DIGEST

OF

BRITISH COLUMBIA CASE LAW

BEING

THE CASES DETERMINED

IN

THE COURTS OF BRITISH COLUMBIA
AND ON APPEAL THEREFROM

AND REPORTED IN

THE BRITISH COLUMBIA REPORTS
VOLUMES 45 TO 63
(the Reports having been discontinued after Volume 63)

AND IN

OTHER REPORTS OF BRITISH COLUMBIA CASES
DURING THE SAME PERIOD

COMPILED BY DIRECTION OF
THE LAW SOCIETY OF BRITISH COLUMBIA

BY

D. E. McTAGGART
one of Her Majesty's Counsel and a Bencher of the
Law Society of British Columbia

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Zoning by-laws, In re, City of Kamloops; (1935) 3 W.W.R. 206 500

DIGEST
OF
BRITISH COLUMBIA CASE LAW

ABSCONDING DEBTOR.

See ARREST AND IMPRISONMENT FOR DEBT.

ACTION.

See PRACTICE.

See PLEADINGS.

ADMINISTRATION.

See EXECUTORS AND ADMINISTRATORS.

ADMIRALTY.

1. False declaration as to ownership.]—Sec. 67 (2) of the Merchant Shipping Act, 1894, authorizes the forfeiture of an interest in a ship if the holder of such interest wilfully makes a false declaration as to her ownership. A ship was seized under the section, after which she was arrested for wage claims and sold by order of the Court. After satisfying the claims about $2500 remained in Court, which the Crown claimed as being forfeitable in lieu of the ship. At the hearing B. was permitted to come in as a defendant as the holder of an unregistered transfer of a registered mortgage. The Local Judge in Admiralty held that the ship should be forfeited but that B.'s interest should be protected, as there was no actual forfeiture until adjudication, or at any rate until seizure. He ordered the balance to be paid out to B. in reduction of his mortgage. Held, on appeal to the Supreme Court of Canada, dismissing the Crown's appeal, that there was no proper foundation for a declaration of forfeiture of the ship but no disagreement is implied with the reasons upon which the Court below acceded to B.'s claim. *The King* v. *The Ship "Emma K"*, (1936) S.C.R. 256; (1936) 3 D.L.R. 385, affirming; (1935) 50 B.C.R. 97; (1935) 3 D.L.R. 673; (1936), Ex. C.R. 92.

2. Priority over mortgage — master's wages.] — The master's claim for wages was resisted by mortgagees of the ship who alleged that the plaintiff was in fact the owner of the ship and hence was working for himself. The vessel was registered in the name of the plaintiff's father. Held, on all the evidence, that the plaintiff's claim was a genuine one and his lien must be upheld, and not made subject to the rights of the mortgagee. The plea of estoppel had not been made out. *Cholberg* v. *M.S. "Silver Horde"*, (1939) 55 B.C.R. 153.

3. Limitation of liability—how raised—Joint owners.] — Sec. 649 of the Canada Shipping Act entitles owners of a ship to limit their liability in certain cases where their actual fault or privity is not involved. The defendants pleaded such limitation; the plaintiff contended that the issue should be raised in a separate action after liability had been determined. Held, a defendant in an action of damage who is entitled to institute a separate suit of limitation of liability may, if he chooses, plead his right to have his liability limited, by way of defence in the action of damage in which he is defendant, and set up a counterclaim in the same action, claiming a decree of limitation of liability such as he might have claimed as a plaintiff in a separate action of limitation of liability. Held, further, joint owners are in the same position as co-owners in a

case where the actual fault of one of them only, occasioned the loss. *Gale* v. *The Ship "Sonny Boy"*, (1945) 61 B.C.R. 309; (1945) 2 D.L.R. 363.

See COLLISIONS AT SEA.

See SALVAGE.

See SHIPPING.

ADOPTION.

See INFANTS.

AGENCY.

See PRINCIPAL AND AGENT.

ALIENS.

See IMMIGRATION.

See CONFLICT OF LAWS.

ALIMONY.

See DIVORCE AND MATRIMONIAL CAUSES.

ANIMALS.

1. Cattle straying into farm — unprotected by lawful fence.]—Sec. 14 of the Trespass Act provides that where cattle stray into lands unprotected by a lawful fence no action of trespass shall lie. Here there was no fencing on two sides of the lands and the lessee was held unable to recover for the loss of bulbs eaten by the lessor's cattle which had strayed, i.e. "wandered" or "roved" into the lands. *Macdonald-Buchanan* v. *Johnson,* (1934) 1 D.L.R. 216.

2. Proceedings under Sheep Protection Act civil in character.]—Sec. 13 does not create an offence; it merely imposes on the owner of a dog liability for damages occasioned by the dog, and the proceedings, although taken under the Summary Convictions Act, are purely civil in character. The magistrate found the defendants guilty but what he really meant was that he found that they were the owners of the dogs that killed or worried the sheep. *Rex ex rel. Threlkeld* v. *Smith and Stewart,* (1935) 49 B.C.R. 550; (1935) 1 W.W.R. 661.

3. Cow as trespasser eating dangerous vegetable.]—In an action for damages for the death of a cow through choking from eating an onion on the defendant's land, it was held that the animal had got the onion by thrusting her head through a broken fence. The action was dismissed since the cow was a trespasser. *Schneider* v. *Hee Fong,* (1935) 2 D.L.R. 812; (1935) 1 W.W.R. 366.

4. Status of agent of branch of Society for the Prevention of Cruelty to Animals.]—The agent of the Vancouver Branch of the Society found the plaintiff's dogs so badly cared for that he accepted the advice of two reputable citizens and of a veterinary surgeon and destroyed some 24 animals belonging to the plaintiff. The plaintiff sued the agent and the Branch for damages. Held, dismissing the action, that the agent under sec. 7 of the Society for the Prevention of Cruelty to Animals Act was justified in destroying the animals as being unfit for any useful purpose. In any event the Branch would not be liable for the other defendant's acts as he was carrying out statutory duties which he performed independently. *Useich* v. *Fisher,* (1939) 54 B.C.R. 113; (1939) 4 D.L.R. 776; (1939) 3 W.W.R. 79.

5. Cattle entering another's land within pound district—effect of Trespass Act on Pound District Act.]—The Pound District Act (Secs. 7 and 10) provides that no animal shall be permitted to run at large within any pound district and makes the person in charge of such an animal liable for damage as if he were the owner. The Trespass Act (sec. 14 (1)) provides that where cattle stray into lands unprotected by a lawful fence no action for trespass shall be maintainable therefor. The Trespass Act is to be read as relating to lands other than those lying within a pound district. The Trespass Act being a general statute must yield to the special act—the Pound District Act. Damages were recoverable, nothwithstanding the absence of a lawful fence, where the lands were in a pound district. *Gladysz* v. *Gross,* (1945) 61 B.C.R. 410; (1945) 3 D.L.R. 208; (1945) 2 W.W.R. 266.

APPEALS.

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1. WHAT APPEALABLE.

1. Petition for advice under the Trustee Act.] — There is no appeal from the "opinion, advice or direction given" by a judge on a petition by trustees under sec. 79 of the Trustee Act. *In re Estate of Katherine Dixon,* (1935) 50 B.C.R. 285; (1936) 1 D.L.R. 593; (1936) 1 W.W.R. 383.

2. Identity of goods.]—The accused was convicted of being in possession of 500 sacks knowing them to have been stolen. It was contended that the proof of identity of the sacks was incomplete. Held, on appeal, affirming the conviction on an equal division of the Court, that the evidence was sufficient to justify the magistrate in coming to the conclusion he did. It was the duty of the Court of Appeal not to interfere where the facts have been found upon evidence by a jury or by a Court of summary jurisdiction. *Rex* v. *Kolberg,* (1935) 51 B.C.R. 535; 68 C.C.C. 358.

3. Whether restraining order may be made after Court's judgment completed and entered.]—The applicant moved for an injunction requiring the defendant, pending a further appeal, to pay into Court the proceeds of shipments of ore from the mine which was the subject of litigation. Held, judgment having been completed and duly entered the Court is functus officio and without jurisdiction to entertain the motion. *May* v. *Roberts,(No. 3)* (1936) 1 W.W.R. 465.

4. Taking benefit under judgment below.]—The appellant (defendant) was entitled to the costs of an interlocutory proceeding and the respondent (plaintiff) was entitled to the costs of the action. The one was subtracted from the other and the balance was paid to the respondent (plaintiff). It was contended that by deducting his own costs the appellant (defendant) was, by reason of the judgment under appeal, paying less than he otherwise would have, and was thus taking a benefit under it. Held, no benefit was taken. *Elgeti* v. *Smith (No. 1),* 1936) 51 B.C.R. 545; (1937) 4 D.L.R. 196.

5. Question first raised on appeal.]—The case for the plaintiff was formulated on the pleadings and developed at the trial as an action of negligence. The case went to the jury, without any objection, on the basis of an action for negligence in which the burden lay on the plaintiff. The Court of Appeal ordered a new trial on the ground that the doctrine of res ipsa loquitur applied and that the trial judge had misdirected the jury as to the burden of proof. Held, on further appeal to the Supreme Court of Canada, reversing the decision below, that res ipsa loquitur was not relied on at the trial and could not be raised on appeal. *Field* v. *Spencer,* (1939) S.C.R. 36; (1939) 1 D.L.R. 129, reversing; (1938) 52 B.C.R. 447; (1938) 2 D.L.R. 245; (1938) 2 W.W.R. 385.

6. Barbers Act — whether appeal lies from decision of County Court.]—An appeal to the County Court from the decision of the Board of Examiners that a candidate had failed in hair-cutting was dismissed. On further appeal to the Court of Appeal it was objected that no such appeal lay. Held, overruling the objection, the case relied on, viz. *Larsen* v. *Coryell,* (1904) 11 B.C.R. 22 was distinguishable. *McAllister* v. *Board of Examiners,* (1939) 54 B.C.R. 243; (1939) 3 W.W.R. 250.

7. Appeal from settlement by registrar.]—A single judge of the Court of appeal has no jurisdiction to entertain an appeal from the registrar upon his settlement of the appeal books. The Court should deal with it in the exercise of its inherent jurisdiction. *McDonald* v. *Neary,* (1939) 53 B.C.R. 438; (1939) 2 D.L.R. 795; (1939) 2 W.W.R. 176.

8. Effect on Crown's right of appeal where misdirection not objected to.]—Where there was misdirection in a criminal trial to the advantage of the accused, who was acquitted, and the Crown had not objected, it was contended on appeal that the Crown could not in the circumstances ask for a new trial. The acquittal was affirmed on other grounds but it was held by Martin C.J.B.C. and Sloan J.A. that the Crown should not remain silent under a mis-

direction in favour of the accused, and then on acquittal seek to place him in jeopardy again because of the Crown's neglect to object. *Rex* v. *Munroe,* (1939) 54 B.C.R. 481; (1940) 2 D.L.R. 579; (1939) 3 W.W.R. 128 and (1940) 2 W.W.R. 1; 73 C.C.C. 357.

9. Findings of fact based on credibility —not to be disturbed.]—Where the trial judge has found facts based on the credibility and demeanor of witnesses, they should not be disturbed. *Kasky* v. *Senich* (1939) 3 D.L.R. 632.

10. Appeals from summary conviction —to County Court—not Court of Appeal.]—There is no jurisdiction in the Court of Appeal to entertain an appeal from the acquittal by a magistrate of a person charged under summary conviction. (Part XV of the Criminal Code). Sec. 1013 (4) will not support such an appeal; it is limited to acquittals in respect of indictible offences. *Rex* v. *Moore,* (1941) 56 B.C.R. 300; (1941) 3 D.L.R. 384; (1941) 2 W.W.R. 93; 76 C.C.C. 391.

11. Death of one of three presiding judges while judgment reserved — status of survivors to give judgment.]—Where one of three judges who had heard an appeal died after judgment had been reserved without delivering it, it was held that the appeal must be reheard. *Skelding* v. *Daly,* (1941) 57 B.C.R. 109; (1942) 1 D.L.R. 103; (1941) 3 W.W.R. 851.

12. No jurisdiction in Court appealed from to stay proceedings after notice of appeal—Sec. 30 of Court of Appeal Act.] —The trial judge directed an inquiry before the registrar and payment of the amount certified by him. Following the launching of an appeal the judge was asked to postpone the inquiry pending the determination of the appeal; he granted a stay on terms. The appellant, not satisfied with the terms, applied to the Court of Appeal for the same relief. It was objected that the Court of Appeal had no jurisdiction, (a) because the order below granting the stay had not been appealed against, and (b) because what was sought was really a stay of execution under Sec. 30 (d) of the Court of Appeal Act and hence a matter exclusively for the Court appealed from. Held, granting the stay without terms, the first objection failed because there was no jurisdicition in the Court below to make the order—it was a nullity. As to the other objection, the order sought was a "stay of proceedings" and not a "stay of execution" within Sec. 30, and even if the motion could be regarded as one for a "stay of execution," nevertheless the subject-matter of the order for judgment did not fall within the classes of judgments enumerated in Sec. 30 as exceptions to its overriding initial mandatory enactment that stay of execution occurs automatically once security for costs of the appeal has been perfected. *Stephen* v. *Stewart, (No. 2)* (1943) 59 B.C.R. 297; (1943) 4 D.L.R. 642; (1943) 3 W.W.R. 225.

13. Appeal from County Court—questions of fact excluded.]—Sec. 117 of the County Courts Act bars an appeal on questions of fact. The plaintiff sued the defendant for wages as a partner in a lumber company. The question of whether the defendant was a partner or not was one of fact from which there was no appeal. A second claim was for lumber sold to the company for which the plaintiff already held a certificate under the Creditor's Relief Act, which is equivalent to a judgment. Thus having judgment the action and appeal on this claim were unnecessary. *Dalip Singh* v. *Kanshi Ram,* (1943) 1 W.W.R. 546.

14. Reversing trial judge on question of fact.]—Where the trial judge misconceived the apposite law and the effect of the evidence an appellate court will reverse his findings of fact. *Johnson* v. *Grossman (No. 2),* (1944) 1 D.L.R. 679.

15. Judge sitting as arbitrator—no appeal.]—Where a County Court Judge sat as an arbitrator by consent of the parties, an appeal from his decision was quashed. The parties must be held to have taken his decision as that of an arbitrator and hence it must be regarded as extracurial and without appeal. *Chong Hing Wah Kee Co. Ltd.* v. *G. H. Chen,* (1945) 62 B.C.R. 93; (1945) 3 W.W.R. 474.

16. As to jurisdiction—length of notice under Rule 9.]—Rule 9 requires notice of an objection to the jurisdiction to be given at least one clear day "before the appeal comes to be heard." The notice was given two weeks before the day of hearing but after the first day of the Court's sittings. It was contended that the "appeal comes to be heard" on the first day of the sittings, regardless of when it is actually heard. Held the notice was in time. *Yue Shan Society* v. *Chinese Workers Protective Ass'n* (1943) 60 B.C.R. 121; (1944) 1 W.W.R. 118.

17. Whether appeal lies in habeas corpus matter where conviction is for criminal offence.]—The provisions of Sec.

6 of the Court of Appeal Act granting a right of appeal to the Court of Appeal in habeas corpus matters are inoperative if the applicant for the writ is detained by virtue of a conviction for an offence under the Criminal Code. The Dominion Parliament has exclusive jurisdiction to authorize such an appeal under Sec. 91 (27) of the British North America Act and a Provincial legislature has no such power under Sec. 92 (13). *Rex* v. *Storgoff*, (1945) S.C.R. 526, (1945) 3 D.L.R. 673, 84 C.C.C.1; overruling (1944) 60 B.C.R. 464; (1944) 3 W.W.R. 1; (1944) 4 D.L.R. 445; 82 C.C.C. 153; reversing (1944) 2 W.W.R. 509, 82 C.C.C. 111.

18. Bankruptcy rule as to appeal—effect of non-compliance.] — Under Bankruptcy Rule 68 (1) no appeal shall be brought unless notice is filed and served within ten days of the decision complained of. The failure to comply with the rule deprives the Court of Appeal of jurisdiction. *May* v. *Hartin (No. 5)*, (1946) 2 W.W.R. 655, 27 C.B.R. 265.

19. Power to suspend sentence.]—The Court of Appeal has no jurisdiction to suspend the passing of sentence on an appeal from conviction. *Rex* v. *Cruickshank*, (1946) 63 B.C.R. 102; (1946) 4 D.L.R. 745; (1946) 3 W.W.R. 225, 86 C.C.C. 257.

20. Benefit taken under judgment appealed from.]—The costs of an interlocutory application in the County Court were awarded to the plaintiff. He later recovered judgment in the action for $95. The costs of the action were taxed but those of the application were disallowed by the Registrar as being in excess of the $20 fixed by Schedule 1 of the Tariff of Costs. The plaintiff appealed to the judge who upheld the Registrar and made an order awarding $32.20 in all, being the maximum of $20 and $12.20 for disbursements. The plaintiff appealed to the Court of Appeal with respect to the costs of the interlocutory application and was met by the preliminary objection that he had demanded and received the $32.20 and could not, having taken a benefit under it, ask that the order be set aside. Held that the appeal should be dismissed. *Barkley* v. *Pacific Stages Ltd.*, (1934) 49 B.C.R. 158.

II. Formal Conditions of Appeal.

1. Changing place of hearing.]—Sec. 13 (3) of the Court of Appeal Act requires that all appeals shall be heard in the city in which the same are entered for hearing. The effect is to deprive the Court of jurisdiction to make a change. If there is consent the Court may give leave to withdraw an appeal from the list and give notice for a sitting at another place. *Tatroff* v. *Ray*, (1934) 49 B.C.R. 162.

2. Judgment below not perfected.]—At the hearing the preliminary objection was taken that the judgment appealed from had never been perfected in the Court below, and that, as a result, there was no jurisdiction to hear the appeal. The delay had been caused by the illness of the trial judge. Held, overruling the objection, the appellant is not bound to perfect a final judgment before giving notice of appeal, but it must be included in the appeal book when the appeal comes on for hearing. *Tatroff* v. *Ray (No. 2)*, (1934) 49 B.C.R. 321; (1935) 1 D.L.R. 129.

3. Final or interlocutory — Execution Act, Sec. 38.]—An order made under sec. 38 of the Execution Act, on a motion by a judgment creditor to show cause why any land, or the interest therein, of the judgment debtor, affected by the registration of a certificate of judgment in the Land Registry Office, should not be sold, is an interlocutory order. The appeal was quashed as being out of time. *Thorne* v. *Columbia Power Co. Ltd.*, (1936) 50 B.C.R. 504; (1936) 4 D.L.R. 808; (1936) 3 W.W.R. 46.

4. In what Court intituled.]—Notice of appeal to the Court of Appeal should be intituled in the Court appealed from. The notice should be filed in the Court appealed from and a copy thereof filed in the Court of Appeal. The notice is dual in its nature and is aimed to start proceedings in the Court of Appeal and to stay them in the Court appealed from. *Romano* v. *Maggiora (No. 2)*, (1936) 50 B.C.R. 362; (1936) 1 W.W.R. 423.

5. Principles upon which extension granted.]—Where a charge was dismissed in police court and on appeal (on the merits) to the County Court, leave to extend the time for appealing to the Court of Appeal was refused. The avoidance of injustice having regard to the special circumstances of each case should be considered. *Rex* v. *Safeway Stores Ltd.*, (1937) 52 B.C.R. 396; (1938) 2 D.L.R. 415, 70 C.C.C. 106.

6. Mechanic's Lien—whether final or interlocutory.]—Where a claimant's action to enforce a Mechanic's lien was dismissed,

it was held to have disposed finally of the claim and was a final judgment for purposes of appeal. *Hodgson Lumber Co. Ltd.* v. *Marshall,* (1940) 55 B.C.R. 467; (1941) 1 D.L.R. 474 (sub nom. *Hodgson Lumber Co. Ltd.* v. *Wendland.*)

7. Whether final or interlocutory — trial judge's reservation of questions of receiver, partition and costs.]—The judgment appealed against declared the plaintiff entitled to a share in certain properties, with a reference to the registrar as to rents and profits and judgment accordingly. Questions of the appointment of a receiver, the sale or partition of the properties and costs were reserved to be dealt with on further consideration. Held, the judgment was a final one and a motion to quash the appeal as being out of time was dismissed. The question of what is a final and what is an interlocutory judgment for purposes of appeal procedure still remains somewhat beclouded and uncertain. *Spelman* v. *Spelman,* (1943) 59 B.C.R. 120; (1943) 4 D.L.R. 248; (1943) 3 W.W.R. 181.

8. County Court—ordinary judgment—time runs from entry in plaint and procedure book.]—In the case of an ordinary judgment in the County Court the time begins to run from the entry of the judgment in the plaint and procedure book. The appeal may be "brought" within three months and the giving of the notice is deemed to be the bringing of the appeal (Section 14 (5)). The "giving of the notice" is the service of it, not the filing. *Rutter* v. *McLeod,* (1944) 60 B.C.R. 233; (1944) 2 D.L.R. 657; (1944) 1 W.W.R. 645.

III. Notice of Appeal.

1. Notice given before judgment below settled.]—Notice of appeal was given after the trial judge had given his reasons for judgment but before the judgment was settled. The respondent took the preliminary objection that there was no judgment at the time the notice was given and it was a nullity. Held, overruling the objection, that as the judgment had been entered before the appeal came on for hearing, and is in the Appeal Book, and as notice of appeal was given within time, there is no reason for holding that the judgment is non-existent. *Lowe Chong Co.* v. *B. C. Coast Vegetable Marketing Board,* (1937) 51 B.C.R. 559; (1937) 3 W.W.R. 406.

2. Time—power of Court to look at its own records.] — The appellant had been acquitted by the magistrate and the Crown appealed to the County Court where he was convicted. On appeal to the Court of Appeal, it was contended that it had not been proved before the County Court Judge that notice of appeal to that Court had been filed in time. The County Court Judge actually had before him, as part of the record, the original notice of appeal bearing the registrar's stamp which showed that it had been filed in time. Held, dismissing the appeal, that that constituted sufficient proof of filing. *Rex* v. *Lewis,* (1941) 57 B.C.R. 83; (1941) 4 D.L.R. 640; (1941) 3 W.W.R. 575; 77 C.C.C. 95.

3. When cross-appeal necessary.] — A respondent in the Court of Appeal, not having cross-appealed, claimed that he could rely on certain evidence ruled out by the trial judge as privileged. Per McDonald C.J.B.C.—The general rule is that a respondent can hold a judgment on any grounds available below, even though it was not based on them, and that he need not cross-appeal against the Judge's reasoning, merely because it is untenable, so long as the respondent is satisfied with the result. Appeals are taken against the effect of judgments, not against the reasons given for them. *Cole* v. *Cole,* (1944) S.C.R. 166; (1944) 2 D.L.R. 798, affirming; (1943) 59 B.C.R. 372; (1944) 1 D.L.R. 37; (1943) 3 W.W.R. 532.

IV. Preliminary Motions.

1. Ex parte application to a Judge.]—Rule 21 excludes ex parte applications to judges; they should be made to the Court. *Bland* v. *Agnew,* (1932) 46 B.C.R. 230; (1932) 4 D.L.R. 464; (1932) 3 W.W.R. 222.

2. Effect of stay ordered in Court below, prior to notice of appeal.]—An order was made at the instance of the plaintiff to take evidence abroad. Then the defendant obtained an order for security for costs, with a direction that all further proceedings be stayed until the security was put up. Before it was put up the plaintiff gave notice of appeal from the order to take evidence abroad. At the hearing the defendant took the preliminary objection that the giving of the notice of appeal (being intituled in the Court below) was a proceeding which contravened the order to stay. Held, overruling the objection, that

the filing of the notice transferred the matter to the Court of Appeal, and there could be no further proceedings in the Court below. *Romano* v. *Maggiora (No. 3)*, (1936) 50 B.C.R. 362; reversing (No. 2) (1936) 50 B.C.R. 273; (1936) 1 W.W.R. 423.

V. Hearing and Determination.

1. Effect of Appeal—Rule 18.]—Rule 18, providing that an interlocutory order shall not prejudice an appeal, has a limited and rare application. *Shannon* v. *King (No. 2)*, (1931) 45 B.C.R. 7; (1932) 1 W.W.R. 156; (1932) 1 D.L.R. 700.

2. Review of facts].—Unless it can be shown that the trial judge was clearly wrong in his view of the facts, the appeal should be dismissed. *Rahal* v. *Burnett*, (1932) 45 B.C.R. 122.

3. Court may apportion degrees of fault instead of referring to jury.]—Where the Court of Appeal finds contributory negligence the jury having found none, it may apportion the degrees of fault and need not send the case back to the jury for the purpose. *Ritchie* v. *Gale*, (1934) 49 B.C.R. 251; (1935) 1 D.L.R. 362; (1934) 3 W.W.R. 703.

4. Effects of diverse reasons for allowing appeal.]—Where a new trial is ordered under sec. 1014 of the Criminal Code, it is not necessary that the collective decision of the Court should be based on the same reasons. *Rex* v. *George* (No. 2), (1935) 49 B.C.R. 393; (1935) 2 D.L.R. 765; (1935) 2 W.W.R. 657; 63 C.C.C. 304.

5. Change of ground—departure from course of trial.]—Counsel on appeal will not be permitted to take up a new position inconsistent with the form of his pleadings, the course of the trial, the reasons for judgment below, and the submissions in his own factum. *Bancroft* v. *Montreal Trust Co.*, (1937) 52 B.C.R. 54; (1937) 4 D.L.R. 461.

6. Plaintiff's moral turpitude — first raised on appeal.]—The plaintiff and the defendant, who were sisters, wrongfully withdrew money from a bank and together lodged it elsewhere. The defendant then spirited it away to Seattle. The plaintiff claimed it back as money she had handed to her sister for safekeeping. The pleadings said nothing about the illegal arrangement but counsel for the defendant brought it to the attention of the trial judge at the trial. It was not gone into or pressed and judgment was awarded the plaintiff. Held, dismissing the appeal which was based on the ground that the trial judge should ex mero motu have dismissed the action or refused to proceed with it, that it would not be proper to direct a new trial. The matter was not adequately considered by the trial judge nor did he pass upon it, with the result that the plaintiff had no opportunity to clear herself. It would only be in a case of a very clear kind that the Court of Appeal would interfere after the trial judge had declined to do so. *Winter* v. *Schulte*, (1938) 53 B.C.R. 157; (1938) 4 D.L.R. 285; (1938) 3 W.W.R. 201.

7. New trial—costs of abortive trial to follow result of new one.]—Except under very exceptional circumstances, the costs of an abortive trial will follow the result of the new trial. *Pike* v. *British Columbia Electric Railway Co. Ltd.*, (1939) 54 B.C.R. 279; (1939) 4 D.L.R. 373; (1939) 3 W.W.R. 220.

8. Failure to take objection.]—Where a new trial is ordered because the trial judge had failed to give the statutory direction to the jury upon the law and its application to the issues, as required by sec. 60 of the Supreme Court Act, the costs will be payable by the successful appellant if no objection was made below. *Pike* v. *British Columbia Electric Railway Co. Ltd.*, (1939) 54 B.C.R. 279; (1939) 4 D.L.R. 373; (1939) 3 W.W.R. 220.

9. Canon to be followed on appeal as to damages.]—The tribunal which has the duty of assessing damages, whether it be judge or jury, has often a difficult task, but it must do it as best it can, and unless its conclusions are clearly erroneous they should not be interfered with on appeal. The advantage of seeing the witnesses is a matter of grave importance as to the quantum. *Richmond Wineries Western Ltd. and Simpson*, (1940) S.C.R. 1; (1940) 2 D.L.R. 481.

10. No interference unless trial judge clearly wrong.] — In non-jury cases the Court of Appeal will review the evidence, have regard to the fact that the onus is on the plaintiff, consider the language used by the judge, method of approach and so on. Where questions of credibility are involved the trial judge is normally in a better position to judge than the appellate trinunal can be. But if convinced of error, the Appellate Court will interfere. Unless

convinced that the findings of fact are "clearly wrong" the Appeal Court will not interfere. *Claridge* v. *British Columbia Electric Railway Co. Ltd.*, (1940) 55 B.C.R. 462; (1941) 1 D.L.R. 78, affirming; (1940) 55 B.C.R. 203; (1940) 2 W.W.R. 544.

11. Alleged disregard of evidence of one witness.]—Because the trial judge in his reasons for judgment does not mention a particular witness's evidence is no ground for supposing that he did not consider it. It is not necessary to refer to the evidence of every witness heard. *Jacobsen* v. *Huntley*, (1941) 56 B.C.R. 322; (1941) 3 D.L.R. 445; (1941) 3 W.W.R. 506.

12. Ground for interference—exercise of discretion.]—An appellate court ought not to reverse an order merely because its members would themselves have exercised the original discretion, had it attached to them, in a different way. But if it reaches a clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations, then the reversal of the order on appeal may be justified. *Creasey v. Sweney*, (1942) 57 B.C.R. 457; (1942) 2 D.L.R. 552; (1942) 3 W.W.R. 65, affirming; (1942) 1 W.W.R. 576.

13. Death of one judge while judgment reserved—effect of Sec. 25 of Court of Appeal Act.]—Where a judge of the Court of Appeal had died after argument and before the delivery of judgment and had handed his written opinion to a brother judge (under sec. 25) to be read, it was held, on an equal division of the Court that the opinion could not be read. *Lyford* v. *Cargill Co. of Canada Ltd.*, (1943) 59 B.C.R. 492; (1944) 1 D.L.R. 696; (1944) 1 W.W.R. 273, affirming; (1943) 3 W.W.R. 81.

14. Motion to reopen hearing—death in meantime of one member of the Court.]—Before the judgment of the Court had been perfected the unsuccessful appellant sought to have the hearing reopened to raise the Statute of Limitations on the assumption that the judgment had established a simple contract debt. Held, refusing the motion, that the judgment had not established a simple contract debt, and in any event the discretion should not be exercised where, as here, one member of the Court had died since the judgment was pronounced. *British American Timber Co. Ltd.* v. *Ray W. Jones*, (1944) 60 B.C.R. 364; (1944) 3 D.L.R. 524; (1944) 2 W.W.R. 613.

15. Review of facts — misdirection by trial judge.]—Where the trial judge misconceived a governing fact, which in relation to others had created a wrong impression, the Court of Appeal was free to consider the facts afresh, and allowed the appeal. *Ross* v. *Gill*, (1944) 61 B.C.R. 70; (1945) 2 D.L.R. 139; (sub nom *Gill* v. *Ross*).

16. Perverse verdict—unreasonable and unjust—failure of jury to perform duty.]—Where the verdict was irreconcilable with the evidence and, nothwithstanding a proper direction by the trial judge, not one that a jury could reasonably have found, the Court of Appeal gave the judgment which the plain facts demanded, rather than order a new trial. It was not merely a question of the weight of evidence but of such preponderance against the verdict as to show that the jury failed to perform its duty. *Jardine* v. *Northern Co-operative Timber and Mill Assn.*, (1944) 61 B.C.R. 86; (1945) 1, D.L.R. 732; (1945) 1 W.W.R. 533.

17. Crown's acquiescence in charge to jury—attempt on appeal to have verdict of acquittal upset.]—Crown counsel cannot, by remaining silent allow the case to go to the jury for decision upon a charge that is considered erroneous in law and then appeal a verdict of acquittal resulting from such instruction. The Crown elected to have the issues decided upon a charge now claimed to be faulty. In the absence of objection below it is not open on appeal to the Crown to make that submission. *Rex* v. *Fleming*, (1945) 61 B.C.R. 464; (1945) 4 D.L.R. 800; (1945) 2 W.W.R. 572, 84 C.C.C. 360.

18. Fresh evidence—affidavit to replace one used but unsworn.]—Where an unsworn affidavit had been used below, all parties and the judge believing it had been sworn, the Court of Appeal permitted a sworn copy to be used on the appeal. *Petkovich* v. *Potkonjak*, (1945) 62 B.C.R. 164; (1945) 3 W.W.R. 476.

19. How far appellate court will review the evidence—findings of fact—no jury.]—On an appeal from findings of fact made by a judge without a jury it is clearly the duty of an appellate court to review the evidence, having due regard to all the factors disclosed on the record. If convinced that the findings of fact are wrong the court has not only the right but the duty to make a finding in accordance with the evidence. *Punter* v. *Punter*, (1945) 62

B.C.R. 249; (1946) 2 D.L.R. 353; (1946) 1 W.W.R. 361.

VI. Costs.

1. Grouping appeals for purpose of taxing costs.]—Two appeals involving the same parties and the same issues went off on a preliminary objection raised by the defendant. The Registrar in taxing the costs dealt with them as separate and distinct appeals. Upon a review of the taxation, it was held affirming the action of the Registrar that at this stage they could not be grouped for the purpose of taxation. *Rithet Consolidated Ltd.* v. *Weight,* (1933) 47 B.C.R. 189.

2. Appeal and cross-appeal.] — In the case of two separate appeals—not merely an appeal and a cross-appeal as provided by rule 8 of the Court of Appeal rules—the practice as to costs on claim and counterclaim does not apply. *Foxall* v. *Shobrook (No. 2),* (1936) 51 B.C.R. 19.

3. No costs of appeal under Part XIX of the Criminal Code.]—Where an appeal to the Court of Appeal was dismissed for lack of jurisdiction, sec. 1021 (8) applies and no costs are allowable. *Rex* v. *Crowe (No. 5),* (1938) 53 B.C.R. 173; (1938) 4 D.L.R. 592; (1939) 1 W.W.R. 218; 71 C.C.C. 82.

4. Fee or disbursement—appeal books and factums.]—The cost of preparation of the appeal books and factums is not a fee but a disbursement and hence is not subject to the operation of the "maximum" rule. *Worth* v. *Weber,* (1938) 53 B.C.R. 170.

5. Practice when costs to be spoken to.]—It is contrary to established practice to launch a substantive formal motion respecting costs. It is always open to counsel to speak to costs at the time of delivery of the judgment. An informal notice to the other side and an arrangement with the registrar to have the matter put on the list, is all that is necessary. *Canada Rice Mills Ltd.* v. *The Union Marine & General Insurance Co. Ltd. (No. 2),* (1939) 54 B.C.R. 10; (1939) 2 D.L.R. 751; (1939) 1 W.W.R. 472.

VII. Security for Costs.

1. Effect of Bankruptcy Rule 68.]—A trustee in bankruptcy on appeal to the Court of Appeal must lodge $100 in Court at or before the time of entering the appeal. The lodgement need not be within 10 days after the pronouncing of the decision appealed from since the "entering of the appeal" means the entry of it in the Court of Appeal. *Shimmin* v. *Clark,* (1932) 45 B.C.R. 355; (1932) 3 D.L.R. 702; (1932) 2 W.W.R. 370, 14 C.B.R. 138; reversing (1931) 3 W.W.R. 306, 13 C.B.R. 175.

2. Whether three appeals or only one appeal.]—An appeal was taken from two interlocutory orders and a final judgment. The respondent demanded full security for each. Held fixing two-thirds of the minimum taxable costs as security that although there are three appeals involved, there will be only one argument. *Joy* v. *Vancouver Engineering Works Ltd.,* (1934) 1 W.W.R. 749.

3. Sole jurisdiction in Court appealed from.]—Security for the costs of appeal to the Court of Appeal should be fixed in amount by a judge of the Court appealed from, who may also fix the time for giving it. *Prudential Savings & Loan Association* v. *Wheatley,* (1932) 48 B.C.R. 401; (1934) 3 D.L.R. 776.

4. In consolidated actions — Supreme Court of Canada.]—Sec. 70 of the Supreme Court Act of the Dominion does not make provision for security for more than a single sum in the case of a single judgment. The fact that it constitutes an adjudication upon the rights of three parties in two consolidated appeals in different causes of action arising out the same accident, does not mean that it is divisible into two or more distinct judgments for the purpose of appeal. The usual order was made. *J. W. Bailey* v. *Grogan,* (1938) 52 B.C.R. 487; (1938) 2 D.L.R. 323; (1938) 1 W.W.R. 805.

5. Appeal as to costs only—terms of stay of execution and security for appeal.] — The appeal was not from the judgment but only in relation to the costs of an issue which the defendant (appellant) claimed he succeeded on at the trial. The appellant offered to pay into Court the judgment and costs. The plaintiff contended that no approval of the security was necessary and that the judgment should be paid, whereupon there would be no need for an order approving the security or staying the execution. Held, the application to approve the security was properly made and it was fixed at $150. Upon payment of the judgment and costs into Court execution was stayed. *Mah Ming Yu* v. *Terminal Cartage Ltd.,* (1943) 1 W.W.R. 268.

VIII. Stay of Execution.

1. Pending appeal to Supreme Court of Canada.]—A motion to the Court of Appeal for an injunction to stay the execution of a judgment pending an appeal to the Supreme Court of Canada was denied because the Court of Appeal was functus officio, the judgment having been drawn up and entered before the motion was launched. *Andler* v. *Duke (No. 2)*, (1932) 45 B.C.R. 256; (1932) 3 D.L.R. 210.

2. Judgment below directing execution of certificate—appeal dismissed after deposit with Registrar.] — Under mandamus the Registrar of Companies was commanded to issue a certificate to commence business. The Registrar appealed and later deposited the certificate with the Registrar of the Court where, under sec. 29 of the Court of Appeal Act it was to abide the order or judgment of the Court of Appeal. The appeal was dismissed but the judgment said nothing about the certificate. It was contended that only the Court of Appeal could deal with it. Held, failing any direction by that Court in disposing of the appeal, the Court appealed from may deal with the certificate. The certificate was ordered to be delivered to the company entitled to it. *Rex* v. *Registrar of Companies (No. 2)*, (1934) 1 W.W.R. 395.

3. Whether Notice of Appeal contravenes order appealed against granting a stay.]—The respondent objected that the appeal was a contravention of a term of the order appealed against which had stayed all further proceedings until certain security had been given. Held, dismissing the preliminary objection, the object of filing the original notice of appeal in the Court appealed from is not to continue proceedings there but to arrest them. The giving of the notice of appeal cannot be a breach of the clause as to security. *Romano* v. *Maggiora (No. 3)*, (1936) 50 B.C.R. 362; reversing No. 2 (1936) 50 B.C.R. 273; (1936) 1 W.W.R. 423.

4. Trust company appealing — use of deposit made with Minister of Finance.] Where, under the Trust Companies Act, a trust company maintains a deposit with the Minister of Finance "as security for its depositors and creditors in the Province", the deposit may be taken into account in fixing the security under Sec. 29 of the Court of Appeal Act, upon the giving of which execution may be stayed. *Stave Falls Lumber Co. Ltd.* v. *Westminster Trust Co. Ltd. (No. 2)*, (1939) 53 B.C.R. 481; (1939) 1 D.L.R. 804; (1939) 1 W.W.R. 244.

5. No jurisdiction in Court appealed from to stay proceedings after notice of appeal — Section 30 of Court of Appeal Act.]—The trial judge directed an inquiry before the registrar, and payment of the amount certified by him. Following the launching of an appeal the judge was asked to postpone the inquiry pending the determination of the appeal; he granted a stay on terms. The appellant, not satisfied with the terms, applied to the Court of Appeal for the same relief. It was objected that the Court of Appeal had no jurisdiction, (a) because the order below granting the stay had not been appealed against, and (b) because what was sought was really a stay of execution under sec. 30 (d) of the Court of Appeal Act and hence a matter exclusively for the Court appealed from. Held, granting the stay without terms, the first objection failed because there was no jurisdiction in the Court below to make the order—it was a nullity. As to the other objection, the order sought was a "stay of proceedings" and not a "stay of execution" within sec. 30, and even if the motion could be regarded as one for a "stay of execution" nevertheless the subject-matter of the order for judgment did not fall within the classes of judgments enumerated in sec. 30 as exceptions to its overriding initial mandatory enactment that stay of execution occurs automatically once security for costs of the appeal has been perfected. *Stephen* v. *Stewart (No. 2)*, (1943) 59 B.C.R. 297; (1943) 4 D.L.R. 642; (1943) 3 W.W.R. 225.

6. No proof that order said to have been disobeyed was served.]—The appellant was ordered to pay alimony. Upon his default an order for his attachment was made by reason of his contempt of Court. He appealed and applied for a stay until the validity of the order for attachment was considered by the Court of Appeal. Held, granting the stay, that before the notice of motion was filed or any step taken for attachment, an affidavit must first have been filed proving that theretofore a copy of the order for payment had been served. *Williams* v. *Williams*, (1943) 59 B.C.R. 319; (1943) 3 W.W.R. 303.

7. Stay pending appeal to Privy Council—terms.]—Only partial suspension of the execution of the judgment was ordered. Certain timber licenses in question were to be assigned to the plaintiff and lodged with the registrar. The plaintiff's taxed costs were to be paid or secured. *Cole* v. *Cole*, (1944) 1 W.W.R. 189.

IX. Supreme Court of Canada.

1. Smallness of amount involved.]—Where the amount involved is less than $2,000 (beyond which leave is not necessary) leave should not be given where no important question is raised. *Dewees* v. *Morrow*, (1932) 45 B.C.R. 154.

2. Question as to custody or guardianship of infant.]—While the question is of great importance to the parties, it is not one of general public importance and leave should not be granted, particularly as it will still be open open to the Supreme Court of Canada to grant the leave, if it sees fit. *Bland* v. *Agnew*, (1933) 47 B.C.R. 379; (1933) 3 W.W.R. 93.

3. Special leave—adoption order.]—Sec. 41 of the Supreme Court Act of Canada provides that special leave to appeal may be granted from the highest court of final resort in certain cases with a proviso that it may be granted in any case whatever involving (inter alia) "other matters by which rights in future of the parties may be affected." Here leave had been refused by the Court of Appeal on the validity of an adoption order. Held, dismissing the application, that such "matters" are restricted in scope to matters involving or affecting something in the nature of a pecuniary or economic interest. *Bland* v. *Agnew*, (1933) 3 D.L.R. 639; (1933) S.C.R. 345.

4. Deserted Wives' Maintenance Act.]—Leave to appeal was refused as no important question of law arises upon an order giving a wife leave to serve her husband in New Zealand. *Gagen* v. *Gagen*, (1934) 49 B.C.R. 102.

5. Case—Motion to add material.]—Under sec. 68 of the Supreme Court Act (Dominion) there is no power in the Court of Appeal, or a judge thereof, to include any material in the appeal case which was not before the Court of Appeal. *The King* v. *Minister of Finance (No. 2)*, (1934) 49 B.C.R. 243.

6. Jurisdiction—whether dissent on interlocutory motion effective under sec. 1023 of the Criminal Code.]—The accused applied to admit new evidence on the hearing of the appeal. This was refused with two judges dissenting. The conviction was affirmed. Held, the dissent on the motion to admit new evidence is not a dissent against the affirmance of the conviction on a question of law within sec. 1023 of the Criminal Code. The appeal was accordingly dismissed for lack of jurisdiction. *Yip Sing* v. *The King*, (1935) 3 D.L.R. 798; (1935) S.C.R. 635.

7. Matter of public interest.]—Leave to appeal was granted where the Court of Appeal had set aside an injunction restraining a dentist in the State of Washington from advertising within British Columbia. *Attorney-General for British Columbia* v. *Cowen (No. 3)*, (1938) 53 B.C.R. 87; (1938) 4 D.L.R. 804.

8. Extension of time to serve notice of appeal.]—Where the head office of the appellant was in Toronto, where the reasons for judgment of one judge were delayed, where the question was one of general public importance, and where the motion for the extension was launched before the statutory period had expired, an order was made extending the time for service of the notice of appeal. *Canadian Bank of Commerce* v. *Yorkshire & Canadian Trust Ltd.*, (1938) 53 B.C.R. 7; (1938) 4 D.L.R. 807.

9. Price-fixing regulation restrained pending appeal.]—The Court of Appeal held that the Petroleum Products Control Board Act was intra vires. The price-fixing regulations were to come into effect before the appeal to the Supreme Court of Canada could be heard. An application was made to a judge of the Court of Appeal under sec. 10 of the Court of Appeal Act, to restrain the coming into force of the regulations pending the appeal. Held, the order should be granted but only until the sitting of the Court of Appeal when it could have the attention of the Court instead of a single judge. *Home Oil Distributors Ltd.* v. *Attorney-General for British Columbia*, (1939) 54 B.C.R. 422; (1939) 4 D.L.R. 766; (1939) 3 W.W.R. 335.

10. Questions of fact alone involved—difference among judges of Court appealed from.]—Leave to appeal to the Supreme Court of Canada will not be given unless an important question of law is involved. Here only questions of fact were in controversy. The circumstance that the members of the Court from which leave to appeal was sought differed in their views is not per se a ground for giving leave, particularly when the difference relates to facts. *Lauder* v. *Robson*, (1940) 55 B.C.R. 399.

11. Special leave—absence of special circumstances.]—Leave was denied where the amount in controversy was only $1100 and there was no matter of public interest

involved nor was there any important question of law. *James* v. *McLennan McFeely and Prior Ltd.*, (1941) 2 D.L.R. 608; (1941) 1 W.W.R. 489.

12. Two judgments arising out of one accident—damages in one case over $2000 and under $2000 in another.]—In two actions arising out of the same accident the plaintiff M. recovered more than $2000 and the defendant having failed in the Court of Appeal had appealed to the Supreme Court of Canada; the plaintiff T. recovered less than $2000 and, the decision having been upheld by the Court of Appeal, the defendant asks leave to appeal against T.'s judgment as well. Held, approaching the case as if T. were the sole plaintiff in respect of the accident, and granting the leave, that the case was of great concern to the public at large and involved an important question of law, viz. the proper construction of sec. 74A of the Motor-vehicle Act. *Terry* v. *Vancouver Motors U-Drive Ltd.*, (1942) 57 B.C.R. 268; (1942) 2 D.L.R. 260; (1942) 3 W.W.R. 650.

13. Amount in controversy not shown to exceed $2000 — no special leave obtained.]—In his statement of claim the plaintiff had sought damages of $10,000. At the end of the trial he was given leave to amend, but in his new claim he asked for no specific amount of damages. It was referred to the registrar to ascertain them, but the plaintiff had not proceeded with the reference. He did not succeed before the trial judge on his original $10,000 claim, and the most he could get on this appeal if successful would be the restoration of the trial judgment. Neither the material filed or the record established that more than $2,000 was involved in the appeal. The appeal was quashed. *Saperstein* v. *Drury*, (1943) 59 B.C.R. 281; (1943) 4 D.L.R. 191; (1943) 3 W.W.R. 193; (1944) S.C.R. 148; (1944) 2 D.L.R. 511.

14. Whether final or interlocutory — issue of res judicata.]—The Court of Appeal set aside a decision that the matters in question were res judicata. The defendants appealed to the Supreme Court of Canada and were met by the objection that the decision below was not final but interlocutory. Held, overruling the objection, on the issue of res judicata, the right of the parties is finally determined and will remain so unless the appeal succeeds. The decision below is a final judgment. *Hartin* v. *May*, (1944) 4 D.L.R. 264; (1944) S.C.R. 278.

15. Special leave refused—application to approve security nevertheless.] — Where special leave to appeal to the Supreme Court of Canada has been refused and, on the same material, the appellant applies to approve the form of security his application should be dismissed The contention that the Court of Appeal is concerned in this application only with the approval or disapproval of the form of security, was not given effect to. *Guenette* v. *British Columbia Electric Railway Co. Ltd.*, (1944) 60 B.C.R. 242; (1944) 3 D.L.R. 270; (1944) 2 W.W.R. 33.

16. Notice of appeal out of time—extending time.]—An appeal to the Supreme Court of Canada must be brought within 60 days from the "signing or entry or pronouncing" of the judgment. The time runs from the pronouncing unless a settlement of the judgment has given some difficulty. Sec. 66 of the Supreme Court Act gives a judge of the Court appealed from the power to "allow" an appeal although out of time. Special circumstances must be shown. The time was extended since; there was a bona fide intention to appeal; 60 days from the entry of the judgment had not yet expired; the different times fixed for the various Courts were confusing; the printing was well under way. *Levi* v. *MacDougall*, (1944) 60 B.C.R. 492; (1944) 4 D.L.R. 246.

17. Not matter of public interest or important question of law.]—A landlord obtained an order for possession of an apartment for breach of a covenant against subletting. The Court of Appeal held that what had occurred did not amount to a subletting and set the order aside. The landlord moved for leave to appeal to the Supreme Court of Canada on the ground that a matter of public interest and an important question of law were involved. It appeared that since the hearing by the Court of Appeal the occupant had moved out and given up the keys. Held, refusing the leave, a successful appeal would only bring about the same result. The landlord no longer requires an order of the Court; all that is left is a question of costs. It is well settled that the Court will not decide abstract propositions of law merely to decide liability as to costs. *Carmichael* v. *Dolmage*, (1946) 63 B.C.R. 441; (1947) 1 D.L.R. 781; (1947) 1 W.W.R. 286.

18. Special leave to appeal — whether important question of law.]—Where the question at issue is no more important than questions which come before the Court in most cases, leave should not be

granted. Here the amount involved is small and a new trial had been ordered. *Hare* v. *Better Business Bureau of Vancouver (No. 3)*, (1947) 1 W.W.R. 289.

X. Leave to Appeal to the Privy Council.

1. Providing security to the satisfaction of the Court.]—An order for leave to appeal to the Privy Council was conditioned upon the appellant's providing security to the satisfaction of the Court appealed from within two months. The security was duly provided but was not approved by the Court. On moving for the final order for leave, the objection was taken that the security must be passed upon by the Court within the two months and that the time could not be extended. Held, overruling the objection, that on the application for final leave the Court can properly consider the question of whether or not the security which has been provided is satisfactory. *Vancouver Breweries Ltd.* v. *Vancouver Malt and Sake Brewing Co. Ltd.*, (1933) 47 B.C.R. 235; (1933) 3 W.W.R. 182.

2. Whether of great general or public importance—refusal of jury trial.]—Leave of appeal to the Privy Council was withheld in a case where an order for trial by jury had been refused in a negligence action against a hospital and doctors. *Taylor* v. *The Vancouver General Hospital*, (1945) 62 B.C.R. 79; (1945) 3 W.W.R. 519.

3. Statute of Westminster—effect on appeal to Privy Council "as of right".]—On a motion for leave to appeal to the Privy Council where the value of the matter in dispute was over 500 pounds the objection was taken that the Imperial Order in Council giving an appeal "as of right" ceased to apply with the passing of the Statute of Westminster in 1931. It was contended that since that statute gave the power to repeal Imperial Orders in Council the appeal was no longer "as of right" and the Court of Appeal should exercise discretion in granting leave. Held, granting the leave as of right, the Statute of Westminster does not repeal any existing legislation, but clothes Canada with power "after the commencement of this Act" to do so. Until such right is exercised existing Imperial legislation continues in force. *May* v. *Hartin*, (1945) 62 B.C.R. 544; (1946) 4 D.L.R. 202.

See Costs.

See Courts.

See Criminal Law.

See Practice.

ARBITRATION.

I. In General, 26.

II. Award, 27.

I. In General.

1. Consent trial by County Court judge without jurisdiction.] — An action was commenced in the Supreme Court and afterwards by consent ordered to be tried in the County Court. As there was no jurisdiction to make such an order, it was held on appeal from the judgment at the trial that the hearing before the County Court judge, was, in effect, an arbitration from which no appeal would lie. *Wong Soon* v. *Gareb*, (1935) 49 B.C.R. 456; (1936) 1 D.L.R. 605, 63 C.C.C. 174.

2. Defence that arbitration only remedy — when objection to be taken.] — The agreement provided for the arbitration of disputes. The Crown (respondent) pleaded that arbitration was a condition precedent to any relief. Held, overruling the objection: if the respondent relied on the arbitration clause he should have moved for a stay of proceedings before delivering a pleading. Otherwise the Court ordinarily should not entertain the objection at the trial. Here, too, the Crown had granted a fiat which means that the issues are to be tried out regardless of arbitration clauses. *Coughlan & Son Ltd.* v. *The King*, (1937) Ex. C.R. 29.

3. Effect on right of appeal from judge acting as arbitrator.] — Where a County Court judge with the concurrence of the parties departed from the course of Court procedure he will be taken as having acted as an arbitrator by consent. In such a case the decision must be regarded as extracurial and without appeal. *Chong Hing Wah Kee Co. Ltd.* v. *Chen*, (1945) 3 W.W.R. 474; (1945) 62 B.C.R. 93.

II. AWARD.

1. Attitude of Court to impugned award.]—The grounds for attack on the validity of an award are narrowly restricted and the law seems to be clear that the Court will support the award if possible. *The King* v. *City of Vancouver,* (1933) 47 B.C.R. 243.

2. Enforcement of award — summarily or by action.]—The summary method (a judge's order that it be enforced in the same manner as a judgment) of enforcing awards is only to be used in reasonably clear cases. If it is not reasonably clear that the award should be enforced, the party seeking to enforce it must be left to his remedy by action, when the matter can be raised on proper pleadings, and dealt with in proper form. *Wong Soon* v. *Gareb,* (1935) 50 B.C.R. 310; (1935) 2 D.L.R. 415; (1936) 1 W.W.R. 270.

3. Error of law apparent on face of the award—specific question of law not submitted.]—The applicant as charterer entered into a contract of affreightment on a ship which the shipping company stated was "expected ready to load, about February 18, 1939". On February 23 the charterer repudiated the contract. It provided for arbitration of differences; the award to be final. The arbitrators found that the ship "was in a position to fulfil the contract" and that there was no ground for repudiation. The charterer moved to set the award aside on the ground of misconduct by the arbitrators. Held, remitting the award to them for reconsideration, that although an award on a specific question of law, bad on its face, will not be set aside yet where there is a question of law which is material to a decision and the decision is wrong, the award will be set aside for error of law apparent on its face. Here the question before the arbitrators was: on the facts known to the shipping company did it honestly expect that the vessel would be ready, and was the expectation based on reasonable grounds? The arbitrators made no finding of fact on that question but dealt with another matter altogether viz. whether or not the vessel was in a position to fulfill the contract. That finding was insufficient in law to uphold the conclusion that there was no proper ground for repudiating. There was thus error in law on the face of the award. *Re Empire Shipping Co. Ltd.* and *Hall Bryan Ltd.* (1940) 1 D.L.R. 695; (1940) 1 W.W.R. 97.

ARCHITECT.

1. Practice by unregistered corporation.]—The Architects Act makes it unlawful, with certain exceptions, for any unregistered person to practise as an architect and imposes a penalty for doing so. The accused practised as an architect, but the magistrate held that a corporation could not be convicted for the offence. On a case stated it was held, reversing the decision below, that "person" is defined in the Interpretation Act to include a corporation. Having regard to the scope of the Act and the intention to safeguard those who resort to buildings such as theatres, churches, etc., corporations were included. *Rex* v. *Dominion Construction Co. Ltd.,* (1939) 53 B.C.R. 557; (1939) 2 D.L.R. 591; (1939) 1 W.W.R. 653; 72 C.C.C. 124.

2. Practising as an architect — professional engineer.] — The Architects Act makes it an offence for an unregistered person to practise as an architect, but excepts (a) professional engineers in respect of their practice as such, and (b) structural engineers designing structures usually designed by structural engineers. The accused, a registered professional engineer (mechanical and structural) was convicted of practising as an architect in respect of designing and construction of a theatre building. Held, on appeal to the County Court affirming the conviction, that the exception as to professional engineers extends only to buildings necessary to the proper housing etc. of engineering works and a theatre did not come within that interpretation. The contention that a single act would not amount to practising was rejected since the accused claimed to have built several theatres. *The King* v. *Bentall,* (1939) 54 B.C.R. 81; (1939) 3 W.W.R. 39; 72 C.C.C. 176.

3. Plans not in accord with defendant's instructions.]—An architects's instructions were to submit plans for an apartment house of Tudor design containing thirty suites, not to cost more than $120,000. He suggested many schemes all of which ran to $150,000 or more, and none of which were of Tudor design or contained thirty suites. In an action for his fees or in the alternative a quantum meruit, it was held dismissing the action, that the architect had never prepared a plan in accordance with the defendant's instructions. His proper course would have been to tell the defendant that she could not get what she desired for her price, and that he would draw the plans she wanted and call for tenders, she taking

the risk that they would exceed $120,000. *Sharp* v. *Furber*, (1939) 54 B.C.R. 179; (1939) 4 D.L.R. 775; (1939) 2 W.W.R. 242.

