the statute. The plaintiffs are therefore entitled to recover from the defendant the unpaid balance, namely, the total amounts which have been deducted from them during the period in question less the amounts paid to the Board and deducted from earnings payable to plaintiffs more than six years before the action was brought and less any sums which have been paid to them by the defendant with respect to the total amounts deducted from them. The claim for interest is disallowed. BILAN *et al.* v. CANADIAN FISHING COMPANY LIMITED. - **241**