4. Defective plans — damages awarded client.] — The architects for an apartment building designed it so badly that the basement was found to be below the street sewers, and pipes and fixtures had to be installed in such a way as to cut up and render useless certain parts of the ground floor. It was referred to the registrar to ascertain the damages. *Johnson* v. *Grossman*, (1944) 1 D.L.R. 679; (1944) 1 W.W.R. 23.

ARREST AND IMPRISONMENT FOR DEBT.

1. Capias for permanent alimony.]— A writ of capias ad respondendum must itself disclose the nature of the action on account of which the arrest is being made. Where the action was described as one of "debt" whereas it was one to enforce the payment of alimony ordered in a divorce action, the writ was set aside. Permanent alimony is not a debt though it may be a money demand. *McKay* v. *McKay*, (1933) 47 B.C.R. 241; (1933) 2 W.W.R. 78.

2. Capias ad respondendum—power of judge to set aside his own order.] — For over half a century it has been the practice in British Columbia for the judge granting an order for a capias to review it at large, and it is very fitting where personal liberty is concerned that all remedies should be preserved. The Court of Appeal upheld the long established practice following *Hartney* v. *Onderdonk*, (1884) 1 B.C.R. (Pt. 2) 88, but held that the practice should extend only to a judge reviewing his own ex parte order, or that of another judge upon request. *Mit Singh* v. *Kehar Singh Gill*, (1935) 50 B.C.R. 332; (1936) 1 W.W.R. 396; 65 C.C.C. 263.

3. Writ of capias — faulty endorsement.]—In matters affecting the liberty of the person a strict compliance with the statute is necessary, and the failure to endorse the writ in the presence of the sheriff, or his officer, as required by sec. 13 of the Arrest and Imprisonment for Debt Act is fatal. *Squire* v. *Wright*, (1936) 50 B.C.R. 411.

4. Failure to pay wife's cost of hearing of divorce petition.]—A registrar's order in a divorce action requiring the husband to pay money into Court or give a bond to cover the wife's costs, is an order for the payment of money. An application to attach the respondent was dismissed since there can be no imprisonment for contempt for non-payment of money except under sec. 19 of the Arrest and Imprisonment for Debt Act or sec. 58 of the Supreme Court Act. *Humber* v. *Humber*, (1936) 50 B.C.R. 427; (1936) 2 W.W.R. 414.

5. Capias ad respondendum—signature of solicitor lacking.]—Where the liberty of the subject is involved proceedings will be construed strictissima juris, and a writ of capias wholly in typewriting and without any actual signature by the solicitor was set aside. *Martin* v. *Martin*, (1939) 54 B.C.R. 399; (1939) 4 D.L.R. 771; (1939) 3 W.W.R. 343.

ASSAULT.

See TORT.

ASSESSMENT.

See MUNICIPAL CORPORATIONS.

ASSIGNMENT.

I. WHAT ASSIGNABLE, 30.

II. EQUITABLE ASSIGNMENTS, 31.

III. ASSIGNMENTS OF BOOK DEBTS, 32.

IV. NOTICE, 32.

V. RIGHTS AND LIABILITIES OF PARTIES, 33.

I. WHAT ASSIGNABLE.

1. Splitting of cause of action.] — A document whereby an insured party purports to assign to his insurers a part only of his claim for a fire loss is ineffective. *Kapoor Lumber Co. Ltd.* v. *Canadian Northern Pacific Railway Co.*, (1932) 45 B.C.R. 213; (1932) 3 D.L.R. 487, (1932) 2 W.W.R. 417.

2. Certificate of taxation — execution thereon by assignee.]—A firm of solicitors rendered a bill and had it taxed, receiving a certificate of taxation from the registrar. The solicitors then gave an assignment of the costs, and their lien on documents, to a third party (not a solicitor). The assignee applied and was granted leave to issue execution on the assigned certificate invoking sec. 96 of the Legal Professions Act and Rule 601. It was held dismissing the appeal, on an equal division of the Court, that the certificate was equivalent to a judgment which the solicitors could assign. In re *Taja Singh* and *Nutta Singh,* (1932) 45 B.C.R. 547; (1932) 4 D.L.R. 303; (1932) 2 W.W.R. 671.

3. Element of personal skill and confidence.]—The relation between an insured and the agent employed to place the insurance involves personal skill and confidence and a contract placing all the defendant's insurance in the hands of an agent is not assignable by the agent. *Royal Financial Insurance Ltd.* v. *National Biscuit and Confection Co. Ltd.,* (1932) 46 B.C.R. 294; (1933) 1 W.W.R. 43; 14 C.B.R. 203.

4. Miners' lay agreement.]—A lay agreement (one under which the layman pays rent depending on the amount of the clean-up) is equivalent to a lease and is assignable by a layman. *Beaton* v. *Schulz,* (1934) 49 B.C.R. 1; (1934) 4 D.L.R. 488; (1934) 3 W.W.R. 179.

5. As security under the Bank Act—vendor's assignment.] — Sec. 75 of the Bank Act forbids a bank to lend money on the security of land, but permits it to take the rights of vendors under agreements of sale by way of additional security for a past indebtedness. A vendor assigned the purchase money due under such an agreement. It was held that there could not be an assignment of the money separated from the vendor's obligation to convey the land. *Canadian Bank of Commerce* v. *Yorkshire & Canadian Trust Ltd.,* (1939) S.C.R. 85; (1939) 1 D.L.R. 401 affirming; (1937) 52 B.C.R. 438; (1938) 2 D.L.R. 285; (1938) 1 W.W.R. 530 reversing; (1937) 52 B.C.R. 16; (1937) 2 W.W.R. 474.

II. Equitable Assignments.

1. Insurance moneys.]—An unpaid vendor took a covenant from his purchaser to insure certain chattels for $1500, the loss to be paid to the vendor. The insurance was placed but the policy made no mention of the vendor. Held, that upon a fire the vendor was entitled to recover the $1500 as upon an equitable assignment. *Budge* v. *Marbin Lumber Co. Ltd.,* (1932) 45 B.C.R. 479; (1932) 2 W.W.R. 64.

2. Competing equitable assignees — whether assignor must be a party.]—Where there are two equitable assignees of a debt an action by the subsequent assignee can ordinarily only proceed to judgment if the prior assignee and the assignor are joined as parties. If the prior assignee gives notice after the action is brought that his claim has been satisfied, or if the assignor appears at the trial and disclaims, neither need be added as a party. *Columbia Grain Milling Co.* v. *Weins,* (1941) 1 D.L.R. 149; (1940) 3 W.W.R. 396.

III. Assignments of Book Debts.

1. Effect of registration.]—Registration of an assignment of book accounts under the Assignment of Book Accounts Act confers no greater rights upon the assignee than he had by virtue of the assignment; the effect of registration is to preserve those rights as against creditors, subsequent purchasers or mortgagees. The fact that the assignment is also registered under the Companies Act has no effect as against existing superior equities. *Burrard Drydock Co. Ltd* v. *Bank of Toronto,* (1933) 46 B.C.R. 447; (1933) 1 W.W.R. 222.

IV. Notice.

1. Assignee proceeding without giving notice.]—Even in the absence of notice an assignee may enforce a debt without bringing in the assignor (a company) when the assignor is a mere name, without any means and without any executive or board of directors, if indeed it has any corporate existence at all. Here the assignor was dissolved some years ago. Moreover the action turned on a charge over property and the rule as to notice of assignment of debts does not apply to assignment of charges. A right to foreclose is not a chose in action. *British American Timber Co. Ltd.* v. *Jones,* (1944) 60 B.C.R. 174; (1944) 2 D.L.R. 481; (1944) 2 W.W.R. 577 varying; (1943) 59 B.C.R. 270; (1943) 4 D.L.R. 686; (1943) 2 W.W.R. 654.

V. RIGHTS AND LIABILITIES OF PARTIES.

1. Whether set-off available to debtor against assignee where assignor had defaulted on mortgage assumed by the assignor.]—On a trade of an apartment house for a residence each party agreed to assume the existing mortgages and the plaintiff, as transferee of the apartment house, gave a second mortgage to the W. company to balance the trade. The W. company defaulted its obligation in assuming the mortgage on the residence and the original borrower suffered judgment and threatened the plaintiff who then sued the W company and recovered judgment against it after crediting the amount due under the second mortgage of the apartment house. The judgment contained a declaration that the second mortgage was satisfied. After the W. company had made default and at a time when the plaintiff's indebtedness on the apartment house mortgage had stood at $2500 and the W. company owed the plaintiff $10,000 on the first mortgage of the residence, the W. company had assigned the second mortgage on the apartment house to the defendant and gave notice to the plaintiff accordingly. It was held that the plaintiff was entitled to a declaration that a set-off existed and had been exercised in the former action and that the mortgage sought to be assigned had been paid and satisfied. The defendant took it subject to all equities including the right of the plaintiff to the set-off. Here the claim under the assignment and the assignor's default had a common origin and the obligations arose, not out of separate and distinct transactions, but out of a single contract. The defendant was ordered to execute a release of the assignment so far as it related to the mortgage. *Macdonald Apartments Ltd.* v. *False Creek Lumber Co. Ltd.*, (1936) 1 W.W.R. 543.

See CONTRACT.

ATTACHMENT OF DEBTS.

See GARNISHMENT.

ATTACHMENT OF PERSON.

See CONTEMPT OF COURT.

BAIL.

See CRIMINAL LAW.

BAILMENT.

1. Car stolen while being repaired.]—A car was left in the possession of the defendant, a garage operator, for repairs. The defendant permitted the ignition key to remain in place while the car was parked in an open shed at the rear of the garage. The defendant had no person in attendance to protect the car from theft. It was stolen. Held the defendant was negligent in leaving the car where it was in such circumstances. The same result would follow whether the bailment was one for repair or for storage. *Rutherford* v. *Stewart-Warner Sales Co. Ltd.*, (1935) 50 B.C.R. 256; (1935) 3 W.W.R. 472.

2. Warehouseman.] — In an action for damages for the loss of a shipment of canned salmon, the defendant steamship company was a warehouseman. The goods were lost in a fire which destroyed the wharf where they were stored. Semble, the onus was on the plaintiff to prove that the fire was a negligent one and did not "accidentally begin" within the meaning of 14 Geo III, C. 78 S. 86. Here there was no evidence that the fire had its origin through the negligence of the defendants. The steamship company had exercised the same care as might be expected from a skilled storekeeper. As to liability for the spread of the fire the question of fact as to whether or not there was negligence was resolved against the plaintiff. *DesBrisay* v. *Canadian Government Merchant Marine Ltd.*, (1941) S.C.R. 230; (1941) 2 D.L.R. 209, affirming; (1940) 56 B.C.R. 161; (1940) 4 D.L.R. 171; (1940) 2 W.W.R. 97, affirming; (1938) 53 B.C.R. 207; (1938) 4 D.L.R. 798; (1938) 3 W.W.R. 209.

See CARRIERS.

BANKRUPTCY.

I. JURISDICTION, 35.

II. PROCEDURE, 36.

III. TRUSTEE, 38.

IV. EFFECT ON ANTECEDENT TRANSACTIONS, 39.

V. SECURED AND PREFERRED CREDITORS, 40.

VI. FRAUDULENT PREFERENCE, 42.

VII. DISCHARGE, 42.

I. JURISDICTION.

1. Counterclaim raised by defendant against plaintiff trustee.] — A defendant cannot set up by counterclaim what is really a separate action against the trustee. *Stobie Forlong Assets Ltd.* v. *Beck*, (1932) 1 W.W.R. 822; 13 C.B.R. 392.

2. Executor as subject of receiving order.]—A creditor of a deceased testator obtained an order adjudging the executor, as personal representative, bankrupt. A motion to annul the order having been dismissed, it was held on appeal, affirming the dismissal, on an equal division of the Court, that a receiving order may be made against the personal representative of a deceased debtor. *Yorkshire Insurance Co. Ltd.* v. *The Bank of Toronto*, (1933) 48 B.C.R. 1; (1934) 2 D.L.R. 65; (1934) 1 W.W.R. 416; 15 C.B.R. 282.

3. Whether the Farmers' Creditors Arrangement Act is intra vires of Parliament.]—Notwithstanding that the Act provides for compositions by which bankruptcy is avoided, but which assume insolvency, it is none the less within the sphere of bankruptcy legislation rather than that of property and civil rights or matters of a merely local or private nature in a Province. The provisions for the reduction of a farmer's debt or for an extension of time for payment are familiar features of compositions. The Act does not enable a creditor to be deprived of his security. The contention that it was mainly designed to keep the debtor farmer on his land at the expense of his creditors was not accepted. *A.G. for British Columbia* v. *A.G. for Canada — re Farmers' Creditors Arrangement Act*, (1937) A.C. 391; 18 C.B.R. 217; (1937) 1 W.W.R. 320, affirming; (1936) S.C.R. 384; 17 C.B.R. 359.

II. PROCEDURE.

1. Whether maximum costs of 10% prevents payment in respect of matters in other Courts.]—The trustee under direction of the Court sued in the Supreme Court to recover certain chattels. The costs due the solicitors exceeded the maximum of 10% fixed by sec. 162 (3) of the Bankruptcy Act with respect of "proceedings under this Act." Held, the costs of the proceeding in the Supreme Court were dehors the bankruptcy proceedings and should be allowed. *In re Ash Estate*, (1934) 1, W.W.R. 540; 15 C.B.R. 311.

2. Mortgagors' and Purchasers' Relief Act.]—Leave was granted to commence proceedings which led to judgment and a writ of execution with a return of nulla bona. On a petition for a receiving order based on the return, it was objected that further leave under the Act was necessary. Held, making the order, that only one leave is contemplated by the Act and, that having been given, it includes all steps necessary to be taken, either before or after the judgment. *In re B.C. Realty Development Corporation Ltd.* (a bankrupt), (1934), 49 B.C.R. 86; (1934) 3 W.W.R. 136; 16 C.B.R. 40.

3. Status of registrar in "Exercising the powers of the Court".]—The definition of "Court" in Rule 2 "includes a registrar when exercising the powers of the Court pursuant to the Act or its rules." A registrar purported to give the approval of the Court with respect to the trustee's remuneration. Held, the rule applied only where a section of the Act authorized the registrar to exercise the powers of the Court. *In re Penticton Hotel Co. Ltd.*, (1937), 3 W.W.R. 36; 19 C.B.R. 18.

4. Necessity of consent of inspectors.]—A trustee moved under rule 142 and was met by the objection that he had not obtained the permission in writing of the inspectors as required by sec. 43 (c) of the Bankruptcy Act. It was held that the consent of the inspectors is merely a provision for the protection of the estate and is not available as an objection in the circumstances. *In re estate of H. O. Kirkham & Co. Ltd.*, (1938) 53 B.C.R. 278; (1939) 1 D.L.R. 796; (1939) 1 W.W.R. 425; 20 C.B.R. 223.

5. Appeal—jurisdiction—future rights.] The appellant applied under Bankruptcy rule 142 for a declaration that certain mineral

claims were the property of the appellant. Upon dismissal of the application an appeal was taken and the respondent raised the objection that there was no jurisdiction to hear the appeal as under sec. 174 (a) of the Bankruptcy Act future rights must be involved and, it was contended, there were none such here. Held, overruling the objection, more than a matter of procedure is involved and future rights are called into question. *Gibson Mining Co. Ltd.* v. *Hartin*, (1939) 55 B.C.R. 196; (1940) 2 D.L.R. 605; (1940) 2 W.W.R. 155; 21 C.B.R. 403.

6. Failure to file proof of claim—effect of final dividend.]—The trustee notified a creditor, under sec. 75 of the Bankruptcy Act, to file proof of his claim. The notice was ignored and the trustee declared a final dividend. Held, dismissing an application for an extension of time under sec. 75 (2) the dividend as distributed could not be disturbed. *Re Vibra-lite (Western) Ltd.*, (1942) 3 D.L.R. 799; (1942) 2 W.W.R. 189; 23 C.B.R. 332.

7. Settlement of order — Bankruptcy Rule 20.]—A simple order dismissing an application need not be settled by an appointment and notice to the applicant. Rule 20 requires an appointment to settle only where the judge or registrar, as the case may be, is of the opinion that there is some point involved which requires the parties to be heard. *In re Bankruptcy of Daybreak Mining Co. Ltd.*, (1942) 58 B.C.R. 154; (1942) 3 W.W.R. 686; 24 C.B.R. 85.

8. Notice of bankruptcy in Canada Gazette—not of itself registration and notice of charge on bankrupt's lands.]—The mere filing of the Canada Gazette with the registrar of titles pursuant to sec. 28 (2) of the Bankruptcy Act (as it stood in 1927) and the notification of the fact of bankruptcy therein advertised in the bankruptcy index in the registry office does not constitute registration. *In re Land Registry Act* and *in re Chambers*, (1943) 1 W.W.R. 297; 24 C.B.R. 121.

9. Assignment cancelled by Official Receiver—whether appealable.]—The Official Receiver at the request of the Custodian issued a notice under sec. 9 (8) of the Bankruptcy Act cancelling the assignment in bankruptcy. The debtor after four years moved to set aside the cancellation. Held, dismissing the motion, there was no provision in the Act for an appeal from the Official Receiver's action. *Re Morrow*, (1944) 2 D.L.R. 544.

III. Trustee.

1. Status of trustee — stock broker — duty to customer—alleged "bucketing".]—The plaintiff as trustee of F. (a stockbroker in Kamloops) claimed against the defendant company (also a stock broker) and its directors alleging that the defendant company over a long course of buying and selling at the instance of F. had been guilty of "bucketing," i.e. failing to buy and sell as instructed but itself betting against the rise and fall of the securities traded in, at the same time reporting fictitious transactions. F. acted for many local clients although some of the orders were for F.'s own account. Held, at the trial that the defendant company was guilty of "bucketing" without proof that each individual transaction was fraudulent and that the plaintiff as trustee in bankruptcy was entitled to recover the amounts paid and the value of the securities deposited from the defendant company and from the directors who were parties to the fraud. The Court of Appeal affirmed the judgment at the trial. Held, on further appeal to the Privy Council by one of the directors, reversing the decisions below, the claim was based on *Rothschild* v. *Brookman*, (1831) 5 Bli. N.S. 165, in that the defendant company was alleged to have adopted a fraudulent system of not making independent contracts and that the appellant director was a party thereto. It had not been shown in evidence that the fraudulent system had been used in connection with any particular contract. F.'s customers were undisclosed principals and with the bankruptcy all authority of F. as agent came to an end and no title to sue for the moneys claimed ever vested in the plaintiff as trustee in bankruptcy. Moreover, the appellant was not liable in the absence of proof of loss. *Johnson* v. *Solloway Mills & Co. Ltd.*, (1934) A.C. 193; (1934) 2 D.L.R. 241; (1934) 15 C.B.R. 319; (1934) 1 W.W.R. 516, reversing; (1932) 46 B.C.R. 260; (1932) 3 W.W.R. 316; 14 C.B.R. 133, affirming; 45 B.C.R. 420; (1932) 1 W.W.R. 481; 13 C.B.R. 359.

2. Personal liability — of trustee for costs.]—In a proceeding against a trustee (not alleged to be representing the estate of the debtor) the payment of costs by "the said A. A. C., Trustee, H. L. and R. L." was ordered. On the application to set aside an execution against the trustee personally

for the costs, coupled with a cross-application to amend if the order was not a personal one, it was held that the order was a personal one. The insertion of the word "Trustee" was merely descriptive. If the order did not operate personally the cross-application to amend would be granted. In *re Penticton Hotel Co. Ltd.,* (1937) 3 W.W.R. 36; 19 C.B.R. 18.

3. Trustee's improper advice to wage-earners.] — A trustee acted in an unwarranted manner in advising certain wage-earners claiming the right to liens under the Workmen's Lien for Wages Act, not to file their liens in the ordinary way. *Workmen's Compensation Board* v. *Nichols et al,* (1932) 45 B.C.R. 241; (1932) 3 D.L.R. 385; (1932) 2 W.W.R. 325; 13 C.B.R. 461; affirming 43 B.C.R. 477. Sub nom: In *re Campbell River Mills Ltd.*

IV. Effect on Antecedent Transactions.

1. Trustee claiming on basis of sham payment for shares allotted.] — The M. company amalgamated with the C. company and the latter allotted fully-paid shares to the three members and directors of the M. company under the following arrangement. It was agreed that the three directors of the M. company would transfer their good will and would actively participate in the business of the C. company for a period of four years. For this the C. company agreed to pay $30,000 to each such director. One of these, J., having received his cheque for $30,000, applied for 300 shares in the C. company and paid for them by endorsing the cheque back. The C. company became bankrupt and the trustee claimed the payment was a sham and asked for judgment against J. as a contributory. Held, dismissing the trustee's claim, the whole transaction was open and above board; the good will and covenant for four years were of substantial value and the amount paid raised no presumption of fraud; the method of payment for the shares was a convenient one and raised no inference that the transaction was a sham. The provision of the Companies Act that every share shall be deemed to have been issued subject to payment of the whole amount in cash unless covered by a filed agreement was met by Spargo's Case (1873), 8 Ch. App. 407, and the shares were paid for in full by J. *In re R. P. Clark & Co. (Vancouver) Ltd., Juke's case,* (1938) 53 B.C.R. 224; (1938) 4 D.L.R. 806; (1938) 3 W.W.R. 233; 20 C.B.R. 6.

V. Secured and Preferred Creditors.

1. Claim for lien upon chattels as against trustee.] — Upon dissolution two partners transferred to a third certain restaurant equipment, taking a covenant for payment and an indemnity. Upon the later bankruptcy of the transferee, the transferors claimed a specific lien upon the equipment as against the trustee, alleging that the property was held by the bankrupt in trust for them under the terms of the deed of transfer. It was held that the lien did not exist and in any event that the action of the transferors in giving up possession and allowing the bankrupt to appear as the owner would have vitiated their claim. *In re Dimor,* (1931) 45 B.C.R. 22; (1932) 1 W.W.R. 53; 13 C.B.R. 206.

2. Landlord's preference for three months arrears.]—The preference given by sub sec. 5 of sec. 2 of the Landlord and Tenant Act Amendment Act 1924 is limited to the rent accruing due within the three months immediately preceding the bankruptcy. *In re Claman's Limited,* (1932) 45 B.C.R. 1; (1932) 1 W.W.R. 413; 13 C.B.R. 204, affirmed on an equal division of the Court; (1932) 45 B.C.R. 474.

3. Unregistered conditional sale agreement.]—The claimants sold goods to the debtor under conditional sale agreements, (reserving the property in the vendors) which were never registered. No creditor had notice of the reservations and no creditor had taken any proceedings. On an issue between the claimants, contending that they were in a preferred position, and the trustee in bankruptcy, it was held that the trustee could have no greater rights than the bankrupt buyer. Sec. 3 of the Conditional Sales Act makes such a sale void against creditors who, at the time of becoming such, had no notice of the reservation and who subsequently obtained judgment under which the goods might have been seized. As here, these were no such creditors, the agreements were good against the trustee and the claimants were secured creditors accordingly. *In re Bankruptcy of Lytton Canners Ltd.,* (1933) 52 B.C.R. 488; (1938) 3 D.L.R. 787; (1938) 2 W.W.R. 455; 19 C.B.R. 283.

4. Order for payment operating as assignment.]—The debtor (a salmon canner) employed C. to furnish the necessary labour for the season's work and gave him an order on the debtor's selling agent for payment. Upon the debtor's bankruptcy C.'s

claim as a secured creditor, based on the order as an equitable assignment, was denied by the trustee. Held, allowing the appeal, that the order constituted an equitable assignment, not enforceable until presented nor until the agent was in funds. *In re B. C. Empire Salmon Canners Ltd. (in bankruptcy)* and *Chung Dot (claimant)*, (1934) 49 B.C.R. 89.

5. First execution creditor's priority for costs.]—A judgment creditor was proceeding to sell lands under the Execution Act when bankruptcy intervened. As the first execution creditor he claimed priority for his costs of the action and subsequent proceedings. As no execution process had actually been lodged with the sheriff, the trustee rejected the claim. Held, allowing the priority, that the obvious intention of the Act should override a literal reading that would bring about a result not intended. *In re Executors of Gordon Drysdale,* (1938) 53 B.C.R. 155; (1938) 3 D.L.R. 791; (1938) 3 W.W.R. 57; 19 C.B.R. 324.

6. Status of licences to cut timber.]—The Crown claimed as an unsecured creditor for dues, etc., in respect of certain timber berths. The disallowance of the claim by the trustee in bankruptcy was upheld by the judge on the ground that the Crown was secured by its right of cancellation, right to resume ownership, etc. Held, on appeal reversing the decision below, (a) the licenses expired automatically at the end of each license year, and (b) there could be no right of cancellation or repossession of the Crown's own property. The Crown was entitled to prove as an unsecured creditor. *Attorney-General for British Columbia* v. *Salter,* (1938) 53 B.C.R. 338; (1939) 1 D.L.R. 513; (1940) 1 W.W.R. 319; 21 C.B.R. 273 reversing; (1938) 2 D.L.R. 790; (1938) 1 W.W.R. 554; 19 C.B.R. 155; (sub nom. *re Abernethy-Lougheed Logging Co.*)

7. Whether warehouse receipt constitutes a valid security—estoppel.]—The appellant contended that the trustee had erred in refusing to recognize him as the holder of a warehouse receipt constituting a valid security against certain salt which he claimed was the property of the bankrupt. It was held that the property in the salt had passed to a third party and that, in the circumstances, the appellant could not invoke the principle of estoppel against the trustee so as to affect the rights of the third party. *In re R. Tabata & Co.,* (1933) 1 W.W.R. 29; 14 C.B.R. 154.

V. Fraudulent Preference.

1. Fraudulent transfer of partially paid-up shares to escape liability.]—The respondent, a shareholder of a bankrupt company (of which her husband, who held her power of attorney, was president), owed the company $5900 on her shares. At a time when the company was in difficulties, she transferred to it certain shares in another company, apparently of no value in consideration of the cancellation of her indebtedness of $5900. The trustee moved to set aside the transaction and recover the $5900. Held, that although a shareholder may on the eve of bankruptcy transfer partially paid-up shares to escape liability thereon, the sale must be an out and out one leaving no interest in the transferor. The transaction here was a hollow sham and there was no bona fide transfer. The so-called ratification by the company was wholly illegal and ineffective. The transaction was set aside. *Shimmin* v. *Clark,* (1932) 45 B.C.R. 355; (1932) 3 D.L.R. 702; (1932) 2 W.W.R. 370; 14 C.B.R. 138, reversing; (1931) 3 W.W.R. 306; 13 C.B.R. 175.

2. Effect of Bankruptcy Act on provincial Fraudulent Preferences Act.] — The defendant being in insolvent circumstances made a transfer of goods to his co-defendant. The transfer was made with a view to giving the co-defendant a preference over other creditors. The plaintiffs, being judgment creditors of the tranferor, claimed to set aside the transfer as void under sec. 3 of the Fraudulent Preferences Act. It was contended that that Act had ceased to be operative since the passing of sec. 64 of the Bankruptcy Act. Held by the trial judge that the clauses of the Bankruptcy Act with regard to fraududent conveyances and preferences are not an essential part of bankruptcy and insolvent legislation. The provincial Act is intra vires and operative except in so far in a particular case that its provisions should lie dormant by reason of the fact that the provisions of sec. 64 of the Bankruptcy Act are applicable. *Gard* v. *Yates,* (1936) 50 B.C.R. 353; (1936) 1 W.W.R. 212; 17 C.B.R. 168.

VII. Discharge.

1. Conditions of Discharge.]—After five years the debtor applied for his discharge; he was supported by the trustee and in-

spectors and a large majority in value of the creditors. The Court was not satisfied (under sec. 143 (1) (a)) that the failure to pay fifty cents on the dollar, on the amount of his unsecured liabilities, was due to causes beyond his control, such as depression in the lumber trade and business generally. The order for discharge was made but suspended for one month pursuant to sec. 142 (2) (b). *In re Lougheed, in bankruptcy,* (1939), 54 B.C.R. 428; (1940) 1 W.W.R. 31; 21 C.B.R. 180.

See COMPANIES.

See CONSTITUTIONAL LAW.

See FRAUDULENT AND VOIDABLE TRANSACTIONS.

BARRISTERS.

See SOLICITORS.

BANKS AND BANKING.

1. Bank of Canada—election of directors.]—The bylaws of the Bank of Canada provide that the directors shall be elected from various categories, viz., commerce, manufacturing, primary industry, and others than those mentioned. W. whose chief occupation is alleged to be in commerce, was styled an accountant and nominated in the "other" category. The plaintiff obtained a mandamus commanding W. to withdraw his nomination. Held, on appeal, reversing the decision below, that the finding by the judge that W. was a merchant was not sufficiently established on the material filed to warrant a mandamus. The main question of fact was still to be tried and it cannot be said at this stage that the plaintiff is obviously right or wrong in his contention. *Bain* v. *Bank of Canada,* (1935) 50 B.C.R. 138; (1935) 4 D.L.R. 112; (1935) 3 W.W.R. 25.

2. Status of joint account.]—Where (a) the joint account was evidenced by a form supplied by the bank prepared for the bank's protection; (b) the money was the husband's; (c) he was seriously ill; (d) the wife's withdrawals were not for her separate use; (e) he could at any time withdraw the whole and, if he did, it would all be his own money; (f) there was nothing in the document to constitute a gift or to give her title to any of the money; the arrangement was merely a convenience to enable the wife to draw out her hushand's money, and it passed to his executors. *Robertson* v. *Batchelor,* (1936) 53 B.C.R. 261; (1939) 1 D.L.R. 255; (1939) 1 W.W.R. 180 and 306 reversing on this point; (1935) 3 W.W.R. 292.

3. Sec. 75 of Bank Act.]—S. by assignment purporting to be by way of security, transferred to the plaintiff bank the amount payable under an agreement of sale from himself to N. Subsequently it was held in another proceeding that the land covered by the agreement belonged to the estate of S.'s wife, and that he held it in trust for her estate. The question was whether or not the assignment was valid against the defendant as personal representative of the wife. The trial judge held that, as the assignment was taken by the bank as additional security for a past debt, it was not contrary to sec. 75 of the Bank Act. Held, on appeal reversing the decision below, that the assignment was invalid as to any future indebtedness by reason of sec. 75. Held on further appeal to the Supreme Court of Canada, affirming the decision below, that there could not be an assignment of the money separated from the vendor's obligation to convey the land and the bank, directly or indirectly, lent money on the security of the land. *Canadian Bank of Commerce* v. *Yorkshire & Canadian Trust Ltd.,* (1939) S.C.R. 85; (1939) 1 D.L.R. 401, affirming; (1937) 52 B.C.R. 438; (1938) 2 D.L.R. 285; (1938) 1 W.W.R. 530, reversing; (1937) 52 B.C.R. 16; (1937) 2 W.W.R. 474.

4. Forged cheques—delay in notifying bank—estoppel.]—A customer, learning that forged cheques were being charged to his account, did not notify the bank for six weeks; in the meantime the bank had paid further forged cheques. In an action by the customer the bank contended that he was estopped by his conduct from recovering. It was held that no estoppel operated in respect of the cheques cashed prior to the day when the plaintiff first learned of the forged cheques. As to them the bank had suffered no prejudice and was in no worse position by reason of the delay in notification. *Keech* v. *Canadian Bank of Com-*

merce, (1938) 53 B.C.R. 77; (1938) 2 W.W.R. 291.

5. Damages against bank for failure to honour customer's cheque—nominal only.] —The plaintiff opened an account with a $5.00 cash deposit. Two cheques for $15.00 in all were later deposited, the endorsement of which the bank's accountant questioned but did not refuse. When about to make another deposit of cheques aggregating $50.00 with the same endorsement, the accountant accepted it on the plaintiff's promise to complete and return the bank's form as to authority to sign the endorsement. The plaintiff was told that he could not operate the account until the form was returned. Without completing the form, the plaintiff issued a cheque for $16.70 and sued the bank for damages when it refused payment. The judge held that the earlier deposits duly accepted were available to meet the cheque and that the bank had, on the evidence, only applied the condition to the $50.00 item. As the plaintiff's action was merely to test the legal position taken by the bank, and as he had expected that payment would be refused, he was allowed only $1.00 damages and county court costs. *Davis* v. *Bank of Montreal,* (1945) 61 B.C.R. 294; (1945) 1 W.W.R. 651.

BASTARDY.

See CHILDREN OF UNMARRIED PARENTS.

BILLS AND NOTES.

1. Promissory note—necessity for presentment.] — Where a promissory note is made payable at a particular place, presentation of the note is unnecessary to charge the maker, but if the maker is sued before presentation and it appears that he had funds available at the place of payment sufficient to satisfy the note if it had been presented, the Court might, and doubtless would, award the costs of the action against the plaintiff. *Schonemeier* v. *King,* (1929), 50 B.C.R. 174.

2. Promissory note—effect of failure to present.]—Presentation for payment of a promissory note made payable at a particular place is not necessary as against the maker. *Evans* v. *Allan,* (1938), 3 D.L.R. 785; (1938) 2 W.W.R. 353.

3. Consideration — forbearance to sue — good faith.]—A draft accepted by the defendant and taken by the plaintiff in good faith and for value had been so altered by the drawer as to make it unenforceable. Before the alterations were noticed the plaintiff was threatening suit on the draft when, after lengthy negotiations, the defendant gave the plaintiff a promissory note by way of compromise. The plaintiff sued on the note and lack of consideration was pleaded. Held, affirming the trial judge, that the plaintiff's forbearance to sue on the draft was good consideration for the note. The suggestion that the plaintiff deliberately shut his eyes and in bad faith abstained from inquiry was not borne out by the evidence. *Famous Foods Ltd.* v. *Laurie's Pie Company,* (1941) 56 B.C.R. 372; (1941) 3 D.L.R. 525; (1941) 3 W.W.R. 708.

BILLS OF SALE.

Mortgagee feeling unsafe or insecure.] —A chattel mortgage provided for seizure if the mortgagee should feel unsafe or insecure or deem the goods in danger of being sold or removed. This power to seize, which is independent of other powers, may be exercised notwithstanding that there is no money default under the mortgage, but the mortgagee is authorized to sell and retain only such money as may be due. Full effect can be given to the mortgage by holding that the mortgagee, if he bona fide feels unsafe or insecure, is authorized to seize and hold the goods as a pledge. Semble, he could not sell but he could retain them until paid off. When, or so soon as there was any money default, he could sell under another power given him in the document. By its terms the mortgagor had put the mortgagee in possession by delivering the instrument. The seizure being bona fide was authorized by the terms of the mortgage. *Richards* v. *Hanson,* (1935) 50 B.C.R. 245; (1935) 3 W.W.R. 144.

2. Seizure by unlicensed bailiff.] — A chattel mortgagee made a seizure under a

warrant executed by a person who held no license under the Collection Agents' Licensing Act. It was contended that the mortgagee was a trespasser ab initio as a result. Sec. 4 (1) of the Act shows that it is the engaging in or advertising himself as engaging in the business that is forbidden. The bailiff was not in the business and acted as bailiff only on this one occasion. That did not contravene the Act. *Richards* v. *Hanson*, (1935) 50 B.C.R. 245; (1935) 3 W.W.R. 144.

BONA VACANTIA.

See CONSTITUTIONAL LAW.

BROKER.

See PRINCIPAL AND AGENT.

BUILDING CONTRACT.

1. Employment of independent contractor where operation a dangerous one.]—The defendant as owner employed an architect and a contractor to construct a building with a concrete wall immediately adjoining the plaintiff's brick building. The forms for the concrete were so improperly made that the fluid concrete pushed in a portion of the plaintiff's wall. Held the work was done near the plaintiff's property and was work involving danger to that property unless proper care was taken. The damage resulted from the failure to take proper care and the defence of "independent contractor" did not avail. *Peter* v. *Yorkshire & Pacific Securities Ltd.* (1937) 52 B.C.R. 166; (1937) 3 W.W.R. 49.

2. Tile flooring laid on improper foundation—effect on right to recover.]—The trial judge held the plaintiff entitled to recover the contract price for tile flooring although it buckled and had to be renewed on account of an improper foundation laid by another contractor. Held, on appeal reversing the trial judge, that where a person is employed in a work of skill the employer buys both his labour and his judgment; the person employed should not undertake the work if it cannot succeed and he should know whether it will or not. A usage to the effect that each contractor may rely upon the efficiency of the work of other contractors was, in the circumstances, held not to be reasonable. *Sansan Floor Co.* v. *Forst's Ltd.* (1942) 57 B.C.R. 222; (1942) 1 D.L.R. 451; (1942) 1 W.W.R. 553; reversing (1941) 56 B.C.R. 391; (1941) 3 D.L.R. 751; (1941) 2 W.W.R. 529.

3. Building contract—duty to do work in a good and workmanlike manner.]—It was implied in a contract for the construction of a house that the work would be done in a good and workmanlike manner, in accordance with ordinary and reasonable standards. Where the builder has substantially complied with the contract, but has done it negligently or improperly, the builder is entitled to recover with deductions necessary to complete according to the contract. *Hutchinson* v. *Mathias*, (1943) 1 W.W.R. 451.

4. Subcontractor — work negligently done—right to contract price less deduction for defects.]—Where a builder has substantially complied with the contract, that is, where all the work to be done has been done, but where it has been done negligently, or in an improper manner, the builder is entitled to recover with deductions necessary to complete the work as specified in the contract. *Holliston* v. *Zaluski*, (1946) 63 B.C.R. 1; (1946) 4 D.L.R. 828; (1946) 3 W.W.R. 468.

See CONTRACTS.

See MECHANICS' LIEN.

BULK SALES ACT.

1. Whether declaration sufficient if regular in form but untrue.]—All that the purchaser is required to do is to get a declaration in proper form; he does not become the guarantor of the vendor's veracity, and a perjured affidavit will suffice if it is in the proper form. *Muriel Warner* v. *William Graham*, (1945) 62 B.C.R. 273; (1946) 2 D.L.R. 277.

2. All creditors to be listed whether in connection with business or not.]—Sec.

5. of the Bulk Sales Act requires a purchaser to demand of and receive from the vendor, and requires a vendor to furnish a verified list of all the creditors of the vendor etc., with their addresses and the amounts owed to each. Such a list will be defective if it purports to contain only the information as to creditors of the vendor in connection with the business. The plaintiff, a creditor, was not mentioned in the list, the form did not comply with the Act, and the sale was therefore held to be fraudulent and void as against the plaintiff. *Muriel Warner* v. *William Graham*, (1945) 62 B.C.R. 273; (1946) 2 D.L.R. 277.

CAPIAS.

See ARREST AND IMPRISONMENT FOR DEBT.

CARRIERS.

I. CARRIERS OF GOODS, 49.

II. LIABILITY FOR PERSONAL INJURIES, 51.

I. CARRIERS OF GOODS.

1. Whether contract one for carriage of goods by rail or haulage contract—shipper's undertaking to "get it ready for shipment."]—The defendant railway company received for transportation a flat-car upon which was built a heavy revolving crane with ballasting to offset the weight of the boom. The boom was detached and the flat-car with the crane in place on it formed one car of a train made up by the defendant. The plaintiff had undertaken to "get it ready for shipment." En route the lashings and wedges, used by the plaintiff's employers in getting it ready, failed and the heavy ballast swung out causing the car to become derailed with several other cars with consequent damage to the railway. The owners of the crane sued for damages and the railway counterclaimed for its freight and damages. The trial judge found for the plaintiff on the general duty of a railway to a shipper of goods. It had the obligation to see that the crane was in a proper condition for the journey. The Court of Appeal upheld the trial judge. Held, on further appeal to the Supreme Court of Canada, dismissing the action and allowing the counterclaim, the contract was not one for the carriage of goods, but one of haulage. Hence the obligation of the defendant was, as bailee for hire, only for negligence after taking delivery of the crane. A railway accepts goods for either carriage or for haulage (as here) on condition that the shipper has done what is adequate to prepare the goods for transportation and it is a condition of the railway's liability that any resulting loss is not due to the neglect of the shipper. Such a condition does not infringe sec. 242 of The Railway Act (Provincial). *Bridge River Power Co. Ltd.* v. *Pacific Great Eastern Railway*, (1944) 2 D.L.R. 673; (1944) S.C.R. 196; reversing (1943) 58 B.C.R. 420; (1943) 1 D.L.R. 729; (1943) 1 W.W.R. 413; affirming (1942) 57 B.C.R. 247; (1942) 2 D.L.R. 78; (1942) 1 W.W.R. 529.

2. Whether furniture-movers by van are common carriers.]—On the evidence the movers established that they always reserved the right to refuse business. Furniture movers are not as a general rule common carriers for they usually make a special contract with each customer. Here they charged the rate fixed by City by-law. They were not common carriers. *Mellish* v. *Campbell Storage*, (1946) 3 W.W.R. 157.

3. General average—unseaworthiness—Canadian Water Carriage of Goods Act—limitation of liability.]—The ship with a cargo of lumber from Vancouver to Durban was leaking so badly that she had to abandon the voyage at Valparaiso. The cargo was sold at a heavy loss. The shipowners sued to recover a general average contribution from the owner of the lumber under the rule that a loss caused by a sacrifice in time of peril at sea is to be shared by all the interests involved in the adventure. Here the loss was by way of expenditures made for repairs, etc., to the ship. The defendant, owner of the cargo, alleged that the vessel was initially unseaworthy and counterclaimed for the loss it had sustained. The bill of lading of the lumber imported the provisions of The Canadian Water Carriage of Goods Act which removed the shipowner's absolute liability and replaced it by a provision requiring only due diligence to make the ship seaworthy, a change more apparent than real. Held, on the facts, the ship was not seaworthy when she left Vancouver. Further, the owner had not exer-

cised due diligence to make her so at the beginning of the voyage. The plaintiff's claim was therefore dismissed. As to the counter-claim, the plaintiffs claimed to limit their liability under sec. 649 of The Canada Shipping Act under which the loss could be held at so much per ton of the ship's tonnage if the loss was occasioned without the actual fault or privity of the owner. Held, in the circumstances, the owner was entitled to limit its liability, and judgment against it on the counter-claim was awarded on that basis. *Canadian Transport Co. Ltd.* v. *Hunt, Leuchars, Hepburn Ltd.*, (1947) 63 B.C.R. 262; (1947) 2 D.L.R. 647; (1947) Ex C.R. 83.

II. Liability for Personal Injuries.

1. Passenger landing from steamer.]—The plaintiff fell and was injured when she alighted (without making use of the step provided) from the defendant's steamer onto a float. The jury, in answer to questions, found both parties negligent. On appeal by the defendant, the verdict was affirmed upon an equal division of the Court. The contention that the answers found negligence where none had been pleaded or put to the jury was rejected. *Boniface* v. *Harbour Navigation Co. Ltd.*, (1934) 48 B.C.R. 136; (1934) 2 D.L.R. 714; (1934) 1 W.W.R. 612.

2. Duty in respect of drunken passenger on steamer.] — Where a carrier allows a passenger who is obviously drunk to come on board his vehicle or vessel, it becomes the duty of the carrier to take due and reasonable care, having regard to his condition, to prevent any inconvenient or injurious consequences to other passengers arising from his condition. An action by a passenger by vessel for assault by a drunken fellow-passenger was dismissed; where the latter had retired to his stateroom and all was quiet, the carrier could not anticipate that trouble would ensue. *Booth* v. *Canadian Pacific Railway Co.*, (1938) 52 B.C.R. 538; (1938) 2 D.L.R. 793; (1938) 1 W.W.R. 753.

3. Duties of carriers of passengers.]—A common carrier of goods was at common law "bound to answer for the goods at all events" except acts of God and the King's enemies. The obligation of a carrier of passengers is to carry "with due care." Both classes of carriers are subject to the obligations which arise from their exercising a public profession which requires them to carry for all and sundry, subject to the obvious limiting conditions. The common carrier was nevertheless at common law free to limit his stringent obligations by special contract. He still remained a common carrier, and was bound to carry for all according to his profession, but he could all the same insist on making his own terms and refuse to carry except on those terms, provided that there were no statutory conditions limiting his right. *Ludditt* v. *Ginger Coote Airways Ltd.*, (1947) 2 W.W.R. 591; (1947) A.C. 233; (1947) 2 D.L.R. 241; affirming (1942), S.C.R. 406; (1942) 4 D.L.R. 353; affirming (1941) 57 B.C.R. 176; (1942) 2 D.L.R. 29; (1942) 1 W.W.R. 465; reversing (1941) 56 B.C.R. 401; (1941) 3 D.L.R. 504; (1941) 2 W.W.R. 397.

4. Car being transported on steamer—failure to secure to deck.]—A car and trailer were shipped from Nanaimo to Vancouver. While the ship was making an abrupt turn, the vehicles were put in motion and the owner's wife standing on the deck was struck and injured. Held, awarding damages, the carrier, although not an insurer against all defects, is an insurer against all defects which care and skill can guard against. The blocking of the wheels here was insufficient or improperly done. The owner of the car was not warned to put on the emergency brake. The requirements of the Motor-vehicles Act with respect to the brakes on cars being operated on a highway have no application here. As to contributory negligence, the owner was entitled to assume that whatever precautions were necessary would be taken by the carrier. *Olsen* v. *C.P.R.*, (1946) 4 D.L.R. 776; (1946) 2 W.W.R. 668.

CERTIORARI.

I. Jurisdiction, 52.

II. Procedure, 54.

III. Costs, 55.

I. Jurisdiction.

1. Order of committal under Infants Act.]—On an application for habeas corpus with certiorari in aid, it was contended that

only the order could be looked at in a case where a magistrate had found five children to be neglected and committed them to a Children's Aid Society. Held, a proceeding of this kind under the Infants Act is not the trial of a charge against the children. The general rule in the case of *Rex* v. *Nat Bell Liquors Ltd.*, (1922) 2 A.C. 128, was distinguished. *In re Bland and Children's Aid Society*, (1933) 48 B.C.R. 45; (1934) 1 D.L.R. 546; 60 C.C.C. 339.

2. Effect of "Nat Bell" case.]—A judge on an application to quash a magistrate's conviction has no right to consider whether there was sufficient or proper evidence to convict the accused. The magistrate imposed a penalty in excess of that which might lawfully have been imposed and illegally awarded a sum to himself for costs, but these defects are capable of amendment under sec. 101 of the Summary Convictions Act. As an offence of the nature described in the conviction had been committed over which the magistrate had jurisdiction, the curative provisions should be applied and the amendments were made accordingly. *Rex* v. *Colpe*, (1937) 52 B.C.R. 280; (1937) 3 W.W.R. 341.

3. Only witness not sworn—jurisdiction conceded.]—Where the only witness for the prosecution was never sworn but the magistrate had jurisdiction, a conviction will not be quashed on certiorari. Jurisdiction is determinable on the commencement not at the conclusion of the inquiry. *Rex* v. *Ryan*, (1939) 54 B.C.R. 13; (1939) 3 D.L.R. 634; (1939) 1 W.W.R. 432; 72 C.C.C. 140.

4. Whether appropriate remedy — lack of jurisdiction not shown.]—The question is: was there jurisdiction in the magistrate to convict? To go further afield is to enter upon a discussion of irrelevant matters. Mandamus was suggested as the proper remedy. *Rex* v. *Nychuk*, (1939) 54 B.C.R. 30; (1939) 2 W.W.R. 257; (1939) 3 D.L.R. 456; 72 C.C.C. 97, reversing 53 B.C.R. 272; (1939) 1 W.W.R. 108.

5. Whether ousted by Exchequer Court's powers—assessments under Income War Tax Act.]—Sec. 66 of the Income War Tax Act gives the Exchequer Court exclusive jurisdiction to hear and determine all questions arising in connection with any assessment made under the Act. It was sought by certiorari to question the actions of a board of referees dealing with the assessment of the appellant company. The judge held that the Exchequer Court alone had jurisdiction. On appeal it was contended that sec. 66 could not affect the power of the Supreme Court of British Columbia to issue a writ of certiorari because the Exchequer Court, being a statutory court, had no common law powers. Precise words would be necessary to take away the jurisdiction of the Supreme Court of British Columbia in certiorari. Held, affirming the decision below, the intention was to give to the Canadian Exchequer Court the same jurisdiction as that enjoyed by the English Exchequer Court (which included the power to issue a writ of certiorari) and to oust the jurisdiction of all other courts where exclusive jurisdiction was conferred—sec. 66 does that in clear and express words. Moreover, the legislation comes within secs. 101 and 91 (3) of the British North America Act. *Nanaimo Community Hotel Ltd.* v. *Board of Referees* under the Excess Profits Tax Act, (1944) 61 B.C.R. 354; (1945) 3 D.L.R. 225; (1945) 2 W.W.R. 145, affirming; (1944) 60 B.C.R. 558; 4 D.L.R. 638.

II. Procedure.

1. Conviction for two separate offences.]—Where a person was convicted of "wounding" and "hunting" big game and it was held that two separate offences were included, the judge on certiorari amended the conviction and reduced the penalty. *Rex* v. *Advent*, (1937) 53 B.C.R. 9; (1938) 2 D.L.R. 792; (1938) 1 W.W.R. 881; 70 C.C.C. 388.

7. Whether deposition must accompany application — Crown Office Rule (Civil) 35.]—A compliance with Rule 35 is sufficient and an application to quash will not be dismissed for failure to bring the deposition, duly verified before the Court. *Rex* v. *Vaughan*, (1942) 1 D.L.R. 776; (1942) 1 W.W.R. 263; 77 C.C.C. 122.

3. Whether affidavit admissible to show no proof of territorial jurisdiction.]—An affidavit of the accused was submitted stating that no evidence was given proving that the offence charged was committed within the territorial jurisdiction of the magistrate. Both the information and the conviction set forth a charge within the magistrate's territorial jurisdiction. Held, quashing the conviction, the affidavit was admissible. *Rex* v. *Ormonde*, (1945) 62 B.C.R. 244; (1946) 1 W.W.R. 707; 85 C.C.C. 346.

4. Denial of natural justice alleged — how established.]—The accused was convicted of failing to stop at the scene of an accident. On an application for certiorari an affidavit by his counsel implied that the convicting magistrate had stated that he had received information regarding the matter out of Court and was influenced thereby. The magistrate denied any such influence. Held, refusing the application, that while a denial of natural justice might entitle the victim to the writ, here it was oath against oath and the applicant had failed to make out a case. As to hearing evidence out of Court, what had occurred was merely accidental and no doubt the magistrate eliminated it from his mind. *Rex* v. *Bellak*, 88 C.C.C. 418.

III. Costs.

1. Of Crown.] — It is the practice to award costs to the Crown on unsuccessful applications for a writ of certiorari. *Rex* v. *Beru*, (1934) 48 B.C.R. 286.

See Costs.

See Criminal Law.

See Habeas Corpus.

CHILDREN OF UNMARRIED PARENTS.

1. Appeal from affiliation order—failure to serve superintendent.] — Where the notice of appeal was not served upon the Superintendent of Neglected Children as required by sec. 16 of the Act, the appeal will be dismissed. *Ogilvie* v. *Finley*, (1931) 45 B.C.R. 76; 57 C.C.C. 195.

2. Corroboration of mother's evidence.] —A magistrate made an order requiring the appellant to maintain the complainant's child. On a case stated the decision of the magistrate was confirmed. Held, on appeal, affirming the decision below, that the appellant's promise that he would see about paying the bills for the complainant's confinement supplied the other material evidence required by sec. 14 of the Children of Unmarried Parents Act, particularly in the absence of any explanation from the appellant. *Dunham* v. *Bradner*, (1934) 48 B.C.R. 503; (1934) 4 D.L.R. 514; (1934) 1 W.W.R. 571, affirmed; (1934) 3 W.W.R. 67; 62 C.C.C. 163.

3. Complaint within one year from an act acknowledging paternity.]—The putative father, after receiving a solicitor's letter charging him with the paternity of the child, arranged a meeting with the complainant and made statements which the magistrate accepted as evidence of acknowledgement of paternity. These statements constituted "acts" within sec. 8 (b) which requires the complaint to be made within one year of the doing of an act by the putative father affording evidence of acknowledgement of paternity. *Dunham* v. *Bradner*, (1934) 48 B.C.R. 503; (1934) 4 D.L.R. 514; (1934) 1 W.W.R. 571; affirmed (1934) 3 W.W.R. 67; 62 C.C.C. 163.

4. Whether notice of appeal should be given to Superintendent of Neglected Children.]—The requirement of sec. 16 of the Children of Unmarried Parents Act as to notice to the Superintendent of Neglected Children has no reference to appeals; it applies to the institution of the proceedings. *Ogilvie* v. *Finley* (supra) distinguished. *Myllymaki* v. *Arnold*, 63 C.C.C. 366.

5. Whether divorced woman entitled to protection of Act.]—The benefit of the Children of Unmarried Parents Act extends to a "single woman or a widow" and a divorced woman comes within the category of a "single woman." The presumption of legitimacy of a child born during wedlock may be rebutted by statements of the mother and admissions of the putative father. Sec. 14 (2) and (3) of the Act abrogate the rule in *Russell* v. *Russell. Dodd* v. *Wilcox*, (1935) 4 D.L.R. 797; (1936) 1 W.W.R. 98; 64 C.C.C. 238.

6. Complaint not shown to have been made within one year after the birth of the child.]—At the close of case for the complainant the putative father objected that there was no evidence that any complaint such as is referred to in sec. 7 (1) had been made. No evidence was called for the defence. The original complaint was not produced or read in Court before the magistrate. In making the affiliation order he treated the complaint as if it had been before him although nothing was said about it. Held, on appeal, affirming the judgment setting the affiliation order aside, the magistrate should have told counsel when the objection was taken that there was a complaint and that he proposed to use it in

evidence whereupon counsel might have asked leave to recall the complainant to cross-examine her upon it. Per O'Halloran, J. A.; The magistrate could not look at the information behind the respondent's back and accept its date as evidence that it was made within a year of the child's birth. There was not here an "exception, exemption, proviso, excuse or qualification" within the meaning of sec. 30 (1) of the Summary Convictions Act. *Rex* v. *Wheeler,* (1944) 60 B.C.R. 525; (1945) 1 D.L.R. 745; (1945) 1 W.W.R. 61; 83 C.C.C. 105.

CHOSES IN ACTION.

See ASSIGNMENT.

COLLECTIVE BARGAINING.

See TRADE UNIONS.

COLLISION AT SEA.

1. Fog — excessive speed — equally at fault.]—The Princess Alice, coming in, struck the West Vancouver Ferry, going out, in a dense fog near the entrance to First Narrows, Vancouver Harbour. The trial judge found both vessels equally to blame. The Princess Alice appealed. Held, dismissing the appeal, both vessels were travelling at an immoderate speed in view of the fog, and contrary to the first part of Article 16 of the International Rules of the Road. *The S.S. Princess Alice and The Corporation of the District of West Vancouver,* (1936) Ex. C.R. 115.

2. Wrong side of narrow channel — failure to turn out.]—A tanker was entering False Creek (in Vancouver Harbour) as a tug with a large scow lashed to her port side was going out. The tug was much less manoeuvrable than the tanker. The judge found that the tug was in her proper place on the north side of the channel and that the tanker was coming in, not on the south side, but somewhat to the north of mid-channel. The tanker as they neared each other did not swerve to the south to let the tug and tow pass. When a collision was inevitable the tug signalled that she was turning to port and did so. Held, that the tanker was at fault in holding her course and not turning out as required by the International Rules of the Road (Art. 25). The tug was justified in going to port when it was clear that a collision must take place—she went to port to lessen the impact of the imminent collision. *McKenzie Barge & Derrick Co. Ltd.* v. *M.S. "Aleutian Native,"* (1940) 56 B.C.R. 34; (1941) 1 D.L.R. 490.

3. Victoria Harbour—both vessels leaving—look-out.]—Both ships were leaving the restricted waters of the harbour at 11 p.m. on a moonlight night. The "Princess Norah" (a much larger vessel than the other) had backed away from the wharf and was shaping up for the outer channel when the "Co-operator 1" having backed out from a wharf at the north-east corner of the harbour was also heading out. The port side of the "Co-operator 1" struck the starboard counter of the "Princess Norah" at a time when the latter had very little headway and the other vessel was moving at three to four knots. The proper lights were exhibited by the "Princess Norah." Held, the "Co-operator 1" was most to blame; as the smaller and more easily handled vessel, she should have stopped and allowed the other to pass out ahead of her. The failure of the "Co-operator 1" to keep a look-out was the primary cause of the collision and she was three-quarters to blame. The "Princess Norah" should have become sooner aware of the presence of the other vessel and could in that case have given her a wider berth. She was one-quarter to blame. *"Princess Norah"* v. *"Co-operator 1,"* (1945) 62 B.C.R. 211; (1946) Ex. C.R. 380.

4. Engines going full speed astern—collision rules.]—Article 28 requires that when vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required under the rules, shall indicate that course by a signal on her whistle. Three short blasts mean "my engines are going full speed astern." Held, the rule does not apply unless the engines are going full speed astern; here they were going "half" or "slow" astern. Nor does it apply where a vessel was pursuing her usual and proper course out of Victoria Harbour — she was not taking any course "authorized or required" by the rules. *"Princess Norah"* v. *"Co-operator 1,"* (1945) 62 B.C.R. 211; (1946) Ex. C.R. 380.

5. Failure to keep proper look-out.]— Where a tug with a small tow was obviously not on a steady settled course but was circling the car ferry pier in Vancouver Harbour, the other vessel, with a proper lookout, should have seen her, and was responsible in damages caused by a collision. The cost of repairs was properly taken into account. *Canadian Pacific Railway Co.* v. *The King*, (1946) Ex. C.R. 378.

COMPANIES.

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X. SECURITIES ACT, 72.

I. CAPITAL.

1. Company taking its own shares as security—whether reduction of capital.]— Where shares were pledged by way of collateral security, but under the arrangement were not subject to sale on default, the transaction will not result in the pledgee ever becoming the absolute owner of the shares and cancelling them, thus reducing its nominal capital. Here the company could obtain payment of the amount for which the shares were pledged in two ways only: (1) by the pledgor paying the amount if he chose to do so, or (2) if dividends paid by the company should pay the principal and interest. *British American Lumber Co. Ltd.* v. *Jones*, (1944) 60 B.C.R. 174; (1944) 2 D.L.R. 481; (1944) 2 W.W.R. 577, varying; (1943) 59 B.C.R. 270; (1943) 4 D.L.R. 686; (1943) 2 W.W.R. 654.

2. Certificate of Superintendent of Brokers—jurisdiction over money received for fully paid shares.] — A company obtained from the superintendent a certificate authorizing the sale of certain of the shares subject to a term that the proceeds should be deposited in a trust account with the defendant trust company until $30,000 should be accumulated. The company went into voluntary liquidation at a time when about $2000 was in the account. The defendant refused to pay it to the liquidator of the company who sued, claiming the money as funds of the company. The trial judge held that the subscriptions for shares were paid to the trust company upon trust for the subscribers pro rata in the event of the $30,000 not being accumulated. He refused to direct payment to the liquidator but ordered payment to the subscribing shareholders who had put up the money. Held, on appeal, reversing the decision below, the certificate did not impress a trust upon the money received by the company for the sale of shares. So to hold would give them a priority over the creditors and over the other ordinary shareholders. For the liquidator to take them back would amount to a reduction of capital and would be illegal. *Campbell* v. *Prudential Trust Co. Ltd.*, (1944) 60 B.C.R. 225; (1944) 3 D.L.R. 69; (1944) 3 W.W.R. 456.

II. MEMBERSHIP.

1. Rectification of register — sec. 78 of Companies Act.]—Where an order for rectification of the register involved the cancellation of 753 shares in unusual circumstances, the Court of Appeal held, allowing the appeal, that the essential facts had not been disclosed on the record and the petition should be reheard. Per McDonald, J. A. The petition was misconceived and this was not a proper case to bring under the section. In a complicated or doubtful case this summary procedure should not be made use of. *British American Timber Co. Ltd.* v. *Ray W. Jones*, (1941) 57 B.C.R. 1; (1941) 3 W.W.R. 296.

2. Business transferred to company — attempt to hold wife of transferor.] — Husband and wife incorporated a company and the husband transferred the assets of a business to it, each taking a single share. It purchased goods on credit and an attempt was made to hold the wife as the purchaser. Held, the "two person" company was a legal

entity and its incorporation was a matter of public information. The evidence showed that the vendor of the goods was fixed with notice of the incorporation through the officers and employees of the company in the ordering of goods, in the making arrangements for payment, in receiving accounts and in giving the cheques of the company in payment. *Waldron* v. *Hogan*, (1934) 3 D.L.R. 800.

III. SHARES: TRANSFER.

1. Whether agreement to sell treasury shares is satisfied by transfer of shares held by vendor.]—An agreement for the sale of treasury shares is not satisfied by the transfer to the purchaser of an individual shareholder's personal stock. *Clay* v. *Powell*, (1932) S.C.R. 210; reversing (1931) 44 B.C.R. 124; (1931) 3 D.L.R. 538; (1931) 2 W.W.R. 325.

2. Private company—charge of invitation to public to take shares.]—Sec. 38(3) of the Companies Act forbids a private company to invite the public to subscribe for its shares. It was shown that some hundreds of circulars were sent out to shippers, investors, solicitors and others, suggesting the excellence of the shares as an investment, much like the usual invitation prospectus in such cases, except that the company was stated to be a private company. The magistrate convicted. Held, on appeal affirming the conviction, that the offence is not avoided by showing that many of the recipients were friends, or customers, or connections of the accused. There was here none the less an invitation to the public notwithstanding that only a few hundreds of the circulars were sent out. *Rex* v. *Empire Dock Ltd.*, (1940) 55 B.C.R. 34.

3. Private company—restriction on sale of shares—to be offered first to existing members.] — The Company's memorandum of association provided that no share could be transferred to a non-member so long as an existing member was willing to purchase it at a fair value to be fixed by the company's auditor. The articles of association provided that the directors might decline to register a transfer of shares unless they had been offered to the existing members through the Secretary by a notice (stating the price and terms at which the shares were to be sold) given 30 days before the completion of the sale. The company then had 28 days to find a member willing to buy and the proposing vendor would, on notice, be bound on payment of the fair value (as fixed by the auditor) to transfer to the existing member. The holder of a block of shares offered them to the company at a named price and terms, and having waited 30 days sold them to a company incorporated a few days earlier. The purchaser applied to be registered, but was met with a refusal on the ground that the requisite notice had not been given. The purchaser petitioned under sec. 78 of the Companies Act to rectify the register by entering its name as owner of the shares. The judge granted the order holding that compliance with the requirements laid down had been carried out. Held, on appeal, reversing the decision below, that before the selling member could give the notice to the secretary he must have made a conditional bargain to sell the shares to a non-member at the expiration of 30 days from the date of the notice, upon the price and terms specified in the notice. The notice is not to be a mere offer to sell to existing members. There must be a bargain already made with an outsider and the price and terms of that bargain are, by the notice, to be disclosed to the existing members. *In re Champion & White Ltd.* and *in re Ajax Holdings Ltd.* (1943) 58 B.C.R. 536; (1943) 2 D.L.R. 145; (1943) 1 W.W.R. 633; reversing (1942) 58 B.C.R. 365; (1943) 1 D.L.R. 283; (1943) 1 W.W.R. 152.

4. Gift of shares—whether revocable—held by company's secretary.]—A company promoted by T. took from him a valuable property in consideration of the allotment to him or his nominees of all the shares except three. The plaintiff was by written direction of T. to the company issued 40,000 shares in 1934 which were retained by the secretary of the company. T. told the plaintiff of the gift and that the secretary held them. Five years later T. instructed the secretary to cancel the plaintiff's certificate and transfer the shares to another name and this was done without the plaintiff's knowledge or signature on the share certificate. T. died. In an action for a declaration that the plaintiff was the owner of the shares the plaintiff succeeded. The allotment to the plaintiff was not a "sale or other disposition" within the meaning of the company's by-law dealing with the manner in which shares might be transferred. This was not a transfer but an allotment pursuant to a proper resolution. T.'s state-

ment to the plaintiff as to the gift was admissible as part of the res gestae. On the evidence T. had looked upon the shares as belonging to the plaintiff and when the change was made spoke of "taking them away" from the plaintiff. Shares are choses in action and are capable of transfer without physical delivery of the certificate. Sec. 2 (25) of the Laws Declaratory Act applies. T. had done everything which according to the nature of the property was necessary to transfer the property and render the settlement binding on him. *McDougall* v. *Johnson,* (1946) 3 W.W.R. 143.

5. Broker's obligation on customer's order for shares in private company.]—The plaintiff ordered from the defendant broker certain shares and paid for them. The company was a private one and its shares were not transferable without the approval of the directors. The defendant acquired street certificates, but did not get the plaintiff approved as transferee. After the lapse of a year and a half and when the shares had dropped in value, the plaintiff repudiated and sued for his money back. The trial judge held that the broker's contract was to supply shares, not merely certificates, and that a reasonable time had elapsed with the result that the plaintiff was entitled to recover. Held, on appeal, affirming the decision below, the defendant had failed to fulfil his obligation to deliver the shares. *Born* v. *Premier Investments (Victoria) Ltd.,* (1948) 1 D.L.R. 596; affirming (1947) 1 W.W.R. 492.

IV. Shares: Allotment and Issue.

1. Deemed to be issued for cash.]—The requirement of the Companies Act that shares are deemed to be issued subject to payment therefor in cash, unless there is a contract filed with the Registrar, was met where the company issued a cheque to the proposed allottee for an indebtedness and the allottee endorsed it back to the company; such a transaction amounts to payment in full in cash. *In re R. P. Clark & Co. (Vancouver) Ltd., Juke's case,* (1938) 53 B.C.R. 224; (1938) 4 D.L.R. 806; (1938) 3 W.W.R. 233; 20 C.B.R. 6.

V. Regulation and Management.

1. Acquisition of company's property by directors.] — A syndicate holding 51 per cent. of the shares in a mining company made large advances to enable the mine to continue in operation. At a time when prospects were far from encouraging the four directors (three of whom were members of the syndicate) gave a working bond to S. which included an option to purchase the property out of the proceeds of the mine. S. gave a declaration of trust to the members of the syndicate reciting that they were advancing one-half of his outlay and that they were entitled to one-half the benefits to be derived from the property. The company was wound up voluntarily and the liquidator, supported by meetings of the shareholders and the creditors, approved of a sale of the property to a nominee of the syndicate, subject to the bond and option given to S. A new company was formed and the syndicate and S. transferred their interests to it in consideration of shares. The mine having later proved valuable the plaintiff sued on behalf of the minority shareholders alleging fraud and breach of trust. The trial judge dismissed the action holding that no fraud was proven and justifying the acts of the defendants in every respect. Held on appeal, affirming the decision of the trial judge, per Macdonald, C. J. B. C. there was a breach of trust but no conscious fraud. The option and the declaration of trust were a single transaction and when the plaintiff acquiesced in the option, he could not repudiate the other part of the arrangement. Per Martin, J. A. The transaction can be upheld by reason of the special provisions in article 102 of the company's articles of association. Apart from that, constructive fraud was established.

Per McPhillips, J. A. (dissenting). The defendants were guilty of a breach of their duty and the benefits of the impugned transaction belong in equity to the company.

Per McDonald, J. A. The shareholders ratified each step taken after proper disclosure and fraud was not established.

On further appeal to the Privy Council a preliminary objection was taken by the respondants that the wound-up company (not a party to the action) could alone be entitled to the relief claimed and that no amendment adding it as a party could now be made. Held, dismissing the appeal, that the claim raised by the appellants is one open only to the wound-up company and any order made would necessarily have to be an order for payment to the company if and when resuscitated. The right of a minority shareholder to maintain a representative action against the company and the majority shareholders ceases as soon as the company

goes into liquidation. *Ferguson* v. *Wallbridge,* (1935) 1 W.W.R. 673; (1935) 3 D.L.R. 66; affirming (1933) 47 B.C.R. 518; (1934) 2 D.L.R. 270.

2. Ratification within a reasonable time.] A director who had wrongfully taken in his own name an option to purchase mineral claims was sued for a declaration that he held as trustee for his company. The authorization for the suit was a resolution of the directors, dated September 23rd but no notice of the meeting was given to the defendant. The defect having been raised in the action another meeting was had on proper notice on December 9th and the authorization ratified. It was held in answer to the claim that the ratification did not take place within a reasonable time, and was thus ineffective, that it was done within a reasonable time, inasmuch as the defendant had not been injured or altered his position by reason of the delay. *Lytton Gold Mines Ltd.* v. *Munro,* (1933) 49 B.C.R. 18.

3. Company a necessary part to an action to restrain voting of shares.]—The defendants were the registered holders, in trust, of a block of shares. The plaintiff alleging that he was cestui que trust moved to enjoin the defendants from voting the trust shares at the company's annual meeting. Held, dismissing the motion, that the company should have been a party defendant, for the reason that the plaintiff would not, if the votes were illegally tendered, and rejected, be injured. *Petrie* v. *Brown,* (1934) 49 B.C.R. 299; (1934) 3 W.W.R. 380.

4. Conditions of exercise of supremacy by majority shareholders.] — Notice was given that a resolution would be submitted to the annual meeting leading to a voluntary winding up and a reorganization whereby the company's assets would be transferred to a new company. The plaintiff alleged that the personal defendants (shareholders and creditors of the company) were to be illegally released from their obligations to finance the company and were to get preferential treatment in the distribution of shares in the new company. The claim on behalf of the minority included a declaration that the majority were acting oppressively, illegally and in an ultra vires manner. The action was dismissed. It was not shown that the proposed plan could not be of benefit to the company. There was here no such abuse of the supremacy of the majority, exercised in good faith, as would deprive the minority of their rights. A shareholder may properly promote such a resolution although he has a particular interest in its subject matter. If the power of the majority were used to divide the property of the company among themselves to the exclusion of the minority that would be oppression which would be relieved against. The proposed plan was not ultra vires of the company. *Carr* v. *B. C. Nickel Mines Ltd. (No. 2),* (1937) 3 W.W.R. 61.

5. Ostensible authority.]—A single director, as director, has no ostensible powers such as a managing director has, but any director, or even an agent not on the board, may be allowed by the company to wield de facto powers without any formal investment, and then the company cannot deny his possession of them. Here the director bought the goods to fill an order received in the company's name, and to fill it for the company's benefit, and the proceeds actually went to its credit. The company by taking advantage of the transaction, ratified it. *Keystone Shingles and Lumber Ltd.* v. *Moody Shingles Ltd.,* (1942) 57 B.C.R. 401; (1942) 2 D.L.R. 311.

6. Rejection of shareholder's vote—action for damages against chairman.] — At a meeting of the shareholders of a company, the chairman erroneously refused to allow the plaintiff to vote, wrongly believing that he was an alien enemy. The shareholder brought an action against the chairman for damages. Held, dismissing the action, that the chairman honestly tried to do his duty and had not acted maliciously or from corrupt or wrong motives. The right of a shareholder to vote is not as in *Ashby* v. *White,* (1703) 2 Ld. Raym, 938, a public right. The act of the chairman was in the nature of a judicial act, deciding whether or not the plaintiff had a right to vote, and he was entitled, if he acted in good faith and without malice to be protected from liability. *Bluechel and Smith* v. *Prefabricated Buildings Ltd.,* (1944) 61 BC.R. 325; (1945) 2 D.L.R. 725; (1945) 2 W.W.R. 309.

V. Powers and Liabilities.

1. Necessity of head office seal.]—The company, whose head office and seal was in Montreal, by resolution authorized certain officers at Vancouver to execute documents which would then be binding on the company. The resolution ended "The seal of the company may be affixed to the documents so executed." The company gave a convey-

ance and it was executed by the officers but the seal at head office in Montreal was not used; a duplicate kept at the company's office in Vancouver was employed. The judge held that "The seal of the company" had not been affixed. On appeal to the Court of Appeal, upon an equal division of the Court, the decision below was affirmed. Held, on appeal to the Supreme Court of Canada, reversing the judgment below, that the last sentence of the resolution did not contemplate exclusively the seal at head office. The resolution contemplated an impression in the form prescribed by the by-law, made by any stamp used by agents thereunto properly authorized on behalf of the company. The instrument was prima facie the instrument of the company, and there was nothing brought to the notice of the Court justifying a judicial conclusion that the conveyance was invalid. *In re Land Registry Act* and *Robert H. Baird,* (1938) S.C.R. 25; (1938) 1 D.L.R. 61; reversing (1936) 51 B.C.R. 487; (1937) 3 D.L.R. 484; (1937) 3 W.W.R. 13.

VI. Actions and Proceedings.

1. Defendant company sued and bank account attached — inability to move because one of two directors refuses to attend meeting.]—The plaintiff on instructions by its president commenced an action and attached the defendant's bank account. The president of the defendant company, who was vice-president of the plaintiff company and one of its largest shareholders, disapproved of the action and called a meeting of the directors of the defendant company to instruct counsel to move to set the proceedings aside as having been commenced without authority. The only other director of the defendant company was the president of the plaintiff company who had promoted the proceedings and he refused to attend the meeting. The president of the defendant company then applied ex parte for an order to enter a conditional appearance. The judge ordered that a firm of solicitors be authorized to act for the defendant as if they were directly retained, and leave was given to enter a conditional appearance so that a motion to set the writ aside could be made. *Mayo Lumber Co. Ltd.* v. *Kapoor Lumber Co. Ltd,* (1939) 54 B.C.R. 1; (1939) 4 D.L.R. 812.

2. Shareholders' class action — what must be pleaded to justify—amendment refused.]—In an action by two shareholders suing for themselves and all other shareholders of the defendant company, except the defendants, the defence pleaded that no cause of action was disclosed by the statement of claim, in that it did not allege the facts necessary to entitle them to sue in their own names. At the opening of the trial the defence took the objection and the trial judge allowed certain letters to be put in and certain evidence to be given on the question raised. The plaintiff asked for time to consider a possible amendment but it was opposed and no amendment was granted. The trial judge then dismissed the action because as he found the statement of claim was bad in law and disclosed no cause of action in the plaintiffs. On appeal it was held, affirming the decision below, that in this type of class action, the plaintiffs must allege and prove (a) a refusal by the shareholders to sue, or, (b) that it would be futile to hold a meeting because the defendants were majority shareholders. The letters put in at the hearing did not constitute the necessary demand and refusal and the evidence showed that the defendants were not in fact, majority shareholders. Held, on further appeal to the Supreme Court of Canada reversing the decision below, the trial ought to have been allowed to proceed and leave to amend should have been given. The action should not have been dismissed on the ground that the pleadings were insufficient, without giving the plaintiff an opportunity to amend. *Levi* v. *MacDougall,* (1941) 4 D.L.R. 340, reversing; (1940) 56 B.C.R. 81; (1941) 2 D.L.R. 171; (1941) 3 W.W.R. 301; affirming (1940) 4 D.L.R. 666; (1940) 3 W.W.R. 317.

VII. Borrowing and Securing Money.

1. Municipal debentures payable in Canadian funds or sterling equivalent.]—Each of twenty debentures provided for payment "of $500 of lawful money of the the Dominion of Canada, or £102, 14s, 10d., its sterling equivalent, at the rate of $4.86 2/3 to the one pound sterling." At the date of maturity English money was at a premium. The plaintiff, as holder, sued for payment of £102, 14s., 10d. in respect of each debenture at the rate of exchange then prevailing. The municipality paid $10,000 and interest into Court on the basis of the named rate of $4.86 2/3. Held, the plaintiff was entitled only to the amount paid into Court with costs up to the time of payment

in, and the defendant was entitled to costs thereafter. No matter in what foreign currency an obligation is payable in Canada, the judgment must be for an amount in the currency of this country. The words "at the rate of $4.86 2/3 to the one pound sterling" would have no purpose unless they were inserted to ensure that at all times the fixed rate of exchange was to be $4.86 2/3. *The Royal Trust Co.* v. *The Corporation of Oak Bay,* (1934) 48 B.C.R. 514; (1934) 4 D.L.R. 697; (1934) 3 W.W.R. 210.

2. Charge on standing timber—permission to carry on business.]—Where a company owning standing timber has created a fixed and specified charge thereon for the benefit of its bondholders, the fact that it is engaged in the timber business and the trust deed authorized it to hold the mortgaged premises and to carry on its business as a going concern, enabled it to cut and sell standing timber notwithstanding the charge. *Stave Falls Lumber Co. Ltd.* v. *Westminster Trust Co.,* (1939) 55 B.C.R. 241; (1940) 4 D.L.R. 382; (1940) 2 W.W.R. 241; reversing (1938) 53 B.C.R. 300; (1938) 4 D.L.R. 797; (1938) 3 W.W.R. 410.

VIII. Extra-Provincial Companies.

1. Carrying on business—isolated transaction.]—Where the only evidence that an unregistered extra-provincial company carried on business was that on a single occasion its representative took an order for the purchase of calendars, that did not constitute "carrying on business" within the meaning of the Act. *News Publishing Co.* v. *Armstrong,* (1933) 3 D.L.R. 568.

IX. Liquidation and Forfeiture.

1. Petition under Sec. 204 of Companies Act—just and equitable.]—The petitioner was director and manager of the company. One C. made substantial advances to the company for which he was given control until repayment. The petitioner was ousted from the directorate and the management after C. had advanced some $9,000 and the company had suffered losses in its business. The petitioner claimed that a deadlock had been reached and that it was just and equitable that the company be wound up. Held, dismissing the application, there was no tyrannical use of his majority position by C., who acted entirely within his rights. The petitioner was himself responsible for the position in which he found himself. *In re Sovereign Oil Co. Ltd.* (1934) 3 W.W.R. 317.

2. Bona vacantia—money in bank—restoration of company.]—A company with money in the bank was struck off the register and, after notice in the Gazette, dissolved. It was subsequently restored under sec. 200 of the Companies Act. After striking off and before restoration the Crown demanded the money from the bank as bona vacantia. Held, on appeal to the Supreme Court of Canada, affirming the judgments below and dismissing the action that the Company though dissolved, was not dead for all purposes; the Act said that restoration should have the effect of continuing its existence as if it had not been struck off. *Attorney-General of British Columbia* v. *The Royal Bank of Canada,* (1937) S.C.R. 459; (1937) 3 D.L.R. 393; affirming (1936) 51 B.C.R. 241; (1937) 1 D.L.R. 637; (1937) 1 W.W.R. 273; varying (1935) 50 B.C.R. 268; (1936) 1 W.W.R. 108.

3. Application of contributory to direct liquidator to sue.]—A minority shareholder in a representative action had sued the respondents in a former action for the recovery of assets alleged to have been wrongfully diverted from the company then in voluntary liquidation. The action was dismissed in the Privy Council, not on the merits, but because the company, which alone would be entitled to relief, was not the plaintiff. Thereupon the petitioner, a contributory, applied to the judge for an order under the Companies Act directing the liquidator to take action against the same respondents for the like recovery. The petition was dismissed. On appeal it was held, affirming the decision below, that the order prayed for should be granted only, if, with fraud in all its phases eliminated, the new action would have a reasonable chance of success; and that it was clear that there was no possibility of success. Held, on further appeal to the Privy Council, reversing the decision below, that it was the duty of the judge to see to it that all the assets of the company were brought into the winding up. He was the custodian of the interests of every class affected by the liquidation. There could be no certainty that fraud would be eliminated from the proposed

action; the proceedings in the former action cannot affect the company which was not a party there; the statement below that with fraud eliminated the action could not possibly succeed was unjudicial in expressing a conclusion so absolute at that stage. *Lloyd-Owen* v. *Bull*, (1936) 3 W.W.R. 146; (1936) 4 D.L.R. 273; 18 C.B.R. 1; reversing (1936) 50 B.C.R. 370; (1936) 1 D.L.R. 433.

4. Winding-up of stock broker company subject to supervision of the Court — various class of customers.]—The order directed how the liquidator should deal with the various classes of customers where some had claims to shares or securities but were indebted to the company, for some there were sufficient and for others insufficient shares or securities to satisfy the customers. Certain of the shares claimed had been pledged by the company without the authority of the customers. *In re Miller Court & Manley Ltd.*, (1940) 3 W.W.R. 184.

5. Whether liquidator a trustee and thus subject to restriction as to remuneration under sec. 80 of Trustee Act.]—The liquidator in a winding up subject to the supervision of the Court is not restricted in respect of his remuneration to the limitation contained in sec. 80 of the Trustee Act. *Re Intermountain Building & Loan Association of Canada*, (1942) 3 D.L.R. 779; (1942) 2 W.W.R. 571.

6. Dominion charter to Welfare Association—action for cancellation for misuser and abuse.]—A charter was granted to an association with worthy objects. It was given the right to create branches throughout Canada. The Attorney-General of Canada brought action to annul the charter. At the trial it was shown that the association's objects had never been promoted, but that the charter was used, by means of its various branches, as a cloak for carrying on an extensive gambling enterprise. Held, forfeiting the charter, the Court has power at common law and apart from the Companies Act to annul a charter for misuser and abuse. Its operations were against public policy. *Attorney-General of Canada* v. *Hellenic Colonization Association*, (1946) 63 B.C.R. 16; (1946) 3 D.L.R. 840; (1946) 3 W.W.R. 482.

7. Provincial Act — "just and equitable.] — The majority of the shareholders were against the winding-up — they were practically all the creditors of the company. No proper books were kept; no general meeting had been held for ten years; a demand by the petitioner for a balance sheet, etc., was not met; the company's premises had been leased to one of the directors. Held, on appeal, affirming the winding-up, it was just and equitable that there should be a winding-up under the supervision of the Court. There was a justifiable lack of confidence in the conduct of the company's affairs. Although usually the wishes of the majority would prevail, here the circumstances justified the order. *In re Delip Singh* and *Moody Shingles Ltd.*, (1947) 1 W.W.R. 480; 28 C.B.R. 86.

X. Securities Act.

1. Application of Part I to corporations.]—The Registrar of Companies refused a certificate to commence business because the applicant company had not become registered under the Security Frauds Prevention Act. A mandamus against the Registrar was obtained. Held, on appeal, affirming the order for a mandamus, that the requirement for registration is limited to "persons" and corporations are not "persons" under the Act. *The King* v. *Registrar of Companies*, (1933) 48 B.C.R. 152; (1934) 1 W.W.R. 393.

2. Scope of investigation under sec 10.]—Pursuant to sec. 10 of the Securities Act, the Attorney-General had directed an investigation in order to ascertain whether any fradulent act or offence against the Act had been, or was about to be, committed by a company and for that purpose authorized the defendant to examine any person, company, property or thing whatsoever. The plaintiffs were not directors or officers of the company but were large purchasers of its shares; the company had no control over the manner in which the plaintiffs dealt with the shares so purchased. On a motion to dissolve an injunction restraining the defendant, as investigator from proceeding in relation to the plaintiff's actions, it was held, dissolving the injunction, that the investigator was authorized to investigate people dealing with shares in the company although they were not officials of the company. Moreover, sec. 29 of the Act is effective to deny access to the Courts where the investigation is within the scope of the authority given by the Act. *Bartley & Co.* v. *Russell*, (1934) 49 B.C.R. 274; (1935) 1 W.W.R. 26; affirmed (1935) 49 B.C.R. 502; (1935) 2 W.W.R. 64; (1935) 3 D.L.R. 135,

and by Supreme Court of Canada; (1935) 3 D.L.R. 465; (1935) S.C.R. 441. Sub nom *St. John* v. *Fraser*.

3. Status of investigator under sec. 10.]—The investigation is not a judicial proceeding in any sense of the term, but is intended to be conducted in private and no person should have the right of cross-examining witnesses, whether the evidence given affects the status or reputation of that person or not. It is merely an inquiry for the information of the Attorney-General in order that he may take such proceedings as he may deem advisable for the protection of the public. Sec. 29 which bars actions and proceedings relating to such investigations constitutes an insuperable barrier to the claim for an injunction to restrain the investigator. *St. John* v. *Fraser*, (1935) S.C.R. 441; (1935) 3 D.L.R. 465; 64 C.C.C. 90; affirming (1935) 49 B.C.R. 502; (1935) 2 W.W.R. 64; (1935) 3 D.L.R. 135; 64 C.C.C. 57; affirming (1935) 49 B.C.R. 302; (1935) 1 W.W.R. 31.

4. Powers of Superintendent of Brokers.]—The plaintiff agreed to sell certain mining leases and the documents of title were deposited in escrow with the defendant Y. upon the terms that the plaintiff should have his leases back if the purchaser defaulted and the plaintiff filed a statutory declaration to that effect. The purchaser, in order to sell shares to the public, applied to the Superintendent of Brokers under the Securities Act and that official without the knowledge or consent of the plaintiff required that the documents of title be held in escrow by Y. until released by the Superintendent. The plaintiff on learning of this protested but the defendant Y. insisted that he would hold the documents as directed by the superintendent, disregarding the former trust. Then Y. transferred the escrow to the defendant L. without the knowledge of the plaintiff. Default by the purchaser having occurred, the plaintiff made his statutory declaration and demanded his documents. He was refused because the Superintendent's release had not been given. The plaintiff sued for delivery of his documents. Held, ordering delivery of the documents, and awarding damages against both Y. and L. that the Legislature had not conferred on the Superintendent any such authority as he had assumed to exercise. He was given no power to interfere with the property rights of strangers. Sec. 29 of the Act does not avail because what was done was not done "in connection with the administration or carrying out of the provisions of the Act," but entirely outside its scope. *Briscoe* v. *Yorkshire and Canadian Trust Ltd.*, (1936) 51 B.C.R. 222; (1936) 3 W.W.R. 513.

5. Certificate of Superintendent of Brokers—jurisdiction over money received for fully paid shares.]—A company obtained from the Superintendent a certificate authorizing the sale of certain of the shares subject to a term that the proceeds should be deposited in a trust account with the defendant trust company until $30,000 should be accumulated. The Company went into voluntary liquidation at a time when about $2,000 was in the account. The defendant refused to pay it to the liquidator of the company who sued, claiming the money as funds of the company. The trial judge held that the subscriptions for shares were paid to the trust company upon trust for the subscribers pro rata in the event of the $30,000 not being accumulated. He refused to direct payment to the liquidator but ordered payment to the subscribing shareholders who had put up the money. Held, on appeal, reversing the decision below, the certificate did not impress a trust upon the money received by the company for the sale of shares. So to hold would give them a priority over the creditors and over the other ordinary shareholders. For the liquidator to take them back would amount to a reduction of capital and would be illegal. *Campbell* v. *Prudential Trust Co. Ltd.*, (1944) 60 B.C.R. 225; (1944) 3 D.L.R. 69; (1944) 3 W.W.R. 456.

6. Acting as broker without certificate —reorganization.]—The Securities Act forbids a person to act as a broker without a certificate of registration. It excepts trading in its own securities by a company in the course of reorganization. The company sold a large block of its own shares without being registered. It was prosecuted and convicted. On appeal it was contended that the sales came within the exception. The impugned transactions were designed to resuscitate the then bankrupt company so that it could carry on. In this it was successful. Held, quashing the conviction, the Securities Act is a penal statute and the accused must be brought strictly within its terms. Here, the onus of proving the case was not discharged by the Crown. *Rex* v. *Santiago Mines Ltd.*, (1946) 63 B.C.R. 87; (1947) 1 D.L.R. 642; (1946) 3 W.W.R. 129; 86 C.C.C. 357.

COMPENSATION.

See COMPULSORY PURCHASE.

COMPULSORY PURCHASE.

I. RIGHT TO COMPENSATION, 75.
II. COMPENSATION, 75.

I. RIGHT TO COMPENSATION.

1. Restriction on access to and from wharf.]—The claimant was owner of a lot abutting on False Creek, a tidal navigable arm of the sea. His predecessor in title had, without any authority, built a wharf on the foreshore in front of the lot and when the claimant acquired the lot he also acquired the wharf. The City of Vancouver erected bridge-piers in False Creek which restricted the access to and from the wharf. A claim was made for injurious affection both to the lot and the wharf under the provisions of the Vancouver Incorporation Act, and the arbitrators stated a special case for the opinion of the Court. Held, the claimant was the "occupier" of the property on which the wharf stood, although he had no legal right or claim thereto. The wharf, having been built without proper authorization and interfering, as it did, with the general right of navigation, was a nuisance and the claimant was a trespasser as against the Crown (owner of the foreshore). He was not, however, a trespasser as against the City and was entitled to compensation. A claim based on the expectation that a license might in the future be obtained under the Navigable Waters Protection Act was not too remote to be taken into consideration. As to the claimant's lot, it was injuriously affected because the bridge diminished the claimant's right of access for vessels and also his right to moor them alongside the property. *London* v. *City of Vancouver,* (1934) 49 B.C.R. 328.

2. Injurious affection — two islands — whether expropriation of one for a penitentiary injuriously affects the other.]—The defendant owned two islands off Victoria some 1250 feet apart. The Crown took one of them for penitentiary purposes. Held, there was no severance as they were separate estates nothwithstanding the common ownership. To recover for injurious affection to the island not taken there must be damage arising from something which would, if done without statutory authority, have given rise to a cause of action. Here, the ownership of the remaining island did not enable the plaintiff to claim with respect to the use to which the other was put. *The King* v. *O'Halloran,* (1934) Ex C.R. 67.

3. Expropriation under "Water Act" — rights of owner of land taken.]—While a body authorized to take land compulsorily for specified purposes will be restrained from exercising its powers for different purposes, here the defendant had not transgressed the rule. The plaintiff's right to the water depended on his licence from the Crown. In the defendant's expropriation proceedings the amount of land to be taken and its price will be fixed by arbitrators under the Act. *George Jackson Ltd.* v. *Union Estates Ltd.* (1940) 1 W.W.R. 461.

II. COMPENSATION.

1. Set-off for increased value of property not taken.]—In an arbitration under the Vancouver Incorporation Act with respect to Indian Reserve lands, the arbitrators awarded $7000 as a set-off for the enhanced value of lands not taken. It was held that this was a proper matter for the arbitrators to deal with. *The King* v. *City of Vancouver,* (1933) 47 B.C.R. 243.

2. Dominion Expropriation Act — residential buildings not readily saleable — replacement cost less depreciation.]—The property on account of its size and character was not in demand. Sales in the vicinity were not of comparable properties. In the circumstances, the value to the owner at the time of the expropriation (the basis of compensation allowable), could best be arrived at, so far as the buildings were concerned, by taking their replacement cost and deducting the depreciation. The municipal assessment was not of itself a determining factor but would assist where evidence is given to show the relation between the assessments and the real values. The expense of moving would have been allowed if evidence had been submitted on the point. The customary 10% was allowed for incidental costs and charges. *The King* v. *Spencer,* (1940) 1 D.L.R. 575; (1939) Ex C.R. 340.

3. Injurious affection by reason of severance.]—The Crown expropriated some acreage and a right of way for military purposes across the defendant's property fronting on the Straits of Juan de Fuca near Victoria. The measure of compensation for

injurious affection to contiguous lands not taken is the depreciation in value of the premises damaged. Here the expropriation severed quite an area of land from adjacent lands and it broke the physical contiguity of the shore line, which must injuriously affect some of the lands not taken. The use of the land taken for military purposes will cause some injury to the remainder. *The King* v. *Miller,* (1934) Ex C.R. 1.

CONFLICT OF LAWS.

I. WHAT LAW APPLIES, 77.
II. DOMICILE IN GENERAL, 79.
III. DOMICILE AS TO MATRIMONIAL CAUSES, 80.

I. WHAT LAW APPLIES.

1. Trust deed.] — The trustees resided abroad; the deed was made in British Columbia and the mortgaged property was here; the mortgagor was a resident of British Columbia and the bulk of the provisions of the deed were to be performed here. The deed contained a provision contemplating the appointment of a new trustee pursuant to the Trustee Act of British Columbia. In the deed there was no suggestion that the foreign law should apply. Held, it was the intention of its parties that the law of British Columbia would govern. *Harris Investments Ltd.* v. *Smith,* (1933) 48 B.C.R. 274; (1934) 1 D.L.R. 748.

2. Tort committed in foreign country.] —In actions for damages arising out of a motor-car accident which took place in the State of Washington, it was held that an act done in a foreign country is a tort and actionable here (a) if it is actionable had it occurred here, and (b) if it is not justifiable according to the law of the foreign country. *Williams* v. *Tang,* (1933) 47 B.C.R. 81; (1933) 2 W.W.R. 113.

3. Defence that summons and complaint not served.] — The Washington judgment sued on contained a finding that the defendant had been duly and personally served with the summons and a copy of the complaint. Held, this is at least prima facie evidence that the proper formalities were observed and the onus of displacing it was on the defendant. His story that the process-server had handed him an envelope which he had put aside and never opened was not accepted and the onus upon him was not discharged. The defendant being a resident of the foreign country was subject to its jurisdiction and could be sued in accordance with the law of that country. The plaintiff was entitled to judgment here on the Washington judgment. *Romano* v. *Maggiora (No. 4),* (1936) 51 B.C.R. 352; (1937) 1 W.W.R. 490.

4. Presumption as to law of foreign country.]—The plaintiff is entitled to rely upon a presumption which is a presumption of law, viz., that the general law of the place where the alleged wrongful act occurred is the same as the law of British Columbia. Where the defendant relies upon some difference between the law of the locus and the law of the forum, the onus is upon him to prove it. Such a presumption need not be pleaded or proved. *Young* v. *Industrial Chemicals Ltd.,* (1939) 54 B.C.R. 309; (1939) 4 D.L.R. 392; (1939) 2 W.W.R. 468.

5. Tort in foreign country resulting in death — claim by executor.]—The deceased was a passenger with B., who was driving the car of the defendant company with its authority. The death of the deceased was due solely to B.'s negligence. Held, awarding damages against B. and dismissing the action against the defendant company, the statutes under which the plaintiff claimed (Administration Act and Families' Compensation Act), had no extra-territorial application with the result that recourse must be had to the principles of private international law, under which for the plaintiff to succeed the wrong must either be actionable in the foreign country or punishable there. It was not actionable in the foreign country because at the time this action was brought probate had not been taken or resealed there and the necessary status did not therefore exist. It was punishable in the foreign country because, being punishable here under the Criminal Code, it will be presumed that it is punishable there unless otherwise provided and there was no evidence to meet the presumption. Hence the wrong would have been actionable if committed here and it was punishable in the foreign country and the Court here had jurisdiction as against B. As to the defendant company, there was no proof that a corporation in the foreign country would be responsible vicariously for the acts of its servants and the Court here had no jurisdiction in the case against the defendant company. *Young* v. *Industrial Chemicals Ltd.,* (1939) 54 B.C.R. 309; (1939) 4 D.L.R. 392; (1939) 2 W.W.R. 468.

II. Domicile in General.

1. Testator's Family Maintenance Act.] — The Act applies to land in British Columbia belonging to a testator domiciled abroad, but does not apply to his movables. The testator was born in England and came to live in British Columbia in 1890 where he remained until 1929 when he and his family returned to England, where all remained until his death in 1935. British Columbia became his domicile of choice, but he abandoned it when he returned to England. Upon such abandonment the domicile of origin revived. *In re Rattenbury Estate* and *Testator's Family Maintenance Act*, (1936) 51 B.C.R. 321; (1936) 2 W.W.R. 554.

2. Testator's Family Maintenance Act—shares.]—The testator, domiciled in Alberta, where his will was proved, left shares in a British Columbia company. The probate was not resealed here nor were ancillary letters obtained here. Held that the Court in British Columbia had no jurisdiction to make an order with respect to the shares under the Testator's Family Maintenance Act. Shares are "mobilia" and the "mobilia" doctrine operates in respect of them. When questions of liability to succession duty or the like are concerned they may by statute be subject to taxation in two jurisdictions. But the "lex domicilii" prevails. The courts of the jurisdiction of the "register" will not make an order with respect to shares which may conflict with the order of the courts of jurisdiction of domicil. *In re Testator's Family Maintenance Act* and *in re petition of Laura Elsie Elliott*, (1941) 56 B.C.R. 178; (1941) 1 W.W.R. 356; affirmed (1941) 56 B.C.R. 465 (sub nom. *in re William Stewart Herron, deceased*).

3. Loss of Canadian domicile—status of wife and child.] — Where a person whose domicile of origin was Scotland came to British Columbia with his wife and minor son and after seven years residence here returned to Scotland, it was held that he had acquired a domicile of choice in British Columbia and abandoned it upon his return to Scotland. As a result the domicile of the wife and son changed with that of the husband. There is nothing in the Immigration Act to support the contention that the wife and son could acquire a domicile apart from that of her husband. *In re Immigration Act* and *in re Mary C. Carmichael*, (1942) 57 B.C.R. 316; (1942) 3 D.L.R. 519; (1942) 2 W.W.R. 84; 77 C.C.C. 281.

III. Domicile as to Matrimonial Causes.

1. Effect of invalid divorce on distribution of estate.]—The deceased was at all times domiciled in British Columbia. His first wife obtained a decree of divorce in the State of Washington. The deceased thereupon married again. It was held that the first wife could not impugn the decree and hence could not claim as widow. As the decree was made without jurisdiction, the second marriage was invalid and the second wife was precluded from claiming. *In re Graham Estate*, (1937) 52 B.C.R. 481; (1937) 3 W.W.R. 413.

2. Domicile — evidence of — effect of appearing in foreign court.] — The wife petitioner claimed a judicial separation and the custody of her child. The parties were both natives of Switzerland. They had lived in British Columbia since 1928 and were married in 1929. In 1934 without informing the petitioner the husband made a trip back to Switzerland and there launched divorce proceedings, notice of which reached her through the Swiss Consul. Her solicitor notified the Consul that she and her husband were domiciled in British Columbia and denied the jurisdiction of the Swiss court. The husband returned to Canada and remained here. In 1937 the Swiss court pronounced a decree of divorce and gave the husband the custody of the child which he took from her by force. Upon an examination of all the indicia relied on by the parties and realizing that the onus is upon a party who seeks to show the establishment of a new domicile, it was held, granting a judicial separation and the custody of the child, that the respondent had abandoned his domicile of origin and acquired a new one in British Columbia. The Swiss decree was made without jurisdiction and was invalid here. The fact that the petitioner had pleaded in the Swiss court not only by way of answer but by way of a cross-demand, did not constitute submission to that jurisdiction and did not preclude her from denying the validity of the decree of that court. Consent did not give jurisdiction in the circumstances. *Chatenay* v. *Chatenay*, (1938) 53 B.C.R. 13; (1938) 3 D.L.R. 379; (1938) 1 W.W.R. 885.

3. Divorce—jurisdiction where husband not domiciled in British Columbia.] — A wife cannot acquire a domicile different from that of her husband. There can be only one domicile for a married woman—that of her husband. Subject to modification by statute

a wife must petition for divorce in a Court having jurisdiction where her husband is domiciled. The provisions of the Divorce Jurisdiction Act of the Dominion making desertion by the husband for two years the basis for jurisdiction, are limited to cases in which the husband immediately prior to the desertion was domiciled where the proceedings were commenced. *Jolly* v. *Jolly*, (1939) 55 B.C.R. 61; (1940) 2 D.L.R. 759; (1940) 2 W.W.R. 148.

4. Divorce—acquisition of domicile of choice.] — In an action for damages for breach of promise of marriage the defence alleged that the plaintiff was at the time of the alleged contract, a married woman. She had been previously married but was divorced by a decree of the Oregon Courts and the question was whether her former husband had acquired a domicile in Oregon so as to give the Court of that state jurisdiction to dissolve the marriage. The former husband's domicile of origin was in Michigan. He lived for some years in Alberta and then went to Oregon where he lived for twenty years. A witness from Oregon satisfied the trial judge that he had acquired a domicile there, hence the Oregon decree was made with jurisdiction and the plaintiff was entitled to recover. Held, on appeal, affirming the decision below, that domicile is a question of fact. The conduct and acts of the former husband subsequently to the divorce in Oregon could be taken into account on the question of his intention to settle permanently in Oregon. *Henderson* v. *Muncey*, (1943) 59 B.C.R. 312; (1943) 4 D.L.R. 758; (1943) 3 W.W.R. 242; affirming (1943) 59 B.C.R. 57; (1943) 3 D.L.R. 515; (1943) 2 W.W.R. 120.

See HUSBAND AND WIFE.

See DIVORCE AND MATRIMONIAL CAUSES.

CONSTITUTIONAL LAW.

I. THE ROYAL PREROGATIVE, 82.
II. ROYAL GRANTS, 83.
III. LEGISLATION, 85.

A. In General, 85.
B. Criminal Law and Procedure, 91.
C. Taxation, 93.
D. Food and Drugs, 95.

I. THE ROYAL PREROGATIVE.

1. Bona vacantia—Companies Act.]—A company was struck off the register and, after publication of notice in the Gazette, dissolved. It was subsequently restored under sec. 200 of the Companies Act whereupon it is to be "deemed to have continued in existence . . . . as if it had not been struck off." The order contained a provision that it was made "without prejudice to the rights of parties acquired prior to the date on which the company is restored." After striking off, but before the restoration, the Crown demanded from the Bank, as bona vacantia, certain funds on deposit to the credit of the company. The plaintiff sued the bank and the company for a declaration that the moneys so on deposit were the property of the Crown. Held, dismissing the action, that the "right" protected by the "without prejudice" clause does not include a right of this sort. Held, on appeal dismissing the appeal with respect to the company and allowing it as against the bank, that the language of secs. 199 and 200 of the Companies Act, by necessary implication, shows a clear intention that the Crown should restore this money to the revived company. The defendant bank should not have retained the fund after the dissolution of the company. Held, on further appeal by the Crown to the Supreme Court of Canada, dismissing the appeal, that the Crown's right to the money as bona vacantia arises only where there is no other owner. It cannot be said that the money on deposit was without an owner when the company was not really dead for all purposes. While it was dissolved, it was not dead for all purposes when by the section referring to dissolution provision is also made enabling the company to apply for an order of revivor, with the express enactment that, upon the order being made "the company shall be deemed to have continued in existence . . . as if it had not been struck off." *Attorney-General of British Columbia* v. *The Royal Bank of Canada* (1937) S.C.R. 459; (1937) 3 D.L.R. 393; affirming (1936) 51 B.C.R. 241; (1937) 1 D.L.R. 637; (1937) 1 W.W.R. 273; varying (1935) 50 B.C.R. 268; (1936) 1 W.W.R. 108.

2. Statute of Westminster — effect on appeal to Privy Council "as of right".]—On a motion for leave to appeal to the Privy Council where the value of the matter in dispute was over 500 pounds the objection was taken that the Imperial Order in Council giving an appeal "as of right"

ceased to apply with the passing of the Statute of Westminster in 1931. It was contended that since that statute gave the power to repeal Imperial Orders in Council the appeal was no longer "as of right" and the Court of Appeal should exercise discretion in granting leave. Held, granting the leave as of right, the Statute of Westminster does not repeal any existing legislation, but clothes Canada with power "after the commencement of this Act" to do so. Until such right is exercised existing Imperial legistion continues in force. *May* v. *Hartin* (1945) 62 B.C.R. 544; (1946) 4 D.L.R. 202.

II. Royal Grants.

1. Foreshore of Burrard Inlet—agreement of 1924 between Dominion and Provincial governments — effect of indefeasible title.] — The plaintiffs claimed possession of certain foreshore property by virtue of certificates of indefeasible title, stemming from grants from the Crown Dominion. The defendant was in occupation but had no title; he contended that the root of title in the Dominion was defective in that Burrard Inlet was not a public harbour at Confederation and hence did not become the property of the Dominion. Held, giving judgment for the plaintiffs (1) the validity of the settlement reached in 1924 between the two governments allocating Burrard to the Dominion was not challenged and the registration of the relevant documents in the Land Registration Office made title in the Dominion as from 1924, regardless of the situation before the settlement. (2) Having acquired title the Dominion grants previously made became registrable conveyances and upon registration the plaintiffs had the statutory protection of holders of indefeasible titles. (3) It was not established that the defendant was rightly entitled to the property within the exception in sec. 37 (2) of the Land Registry Act. The certificates of title were conclusive and the evidence as to the use of the area as a public harbour prior to 1871 did not need to be considered. *Kapoor Sawmills Ltd.* v. *Deliko,* (1941) 56 B.C.R. 433; (1941) 2 W.W.R. 554.

2. Coal Harbour — foreshore — grant of waterfront lot "with the appurtenances."] —The Crown Dominion sued for a declaration that it was the owner of a strip of land between high and low tide in Coal Harbour in front of an upland lot owned by the defendant. The claim was based (a) on the ground that His Majesty held the title in 1792 and had never parted with it, or alternatively, (b) on an arrangement made in 1924 between the Dominion and the Province of British Columbia vesting it in the Crown Dominion. The defence claimed (a) on a Crown Grant to a predecessor in title of the upland lot "with the appurtenances," (b) title by prescription of sixty years, (c) on the footing that Coal Harbour was not part of a public harbour at Confederation and hence had never ceased to be Provincial property, (d) that the arrangement between the two governments was ineffective without legislation to implement it. The trial judge found for the plaintiff, holding: Coal Harbour was a part of Burrard Inlet and hence a part of a public harbour and the property of the Dominion; the grant of the upland lot "with the appurtenances" did not include the foreshore in front of it; the arrangement between the two governments made by order-in-council was effective to transfer the administrative control from one to the other. Held, on appeal reversing the trial judge, that Coal Harbour was not, although Burrard Inlet was, a public harbour in 1871; the arrangement was ineffective without legislation. Held on further appeal to the Supreme Court of Canada, restoring the judgment of the trial judge, (a) Coal Harbour was part of a public harbour at the material time; (b) the foreshore did not pass as an appurtenance—land could not be appurtenant to land; (c) the arrangement was valid as being an admission of fact to that effect by the Province; (d) the onus of establishing its acquisition by prescription was not discharged by the defendant; (e) the making of a fill and the erection of buildings thereon could not be justified as an exercise of riparian rights arising out of the title to the upland lot. *Attorney-General of Canada* v. *Higbie,* (1945) S.C.R. 385; (1945) 3 D.L.R. 1; reversing (1944) 2 D.L.R. 425; (1943) 60 B.C.R. 123; reversing (1941) 57 B.C.R. 274; (1942) 3 D.L.R. 66 (1942) 1 W.W.R. 253.

3. Nanaimo Harbour—right to foreshore —effect of certificate of title.]—The plaintiff sued for the recovery of possession of a parcel below high-water mark in Nanaimo Harbour to which he held a certificate of indefeasible title under the Land Registry Act. The defendant claimed, (a) that the foreshore in question passed to the Dominion in 1871 under sec. 108 of the British North

America Act and the plaintiff had no title through it, and (b) that he was adversely in actual occupation of and rightly entitled (sec. 37 (2) of the Land Registry Act.) The trial judge held that the plaintiff was entitled to possession. Held on appeal, affirming the decision below, the onus on the defendant of strict proof of the necessary possession was not discharged. After the issue of a certificate of title in 1920 no possession subsequent to that time could affect the title. As to the ownership in the Dominion, it was not shown that the Crown Dominion was owner in 1871 at Confederation. Five years earlier an official map showed the property as part of a subdivision. *Nanaimo Ice & Cold Storage Ltd.* v. *Blyth* (1946) 63 B.C.R. 150; (1946) 4 D.L.R. 524; (1946) 3 W.W.R. 719.

III. Legislation.

A. In General.

1. Validity of provisions of Game Act as to Indian Reserve.]—The imposition of a close season under the Game Act is a matter of civil rights and a conviction for shooting on an Indian Reserve under that Act will not be set aside as ultra vires because of the provisions of the Indian Act of Canada. *Rex* v. *Morley,* (1931) 46 B.C.R. 28; (1932) 4 D.L.R. 483; (1932) 2 W.W.R. 193; 58 C.C.C. 166.

2. Validity of Deserted Wives' Maintenance Act.] — A motion for prohibition directed to a magistrate, based upon the argument that only a federally appointed judge could deal with the matter, was refused. Held, that as there was a colonial tribunal in existence in British Columbia before Confederation which, in effect, had jurisdiction over the subject-matter of these proceedings, the appeal should be dismissed. *Dixon* v. *Dixon,* (1932) 46 B.C.R. 375.

3. Effect of Bankruptcy Act on provincial Fraudulent Preferences Act.]—Provincial legislation respecting property and civil rights qua property and civil rights, which is always intra vires, where in conflict with intra vires Dominion legislation, including its reasonably necessary ancillary provisions, becomes inoperative to the necessary extent but no more. Hence the provincial Act may be invoked, nothwithstanding sec. 64 of the Bankruptcy Act, where a transfer of goods was made at a time when the transferor was in insolvent circumstances and with a view of giving one creditor a preference over other creditors. *Gard* v. *Yates,* (1936) 50 B.C.R. 353; (1936) 1 W.W.R. 212; 17 C.B.R. 168.

4. Power to legislate in respect of alimony and maintenance.]—While divorce is a matter of status, alimony is a matter of property and civil rights, and so is within Provincial jurisdiction. Divorce rules 65 to 70 dealing with alimony and maintenance are intra vires of the Provincial Legislature. *Langford* v. *Langford,* (1933) 50 B.C.R. 303; (1936) 1 W.W.R. 174.

5. Whether the Farmers' Creditors Arrangement Act is intra vires of Parliament.]—Notwithstanding that the Act provides for compositions by which bankruptcy is avoided, but which assume insolvency, it is none the less within the sphere of bankruptcy legislation rather than that of property and civil rights or matters of a merely local or private nature in a province. The provisions for the reduction of a farmer's debt or for an extension of time for payment are familiar features of compositions. The Act does not enable a creditor to be deprived of his security. The contention that it was mainly designed to keep the debtor farmer on his land at the expense of his creditors was not accepted. *A.G. for British Columbia* v. *A.G. for Canada—re Farmer's Creditors Arrangement Act,* (1937) A.C. 391; 18 C.B.R. 217; (1937) 1 W.W.R. 320; affirming (1936) S.C.R. 384; 17 C.B.R. 359.

6. Natural Products Marketing (British Columbia) Act—validity of.]—The legislation substantially interfered with interprovincial and export trade in natural products and is ultra vires as trenching on the federal powers with respect to trade and commerce. The imposition of a licence fee is an indirect tax. *Hayward* v. *B.C. Lower Mainland Dairy Products Board,* (1937) 2 W.W.R. 401.

7. Effect of opinion given under Constitutional Questions Determination Act.]—Sec. 7 of the Constitutional Questions Determination Act makes the opinion given pursuant to a reference a judgment of the Court of appeal or of a judge of the Supreme Court, as the case may be. A trial judge disregarded the opinion as certified by the Court of Appeal on such reference. Held, allowing the

appeal, the proper action for the judge to have taken was to follow the opinion of the Court of Appeal as certified under the Act. *Lowe Chong Co.* v. *B.C. Coast Vegetable Marketing Board,* (1937) 51 B.C.R. 559; (1937) 3 W.W.R. 406.

8. The Federal Natural Products Marketing Act—whether intra vires of Parliament.]—The provisions of the Act cover transactions in any natural products completed within a province and have no connection with interprovincial or export trade; hence property and civil rights are affected. It was, however, contended that the Act fell within class 2 of sec. 91 of the British North America Act (the regulation of trade and commerce) but such regulation of trade and commerce does not permit the regulation of individual forms of trade or commerce confined to a province. The Act invades the provincial field and is invalid. Notwithstanding sec. 26 as to the severability of ultra vires provisions the whole structure of the Act is so inextricably interwoven that there are no severable provisions. Moreover the sections claimed to be severable are incidental and ancillary to the main legislation and fall with it. *A.G. for British Columbia* v. *A.G. for Canada re Natural Products Marketing Act,* (1937) A.C. 377; 67 C.C.C. 337; (1937) 1 W.W.R. 328; affirming (1936) S.C.R. 398; 66 C.C.C. 180; (1936) 3 D.L.R. 622.

9. Provincial Natural Products Marketing Act—whether encroaching on Dominion powers.] — The Natural Products Marketing (British Columbia) Act was held by the trial judge to be ultra vires. The Court of Appeal following its decision [(1937) 4 D.L.R. 298] upon a reference under the Constitutional Questions Determination Act, held that the Act was intra vires. On further appeal to the Privy Council, it was held, affirming the decision below: (a) the Act does not encroach on the class of subjects enumerated in sec. 91 (2) of the British North America Act. It is clearly confined to dealings with the natural products situate within the province. The power of the Dominion as to trade and commerce does not interfere with the regulation for legitimate provincial purposes of particular trades or businesses so far as the trade or business is confined to the province. The pith and substance of the Act is the regulation of particular businesses entirely within the province; (b) the regulation being intra vires the ordinary method of regulating, viz. by a system of licenses, is valid. If licenses are granted it follows that the collection of license fees is unobjectionable as raising a revenue for local or provincial purposes or as fees for services rendered. The licensing feature does not constitute an invasion of sec. 91 (3) of the British North America Act; (c) within its appointed sphere the Provincial Legislature is as supreme as any other Parliament and the objection that it has not authority to delegate its legislative powers to the Lieutenant-Governor in Council is without substance. *Shannon* v. *Lower Mainland Dairy Products Board,* (1938) 4 D.L.R. 81; (1938) 2 W.W.R. 604; (1938) A.C. 708.

10. Victoria City Debt Refunding Act.] —Under this provincial statute the City of Victoria was enabled to extend the time for the repayment of its debentures and to alter the rate of interest during the extended period. The trial judge held that the Act was ultra vires as destroying the civil right of holders outside the Province and as arbitrarily fixing a different rate of interest for such holders. Held, on appeal reversing the decision below, that the Act was within the jurisdiction of the Province as dealing with "property and civil rights," and was, in effect, no more than an extension of the moratorium legislation passed from time to time since 1914. The right to enforce the "substance of the obligation" was a civil right exercisable solely within the Province and hence the Act did not derogate from any extra-territorial civil rights. As to interest the Act was one "in relation to" a subject matter assigned to the Province, and was not one "in relation to" interest. although some of its provisions affected interest as an incident to the general scheme. *Day* v. *Corporation of the City of Victoria,* (1938) 53 B.C.R. 140 (1938) 4 D.L.R. 345: (1938) 3 W.W.R. 161.

11. The Farmers' Creditors Arrangement Act (Dominion) — application to Crown (Provincial.]—The Dominion Act is binding on the Crown (Provincial). The fact that the plaintiffs were in debt on a preemption of Provincial lands made them creditors within the meaning of the Dominion Act, and a proposal for their relief confirmed by a Federal Board of Review was binding on the Crown (Provincial. *Lindsay* v. *Attorney-General for the Province of British Columbia,* (1939) 54 B.C.R. 185; (1939) 4 D.L.R. 762; (1939) 2 W.W.R. 145; 20 C.B.R. 383

12. Price fixing — Coal and Petroleum Products Control Board Act.]—The trial judge held the Act to be ultra vires. The Court of Appeal reversed the decision below and held the act valid following *Shannon* v. *Lower Mainland Dairy Products Board,* (1938) A.C. 708. On further appeal to the Supreme Court of Canada the validity of the Act was upheld as being legislation confined to regulating transactions that take place wholly within the Province. It was an Act to regulate particular businesses entirely within the Province. There was nothing in the language of the statute which necessarily gives to the enactment an extra-territorial effect. The Court was entitled to look at the report of a Royal Commission to ascertain what was present in the mind of the Legislature in considering the Act, but the statements therein should not be taken as facts. *Home Oil Distributors Ltd.* v. *Attorney - General of British Columbia,* (1940) 2 D.L.R. 609; (1940) S.C.R. 444; affirming (1939) 54 B.C.R. 48; (1939) 3 D.L.R. 397; (1939) 2 W.W.R. 418; reversing (1939 1 W.W.R. 666.

13. Dentistry Act — foreign dentist advertising in British Columbia.] — The Act makes it an offence for an unregistered person within the province to hold himself out as being entitled to practise dentistry either within the province or elsewhere. An unregistered dentist in Spokane was advertising in a Nelson newspaper inviting readers to go to his office in the former city for dental work. The trial judge granted an injunction holding that the Act fell within sec. 92 of the British North America Act as being a matter of merely local or private nature in the province. On appeal the decision below was affirmed. On further appeal to the Supreme Court of Canada it was held, dismissing the appeal, that the legislation was intra vires as being directed against acts done within the province. There was no circumstance to rebut the prima facie conclusion that the Act was within the provincial legislative sphere. *College of Dental Surgeons of British Columbia* v. *Cowen,* (1941) S.C.R. 321; (1941) 2 D.L.R. 687; affirming (1940) 55 B.C.R. 506; (1941) 1 D.L.R. 565; (1941) 1 W.W.R. 9; affirming (1940) 55 B.C.R. 370; (1940) 4 D.L.R. 755; (1940) 3 W.W.R. 242.

14. Whether certiorari ousted by Exchequer Court's powers — assessments under Income War Tax Act.]—Sec. 66 of the Income War Tax Act gives the Exchequer Court exclusive jurisdiction to hear and determine all questions arising in connection with any assessment made under the Act. It was sought by certiorari to question the actions of a board of referees dealing with the assessment of the appellant company. The judge held that the Exchequer Court alone had jurisdiction. On appeal it was contended that sec. 66 could not affect the power of the Supreme Court of British Columbia to issue a writ of certiorari because the Exchequer Court being a statutory court had no common law powers. Precise words would be necessary to take away the jurisdiction of the Supreme Court of British Columbia in certiorari. Held, affirming the decision below, the intention was to give to the Canadian Exchequer Court the same jurisdiction as that enjoyed by the English Exchequer Court (which included the power to issue a writ of certiorari) and to oust the jurisdiction of all other courts where exclusive jurisdiction was conferred —sec. 66 does that in clear and express words. Moreover, the legislation comes within secs. 101 and 91 (3) of the British North America Act. *Nanaimo Community Hotel Ltd.* v. *Board of Referees under the Excess Profits Tax Act,* (1944) 61 B.C.R. 354; (1945) 3 D.L.R. 225; (1945) 2 W.W.R. 145; affirming (1944) 60 B.C.R. 558; (1944) 4 D.L.R. 638.

15. Whether Hours of Work Act applies to metalliferous mines.] — The Hours of Work Act in effect fixes an eight-hour day and a forty-four hour week. It contains a clause providing that it shall not in any way limit or affect the provisions of The Metalliferous Mines Regulation Act. The latter Act also provides for an eight-hour day but is silent as to a work-week. Held, on a reference under the Constitutional Questions Determination Act, the provisions of the Hours of Work Act apply since the two statutes can be read together. It was contended that P.C. 1003 — Wartime Labour Relations Regulations — having fixed hours of work in the metalliferous mines the Provincial power is ousted. P.C. 1003 however deals with procedural matters and the bargaining parties are left free to make their own agreements in conformity with the relevant provincial laws. P.C. 1003 and the Hours of Work Act can be read together, each applicable in its own legislative sphere. *Reference re application of Hours of Work Act to Metalliferous Mines,* (1947) 2 D.L.R. 737; (1947) 1 W.W.R. 841.

16. Whether Provincial Hours of Work Act applied to employees of hotel oper-

ated by railway company under Dominion jurisdiction.] — The Provincial Hours of Work Act in effect fixes an eight-hour day and a forty-four-hour week. It was referred to the Court of Appeal under the Constitutional Questions Determination Act to determine whether the Hours of Work Act applied to employees of the Empress Hotel at Victoria operated by the C.P.R. The Court of Appeal held that it so applied. On appeal to the Supreme Court of Canada the decision was affirmed. On further appeal to the Privy Council it was held, dismissing the appeal, (a) the argument that the company's activities have become so important that Parliament could deal with them as relating to the peace, order and good government of Canada, was invalid: they fell within sec. 92 of the B.N.A. Act, (b) the hotel was not a part of the company's railway works and undertaking within sec. 92 (10) (a), but was a separate undertaking, (c) the hotel did not fall within the definition of "railway" in the Railway Act and hence was not a work for the general advantage of Canada under sec. 92 (10) (c) of the B.N.A. Act. *Reference re application of Hours of Work Act to C.P.R. hotel employees,* (1950) A.C. 122; (1950) 1 D.L.R. 721; (1950) 1 W.W.R. 220; affirming (sub. nom *C.P.R.* v. *A.G. B.C.*) (1948) S.C.R. 373; (1948) 3 D.L.R. 417; affirming (1947) 1 W.W.R. 927; (1947) 2 D.L.R. 723.

B. Criminal Law and Procedure.

1. Action against police officer.] — Sec. 1143 of the Criminal Code requires that the action shall be tried in the judicial division where the act was committed. Sec. 1144 requires that notice be given to the defendant one month before the commencement of the action. In an action against Vancouver police officers for false imprisonment alleged to have taken place in California, the effect of non-compliance with these sections was raised as a question of law. Held, on appeal, upon an equal division of the Court, that these sections apply only to acts done in Canada and do not constitute a bar to the plaintiff's claim. *Caldwell* v. *Reilly,* (1931) 45 B.C.R. 342; (1932) 3 D.L.R. 149; (1932) 1 W.W.R. 890; 58 C.C.C. 241. (Affirmed by Supreme Court of Canada but not reported).

2. Ill-treatment of child—whether penalty under Infants Act trenches on criminal law.]—Sec. 79 of the Provincial Infants Act makes it an offence punishable by fine and imprisonment to ill-treat a child in one's custody. It was contended on certiorari that a conviction under the section was invalid since it dealt with a criminal offence which Parliament alone could establish. Held, dismissing the application, the presumption is in favour of the legality of the section. Similar statutes are in force throughout Canada. The section does not invade exclusive jurisdiction conferred on Parliament with respect to criminal law. It comes in a domain where the two jurisdictions overlap in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet, the Dominion legislation must prevail. Here the section simply implements and gives effect to the provincial legislation with respect to children. *Rex.* v. *Dowdell,* (1933) 4 D.L.R. 794; (1932) 46 B.C.R. 267; (1932) 3 W.W.R. 297; 60 C.C.C. 164.

3. Whether sec. 498A of Criminal Code intra vires—affecting civil rights.] — Sec. 498A makes it an offence to discriminate against competitors of purchasers by the use of discounts, rebates, etc., or to cut prices for the purpose of destroying competition. On a reference to the Supreme Court of Canada it was held by a majority of the Court that certain sub-sections were intra vires. Held on appeal to the Privy Council, the whole section was intra vires. The criterion of "wrongness" is the intention of Parliament in the public interest to prohibit the act or omission made criminal. The only limitation is that Parliament shall not in the guise of enacting criminal legislation in truth and substance encroach on any of the classes of subjects in sec. 92 of the British North America Act. There seems to be nothing to prevent the Dominion if it thinks fit in the public interest from applying the criminal law generally to acts and omissions which so far are only covered by provincial enactments. *Attorney-General for British Columbia* v. *Attorney-General for Canada,* 67 C.C.C. 193; (1937) A.C. 368; affirming (1936) S.C.R. 363.

4. Whether appeal lies in habeas corpus matter where conviction is for criminal offence.]—The provisions of sec. 6 of the Court of Appeal Act granting a right of appeal to the Court of Appeal in habeas corpus matters are inoperative if the applicant for the writ is detained by virtue of a conviction for an offence under the Criminal Code. The Dominion Parliament has

exclusive jurisdiction to authorize such an appeal under sec. 91 (27) of the British North America Act and a Provincial legislature has no such power under sec. 92 (13). *Rex* v. *Storgoff*, (1945) S.C.R. 526; (1945) 3 D.L.R. 673; 84 C.C.C. 1; overruling (1944) 60 B.C.R. 464; 82 C.C.C. 153; reversing 82 C.C.C. 111.

C. Taxation.

1. Dairy Products Sales Adjustment Act.]—The levies contemplated by the Act are taxes and, having a tendency to affect the price of milk to the consumer, they are indirect taxes and beyond the competency of the Provincial authority. *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.*, (1932) 45 B.C.R. 191; (1932) 2 D.L.R. 277; (1932) 2 W.W.R. 41; affirming (1931) 3 W.W.R. 384; affirmed by Judicial Committee of Privy Council, (1932) W.N. 238; (1932) 3 W.W.R. 639; (1933) A.C. 168.

2. Fuel-oil tax—direct or indirect.]—The Fuel-oil Tax Act of British Columbia imposes a tax of one-half cent a gallon on consumers of fuel oil in the Province. In an action by the Attorney-General to collect the tax, the trial judge held that it was ultra vires as being an indirect tax, viz. a duty of excise not within the competence of the Province and that it invaded the field of trade and commerce reserved to the Dominion. The Court of Appeal upheld the decision of the trial judge. On further appeal to the Privy Council, it was held, reversing the judgments below, that the tax was direct in that it was demanded from the very persons who it is intended or desired should pay it. As the tax did not relate to any commercial dealing with the commodity, it did not fall within the category of customs or excise duties, both because they are by nature indirect taxes and having regard to sec. 122 of the British North America Act, 1867. *Attorney-General for British Columbia* v. *Kingcome Navigation Co. Ltd.*, (1934) A.C. 45; (1933) 3 W.W.R 353; reversing (1934) 1 D.L.R. 31; (1933) 3 D.L.R. 364; affirming (1933) 47 B.C.R. 114; (1933) 1 D.L.R. 688.

3. Provincial succcession duties; direct or indirect.] — Where the executor who applies for probate becomes, as he does under the Succession Duty Act, personally liable for the duty, for which he is obviously expected to indemnify himself out of the estate, the taxation is indirect and beyond the competency of the Province. *Attorney-General for British Columbia* v. *Col*, (1934) 48 B.C.R. 171; (1934) 3 D.L.R. 488; (1934) 2 W.W.R. 481.

4. Taxation of Crown property.]—Sec. 125 of the British North America Act states that no lands or property belonging to Canada or any Province, shall be liable to taxation. The ad valorem fees payable upon the registration of title to land under the Land Registry Act do not constitute taxation because their payment is not compulsory. The Crown's title under the Expropriation Act is perfect without registration and hence the Crown need not take advantage of the Land Registry Act unless it desires to do so. *Attorney-General of Canada* v. *Registrar of Titles of Vancouver Land Registration District*, (1934) 48 B.C.R. 544; (1934) 4 D.L.R. 764; (1934) 3 W.W.R. 165.

5. Marketing legislation.]—The Natural Products Marketing (British Columbia) Act was not in any particular beyond the powers of the Provincial Legislature. It did not interfere with the Federal power to regulate trade and commerce. The license fees imposed did not constitute indirect taxation. The licensing contemplated by the Act was within the powers of the Legislature. *In re Constitutional Questions Determination Act* and *in re Natural Products Marketing (British Columbia) Act*, (1937) 52 B.C.R. 179; (1937) 4 D.L.R. 298; (1937) 3 W.W.R. 273.

6. Indirect tax—marketing legislation.]—Where under the guise of a scheme to regulate the milk industry a Board was, in effect, taking from one milk producer supplying the fluid market a portion of his returns, and giving it to the other producers supplying the non-fluid market, for the purpose of equalization, it was held by the Court of Appeal that what was being done constituted an indirect tax and was beyond the powers of the Province. The decision was affirmed by the Supreme Court of Canada. *Turner's Dairy Ltd.* v. *Lower Mainland Dairy Products Board*, (1941) S.C.R. 573; (1941) 4 D.L.R. 209; affirming (1940) 56 B.C.R. 103; (1941) 2 D.L.R. 279; (1941) 3 W.W.R. 342; affirming (1940) 3 W.W.R. 42.

7. Competing claims of Workmen's Compensation Board and Minister of Revenue under Dominion Income War

Tax Act.]—A logging operator failed to pay his Workmen's Compensation payments and failed to set aside the money deducted from his employees for income tax as required by sec. 92 (7) of the Income War Tax Act. The Workmen's Compensation Board garnisheed one B. and he paid some $1800 into Court. The Department of Income Tax intervened and claimed the fund as being money deducted from the logging operator's employees for income tax. Held, the Board was in the circumstances entitled to priority. The effect of sec. 92 is to make the employer a trustee for the Dominion Government of the sums deducted from his employees, but only against the fund actually set aside, or such moneys as could be followed as belonging to or having come from the fund. Here it was not established that the money garnisheed came out of the trust fund or should have been paid into it. The Dominion has no greater rights than any person would have against a trustee handling trust funds. *Workmen's Compensation Board* v. *Graham*, (1944) 61 B.C.R. 36; (1945) 1 D.L.R. 557.

D. Food and Drugs.

1. Food and Drugs Act.] — Where the adulteration of sausage is not proved to be injurious to health, the provisions of the Act prohibiting the sale of adulterated food are nevertheless intra vires of Parliament. *Rex* v. *Goldsmid,* (1932) 45 B.C.R. 435.

2. Dominion Food and Drugs Act.] — The provisions forbidding the adulteration of food are intra vires of the Parliament of Canada as constituting an exercise of Federal powers over criminal law. The fact that injury to property or person is not involved does not take the legislation out of the field of criminal law. *Standard Sausage Co. Ltd.* v. *Lee,* (1933) 47 B.C.R. 411; (1933) 4 D.L.R. 501; (1934) 1 W.W.R. 81; 60 C.C.C. 265 and 61 C.C.C. 95.

See CROWN.

See MARKETING LEGISLATION.

See REGISTRATION OF TITLE TO LAND.

See STATUTES.

CONTEMPT OF COURT.

1. Undertaking given at adjournment of injunction application.]—The plaintiffs moved that the defendants be committed to gaol for contempt in failing to carry out an undertaking given when a motion for an injunction was stood over. Both parties filed affidavits as to the facts upon which it was alleged the undertaking had not been carried out. As there was no cross-examination on the affidavits many matters remained uncertain. Held, dismissing the motion that an undertaking entered into with the Court is equivalent to an injunction. An application to commit for violation of a order of the Court for an injunction is a matter strictissima juris. The evidence was not sufficiently clear that there had been an actual breach. *Lowe Chong* v. *Gilmore,* (1936) 51 B.C.R. 157; (1936) 3 W.W.R. 595.

2. Divorce—failure to pay wife's costs—committal.]—A respondent was committed to gaol for contempt of Court in refusing to comply with an order to pay his wife's costs. An application for his release was based on Order LXIX which requires maintenance money for the person arrested to be furnished in the cases mentioned in the order. Held, dismissing the application that the order for arrest was not one of the writs mentioned in Order LXIX. *Mattock* v. *Mattock (No. 3)*, (1937) 52 B.C.R. 301; (1937) 3 W.W.R. 317.

3. Editorial comment by defendant publisher.]—The plaintiff in April 1939 brought action for libel alleged to have been published in August 1938. A week after the action was commenced, one of the defendants who was the publisher of a newspaper, called attention in an editorial to the delay that had taken place in bringing the action and to the fact that none of the others in the position of the plaintiff had taken action. The editorial went on to say that if intimidation was was the object of the action it would fail. The plaintiff moved to commit this defendant for contempt of court as tending to prejudice a fair trial of the action. Held, dimissing the motion, that at least six weeks would elapse before the trial, by which time much of the comment would be forgotten. The editorial was not calculated really to interfere with a fair trial of the action. Committal is a weapon to be used sparingly and always with reference to the interests of the administration of justice. *Staples* v. *Isaacs and Harris*, (1939) 54 B.C.R. 108; (1939) 4 D.L.R. 556; (1939) 2 W.W.R. 540; 72 C.C.C. 259.

4. Judicial separation — failure to pay wife's costs as ordered.]—While it is true

that a husband who disobeys an order for payment of his wife's costs is in contempt of Court, and may be barred from appearing in answer to her petition, that course should be taken only after considering whether the disobedience is due to his fault or his misfortune. The inherent jurisdiction to make so severe an order is based on his contumacy. Where a husband was deprived of a reasonable opportunity to purge his contempt before the trial proceeded, the order barring him from appearing at the trial was set aside. *Wessels* v. *Wessels*, (1940) 55 B.C.R. 476; (1941) 1 D.L.R. 606; (1941) 3 W.W.R. 500.

5. Necessity to show endorsement of warning on order said to have been disobeyed—rule 573.]—An order requiring a person to do an act must be endorsed with a warning to the person of the consequences of disobedience, and the affidavit of service in support of an application for attachment must show that it was so endorsed. *Williams* v. *Williams*, (1943) 59 B.C.R. 359; (1944) 1 W.W.R. 21.

6. Prejudicial to a fair trial.]—In respect to newspaper publications, during the course of the proceedings no comment or news items can be published by a newspaper which may be prejudicial to a fair trial. When the trial is over the public and the press have the right to criticize in a fair and candid spirit all the incidents of the trial and in the same spirit to dissect the public conduct of all concerned, including the judges themselves. *Rex* v. *Hawken*, (1944) 60 B.C.R. 64; (1944) 2 D.L.R. 116; (1944) 1 W.W.R. 408; 81 C.C.C. 80.

7. Failure to serve copies of affidavits in support on motion to commit.] — A motion to commit being one which affects the liberty of the subject is a matter strictissima juris and exact compliance with the rule (699) is required. Assuming that the failure to serve copies of the affidavits was a mere irregularity curable by rule 1037, this was not a case for the exercise of the discretion to condone it. The fact that copies had been served 14 days previously on another motion did not avail. *Claggett* v. *Claggett*, (1945) 61 B.C.R. 238; (1945) 3 D.L.R. 414; (1945) 2 W.W.R. 191.

See DIVORCE AND MATRIMONIAL CAUSES.

CONTRACT.

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I. OFFER AND ACCEPTANCE.

1. Whether contract concluded.] — The defendant handed to the plaintiff in Vancouver a written option for the sale of shares. The plaintiff telegraphed its acceptance to the defendant in Oregon. There was no evidence that the telegram reached the defendant nor was there anything to indicate that the option might be accepted by telegram. In such a case the telegraph office does not become the agent of the offeror unless the offer had been made by telegram and an acceptance by telegram thereby impliedly authorized, or unless the circumstances are such as to warrant the conclusion that acceptance by telegram was impliedly authorized. As a result there was no proof of any acceptance of the option and hence no breach. The order giving leave to issue the writ for service ex juris was set aside. *Smith & Osberg Ltd.* v. *Hollenbeck*, (1938) 53 B.C.R. 296; (1938) 3 W.W.R. 704.

2. Intention to be gathered from conduct.]—If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms. *Lawson* v. *W. R. Carpenter Oversea Shipping Co. Ltd.*, (1944) 60 B.C.R. 536; (1944) 4 D.L.R. 784; (1945) 1 W.W.R. 5.

3. Contract or no contract—silent as to duration—notice to terminate.]—The trial judge found that the defendant (a sawmill operator) entered into an oral agreement with the plaintiffs (wood dealers) for the sale of wood fuel from the mill at stipulated prices, on condition that the plaintiffs would keep the mill-wood bunker clean, in the sense that the wood would not accumulate in the bunker. The defendant terminated the agreement which specified no period of duration, by a six-day notice. The trial judge held such a notice unreasonable and referred it to the registrar to assess damages on the basis that a six months' notice would have been reasonable. Held on appeal, affirming the judgment below, the contention of the appellant that there was no contract, that the arrangement was nudum pactum and that there was merely a continuing offer by the defendant subject to revocation at any time, could not be accepted. The transaction was founded on mutual recognition of enforceable reciprocal obligations. The defendant consented to the plaintiff's having the wood at stated prices on condition the plaintiffs gave a simultaneous consent to keep the bunker clear. A further appeal to the Supreme Court of Canada was dismissed. *Gill Brothers* v. *Mission Sawmills Ltd,* (1945) S.C.R. 766; (1945) 4 D.L.R. 449; affirming (1945) 61 B.C.R. 435; (1945) 3 D.L.R. 506; (1945) 2 W.W.R. 337; affirming (1944) 3 W.W.R. 310.

4. Failure to make out a contract—likewise no claim for a quantum meruit.]—The plaintiffs alleged that the deceased, man and wife, as proprietors of a business had agreed with them that if the plaintiffs would continue to work at the business during the lives of the deceased they would have the business when the survivor of the proprietors died. The plaintiffs continued to work, but the deceased made no provision in their wills to implement the alleged agreement. Held, dismissing the action, no contract with the clearness and definiteness required by the law was established. The salaries of the plaintiffs were not lessened after the date of the alleged agreement. The evidence disclosed no acceptance of the alleged offer even if an offer was proved. The salaries paid were not generous, but could not be said to be so grossly inadequate as to buttress the plaintiffs' contention. As to a quantum meruit it, too, implied the existence of a binding contract with the remuneration not fixed. *Porter* v. *The Toronto General Trusts Corporation,* (1946) 62 B.C.R. 468.

II. Parties.

1. Parties alone entitled to sue.]—In a policy of automobile insurance the insurer agreed to indemnify, not only the insured, but also persons entrusted with the vehicle. Held on appeal, reversing the trial judge, who found that the insured was entitled to require the insurer to indemnify the person to whom the vehicle had been entrusted, that the insured had no status to enforce such a claim. *Hornbrook* v. *Toronto Casualty Fire and Marine Insurance Co.,* (1932) 46 B.C.R. 383.

2. Whether "joint" covenant or "joint and several" — position of executors of covenantor.]—Where the contract entered into by the deceased ran, "and S. and R. do and each of them doth hereby covenant," the obligation was joint and several and his estate was bound. *E. A. Towns Ltd.* v. *Harvey,* (1946) 4 D.L.R. 160; affirming (1946) 2 D.L.R. 72; (1945) 62 B.C.R. 168; affirming (1945) 2 D.L.R. 782; (1945) 61 B.C.R. 414.

III. Statute of Frauds.

1. Oral agreement to will land followed by oral agreement to pay money.] — The defendant in consideration of the plaintiffs taking charge of his home during his lifetime agreed orally that it would be theirs after his death. His plans having been changed he promised them orally that if they would give up their rights and leave his home, he would pay them $1000 before the end of the year. The plaintiffs acquiesced but payment was not made and they sued. Held, awarding judgment to the plaintiffs, (1) the first oral agreement could not be enforced by reason of the Statute of Frauds, the agreement being one relating to an interest in land; (2) the acts of part performance are not necessarily referable to the contract in view of the defence; (3) the second oral agreement (the one sued upon) was supported by good consideration, the release from the former obligation, even though it was based on a mistaken conception by the defendant of his legal rights. *Fairgrief* v. *Ellis,* (1935) 49 B.C.R. 413; (1935) 2 D.L.R. 806; (1935) 1 W.W.R. 363.

2. Agent for undisclosed principal.]—The plaintiff's agent wrote to the defendant as owner offering to take a lease for restaurant purposes and setting out the terms, but identifying the plaintiff as lessee only by referring to him as "a client." The owner accepted the proposal in writing, together with a cheque enclosed with the letter. The name was disclosed a day or two later. Then the owner repudiated and when sued, pleaded sec. 4 of the Statute of Frauds. Held, ordering specific performance, following *Potter* v. *Duffield,* (1874) 43 L.J. Ch. 472, that the statute will be satisfied if the parties are sufficiently described so that their identity cannot be fairly disputed. Where an agent contracts, parol evidence may be given to show who is the principal. Here the offer was made on behalf of a definite client —one who wanted the premises for the purpose of a restaurant and on whose behalf a cheque was enclosed as stated in the letter. There was a very definite identification of the prospective lessee. *Litras* v. *Mattern,* (1938) 52 B.C.R. 500; (1938) 2 D.L.R. 401; (1938) 1 W.W.R. 381.

3. Oral contract for delivery of goods—completion within one year—sec. 4.]—Notwithstanding that the parties to an oral contract for the sale of goods do not expect that all deliveries will be made in one year, if the purchaser has the right to accelerate deliveries so that the contract is not incapable of being performed within one year, an action on the contract is not barred by sec. 4 of the Statute of Frauds. *Richmond Wineries Western Ltd.* v. *Simpson,* (1940) 2 D.L.R. 481.

4. Sufficiency of memorandum — denial of liability therein.]—Letters written by a party sought to be charged which set out the terms of the alleged contract, but contain a denial of liability may afford a sufficient memorandum in writing to satisfy the Statute of Frauds. Here the memorandum was sufficient but the contract pleaded was not proved. *Hird* v. *Bessemyer,* (1942) 1 W.W.R. 233.

5. Not to be performed within one year —performance on one side.]—It was contended that the agreement was one which under the Statute of Frauds had to be in writing, and that therefore any variation of it to be valid, had also to be in writing. The contention was based on a clause that before or after its termination the plaintiff would not divulge any trade secrets and that his obligation would extend beyond the year into the future. Held, as the plaintiff might have died within the year all his obligations under the contract could have been carried out within the year and the statute did not apply. It will apply only to an agreement which appears from its terms to be incapable of performance within the year. *Van Snellenberg* v. *Cemco Electrical Manufacturing Co. Ltd.,* (1946) 4 D.L.R. 305; (1947) S.C.R. 121; affirming (1945) 61 B.C.R. 507; (1946) 1 D.L.R. 105; (1945) 3 W.W.R. 369.

6. Employer buying farm at employee's request—whether relation that of vendor and purchaser or trustee and cestui que trust.] —The plaintiff desired to hold the services of the defendant and bought a nearby farm which the defendant occupied. The trial judge found that the arrangement was that the farm was to be the property of the defendant to be paid for partly out of a portion of his wages and partly from the proceeds of the sale of a property in Saskatchewan, and that the plaintiff took title only for security. When prices went up he (as the judge held) decided to keep the place for himself. It was held that the plaintiff was trustee of the farm for the defendant. Held on appeal, affirming the decision below, the plaintiff held the property in trust and as security for the payment of the money laid out by him. No technical expressions are necessary to create an express trust; any language will suffice if it is clear that the party using it considers himself a trustee and adopts that character. It is a fraud on the part of a person to whom land is conveyed as trustee, and who knows it was so conveyed to deny the trust and claim the land himself. Hence the agreement may be proved by parol evidence notwithstanding the Statute of Frauds. The defendant was entitled to a declaration that the plaintiff bought the farm as trustee and that it was so held subject to a charge for the amount due the plaintiff. *Brown* v. *Storoschuk,* (1946) 63 B.C.R. 225; (1946) 3 W.W.R. 641.

IV. Consideration.

1. Based on mistaken conception of legal rights.]—The defendant had made an agreement with the plaintiffs which was not enforceable by reason of sec. 4 of the Statute of Frauds. Before the time for performance of the agreement had arrived the defendant changed his plans and promised the plaintiffs orally that if they would

give up their rights under the agreement he would pay them $1000. Held, awarding judgment for the plaintiff, the new agreement was supported by good consideration, viz., the release from the former obligation, even though it was based on a mistaken conception by the defendant of his legal rights. *Fairgrief* v. *Ellis,* (1935) 49 B.C.R. 413; (1935) 2 D.L.R. 806; (1935) 1 W.W.R. 363.

V. CONSTRUCTION.

1. Sale of insurance business—free of all encumbrances — adjustment on certain date.]—The plaintiff purchased the defendant's insurance, brokerage and real estate business. The agreement provided for a transfer of the assets "free of encumbrances" except a mortgage not material here. There was a provision that all adjustments of insurance and other outgoings and incomings were to be made as of September 1st, 1927. On that date the vendor owed more to the insurance companies than was due it for premiums by policy holders. Held, the agreement meant that if on September 1st, after making all proper allowances, there was more owing to the companies than was owing by the vendor's customers for premiums, then the vendor would have to reimburse the purchaser therefor. *Miller* v. *Winch,* (1933) 3 W.W.R. 215.

2. Trade custom—how established.]—The plaintiff sold oranges to the defendant. The latter resold them to the trade and was obliged to make adjustments with purchasers for bad fruit. In an action for the price the defendant, without pleading custom, was permitted to set up a trade usage that was in effect incorporated in the contract allowing the defendant to charge back any allowance bona fide made to his customers for oranges in bad condition. Such a usage was reasonable and recognized in the trade. *Piercy Lumber Co. Ltd.* v. *Oppenheimer Bros. & Wood Ltd.,* (1933) 3 W.W.R. 300.

3. "Engage in".] — A covenant against engaging in competition given by the vendor of a business will not be broken where the covenantor merely becomes an employee of a competitor. *Knight* v. *Fairall,* (1933) 48 B.C.R. 61; (1934) 1 W.W.R. 131.

4. Whether implied term may be read into a contract.]—The defendant took an option for six months on mining shares and agreed with the plaintiff for good consideration to pay him a commission on sales made by him. The shares proved disappointing and the defendant, having paid the plaintiff his commissions, cancelled the option. The plaintiff sued claiming breach of agreement by reason of the cancellation. He contended that it was understood that the option would be retained for the six months. Held, dismissing the action, there was no such obligation. Where there is a principal subject matter in the power of one of the parties, and an accessory or subordinate benefit arising by contract out of its existence to the other party, the Court will not, in the absence of express words, imply a term that the subject matter shall be kept in existence merely in order to provide the accessory or subordinate benefit to the other party. *Clegg* v. *Pacific Stock Co. Ltd.,* (1935) 1 W.W.R. 369.

5. "Similar service" of electric energy.] —In a contract between a municipality and a power company, it was held that the words "similar service" meant not the act of providing facilities and supplying energy, but refers to the use to which the consumer puts the energy supplied, i.e. lighting, power, heating etc. *The Corporation of the District of Matsqui* v. *Western Canada Power Co. of Canada Ltd.,* (1933) 47 B.C.R. 335; (1934) 1 D.L.R. 264; affirmed by Privy Council (1934) 2 D.L.R. 81; (1934) 1 W.W.R. 483; (1934) A.C. 322.

6. Escrow—necessity of notice.] — The plaintiff with others entered into an agreement to place a block of mining shares in escrow with the defendant trust company. The escrow agreement provided, inter alia, that the plaintiff and his associates might, every three months, commencing March 21st each draw down from the escrow deposit his quota of the shares, provided that prior to such withdrawal they were first offered to C. C. upon fifteen days written notice and upon C. C. not accepting them within that time. On April 19th the plaintiff and others gave C. C. notice of intention to draw down shares and offered them to C. C. The latter notified the defendant escrow holder that proper notice had not been given and instructed that no shares be released. The plaintiff, unable to get the shares, commenced action and the trial judge awarded him damages. Held, on appeal, reversing the decision below, the "draw-down" dates were March 21st, June 21st and every three months thereafter and the giving of the notice in disregard of those dates was an invalid notice. The requisite notice was not given and the defendant properly retained

the shares in the escrow deposit. *Bancroft* v. *Montreal Trust Co.*, (1937) 52 B.C.R. 54; (1937) 4 D.L.R. 461.

7. Logging contract—notice of default—adequacy of.]—The contract provided that in case any default should continue for ten days after the plaintiff gave notice to the defendant specifying such default, and notifying him of the intention to cancel the agreement, the contract should be at an end. After delays and disputes the plaintiff gave notice to terminate without specifying the particular default. He failed to give the particulars when the defendant demanded them. The trial judge held that the cancellation proceedings were effectively taken and gave damages. Held, on appeal, reversing the decision below, the purpose of the requirement as to particulars was to give an opportunity to remedy the default. The notice was too general in its terms to be the basis for a notice of cancellation. *Heep* v. *Thimsen*, (1940) 55 B.C.R. 487; (1941) 1 D.L.R. 424; (1940) 3 W.W.R. 679.

8. Option—strict construction of.]—The conditions imposed on the exercise of an option are always strictly construed. All precedent conditions must be fulfilled by the purchaser before the contract for sale binds the vendor. Moreover, time is of the essence of such contracts; hence if the conditions are not complied with by the day fixed, the option is lost. *Mines Ltd.* v. *Woodworth*, (1942) 1 D.L.R. 135; affirming (on other grounds) (1941) 56 B.C.R. 219; (1941) 4 D.L.R. 101; (1941) 3 W.W.R. 40; varying (1940) 4 D.L.R. 676; (1940) 3 W.W.R. 200.

9. Agreement to work placer-leases—option—whether "testing" or "operating".]—The plaintiff in order to test and prospect the ground agreed to buy certain equipment from the defendants and pay $3000 down. The equipment he was to use in the testing. If, after testing, he elected to carry on, he was to be reimbursed up to $3000 for improvements to the equipment. The agreement provided that the plaintiff's election to operate would not be effective until he gave a written notice. This was never given but the plaintiff continued on the property "testing" as he said but "operating" as the defendants claimed. The trial judge held that the plaintiff had never reached the operating stage and that the plaintiff was entitled to $3000 for improvements he made to the equipment. Held, on appeal, affirming the decision below, that the plaintiff was not estopped by his continuance on the property from relying on his own failure to give notice of election to operate. The plaintiff never advanced beyond the testing stage. *Watkins* v. *Cam-roy Mining Co. Ltd.*, (1941) 57 B.C.R. 141.

VI. Assignment.

1. Element of personal skill and confidence.]—The relation between an insured and the agent engaged to place the insurance involves personal skill and confidence, and a contract placing all the defendant's insurance in the hands of an agent is not assignable by the agent. *Royal Financial Insurance Ltd.* v. *National Biscuit and Confection Co. Ltd.*, (1932) 46 B.C.R. 294; (1933) 1 W.W.R. 43; 14 C.B.R. 203.

2. Essentials of novation.] — M. held timber berths from the Crown (Dominion) in the Railway Belt upon which moneys were due the Crown. In 1930 the administration of Crown lands in the Railway Belt reverted to the Crown (Provincial) by agreement between the two governments. M. transferred the berths to A., the latter assuming all charges to date, and in 1932 A. applied to the Provincial authority for a transfer of the M. license and the issue of licenses for the following years. Disclaiming responsibility as to title the Provincial Department issued the licenses to A. When owing about $30,000 incurred to the Dominion and $20,000 to the Province, A. went into bankruptcy. It was held that the agreement between the two governments constituted an assignment to the Province of the amount due to the Dominion. Held, further reversing the decision of the trial judge that there was a novation, since (a) the new debtor A. had assumed complete liability; (b) the creditor (the Province) had accepted the new debtor, not merely as agent or guarantor; (c) the creditor accepted the new contract in full satisfaction and substitution for the old one. The Province was a creditor of A. in bankruptcy for the full amount. *Attorney-General for British Columbia* v. *Salter*, (1938) 53 B.C.R. 338; (1939) 1 D.L.R. 513; (1940) 1 W.W.R. 319; 21 C.B.R. 275; reversing (1938) 2 D.L.R. 790; (1938) 1 W.W.R. 544; 19 C.B.R. 155 (sub nom. in *re Abernethy Lougheed Logging Co.*)

3. New company incorporated here to take over assets of Dakota company—

shareholder debtor of Dakota company accepting new company as creditor.]—J. was indebted to a Dakota company with timber holdings in British Columbia, and lodged with it certain of its shares as security for promissory notes given to cover the indebtedness. A new company was incorporated in British Columbia which took over the timber holdings and allotted shares to shareholders of the old company in proportion to their holdings in it. J died intestate. The reports and statements made by him showed that it was not intended that the indebtedness be cancelled. J. had endorsed a like number of shares in the new company to be substituted for the ones he had pledged in the old one. Held, there was to be inferred from J.'s acts and conduct the making of a novation and J. had recognized and adopted the new company as his creditor. Held, on appeal, varying the decision below on another point, that J.'s obligation to the old company was vested in the new company by necessary implication. Per McDonald, C. J. B. C., the plaintiff need not rely on novation; the bargain was that the new company could hold the shares until paid a certain sum. *British American Timber Co. Ltd.* v. *Jones,* (1944) 60 B.C.R. 174; (1944) 2 D.L.R. 481; (1944) 2 W.W.R. 577; varying (1943) 59 B.C.R. 270; (1943) 4 D.L.R. 686; (1943) 2 W.W.R. 654.

VII. Illegality.

1. Sale of business — vendor becoming employee of competitor.]—A covenant by a vendor not to enter into the garage business within the radius of one mile is not broken where the vendor takes employment within the forbidden area as a mere workman for a competitor. *Morrison* v. *McTurk* (1931) 45 B.C.R 28.

2. Covenant not to compete by retiring partner.] — The retiring partner formed a new partnership with two co-defendants and the firm carried on a competing business. The plaintiff claimed for breach of contract against the retiring partner and against him and the co-defendants for conspiracy. The trial judge awarded $1000 against the retiring partner for breach of contract and $50 against the co-defendants. The plaintiff appealed claiming that the $50 award should be increased and should go against all the defendants. Held, dismissing the appeal, that any claim that might have been made against all for tort was waived by the acceptance of the judgment for breach of contract. *Rahal* v. *Rahal,* (1932) 45 B.C.R. 310; (1932) 3 D.L.R. 259; (1932) 2 W.W.R. 99.

3. Restrictive covenants unreasonable and unlimited as to area.]—The appellant company as holder of a brewer's license had manufactured only sake, a Japanese liquor made from rice. It entered into an agreement with another brewing company (the respondent) covenanting that it would not for fifteen years engage in the business of manufacturing any malt liquor except sake. The respondent claimed for a declaration that the agreement was valid and for an injunction and the trial judge granted that relief. The Court of Appeal upheld the trial judge. Held, on appeal to the Privy Council, that the action should be dismissed. Not only were the restrictive covenants open to the objection that they constituted a purchase of protection against mere competition, but they were so wide that they could not pass the test of reasonableness. The restrictions prevented the appellant from manufacturing beer anywhere in the world, and that in itself was a sufficient ground on which to condemn them. *Vancouver Breweries Ltd.* v. *Vancouver Malt & Sake Brewing Co. Ltd.* (1934) A.C. 181; (1934) 50 D.L.R. 253; (1934) 1 W.W.R. 471; (1934) 2 D.L.R. 310; reversing (1933) 47 B.C.R. 89; (1933) 3 D.L.R. 611; (1933) 2 W.W.R. 158; 60 C.C.C. 185.

4. Covenant not to engage in competing business.]—On the sale of all the shares in a company, the purchasers took from the vendor a covenant against carrying on or engaging in or being interested, directly or indirectly, in any competing business in the Fraser Valley for five years. The vendor was employed by his own wife in a competing business and solicited orders from customers of the company. In an action for an injunction and damages, it was held, dismissing the action, that the defendant was in fact simply an employee of his wife and that he had not engaged in the manufacture or selling of competitive products. The word "engaged" does not include "employed" or "hired." *Knight* v. *Fairall,* (1933) 48 B.C.R. 61; (1934) 1 W.W.R. 131.

5. Agreement not to compete or solicit customers.]—The plaintiff carried on a linen supply business in Vancouver and the Fraser Valley. Its drivers, salesmen and collectors were required to enter into an agreement that for one year after the termination of their services, they would not compete with

the plaintiff nor solicit its customers within the territory which was assigned to them. The defendant having left the plaintiff's service broke the agreement. The defence was that it was illegal as being in restraint of trade. Held, granting an injunction, that the restriction put upon the defendant was reasonable in reference to the interests of the parties and of the public; no question of monopoly could arise as there were many competitors in the field; the area and time were not unreasonable. *Canadian Linen Co. Ltd.* v. *Graham,* (1937) 52 B.C.R. 287; (1937) 3 W.W.R. 326.

6. Injunction too sweeping in terms.]—Damages were properly awarded the plaintiff for breach of an agreement not to compete with, or solicit the customers of, the plaintiff. The injunction however, granted by the trial judge was in the most sweeping and unreasonable terms and must be set aside. *Canadian Linen Co. Ltd.* v. *Mole,* (1937) 52 B.C.R. 434; (1938) 2 D.L.R. 730; (1938) 1 W.W.R. 491; reversing (1937) 3 W.W.R. 324.

7. Gaming — money loaned to defray gambling losses.] — A person who loans money to a gambler after the wager is completed, to enable him to pay his losses, is entitled to recover the amount of the loan. *Carr Bros.* v. *Abbs,* (1939) 4 D.L.R. 773; (1939) 1 W.W.R. 249.

8. Status of property purported to be sold by a bankrupt.] — After making an authorized assignment the plaintiff (assignor) not having claimed any exemption under sec. 23 (ii) of the "Bankruptcy Act," entered into an arrangement to sell a car to the defendant to be paid for by instalments. In an action for the balance unpaid the defendant contended, and the judge found, that the car had passed to the trustee and that the arrangement was illegal and void. The action was dismissed but it was held that the amounts paid under the illegal contract by the defendant could not be recovered back. *Carswell* v. *Pollard,* (1939) 3 W.W.R. 225.

VIII. Mistake.

1. Rectification.]—Where by mutual mistake a conveyance failed to include a part of land intended to be conveyed and where the purchaser built a house on that part, rectification will be ordered. *Evans* v. *Nyland,* (1933) 46 B.C.R. 441; (1933) 1 W.W.R. 139.

2. Rectification on ground of mutual mistake.] — A mortgage deed omitted a parcel which the judge found was intended by both parties to be included. Held, ordering rectification of the deed, that the Court can rectify such a contract although, apart from the rectified contract, there is no memorandum to satisfy the Statute of Frauds. *Elkington* v. *Willett,* (1934) 49 B.C.R. 316.

3. Mistake of law.] — The legislation establishing a Marketing Board was held to be ultra vires and a party paying tolls to it sued for their return. It was held, dismissing the action, that the tolls had been paid under mistake of law. The fact that the Board had been ab initio without authority to receive them, did not affect the rule—that money paid voluntarily with a full knowledge of the facts is not, as a general thing, recoverable on the ground that it was paid under a mistake as to the law under which it was paid. The equities here were against the plaintiff and the Court would not assist it. *Independent Milk Producers Co-operative Association* v. *British Columbia Lower Mainland Dairy Products Board,* (1937) 51 B.C.R. 423; (1937) 1 W.W.R. 679.

4. Mistake of law.] — A marketing scheme was declared ultra vires and the plaintiff sued for repayment of tolls and levies paid to the defendant thereunder. It was held that one who pays money voluntarily in a case of this kind must show duress, compulsion or some form of imposition in order to recover it. Here the plaintiff had assented to the deduction of the tolls and levies, with full knowledge of the facts and without bad faith or imposition of any kind, for service received by it. It was a voluntary payment made under an assumed legal liability creating in law no obligation to repay and the judgment in favour of the plaintiff was set aside. *Vancouver Growers Ltd.* v. *G. H. Snow Ltd.,* (1937) 52 B.C.R. 32; (1937) 4 D.L.R. 128; (1937) 3 W.W.R. 121; reversing (1937) 51 B.C.R. 433; (1937) 1 W.W.R. 670.

IX. Duress and Undue Influence.

1. Money obtained by compulsion of legal process.] — A vendor to the defendants had seized and was about to remove

certain chattels claimed by the plaintiff. The latter paid the defendants' claim "under protest" and with a warning that it was brought about by the defendant's threat and would be reclaimed. Held, in the circumstances the payment was a voluntary one and could not be recovered back. *Hudson Bay Co.* v. *Campbell*, (1933) 3 W.W.R. 289.

2. Release given insurance adjuster — binding effect of.]—The plaintiff was badly hurt in a collision and while in hospital he was visited by an adjuster for the insurance company which had insured the defendant. With little or no independent advice and while he was still suffering from his injuries, he accepted $2000 and gave a complete release. In an action for damages for negligence the defendant pleaded the release. Held, dismissing the action, that although he was probably entitled to more than $2000, he was a man of 35, of average intelligence, who conducted his own negotiations and must be bound by the settlement he made. *Sloan* v. *Maude-Roxby*, (1939) 54 B.C.R. 468; (1940) 1 W.W.R. 206.

3. Coercion—whether lawful act becomes unlawful if done with intent to profit by it to the injury of another.]—The parties were brothers. The plaintiff operated a profitable beer delivery business under a contract with a company organized by the brewers, of which the defendant was manager. The contract was subject to arbitrary cancellation. At the time when the plaintff was ill the defendant threatened that if the plaintiff did not sell the business to him, or his nominee, he, the plaintiff, would lose the beer delivery contract. A sale was, as a result, effected of the trucks and goodwill at a price, as the judge found, inadequate if the contract was to be taken into account, but adequate if the contract had no value because of its liability to cancellation. An action to set the transfer aside for undue influence was dismissed. The company had an undoubted right, irrespective of motive to cancel the contract and hence a right to threaten to cancel it. The defendant was the company's agent and as such had the same right to cancel and to threaten. The beer contract had no value in the circumstances. The illness of the plaintiff was not here a factor. The fact that they were brothers had no significance, so far as undue influence was concerned. A lawful act done by one does not become unlawful if done with intent to injure another; much less if as here it was done with the intention of making a profit rather than of injuring another. *Sutherland* v. *Sutherland*, (1946) 63 B.C.R. 194; (1946) 4 D.L.R. 605; (1947) 1 W.W.R. 202.

X. Impossibility.

1. Frustration — charter party — hostilities at port of discharge.]—The defendant chartered a ship to load for Shanghai. Hostilities intervening on the China coast, the defendant notified the plaintiff that on account of war, the charter party had become impossible of performance, and declared it cancelled. The plaintiff claimed damages and the main defence was frustration. The trial judge gave damages but on appeal the action was dismissed. The point for determination was whether or not the outbreak of hostilities was inconsistent with the further prosecution of the voyage. If it was, frustration was complete. Here all parties concerned, including the plaintiff, treated the contract as frustrated with the result that no damages could be claimed. *Australian Dispatch Line Inc.* v. *Anglo-Canadian Shipping Co. Ltd.*, (1939) 55 B.C.R. 177; (1940) 4 D.L.R. 104; (1940) 2 W.W.R. 266; reversing (1939) 53 B.C.R. 401; (1939) 2 D.L.R. 56; (1939) 1 W.W.R. 421.

2. Frustration—rights of parties on.]—The plaintiff turned his car in to the defendant, a dealer, and accepted a credit note on the purchase of a new one. It was exercisable within five years and provided that the plaintiff was not entitled to payment of the money in any circumstances. It stated that the sum should remain and be a perpetual credit to which the plaintiff should be entitled only by purchasing a new car as agreed. A war regulation made it impossible for him to buy a new car or for the defendant to sell him one. The plaintiff sued for the money and recovered on the basis that the contract was frustrated. Held, on appeal reversing the decision below, that assuming that it was a case of frustration, the terms of the contract remained for the purpose of giving effect to the rights and wrongs which had already come into existence at the time of the frustration. The plaintiff was not entitled to a return in cash—the money was to remain as a perpetual credit. Per Sidney Smith, J. A. The parties intended to provide for what happened and agreed that the plaintiff should have no legal right of recovery.

Robbins v. *Wilson & Cabeldu Ltd.*, (1944) 60 B.C.R. 542; (1944) 4 D.L.R. 663; (1944) 3 W.W.R. 625; reversing (1944) 3 W.W.R. 255.

XI. Performance: Breach.

1. Whether agreement to sell treasury shares is satisfied by transfer of shares held by vendor.]—An agreement for the sale of treasury shares is not satisfied by the transfer to the purchaser of an individual shareholder's personal stock. *Clay* v. *Powell*, (1932) S.C.R. 210; reversing (1931) 44 B.C.R. 124; (1931) 3 D.L.R. 538; (1931) 2 W.W.R. 325.

2. Prize money—collusive arrangement among contestants.] — The defendants offered a prize to the couple who in a walking contest would outdo the others. The plaintiffs, together with the then remaining contestants, entered into an agreement whereby certain ones would drop out, it being understood that nevertheless the prize money would be shared among them all. Held, the agreement constituted a breach which justified the defendants in terminating the contract and deprived the plaintiffs of any remedy. *Zavaglia* v. *Rogers*, (1932) 45 B.C.R. 471.

3. Sale of shares where no title in vendor.]—The plaintiffs claimed for money due as the price of shares sold to the defendant. The defence was that the plaintiffs did not own the specific shares so sold. The trial judge upheld the plaintiffs' claim on the ground that they had shown prima facie evidence of title and that the defendant must establish fraud to displace it. The Court of Appeal treated the action as one for specific performance and applied the rules of equity that go with that remedy. The trial judge was reversed and it was held that the Court should not condone a breach of trust or sanction unconscionable dealings. Held, on further appeal to the Supreme Court of Canada, restoring the judgment of the trial judge, that the action was in no sense one of specific performance and the discretionary powers in equity invoked by the Court of Appeal had no application. In a common law action of this kind the onus is on the purchaser to show in his defence the existence of a legal or equitable ground precluding the seller from transferring the shares. *McTavish* v. *Langer*, (1933) 4 D.L.R. 609; (1933) 1 D.L.R. 151; reversing 46 B.C.R. 310; (1932) 3 W.W.R. 305.

4. Effect of counsel's statement at trial.]—Where counsel expressed his willingness to abandon all claims except for damages for breach of contract, it was held on appeal by equal division of the Court that the judgment below which precluded consideration of any question of future instalments under the agreement, should be affirmed. *Cowley* v. *Cowley*, (1934) 48 B.C.R. 155; (1934) 2 D.L.R. 725; (1934) 1 W.W.R. 625.

5. Mutual obligations—terms going to root of contract.]—The plaintiff agreed to build a terminal warehouse and the defendant municipality guaranteed a profit for the plaintiff for ten years. The plaintiff failed to make a profit and sued the municipality. It was shown that the failure was due to the fact that the plaintiff had not put up the necessary working capital as it had agreed to do. Held, dismissing the action, that the failure of the plaintiff went to the root of the contract and that not having carried out its obligations, it could not compel performance of the defendant's guarantee. *Victoria Cold Storage & Terminal Warehouse Co.* v. *Victoria*, (1938) 2 D.L.R. 798; (1938) 1 W.W.R. 742.

6. Contract to buy certain number of articles per year — exclusive territory allotted — invasion by vendor.] — The defendants were allotted certain territory exclusively for selling guitars and agreed to buy 2000 of them each year for ten years. After the second year they fell below their quota and the plaintiff sued for breach of contract. He, however, had already by deceit cut into exclusive territory of the defendants and profited largely thereby. At the trial of the claim and counterclaim, the trial judge gave damages to each against the other — to the plaintiff for the shortage in purchases and to the defendants for the invasion of their territory. Held on appeal, the decision below should be varied by dismissing the plaintiff's appeal and allowing the cross-appeal of the defendants. The plaintiff's deceitful invasion of the exclusive territory was the decisive cause of the defendant's incapacity to buy the stipulated number of instruments. The plaintiff could not take advantage of his own deceit. All the presumptions were against him, under the "omnia praesumuntur" rule. *Silver* v. *Cummins*, (1939) 55 B.C.R. 408; (1940) 4 D.L.R. 529; (1940) 2 W.W.R. 609; affirming (1939) 4 D.L.R. 789; (1939) 2 W.W.R. 329.

7. Defect not due to fault in plaintiff's product or workmanship.]—The trial judge held that the plaintiff was entitled to recover the contract price of tile flooring although it buckled and had to be removed and a new job done. In the circumstances he was not responsible for the damp condition of the laminated construction beneath: the defendant chose to rely on others so far as the foundation for the tiling was concerned. Held on appeal reversing the trial judge, that where a person is employed in a work of skill, the employer buys both his labour and his judgment; the person employed ought not to undertake the work if it cannot succeed, and he should know whether it will or not. A usage to the effect that each contractor relied on the efficacy of the work of other contractors was in the circumstances held not to be reasonable. *Sansan Floor Co.* v. *Forst's Ltd.* (1942) 57 B.C.R. 222; (1942) 1 D.L.R. 451; (1942) 1 W.W.R. 553; reversing (1941) 56 B.C.R. 391; (1941) 3 D.L.R. 751; (1941) 2 W.W.R. 529.

8. Whether waiver of default.] — The plaintiff agreed to buy the timber on 10 timber licenses held by the defendant and to pay the government fees on them. Having decided that three of the licences would not be worth logging the plaintiff refused to pay the licence fees but continued paying the monthly instalments stipulated for. As the three licences would be cancelled the defendant gave notice to determine the agreement. The plaintiff gave the three licenses back and sued for a declaration that the agreement had not been cancelled but was still in force. Held, dismissing the action, the plaintiff could not decide to carry on with a part of the agreement and disclaim liability with respect to the other part. The taking back of the three licences did not, on the evidence, lead the plaintiff to believe that any change in the agreement was effected and hence there was no waiver. No relief against forfeiture could be allowed on equitable grounds; the parties could not be restored to their former positions. *Alaska Cedar Products Ltd.* v. *Arbuthnot* (1945) 61 B.C.R. 315.

XII. Discharge.

1. Release of all claims.]—The defendant, the general manager and a director of the plaintiff company was dismissed after having wrongfully taken company funds and having been guilty of breach of trust with respect to his position with the company. He made restitution on the basis of a sum which he verified as correct taking a release of all claims stated to be based on his representation that the accounts then produced were true and correct. A further shortage being disclosed, the company sued for misfeasance and breach of trust. The trial judge dismissed the action. Held, on appeal, directing that judgment be entered for the plaintiff, that the release embraced only the items that the parties had in contemplation when it was given and that the item sued for had not been disclosed at the time. *B. C. Timber Industries Journal Ltd.* **v.** *Black,* (1934) 48 B.C.R. 209; (1934) 3 D.L.R. 31; (1934) 2 W.W.R. 161.

See Assignment.

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COSTS.

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I. Recovery of.

1. Solicitor for successful appellant alleged to be paid by salary — whether costs recoverable.]—The prosecutor having

succeeded on an appeal to the County Court the respondent contended that the appellant's solicitor was employed on salary as City Prosecutor and hence the appellant was not liable for any costs against which he should be indemnified. The affidavit in support of the facts was made on belief only, without disclosing the grounds thereof. In the result costs were awarded. *Rex* v. *Crowe (No. 4)* (1938) 2 W.W.R. 308; (1938) 53 B.C.R. 86.

2. On reference under statute — no appeal to Court under sec. 28 of Court of Appeal Act.]—The appellant appealed from a finding of the Public Utilities Commission to the Lieutenant-Governor in Council under sec 105 of the Public Utilities Act. Under sec 106 of that Act the Lieutenant-Governor in Council referred the appeal to the Court of Appeal which having heard the appeal, found for the appellant. On the question of costs, it was contended that sec. 28 of the Court of Appeal Act applied and that costs could not be awarded except on "appeals to the Court of Appeal" whereas this was an appeal to the Lieutenant-Governor in Council. Held, awarding costs to the appellant, the Court of Appeal inherited all the powers of the old Full Court and it had complete power over such costs. *The Corporation of the District of Oak Bay* v. *The Corporation of the City of Victoria (No. 2)*, (1941) 56 B.C.R. 415; (1941) 4 D.L.R. 255; (1941) 2 W.W.R. 575.

II. Following the Event.

1. "Event" as applied to counterclaim.] —The rule that costs follow the event in all jury and non-jury actions, unless the Court or judge shall have good cause to order otherwise, applies to the counterclaim in an action. The powers of a trial judge to deal with costs in non-jury cases are more restricted in this Province than they are in England or Ontario. *Alert Logging Co. Ltd.* v. *Standard Marine Insurance Co. Ltd.*, (1933) 47 B.C.R. 450; (1933) 3 W.W.R. 375.

2. Separate issues.] — By rule 977 the costs of the several issues raised are to follow the event unless, for good cause, it is otherwise ordered. It was held that where, although the action was dismissed, there was a finding on one issue in favour of the plaintiff, he should have the costs of that issue, and there is jurisdiction in the Court to apportion the costs. *Canada Rice Mills Ltd.* v. *Morgan*, (1934) 49 B.C.R. 202.

3. Costs to abide rehearing of petition —petitioner withdrawing with leave to begin new proceedings — order that original costs abide result of new proceedings.]—The petitioner company was granted an order to rectify its share register. The Court of Appeal ordered a rehearing and directed that the costs of the abortive petition should abide the result of the rehearing. On the rehearing the petitioner asked that the petition be dismissed and obtained an order giving liberty to commence new proceedings. The order directed that the costs of the original petition should abide the result of the new proceedings. Held, allowing the appeal, that when the petitioner asked that its petition be dismissed the respondent was then entitled ex debito to his costs up to the motion for dismissal, since costs follow the event unless otherwise ordered. The right to the costs of the original petition flowed from the judgment of the Court of Appeal; it ordered that they abide the result of the rehearing. Sec. 16 of the Court of Appeal Act was held not to apply. *British American Timber Co. Ltd.* v. *Ray W. Jones Jr.* (1942) 57 B.C.R. 409.

III. Good Cause for Depriving of.

1. Misconduct resulting in deprivation of costs.] — Where an injunction against members of a Board of Police Commissioners proved abortive because before the injunction was actually served they passed resolutions so dealing with the matters complained of as to remove the basis for the injunction, costs were refused. *Edgett* v. *Taylor*, (1933) 47 B.C.R. 191; (1934) 1 D.L.R. 113; (1933) 2 W.W.R. 465.

2. Whether parties in pari delicto — effect of warning.] — The contract sued upon was held to be an illegal one and the action was dismissed. On the assumption that where the parties are in pari delicto the defendant should not have costs, it was held that here the defendant had given warning that it regarded the contract as unenforcible and it would be unjust to deprive it of costs. *McGuire* v. *Crestland Trust Co. Ltd.*, (1934) 48 B.C.R. 323; (1934) 1 W.W.R. 797 (sub nom. *McGuire* v. *Crestland Fruit Co. Ltd.*)

3. Effect of refusal to withdraw reckless charges of fraud.] — The appellant

suing on behalf of minority shareholders of a company in liquidation made charges of fraudulent conspiracy against the respondents. For the first time the point was taken by counsel for the respondents during the argument in the Privy Council that the action was misconceived as to parties. Effect was given at that stage to the objection. While the argument was proceeding, counsel for the appellant had been invited to withdraw the reckless and unproven charges but he refused to do so. Held, that in ordinary circumstances it would be right to make some special order as to the appellant's costs thrown away as the result of the respondents' delay. Here however, the reckless charges had been persisted in and no special order should be made. *Ferguson* v. *Wallbridge,* (1935) 1 W.W.R. 673; (1935) 3 D.L.R. 66; affirming (1933) 47 B.C.R. 518; (1934) 2 D.L.R. 270.

4. Action for alimony—recovery claimed to be less than was offered.]—The plaintiff was awarded $60.00 per month with liberty to apply to vary. The defendant objected to the payment of costs contending that he had before action, offered that much. Held, directing costs, that all that was offered was a consent to pay as against a judgment of the Court for the amount with liberty to apply. As the issues might have been limited to quantum the plaintiff was awarded two-thirds of her taxed costs. *Mainwaring* v. *Mainwaring (No. 2),* (1942) 1 W.W.R. 359.

5. Claim of undue influence and lack of testamentary capacity — incidence of costs.]—This not being a case falling within rule 251 the costs should follow the event unless there is adequate reason for ordering otherwise. Here there was complete proof of testamentary capacity and no evidence to support the plea of undue influence. Mere disappointment at the testator's change of attitude toward the plaintiff would not justify a departure from the usual rule. His costs were not to be paid out of the estate. *Trites* v. *Johnson,* (1945) 61 B.C.R. 397.

6. Notary Public — costs of appeal to Court of Appeal against order for enrolment.]—The Law Society of British Columbia successfully appealed against an order to enrol the respondent as a notary. On the settlement of the judgment the appellant was refused a direction that the costs be paid to the Society. Good cause was in the circumstances shown. *The Law Society of British Columbia* v. *Gallagher,* (1946) 62 B.C.R. 349.

IV. In Particular Cases.

A. In General.

1. Effect of addition of assignors as parties plaintiff.]—The plaintiff claimed as assignee and put the assignments in at the trial without objection. When a question arose as to the validity of the proof the assignors were added as parties plaintiff. The plaintiff having succeeded, it was contended that the defendant was entitled to costs up to the time when the assignors were added. Held, on appeal, that having regard to the course of the trial, the defendant must be taken to have assented to the assignments being used as evidence and the costs were properly awarded to the plaintiff. *Ecclestone* v. *Union Mining and Milling Co. Ltd.,* (1932) 45 B.C.R. 297.

2. Bankruptcy—whether maximum costs of 10% prevents payment in respect of matters in other Courts.] — The trustee under direction of the Court sued in the Supreme Court to recover certain chattels. The costs due the solicitors exceeded the maximum 10% fixed by sec. 162 (3) of the Bankruptcy Act with respect of "proceedings under this Act." Held, the costs of the proceeding in the Supreme Court were dehors the bankruptcy proceedings and should be allowed. *In re Ash Estate,* (1934) 1 W.W.R. 540.

3. Parties equally to blame.[—The trial judge divided the damages equally but deprived the defendant of costs. Held, allowing the appeal as to costs, that the costs like the damages, should be added together and divided equally. The "direction" necessary to take the case out of the ordinary rule must rest on some good cause and cannot be based on some general conception that the result of applying the rule does not seem just. *Wegener* v. *Matoff,* (1934) 49 B.C.R. 125; (1934) 4 D.L.R. 783; (1934) 3 W.W.R. 429.

4. Contributory Negligence Act—apportionment.]——A judgment apportioned 80% of the fault to the defendant and 20% to the plaintiff and directed that the costs of both parties be taxed and added together and that 80% of the aggregate be borne by the defendant and 20% by the plaintiff. The taxing officer taxed both bills, added them

together and allowed 80% of the total to the plaintiff and 20% to the defendant. He then deducted the lesser amount from the greater and issued his allocatur for the balance. The judge on a review of the taxation set aside the allocatur and fixed a sum more favourable to the defendant. Held, on appeal, restoring the allocatur, that the taxing officer's method was the correct one. *Jackson* v. *Lavoie*, (1935) 50 B.C.R. 119; (1935) 4 D.L.R. 80; (1935) 2 W.W.R. 673.

5. Claim and counterclaim dismissed with costs.]—Both action and counterclaim were dismissed with costs, with right of set-off. The plaintiff's bill in defence of the counterclaim included the amounts in Column 1 of Appendix N for items 2, 9, 10, 13, 14 and 19, all allowed by the taxing officer. The judge refused to disallow them. Held, on appeal affirming the decision below, that the items of the block tariff are in the circumstances of this case, intractable and no variation can be made. Special cases should be dealt with under rule 977. *McKee* v. *Wilson*, (1935) 50 B.C.R. 291; (1936) 1 D.L.R. 521; (1936) 1 W.W.R. 388.

6. Special case for taxation under Column 3 or 4.]—Where the only issue in an action was the amount involved, there was no jurisdiction to make a special order under the proviso. *McLean* v. *Vancouver Harbour Commissioners*, (1936) 51 B.C.R. 74; (1936) 3 W.W.R. 280.

7. Apportionment of costs — petition by husband — wife successfully alleges adultery by petitioner and together with co-respondent unsuccessfully denies adultery.] — The wife's adultery was proved by a decree of divorce in a former action in which she was intervener. Held, there was no reasonable justification for raising a defence on that issue. As to the co-respondent he raised only one issue, viz. the denial of his adultery on which he failed. The wife also raised the issue of the petitioner's adultery on which she succeeded. Held, as to the costs, the co-respondent should be liable only for such costs of the petitioner as were incurred on the issue on which the petitioner succeeded, viz. that of adultery. The respondent's party and party costs were ordered to be taxed and one-half of the amount paid by the petitioner. The petitioner's costs were ordered to be taxed, omitting those payable by him to the respondent, and one-half of the amount paid by the co-respondent to the petitioner. The respondent's costs were not to be paid until the petitioner's costs should be paid into Court by the co-respondent. *Emery* v. *Emery and Barbour*, (1937) 2 W.W.R. 141.

8. Party failing on one issue and succeeding on another.] — The plaintiff succeeded on the issue of the defendant's excessive speed. The third party alone claimed that the plaintiff was drunk and was volens with respect to the defendant's driving in dense fog. The jury held, that the plaintiff was volens. Held, awarding costs to the plaintiff on the issue of drunkeness and to the third party on the issue of volens, that rule 976 has no application because of its opening words "subject to the provisions of these rules." Rule 176 applies. *McDermid* v. *Bowen (No. 2)*, (1937) 51 B.C.R. 528; (1937) 2 W.W.R. 348.

9. Car collision—consolidated actions—third party proceedings.]—It was held on appeal that the trial judge erred in exculpating driver G. and blaming driver B. The Court of Appeal found that G. was 70% to blame and B. 30% to blame. The costs on the settlement of the judgment were awarded as follows, in the first action by B.'s passenger against G., the passenger should get his full costs of appeal and below. In the second action G. v. B., in the third party proceedings: G. should get his full costs of the appeal and 30% of the costs below. In the second action of G. v B., the full costs of the appeal should go to B. together with 70% of the costs below and G. should get 30% of the costs below. *Bailey* v. *Grogan (No. 3)*, (1938) 52 B.C.R. 470; (1938) 1 W.W.R. 520.

10. Solicitor and client costs—allowed.] —Where the mortgage contract provided that solicitor's costs might be added to the mortgage debt, the plaintiff in a foreclosure action was allowed to tax its costs on a solicitor and client basis. *Manufacturers Life Insurance Co.* v. *Independent Investment Co. Ltd.*, (1939) 54 B.C.R. 5; (1939) 4 D.L.R. 811.

11. Whether payable out of estate.]— Where an administrator failed in an action to set aside a deed of settlement made by the intestate on the ground that she was of unsound mind, the costs taxed to the defendants were to be paid out of the estate in the hands of the administrator to the extent of such estate, otherwise to be paid by the plaintiff personally. *Young* v. *The Toronto General Trusts Corporation*

(*No. 2*), (1939) 54 B.C.R. 410; (1940) 3 D.L.R. 768.

12. Whether costs should be awarded against County Court Judge.]—The applicant succeeded on a motion in the nature of a mandamus under sec. 130 of the County Courts Act and sought an order for costs against the County Court Judge. Held, refusing the order, the judge acted in good faith and merely erred in his construction of a statute. *Re Anderson,* (1942) 2 D.L.R. 140; (1942) 1 W.W.R. 379.

13. Action necessary to bring about result.] — A settlement was offered and rejected. The result of the action was more beneficial to the plaintiff than the settlement would have been. The plaintiff, however, should have litigated with respect to the quantum only. Taxation was ordered of the plaintiff's costs and the defendant was directed to pay two-thirds. *Mainwaring* v. *Mainwaring,* (1942) 2 D.L. R. 136.

14. General costs to plaintiff—defendant claiming costs on separate issue.]—In an action by an executor under the Administration Act for damages in respect of physical injuries inflicted on the deceased, it was held that, although the injured man died about a month later, his death was not proved to have been the result of the injuries. The trial judge gave damages for hospital and medical expenses, but held he could make no award for loss of life expectancy as there was no evidence to support it; the plaintiff having relied only on the fact that the deceased was injured by the defendant. The costs of the action went to the plaintiff and the judge held that the question of the responsibility for the death was not a separate issue under Order LXV, rule 2. Held, on appeal, affirming the decision below, that the death was advanced as the sole proof of one element of the damages, viz. loss of expectancy of life. and failure to prove one element is not, generally speaking, failure on an issue within the meaning of the rule. *Mah Ming Yu* v. *Terminal Cartage Ltd.,* (1942) 58 B.C.R. 470; (1943) 2 D.L.R. 209; (1943) 1 W.W.R. 623.

15. Claim and counterclaim—method of computing.]—The plaintiff succeeded on his claim with costs and the defendant recovered on the counterclaim with costs. The costs of the plaintiff's claim should first be taxed as if there was no counterclaim. Then the costs occasioned by the counterclaim should be taxed as though they were part of the costs of a separate action. Items incurred partly on account of each should be divided. *Baxter* v. *Wallace,* (1944) 1 W.W.R. 319.

16. Claim of undue influence and lack of testamentary capacity — incidence of cost.]—This not being a case falling within rule 251 the costs should follow the event unless there is adequate reason for ordering otherwise. Here there was complete proof of testamentary capacity and no evidence to support the plea of undue influence. Mere disappointment at the testator's change of attitude toward the plaintiff would not justify a departure from the usual rule. His costs were not to be paid out of the estate. *Trites* v. *Johnson,* (1945) 61 B.C.R. 397; (1946) 4 D.L.R. 412 (sub nom. *MacDougall* v. *Johnson,* (1945) 3 W.W.R. 100.

B. As Between Defendants.

1. Innocent defendant recovering from negligent one.] — In a negligence action against two defendants each served the other with a third-party notice. At the trial one was held negligent and the other was exculpated. There was jurisdiction in the trial judge to order the negligent defendant to pay the other defendant's costs both of the action and of the third-party proceedings. *Smith* v. *Kennedy,* (1936) 51 B.C.R. 52; (1936) 4 D.L.R. 71; (1936) 3 W.W.R. 255.

2. Negligent defendant ordered to pay costs of other defendant against plaintiff.]—The plaintiff succeeded against one defendant but failed against the other. The judge made an order, following *Smith* v. *Kennedy,* supra, that the culpable defendant pay the costs recoverable by the exonerated defendant against the plaintiff. *Beach* v. *Pearce,* (1936) 51 B.C.R. 59; (1936) 3 W.W.R. 174.

3. Unsuccessful defendants not compellable to pay successful defendant's costs.] —The action against defendant I. was dismissed. The plaintiff succeeded against defendants P. and G. Defendant I. was entitled to his costs against the plaintiff who contended that defendant I. should recover against his co-defendants under Order LXV, rule 32. The rule does not deprive defendant I. of his right to costs against the plaintiff. In the alternative the plaintiff asked for an order that he recover from defendants P. and G. the costs he has to

pay defendant I. Held there was no jurisdiction to make such an order. *Hampton* v. *Park,* (1937) 52 B.C.R. 294; (1937) 4 D.L.R. 726; (1937) 3 W.W.R. 662.

4. Order LXV, rule 32—payment by one defendant to another directly.]—Where the defence of the successful defendant was entirely different from that of the two other unsuccessful defendants, an order was refused directing that the unsuccessful defendants should pay directly to the successful defendant its costs of the action. The successful defendant was entitled to its costs as against the plaintiff. *O'Fallon* v. *Inecto Rapid (Canada) Ltd. (No. 2),* (1938) 53 B.C.R. 276; (1939) 1 D.L.R. 806; (1939) 1 W.W.R. 269.

C. By and Against the Crown.

1. Crown Costs Act not applicable to Dominion prosecution.] — On an appeal from a conviction under the Indian Act of Canada costs were awarded. The Provincial Crown Costs Act does not apply to such a prosecution. *Rex* v. *Tronson,* (1932) 1 W.W.R. 547; 57 C.C.C. 383.

2. Appeal on case stated—Government Liquor Act.]—The Court of Appeal quashed a conviction under the Government Liquor Act on a case stated from a magistrate after a Supreme Court Judge had upheld the magistrate. Held, the Crown Costs Act deprived the appellant of the costs of his successful appeal, and that Act applied equally to costs of the proceedings on the case stated in the Supreme Court. *Rex* v. *Arthur,* (1946) 63 B.C.R. 557; (1947) 4 D.L.R. 555; (1947) 1 W.W.R. 1054; 89 C.C.C. 204 reversing 86 C.C.C. 371.

3. Motor-vehicle Act — wrongful suspension of licence—mandamus.] — Where the plaintiff's licence was wrongfully suspended and a mandamus was directed to the Commissioner of Provincial Police to restore it, the Crown Costs Act did not apply, and the plaintiff was entitled to his costs. *Dumont* v. *Commissioner of Provincial Police,* (1940) 55 B.C.R. 298; (1940) 4 D.L.R. 721; (1940) 3 W.W.R. 39; 74 C.C.C. 200.

4. Right of Attorney-General as Committee to costs—Crown Costs Act.]—On an applicatiion to sell a property of a deceased person the Attorney-General, as ex-officio committee of a lunatic, appeared on behalf of the lunatic who was beneficiary of the deceased. The order for sale was made with costs payable out of the estate of the deceased, but the costs of the Attorney-General were refused. He was held to be an "officer, servant, or agent of and acting for the Crown" within the meaning of Crown Costs Act (sec. 2) and there was no statute which expressly authorized an order in his favour. *In re Estate of E. S. Browne deceased,* (1943) 60 B.C.R. 23.

5. Whether Secretary to Marketing Board an agent of the Crown under Crown Costs Act.] — The B.C. Lower Mainland Dairy Products Board is not an agent of the Crown and its secretary as informant and prosecutor, may be ordered to pay the costs of quashing a conviction. *Rex* v. *Hassel,* (1937) 1 W.W.R. 726.

V. TAXATION.

1. Appendix N — Process.] — Process means either a writ of summons or an originating summons and in dealing with items 6 and 7 of Appendix N. both cannot be included. *Taylor* v. *Millman,* (1932) 46 B.C.R. 79.

2. Appendix N to be read distributively.]—Item 13 of Appendix N is to be read distributively and not inclusively. *Overn* v. *Strand,* (1932) 46 B.C.R. 207; (1933) 2 D.L.R. 793; affirming 42 B.C.R. 358.

3. Several defendants with one solicitor —action dismissed against one.] — In an action against four defendants (all represented by the same solicitor) the judgment dismissed the claim against one of them "with costs to be taxed." The taxing officer awarded the successful defendant the whole costs of any steps he had taken. Held, dismissing an appeal from the taxation, under the terms of the judgment and rule 977 the taxing officer could not do otherwise than he did. *Mori* v. *Lion Lumber Co. Ltd.,* (1932) 46 B.C.R. 292; (1933) 1 W.W.R. 31.

4. Appendix N — charge for appeal books.]—The judgment provided that each party was to be allowed a certain proportion of its costs. This direction did not prevent the application of the paragraph in Appendix N providing that, where costs are reduced by the maximum any costs set off or to be deducted shall be reduced in the same proportion. The charge for appeal books under

Item 38 is a solicitor's charge and not a disbursement. *Worth* v. *Weber*, (1938) 53 B.C.R. 170, distinguished. *Northwest Terminals* v. *Westminster Trust Co. (No. 2)*, (1939) 4 D.L.R. 765; (1939) 3 W.W.R. 351; affirming (1939) 54 B.C.R. 132; (1939) 2 D.L.R. 795; (1939) 2 W.W.R. 136.

5. Appendix N — effect on powers of Court of Appeal.]—The various powers of disposition, whether derived from statute or rules or otherwise, hitherto exercised by the Court over costs in the Court of Appeal, and below, have not been curtailed in any relevant respect by the promulgation of Appendix N. *Canada Rice Mills Ltd.* v. *The Union Marine & General Insurance Co. Ltd. (No. 2)*, (1939) 54 B.C.R. 10; (1939) 2 D.L.R. 751; (1939) 1 W.W.R. 472.

6. Discretion of taxing officer.] — Where the matter was one of discretion, no question of any error of principle being involved, the Court of Appeal set aside a judge's order reversing the taxing officer. The rule that a judge should not override the registrar except on a matter of principle is simply a rule of policy and good sense. *Frost* v. *Frost*, (1940) 56 B.C.R. 30; (1941) 1 D.L.R. 774; (1941) 3 W.W.R. 273.

7. Right of taxing officer to direct payment of costs of the estate.] — The District Registrar taxed the costs of the solicitor for the executors and directed that they be paid out of the estate. The judge upheld the action of the registrar. Held, on appeal reversing the decision below, the registrar's function as taxing officer is confined to taxing the bill of costs; he has no jurisdiction to pass judically on whether or not the amount should be paid out of the estate. *Smith and Fisher* v. *Woodward*, (1940) 55 B.C.R. 401; (1941) 1 D.L.R. 137; (1940) 3 W.W.R. 432; reversing (1940) 3 W.W.R. 46.

8. Appendix N — examining proofs of print of appeal books—Items 38 and 39.] —Tariff Item 38 so far as appeal books are concerned is exclusively for the benefit of the party preparing the appeal book. The fact that the respondent was given a copy of the proof and actually checked it, does not affect the situation as far as party and party costs are concerned. *Elk River Timber Co. Ltd.* v. *Bloedel, Stewart & Welch Ltd.*, (1941) 56 B.C.R. 530.

9. Registrar postponing taxation pending appeal—to save possible expense.] — Where a party became entitled to costs under an order, the registrar had no discretion to postpone the taxation because an appeal had been launched and, if allowed, might make the taxation unnecessary. A stay of execution should be applied for in the regular manner. *In re Edward Bowman Welsh*, (1942) 57 B.C.R. 559; (1942) 2 D.L.R. 264; (1942) 1 W.W.R. 565.

VI. On What Scale.

1. Appendix N.: amount involved.]—The claim in the action, which was dismissed, prayed for cancellation of an instrument, a declaration of ownership, a vesting order and a direction to the Registrar of Titles. The applicant might, before taxation, have invoked the proviso enabling the taxation to be had under a higher column but he did not do so. Held, the claim was essentially an equitable one and could not be said to have a pecuniary "amount involved." The taxation under Column 2 was confirmed. *Andler* v. *Duke*, (1933) 47 B.C.R. 282; (1934) 1 D.L.R. 128.

2. Constitutional issue involved — whether amount involved governs.] — The real contest was as to the constitutionality of a statute. In the result a "special cause" was created within the meaning of the proviso to Appendix N. and the costs were ordered to be taxed under Column 4. *Attorney-General for British Columbia* v. *Kingcome Navigation Co.*, (1933) 3 W.W.R. 157.

3. Foreclosure action.] — There is no "amount involved" in a foreclosure action, which is one brought merely for the purpose of enforcing an equitable remedy. The costs should be taxed under Column 2 of Appendix N. *The Canada Life Assurance Co.* v. *McClellan*, (1933) 47 B.C.R. 438; (1933) 3 W.W.R. 557.

4. When higher scale to be ordered.] —The object of Appendix N is to enable parties contemplating litigation to form a fairly accurate estimate of the party and party costs for which they will be liable in case of non-success. Orders for taxation on a higher scale than the one indicated tend to the reintroduction of the uncertainty which Appendix N was intended to eliminate. *McGuire* v. *Crestland Trust Co. Ltd.*, (1934) 48 B.C.R. 323; (1934) 1 W.W.R. 797.

5. Column 2 or Column 3 — effect of third-party proceedings.]—In a motor car

collision case the plaintiff, a passenger with G., sued G. and W., the driver of the other car. Both G. and W. took third-party proceedings against the other, and each defendant counterclaimed against the other. The plaintiff recovered $11,000 against W. but his claim was dismissed as against G. G. recovered $140 against W. on his counterclaim. The judgment gave G. his costs of the action and of the third-party proceedings against W. The registrar treated the action and the third-party proceedings separately and allowed G. $755 and $455 or $1,200 in all under Column 3. Held, that under Appendix N the third-party proceedings were part of the proceedings in the action and G. was limited to a maximum of $600 plus disbursements under column 2 on his whole bill, including the third-party proceedings. *Howell* v. *Wallace,* (1939) 54 B.C.R. 401; (1939) 4 D.L.R. 768; (1939) 3 W.W.R. 479.

6. Appendix N.—value of subject matter.]—The plaintiff recovered $23,000 and a counter-claim for $7,000 was dismissed, the plaintiff being allowed costs throughout. The costs were taxed under column 3 of Appendix N. Held on appeal from the registrar, affirming his decision, that Order LXV, rule 10A applied, and the judgment given or decision rendered was in favour of the plaintiff for $23,000, not $30,000. *The East Asiatic Co. Inc.* v. *Canada Rice Mills Ltd. (No. 2)*, (1939) 54 B.C.R. 228; (1939) 4 D.L.R. 768; (1939) 3 W.W.R. 190.

7. On what scale—difficult point of law or construction.]—In an action for a declaration as to the price to be fixed for the supply of water the plaintiff failed and the counter-claim was allowed. Held there was more involved than the sum fixed. The taxation was directed under column 3 having regard to the fact that the decision was determinative of rights beyond those immediately involved and that difficult points of law or construction had to be considered. *City of Victoria* v. *District of Oak Bay,* (1939) 2 W.W.R. 416.

8. Difficult points of law—Column 3.]—Because of conflicting decisions and a somewhat unsettled state of the law, the case should be regarded as one where difficult points of law were involved and the costs of two appeals and of the trial were accordingly directed to be taxed under column 3. *National Trust Co. Ltd.* v. *The Christian Community of Universal Brotherhood Ltd. (No. 2)*, (1940) 56 B.C.R. 102.

9. Amount involved — Appendix N.]—The defendant Trust Company pleaded that it was a bare trustee and had no interest in any of the matters in issue and had been at all times ready to abide by any judgment that might be given. The action as against it was dismissed with costs. There was no "amount involved" as between these parties. The taxation should be under column 2 of Appendix N. *Consolidated Tungsten Tin Mines Ltd.* v. *MacCulloch and The London & Western Trusts Co. Ltd.,* (1942) 58 B.C.R. 396; (1943) 1 W.W.R. 221; affirming (1942) 58 B.C.R. 18.

10. Amount involved—columns 1 or 4.]—The petition involved shares of the estimated value of over $75,000. The Court of Appeal ordered when the petition was withdrawn, that the costs of the petition should go to the respondent. They were taxed and the petitioner had the taxation reviewed. The judge gave the respondents the costs of the review. The bill for the costs of the review was presented under column 4 based on an amount involved of $75,000. The registrar held that the amount involved was less than $3000 and taxed it under column 1. Held on review, that the registrar was right. When the petition was withdrawn all "amounts involved" in it had been disposed of. The only "amount involved" here was, at most, the total amount of the bill. *In re Companies Act* and *British American Timber Co.,* (1942) 58 B.C.R. 49.

11. Appendix N—costs of appeal—what column.]—In deciding whether an order should be made to tax costs under column 4 which normally would come under column 2, the facts of the particular case rather than decisions on other facts, (unless they lay down principles), are to be considered. *Hare* v. *Better Business Bureau of Vancouver (No. 2)*, (1946) 63 B.C.R. 341; (1947) 1 W.W.R. 25.

12. Co-respondent's costs — on what scale.]—A petition for dissolution of marriage, in which $500 damages against the co-respondent had been claimed, was dismissed with costs. The rule under Appendix N. as to scale is that where the amount involved can be determined, the costs shall be taxed on the scale applicable to that amount. Subject to a proviso not applicable here, column 2 is to be used in all other cases. Held, where as here, the issue is that of adultery alone, there is no amount involved which can be determined. The co-respondent's costs should be taxed on

column 2. *Crabbe* v. *Crabbe,* (1946) 62 B.C.R. 373; (1946) 2 W.W.R. 692.

13. Whether costs against co-respondent can be ordered to be taxed on a higher scale.] — The petitioner applied for taxation on a scale higher than column 2. The only ground open to him was "for special reason." The co-respondent did not defend or do more than appear by counsel. Held, dismissing the application, no special reason was shown. The conduct of the co-respondent had been reprehensible but that did not furnish a special reason within the rule. To direct taxation on a higher scale would be in effect to award damages where none were sought. *Hopgood* v. *Hopgood,* (1946) 62 B.C.R. 450; (1946) 2 W.W.R. 699.

14. Appendix N.—costs of interlocutory appeal—amount involved.]—The plaintiff's claim in the action was for an accounting and damages and consequentially for judgment for the amount found to be due. The plaintiff succeeded on appeal on an interlocutory matter and was awarded costs. The registrar received an affidavit as the result of which he taxed the costs under column 4. Held, reversing the registrar, the amount involved could not be determined until the trial and if the plaintiff elects to tax in the meantime there is no ascertained "amount involved" and column 2 is applicable. There was no specific claim for any amount in the writ, statement of claim or elsewhere. *Fenchurch Export Corporation* v. *Sitka Spruce Lumber Co. Ltd.,* (1946) 63 B.C.R. 368; (1947) 2 D.L.R. 143; (1947) 1 W.W.R. 140.

VII. Solicitor and Client.

1. Commission on collection.] — The application of Order LXV, rule 29, includes amounts recovered by action as well as those collected without action. *Cornwall & Archibald* v. *J. Joseph Doyle Contracting Co. Ltd.,* (1931) 45 B.C.R. 81; (1932) 1 W.W.R. 8.

2. Collusive settlement to deprive solicitor of costs — whether lien exists.] — Where the parties met behind the back of the plaintiff's solicitor and effected a settlement by which money was paid by a roundabout method thus depriving the plantiff's solicitor of his costs, the transaction was held to be collusive. The solicitor's lien, which was upheld, would not extend to moneys agreed to be paid over and above the taxed costs. *In re Crux*: *Enfante* v. *Enfante,* (1932) 1 W.W.R. 93.

3. In divorce action.] — The Court has jurisdiction to order that the costs in a divorce action be taxed as between solicitor and client. *Trueb* v. *Trueb,* (1933) 47 B.C.R. 443; (1933) 3 W.W.R. 404.

4. Right to solicitor and client costs—after receipt of party and party costs.]—A solicitor is entitled to be paid on a solicitor and client basis, notwithstanding that he has received party and party costs, giving credit for the amount received. *Cameron* v. *Parsons,* (1936) 51 B.C.R. 70; (1936) 3 W.W.R. 237.

5. Bill presented with a lump sum charge—how to be taxed—item by item.] —On the taxation of a bill with a lump sum charge the taxing officer ordered further details of the services rendered, and heard evidence from outside counsel as to the reasonableness of the bill. He taxed the bill at the amount presented and did not go over it item by item. Held, on appeal to a judge, sec. 82 of the Legal Professions Act in allowing lump sum charges, is dealing with the form of the bill, not its taxation, and the bill must still be taxed item by item. The possibility of "further allowances" under order LXV, rule 8 (b) was denied as being contrary to the statute. Held, on further appeal to the Court of Appeal, affirming the decision below, order LXV, rule 8 (b) was ultra vires so far as "further allowances" were concerned; the effect of sec. 82 of the Legal Professions Act enabled the solicitor to make a lump sum charge in the first instance, but as soon as the bill came before a taxing officer the former practice obtained viz. item by item taxation. The outside counsel's evidence as to reasonableness generally, was not admissible but it might be received in respect of particular work or for services not itemizable. *In re taxation of costs* and *in re Locke, Lane, Nicholson & Sheppard,* (1941) 57 B.C.R. 304; (1942) 2 D.L.R. 200; (1942) 1 W.W.R. 709; affirming (1942) 1 D.L.R. 321; (1942) 1 W.W.R. 96.

6. Appendix M—schedule 5—power to allow higher fees.]—At the end of schedule 5, it is provided that "in all the above enumerated cases the Registrar shall have power to allow higher fees than those mentioned." These words were intended to refer to all the items in schedule 5 and not merely to items 32 to 42 as the taxing officer held.

However the effect of item 31 should be confined to items 29 and 30. *In re taxation of costs* and *in re Locke, Lane, Nicholson and Sheppard (No. 3)*, (1942), 58 B.C.R. 149; (1943) 1 W.W.R. 489; affirming (1942) 58 B.C.R. 46.

VII. Security for Costs.

1. Residence of registered extra-provincial company.]—Order 18 of the County Court rules authorizes the furnishing of security where the plaintiff resides out of British Columbia. The plaintiff with its head office in Chicago and registered as an extra-provincial company under the Companies Act was ordered to give security. Held, on appeal, affirming the decision of the County Court judge, the plaintiff resided outside the Province notwithstanding registration here. *LaSalle Extension University* v. *Linley*, (1932) 46 B.C.R. 369; (1933) 3 D.L.R. 643; (1933) 2 W.W.R. 288.

2. Plaintiffs residing abroad but having unsatisfied judgment there against defendants.] — Notwithstanding that the plaintiffs hold an unsatisfied judgment in California against the defendants an order for security for costs will be made in the action in British Columbia. *Andler* v. *Duke*, (1933) 47 B.C.R. 79.

3. Interpleader issue—both parties ex juris.]—Both parties to an interpleader issue as to the ownership of certain bonds lived outside the jurisdiction, one in the State of Washington and one in the Province of Ontario. Each asked that the other give security for costs. Held, both could properly be ordered in such a case to give security, but here the Ontario party is subject to the Reciprocal Enforcement of Judgments Act and a judgment for costs against him would be enforcible in Ontario. An order was made against the Washington party only. *Whiting* v. *Imperial Bank of Canada*, (1935) 3 W.W.R. 255.

4. Nominal plaintiff.]—Where an insolvent company is a nominal plaintiff for the benefit of somebody else and is not suing as executor or as trustee in bankruptcy, security for costs will be ordered. *Victoria Cold Storage and Terminal Warehouse Co. Ltd.* v. *City of Victoria*, (1938) 53 B.C.R. 1; (1938) 2 D.L.R. 799; (1938) 1 W.W.R. 804.

5. Sec. 256 of Companies Act — only assets not exigible—protracted trial probable.]—Where the plaintiff company's only assets were water licenses which were not exigible, and where the charges made were so serious as to suggest a protracted and expensive trial, substantial security will be ordered. *Westminster Power Co. Ltd.* v. *Indian River Pulp and Power Co.*, (1941) 56 B.C.R. 399; (1941) 2 W.W.R. 416.

6. Seamen brought to British Columbia — held at Immigration Office — whether proper to order security.]—Certain Chinese seamen were ordered off their ship at San Francisco and brought to Vancouver for return to China. They sued for wages and damages. The plaintiffs did not come within the jurisdiction for the purpose of suing; their action arose as a result of their having been brought here. Due to war conditions they may be expected to be here for the trial. In the special circumstances the application by a defendant for security was dismissed. *Yip Chun* v. *W. R. Carpenter (Canada) Ltd.*, (1942) 58 B.C.R. 285; (1942) 3 W.W.R. 528.

See Appeals.

See Practice.

COUNTY COURT PRACTICE.

1. Jurisdiction in interpleader.]—Section 86 of the County Courts Act confers jurisdiction upon the Court in interpleader notwithstanding the Fraudulent Preferences Act. *Marshman* v. *Scott*, (1932) 46 B.C.R. 59; (1932) 4 D.L.R. 588; (1932) 3 W.W.R. 161.

2. Dividing cause of action—sec. 35 of County Courts Act.]—The plaintiff recovered judgment in two separate County Court actions against the same defendant on two promissory notes relating to the sale of the same motor car both notes being overdue and in the hands of the plaintiff. Held, allowing the appeal, that this amounted to the division of a cause of action contrary to the provisions of sec. 35 of the Act. *Rithet Consolidated Ltd.* v. *Weight*, (1932) 46 B.C.R. 345.

3. Unstated damages—Court's jurisdiction.] — The plaintiff's claim was for (a) return of $170 paid to the defendant; (b)

damages; (c) other relief; (d) costs. The defendant at the trial objected to the jurisdiction on the ground that a claim for unstated damages does not show the claim to be within the competence of the Court and that there can be no amendment where there is no jurisdiction in the first instance. Held, overruling the objection that ex facie the Court has jurisdiction in respect of the other claims, and so must hear the action, and may exercise its powers of amendment if they are invoked. *Jones* v. *Simonson,* (1935) 50 B.C.R. 94.

4. Transcript of evidence at inquest—plan of locus — reporter at trial.] — The evidence taken at the inquest was in the nature of a luxury used by both parties and its costs should be borne equally. A plan of the locus would not be allowed by the taxing officer without an order but the order could be made by the judge on the review. As there was an agreement that the costs of attendance of the stenographer would be borne equally, one-half the item should be allowed. *Creighton* v. *Clark,* (1935) 50 B.C.R. 169; (1935) 2 W.W.R. 649.

5. Moving against garnishee order without filing dispute note.] — A defendant, without filing a dispute note, may apply to set aside a garnishee order. Such an application is not a "step in the action." *Trosell* v. *Gregov,* (1935) 50 B.C.R. 265; (1936) 1 W.W.R. 13.

6. Security for costs—one plaintiff in and one out of the jursdiction.]—Where each of two plaintiffs has a separate and distinct cause of action, although the causes both arise out of the same motor-car collision, order XVIII, rule 2 authorizes the making of an order that a plaintiff residing without the jurisdiction give security for costs, although his co-plaintiff resides within the jurisdiction. *MacLeod* v. *Sing Lung Co.,* (1936) 2 W.W.R. 48.

7. Claim for arrears of alimony provided for by agreement.]—The parties had been divorced but no alimony was claimed or awarded. The husband made an agreement to pay apart altogether from the proceedings. Held, the County Court had jurisdiction in an action to recover arrears under the agreement. *Dillon* v. *Dillon,* (1938) 1 D.L.R. 790; (1938) 1 W.W.R. 363.

8 Jurisdiction—fraudulent transfer.]—A County Court has jurisdiction under sec. 40 (1) of the County Courts Act to set aside as fraudulent a bill of sale, within the limits fixed by the section. *W. E. Sherlock Ltd.* v. *Burnett,* (1937) 52 B.C.R. 345; (1938) 1 D.L.R. 381; (1938) 1 W.W.R. 141.

9. Summons not in force for more than twelve months.]—A summons was issued on December 3, 1936. The plaintiff died December 13, 1936. No order of revivor having yet been made, the summons was served on the defendant November 18, 1937. Such an order was made December 14, 1937. The defendant moved to set aside the service as being a nullity with the result that order 1, rule 2D would apply and the summons not having been served within twelve months would cease to be in force. Held the service being a nullity, the summons ceased to be in force after the expiration of twelve months from December 3, 1936. *Bening* v. *Singer,* (1938) 52 B.C.R. 392; (1938) 1 D.L.R. 588; (1938) 1 W.W.R. 859.

10. Application to add plaintiff's wife as defendant to counterclaim.] — As the result of a collision between two cars the plaintiff, as owner of one car, sued the defendant for damages. The defendant denied liability and filed a counterclaim against the plaintiff, alleging that the plaintiff's wife, as the servant and agent of the plaintiff, was negligent. The defendant applied under order V, rule 23, to add the wife as a party to the counterclaim. Held, dismissing the application that such an order will not be made where the defendant has an alternative claim. *Spencer* v. *Deane,* (1938) 53 B.C.R. 35; (1938) 4 D.L.R. 805.

11. Whether attachment a form of execution—order XII, rule 17 of County Court rules.]—The rule provides that where six years have elapsed since the date of a judgment the leave of a judge must be obtained before execution may issue. Here a garnishing order was issued after the lapse of more than six years. Held, that the ex parte order for attachment of debts issued by the registrar is a garnishing order nisi and not a process of execution. It may be that the garnishing order absolute is a form of execution. *Caple* v. *Caird,* (1944) 60 B.C.R. 60; (1944) 1 W.W.R. 569.

12. Setting aside—whether long delay a bar.]—Judgment was entered in default of a dispute note in 1931. The judgment creditor applied in 1945 to be let in to defend. The judge dismissed the application in view of the length of time since the judgment. Held, allowing the appeal, the

time should not be held to commence running until the defendant knew of the judgment. Here the defendant swore that in 1931 when served with the summons and some garnishee orders, he went to the plaintiff and arranged that the amount attached should be accepted as the amount due to the plaintiff. He did not therefore enter a disput note or collect from the garnishees on the assumption that the plaintiff was to look to them for his money. He heard nothing more of the matter in the meantime. Held further it might be possible at the trial for the defendant to establish an accord and satisfaction. *Petkovich* v. *Potkonjak*, (1945) 62 B.C.R. 164; (1945) 3 W.W.R. 476.

13. Continuing damages between commencement of action and trial—no jurisdiction.] — Apart from express legislation, recovery of damages for breach of contract is limited to damages sustained at or prior to the commencement of the action. Supreme Court rule 482 authorizes their assessment in that Court down to the time of assessment but there is no similar rule in the County Court. Sec. 77 of the County Courts Act enables a judge where there is no provision in the Act or rules to import the Supreme Court rules in matters of practice or procedure. Held, this is not a matter of practice or procedure but of substantive right. Neither sec. 22 of the County Courts Act nor sec. 2 (7) of the Laws Declaratory Act will avail since in each case the powers are limited by the ordinary jurisdiction of the Court. *Moore* v. *DeWolf*, (1945) 63 B.C.R. 161; (1946) 4 D.L.R. 357; (1946) 3 W.W.R. 358.

14. Setting aside—payment into Court—onerous terms.] — The judge set aside a judgment entered in default of a dispute note on the terms that the amount claimed in the action should be paid into Court. The defendant appealed against the severity of the term. Held, dismissing the appeal, there were exceptional circumstances making it equitable to impose the term. The service of the plaint was made substitutionally and the record showed that the defendant appeared to have evaded service for three months. The judge had doubts that the alleged defence was meritorious. The defence suggested might have been raised many months before but was not acted upon until the action was brought. *National Health Association* v. *Blank*, (1946) 63 B.C.R. 71; (1946) 4 D.L.R. 221; (1946) 2 W.W.R. 417.

15. Power to renew summons when default judgment set aside.] — A default judgment was set aside two years after its entry. In the meantime the Statute of Limitations had barred the original claim. An application to renew the summons was refused. The Court has power to renew but generally will refuse where a limitation has intervened. If, however, the defendant's conduct is such as to disentitle him to object the extension will be granted. *James* v. *Lawson*, (1946) 3 W.W.R. 35.

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IV. Effect of Previous Decisions, 141.

I. Jurisdiction.

1. Claim against Vancouver Harbour Commissioners — Exchequer Court.] — An action for wrongful dismissal arising out of a contract made with the Commissioners as servants or agents of the Crown may be litigated in the Supreme Court of British Columbia. Sec. 18 of the Exchequer Court Act giving exclusive jurisdiction to the Exchequer Court in cases in which the claim arises out of a contract entered into by or on behalf of the Crown, applies to contracts to which His Majesty is actually a party, or in which someone actually contracts, in the contract, on behalf of, or as representing His Majesty. *McLean* v. *Vancouver Harbour Commissioners*, (1936) 51 B.C.R. 169.

2. Tribunal given jurisdiction by consent.] — An action commenced in the Supreme Court of British Columbia was by consent ordered to be tried in the County Court. Judgment having been given by the County Court Judge, one of the parties appealed and at the hearing the respondent took the objection that the consent order was made without jurisdiction, and that the judge was merely an arbitrator, from whom no appeal would lie. Held, sustaining the preliminary objection, that in the circumstances the County Court judge was acting as an

arbitrator and there was no appeal. *Wong Soon* v. *Gareb*, (1935) 49 B.C.R. 456; 1 D.L.R. 605; 63 C.C.C. 174.

3. Declaration as to presumption of death—when to be made.]—The petitioner sought a declaration presuming the death of her husband, he having disappeared 18 years before. Held, refusing the declaration, the Court has no jurisdiction to grant the declaration where, as here, it was sought to enable the petitioner to marry again. The declaration may be made as incidental to the exercise of some other jurisdiction, e.g. admitting a will to probate. *In re Debray*, (1942) 3 W.W.R. 335; (1943) 4 D.L.R. 103.

4. Whether Court's jurisdiction ousted by statutory order.] — An order passed under the War Measures Act provided that no proceedings by way of injunction should be instituted against any member of the Wartime Prices and Trade Board for any act in the purported exercise of any power conferred by the regulations. Held, the bar refers only to powers conferred—if they are not in fact conferred the Court may grant an injunction. *The Society of the Love of Jesus* v. *Smart*, (1943) 60 B.C.R. 71; (1944) 2 D.L.R. 551; (1944) 1 W.W.R. 534.

5. Whether certiorari ousted by Exchequer Court's powers — assessments under Income War Tax Act.]—Sec. 66 of the Income War Tax Act gives the Exchequer Court exclusive jurisdiction to hear and determine all questions arising in connection with any assessment made under the Act. It was sought by certiorari to question the actions of a board of referees dealing with the assessment of the appellant company. The judge held that the Exchequer Court alone had jurisdiction. On appeal it was contended that Section 66 could not affect the power of the Supreme Court of British Columbia to issue a writ of certiorari because the Exchequer Court being a statutory court had no common law powers. Precise words would be necessary to take away the jurisdiction of the Supreme Court of British Columbia in certiorari. Held, affirming the decision below, the intention was to give to the Canadian Exchequor Court the same jurisdiction as that enjoyed by the English Exchequer Court (which included the power to issue a writ of certiorari) and to oust the jurisdiction of all other courts where exclusive jurisdiction was conferred—sec. 66 does that in clear and express words. Moreover, the legislation comes within sec. 101 and 91 (3) of the British North America Act. *Nanaimo Community Hotel Ltd.* v. *Board of Referees under the Excess Profits Tax Act*, (1944) 61 B.C.R. 354; (1945) 3 D.L.R. 225; (1945) 2 W.W.R. 145; affirming (1944) 60 B.C.R. 558; (1944) 4 D.L.R. 638.

6. Effect of Dominion regulation passed under War Measures Act — interference with writ of possession.]—An Emergency Shelter Officer under the powers contained in P.C. 9439 ordered a sheriff not to execute a warrant of possession of rented premises. Assuming that the regulations were validly passed and the officer duly authorized to enforce them, it was held, directing the sheriff to enforce the writ of possession, that to interfere with the administration of justice in this way would require language that forbids any other interpretation. What happened would amount to an administrative official revoking an order of a Court of competent jurisdiction. If the intention is clearly expressed and if it is intra vires the Court must give effect to it. Held, further, P.C. 9439 gives no authority to interfere with the execution of legal process. *In re Landlord and Tenant Act* and *in re Bachand and Dupuis*, (1946) 62 B.C.R. 436; (1946) 2 D.L.R. 641; (1946) 1 W.W.R. 545.

II. Local Judges.

1. Attempt to vary a Court order by local judge sitting in Chambers.]—In a redemption action the mortgagor (plaintiff) moved for judgment upon admissions in the statement of defence. The local judge under the authority of rule 1 of order LXXB made an order in Court fixing a time for redemption. The plaintiff moved for an extension of the time and his notice of motion read "The Court will be moved before His Honour Judge W .C. Kelley as local judge thereof." Although the notice was one for the Court, the local judge elected to treat it as a Chamber matter. He extended the time by an order made in Chambers. Held, on appeal, setting aside the order extending the time for redemption, the local judge had no jurisdiction sitting in Chambers to make the impugned order. Unlike a judge of a superior court a local judge will not be presumed to have any jurisdiction beyond that given by statute. The authority to do what a Supreme Court Judge could do in Chambers does not enable the local judge by virtue of order LV, rule 1(18) to dispose of matters which he thinks

fit in Chambers. If he may not do it in Court, he may not do it in Chambers. Order LXXB is not to be construed to empower local judges to decide contested proceedings summarily in Chambers, when the power to hold trials has been denied them, and their power to hear any proceedings in Court has been restricted to the giving of judgments in undefended cases and upon admissions of fact. *Kennedy* v. *MacKenzie*, (1941) 57 B.C.R. 94; (1942) 1 D.L.R. 118; (1942) 3 W.W.R. 117.

III. Small Debts Court.

1. Receiver—when appeal lies.] — The "decisions" from which an appeal lies from the Small Debt Court are those which are final in their effect and do not include the refusal of a magistrate as a matter of practice to appoint a receiver by way of equitable execution. *Davis* v. *Yoshida*, (1931) 45 B.C.R. 85.

2. Appeal to nearest County Court or a Judge of the Supreme Court—no concurrent appeals.]—The Small Debts Court Act (sec. 55) gives an appeal to the nearest County Court or to a judge of the Supreme Court. Here an appeal was taken to the nearest County Court. The necessary security was, by a slip, not put up in time and the magistrate refused to extend the time. From this refusal the appellant then appealed to a judge of the Supreme Court. Held, dismissing the appeal, that when notice of appeal is given to the County Court, that Court becomes seized of the matter and any interlocutory or other relief should be obtained from that Court. Concurrent appeals in the same cause at different stages to different forums were not contemplated. *Kyle* v. *Hall*, (1946) 62 B.CR. 364.

IV. Effect of Previous Decisions.

1. Stare decisis.]—While the Courts are not bound by the English practice in divorce, the fact remains that an English decision has been followed for over thirty years. The principle of stare decisis applies and the established practice should not be disturbed. *Mattock* v. *Mattock* (*No. 2*), (1937) 52 B.C.R. 298.

2. Review of Court's own decisions.]—While fully recognizing that judicial comity which leads one Court to follow the decisions of another of co-ordinate jurisdiction, it must yield in some cases to considerations which are paramount to it in importance. It may be incumbent upon the Court to review its own and other decisions when it is satisfied that error has crept in. *Ex parte Yuen Yick Jun*, (1938) 54 B.C.R. 541; (1940) 2 D.L.R. 432; (1938) 2 W.W.R. 274 and (1940) 2 W.W.R. 467; 73 C.C.C. 289; reversing (1937) 52 B.C.R. 158; (1937) 3 W.W.R. 143.

3. Duty to follow decision of judge of co-ordinate jurisdiction.]—It might be right under exceptional circumstances not to follow the decision of a judge or Court of co-ordinate jurisdiction, but it would be extraordinary for a judge to refuse to follow the considered judgment of a brother judge given in the same case. *National Trust Co. Ltd.* v. *The Christian Community of Universal Brotherhood Ltd.*, (1939) 54 B.C.R. 386; (1940) 4 D.L.R. 767; (1940) 3 W.W.R. 203; 22 C.B.R. 49.

4. Effect of opinion given under Constitutional Questions Determination Act.]—Sec. 7 of the Constitutional Questions Determination Act makes the opinion given pursuant to a reference a judgment of the Court of Appeal or of a judge of the Supreme Court, as the case may be. A trial judge disregarded the opinion as certified by the Court of Appeal on such a reference. Held, allowing the appeal, the proper action for the judge to have taken was to follow the opinion of the Court of Appeal as certified under the Act. *Lowe Chong Co.* v. *B.C. Coast Vegetable Marketing Board*, (1937) 51 B.C.R. 559; (1937) 3 W.W.R. 406.

See Appeals.

See Judgments and Orders.

See Practice.

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XX. Appeals.
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I. Offences Against Public Order.

1. Advocating change by use of violence.]—Sec. 98 (8) of the Criminal Code made it an offence to teach or advocate without authority of law, the use of force as a means of accomplishing any governmental change. The accused was convicted by a jury. Held, dismissing the appeal, that properly interpreted in its setting with the aid of the surrounding facts, the evidence showed that accused taught and advocated the use of force as charged. Even indirect language carefully selected in the hope of avoiding a breach of the Code might be regarded as an advocacy of force. *Rex* v. *Evans,* (1934) 48 B.C.R. 223; (1934) 2 W.W.R. 326; 62 C.C.C. 29.

II. Offences Against the Administration of Law and Justice.

1. False oath amounting to perjury if made in a judicial proceeding.]—Sec. 175 of the Criminal Code makes it an offence for a person who is required or authorized by law to make a statement on oath, thereupon to make one which would amount to perjury if made in a judicial proceeding. Held, the word "thereupon" refers to a statement that the accused is "required" or "authorized" to make and an acquittal was directed where that element was lacking in the evidence for the prosecution. *Rex* v. *Davidson,* (1933) 2 W.W.R. 285; 14 C.B.R. 474.

2. Conspiracy to effect a public mischief by perverting the course of justice.]—A former chief of police of the City of Vancouver and several others were charged with this offence. Such a conspiracy is a common law offence and is not covered by the Criminal Code. It consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act or to do a lawful act by an unlawful means. The prosecution here must prove that the accused entered into an agreement for the unlawful purpose of preventing the enforcement of the named sections of the Criminal Code as to immorality and gaming. There is no suggestion of the paying or receiving of money among the alleged conspirators. The conduct of the chief of police in consorting with underworld characters was explained by a Crown witness as being the recognized police method of securing information for the suppression of major crime. Held, acquitting the accused, that no agreement or combination amounting to a conspiracy had been proved. *Rex* v. *Cameron,* (1935) 50 B.C.R. 179; (1935) 4 D.L.R. 447; 64 C.C.C. 224.

3. Obstructing peace officer — City by-law.]—The accused stood on a street corner

in the City of Vancouver offering flowers for sale. A constable asked him as to his right to do so and, when the accused replied that he had none, the constable told him he was breaking a City by-law and would have to move. He went across the street and continued offering flowers for sale. The constable spoke to him again and explained that he was to cease selling flowers anywhere on the streets. When the accused refused to desist the constable arrested him. He was charged with and found guilty of wilfully obstructing a peace officer in the execution of his duty. Held, on appeal affirming the conviction, that the accused had persisted in doing what he was told by the police officer he had no legal right to do; and therefore he accentuated his position; that is obstruction to the officer. *Rex* v. *Golden,* (1936) 51 B.C.R. 236; (1937) 1 D.L.R. 350; (1937) 1 W.W.R. 337; 67 C.C.C. 292 (*see Rex* v. *Johanson, infra.*)

4. Attempt to obstruct the course of justice.] — The wife of the accused was charged under the Minimum Wage Act. Having appeared and obtained an adjournment she was taken by the accused to the border apparently with the intention of preventing her from appearing at the hearing. The trial judge acquitted him of attempting to obstruct, etc., holding that as her trial had not actually commenced, the wife had committed no offence in failing to appear and hence the accused could not be guilty. Held on appeal, affirming the acquittal, that the conduct of the accused, though in some respects equivocal, was not inconsistent with a lawful purpose. *Rex* v. *Kadin,* (1937), 51 B.C.R. 403; (1937) 2 D.L.R. 800; (1937) 2 W.W.R. 345; 68 C.C.C. 318.

5. Offering reward — "no questions asked"—whether more than one recovery of penalty possible.]—The plaintiff, an informer, proved two publications in the defendant's newspaper of an advertisement offering a reward for the return of lost property, "no questions asked." His action was launched before but was tried after another one for the same penalty in which judgment had been given against the defendant. The satisfaction of the earlier judgment was pleaded as a bar to this action. Held, the plaintiff was entitled to succeed as there was no evidence of any collusion or delay by the plaintiff. The defendant had the opportunity in this action to apply for a stay and to plead the prior action but did not do so. *Jackman* v. *The News Herald Ltd.,* (1940) 1 W.W.R. 377; 73 C.C.C. 402.

6. False declaration under Bulk Sales Act not perjury under sec. 172 of Criminal Code—power to substitute offence under sec. 176.]—Under the Criminal Code (sec. 170) perjury is limited to ***witnesses*** in judicial proceedings. False swearing is covered by sec. 175. Sec. 176 covers the offence of making a false statement, not under oath, to a person authorized by law to receive it. Sec. 172 makes one guilty of perjury if, (inter alia) he takes a false oath or an affirmation, declaration or deposition in the circumstances there described. The intention of sec. 172 was to declare that it would be a crime amounting to perjury, for *any person other than a witness,* to give a false statement under oath in a judicial proceeding, e.g. parties who make affidavits, etc. Held, affirming the decision below, the accused did not give a false statement under oath as a witness in a judicial proceeding under sec. 170; nor did he make a false oath in a judicial proceeding under sec. 172; hence he could not be guilty of perjury. A conviction under sec. 175 could not be considered because there was no dissent below on the point. As to making use of sec. 176, there was no proof that the officer before whom the oath was made was one of those mentioned in the section. *Rex* v. *Orford,* (1943) 2 D.L.R. 337; (1943) S.C.R. 103; 79 C.C.C. 151; affirming (1942) 58 B.C.R. 51; (1942) 3 D.L.R. 582; (1942) 3 W.W.R. 83; 78 C.C.C. 102.

7. Obstructing a police officer—playing bag-pipes on street—refusal to desist.]—The accused was convicted of obstructing a police officer in the execution of his duty. He was playing the bag-pipes on the street followed by some children. A police officer told him he was obstructing traffic. The accused refused to desist and was arrested for obstructing a police officer. Held, quashing the conviction, he was not obstructing traffic and therefore the officer when he interfered, was not executing any duty, and hence could not have been obstructed by the accused in the exercise of any duty. As to the City by-law which prohibited the making of any loud and objectionable noise there was no evidence to suggest that the music produced by the bagpipes was a loud and objectionable noise. *Rex* v. *Sutherland,* (1943) 59 B.C.R. 159; (1944) 1 W.W.R. 529.

8. Obstructing a police officer—"tagging" on city street — refusal to desist.] — The accused was convicted of wilfully obstructing a police officer in the execution of his

duty. The occasion was a tag-day in Vancouver and the accused with others was standing on street corners soliciting contributions in support of a strike. There was no law banning such soliciting but a City by-law forbade persons from standing or loitering on any street in such a manner as to obstruct or impede or interfere with traffic thereon. An officer ordered the accused to move on which he refused to do. The evidence of impeding or obstruction was general in character and did not refer specifically to the accused. Held, on appeal to the Court of Appeal, affirming the conviction, that persistence in doing what a person is told by a police officer in the execution of his duty, not to do, is obstruction of the officer. Held on further appeal to the Supreme Court of Canada, quashing the conviction, the evidence of infraction of the by-law was not brought home to the accused. The evidence did not show that the police in directing the accused to move, was proceeding on any anticipated obstruction of the public. It was not obstruction but tagging which was in the mind of the officer. It cannot be said the tagging *per se* is obstructing. The evidence proved only tagging and there was no bylaw against tagging. *Rex* v. *Johanson,* (1947) 4 D.L.R. 337; 89 C.C.C. 305 reversing (1946) 63 B.C.R. 393; (1947) 2 D.L.R. 458; 87 C.C.C. 201.

III. Offences Against Public Revenue.

1. Excise — vessel within three-mile limit.] — The applicant for habeas corpus (a foreigner) was convicted under sec. 181 of the Excise Act, on summary conviction, of having a quantity of alcohol, unlawfully imported, on a foreign vessel in Trincomali Channel in the County of Victoria. The vessel was on the most convenient and direct route from Seattle to Alaska but was within three miles of the coast of Canada. Held, granting the application, that the Territorial Waters Jurisdiction Act relating to offenses committed on foreign vessels deals only with offences punishable by indictment and that even if the waters of Trincomali Channel are territorial waters of Canada, they are so placed that passage over them is necesarry or at least convenient and generally used for the navigation of open seas, with the result that the exception in sec. 111 of the Customs Act as to "international waters" applies. *Rex* v. *Hardy* (1932) 46 B.C.R. 152; 59 C.C.C. 394.

2. Excise Act—conviction amended by adding imprisonment.] — Upon a conviction under sec. 176 (e) of the Excise Act, the magistrate imposed a fine only. The Crown moved by way of certiorari to have the conviction amended by adding imprisonment. Held, that imprisonment as well as a fine must be imposed and the conviction was ordered to be amended by providing for a term of imprisonment for one month. with hard labour, in addition to the pecuniary penalty. *Rex* v. *Leschiutta,* (1933) 47 B.C.R. 407.

3. Forfeiture of boat under Customs Act—smuggling.]—In an action based on on alleged illegal seizure and forfeiture of an American vessel seized in Canadian waters while transporting alcohol the consent or connivance of the owner is immaterial. The statute attaches to the vehicle used the penalty of forfeiture, independently of the guilt or innocence of the owner. *Sandness* v. *The King* (1933) Ex. C.R. 78; 60 C.C.C. 220 .

4. Onus on Crown under sec. 1014 (2) of the Criminal Code.]—The accused were convicted of conspiracy to defraud the Dominion Government in relation to income tax. The trial judge admitted a body of evidence that was held on appeal not to be admissible. The Court of Appeal held that no substantial wrong or miscarriage of justice had actually occurred within the meaning of sec. 1014 (2) of the Criminal Code. Held, on further appeal to the Supreme Court of Canada, reversing the decision below and ordering a new trial, illegal evidence of a very damaging character was admitted at the trial, which was highly prejudicial to the accused. It may have seriously influenced the trial judge. It cannot be said that the verdict would necessarily have been the same if the evidence had been excluded. The onus on the Crown to satisfy the Court that there would without doubt have been a conviction without the impugned evidence had not been discharged. The function of a Court of Appeal is not to retry the accused, but to decide whether or not they had a fair trial on proper evidence. *Rex* v. *Northey,* (1948) S.C.R. 135; (1948) 3 D.L.R. 145; 91 C.C.C. 193; reversing (1947) 63 B.C.R. 515; (1947) 4 D.L.R. 774; (1947) 2 W.W.R. 289; 89 C.C.C. 254.

IV. Offences Against Morality.

A. In General.

Seduction—failure to instruct jury as to elements of.] — The Court of Appeal directed a new trial where on a charge of seduction (under Code sec. 213) consent was denied and the elements necessary to a conviction were not explained to the jury. *Rex* v. *Blanchard;* (1941) 56 B.C.R. 378; (1941) 3 D.L.R. 467; (1941) 3 W.W.R. 785; 75 C.C.C. 279.

B. Bawdy House.

1. Common bawdy house.]—The magistrate dismissed a charge under sec. 225 of the Criminal Code because, in his opinion, the section did not apply to the case of a place kept by one woman as her home as well as a place for the purpose of prostitution. Held, on appeal, ordering a new trial, that the 1907 amendment to the section made it clear that it is no longer necessary to prove that women, other than the woman whose home it is, resort to the place. *Rex* v. *Miket,* (1938) 53 B.C.R. 37; (1938) 3 D.L.R. 710; (1938) 2 W.W.R. 459; 70 C.C.C. 202 .

2. Whether rental agent guilty as keeper — sec. 229 (5) of the Criminal Code.] — The accused was convicted of being the keeper of a common bawdy house pursuant to sec. 229 (5) of the Code, which makes a landlord or agent of premises a keeper if, after a person has been convicted of the offence in respect thereof, he fails to exercise any right he may have to determine the tenancy, and the offence is repeated. The accused was the rental agent of the premises in question. He was notified by the police of a conviction in the place and warned that a repetition would result in action against him. He gave the tenant notice to vacate but did not follow it up by any proceedings. A subsequent conviction took place with respect to the premises and the agent was thereupon charged and convicted. Held, quashing the conviction, that the accused had exercised whatever right he had to determine the tenancy. The magistrate had so found and was in error in convicting. *Rex* v. *Jacobs,* (1941) 56 B.C.R. 228; (1941) 3 D.L.R. 221; (1941) 3 W.W.R. 275; 75 C.C.C. 337.

C. Procuring.

1. Sec. 216 of the Criminal Code.]—Section 216 (1) of the Criminal Code makes a male person who lives, wholly or in part, on the earnings of prostitution, guilty of an indictable offence. Sec. 216 (2) applies to sec. 216 (1) and does not create a separate offence. *Rex* v. *James* (1938) 52 B.C.R. 472; (1938) 2 D.L.R. 750; 69 C.C.C. 320.

2. No visible means of support—sec. 216 (2) of the Criminal Code.]—To support a conviction of living on the earnings of prostitution based on sec. 216 (2) there must be proof that the accused had no visible means of support. *Rex* v. *Zelky,* (1938) 53 B.C.R. 151; (1938) 3 W.W.R. 63 (see (1939) 1 W.W.R. 305); 71 C.C.C. 143.

3. Person "habitually" in prostitute's company — deemed to be living on her earnings.]—The accused was convicted of living off the earnings of a prostitute. Sec. 216 (2) of the Criminal Code makes the being habitually in a prostitute's company prima facie evidence of the offence charged. The trial judge found that although he was not living with the woman, who was admittedly a prostitute, he was habitually in her company, and applying the presumption he convicted. Held, affirming the conviction the word "habitually" as used here does not connote that they must be together usually, or continually or customarily, between the dates set out in the charge, but that they were in each other's company for the most part. *Rex* v. *Johnson,* (1940) 55 B.C.R. 481; (1941) 1 D.L.R. 782; (1940) 3 W.W.R. 623; 74 C.C.C. 324.

4. Living on earnings of prostitution—money used for purposes other than that intended.] — The fact that the money in question was not given for living purposes but to keep the accused out of gaol on a charge of embezzlement, will not afford a defence to the charge. *Rex* v. *Cavanaugh* (1942) 1 D.L.R. 592; 77 C.C.C. 79.

D. Gaming.

1. Automatic vending machine—whether means or contrivance for playing a game of chance.]—The accused was convicted for keeping a common gaming house. The machine in question was a candy vending machine and the operator knew before putting money in the slot what would be the result of the operation. It was contended that each operation was thus a distinct game with no element of chance involved. Held, affirming the conviction, that taking the

game as a whole it came within sec. 986 (4) of the Criminal Code. The inducement was to keep on playing until something substantial came up. The operator did not know when he first played what the second or third operation would produce—hence the element of chance or uncertainty. *Rex* v. *Richards,* (1932) 1 W.W.R. 148; 57 C.C.C. 208.

2. Automatic machine in common gaming house—whether to be confiscated and destroyed.] — The convicting magistrate ordered the machine upon which the conviction was based to be confiscated. On appeal from that order it was set aside. The machine was not the property of the accused, but was leased by her. The decision in *Rex* v. *Roberts* (1931) S.C.R. 417 had thrown doubt on the illegality of the machine. The City officials had passed the machine as being legal. The decisions on this question of its legality are so conflicting that the accused did not know how far she could go. *Rex* v. *Richards* (*No. 2*), (1932) 1 W.W.R. 177.

3. Mens rea—"wilfully and knowingly."]—The accused was charged under sec. 235 (i) of the Criminal Code with wilfully and knowingly receiving a message by telegraph conveying information relating to betting. It was shown that the accused operated a general news service by means of a teletype machine and that racing news was disseminated. Held, acquitting the accused, that the words "wilfully and knowingly" predicate mens rea. The gravamen of the offence is the corrupt and intentional receipt of information for use in betting operations in which the accused has some active part. *Rex* v. *General News Bureau Inc.,* (1933) 46 B.C.R. 459; (1933) 1 W.W.R. 741; 60 C.C.C. 66.

4. Slot-machines in club.]—The acting-secretary of an incorporated social club had the control of two slot-machines kept in the club premises and he collected the proceeds on behalf of the club. The game played was one of mixed chance and skill, if not of pure chance. On appeal from the conviction of the acting-secretary, it was held, affirming the conviction, that, as the stakes or bets were directly paid to the person keeping the place, the accused came within sec. 226 (b) (i) of the Criminal Code as the conductor of a place kept for playing at a mixed game of chance and skill in which a bank is kept by one player exclusively of the others. *Rex* v. *Thomas,* (1934) 48 B.C.R. 76; (1934) 1 W.W.R. 493; 61 C.C.C. 301.

5. Conveying lottery tickets.] — The appellant was convicted of knowingly conveying lottery tickets intended for use in carrying out a scheme for disposing of property by a mode of chance, under sec. 236 (bb) of the Criminal Code. On a search warrant ten cases were found containing paper slips that could be adapted to either a lawful use or an unlawful use. The appellant was in the trucking business and was bringing the cases from the Customs warehouse under contract. Held, on appeal, quashing the conviction, that assuming that the papers were being imported with the intention of illegal use, there was no evidence to support the finding that the appellant had knowledge of that intention. *Rex* v. *Louie How,* (1936) 50 B.C.R. 554; (1936) 4 D.L.R. 389; (1936) 2 W.W.R. 638; 66 C.C.C. 250.

6. Common gaming house — bona fide club or business carried on for profit.]—A club incorporated under the Societies Act may at the outset be a members' club at which gambling of a certain kind is lawful. If, however, while preserving the forms of a members' club it falls under the control of a small group bent on exploiting the gaming commercially, so that while it has the shell of a legal social club, it has in fact degenerated into a proprietary club carried on for profit, its operations may become unlawful. The original annual fee was reduced to ten cents for what was really a life membership. Those who frequented the place were not "members" but customers or patrons of an established business. Held, affirming the conviction, that the onus upon the accused by sec. 985 and 986 of the Criminal Code had not been displaced. *Rex* v. *Williamson,* (1937) 51 B.C.R. 456; (1937) 3 D.L.R. 553; (1937) 2 W.W.R. 545; 68 C.C.C. 380.

7. Disposing of property by a mode of chance.] — The accused was acquitted of "selling tickets for disposing of property by a mode of chance" contrary to sec. 236 (b) of the Criminal Code. The tickets in question bear eighty Chinese characters. The purchaser would select and mark ten of these characters. Later a drawing takes place; ten balls each bearing a character are taken from a bag. The number of selections the purchaser has succeeded in marking on his ticket corresponding with those on the balls, and the amount paid for the ticket,

governs the winnings. Held, on appeal, reversing the decision below, that the Crown had proved the three essentials to make out the offence; (1) the sale of the tickets; (2) the intention to dispose of property, viz., money; (3) that the disposal was by a mode of chance. The fact that an unlucky purchaser might not select any winning characters did not matter. *Rex* v. *Sam Chow,* (1937) 52 B.C.R. 467; (1938) 2 D.L.R. 332; (1938) 1 W.W.R. 458; 70 C.C.C. 150.

8. Uncertainty of charge.] — A charge that the accused on a certain date and place "did unlawfully keep a disorderly house, to wit, a common gaming house" at a certain street address sufficiently states the offence. *Rex* v. *Lum Pie,* (1937) 52 B.C.R. 420; (1938) 3 D.L.R. 432; (1938) 2 W.W.R. 463; 70 C.C.C. 343.

9. Conviction quashed—disposal of order confiscating money.]—The accused were convicted as keepers of a common gaming house and later an order was made that certain money found there be confiscated by reason that the accused had been convicted. The conviction having been quashed the accused moved by certiorari to quash the order of confiscation. While there is authority for the proposition that the confiscation need not necessarily fall with the conviction, the forfeiture here should be set aside because the order in terms based it on the conviction of the accused. *Rex* v. *Chin Jung,* (1938) 52 B.C.R. 478, (1938) 1 D.L.R. 784; (1938) 1 W.W.R. 414.

10. Status of agent here for lottery conducted in Australia.]—The accused was convicted under the first part of sec. 236 (c) of the Criminal Code. His practice was to give the purchaser an interim receipt for his money after which the operators of the lottery in Australia sent a ticket to the purchaser entitling him to a chance in the draw to be conducted there. Held, on appeal, quashing the conviction, that the section was aimed at those who control and manage the scheme and not at their agents in this country who afford persons the opportunity to try their luck in a draw in another country. Sec. 69 which makes one who aids another to commit an offence, guilty of it, did not avail in the circumstances. *Rex* v. *Rankine,* (1938) 53 B.C.R. 109; (1938) 4 D.L.R. 201; (1939) 1 W.W.R. 14; 70 C.C.C. 354.

11. Code sec. 235 (1) (h) — guessing competition.]—The accused was convicted under sec. 235 (1) (h) of the Criminal Code of aiding or assisting in giving notice of an invitation to guess or foretell the result or contingency of or relating to a contest. It was shown that he invited subscribers to pay $1 each for the privilege of competing with one another in guessing which one of the ten armed services would be selected by a judge as the most popular. Held, on appeal quashing the conviction, that there was no contest or contingency upon the result of which the subscribers were invited to bet. The scheme was merely an invitation to join with other subscribers in a guessing competition among themselves. The section was not intended to prohibit such a competition. *Rex* v. *Hamm,* (1941) 56 B.C.R. 66; (1941) 2 D.L.R. 466; (1941) 1 W.W.R. 304; 75 C.C.C. 185.

12. Lottery—failure to state consideration.]—The accused was convicted on a plea of guilty, of unlawfully disposing of "tickets in a scheme for the purpose of determining who were the winners of property proposed to be disposed of by a mode of chance." Held, on habeas corpus, that the charge did not disclose any offence because the essential averment as to consideration was omitted. The conviction was quashed. *Rex* v. *O'Malley,* (1941) 57 B.C.R. 138; (1942) 1 D.L.R. 206; (1942) 1 W.W.R. 127; 77 C.C.C. 99.

13. Common Betting House—sec. 227 (c) of Criminal Code.]—The accused was convicted under sec. 227 (c) of the Code apart altogether from the presumptions of sec. 986 (2). The character and use made of the premises, the special telephone equipment, the supply of racing-sheets and the markings thereon, the scanty stock of goods on hand—all these facts clearly entitled the magistrate to convict. *Rex* v. *Porta,* (1945) 61 B.C.R. 103; (1945) 2 D.L.R. 591; (1945) 1 W.W.R. 351; 83 C.C.C. 292.

E. Vagrancy.

1. Mode of stating vagrancy charge.] —Sec. 238 of the Criminal Code provides "Every one is a loose, idle or disorderly person or vagrant" who commits any of the ten offences listed in the section. The accused was charged in the information that he "did unlawfully cause a disturbance in a public place by swearing, contrary to sec. 238, subsection (f) of the Criminal

Code of Canada." It was contended that this charge disclosed no offence because it said nothing about vagrancy, and that the offence is that of being a vagrant, and not of "causing a disturbance etc." Held, that the information does disclose an offence which on proof is punishable under sec. 239. *Rex* v. *Washington,* (1935) 50 B.C.R. 238; 65 C.C.C. 106.

2. Vagrancy—wandering abroad.]—The accused was convicted under sec. 238 (a) of the Criminal Code. She was found walking in the corridor of a rooming house where she had no right to be. Held, quashing the conviction, she was not "wandering abroad" within the meaning of the section. As the rooming house was a private place and as she could have been ejected at any time by the proprietor, the ingredient of being free to come and go was lacking. *Rex* v. *Mandzuk,* (1944) 61 B.C.R. 101; (1945) 1 W.W.R. 354; 83 C.C.C. 347.

F. Juvenile Delinquency.

1. Charge of indictable offence at Assize.] — The accused having established that he was a juvenile, his counsel moved to quash the charge for lack of jurisdiction. Held that the proper course was to quash the charge, leaving it to the Crown to take whatever steps it saw fit. *Rex* v. *Roos,* (1932) 46 B.C.R. 235; (1932) 3 W.W.R. 372.

2. Effect of amendments to Juvenile Delinquents Act.] — The purpose of the Juvenile Delinquents Act is to prevent the morals of children from becoming endangered. Prior to the addition of subsection (4) to sec. 33 it was necessary to show that a child's morals were in fact endangered. Sec. 33 (4) as amended relieves the Court of the necessity of speculating as to whether or not the child's morals were in fact undermined. *Rex* v. *Hamlin,* (1939) 54 B.C.R. 14; (1939) 1 W.W.R. 702; 72 C.C.C. 142.

3. Contributing to juvenile delinquency —sexual intercourse in the presence of sleeping child.]—A male child of five years was asleep in a bed wherein the accused was having sexual intercourse with the child's mother. Prior to the amendment to the Juvenile Delinquents Act some proof of viciousness in a way that would be apparent to the child would have been necessary. Now by sec. 33 (4) the failure of the child to understand the nature of the conduct of the accused has ceased to be a defence. A conviction was entered. *Rex* v. *Marr,* (1944) 1 W.W.R. 345; 81 C.C.C. 328.

4. Contributing to juvenile delinquency —sexual intercourse with girl of fifteen.] —The accused was 19 and the girl 15 years of age. The facts were proved. For the defence it was contended that the girl told the accused, and he believed, that she was over 18 years of age. Held, the accused was under a duty to ascertain her age, and having failed to do so he was responsible. The further defence that she was already a delinquent with other men did not avail. Acts of a certain nature are aimed at by the statute; not the result of those acts. A conviction was entered. *Rex* v. *Van Balkem,* (1944) 1 W.W.R. 347.

5. Juvenile Delinquents Act—status of magistrate not sitting as judge of the Juvenile Court.]—Where a magistrate acted as such, not being specially or otherwise authorized to act as a judge of the Juvenile Court, the provisions of sec. 37 of the Act do not apply. *Rex* v. *Henderson,* 82 C.C.C. 357; (1944) 2 W.W.R. 411.

6. Contributing to Juvenile Delinquency —attitude of Court.] — Adults should be held criminally responsible for bringing about delinquency in children. The Court should not be astute to set aside convictions on mere technicalities. *Rex* v. *Manning,* (1946) 3 W.W.R. 74.

7. Contributing to a child becoming a juvenile delinquent — description of offence.]—The accused was convicted for unlawfully and wilfully committing an act likely to make a child a juvenile delinquent, to wit, by acts, etc. Held, the description of the act complained of was sufficiently given in the charge as recited in the conviction. Here the act of contributing was amplified by identifying with some particularity the conduct complained of. Particulars might have been asked for. *Rex* v. *Kendarick,* (1946) 3 W.W.R. 348, 86 C.C.C. 316.

8. Juvenile Court — how to be conducted.]—There is no power in a Juvenile Court to "convict" a child. The Court's powers are found in sec. 20 of the Juvenile Delinquents Act. While the proceedings are to take place without publicity the complainant is entitled to be present at the hearings. It is open to the judge to proceed by plea in appropriate circumstances if he can do so with safety, otherwise he should ask

"Did you do this?" or words to the like effect. There is only one offence under the Act and that is "delinquency." The Court has no power to suspend sentence, i.e. to suspend the passing of sentence. Held, on appeal under sec. 37 of the Act, quashing the conviction for unlawfully killing an animal; the charge was not open to be laid under the Act and there is no such thing as a conviction, only an adjudgment that the children were juvenile delinquents. *Rex* v. *H. and H.*, (1946) 63 B.C.R. 449; (1947) 3 D.L.R. 564; (1947) 1 W.W.R. 49, 88 C.C.C. 8.

G. Opium and Narcotic Drug Act.

1. Possession—accused making preparations to smoke.]—Notwithstanding that the penalty for smoking opium (sec. 12) is lighter than for having it unlawfully in possession (sec. 4 (d)) a person was properly convicted of the latter offence where he merely had a package of opium in his hands although he was obviously preparing to begin smoking. Held, affirming the conviction, that the purpose for which the accused had the opium in his possession was immaterial. *Rex* v. *Lee Po,* (1932) 45 B.C.R. 503; (1932) 4 D.L.R. 712; (1932) 2 W.W.R. 313; 58 C.C.C. 315.

2. Effect of sec. 42 of the Immigration Act.]—Where on a habeas corpus application the return showed that the arrect was based on sec. 26 of the Opium and Narcotic Drug Act, it was held that only such provisions of the Immigration Act could be relied on as that section make applicable (those relating to enquiry, detention and deportation). The provision for arrest in sec. 42 of the Immigration Act is hence inapplicable. *In re Immigration Act* and *Sue Son Poy,* (1932) 46 B.C.R. 232; 58 C.C.C. 338.

3. Opium dross — residue after smoking.]—The respondent charged with unlawful possession of opium was found not guilty on evidence showing that he had opium dross in his pockets. It was held at the trial that dross, i.e. the residue remaining in a pipe after opium is smoked is not "opium" as defined by the Opium and Narcotic Drug Act. Held, allowing the appeal, that under the statutory definition the respondent was in possession of opium. *Rex* v. *Chan Sam,* (1932) 46 B.C.R. 341; (1933) 1 W.W.R. 296; 59 C.C.C. 325.

4. Discharge of onus placed on accused by sec. 17.]—A small quantity of opium was found in the house of the accused, a woman of 65. Under sec. 17 of the Opium and Narcotic Drug Act, she would be deemed to be in possession of it without lawful authority unless she proved that it was there without her authority, knowledge or consent. Having been convicted, it was held on appeal, directing an acquittal, that her explanation that her step-son had without her knowledge come to the house and smoked opium, had advanced the "proof" of her defence to such a stage that a reasonable doubt of her guilt was established and that she was entitled to the benefit of that doubt. *Rex* v. *Lee Fong Shee,* (1933) 47 B.C.R. 205; (1933) 3 W.W.R. 204; 60 C.C.C. 73.

5. Defence of agency.]—The defence of the accused, charged with selling opium, was that he was not the vendor but had merely acted for a police operative in getting the drug from a third party. The trial judge found that the third party was a myth and that the accused was the vendor. Held, on appeal, affirming the conviction, that an offence is committed by persons who aid and abet in the transaction ,and that there was abundant evidence to enable the judge to convict. *Rex* v. *Mah Quon Non,* (1933) 47 B.C.R. 464; (1934) 1 W.W.R. 78.

6. Habeas corpus — jurisdiction of magistrate.]—The accused was convicted of having in his possession a drug, to wit, morphine. The evidence showed that he actually had poppy heads and it was argued that poppy heads are not morphine within the meaning of the Opium and Narcotic Drug Act. Held, dismissing an application for habeas corpus, that the question raised was one of fact for the decision of the magistrate and did not go to his jurisdiction. The question is not, did the magistrate come to a wrong conclusion, but ought he never to have begun the inquiry. *Rex* v. *Beru,* (1934) 49 B.C.R. 22; (1934) 3 W.W.R. 47; 62 C.C.C. 158.

7. Having possession—smoking.]—The trial judge on a charge of having opium in their possession acquitted the accused because, on the facts, he found they had been smoking. Held, on appeal, reversing the decision below and ordering a new trial, that the judge erred in restricting his main consideration to the previous smoking instead of to the question of possession. With the fact that possession carries a heavier penalty than smoking, the Court has nothing

to do. *Rex* v. *Wong Yip Lan,* (1936) 50 B.C.R. 350; (1936) 1 W.W.R. 478; 65 C.C.C. 229.

8. Conspiracy to distribute drugs — corroboration of accomplice.]—The witness F. had been convicted on a separate trial, as a conspirator with the accused in the sale of narcotics. It was held that his evidence was sufficiently corroborated by that of a police agent that when they were together in a house frequented by bootleggers and drug pedlars, he heard the accused call to F. "I want to talk to you" and that thereupon both got up and left the room. *Rex* v. *Canning,* (1937) S.C.R. 421; affirming (1937) 52 B.C.R. 93.

9. Marihuana as a narcotic.] — The accused having pleaded guilty to having in possession a drug, marihuana, contrary to the Opium and Narcotic Drug Act, was sentenced to 18 months and a fine. He had a long criminal record against him. *Rex* v. *Forbes,* 69 C.C.C. 140.

10. Posssession — mens rea.] — The accused was convicted of having morphine in his possession, viz, the possession contemplated by sec. 17 of the Act, which makes a person who occupies, controls or is in possession of any room where the drug is found, prima facie guilty. Held, ordering a new trial, that while under sec. 4 (physical possession) mens rea is not an essential ingredient, the defence of want of knowledge is open to the accused under sec. 17. *Rex* v. *Wong Loon,* (1937) 52 B.C.R. 326; (1938) 1 D.L.R. 313; (1938) 1 W.W.R. 333; 69 C.C.C. 284.

11. Possession of poppy heads — mens rea.]—Mens rea is not an essential ingredient of the offence of having in possession a drug, to wit, portions of the opium poppy other than the seed. A new trial was ordered where the judge dismissed the charge for the reason that no mens rea had been shown. *Rex* v. *Ganda Singh,* (1938) 54 B.C.R. 191; 72 C.C.C. 240.

12. Carrying poppy heads—mens rea.] —Mens rea is not an essential ingredient of the offence of taking or carrying a drug, to wit, portions of the opium poppy other than the seed, from one place in Canada to another. *Rex* v. *Ganda Singh (No. 2),* (1938) 54 B.C.R. 193; (1939) 3 D.L.R. 706; 72 C.C.C. 240.

13. Having possession of opium—effect of sec. 5 (2) of the Criminal Code.] — The accused by previous arrangement was in the act of buying opium when, being interrupted by the police, the vendor threw the package of opium behind him. The accused had paid his money but the opium never reached his hands. The magistrate dismissed the charge of having opium in his possession. The Crown appealed relying upon sec. 5 (2) of the Criminal Code which provides, in effect, that if one of two persons with the knowledge and consent of the other, has anything in his custody or possession, it shall be deemed to be in the possession of each of them. Held on appeal, reversing the decision below, that the section was applicable and that the possession by the vendor with the knowledge and consent of the accused was, by virtue of the section, the latter's possession. *Rex* v. *Lee Chew,* (1940) 55 B.C.R. 385; (1940) 4 D.L.R. 571; (1940) 3 W.W.R. 285; 74 C.C.C. 230.

14. Being in possession of opium — application of sec. 5 (2) of the Criminal Code.]—The accused was acquitted of unlawfully having in his possession a drug, to wit, opium. The facts were that the accused went to a friend's room to sell him some lottery tickets. He found his friend smoking opium and sat down to wait until he finished. While waiting the police entered. It was contended that sec. 5 (2) of the Code made the accused guilty as constructively having the drug in his possession because the friend had it. Held on appeal affirming the acquittal that the element of consent in sec. 5 (2) was lacking. *Rex* v. *Cho Chung,* (1940) 55 B.C.R. 234; (1940) 3 D.L.R. 533; (1940) 3 W.W.R. 79; 74 C.C.C. 250.

15. Having opium in possession — constructive possession.] — The accused was visiting a friend in his room and the friend asked him to hand him a box. The accused complied without knowing that there was opium in the box. While in the act of handing the box to his friend the police rushed into the room and forced his hand down on the box. Held, quashing the conviction, the possession under sec. 4 (1) of the Opium and Narcotic Drug Act means actual physical posssession which was not proved. As to constructive possession under sec. 5 (2) of the Criminal Code the accused had no knowledge of what was in the box and did not come within it. *Rex* v. *Lum Hop,* (1941) 56 B.C.R. 397; (1941) 4 D.L.R. 425; (1941) 2 W.W.R. 383; 76 C.C.C. 299.

16. Having morphine in possession — effect of sec. 5 (2) of the Criminal Code.]—Three men were found in a room where poppy heads were being cooked on a heater. The tenant pleaded guilty to having morphine in his possession. The others were charged but acquitted by the magistrate. Held on appeal by the Crown, affirming the acquittal, the element of consent required by sec. 5 (2) was not established. *Rex* v. *Colvin,* (1942) 58 B.C.R. 204; (1943) 1 D.L.R. 20; (1942) 3 W.W.R. 465; 78 C.C.C. 282.

17. Effect of adding by order-in-council to list of drugs one which is not supported by the Act.]—The accused was charged with possession of a drug viz. a portion of a plant containing morphine. The fact that he had poppy heads containing morphine was proved. Under the Act a "drug" includes the substances listed in the schedule together with such others as may be added under authority of the Act. The Crown contended that the drug here had been added to the schedule. By sec. 24 the Governor in Council may make additions to the schedule of a particular kind, viz. "alkaloids, derivatives or preparations of drugs . . . or similar synthetic preparations." On the expert evidence given a portion of a plant cannot be one of the things so added. The possession of such a plant cannot be an offence and the charge was dismissed. *Rex* v. *Lee Hai,* (1943) 1 W.W.R. 439; 79 C.C.C. 108.

18. Unlawful possession of opium — whether in possession with knowledge and consent of another.]—The accused C. obtained by deceit a prescription for a mixture containing opium. The accused B. took the prescription to a druggist and got it filled and took the compound away. On these facts the trial judge directed a verdict of "not guilty." The Crown appealed. Held, ordering a new trial, there was evidence to go to the jury which if believed could result in a conviction. As to B. sec. 4 of the Act excuses possession only if it was under "lawful authority." The prescription was a sham and it was for B. to show the lawful authority—mere possession made out a prima facie case. As to C., sec. 5 (2) of the Criminal Code states that if one person with the knowledge and consent of another has any thing in his possession, it shall be deemed to be in the possession of the other. It was for the jury to say whether B. when he obtained possession of the drug from the druggist had such possession with the knowledge and consent of C. with the result that C. would also have possession. *Rex* v. *Codd,* (1944) 60 B.C.R. 384; (1944) 3 D.L.R. 746; (1944) 2 W.W.R. 495; 82 C.C.C. 97 .

19. Conspiracy to have drugs in possession—circumstantial evidence.]—Although the evidence was entirely circumstantial, the appeal was dismissed, as an examination of the evidence showed that the inculpatory facts were incompatible with innocence and were incapable of any other reasonable hypothesis than that of guilt. *Rex* v. *Young,* (1945) 62 B.C.R. 84; (1945) 3 W.W.R. 623.

20. Circumstantial evidence only—rule in Hodge's case.]—The appellant was convicted of having possession of morphine. The evidence was entirely circumstantial. A police officer entered a room in which there were four persons and thought he saw the appellant make a motion as if throwing something toward a closed window. He found under a book beneath the window the paraphernalia for taking drugs with traces of morphine in them. The occupant of the room said they were his and that the appellant knew nothing of it. Held, quashing the conviction, the evidence lacked that certainty and precision essential to establish guilt. It did not exclude a rational hypothesis of innocence. *Rex* v. *Sherman,* (1945) 62 B.C.R. 241; (1946) 1 W.W.R. 479.

21. Whether analyst's certificate sufficient—alleged drug not produced.] — The accused was acquitted of having a drug in his possession. The Crown had put in an analyst's certificate, as proof under sec. 18 of The Opium and Narcotic Drug Act, of the presence of a narcotic drug in articles seized in the accused's room. The analyst was not called nor was the drug produced in Court. The magistrate dismissed the case without calling on the defence. Held, on appeal setting the acquittal aside, the magistrate was wrong. There is nothing in the Act which requires production of the drug; the analyst's certificate is prima facie evidence of what it certifies. Counsel for the defence did not ask that the analyst be produced for cross-examination. *Rex* v. *Olsen,* (1946) 63 B.C.R. 275; (1947) 2 D.L.R. 315; (1947) 1 W.W.R. 299; 87 C.C.C. 223.

V. Offences Against the Person.

A. In General.

1. Costs against private prosecutor on nolle prosequi of libel charge.]—Sec. 1045 of the Criminal Code provides that on a charge of libel preferred by a private prosecutor where judgment is given for the defendant, he may recover his costs from such prosecutor. The libel proceedings were terminated by a nolle prosequi and it was held in an action to recover the costs that this amounted to a judgment for the defendant. Held, further, that the costs thereof are legal and proper costs which may be allowed under sec. 1045, and the Court in the Criminal case had jurisdiction to order them to be paid by the private prosecutor. Such costs may be taxed pursuant to the order of the Criminal Court and then made the subject of a civil action. *Young* v. *Uchiyama,* (1933) 47 B.C.R. 155; (1933) 1 W.W.R. 545; 60 C.C.C. 55; affirmed (1933) 48 B.C.R. 55; (1934) 1 W.W.R. 401; 61 C.C.C. 313.

2. Unlawful wounding—mens rea.]—On a charge of unlawful wounding under sec. 274 of the Criminal Code proof of mens rea is not essential. *Rex* v. *White,* 62 C.C.C. 76.

3. Medical practitioner—omission to discharge duty to use skill.]—The accused, a medical practitioner, was convicted under sec. 246 of the Criminal Code, of omitting to discharge the duty of using reasonable knowledge, skill and care, and thereby killing a patient. Evidence was given that he was under the influence of liquor on at least two occasions when he was treating the deceased. Held, quashing the conviction, that too much weight was given to the fact that the accused was under the influence of liquor. It had not been shown that, whether sober or not, some omission or failure to supply proper treatment was disclosed and that by reason of it, death ensued. *Rex* v. *Watson,* (1936) 50 B.C.R. 531; (1936) 4 D.L.R. 358; (1936) 2 W.W.R. 560; 66 C.C.C. 233.

4. Parent failing to provide for child—sec. 242 (3) (b) of the Criminal Code.]—It is an offence under the above section for a parent under a legal duty to provide necessaries for a child under sixteen, to neglect or refuse to provide such necessaries, if the child is in destitute or necessitous circumstances. The accused father was convicted by the police magistrate. Held, on appeal, affirming the conviction, that the fact that the wife of the accused with whom the child lived was on relief, was evidence of necessitous circumstances. The duty to provide is not created by the Code—it only provides a penalty if the duty exists and has not been performed. The duty arises under the statute 43 Elizabeth, Cap. 2, being the Poor Relief Act 1601. It is in force in British Columbia by virtue of the English Law Act. *Rex* v. *Hall,* (1941) 56 B.C.R. 309; (1941) 2 W.W.R. 245; 76 C.C.C. 311; affirming (1941) 1 W.W.R. 618.

5. Assault with intent to rob — bank holdup—property laid in manager.]—The accused was convicted by a jury of assaulting M. a bank manager, with intent to rob the said M. On appeal, it was contended that there was no evidence to support the conviction because in fact the accused intended to rob the bank and not M. Held, dismissing the appeal, if M. had handed over his own money the accused would have accepted it. Moreover M. had, as bank manager, the possession of and a special property in the money of the bank. *Rex* v. *Flett,* (1943) 59 B.C.R. 25; (1943) 2 D.L.R. 656; (1943) 1 W.W.R. 672; 79 C.C.C. 183.

6. Having explosives in its charge and under its control—failing to take precautions.]—The accused was convicted of having explosives in its charge and under its control and of failing to take precautions, thus causing the death of two persons. Held, quashing the conviction, there was no evidence that the accused had the explosives in its charge or under its control. The accused ordered the dynamite and paid for it but never had possession of it. *Rex* v. *Miller Construction Co. Inc.,* (1943) 59 B.C.R. 481; (1944) 1 W.W.R. 83; 82 C.C.C. 389.

7. Insufficient evidence—conviction for lesser offence substituted.]—It was held on appeal that the offence of robbery with violence had not been made out as to the element of robbery. In the circumstances a conviction for common assault was substituted for the more serious offence. The sentence was reduced from three years to six months. *Rex* v. *Long,* (1944) 60 B.C.R. 356; (1944) 4 D.L.R. 156; (1944) 3 W.W.R. 212; 81 C.C.C. 393.

8. Robbery with violence—no substantion wrong or miscarriage of justice.]—Whether or not the convicting magistrate wrongly admitted certain evidence during the cross-examination of the accused, the

latter was plainly guilty apart from the impeached testimony. The conviction was affirmed as there was no substantial wrong or miscarriage. *Rex* v. *Dillabough,* (1944) 60 B.C.R. 534; (1945) 3 D.L.R. 636; 84 C.C.C. 146.

9. Having revolver for a purpose dangerous to the public peace.]—A revolver was found in a suit case of the accused with a supply of ammunition. He at first denied that he had any weapon. When it was discovered he said he had borrowed it for shooting in the bush. The magistrate convicted and imposed a sentence of five years. Held, on appeal, reducing the charge to having an unregistered revolver in his possession, there was not before the magistrate evidence from which the inference could be drawn that possession was for a purpose dangerous to the public peace. The proof fell far short of leaving as the only rational conclusion that the accused had the weapon for that purpose. *Rex* v. *Kube,* (1945) 62 B.C.R. 181; (1946) 1 W.W.R. 161; 85 C.C.C. 324.

10. Using instrument with intent to procure a miscarriage—use of instrument not proved.]—The accused was convicted by a jury of using an instrument upon the person of a woman with intent to procure a miscarriage. The evidence fell short of establishing that an instrument was used. The complainant saw no instrument and admitted that the fingers of the accused might have been used. Held, quashing the conviction, on a charge under sec. 303 of the Criminal Code, which defines three methods of procuring an abortion, the Crown once having elected in the indictment upon which method to proceed, must establish that method. Here, there was no evidence upon which a jury, acting reasonably and giving the benefit of the doubt to the accused, could find him guilty of the offence charged. *Rex* v. *Campbell (No. 2),* (1946) 63 B.C.R. 307; (1947) 1 W.W.R. 145; 88 C.C.C. 41.

B. Murder and Manslaughter.

1. Failure to give notice of the cause of arrest.]—A constable, without a warrant, undertook to arrest the accused who had wounded his wife severely. The constable did not notify the accused of the cause of the arrest. An affray took place in which the constable was killed. The accused was found guilty of murder and sentenced to be hanged. On the appeal the defence was allowed to call a witness not available at the trial. He testified inter alia that the accused knew that the constable wanted him for the wounding of his wife. Held, granting a new trial; Per Macdonald C.J.B.C. sec. 40 of the Criminal Code requires the notice to be given if practicable. It was open to the jury to find that notice was practicable and that the arrest was unlawful, and the trial judge should have instructed the jury accordingly. Per Martin, J. A. Since the accused already knew the cause of arrest, it was not necessary for the constable to repeat it and there was compliance with sec. 40, but the new evidence was so important that another jury should pass upon it. Per McPhillips, J.A. As the Court was divided a new trial should be had although a setting aside of the conviction was warranted. Macdonald and McQuarrie J.J.A. (dissenting), sec. 40 was substantially complied with. *Rex* v. *George,* (1934) 49 B.C.R. 345; (1935) 2 D.L.R. 516; (1935) 1 W.W.R. 145; 63 C.C.C. 225.

2. Compulsion by threats as defence.]—On a charge of murder the accused testified that he was forced at the point of a gun to drive three others to and from the bank where they killed the teller in a robbery. The accused was convicted. Held, on appeal, affirming the conviction, that the accused was pursuing a common purpose with the others, and his actions before and after the robbery were not consistent with the defence of compulsion. Held, on further appeal to the Supreme Court of Canada, upholding the conviction, that the accused could not exculpate himself from the crime of murder on the ground that he acted in the robbery under compulsion of his associates, since murder and robbery are not excusable crimes under sec. 20 of the Criminal Code when committed under compulsion. *Rex* v. *Dunbar,* (1936) 4 D.L.R. 737; 67 C.C.C. 20; affirming (1936) 51 B.C.R. 20; (1936) 3 W.W.R. 99; 66 C.C.C. 306.

3. At what stage alibi to be claimed—misdirection.]—On a trial for murder the judge told the jury that, in considering a defence of alibi, "it must be set up at the earliest possible moment." Held, on appeal, affirming a verdict of guilty, that although it is not right to say that an alibi must be raised at the earliest possible moment, it is clear that where a finding of identity based on satisfactory evidence, had effectively disposed of the alibi, there was no substantial wrong within the meaning of sec. 1014 (2)

of the Criminal Code. Held, on further appeal, to the Supreme Court of Canada, affirming the conviction, that there was no misdirection, since the charge as a whole amply brought to the jury's attention the essential question whether under the evidence the accused was present and fired the fatal shot. *Rex* v. *Russell,* (1936)) 4 D.L.R. 744; 67 C.C.C. 28; affirming (1936) 51 B.C.R. 1; (1936) 3 W.W.R. 81; 66 C.C.C. 306.

4. Failure to give notice of the cause of arrest.]—A constable, without a warrant, undertook to arrest one of the accused who had wounded his wife severely. He did not notify the accused of the cause of the arrest but all the accused knew that he was a constable and had come to make the arrest for the wounding. An affray took place in which the constable was killed and the accused were convicted, upon a second trial, and sentenced to be hanged. On appeal to the Court of Appeal the conviction was affirmed upon an equal division of the Court. On further appeal to the Supreme Court of Canada, it was held, affirming the verdict, that the issue of arrest without warrant and without notice was sufficiently put before the jury, and the charge as a whole could not be regarded as unfair to the accused or as tending to mislead the jury on any question of fact or law. *Rex* v. *George (No. 3)*, (1936) 4 D.L.R. 749; 67 C.C.C. 33; affirming (1936) 51 B.C.R. 81; (1936) 3 W.W.R. 177; 66 C.C.C. 365.

5. Dying declaration.] — The accused was convicted of manslaughter on a charge of murder for having counselled an abortion. The admission of the dying declaration of the deceased woman was essential to the Crown's case. The declaration was a lengthy narrative which, day by day, she related to her mother, who wrote down the story. Police officers asked several questions which the deceased answered. The narrative and the answers were all put before the jury. Held, on appeal, affirming the verdict, that the declaration was part of the res gestae and admissible. Held, on further appeal to the Supreme Court of Canada, quashing the conviction, that assuming that the indictment was one for homicide (which was doubted), a great part of the narrative and the answers was outside the competence of a dying declaration in that much of it was irrelevant as no part of the res gestae. Dying declarations are competent only in homicidal cases, and then only in so far as the statements therein could have been given in evidence by the deceased, had she lived. It is improper to permit a lengthy narrative to go to the jury, notwithstanding instructions from the judge as to the portions deemed by him to be incompetent. In spite of instructions the jury might easily be influenced against the accused. *Rex* v. *Schwartzenhauer,* (1935) S.C.R. 367; (1935) 3 D.L.R. 711; 64 C.C.C. 1; reversing (1935) 50 B.C.R. 1; (1935) 2 D.L.R. 739; (1935) 2 W.W.R. 146; 63 C.C.C. 269.

6. Attempt to procure abortion.]—On a trial for murder, resulting in a verdict of manslaughter a dying declaration of the victim was properly amitted. The Crown then tendered and was allowed to put in a number of articles found by the police on a search of the residence of the accused. Most of these articles had no pertinency to the charge and some of them were calculated to prejudice the accused with the jury. Moreover on the vital issue of the case the judge read to the jury only a part of the medical testimony and put the matter to them in such a way as likely to mislead them. A new trial was ordered. *Rex* v. *Picken*, (1938) S.C.R. 457; (1938) 3 D.L.R. 32; 69 C.C.C.321; reversing (1937) 52 B.C.R. 264; (1937) 4 D.L.R. 425; 69 C.C.C. 61.

7. Drunkenness as a defence.] — On a charge of murder the evidence disclosed that the accused was intoxicated at the time of the occurrence. The trial judge told the jury that, upon the facts in evidence, they should find the accused guilty of either murder or manslaughter, unless they found him insane. He was convicted of manslaughter. Held, on appeal, rejecting the contention that the trial judge should have charged that if through intoxication the accused was incapable of forming an intent and incapable of appreciating what he was doing, the jury might acquit him, that the conviction be affirmed. Only actual insanity, the outcome of alcoholic excess, could prevent a conviction. If the condition falls short of insanity, the jury could find the accused guilty of manslaughter. *Rex* v. *Garrigan,* (1936) 52 B.C.R. 89; (1937) 4 D.L.R. 344; (1937) 3 W.W.R. 109; 69 C.C.C. 98.

8. Ingredients of offence—sec. 259 of Criminal Code.]—Proof of an assault and the ensuing death of the person assaulted does not of itself make the assaulter a murderer. It will do so only if and when on a

proper direction, the jury has considered and found against the accused those relevant elements defined in sec. 259 of the Criminal Code which constitute the death of the person killed, murder. *Rex* v. *Rennie,* (1939) 55 B.C.R. 155; (1940) 3 D.L.R. 350; (1940) 2 W.W.R. 343; 73 C.C.C. 335.

9. Charged with manslaughter — convicted of reckless driving—no witness to accident.]—The accused was charged with manslaughter and convicted by a jury of reckless driving under sec. 951 (3) of the Criminal Code. He did not give evidence at the trial. No one actually saw the impact of the accused's car upon the deceased. Held, on appeal, affirming the verdict, there was evidence to go to the jury on the charge of manslaughter. The damage to the front of the car, the speed of the car immediately before the accident, the action of the accused in failing to stop, the fact that the body was dragged fifty feet, were all factors for the jury. Per McDonald C.J. B.C.: It was contended that there was no case of manslaughter to go to the jury and that as a result the jury could not even consider the question of reckless driving. On the analogy of murder and manslaughter the lesser offence ought to be left to the jury. *Rex* v. *Brunton,* (1943) 59 B.C.R. 182; (1943) 4 D.L.R. 465; (1943) 3 W.W.R. 127; 80 C.C.C. 214 .

10. Bail on murder charge—under what conditions granted.]—The general rule has been that, when a person has been properly committed for trial for murder, bail will not be granted. However, if, upon examination of the depositions, it is found that the evidence does not justify a committal, or the evidence is so weak that there is little chance of a conviction, and when the other circumstances are such that there will be no chance of the accused failing to appear on his trial, bail should be granted. *Rex* v. *Hawken,* (1944) 60 B.C.R. 64; (1944) 2 D.L.R. 116; (1944) 1 W.W.R. 408; 81 C.C.C. 80.

11. Inconclusive murder verdict — "guilty with a strong recommendation for mercy owing to temporarity insanity."]—Where a jury, instead of a verdict of guilty, bring in a verdict of guilty with words added, and the Court can be sure what the jury really means, it may quash or affirm the conviction. The main defence here was legal insanity and experts gave opinions both ways. The words "temporary insanity" were not used by the trial judge or by the experts. Held, ordering a new trial, it was impossible to say what the jury meant. They should have been asked to reconsider their verdict, with further instruction if necessary, and directed to bring in a verdict of "guilty," or, if they acquitted because of insanity, to "find" and "declare" as provided by sec. 966 of the Criminal Code. *Rex* v. *Logan,* (1944) 60 B.C.R. 473; (1944) 4 D.L.R. 287; (1944) 3 W.W.R. 299; 82 C.C.C. 234.

C. Rape and Carnal Knowledge.

1. Consent extorted by fear of bodily harm.]—On a charge of rape where the defence is consent, it is not enough for the complainant to say, "I was afraid of serious bodily harm and therefore consented." She must prove in evidence that she had dire reason to be afraid, and that she took every reasonable precaution to avoid the outrage. *Rex* v. *Jones,* (1934) 49 B.C.R. 537; (1935) 3 D.L.R. 237; (1935) 2 W.W.R. 270; 63 C.C.C. 341.

2. Carnal knowledge.] — Upon a trial for having carnal knowledge of a girl of previous chaste character under sec. 301 (2) of the Criminal Code it was shown that the girl had had illicit relations with the accused on a previous occasion under duress. The trial judge convicted. Held, on appeal, affirming the conviction, that it was open to the trial judge to find the girl to be of previous chaste character in the circumstances. *Rex* v. *Stinson,* (1934) 48 B.C.R. 92; (1934) 2 D.L.R. 544; (1934) 1 W.W.R. 593; 61 C.C.C. 227.

3. Seduction of "girl" under sec. 213 of the Criminal Code.]—The complainant was a married woman but under 21 years of age. Held that the meaning of "girl . . . under the age of twenty-one years", must for the purposes of the section be restricted to unmarried women. *Rex* v. *Jones,* (1934) 49 B.C.R. 537; (1935) 3 D.L.R. 237; (1935) 2 W.W.R. 270; 63 C.C.C. 341.

4. Punishment—whipping.] — Upon a charge of indecent assault upon a female the magistrate has jurisdiction under sec. 777 of the Criminal Code to try without the consent of the accused, unless in his opinion the assault charged was with intent to commit rape. The magistrate may base such opinion on an informal examination of Crown witnesses before calling upon the

accused. The magistrate is restricted in the punishment to be imposed by sec. 779 of the Code, and a direction that the accused be whipped was in excess of his jurisdiction. The conviction was on habeas corpus amended accordingly. *Rex* v. *Ah Sing* (1937) 52 B.C.R. 146; (1937) 3 W.W.R. 185.

5. Lack of corroboration of charge under sec. 301 (2) of Criminal Code — reducing to indecent assault — same sentence.]—On a charge of carnally knowing a girl of previously chaste character under the age of sixteen and over the age of fourteen, the corroboration offered and accepted by the trial judge as implicating the accused included the condition of the girl's clothes; her condition as found by a doctor; the finding of certain prophylactic articles and soiled handkerchiefs. All these tended to affirm the credibility of the complainant but did not afford independent evidence implicating the accused. The offence charged included the lesser offence of indecent assault which does not by statute require corroboration, but calls merely for a warning that it will be dangerous to convict without it. Here, the county court judge had no doubt whatever that the complainant's story was true and could have properly convicted for indecent assault. The Court of Appeal accordingly substituted a conviction for the lesser offence but did not alter the the sentence of two years. *Rex* v. *O'Hara,* (1946) 63 B.C.R. 380; (1947) 3 D.L.R. 154; (1947) 1 W.W.R. 472; 88 C.C.C. 74.

VI. Offences Against Rights of Property.

A. In General.

1. Trading stamps — possible duplicity not fatal by reason of sec. 1014 of the Criminal Code.] — The accused was convicted of issuing trading stamps "to one Hart and others." The evidence was limited to Hart alone. If the conviction was bad for duplicity it was clear that there was no substantial wrong or miscarriage of justice and the appeal was dismissed. *Rex* v. *Smith,* (1932) 1 W.W.R. 131.

2. Circumstantial evidence.] — The accused charged with robbery, after the usual warning and without being questioned, asked two police officers if they thought he would "get any more than seven years for this." Before his arrest, he had denied his identity to police officers. Although not then employed he had bought a car and made other unusual expenditures. A bill identified as among those stolen was found in his wife's purse. Held, on appeal affirming the conviction that the circumstances were not merely consistent with guilt, they were inconsistent with innocence and it was open to the jury to convict. *Rex* v. *Jones,* (1933) 47 B.C.R. 473.

3. Having marked boom - chains for sale.]—Sec. 431 (4) of the Criminal Code makes it an offence in certain circumstances for anyone to have unlawfully in his possession for sale any boom-chain which has "upon it the trade mark duly registered or other mark or name" of any person, without that person's written consent. The accused was convicted by a magistrate with respect to chains marked J.H.B. On appeal it was argued that the mark must be characteristic and distinctive in the way registered trade-marks are required to be. Evidence was given on behalf of the prosecution that the letters J.H.B. were duly registered under the provisions of the Provincial Boom-chain Brands Act and were in good standing. Held, quashing the conviction, that the meaning of the words "or other mark" can only be ascertained by reference to the words coupled with them. The mark must be distinctive in the way that a registered trade mark is. The Boom-chain Brands Act cannot be invoked to inflict a penalty under the Criminal Code. *Rex* v. *Klein,* (1935) 50 B.C.R. 90; (1936) 1 D.L.R. 189; 64 C.C.C. 341.

4. Conspiracy — manipulating stock — false entries in books.]—On a conspiracy charge the question is not whether there has been a participation in acts, but in a common design. The evidence here was of such a character that the trial judge could properly draw the inference of a common design by the accused to manipulate the companies to the detriment of the shareholders and the public and to their own wrongful advantage. Once that is established the question whether guilt should be inferred is one of fact. *Rex* v. *Miller,* (1940) 55 B.C.R. 121; (1940) 3 D.L.R. 293; (1940) 2 W.W.R. 505; 73 C.C.C. 343.

5. Charge under Combines Investigation Act—"merger, trust or monopoly."]—The purchase by the accused of one-half the shares in a company does not give the purchaser such control over or interest in the business of the Company as will amount to a "merger, trust or monopoly" as defined

by sec. 2 (4) of the Combines Investigation Act of Canada. The control struck at is a positive not a negative control and the interest is a financial interest. *Rex* v. *Staples,* (1940) 4 D.L.R. 699; (1940) 2 W.W.R. 627; 74 C.C.C. 178.

6. Company's balance sheet—including borrowed money as asset.]—The accused was convicted under sec. 414 of the Criminal Code of unlawfully concurring in making a statement of the financial position of the company of which he was a director, knowing it to be false in a material particular. The false statement was that the company's assets consisted of $48,000 in cash; the fact was that the accused had borrowed $40,000 of it temporarily giving post-dated cheques for its early repayment. Particulars were given and they disclosed the accused's account of the transaction—a sale and repurchase of shares, which it was contended, related to a charge under sec. 413 of the Code. The trial judge convicted. The Court of Appeal reversed the decision below, holding that the accused was not charged at large with the making of a false balance sheet, but with the making of a balance sheet false in a material particular, viz., that the assets consisted of $48,000 cash. In other words the Crown elected to complain of only one item which was a true and not a false material particular. Held on further appeal to the Supreme Court of Canada, restoring the conviction, that merely because the particulars given could be the subject of another count, it could not be said that the count considered was bad for duplicity; the false statement to the shareholders was that the company had a good liquid cash position as a result of its business operations—that cash assets were accumulated to the extent of $40,000. If any technical diffiiculties exist sec. 1014 (2) of the Code should be applied. *Rex* v. *McLeod,* (1941)) S.C.R. 228; (1941) 1 D.L.R. 773; 75 C.C.C. 305; reversing (1940) 55 B.C.R. 439; (1941) 1 D.L.R. 578; (1940) 3 W.W.R. 625; 75 C.C.C. 78.

7. Possession, by day, of house-breaking instruments—sec. 464 (b) of the Criminal Code.]—The appellant was convicted of having been found having in his possession by day instruments of house-breaking with intent to commit an indictable offence. Held, on appeal affirming the conviction, that it was necessary for the Crown to prove two things (1) that he was found having in his possession by day such an instrument. There was ample proof of that. (2) The second thing was that he intended to commit an indictable offence. Here the evidence showed that the pieces of celluloid he had were eminently suitable for housebreaking. The intent could properly be inferred from the fact that these pieces of celluloid were found concealed in the accused's sock. *Rex* v. *Ellis,* (1943) 59 B.C.R. 393; (1944) 1 D.L.R. 212; (1943) 3 W.W.R. 501; 80 C.C.C. 328.

8. Breaking and entering a dwelling-house—whether hotel room included.]—A room in a hotel occupied for temporary accommodation in the course of travelling from one locality to another, or while one is temporarily away from his residence and family, is not a "dwelling-house" within the definition in sec. 335 (g) of the Criminal Code. It cannot be said to be "kept" for the residence therein of the owner or occupier, his family or servants. *Rex* v. *George Eldridge,* (1944) 60 B.C.R. 315; (1944) 4 D.L.R. 128; (1944) 2 W.W.R. 297; 81 C.C.C. 388.

9. "Dwelling-house"—whether one room in a hotel is.]—The accused was convicted of breaking and entering the dwelling-house of M. The latter was night clerk of the hotel in which he and his wife occupied a room. By sec. 335 of the Criminal Code "dwelling-house" means a permanent building, the whole or any part of which is kept by the owner or occupier for the residence therein of himself etc. Held, the room so occupied, even though it was M.'s permanent residence, was not a dwelling-house within the definition. A conviction for attempted theft was substituted. Quare whether dwelling-house as defined could be held to include a hotel. *Rex* v. *Feeney,* (1946) 63 B.C.R. 131; (1947) 1 D.L.R. 392; (1946) 3 W.W.R. 163; 86 C.C.C. 429.

10. Breaking and entering—circumstantial evidence.]—The accused were found at night by the police lying on the roof after a man had been seen running up the stairs inside the premises. Near them were found explosives, etc., and a jemmy which, although it had been raining, were dry. On appeal from the magistrate's conviction it was held, dismissing the appeal, that the magistrate was justified in his inference that the accused had made entry through a door which had been forced open from the outside rather than by an open window. *Rex* v. *Woods,* 82 C.C.C. 211.

11. Having housebreaking instruments by night—lawful excuse—onus of proof.]

—The accused was convicted under sec. 464 (a) of the Criminal Code on evidence which showed that he had in his car a quantity of tools all of which were capable of being used for housebreaking, but some of which he might, as a truck driver, have occasion to use in his trade. Having regard to the time and place and the surrounding circumstances the judge found on the whole of the evidence that the accused was guilty. Held on appeal that the conviction should be affirmed. Held, on further appeal to the Supreme Court of Canada, affirming the conviction, the judge was legally warranted in drawing the conclusions he did. Once the instruments found in the possession of the accused (although capable of being used for housebreaking) were shown to be ordinary tools which he might well use in his trade, the accused established prima facie a sufficient excuse. Then the burden shifted to the prosecution of showing, from other circumstances, that the accused had no lawful excuse for being in possession of these tools at that particular time and place. The judge was satisfied that the burden had been discharged. *Rex* v. *Mihalchan,* (1945) S.C.R. 9; 82 C.C.C. 306; (1945) 1 D.L.R. 202; affirming (1944) 60 B.C.R. 450; (1944) 4 D.L.R. 187; (1944) 2 W.W.R. 445; 82 C.C.C. 87.

12. Circumstantial evidence only—rule in Hodge's case.]—A window of the premises in question had been broken. That night the accused and R. were stopped and questioned in the alley near the place. R. had a screwdriver in his possession, and broken pieces of glass bore the fingerprints of R. The accused did not give evidence and was not represented by counsel. The magistrate convicted him of attempting to break and enter. Held, on appeal, quashing the conviction, the evidence against the accused was mostly circumstantial. The fact that he was found in company with R. though highly suspicious did not lead irresistibly to a conclusion of guilt to the exclusion of any other rational hypothesis. *Rex* v. *Carey,* (1945) 62 B.C.R. 88; (1946) 1 D.L.R. 489; (1945) 3 W.W.R. 508; 85 C.C.C. 6.

13. Explanation of having housebreaking instruments by night.] — The magistrate did not accept the accused's explanation for having house-breaking instruments by night. Held, on appeal affirming the conviction, it was clear that the magistrate did not believe the explanation, and was satisfied it could not be regarded as probable. *Rex* v. *Dalen,* (1946) 2 W.W.R. 352.

B. Theft.

1. Identity of goods with those stolen.]—It was established that a quantity of new tires was stolen and that new tires were found in the possession of the accused. Among those stolen and so found was one that only the company that had been robbed, handled. The sizes of the tires found corresponded with the sizes of those stolen. Held, on appeal affirming the conviction, on an equal division of the Court, that it was open to the magistrate to convict on the evidence. *Rex* v. *Pomeroy,* (1936) 51 B.C.R. 161; (1936) 4 D.L.R. 523; 67 C.C.C. 71.

2. Retaining stolen goods — accused themselves the thieves.]—It is impossible to convict a thief of retaining stolen goods which he himself has stolen. The thief cannot take the stolen property from himself. If it were otherwise every thief would be guilty of the double offence of stealing and retaining. *Rex* v. *Brown,* (1935) 50 B.C.R. 339; (1936) 1 W.W.R. 539; 65 C.C.C. 244.

3. Diversion of money paid for a specific purpose.] — The accused were attempting to get a sawmill into production. They interested D. and H. in the plan and found that a chattel mortgage must be paid off before operation could begin. D. backed H.'s note and the money was borrowed to pay the mortgage. It got into the hands of the accused who instead of discharging the mortgage used the money for other purposes. The accused were convicted of theft from H. Held, on appeal, quashing the conviction, per Macdonald C.J.B.C., the theft was not from H. but from D., as the note was really one for the accommodation of D. Per McPhillips J.A., the element of crime was not established and in any event no information was laid upon which any conviction could have been found. *Rex* v. *Potter; Rex* v. *Van Oudenol,* (1936) 51 B.C.R. 361; (1937) 1 D.L.R. 469; 67 C.C.C. 249.

4. Goods not proved to have been stolen—recent possession.]—On a charge of unlawfully retaining stolen property knowing the same to have been stolen, the rule is that the first obligation of the Crown is to prove the goods to be stolen goods. The presumptions arising out of recent pos-

session do not flow from mere possession of goods but from possession of stolen goods. *Rex* v. *Davis,* (1940) 55 B.C.R. 552; (1941) 1 D.L.R. 557; (1941) 1 W.W.R. 20; 75 C.C.C. 224.

5. Recent possession of stolen goods—no explanation.]—The accused was found in the possession of goods recently stolen. The goods could have been "planted" on him but no attempt was made to give an explanation to account for their being in his possession. Unless recent possession is reasonably explained a prima facie presumption arises that the possessor is the thief; also with proof of the breaking and entering of the store from which the goods were taken, coupled with proof of identity of the goods, and the fact that he was in the company of a person identified as having entered the store, the magistrate was entitled to convict. *Rex* v. *McKinnon,* (1941) 56 B.C.R. 186; (1941) 2 D.L.R. 649; (1941) 3 W.W.R. 246; 76 C.C.C. 101.

6. Receiving and retaining stolen goods—reasonable explanation.]—It cannot be too often said that in cases of receiving and retaining, judges and magistrates should make it clear that when an explanation is given, the question is not whether they believe the explanation, but whether the explanation is a reasonable one. *Rex* v. *Parker,* (1941) 57 B.C.R. 117; (1942) 1 D.L.R. 645; (1942) 3 W.W.R. 189; 77 C.C.C. 9.

7. Recent possession—not in exclusive possession of premises.] — Where an accused person is found in possession of stolen goods after an interval of nine months, no presumption arises, as in cases of recent possession, and in any case possession of stolen goods does not put a person upon his defence unless the possession is his own and to the exclusion of all other persons. *Rex* v. *Pais,* (1941) 56 B.C.R. 232; (1941) 2 D.L.R. 748; (1941) 3 W.W.R. 278; 75 C.C.C. 318.

8. Exclusive or joint control of the stolen property — whether explanation reasonable.]—The accused was convicted of retaining a sewing-machine knowing it to have been stolen. The thief brought it to the accused, a second-hand dealer, who refused to buy but suggested a neighbour who might. The accused assisted in the sale to the neighbour and helped carry the machine to the purchaser's house. Held, on appeal, quashing the conviction, the accused at no time had the necessary exclusive or joint control of the machine. *Rex* v. *Parker,* (1941) 57 B.C.R. 117; (1942) 1 D.L.R. 645; (1942) 3 W.W.R. 189; 77 C.C.C. 9.

9. Receiving stolen goods knowing them to have been stolen.] — Sec. 993 of the Criminal Code enables the prosecution after notice to the alleged receiver to give evidence of his possession of other stolen property. A conviction was quashed by the Court of Appeal where there was no proof that such other property had been stolen. Important evidence, which was inadmissible, was put in by the Crown, and this evidence may have influenced the verdict of the jury, and caused the accused substantial wrong. *Rex* v. *Keiwitz,* (1941) 57 B.C.R. 85; (1941) 4 D.L.R. 746; (1941) 3 W.W.R. 693; 76 C.C.C. 369.

10. Explanation of possession—whether reasonable—convicting judge's report.]—It was contended that there was a variance between the convicting judge's reasons for judgment ("I do not believe his story") and his report under sec. 1020 of the Criminal Code ("I found his story utterly improbable") and that he had misdirected himself on the question of the accused's explanation of possession. Held on appeal, affirming the conviction, that there was no misdirection; the judge was saying, in effect, that he found the explanation of the accused not only unworthy of belief but also one that could not reasonably be true. In other words he was saying that the Crown had discharged the onus of satisfying him that the explanation could not be accepted by him as a reasonable one. Held on further appeal to the Supreme Court of Canada, that the appeal should be dismissed. *Rex* v. *Reid,* (1943), 2 D.L.R. 786; 79 C.C.C. 311; affirming (1942) 58 B.C.R. 20; (1942) 3 D.L.R. 575; (1942) 3 W.W.R. 461; 78 C.C.C. 177.

11. Receipt of stolen money — recent possession.]—The accused was convicted by a jury of having received stolen money knowing it to have been stolen. The money was stolen December 20. On December 23 the money came to the accused in the mail addressed to him. The police were present when the parcels arrived and the accused disclaimed all knowledge of their source or why they had been sent to him. Held, on appeal affirming the conviction, the accused had possession of the stolen money and it was recent possession, viz. within three days of the theft. The presumption thus put upon the accused to explain his position was not met. He did not give evi-

dence and his denial to the police was not accepted by the jury. *Rex* v. *Milton,* (1943) 3 W.W.R. 678; 81 C.C.C. 60.

12. Retaining under sec. 399 of the Criminal Code—proof of control over goods retained.] — The accused was convicted of retaining in his possession stolen property knowing it to have been stolen. It was contended that the evidence did not disclose that he had any measure of control over the stolen articles. Held, on appeal, affirming the conviction, the evidence showed that the accused had an equal measure of control with two others who were convicted. They had driven to Stanley Park in Vancouver together and got the stolen tires from a hidden place in the bush. They then went together in the car with the tires resting against the accused's knees to try to sell them. *Rex* v. *McClellan,* (1943) 59 B.C.R. 401; (1944) 1 D.L.R. 158; (1943) 3 W.W.R. 504; 80 C.C.C. 310.

13. Theft — fraudulently and without colour of right.]—The accused as landlord of a rooming house found his tenant using an electric heater which he feared put too heavy a load on the wiring of the premises. He entered the tenant's suite and took the heater away, explaining to the tenant's wife why he was doing it and promising to return it when the tenants vacated. He was convicted of theft of the heater. Held, on appeal, quashing the conviction, the evidence did not disclose the act of taking fraudulently and without colour of right within sec. 347 of the Criminal Code. *Rex* v. *Lakusta,* (1944) 60 B.C.R. 241.

14. Theft—sufficiency of explanation by accused.] — The accused was convicted of theft. On appeal it was contended that the judge had erred in convicting when, as he said, he was not sure the accused's explanation was reasonable. This, it was argued, meant that the judge was uncertain the explanation was not reasonable. It was held, dismissing the appeal, that the context made it clear that the judge found the explanation unreasonable. The report under sec. 1020 of the Criminal Code confirmed this view. The onus upon the Crown of proving beyond a reasonable doubt that the explanation could not be accepted as a reasonable one was dealt with in *Rex* v. *Davis,* (1940) 55 B.C.R. 552. *Rex* v. *Hong,* (1944) 60 B.C.R. 382; (1944) 2 W.W.R. 383; 82 C.C.C. 52.

15. Commission on subscriptions for periodicals — retaining sums collected.] — The accused was convicted of stealing under sec. 347 of the Criminal Code. He had collected money for his employer and failed to turn it in. Held, on appeal, affirming the conviction, (a) the objection that the magistrate at Vancouver had no jurisdiction where the alleged theft took place in Victoria was met by sec. 577 of the Code. The accused had raised no objection to the jurisdiction at his trial; (b) the fact that he made no secret of what he was doing was met by sec. 347 (3) of the Code; (c) the objection that the criminal courts were being used for the collection of debts was not borne out by the evidence. *Rex* v. *Eist,* (1945) 61 B.C.R. 288; (1945) 3 D.L.R. 590; (1945) 2 W.W.R. 236; 84 C.C.C. 97.

16. Retaining possession of pole-climbers knowing them to have been stolen.]—G. and S. had been convicted of retaining possession of certain pole-climbers, knowing them to have been stolen. G. offered an explanation that he had bought them and there was some corroboration of his story. Held, quashing the conviction; in any case where some matter is presumed against an accused person (here, the presumption arising from recent possession of stolen goods), unless "the contrary is proved," the burden of proof required of the defence is less than that demanded of the prosecution, which must prove beyond a reasonable doubt. If as here the explanation established a preponderance of probability in its favour the defence would be made out. Neither of the accused was fixed with knowledge that the articles were stolen. *Rex* v. *Sullivan and Godbolt,* (1945) 62 B.C.R. 278; (1946) 2 D.L.R. 759; (1946) 1 W.W.R. 384; 85 C.C.C. 349.

17. Retaining possession of revolver and licence forms knowing them to have been stolen.]—The appellants G. and S. were in a car driven by G. The police followed them in another car and saw something thrown or fall from the car ahead. The evidence showed that a stolen revolver and certain licence forms were what had been ejected from the car. G. offered no explanation and a presumption arises that G. knew the articles were stolen. G. and S. had been in the car for over an hour; the police had seen G. speak to S. whereupon S. reached for something behind him just before the stolen articles were ejected. Joint control was established in the circumstances. No explanation having been given by S. he like G. was presumed to know they were stolen articles and the conviction was

affirmed. *Rex* v. *Sullivan and Godbolt,* (1945) 62 B.C.R. 278; (1946) 2 D.L.R. 759; (1946) 1 W.W.R. 384; 85 C.C.C. 349.

18. Whether goods taken fraudulently and without colour of right.] — The accused, sales manager of an electric equipment concern, was convicted of the theft of certain panel boxes and switches from his employer. He delivered the goods in question to a customer after hours and without the usual invoices or billing. He contended that as sales manager he was justified in making this unusual arrangement with the customer by reason of the incidence of certain regulations of the Wartime Prices and Trade Board and that it was an interim arrangement during the manager's absence. Held, affirming the conviction, the claim of right to take and deliver the goods was a question of fact and was decided by the magistrate against the accused. *Rex* v. *Duncan* (1945) S.C.R. 748; affirming (1945) 61 B.C.R. 266; (1945) 2 W.W.R. 297; 84 C.C.C. 113.

19. Presumption from recent possession —may include breaking and entering.]— The accused were convicted of breaking and entering a store and stealing goods therefrom. They were found in joint possession of the goods which were proven to have been stolen very recently. They offered no explanation whatever. On appeal they contended that there was no evidence of breaking and entering. Held, dismissing the appeal, the presumption from recent possession was not only that the goods were stolen but that they were the thieves, and further that if they were the thieves, they committed the breaking and entering since the goods could not, on the evidence, have been stolen without breaking and entering. *Rex* v. *Logan,* (1946) 62 B.C.R. 357; (1946) 1 W.W.R. 431; 86 C.C.C. 242.

20. Whether evidence of "retaining" sufficient.] — The goods were found in a cabin occupied by the accused and his wife as his home. Acts of control over the premises were shown and in any event it is a presumption of law that the possession and control of premises so occupied is that of the husband. The judge could and did on the evidence, find that the possession was recent (three months). It followed that the goods having been stolen, there was a prima facie presumption that the accused was either the thief or the retainer. That presumption could be rebutted by an explanation consistent with innocence even though the judge might not be convinced of its truth. Here the judge was entitled to reject the explanation and convict. *Rex* v. *Mandzuk,* (1945) 62 B.C.R. 16; (1946) 1 D.L.R. 521; (1945) 3 W.W.R. 280; 85 C.C.C. 158.

21. Trial judge misdirecting himself—appeal by Crown.] — The stolen articles were at night removed from a motor pool and placed by the roadside. The accused early next morning were in the act of loading them into a truck when they were arrested. The County Court judge acquitted and the Crown appealed. Held, ordering a new trial, that the judge misdirected himself when he concentrated on the question of the initial removal of the articles from the pool. The real question was whether the incidents at the roadside afforded proof of theft regardless of whether the accused were the men who had put the articles there or not. *Rex* v. *Myles,* (1946) 62 B.C.R. 392.

22. Crown need not negative possible hypotheses.]—The accused was in a jewellery store in the afternoon. In the evening he was found in possession of three watches stolen that day from the store. In order to make out a prima facie case, it was enough for the Crown to show that the watches were in the store exposed for sale at the time of the theft, that the owner had not sold them, and that they were found in the possession of the accused the same evening without any "explanation" from him. It was not necessary for the Crown to negative such hypotheses as that someone else may have taken them, or that the owner might have given them away. *Rex* v. *Angelucci,* (1946) 63 B.C.R. 294; (1947) 1 W.W.R. 82; 88 C.C.C. 111.

23. Proof that the goods retained were the stolen goods—identity—Hodge's case.] —The accused were convicted of retaining goods, knowing the same to have been stolen, the property of E. The only evidence that they were E.'s property was that of E. himself and he would not positively swear that the goods found on the accused were his. He said they were similar. Held, quashing the convictions, there was no positive identification and the circumstances while highly suspicious, fell short of satisfying the test that they be consistent with guilt and inconsistent with any other rational conclusion. *Rex* v. *Carey and Munroe,* (1946) 63 B.C.R. 173; (1946) 3 W.W.R. 385; 87 C.C.C. 250.

C. Forgery.

1. Forgery—elements of.]—The accused gave a cheque as payment for a meal signing it in the presence of the person in charge who could not read. There was no account in the bank under the name so signed. The person to whom it was given knew the accused by a name other than that on the cheque. There was no evidence to show that the person whose name was signed existed. Held, the cheque was a false document but forgery had not been established. Where a man knowingly issues a false document to another for value it can be assumed prima facie that the former intends the other to use or act upon it as genuine. But the presumption may be rebutted. On the facts the accused intended the cheque to be accepted as his own. He intended to defraud but not by leading the person to whom the cheque was given to believe it was signed by the person whose name was on it. The accused did not intend that the cheque would be used or acted upon as the cheque of the person named thereon. It was not forgery. *Rex* v. *Collins*, (1943) 1 W.W.R. 408; 79 C.C.C. 325.

2. Essential averment omitted from charge.] — The accused was convicted of uttering a forged document, to wit, a cheque, etc. The cheque was quite genuine but the endorsement was forged. Held, quashing the conviction, the count lacked a necessary ingredient to sustain the conviction. The accused was tried and convicted upon a count which was not preferred against him. It was not a "defect apparent on the face" of the count requiring objection before plea, nor was it curable under sec. 1010 (2) of the Criminal Code. *Rex* v. *McNab*, (1945) 61 B.C.R. 74; (1945) 1 D.L.R. 583; (1945) 1 W.W.R. 228; 83 C.C.C. 176.

3. Dealing with forged cheque—circumstantial evidence.]—M. and the appellant were charged with dealing with a forged cheque and M. pleaded guilty. The evidence against the appellant fell short of proving that he had any actual part in "dealing with" the cheque. He stood near when M. cashed it; he was seen to hand something to M.; they were together shortly before and after the cheque was cashed; he had a quantity of ten dollar bills in his possession, but they were not identifiable as those given for the cheque. Held, quashing the conviction, the rule in Hodge's case was not satisfied. *Rex* v. *Rea*, 84 C.C.C. 110.

D. False Pretenses and Fraud.

1. Representation that shares sold were treasury shares.] — The trial judge convicted the accused on a charge of obtaining money by false pretenses, with intent to defraud. He held that the complainant relied on the statement that she was buying treasury stock and that the money was going into the funds of the company, whereas the fact was that the shares sold belonged to one of the accused. Held, on appeal, affirming the conviction, that the complainant relied on the statement made to her and parted with her money on the faith of it. *Rex* v. *Jones*, (1935) 49 B.C.R. 422; (1935) 2 D.L.R. 718; 63 C.C.C. 145.

2. False pretenses — retention of sales tax.]—The accused operated a cannery and canned two lots of mushrooms for M. With his bill he included sums for sales tax which he retained. He was charged with obtaining the sums from M. by false pretenses on the basis that he had represented falsely that he was a manufacturer, and thus a person entitled to collect the tax as an agent of the Crown under the Special War Revenue Act. The magistrate convicted. Held on appeal, quashing the conviction, that the Crown had not proved that the accused was not a "manufacturer." The evidence showed that as a result of his interview with the Department, he believed at the time that he was a "manufacturer." A man who has valid grounds for believing it to be true cannot be guilty of a false pretence when the representation is at best a mixed question of law and fact. A representation that something will be done in the future (i.e. that that accused would pay the tax to the Crown) is not within sec. 404 of the Criminal Code which refers to representations either present or past. *Rex* v. *Thimsen*, (1940) 55 B.C.R. 103; (1940) 3 D.L.R. 158; (1940) 2 W.W.R. 165; 73 C.C.C. 315.

3. Promise of future payment—whether false pretense.]—False pretences amounting to mere promises or professions of intention are not false pretences within the meaning of sec. 404 of the Criminal Code. From the nature and character of a representation relating to the future, a representation of a present fact may be implied but only when that implication is necessarily and irresistibly involved in the expressed promise or profession of the future intention. *Rex* v. *Reid*, (1940) 55 B.C.R. 321; (1940) 4 D.L.R. 25; (1940) 3 W.W.R. 96; 74 C.C.C. 156.

VII. Game Laws.

1. Conviction for two separate offences —wound and hunt big game.] — The accused was convicted of wounding and hunting big game. This was held on certiorari to be a conviction for two separate offences, one for wounding and one for hunting. Held, further that it could be amended by striking out the reference to wounding. *Rex* v. *Advent*, (1937) 53 B.C.R. 9; (1938) 2 D.L.R. 792; (1938) 1 W.W.R. 881; 70 C.C.C. 388.

2. Minister's order forbidding hunting without permit.]—The appellant was convicted of entering a closed Forest District. There was no evidence of the promulgation of the Minister's order or that the appellant knew of its existence. Held, on appeal to the County Court, quashing the conviction, it was not compatible with justice that the appellant could be convicted and penalized for the violation of an order of which he had no knowledge or notice. The Forest Act, under which the order was made, was silent as to any requirement as to promulgation. *Rex* v. *Ross*, (1945) 3 D.L.R. 574; (1945) 1 W.W.R. 590; 84 C.C.C. 107.

3. Trap lines—appeal to County Court from decision of Game Commissioner — effect of sec. 6 of 1945 amendment.] — The 1945 amendment takes away the privilege, formerly enjoyed, of trapping a mile outside of one's location. There are no trapping privileges outside of those acquired by registration under the Act. Whenever a change of ownership of a trap-line takes place a new registration is effected. At present disputes must be limited to those of existing registrants. In *re the Game Act* and *re Tompkins and Ardill*, (1947) 1 W.W.R. 16.

VIII. Search Warrant.

Terms upon which search warrant will issue—premises not those of accused.] —A search warrant was quashed where (a) the information did not disclose materials upon which the Justice acting judicially could issue it, (b) the description of the documents sought, was too general, (c) the description of the offence was so vague that the owner of the premises would not know the exact object of the search. Where the premises to be searched are not those of an accused person and the charge is not one of conspiracy or the like, there should be more than a general description of the documents sought. A subpoena would be the normal method of getting the documents. *Re United Distillers Ltd.*, (1947) 3 D.L.R. 900; 88 C.C.C. 338.

IX. Compelling Appearance of Accused.

1. Disorderly house.] — Police officers who had "raided" a rooming-house and arrested the plaintiff were adjudged to pay nominal damages in an action for false arrest and imprisonment. The trial judge held that such an arrest was unlawful as no warrant had been issued. Held, on appeal, reversing the trial judge that an officer could lawfully arrest the accused without a warrant under sec. 648 of the Criminal Code as being a person "whom he finds committing a criminal offence." Moreover, the arrest could be justified under sec. 30 of the Code because the officers had "reasonable and probable grounds" for believing that the offence had been committed by the man they arrested. *Whitworth* v. *Dunlop* (1934) 48 B.C.R. 161; (1934) 3 D.L.R. 727; (1934) 1 W.W.R. 604; 62 C.C.C. 41; reversing (1933) 47 B.C.R. 251; (1933) 4 D.L.R. 202; (1933) 2 W.W.R. 93; 60 C.C.C. 85.

2. Police officer — arrest without warrant — offence being committed.] — The defendant, a police officer, having received a complaint that the female plaintiff had committed an offence for which he could not arrest without a warrant, ordered her to accompany him to the police station. While investigating he detained the plaintiff for about one hour until he had interviewed witnesses as a result of which he released her. He acted without malice and with reasonable and probable cause and at the time of the detention, he believed honestly and reasonably that the plaintiff had committed an offence. The plaintiff sued for false arrest and imprisonment. Held, dismissing the action, that the arrest and subsequent detention could be justified, in a case where the nature of the suspected offence required prompt action, by sec. 648 of the Criminal Code, whereby a peace officer may arrest without warrant any one whom he finds committing any criminal offence. Moreover, the defendant would be justified under sec. 30 of the Code as interpreted in *Whitworth* v. *Dunlop*, (1934) 48 B.C.R. 161, which authorizes an officer who on reasonable and

probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not, and who on such grounds believes that a person has committed that offence, to arrest such person without warrant, whether such person is guilty or not. *Leighton* v. *Lines*, (1941) 57 B.C.R. 232.

X. Procedure on Appearance Before Justices.

1. Re-reading of depositions on preliminary inquiry.]—Sec. 684 (1) of the Criminal Code requires the magistrate on a preliminary inquiry to ask the accused, if the evidence has not been taken in shorthand, whether he wishes the depositions to be read again. The failure of the magistrate to do so resulted in the quashing of the warrant of commitment. The Crown's application to remit the matter to the magistrate to have the section complied with was not acceded to. *Rex* v. *Cameron*, (1936) 51 B.C.R. 313.

2. Unsworn statement by accused at preliminary hearing.]—It was contended that a statement made by the accused at his preliminary inquiry was inadmissible at his trial because it was not a sworn one. Held, there is nothing in the relevant sections of the Criminal Code nor in sec. 4 of the Canada Evidence Act that would justify the restriction of such statements to those made on oath. *Rex* v. *Wright*, (1939) 54 B.C.R. 421; (1939) 4 D.L.R. 786; (1939) 3 W.W.R. 365; 73 C.C.C. 80.

XI. Summary Conviction.

1. Overbearing conduct of magistrate.]—Where the magistrate threatened a witness with imprisonment and thereafter gave him time to think it over and then "tell the truth," and tried to browbeat the witness to give evidence contrary to what he had already given, a miscarriage of justice resulted. The Crown suggested a reduction of the charge but in the circumstances the appeal was allowed and the conviction quashed. *Rex* v. *Lockerby*, (1933) 49 B.C.R. 247.

2. Uncertainty in statement of charge.]—A conviction was set aside where the offence read "did unlawfully keep a disorderly house, to wit, a common gaming house." Sec. 226, read along with sec. 229, creates two separate and distinct offences and the charge should give the accused notice of the particular offence with which he is charged. The conviction is bad, either as disclosing no offence, or as leaving it uncertain on which one of several offences the prisoner was convicted. *Rex* v. *Soo Kit Sang*, (1936) 50 B.C.R. 386; (1936) 1 W.W.R. 382; 65 C.C.C. 220; (1936) 2 D.L.R. 608. (But see *Rex* v. *Wong Gai*, infra).

3. Uncertainty in statement of charge.]—An information charging the accused that he "did unlawfully keep a disorderly house, to wit, a common gaming house" is sufficient in law; it discloses an offence under sec. 226 of the Criminal Code and is not uncertain. *Rex* v. *Soo Kit Sang*, (1936) 50 B.C.R. 386 was overruled. *Rex* v. *Wong Gai*, (1936) 50 B.C.R. 475; (1936) 4 D.L.R. 453; (1936) 2 W.W.R. 645; 66 C.C.C. 265.

4. Effect of failure formally to adjourn hearing.]—Six persons including the accused were separately charged and the magistrate went on with one of them but the case not being finished, it was adjourned to the following day, when the one being tried was found guilty. Again the magistrate adjourned Court till the following day. At neither adjournment was the accused's case called and formally adjourned. When the case was finally called counsel appeared without the accused and contended that the magistrate had lost jurisdiction to try him by reason of what had happened. A warrant was then issued on the original information and the accused was tried and convicted. Held, on certiorari, the accused was legally brought before the Court by warrant and the magistrate had jurisdiction. *The King* v. *Haddrell*, (1939) 54 B.C.R. 526; 74 C.C.C. 245.

5. Conviction not disclosing jurisdiction of magistrate.]—Where a conviction was signed by the magistrate with only the words "Stipendiary Magistrate" after his name, but the notice of motion for certiorari described him properly, the judge refused to give effect to the objection. *Rex* v. *Saporito*, (1941) 56 B.C.R. 277; (1941) 2 W.W.R. 45; 76 C.C.C. 158.

6. Two warrants outstanding.]—The magistrate convicted for theft of goods under $25.00 in value and signed a warrant for imprisonment for one year. Subse-

quently the magistrate had the accused back and fixed the penalty at six months, explaining that he had thought the value was more than $25.00. He signed a new warrant for the six months period, saying "the warrant of commitment I signed will be cancelled." It never was. On habeas corpus, with certiorari in aid, the gaoler returned both warrants. Held, quashing the conviction, the substituted warrant must show by endorsement that it is in place of the original one. Otherwise the second warrant will be disregarded. *Rex* v. *Lyons,* (1946) 62 B.C.R. 461; (1946) 2 W.W.R. 727; 86 C.C.C. 308.

XII. Summary Trial of Indictable Offences.

1. Jurisdiction of police magistrate.]—The accused was convicted by a police magistrate of stealing certain cattle, to wit ,one pig of the value of $22.00, and sentenced to three months imprisonment and a fine, with a further three months in default of payment of the fine. On habeas corpus it was contended that because of the reference to the pig's value the magistrate must have proceeded under sec. 773 (a) of the Criminal Code which by virtue of sec. 778 carries a lighter punishment than was given. Held, dismissing the application, the charge was properly laid under sec. 369 for cattle stealing. The reference to the value of the animal was merely descriptive and did not require that the charge be laid under sec. 773 (a) to the exclusion of sec. 369. *Ex parte Ciminelli,* (1943) 59 B.C.R. 81; 79 C.C.C. 359; (1943) 3 D.L.R. 292; (1943) 2 W.W.R. 94. See *Ex parte Ciminelli (No. 2)* infra.

2. Jurisdiction of police magistrate — theft under $25.00 — whether excess of punishment.]—The accused was convicted by a police magistrate of stealing "certain cattle, to wit, one pig," of the value of $22.00. He was sentenced to three months imprisonment and a fine, with a further three months in default of payment of the fine. On habeas corpus it was held that the magistrate was limited in his sentence by sec. 778 by reason of the property being less than $25.00. But it was further held, dismissing the application, that sec. 1035 (which does permit of a fine) must be read with sec. 778 with the result that the magistrate had jurisdiction to impose the sentence complained of. *Ex parte Ciminelli (No. 2),* (1943) 59 B.C.R. 148; (1943) 3 D.L.R. 294; (1943) 2 W.W.R. 139; 79 C.C.C. 362.

3. Jurisdiction of magistrate without consent—keeper of disorderly house.]—The magistrate referred to in sec. 777 of the Criminal Code (bestowing absolute jurisdiction in certain cases) is the magistrate defined by sec. 771 (a) (iii), and sec. 771 (a) (vii) does not derogate from the definition in sec. 771 (a) (iii). The special definition of "magistrate" in sec. 771 (a) (vii) is an extension of and not a limitation upon the general definition in sec. 771 (a) (iii). *Ex parte Lum Lin On,* (1943) 59 B.C.R. 106; (1943) 4 D.L.R. 336; (1943) 3 W.W.R. 157; 80 C.C.C. 70 and 285.

4. Consent not given according to transcript.]—On a charge of stealing an automobile, the accused were told by the magistrate that they had the option to be tried by him or in the ordinary way. Without getting their consent, as the transcript showed, he went on and asked them to plead. They were convicted. Held on appeal, quashing the conviction, the official transcript failed to show that they had consented to be tried summarily. The fact that the formal convictions stated that they did consent did not avail. They were drawn up after the Court had given its judgment convicting the accused. *Rex* v. *Capello,* (1945) 62 B.C.R. 90.

5. New trial ordered—no direction as to mode of—whether Court of Appeal can supplement order after entry.] — The accused had consented to be tried summarily and pleaded guilty. A new trial was ordered by the Court of Appeal and the order contained no direction as to the mode of the new trial. The accused moved to amend the judgment to provide for a trial by jury. Held, dismissing the motion, the power to give such a direction under sec. 1014 (4) of the Criminal Code cannot be exercised after the order is entered and perfected. Here the order as entered is in the terms pronounced by the Court and the Court is functus officio. It follows that the case was remitted for trial before the tribunal from which the appeal was taken. There is no power in the Court to permit the accused to have a further right of election. The consent once given by the accused remains in effect and is no part of the trial. But an experienced magistrate would be expected in the circumstances to turn the hearing into a preliminary inquiry rather than

proceed with the trial. *Rex* v. *Hand (No. 2)*, (1946) 62 B.C.R. 384; (1946) 3 D.L.R. 130; (1946) 2 W.W.R. 166; 85 C.C.C. 389.

XIII. Speedy Trial.

1. Right to re-election when new trial ordered.]—The accused elected to be tried by a County Court judge and was acquitted. The Court of Appeal ordered a new trial on the same charge. He was again tried and convicted without any re-election. Held, refusing habeas corpus, the election is a preliminary required to give the judge jurisdiction, but is not part of the trial. *Rex* v. *Gee Duck Lim*, (1936) 51 B.C.R. 61, (1936) 4 D.L.R. 464; (1936) 3 W.W.R. 170; 66 C.C.C. 304. (See *Rex* v. *Chow Wai Yam*, (1937 52 B.C.R. 140).

2. Previous conviction—whether necessary to aver in charge.]—The accused was convicted under sec. 216 of the Criminal Code of living in part on the earnings of prostitution. After finding him guilty and before sentence, the trial judge asked the accused if he had previously been convicted of an offence of the same kind. Upon an admission that he had the judge proceeded to order that he be whipped in addition to imprisonment. On appeal it was contended that sec. 963 applied and that a condition precedent to the exercise of the power to whip is that the prior offence be averred in the charge. Held, affirming the decision below on this point, that sec. 963 serves no useful purpose here and does not apply to speedy trials under Part XVIII of the Criminal Code, but is intended for use in trials by a jury. *Rex* v. *Mah Chee*, (1938) 53 B.C.R. 498; (1939) 1 D.L.R. 111; (1938) 3 W.W.R. 85 and (1939) 1 W.W.R. 307; 71 C.C.C. 63 and 396.

3. Election — deprivation of right.] — When the two accused came before the County Court judge to elect for trial .one said "I am not ready to elect now" and the other answered "I am not ready to elect." The judge treated these answers as an election for trial by jury. The accused were without counsel. A week later having retained counsel they applied to the same judge and sought to elect. The judge refused to entertain the application on the ground that they had already elected. An application for a mandamus was denied and upon appeal it was held, directing a mandamus, that the County Court Judge had deprived the accused of their right to elect. When they said they were not ready to elect, it should have been interpreted as a request for time, particularly as they were without counsel *Rex* v. *Lennox*, (1940) 55 B.C.R. 491; (1941) 1 D.L.R. 779; (1941) 1 W.W.R. 65; 75 C.C.C. 158.

4. Attorney-General intervening after election for speedy trial and requiring jury trial—sec. 825 (5) of Criminal Code.] — The accused had elected for a speedy trial. Notwithstanding this the Attorney-General signed an indictment upon which the accused were arraigned in the Assize Court. The accused there represented by counsel, pleaded "not guilty," without pleading any special issue or taking any objection to the jurisdiction. Having been convicted, they appealed on the ground that apart from the indictment there was nothing of record showing that the Attorney-General had invoked the provisions of sec. 825 (5) of the Criminal Code, under which he could require a jury trial to be had. Held, dismissing the appeal, that the Attorney-General's signature to the indictment was a sufficient "requiring" that the charge be tried by a jury. Moreover, the accused had waived any right to raise the question by acceding to the jurisdiction of the Assize Court. The matter was one for special plea before arraignment and before pleading the general issue. *Rex* v. *Sayers and Hall*, (1941) S.C.R. 362; (1941) 3 D.L.R. 483 affirming (1941) 56 B.C.R. 241; 76 C.C.C. 1.

XIV. Indictment or Charge.

1. Calling all witnesses whose names appear on back of indictment.] — The prosecutor is not bound to call witnesses merely because their names are on the back of the indictment. He should have them available so that the defence may call them in which case they will be defence witnesses. *Rex* v. *Sing*, (1932) 50 B.C.R. 32; (1936) 1 D.L.R. 36; 64 C.C.C. 328.

2. Attempting to defeat the course of justice by unlawfully counselling—duplicity—ejusdem generis.]—A charge alleged an attempt to defeat the course of justice by unlawfully counselling a person to abstain from prosecuting. It was contended that the charge contained two offences, viz: an attempt to defeat the course of justice and unlawfully counselling. It was also contended that Section 180 (d) of the Crim-

inal Code must be constructed ejusdem generis with the ways set out in sec. 180 (a), (b) and (c). Held there was no duplicity and the charge as laid was good in law. *Rex* v. *M.*, (1936) 2 W.W.R. 494; 67 C.C.C. 142.

3. Conviction based on non-existent section of a statute—whether amendable on appeal.]—The accused was convicted of having an unlicensed dog contrary to sec. 3 of the "Sheep Protection Act" Amendment Act 1929. That act had only two sections and there was no sec. 3. On appeal, the prosecution sought to amend the charge by reference to the "Sheep Protection Act" without naming any particular section. For the accused it was contended that the proceedings below were a nullity and not an irregularity capable of amendment. It was shown that that position was taken before the convicting magistrate. Held allowing the amendment and dismissing the appeal, that the accused was not misled by the misdescription of the statute. The lack of precision was excused by sec. 62 of the "Summary Convictions Act." *Rex* v. *Meggitt*, (1937) 1 W.W.R. 193.

4. Indictment signed by Acting Attorney-General—whether valid.]—The Acting Attorney-General was duly appointed by order in council to act in the absence or during the illness of the Attorney-General, and while so doing, he had all the powers of the Attorney-General. *Rex* v. *Simpson*, (1943) 59 B.C.R. 132; 79 C.C.C. 344; (1943) 3 D.L.R. 355; (1943) 2 W.W.R. 426. Leave to Appeal to the Supreme Court of Canada refused, (1943) 3 D.L.R. 367; 80 C.C.C. 78.

5. Conspiracy to defraud—sufficiency—"matter" not set out.] — The appellants were convicted of conspiring "to defraud the public by fraudulent means." It was contended that the "matter" of the charge was insufficiently set out. Held on appeal, affirming the conviction, that sec. 863 of the Criminal Code, providing that no count charging conspiracy by fraululent means shall be insufficient for failure to set out the details, is a complete answer. *Rex* v. *Langs*, (1943) 59 B.C.R. 112; 79 C.C.C. 372; (1943) 3 D.L.R. 434; (1943) 2 W.W.R. 300. Leave to appeal to the Supreme Court of Canada refused, (1943) 3 D.L.R. 440; 80 C.C.C. 86.

6. Indictment inaptly drawn—all essential ingredients included.]—The indictment was explicit enough to enable the accused to understand what he was charged with. Some of the wording lacked precise particularity but that did not nullify the indictment. There was no omission of an essential ingredient of the offence charged. One of the purposes of sec. 852 of the Criminal Code was to modify the rigid technicality of the old procedure. Moreover, a defect of this nature was cured by the verdict (sec. 1010 (2)). Even if it could be held that the accused was not properly convicted on the part of the indictment under attack, it is not in doubt that he was properly convicted on the part not attacked. (Sec. 1016 [1]). *Rex* v. *Wyatt*, (1944) 60 B.C.R. 255; (1944) 3 D.L.R. 387; (1944) 2 W.W.R. 168; 81 C.C.C. 311.

7. Crown's power to amend during trial—sec. 889 (1) (2) of Criminal Code.]—The accused was convicted of retaining stolen goods, knowing the same to have been stolen. The charge omitted the words "knowing the same to have been stolen" and the accused near the close of the trial moved to quash the indictment as disclosing no offence known to the law. The trial judge invoked sec. 889 of the Code and directed the missing words to be added. Held, affirming the conviction, there was power to make the amendment provided (1) the matter omitted was proved by the evidence, and (2) the accused was not prejudiced by the omission. Here, the proof required under (1) was satisfactory to the trial judge, and (2) there was no prejudice to the accused since the charge on the preliminary hearing contained the missing words and guilty knowledge was opened to the jury by counsel. Crown witnesses referred to it and were cross-examined on it. *Brodie* v. *Regem*, (1936) S.C.R. 188 distinguished. *Rex* v. *Gordon and Rycer*, (1946) 63 B.C.R. 44; (1947) 2 D.L.R. 350 (sub. nom. *Rex* v. *Rycer*), (1946) 3 W.W.R. 81; 86 C.C.C. 336.

XV. Plea.

1. Autrefois acquit — whether former conviction for same cause.]—The accused was convicted under the Fire Marshal Act of installing a pump for the sale of inflammable liquids on a street, contrary to the regulations under the Act. Some months later he was charged under the same Act with failing to comply with an order to remove the pump, and the charge was dismissed. On appeal by the prosecution it

was contended that the principle of autrefois acquit applied and that the accused was being twice vexed for the same cause. Held, allowing the appeal, the two charges were separate and distinct. The question to be determined on such a plea depends upon matters of substance rather than upon technical considerations. *Kerr* v. *Lloyd,* (1936) 1 W.W.R. 16; 65 C.C.C. 359.

2. Autrefois acquit as a defence.] — Where the accused had been convicted of two successive acts of marketing milk contrary to the provisions of the Natural Products Marketing (British Columbia) Act the magistrate held that the plea of autrefois acquit was not a good defence. Held on appeal affirming the decision of the judge below and the magistrate that each of the acts done, viz. selling milk, was a complete offence in itself and the judge below was right in holding that every act in marketing milk without a licence was a distinct offence. *Rex* v. *Crystal Dairy Ltd.,* (1938) 53 B.C.R. 174; (1938) 4 D.L.R. 427; (1938) 3 W.W.R. 470; 71 C.C.C. 93; affirming (1938) 2 D.L.R. 795; (1938) 1 W.W.R. 800.

3 Plea of guilty — mistake as to charge.] — The accused pleaded guilty, through an interpreter, to a charge of having opium in his possession. On an application for habeas corpus his affidavit showed that he thought he was pleading guilty to a charge of smoking, a much less serious offence. Held on habeas corpus that there was a doubt whether he understood or not and he should be discharged. Held, on appeal reversing the decision below, looking at all the evidence there was nothing to show a violation of the essentials of justice and accordingly no cause shown to quash the conviction. *Ex parte Yuen Yick Jun,* (1938) 54 B.C.R. 541; (1940) 2 D.L.R. 432; (1938) 2 W.W.R. 274 and (1940) 2 W.W.R. 467; 73 C.C.C. 289; reversing (1937) 52 B.C.R. 158; (1937) 3 W.W.R. 143.

4. Special plea—waiver by pleading the general issue.]—The accused having elected for a speedy trial was afterwards charged and convicted at an Assize upon an indictment signed by the Attorney-General. He took part in the trial without any objection as to the jurisdiction. He appealed on the ground that there was no effective direction for a change of the mode of trial under sec. 825 (5) of the Criminal Code. Held, dismissing the appeal, the Assize Court had jurisdiction and the accused, even if he was right, had waived any status to object. There should have been a special plea before arraignment and before pleading the general issue. It was not a case of consent conferring jurisdiction but a waiver of a privilege which might have defeated the jurisdiction of the trial court which had jurisdiction. *Rex* v. *Sayers and Hall,* (1941) S.C.R. 362; (1941) 3 D.L.R. 483; affirming (1941) 56 B.C.R. 241; 76 C.C.C. 1.

5. When plea of guilty should be accepted.]—A plea of guilty ought not to be accepted unless the judge is sufficiently informed in open Court of the facts upon which the accused pleads guilty, to assure himself that the accused is pleading guilty to the offence with which he is charged. *Rex* v. *Johnson,* (1945) 62 B.C.R. 199; (1945) 4 D.L.R. 75; (1945) 3 W.W.R. 201; 85 C.C.C. 56.

6. Necessity of magistrate being informed in open court if plea of guilty to be accepted.]—The accused was convicted under sec. 301 of the Criminal Code. He appealed on the ground that the plea of guilty which he entered was made without any clear understanding of the effect of the plea. The affidavits in support disclosed that the accused might have had a defence based on his drunkenness. A plea of guilty ought not to be accepted unless the magistrate is sufficiently informed in open Court of the facts on which the accused pleads guilty, to provide assurance that the accused understands the offence to which his plea relates. Held a miscarriage of justice had occurred and the case should be remitted for trial. *Rex* v. *Hand,* (1946) 62 B.C.R. 359; (1946) 3 D.L.R. 128; (1946) 1 W.W.R. 421; 85 C.C.C. 388.

7. Whether accused entitled to withdraw plea of guilty.]—The accused represented by counsel pleaded guilty before a magistrate. Having regard to decisions of the Court of Appeal the magistrate thought it right to have an officer outline the facts of the case before accepting the plea. Later counsel asked leave to withdraw the plea; the magistrate refused and convicted. Held, directing a new trial, that when an accused person pleads guilty the magistrate need not go into the evidence in order to satisfy himself that the accused is in fact guilty. What he should do is satisfy himself that the accused knows what he is doing and understands the exact nature of the offence. He must plead in plain, unambiguous and unmistakable terms. Here the magistrate

felt that having heard evidence which supported the plea of guilty he was obliged to accept such plea, notwithstanding that counsel stated that it had been made in error and he wished to change it. There was no proper exercise of the magistrate's discretion—in fact he did not exercise his discretion. *Rex* v. *Johnson,* (1945) 62 B.C.R. 199 and *Rex* v. *Hand,* (1946) 62 B.C.R. 359, explained, *Rex* v. *Milina,* (1946) 62 B.C.R. 532; (1947) 1 D.L.R. 124; (1946) 2 W.W.R. 584; 86 C.C.C. 374.

8. Plea of guilty of conspiracy to steal —effect of subsequent acquittal of alleged co-conspirators.] — The accused pleaded guilty before a magistrate to conspiracy with three others. The others took a speedy trial and were acquitted. Held, quashing the conviction, that since three of the alleged four conspirators were found not guilty, no valid judgment could be passed on the fourth. As the record of conviction can only be made up in the terms of the indictment, it would be inconsistent and contradictory and so bad on its face. The Court of Appeal could not substitute a verdict of theft since the magistrate had before him no evidence of participation in an act of theft, but only a plea of guilty to a common design. *Rex* v. *Tracey* (1946) 4 D.L.R. 296; (1946) 2 W.W.R. 675.

XVI. Trial.

1. Duty of Crown Counsel.]—Counsel for the Crown is under no obligation to reconcile inconsistent stories given by Crown witnesses, at the risk of it being held that the charge is not established. He should call all who were eye-witnesses of the crime whether their evidence supports the charge against the accused or not. It will be for the jury to say which witnesses they will believe and how much of the testimony of each they will accept. *Rex* v. *J. G. Wu,* (1934) S.C.R. 609; (1934) 4 D.L.R. 459; 62 C.C.C. 90; affirming (1933) 48 B.C.R. 24; (1933) 3 W.W.R. 651; 61 C.C.C. 40.

2. Effect of stay in prosecution at assize for criminal libel.] — Following a disagreement by the jury the proceedings were stayed at the instance of the private prosecutor, with counsel for the Crown and for the defendant concurring without objection. The defendant was then discharged and the costs taxed. At a subsequent assize. application was made on behalf of the private prosecution to have the indictment proceeded with on the assurance that the attorney-general would remove the stay. Held, refusing the application, that there is no authority for such procedure and that the proper procedure would be for the Crown to prefer another "charge." *Rex* v. *Takagishi,* (1932) 46 B.C.R. 281; (1933) 1 W.W.R. 54; 60 C.C.C. 34.

3. Magistrate viewing locus without consent of parties.]—Where a magistrate took it upon himself to visit the locus and question the accused the conviction was quashed. He should have had the consent of the parties and he erred in hearing testimony not on oath. *Rex* v. *Crucil,* (1936) 50 B.C.R. 473.

4. Continuance of proceedings before another judge — partly heard before deceased judge.]—Sec. 831 of the Criminal Code provides that proceedings under Part XVIII commenced before any judge may, where such judge is for any reason unable to Act, be continued before another judge as if such proceedings had been commenced before the last-mentioned judge. Held the section does not apply where the judge who begins the trial has died. A new trial was ordered where the evidence of a witness taken before the deceased judge was read into the record and relied upon in an important particular by the convicting judge. The section has reference to the temporary incapacity of the judge who began the hearing and not to the complete lack of capacity of a non-existing judge. *Rex* v. *McLeod,* (1940) 57 B.C.R. 17; (1941) 4 D.L.R. 722; 76 C.C.C. 343.

5. View of locus—irregular method of procedure.]—At the conclusion of a trial, after the jury had been considering their verdict for two or three hours, they asked if they might have a view of the locality where the offence was alleged to have been committed. The trial judge agreed. The complainant and one witness (both of whom in the meantime had gone home and had had the opportunity to discuss the matter with others) guided the party to the place. Upon returning to Court no opportunity was given for counsel to address the jury further and a verdict of guilty was returned. Held, on appeal, ordering a new trial, that while there may be cases in which new evidence may be introduced in this way after the case is closed, they are very rare and can only arise where something has come up which was not foreseen. The dangers of such a

course are obvious. *Rex* v. *Marsh*, (1940) 55 B.C.R. 484; (1941) 1 D.L.R. 431; (1940) 3 W.W.R. 621; 74 C.C.C. 312.

6. Failure to prove proclamation bringing statute into force—reopening trial for purpose.]—Where the Crown inadvertently failed to prove a proclamation bringing the statute into force, it was allowed to reopen its case. A mere matter of formal proof was adduced and a deficiency supplied, without prejudice to the accused in the slightest degree. It was done before the accused had entered upon his defence. *Rex* v. *Kishen Singh*, (1941) 56 B.C.R. 282; (1941) 3 D.L.R. 341; (1941) 2 W.W.R. 145; 76 C.C.C. 248.

7. Whether duty of Crown to call all witnesses.]—Witnesses essential to the unfolding of the narrative on which the prosecution is based must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the prosecution. Farther than that the Crown is not obliged to go and it is open to the prosecution to decide what witnesses will or will not be called. Here the witness in question was not called at the preliminary hearing and his evidence was not necessary to complete the narrative in any way. It was open to the defence to subpoena him, if it desired to call him. *Rex* v. *Hop Lee*, (1941) 56 B.C.R. 151; (1941) 2 D.L.R. 229; (1941) 1 W.W.R. 330; 75 C.C.C. 254.

8. Admissibility of confession — trial within a trial.]—When a statement alleged to have been made by an accused person is sought to be put in evidence, then an issue as to its admissibility should be immediately tried, and all witnesses having any knowledge of the facts relating to the making of the statement should be immediately called. *Rex* v. *Pais*, (1941) 56 B.C.R. 232; (1941) 2 D.L.R. 748; (1941) 3 W.W.R. 278; 75 C.C.C. 318.

9. Evidence of previous criminal acts—application of sec. 1014 (2) of the Criminal Code.] — The appellant and one, Patricia Lane, were tried together on a charge of having morphine in possession. At the close of the Crown's case, the appellant's counsel stated he was calling no evidence. Patricia Lane gave evidence on her own behalf and told a story from which it appeared that she and the appellant had formerly been convicted of procuring morphine by the use of a forged prescription. It was contended on appeal that evidence of the accused's previous conviction was wrongly admitted and that the judge should have warned the jury of the danger of convicting on the evidence of an accomplice. Held, on appeal affirming the conviction, all the elements of proof necessary to convict had been established by uncontradicted evidence and the jury must inevitably have convicted without the evidence of the previous conviction. Sec. 1014 (2) of the Code should be applied. As to the evidence of the accomplice the objection is met by *Rex* v. *Barnes*, (1940) 2 All E. R. 229, holding that the necessity for a warning does not arise where the witness was not called by the prosecution and the jury was not asked to act upon it. *Rex* v. *Pavalini*, (1941) 56 B.C.R. 444; (1941) 4 D.L.R. 183; (1942) 1 W.W.R. 74; 76 C.C.C. 191.

10. Comment by counsel on failure of accused to testify — undue influence by judge as to the facts.]—A new trial was ordered where Crown Counsel made what amounted to a comment respecting the failure of the accused to give evidence at the preliminary hearing. There was on the part of the judge an unconcealed conviction of the guilt of the accused and this was impressed upon the jury by comments and observations throughout the hearing. The jury should not in the discharge of their duty to find the facts be influenced from such an influential quarter by observations leading them to believe that there was no question about the guilt of the accused. *Rex* v. *McCarthy*, (1940) 57 B.C.R. 155; (1941) 1 D.L.R. 623; 74 C.C.C. 367.

11. Adjournment refused—whether reviewable by Court of Appeal.]—Counsel for the Crown notified counsel for the accused on the morning of the trial that two witnesses would be called who did not give evidence at the preliminary hearing. An adjournment was granted until the afternoon. Counsel for the accused renewed his application for an adjournment pointing out that he had not had time to prepare or to confer with his client. The adjournment was refused and counsel retired from the defence of the accused, who was convicted. Held on appeal, affirming the decision below, the propriety of the trial judge's exercise of discretion was not a question of law and was not reviewable by the Court; it did not constitute a question of law within sec. 1014 of the Criminal Code. *Rex* v. *Munevich*, (1942) 58 B.C.R. 4; (1942) 3

D.L.R. 482; (1942) 3 W.W.R. 127; 78 C.C.C. 77.

12. Deposition of deceased witness taken on preliminary inquiry.] — The accused was charged under sec. 180 (a) of the Criminal Code. A witness, since deceased, gave evidence for the Crown and was cross-examined. The magistrate committed the accused for trial, not under sec. 180 (a) but under sec. 180 (d). The charges were, in effect, identical though technically different. At the trial the judge excluded the evidence of the deceased witness on the ground that there was no full opportunity of cross-examining on the new charge. Held on appeal ordering a new trial, the facts brought the matter within the purview of secs. 999 and 1000 of the Code enabling the evidence at the preliminary hearing to be read in certain cases. The magistrate could commit on any charge disclosed by the evidence. *Rex* v. *Banta Singh,* (1942) 58 B.C.R. 213; (1942) 4 D.L.R. 795; (1942) 3 W.W.R. 474; 78 C.C.C. 266.

13. Circumstantial evidence.]—The rule in Hodge's case, 2 Lewin C.C. 227, still prevails, "Not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person." *Rex* v. *Lillian Elliott,* (1942) 58 B.C.R. 96; (1942) 3 D.L.R. 670; (1942) 3 W.W.R. 364; 78 C.C.C. 185.

14. Evidence given in rebuttal — whether merely confirmatory of Crown's case.]—The accused were convicted by a jury, of robbery with violence. One of them set up an alibi and a witness swore that he, and not the accused had committed the crime. He told of a visit to the premises before the robbery. The Crown called the landlady to disprove his story and she in Court identified the accused as the visitor. On the appeal this accused contended that this evidence was calculated to confirm the Crown's case and could not properly be introduced as rebuttal, but should have been tendered at first. Held, affirming the conviction, the admissibility of rebuttal evidence in these circumstances is a matter for the discretion of the trial judge. The Crown could not have foreseen the evidence given by the alibi witness and the landlady was called in rebuttal only. The trial judge's discretion was exercised even though no objection was taken. If there was any prejudice through surprise it could have been met by calling the accused with the leave of the trial judge. *Rex* v. *Therien,* (1943) 59 B.C.R. 264; (1943) 3 D.L.R. 652; (1943) 3 W.W.R. 63; 80 C.C.C. 87.

15. Charge of gross indecency — no need for corroboration—judge holding it to be required.]—Although a charge under sec. 206 of the Criminal Code does not require corroboration the trial judge, in acquitting the accused did so on the ground that there was none. In the judge's report under sec. 1020 of the Code he said he "would" not convict without corroboration. Held, dismissing an appeal by the Crown, that although the judge could have convicted without corroboration, the evidence of the chief witness for the prosecution was not to be relied on. It followed that despite his misdirection of himself by the judge no substantial wrong or miscarriage of justice occurred, and a new trial was refused. *Rex* v. *O'Leary,* (1943) 59 B.C.R. 440; (1943) 4 D.L.R. 655; (1943) 3 W.W.R. 559; 80 C.C.C. 327.

16. Change in place of trial—disregard of judge's order as to—miscarriage of justice.]—The accused was charged with theft and appeared for his trial at the Assize at Pouce Coupe. The Crown applied to traverse the trial to the next Assize on account of the absence of a witness. The accused objected on account of the expense involved if the trial was to be held in another place. The judge made the order but on condition that the trial be at Pouce Coupe. Some months later the Crown at Prince George, over the protest of the accused, obtained leave to quash the indictment and substitute a new one identical in terms but with "Prince George" inserted as the place of hearing instead of "Pouce Coupe." The trial went on at Prince George and the accused was convicted. Held, on appeal, ordering a new trial, the order for the traverse was conditional upon the hearing taking place at Pouce Coupe, for the protection of the accused as to expense. The Crown having accepted it on those terms could not afterwards disregard them. The accused was without his witnesses and, although prejudiced, was obliged to stand his trial. The Crown's objection that the accused did not object but went on and pleaded to the new indictment was met by the fact that his counsel did object immediately before arraignment and was over-

ruled. *Rex* v. *Dunn*, (1944) 61 B.C.R. 169; (1945) 4 D.L.R. 297; (1945) 2 W.W.R. 495; 84 C.C.C. 268.

17. Accused told he could make unsworn statement — misdirection.] — The accused, not represented by Counsel, was told by the judge that he could make an unsworn statement, or go into the witness box and give evidence under oath. Since 1893 there has been no right to make an unsworn statement. *Rex* v. *McNab*, (1945) 61 B.C.R. 74; (1945) 1 D.L.R. 583; (1945) 1 W.W.R. 228; 83 C.C.C. 176.

18. Crown's acquiescence in charge to jury—attempt on appeal to have verdict of acquittal upset.]—Crown counsel cannot, by remaining silent allow the case to go to the jury for decision upon a charge that is considered erroneous in law and then appeal a verdict of acquittal resulting from such instruction. The Crown elected to have the issues decided upon a charge now claimed to be faulty. In the absence of objection below it is not open on appeal to the Crown to make this submission. *Rex* v. *Fleming*, (1945) 61 B.C.R. 464; (1945) 4 D.L.R. 800; (1945) 2 W.W.R. 572; 84 C.C.C 360.

19. When interpreter should be used.] On an appeal from the conviction of an Indian for murder, he having only an imperfect knowledge of English, it was contended that the questions and answers should have been put through an interpreter. Held, affirming the conviction, that where, as here, the accused's counsel announced that he would dispense with the services of the interpreter, who was present throughout, there could be no prejudice. *Rex* v. *Prince*, (1945) 62 B.C.R. 99; (1946) 1 D.L.R. 659; (1945) 3 W.W.R. 720; 85 C.C.C. 97.

20. Obvious hostility of trial judge—intervention in examination of witnesses.] —The accused who was undefended was convicted by a jury of conspiring to defraud the Government of Canada. The chief witness against him was a woman who had pleaded guilty as a co-conspirator with him. The trial judge participated in her examination in such a way as to disclose his conviction of the guilt of the accused beyond question. Held, on appeal, ordering a new trial the judge's comments and questions were not only unfair to the accused but calculated to prejudice the jury against him. There was cast upon the judge the duty of protecting in every reasonable way the interest of the accused, who was without counsel, to the end that he should be assured a fair trial. There was a substantial miscarriage of justice. It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly seem to be done. *Rex* v. *Darlyn*, (1946) 63 B.C.R. 428; (1947) 3 D.L.R. 480; (1947) 1 W.W.R. 449; 88 C.C.C. 269.

21. Accused's failure to testify — comment by prosecutor.] — The accused did not give evidence at his trial for theft by means of violence. Crown counsel in addressing the jury intimated that there should be some explanation on the part of the defence. Counsel for the accused applied for a dismissal of the jury on the ground that counsel for the prosecution had commented on the failure of the person charged to testify (sec. 4 (5) of the Canada Evidence Act). The presiding judge refused the application and the accused was convicted. On appeal, upholding the conviction, held, that the language used by counsel could not be distorted into "comment" within the meaning of the Act. The Act will apply in cases where the reference is to the accused and where it is suggested that he should give an explanation in the witness box. *Rex* v. *Ferrier*, (1932) 46 B.C.R. 136; (1932) 3 W.W.R. 113; 58 C.C.C. 370.

22. Comment on accused's failure to testify.] — The Crown elicited evidence from a witness O. of a statement made to him by the accused. The defence called two witnesses who denied the making of the statement. The accused did not give evidence. In addressing the jury Crown counsel said that if they did not believe the two "then you have the uncontradicted evidence of O." Held, what occurred was not a comment on the failure of the accused to testify under sec. 4 (5) of the Canada Evidence Act. *Rex* v. *Dawley*, 89 C.C.C. 134.

XVII. Jury.

1. Disqualification of juror disclosed after verdict.]—Under the Jurors Act persons convicted of indictable offences are disqualified. On an appeal from a conviction by a jury containing (as it was afterwards discovered) such a disqualified person, it was held that notwithstanding sec. 1011 of the Criminal Code (precluding an appeal on the ground of disqualification

of a juror), there should be a new trial. *Rex* v. *Stewart*, (1932), 46 B.C.R. 17; (1932) 1 W.W.R. 912; reversed by Supreme Court of Canada, (1932) S.C.R. 612; (1932) 4 D.L.R. 337; 58 C.C.C. 358.

2. Evidence of deliberations in jury room.]—The accused having been convicted at an Assize appealed and asked leave to introduce new evidence. It was made up of affidavits suggesting that a Crown witness had told a juror, out of Court, that one of the accused was of bad character, and that the juror had repeated it to his fellows. This was denied on affidavit. The proposed new evidence also showed that the sheriff had "stampeded" the jury into giving their verdict before they were ready to do so. Held, that the new evidence should not be received and the appeal should be dismissed. It is improper to make an application for leave to introduce new evidence using remarks made in the jury room and disclosing what took place there. The jurors who complained of being "stampeded" stood mute when the verdict was pronounced and ought not later to be heard to allege that they did not not understand it. The rule is almost inflexible that affidavits will not be admitted which disclose what went on in the jury room. *Rex* v. *Minness*, (1933) 47 B.C.R. 321; (1933) 1 W.W.R. 657 and (1934) 1 W.W.R. 21; 59 C.C.C. 336 and 61 C.C.C. 169.

3. Depositions containing excluded evidence given to jury.]—The accused was entitled to a new trial where a copy of the transcript of the evidence, containing excluded testimony, was given to the jury along with the exhibits. *Rex* v. *Watson*, (1936) 50 B.C.R. 531; (1936) 4 D.L.R. 358; (1936) 2 W.W.R. 560; 66 C.C.C. 233.

4. Charge of driving in a manner dangerous to the public—verdict of guilty of driving to the common danger.] — Where on a trial for driving in a manner dangerous to the public, the jury found the accused "guilty of driving to the common danger," the Court of Appeal held that there was no other possible conclusion than that the jury intended to convict, and did convict, of the offence as charged. *Rex* v. *Robertson*, (1942) 58 B.C.R. 37; (1942) 4 D.L.R. 498; (1942) 3 W.W.R. 159; 78 C.C.C. 163.

5. Wrongful admission of evidence on trial for murder—judge's warning to disregard it.]—Where a statement damaging to the accused was unexpectedly given in evidence to the surprise of both counsel, the judge ruled it out and very carefully warned the jury to disregard it. Held, on appeal, what happened was an irregularity in the trial but no substantial miscarriage of justice had occurred. Standing alone the incident would have warranted the discharge of the jury and the empanelling of a fresh one. *Rex* v. *Harrison (No. 2)*, (1945) 62 B.C.R. 420; (1946) 3 D.L.R. 690; 86 C.C.C. 166.

6. New trial ordered—no direction as to mode of—whether Court of Appeal can supplement order after entry.]—The accused had consented to be tried summarily and pleaded guilty. A new trial was ordered by the Court of Appeal and the order contained no direction as to the mode of the new trial. The accused moved to amend the judgment to provide for a trial by jury. Held, dismissing the motion, the power to give such a direction under sec. 1014 (4) of the Criminal Code cannot be exercised after the order is entered and perfected. Here the order as entered is in the terms pronounced by the Court and the Court is functus officio. It follows that the case was remitted for trial before the tribunal from which the appeal was taken. There is no power in the Court to permit the accused to have a further right of election. The consent once given by the accused remains in effect and is no part of the trial. But an experienced magistrate would be expected in the circumstances to turn the hearing into a preliminary inquiry rather than proceed with the trial. *Rex* v. *Hand (No. 2)*, (1946) 62 B.C.R. 384; (1946) 3 D.L.R. 130; (1946) 2 W.W.R. 166; 85 C.C.C. 389.

XVIII. Judge's Charge.

1. Robbery with violence—alibi—lack of clearness and particularity.] — A new trial was ordered where on conflicting testimony as to an alibi the trial judge merely told the jury in general terms that they could accept or reject any portion of the evidence. The judge should have put the facts of both sides in such a way as to assist the jury in coming to their conclusion, not that his opinion should influence them but that his collection of the facts would assist them. *Rex* v. *McKenzie*, 58 C.C.C. 106.

2. Misdirection.] — The accused was charged before a jury with wounding with

intent to murder. The evidence of the victim and the other Crown witnesses varied widely as to circumstances but coincided in identifying the accused as the assailant. The accused did not give evidence, but put forward an alibi. Upon his conviction he appealed to the Court of Appeal on the ground of misdirection to the jury and the conviction was affirmed by an equal division of the Court. Upon a further appeal to the Supreme Court of Canada, it was held, (a) the accused having set up the defence of alibi cannot complain because the jury was not instructed on an alternative defence, which, if the alibi was good, had no foundation in fact; (b) the statement in the judge's charge that the accused would be guilty if the jury believed what the witnesses said was done by the man who assailed the complainant, merely means that if the shooting took place as described by the witnesses the intent was obvious and would be implied; (c) the objection that the judge failed to instruct the jury as to the conflicting stories told by the Crown's witnesses, on the theory that the Crown must in some way reconcile their stories, is not tenable. *Rex* v. *J. G. Wu,* (1934) S.C.R. 609; (1934) 4 D.L.R. 459; 62 C.C.C. 90; affirming (1933) 48 B.C.R. 24; (1933) 3 W.W.R. 651; 61 C.C.C. 40.

3. Unlawfully wounding—jury's verdict of "guilty without malicious intent."]—The applicant was tried under Code sec. 273 which involves intent to maim, etc., and under 274 for unlawfully wounding in which intent is not mentioned. The trial judge told the jury that the unlawful wounding charge did not involve intent. The jury found the appellant "guilty without malicious intent." Held, on appeal, affirming the conviction, there was a proper direction by the judge. When he said intent was not involved under sec. 274, he meant that the burden was not on the Crown to establish it. *Rex* v. *White,* (1934) 2 W.W.R. 513.

4. Evidence of accomplice.]—The accused were convicted by a jury of conspiring to publish a defamatory libel concerning S. They had told L., a witness, of their plans and asked him for money to finance the publication. L. went to S. and exposed the plot; he was provided with money which he gave to one of the accused after which an arrest took place and the money was found on him. The trial judge did not warn, and was not asked to warn, the jury of the danger of convicting on the evidence of an accomplice. Held, dismissing the appeal, that if there was more than a scintilla of evidence to that effect then L. was an accomplice. That was a question of fact which should have been left to the jury, but as L. simply took a pretended part in the plot with the object of exposing it, the trial judge was justified here in concluding that he was not an accomplice. *Rex* v. *Williams,* (1934) 49 B.C.R. 379; (1935) 2 D.L.R. 651; 63 C.C.C. 216.

5. Misdirection by trial judge not to be assumed.]—Unless his reasons clearly indicate it a Court of Appeal will not assume that the trial judge has misdirected himself. *Rex* v. *Yip Sing* (1935) 2 D.L.R. 479; 63 C.C.C. 255; affirmed (1935) 30 D.L.R. 798.

6. Circumstantial evidence — adequacy of charge.]—On a trial for murder resulting in a conviction, the evidence was chiefly circumstantial. The trial opened on Ascension Day, a Dominion holiday (Interpretation Act, sec. 37 (11)). The trial judge did not charge the jury in the formula of Baron Alderson that not only the circumstances should be consistent with guilt, but that they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person. In dealing with the question of reasonable doubt the trial judge said "It is an established principle of our criminal law that the crime charged has got to be established by the prosecution beyond a reasonable doubt. That is, convinced beyond a reasonable doubt that the guilt of the accused is the only reasonable explanation of the facts established by the evidence." Held, on an appeal directing a new trial, per Martin and Macdonald, J.J. that the warning as to reasonable doubt was so detached from the judge's remarks upon circumstantial evidence that the jury might not have appreciated the application of the one to the other. Per McPhillips, J., that there was no jurisdiction to sit on Ascension Day. *Rex* v. *Macchione,* (1936) 51 B.C.R. 272; (1937) 1 D.L.R. 593; (1937) 1 W.W.R. 151; 67 C.C.C. 381.

7. Failure by accused to testify.]—On a murder trial the judge told the jury "There are two principles that have to be acted upon . . . 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 read as a whole the charge did not offend against the rule that there must be no comment on the failure of the accused to testify. *Rex* v. *Macchione* (No. 2), (1938) 53 B.C.R. 238.

8. As to the evidence of accomplices.] —The rule requiring warning as to the evidence of accomplices applies equally whether there is or is not corroborative evidence. Where a judge told the jury, in effect, that it was their duty to convict solely upon the evidence of accomplices, provided they believed them to be telling the truth, that was an improper direction. He should tell them that they "may" convict but not that it is "their duty" to do so. *Rex* v. *Nowell,* (1938) 54 B.C.R. 165; (1938) 3 D.L.R. 650; (1938) 3 W.W.R. 328; 70 C.C.C. 329.

9. Misdirection—conviction for offence other than that charged.] — The accused was indicted under sec. 303 of the Criminal Code for using a specific means to procure an abortion. The judge having told the jury that the case had on the facts as proved, turned out admittedly not to be one of using the means so charged, directed them to decide the case as one using other means with the like intent. Held on appeal, ordering a new trial, the jury did not return a verdict upon the charge as laid and therefore there had been a trial on a false issue. *Rex* v. *Dale,* (1939) 54 B.C.R. 134; (1939) 3 D.L.R. 603; (1940) 1 W.W.R. 375; 72 C.C.C. 181.

10. Misdirection—defence not adequately placed before the jury.] — The real defence of the accused should have been placed before the jury. It matters not whether it was weak or strong; that requirement is essential. Further the evidence must be presented in such a way that it can be appreciated by the jury. *Rex* v. *McCarthy,* (1940) 57 B.C.R. 155; (1941) 1 D.L.R. 623; 74 C.C.C. 367.

11. Murder—misdirection—definition of offence.]—The trial judge told the jury, referring to the accused and his companion, "if they went up to this man's room and assaulted him and his death ensues that, of course, is murder." Held, ordering a new trial, that an assault from which death ensues is murder only if and when, on a proper direction, the jury has considered and found against the accused those relevant elements defined in sec. 259 of the Criminal Code which constitute the death of the person killed, murder. *Rex* v. *Rennie,* (1939) 55 B.C.R. 155; (1940) 3 D.L.R. 350; (1940) 2 W.W.R. 343; 73 C.C.C. 335.

12. Theft of shares—by stock-broker—failure to direct jury on possible defence.] —The accused was convicted by a jury of stealing certain shares. A new trial was ordered on the ground of non-direction. The evidence for the prosecution indicated that the theft fell not only within sec. 347 of the Criminal Code upon which the judge instructed the jury but also within sec. 355 upon which the judge refused to instruct the jury. By reason of subsections 2 and 3 of sec. 355, the exception therein contained might be relied on by the accused as a defence to a charge under sec. 355. The indictment simply charged stealing and when the evidence disclosed that the accused may have transgressed against sec. 355 the jury should have been instructed accordingly. It follows that they should have been told to consider the effect of the exceptions in subsections 2 and 3 of sec. 355. *Rex* v. *Manley,* (1940) 55 B.C.R. 208; (1940) 4 D.L.R. 490; (1941) 3 W.W.R. 197; 74 C.C.C. 222.

13. Misdirection—accomplices—effect of change of intention and withdrawal.]—On a trial for murder, the judge warned the jury as to the danger of convicting on the uncorroborated evidence of accomplices. In dealing with the status of two witnesses who had fled just as the fatal blow was struck, the judge said that they would cease to be accomplices if they had abandoned the common object of robbing the deceased before the attack. Held, on appeal, ordering a new trial, that there was misdirection. A mere change of intention and a quitting of the scene of the crime was not enough to reduce a person from the status of being an accomplice. There must also be a timely communication to the one continuing in the enterprise, of the intention to abandon the common unlawful cause — an intimation that from then on no further assistance will be given. Here the jury, on the direction given, could find that the two witnesses were not accomplices, and that the warning as to the danger of convicting on the uncorroborated testimony of accomplices, did not apply to them. *Rex* v. *Whitehouse,* (1940) 55 B.C.R. 420; (1941) 1 D.L.R. 683; (1941) 1 W.W.R. 112; 75 C.C.C. 65.

14. Provocation — reducing murder to manslaughter.] — Where there was some

evidence relating to provocation which under sec. 261 of the Criminal Code, if believed, could have reduced the charge from murder to manslaughter, and where the trial judge failed to direct the jury's specific attention to it, a new trial was ordered. Held, on further appeal to the Supreme Court of Canada, on an equal division of the Court that the direction for a new trial be affirmed. A trial judge need not refer to every piece of evidence but to omit to mention the only evidence upon one branch of the defence is an omission to place that defence before the tribunal of fact. *Rex* v. *Krawchuk,* (1941) 2 D.L.R. 353; 75 C.C.C. 219; affirming (1940) 56 B.C.R. 7; (1941) 3 W.W.R. 540; 75 C.C.C. 16.

15. Possibility of manslaughter.]—On a charge of murder the judge told the jury that only two verdicts were open and manslaughter was not mentioned at any time during the trial either by the judge or by counsel. The accused had given evidence that he was attacked by his wife's paramour with a revolver in his hand and that in the ensuing struggle the revolver was discharged, but that he had become unconscious and did not know with what result. Held, dismissing the appeal, that the defence could not now suggest that the trial judge without any hint of it at the trial, should have dealt in his charge with the possibility of manslaughter on the basis of provocation. *Rex* v. *Krawchuk (No. 2),* (1941) 56 B.C.R. 382; 76 C.C.C. 267; (1941) 4 D.L.R. 239; (1941) 3 W.W.R. 563. Leave to appeal to Supreme Court of Canada refused, (1942) 1 D.L.R. 315; 77 C.C.C. 24.

16. Corroboration—misdirection.]—On a charge of rape it is the duty of the trial judge to warn the jury of the danger of convicting upon the uncorroborated testimony of the prosecutrix. Where the charge was erroneous in law in that there was non-direction amounting to misdirection because of failure to warn the jury, a new trial was ordered. The necessary corroboration is not to be found in the complaint by the prosecutrix; that merely tends to support the credibility of the prosecutrix. Such a complaint lacks the essential quality of coming from an independent quarter. Corroboration must be evidence implicating the accused, i.e. confirming in some material particular not only the evidence that the crime has been committed, but also that the accused committed it. *Rex* v. *Reeves,* (1941) 57 B.C.R. 90; (1942) 1 D.L.R. 713; 77 C.C.C. 89.

17. Murder—shooting during attempted robbery — murder or nothing — whether manslaughter should have been left to the jury.] — The four respondents were convicted of murder. One of them armed with a revolver entered a shop and twice wounded the son of the proprietor and a third shot killed him. There was some evidence that the fatal shot was fired during a struggle. The Court of Appeal ordered a new trial on the ground that it was open to the jury to find that the revolver went off by accident and that the possibility should have been the subject of direction by the trial judge as permitting a verdict of manslaughter. Held, on further appeal to the Supreme Court of Canada, affirming the decision below, the trial judge was wrong in telling the jury that they must acquit if they did not find the accused guilty of murder. If the revolver went off accidentally, it could not be said as a matter of law to be an act of violence "in furtherance of or in the course of" the crime of robbery, as that phrase was used in *Director of Public Prosecutions* v. *Beard,* (1920) A.C. 479. The trial judge ought to have told the jury that they might and ought to find a verdict of manslaughter if they thought the revolver was not discharged by the voluntary act of the accused who had it, and that he did not anticipate and ought not to have anticipated that his conduct might bring about a struggle in which somebody's death might be caused. *Rex* v. *Hughes,* (1942) S.C.R. 517; (1943) 1 D.L.R. 1; 78 C.C.C. 257; affirming (1942) 57 B.C.R. 521; (1942) 3 D.L.R. 391; (1942) 3 W.W.R. 1; 78 C.C.C. 1.

18. Assault with intent to rob—bank hold-up—mental condition short of insanity.]—The accused was convicted by a jury of unlawfully assaulting a bank manager with intent to rob him. The defence was insanity which the jury rejected. On appeal, for the first time, the objection was ruled that the trial judge, having regard to the necessity of proving "intent to rob," should have put it to the jury whether or not the accused, even if not insane, was capable of forming and did form an "intent." Held, affirming the conviction, there is no obligation upon the trial judge to charge upon alternative defences unless there is material before the jury which would justify a direction that they should consider it. Here there was no such material. *Rex* v. *Flett,* (1943) 59 B.C.R. 25; (1943) 2 D.L.R. 656; (1943) 1 W.W.R. 672; 79 C.C.C. 183.

19. No substantial wrong or miscarriage of justice.]—Although the charge of the trial judge to the jury was in some respects erroneous in law, it did not result in any substantial wrong or miscarriage of justice, and sec. 1014 (2) of the Criminal Code was applied. In concluding to dismiss the appeal the fact that the appellant did not give evidence was a factor. *Rex* v. *Hall,* (1944) 1 W.W.R. 125; 81 C.C.C. 31.

20. Failure to place defence before jury.]—Where the charge considered as a whole failed in substantial respects to present adequately and fairly to the jury the defence of the accused and the evidence in support thereof, a new trial was ordered. The trial judge was mistaken when he said no evidence was given on a point made by the defence. *Rex* v. *Findlay,* (1944) 60 B.C.R. 481; (1944) 2 D.L.R. 773; (1944) 1 W.W.R. 609; 81 C.C.C. 183.

21. Murder — failure of trial judge to charge as to manslaughter in relation to self-defence.]—The accused was convicted of murder. There was evidence of provocation and of self-defence. but the trial judge directed the jury that if they believed the only witness who saw the shooting there could be only one verdict—murder, thus excluding self-defence entirely. Manslaughter was explained in relation to provocation and acquittal was referred to in relation to self-defence, but there was no direction that excessive self-defence would justify a manslaughter verdict, but not acquittal. Held, on appeal, a verdict of manslaughter should be substituted for that of murder. *Rex* v. *Barilla,* (1944) 60 B.C.R. 511; (1944) 4 D.L.R. 344; (1944) 3 W.W.R. 305; 82 C.C.C. 228.

22. Murder — failure to charge as to possibility of manslaughter.]—The accused having made threats to the life of H. L. came to her room with a rifle and a knife. He pointed the rifle in the direction of H. L., and the deceased, who was with her in the room. He shot the deceased and a scuffle ensued in which the latter was stabbed with the knife and died shortly afterwards. The accused was convicted of murder. Sec. 259 (c) of the Criminal Code was read to the jury but not explained to them. In summarizing, the trial judge made it appear that it would be murder if the accused meant to cause bodily injury to H. L. and, by accident or mistake, killed the deceased, leaving out the vital element that the accused must have meant to cause H. L.'s death, or was reckless whether death ensued or not. Held, on appeal ordering a new trial, there was misdirection as to a possible verdict of manslaughter under sec. 259 (c). In effect, the trial judge withdrew from the jury the possibility of manslaughter and told them it was murder or nothing so far as sec. 259 (c) was concerned. *Rex* v. *Harrison,* (1945) 61 B.C.R. 181; (1945) 3 D.L.R. 122; 84 C.C.C. 78.

23. Rape — corroboration.] — The trial judge should tell the jury (a) that it would be dangerous to convict upon the uncorroborated evidence of the complainant, (b) whether there is evidence which they might accept as corroborative and point out that evidence to them, (c) what weight and inferences might be drawn from such evidence. *Rex* v. *Lastiwka,* (1945) 61 B.C.R. 450; (1945) 4 D.L.R. 220; 84 C.C.C. 283.

24. Murder — misdirection — failure to charge as to sec. 252 (2) of the Code.]—In charging the jury in a murder case, the trial judge read them the whole of sec. 252 (2) and sec. 259 (a) to (d) of the Criminal Code. He told them it was culpable homicide and murder if it fell within any one of the heads of sec. 259, but might be reduced to manslaughter in certain cases. He stated later that it was not necessary to consider the latter part of sec. 252 (2). That part of the subsection would have a bearing if, as the defence suggested, the deceased came to his death by accident or as a result of provocation. There was misdirection in the sense of *Rex* v. *Hughes,* (1942) S.C.R. 517. *Rex* v. *Harrison (No. 2)* (1945) 62 B.C.R. 420; (1946) 3 D.L.R. 690; (1945) 2 W.W.R. 1; 86 C.C.C. 166.

25. Circumstantial evidence — Hodge's case.]—It is not necessary for a judge in instructing a jury on circumstantial evidence to use the exact formula of Baron Alderson in Hodge's case, (1838) 168 E.R. 1136, so long as it contains the essential elements of the principle there laid down. *Rex* v. *Prince,* (1945) 62 B.C.R. 99; (1946) 1 D.L.R. 659; (1945) 3 W.W.R. 720; 85 C.C.C. 97.

26. Murder—drunkenness as a defence.]—The accused was convicted of murder. His defence was that he was too drunk to know what he was doing. Held on appeal that the trial judge had adequately instructed the jury as to the principles involved including the capacity to form the intent required by sec. 259 (a) and 259 (b)

of the Criminal Code. *Rex* v. *Hainen,* (1945) 61 B.C.R. 555; (1946) 1 D.L.R. 622; (1945) 3 W.W.R. 699; 85 C.C.C. 124.

27. Weakness of identification not explained to jury — misdirection as to the evidence.]—On a charge of indecent assault the accused who was convicted was identified only by a child of eleven. She could remember nothing about her assailant's appearance except that he was a young man with a low cut moustache. He produced strong evidence of an alibi. Held, quashing the conviction, the matter of identification should have been the subject of a detailed and careful examination by the trial judge in his charge to the jury. Specific direction should have been given as to the weakness of the evidence of identity coupled with a pointed warning as to the danger of convicting on the testimony of one such witness. There was also misdirection as to an answer given by the child's mother. *Rex v. Yates,* (1946) 62 B.C.R. 307; (1946) 2 D.L.R. 521; (1946) 1 W.W.R. 449; 85 C.C.C. 334.

28. Possession of mould capable of being used in counterfeiting.]—The mould was found buried in the garden of a house owned by the accused and occupied by him, his wife, his mother and his brother. The judge in charging the jury said it would be open to them to infer that the mould found on his premises was in his possession unless there was some evidence to indicate innocence on his part. Held, ordering a new trial, the mere finding of an article buried in the garden of a householder does not, in itself, discharge the burden of proof of possession resting on the Crown and thrust on the accused the necessity of furnishing evidence of his own innocence. *Rex* v. *Haggerty,* (1946) 63 B.C.R. 416; (1947) 3 D.L.R. 335; (1947) 1 W.W.R. 277; 88 C.C.C. 255.

XIX. Sentence.

1. Reprieve of death sentence pending appeal.]—The accused was convicted of murder and sentenced to be hanged. He appealed to the Court of Appeal and judgment was reserved. A reprieve was ordered until the judgment of the Court might be delivered. *Rex* v. *Macchione,* 69 C.C.C. 175.

2. Effect of imposing imprisonment from date of arrest — the Opium and Narcotic Drug Act.] — The accused was convicted of having possession of opium and sentenced to six months hard labour and to pay a fine of $200 or in default an additional ten days. The Crown appealed as to the sentence. Held, on appeal, amending the conviction, that the minimum sentence fixed by the Act was not imposed. The minimum sentence was fixed in the Act at six months. The magistrate had in effect shortened that time by directing that the term should begin to run from the date of arrest thus cutting some 26 days off. As to the inadequacy of the sentence generally the magistrate's discretion should not be interfered with. *Rex* v. *Jung Quon Chong,* (1937), 52 B.C.R. 317; (1938) 1 D.L.R. 55, 69 C.C.C. 248.

3. Plea of guilty—admission of other offences.]—The accused pleaded guilty on two charges of indecent assault and asked that nine other similar offences be taken into consideration. On an appeal from the sentence it was held that in the unusual circumstances no reduction could be made. *Rex* v. *Belt,* (1938) 53 B.C.R. 118; (1938) 4 D.L.R. 590; (1938) 3 W.W.R. 321; 71 C.C.C. 76.

4. Race or colour as factor.] — The Criminal Code does not contain any provision that the Courts shall take cognizance of a particular man's colour, or his race, in imposing the general penalties prescribed by Parliament. *Rex* v. *Mah Chee,* (1938) 53 B.C.R. 498; (1939) 1 D.L.R. 111; (1939) 1 W.W.R. 307; 71 C.C.C. 63 and 396.

5. Suspended sentence—so-called recognizance to keep the peace.]—The accused was convicted under the Semi-Monthly Payment of Wages Act and released on suspended sentence of one year. The magistrate took from the convicted person a document called a recognizance which was not in the form nor to the effect authorized by sec. 72 of the Summary Convictions Act. Thereafter the magistrate proposed to deal further with the matter on a fresh summons based on the same charge. Held, granting an application for a prohibition that the magistrate's only power to suspend sentence was that given under sec. 72, and unless a proper recognizance had been taken the magistrate had no power to sentence the accused at a later date. There was no real recognizance and, if there was, the procedure would be the issue of a warrant for the apprehension of the offender under sec. 72 (7) of the Summary Convictions Act. *Rex* v. *Eveleigh,* (1939) 54 B.C.R. 94;

(1939) 2 D.L.R. 541; (1939) 1 W.W.R. 323; 71 C.C.C. 387.

6. Appeal from sentence of four years —retaining stolen goods worth $35.] — The Court of Appeal under sec. 1015 of the Criminal Code heard evidence of character and other relevant circumstances. Held, in view of the other and additional facts now adduced, that the sentence should be reduced to two years in the penitentiary. *Rex* v. *Smith*, (1941) 57 B.C.R. 158; (1942) 3 D.L.R. 214; (1942) 1 W.W.R. 361; 77 C.C.C. 332.

7. Order for reprieve of sentence to hang—pending appeal to Supreme Court of Canada.]—The accused had been convicted of murder and sentenced to hang, July 15, 1942. The Court of Appeal ordered a new trial. The Crown appealed to the Supreme Court of Canada. It becoming apparent that the appeal would not be determined by July 15, the Crown, fearing that even if the conviction was restored there would be no way of fixing a new date for the execution, applied to and obtained from the Assize Judge a reprieve until November 18. The accused appealed against the Assize Judge's order to the Court of Appeal. The Crown moved to quash the appeal on the ground that no appeal lay. Held, quashing the appeal, that the Court's jurisdiction is limited under sec. 1013 of the Criminal Code to appeals against convictions, sentence, and on questions of law raised by the Attorney-General in respect of an acquittal. *Rex* v. *Hughes* (*No. 2*), (1942) 58 B.C.R. 189; (1942) 4 D.L.R. 535; (1942) 3 W.W.R. 480; 78 C.C.C. 305.

8. Ten years imprisonment affirmed—rape—trend toward lighter sentences.]—While the severity of sentences during recent years tends to be moderated in England, the Court in affirming a sentence of ten years for a brutal crime, took account of the fact that many women and girls were now engaged in war industries where their work took them into close proximity to men at night and in lonely places. *Rex* v. *Bakshish Singh*, (1943) 59 B.C.R. 238; (1943) 3 D.L.R. 735; (1943) 2 W.W.R. 478; 80 C.C.C. 79.

9. Appeal allowed—conviction entered for lesser offence.]—The accused was convicted of breaking and entering a dwelling-house. On appeal the hotel-room which he entered was held not to be a dwelling-house. The conviction was set aside but the Court held that breaking and entry had been proven in a place not a dwelling-house and held the accused guilty of attempted theft. The sentence was reduced accordingly. *Rex* v. *George Eldridge*, (1944) 60 B.C.R. 315; (1944) 4 D.L.R. 128; (1944) 2 W.W.R. 297; 81 C.C.C. 388.

10. Undue severity—new evidence since hearing in Police Court.] — The accused woman was convicted of obtaining money by false pretences and sentenced to 15 months at hard labour. She had sold a rooming-house business and the false pretence was that there was no lease on the premises, whereas the fact was that her husband was the lessee, subject to a covenant against assignment. During the hearing of the appeal it was shown by affidavit that the purchaser was content with the purchase and had obtained a satisfactory adjustment of the lease from the owner. Held, reducing the sentence to the time served and a fine, it was a first offence, the accused's character was not impeached, the sentence was unduly severe and ought to be reduced. *Rex* v. *Mackie*, (1944) 60 B.C.R. 293; (1944) 2 W.W.R. 84; 81 C.C.C. 338.

11. Danger of allowing undue influence of previous offences to affect sentence.]—The appellant had been sentenced to five years imprisonment and a fine of $1000, or a further six months, for illegal possession of drugs. The punishment was unusually severe and was based on a long record of previous offences. Held, reducing the sentence to three years, the trial judge had acted partly on the ground of the previous offences for which the appellant had already served his time. *Rex* v. *Wilson*, (1944) 3 D.L.R. 671; 82 C.C.C. 65.

12. Effect of past criminal record.] — The accused were convicted of breaking and entering and sentenced to seven years. Held by the Court of Appeal dismissing an appeal as to sentence, the leniency given in the past with respect to previous convictions was not responded to by the appellants. *Rex* v. *Woods* (*No. 2*), 82 C.C.C. 218.

13. Life imprisonment—buggery.]—The accused was convicted of buggery with a human being and admitted several other offences of the kind. On appeal from a sentence of life imprisonment that Court took the opinions of psychiatrists and considered a suggestion of the accused that a surgical operation might cure his unnatural

propensities. Held, dismissing the appeal, no bargaining or arrangement of that kind could be made by the Court. Drastic as the sentence was, it was necessary to imprison the accused until the Minister of Justice should be satisfied he is no longer a menace to society. *Rex v. Belt,* (1944) 61 B.C.R. 159; 84 C.C.C. 403.

14. Effect of sec. 41 of Penitentiary Act on sec 705 (b) of the Criminal Code.]—On habeas corpus it was held that a magistrate under sec. 205A of the Code could not impose a sentence of imprisonment in the penitentiary where the conviction was for more than two years. The Court of Appeal reversed the decision below and held that the plain and imperative language of sec. 41 of the Penitentiary Act applied. Affirmed by the Supreme Court of Canada on this point. *Rex* v. *Storgoff,* (1945) S.C.R. 526; (1945) 3 D.L.R. 673; reversing (1944) 60 B.C.R. 464; (1944) 4 D.L.R. 445; (1944) 3 W.W.R. 1; 82 C.C.C. 153; reversing (1944) 2 W.W.R. 509; 82 C.C.C. 111.

15. Contributing to juvenile delinquency —punishment increased in view of the facts.]—Where a magistrate imposed merely a fine of $50.00 upon a man of 40 for contributing to the delinquency of a girl of 15 and the sentence, whether as a deterrent or a punishment, was much too lenient, it was increased by the addition of six months in gaol. Such a small fine would give the impression that the offence was not serious. *Rex* v. *Richards,* (1945) 61 B.C.R. 234; (1945) 2 D.L.R. 805; (1945) 1 W.W.R. 463; 83 C.C.C. 299.

16. Excessive punishment to first offenders — deserters from army.] — The two accused, aged 23 and 20, were convicted of breaking a window and snatching a purse. They were deserters from the army and hoped by being sent to prison to escape being sent overseas. The magistrate sentenced them to seven years. Held on appeal, reducing the sentence to six months, restitution having been made, the accused were first offenders and the desertion was a matter for the military authorities and not for the civil courts. Following the serving of their sentences they will be returned to the army where they will be dealt with as deserters. *Rex* v. *Tartaglia,* (1945) 61 B.C.R. 334; (1945) 3 D.L.R. 808; (1945) 2 W.W.R. 334; 84 C.C.C. 174.

17. Attempt to break and enter — whether punishment governed by sec. 571 or 1053 of the Code.]—The appellant, having been previously convicted of an indictable offence was convicted of attempting to break and enter and sentenced to seven years. Under sec. 461 of the Criminal Code the maximum sentence for breaking and entering is seven years. It was contended that for an attempt the sentence was by sec. 571 limited to one-half that term. Held, dismissing the appeal, sec. 1053 dealing with the punishment for second offences applied and the maximum under it was ten years. Sec. 1053 is an "express provision" for the punishment of second offenders and prevails as against sec. 571. *Rex* v. *Capello,* (1946) 62 B.C.R. 354; (1946) 3 D.L.R. 639; (1946) 1 W.W.R. 445; 86 C.C.C. 190.

18. "Suspended sentence"—no power in Court of Appeal to direct.]—By "suspended sentence" is meant, not suspension of execution of a sentence already imposed, but suspension of the imposition of the sentence. The expression means that no sentence will be passed unless the accused violates the condition of his recognizance by bad behaviour and is thereupon called upon to appear and receive sentence for the offence for which he was found guilty. Held, the jurisdiction to suspend sentence is given to the convicting Court. It is not given to the Court of Appeal. The power to "modify" a sentence given by sec. 1015 of the Criminal Code does not include the contingency of there being no punishment at all. *Rex* v. *Cruickshanks,* (1946) 63 B.C.R. 102; (1946) 4 D.L.R. 745; (1946) 3 W.W.R. 225; 86 C.C.C. 257.

19. "Theft" in sec. 773 (a) of the Criminal Code as inclusive of "theft from the person" in sec. 379 of not over $25.]—The accused was convicted of stealing one billfold and one twenty-dollar bill from the person. He was sentenced to imprisonment for one year. Held, on appeal, reducing the sentence to six months, that "theft" in sec. 773 (a) of the Criminal Code is a term of generic import and includes "theft from the person" in sec. 379 where, as here, the value of the subject matter does not exceed $25. Hence by reason of sec. 774 (2) and sec. 778 the maximum sentence is six months. *Rex* v. *Arnett,* (1946) 63 B.C.R. 405; (1947) 1 W.W.R. 144.

20. Summary trial for unlawfully retaining a thing of the total value of two dollars — maximum sentence of six months.]—The accused was convicted on summary trial under sec. 399 of the Crim-

inal Code and sentenced to two years imprisonment. The magistrate's jurisdiction was given by sec. 773 (a) based on the value of the property not exceeding $25, and sec. 777 (c). Sec. 778 limits the punishment to six months. Held, reducing the sentence to one of six months, the magistrate had no jurisdiction to impose the punishment he did. *Rex* v. *Clifton*, (1946) 1 D.L.R. 752; (1945) 3 W.W.R. 480; 85 C.C.C. 128.

21. Effect on length of imprisonment where prisoner held in Vancouver gaol.] —The applicant for habeas corpus had been convicted and ordered to be imprisoned at Oakalla for three months. As was commonly done where a prisoner requested it (as here) he was kept in the Vancouver gaol. It was contended that he was unlawfully detained at the City gaol. Held, dismissing the application, the prisoner was properly in custody under sec. 32 of the Prisons and Reformatories Act. His time (as to remissions, etc.) ran from the day of sentence. (Secs 3 and 35). *Rex* v. *Allard*, 88 C.C.C. 97.

XX. Appeals.

A. In General.

1. Sentence already served.] — The Attorney-General moved for leave to appeal against the sentence imposed. The notice of motion was served on the convict while serving his sentence but by the time of the hearing he had finished serving the term and had been discharged. Objection was taken at the hearing that the convict was by sec. 1079 of the Criminal Code "released from all further or other criminal proceedings for the same cause." Held, granting the motion for leave, that sec. 1079 does not come into operation until the question of what is the proper term of imprisonment to be "suffered" has been finally decided by the proper tribunal for that purpose. *Rex* v. *Kirkham*, (1935) 50 B.C.R. 197; (1935) 4 D.L.R. 333; (1935) 3 W.W.R. 55; 64 C.C.C. 255.

2. Jurisdiction—appeal under sec. 1023 of the Criminal Code — meaning of dissent.]—Sec. 1023 of the Criminal Code gives an appeal to the Supreme Court of Canada where a conviction has been affirmed by the Court of Appeal in certain cases where there has been dissent in that Court. A dissent on a motion for leave to introduce new evidence is not such a dissent as will give the Supreme Court of Canada jurisdiction under the section. *Yip Singh* v. *The King*, (1935) S.C.R. 635.

3. Question of law alone.]—The only ground on which the Crown has a right of appeal under sec. 1013 (4) of the Criminal Code is one involving a question of law. The appeal was dismissed where at most the question presented was one of mixed law and fact. *Rex* v. *Turner*, (1938) 52 B.C.R. 476; (1939) 1 D.L.R. 192; (1938) 2 W.W.R. 462; 70 C.C.C. 404.

4. Appeals under sec. 1014 of the Criminal Code.]—The fact that the accused "did not avail himself of the opportunity that the law affords him of going into the witness box" may be taken into account in deciding under sec. 1014 (2) of the Code whether or not a substantial wrong or miscarriage of justice has actually occurred. *Rex* v. *Bush*, (1938) 53 B.C.R. 252; (1939) 1 D.L.R. 428; (1939) 1 W.W.R. 42; 71 C.C.C. 269.

5. Motion for bench warrant when appeal from conviction dismissed by Court of Appeal.]—A bench warrant was refused by the Court of Appeal when a conviction was affirmed in the absence of the appellant. The accused was represented by counsel and under secs. 1018 and 1021 (6) of the Criminal Code was not required to be present in Court when the appeal was heard. There was no flouting of the Court. No substantive order was made such as occurs where the Crown succeeds in appealing from an acquittal and an order for arrest and imprisonment follows. *Rex* v. *Blanchard*, (1941) 56 B.C.R. 378; (1941) 3 D.L.R. 467; (1941) 3 W.W.R. 785; 75 C.C.C. 279.

6. County Court dismissing appeal without hearing evidence de novo—sec. 130 of County Courts Act.]—On an appeal from a conviction by a magistrate, the appellant, before the Crown called any evidence, moved to quash the conviction for lack of evidence in the depositions below. The County Court judge refused to hear evidence de novo but made use of the depositions although they were not proved in any way, and quashed the conviction. The Crown obtained an order under sec. 130 of the County Courts Act calling on the judge and the appellant to show cause why the hearing and determination of the appeal should not be proceeded with. Held, dismissing the application, that assuming the judge was wrong in considering the depositions, it was never-

theless a hearing on the merits even though he refused to hear the evidence which the Crown was prepared to adduce. The judge had jurisdiction and the mistake, if any, was made while he was exercising it. *Rex* v. *McLean*, (1941) 57 B.C.R. 52; (1941) 4 D.L.R. 584; (1941) 3 W.W.R. 753; 77 C.C.C. 32; affirming (1941) 56 B.C.R. 273; (1941) 3 D.L.R. 702; (1941) 2 W.W.R. 41; 76 C.C.C. 295.

7. None from judge of the Juvenile Court — order against municipality for maintenance of neglected child.] — There is no appeal under the Summary Convictions Act to the County Court from an order of a judge of the Juvenile Court requiring a municipality to maintain a neglected child. Only appeals from "justices" are provided and a judge of the Juvenile Court is not a "justice." *The King* v. *City of Armstrong*, (1942) 57 B.C.R. 241; (1942) 2 W.W.R. 50; 77 C.C.C. 386.

8. Question of mixed fact and law—no appeal by Crown.] — The magistrate dismissed a charge of unlawfully printing information for use in connection with betting on horse-races. Held, dismissing an appeal to the Court of Appeal, that questions of mixed fact and law must here be determined. The Court had jurisdiction only where questions of law alone were involved. *Rex* v. *Ashcroft*, (1942) 58 B.C.R. 182; (1943) 1 D.L.R. 146; (1942) 3 W.W.R. 455; 78 C.C.C. 316.

9. Conspiracy—evidence wholly circumstantial — function of Appeal Court.] — The accused was convicted of conspiring to commit robbery with violence. The evidence was purely circumstantial and the jury was properly instructed. Held, on appeal, quashing the conviction, the facts were such as to be equally consistent with the innocence as with the guilt of the accused. It was open to the Court of Appeal, notwithstanding the verdict of the jury, to decide on the evidence whether that situation applied or not, and if it did, to quash the verdict. *Rex* v. *Dawley*, (1943) 58 B.C.R. 525; (1943) 2 D.L.R. 401; (1943) 2 W.W.R. 257; 79 C.C.C. 140.

10. Appeal against sentence only—Bail.] Even on an appeal from a conviction the granting of bail is conditioned upon the presence of exceptional or unusual circumstances. Where the conviction is not questioned and only the severity of the sentence is involved the grounds for granting bail must be even more closely restricted. The application should not be entertained unless and until leave to appeal under sec. 1013 (2) of the Criminal Code had first been obtained. *Rex* v. *Nino Cavasin*, (1944) 60 B.C.R. 497; (1944) 4 D.L.R. 403; (1944) 3 W.W.R. 222; 82 C.C.C. 171.

11. Having in possession, by day, an instrument of housebreaking, with intent to commit an indictable offence—intent.] —The accused was convicted under sec. 464 (b) of the Criminal Code. On appeal it was contended that the intent had not been proved. Pieces of celluloid were found in his possession and intent may be inferred from the explanation given and the fact that the accused attempted to get rid of them when detained. It is enough if guilt may legitimately be inferred from the proven facts. *Rex* v. *Smart*, (1945) 61 B.C.R. 321; (1945) 2 D.L.R. 207; (1945) 1 W.W.R. 250; 83 C.C.C. 392.

12. Circumstantial evidence — how considered by Court of Appeal.]—An appeal from a conviction based, almost entirely, if not wholly, on circumstantial evidence was dismissed. Considering the evidence as a whole, and in the light of the defence relied upon by the appellant, the Court was of the opinion that the cumulative effect of the circumstances established, led irresistiby to the conclusion of guilt, and was inconsistent with any other rational hypothesis. *Rex* v. *McDonald*, (1942) 57 B.C.R. 478; (1942) 2 W.W.R. 96; 77 C.C.C. 352.

13. Power of Court to take judicial notice of geographical areas.]—On an appeal to the County Court, the accused sought to quash the conviction on the ground that there was no evidence that Field, where the offence was laid, was within the geographical jurisdiction of the convicting magistrate. Held, dismissing the motion to quash, the Court could take judicial notice of the fact that a well-known locality is within the jurisdiction. Moreover, the defect, if any, did not constitute the proceedings before the magistrate a nullity and on appeal there is a hearing de novo. *Rex* v. *Lombardo*, (1933) 3 W.W.R. 177.

14. Plea of guilty of conspiracy to steal —effect of subsequent acquittal of alleged co-conspirators.] — The accused pleaded guilty before a magistrate to conspiracy with three others. The others took a speedy trial and were acquitted. Held, quashing the conviction, that since three of the alleged four

conspirators were found not guilty, no valid judgment could be passed on the fourth. As the record of conviction can only be made up in the terms of the indictment, it would be inconsistent and contradictory and so bad on its face. The Court of Appeal could not substitute a verdict of theft since the magistrate had before him not evidence of participation in an act of theft, but only a plea of guilty to a common design. *Rex* v. *Tracey*, (1946) 4 D.L.R. 296; (1946) 2 W.W.R. 675; 86 C.C.C. 244.

15. Court means Canadian Court—sec. 1025 of Criminal Code.]—The "court of appeal" referred to in sec. 1025 of the Criminal Code which gives a right of appeal to the Supreme Court of Canada, upon leave being granted, "if the judgment appealed from conflicts with the judgment of any court of appeal" does not include any courts except Canadian courts. *Rex* v. *Krawchuk (No. 2)*, (1941) S.C.R. 537; (1942) 1 D.L.R. 315 refusing leave to appeal from (1941) 56 B.C.R. 382; (1941) 3 W.W.R. 563.

16. Appeal under sec. 37 of the Juvenile Delinquents Act not open where magistrate not acting as judge of the Juvenile Court.]—The application was for special leave to appeal from the Juvenile Court. Although the proceedings purported to be in that court it was disclosed that the magistrate was not sitting as a judge of the Juvenile Court. The application was dismissed. *Rex* v. *Henderson*, (1944) 2 W.W.R. 411.

B. Practice.

1. Whether notice of appeal to County Court in time—"sittings of the Court."]—"Sittings of the Court" in sec. 750 (a) of the Criminal Code refers to the opening day of a sittings. An adjournment of a sittings will not change the operation of the rule. *Rex* v. *Tronson*, (1932) 1 W.W.R. 537, 57 C.C.C. 383.

2. Notice of appeal—extending time for service of.]—Where it appears that persons convicted are evading service of a notice of appeal by the Crown, an order may be made ex parte extending the time for giving the notice. The practice of requiring notice to the other side will be departed from in a proper case. *Rex* v. *Chow Wai Yam*, (1936) 50 B.C.R. 347; 65 C.C.C. 189.

3. Appeal from sentence.] — Adequate reasons must be advanced before leave to appeal from sentence will be granted under sec. 1013 (2) of the Criminal Code. *Rex* v. *Molland*, (1937) 52 B.C.R. 240; (1938) 1 D.L.R. 770; 69 C.C.C. 413.

4. Person who thinks himself aggrieved.] —A charge having been dismissed the informant gave notice of appeal to the County Court. The objection that the notice was ineffective because it failed to show that appellant was "aggrieved," was overruled. *Rex* v. *Crowe*, (1938) 52 B.C.R. 516; (1938) 2 D.L.R. 799; (1938) 1 W.W.R. 806; 70 C.C.C. 397.

5. Appeal to County Court—necessity to comply with County Court rules.] — Interlocutory applications are to be made to a judge in chambers under the rules and the same practice applies to appeals to the Court pursuant to the Criminal Code. A motion to quash an appeal under sec. 749 of the Code was dismissed since it was made to the Court. *Rex* v. *Crowe (No. 2)*, (1938) 52 B.C.R. 550; (1938) 3 D.L.R. 786; (1938) 2 W.W.R. 305; 70 C.C.C. 398.

6. Security for costs of appeal by prosecutor.] — An appeal was taken from a justice's dismissal of a charge under the Criminal Code. The accused applied to quash the appeal on the ground that no security, or no sufficient security, had been given pursuant to sec. 750 (c) of the Code. Held, dismissing the application, that the section has in contemplation only an appeal on the part of the accused. *Rex* v. *Crowe (No. 3)*, (1938) 53 B.C.R. 75; (1938) 3 D.L.R. 787; (1938) 2 W.W.R. 306; 70 C.C.C. 391.

7. Effect of pronouncing judgment in Court of Appeal.]—If an appeal from a conviction is allowed, the pronouncement of the judgment is the final determination of the accused's right to liberty without waiting for the judgment to be signed and entered, subject, of course, to the right of re-opening in the meantime. If such an appeal is dismissed, the appellant on bail is deemed instantly to revert to the close custody of his gaoler to the same extent as though he had never been bailed at all. *Rex* v. *Blanchard*, (1941) 56 B.C.R. 378; (1941) 3 D.L.R. 467; (1941) 3 W.W.R. 785; 75 C.C.C. 279.

8. Jurisdiction — notice of appeal not filed before being served.]—A notice of

appeal from a conviction under the Summary Convictions Act need not be filed before it is served, provided it is both filed and served within ten days of the making of the conviction. Formal obstacles should not be placed in the way of anyone who has the right of appeal and no such right should be killed or hampered by technical objection. *Rex* v. *Anderson*, (1942) 1 D.L.R. 58; (1941) 3 W.W.R. 769; 77 C.C.C. 49.

9. Informant serving notice of appeal.]—The common law rule that sheriffs and constables are not qualified to act in the serving of process in which they have an interest, was not applied where a member of the Royal Canadian Mounted Police served the notice of appeal in a case in which he was the informant. *The King* v. *The Judge of the County Court of Westminster* and *Heinrich*, (1941) 57 B.C.R. 70; (1941) 4 D.L.R. 641; (1941) 3 W.W.R. 577; 76 C.C.C. 325; reversing (1941) 2 W.W.R. 596.

10. Judge's report under sec. 1020 of the Criminal Code.]—The report of the judge made pursuant to sec. 1020 of the Criminal Code may be read on appeal together with his reasons for judgment when the two do not conflict. *Rex* v. *Hong*, (1944) 60 B.C.R. 382; (1944) 2 W.W.R. 383; 82 C.C.C. 52.

11. New evidence—no proper groundwork.]—Where the applicant sought to introduce new evidence on appeal and did not (a) show diligence to obtain the evidence at the trial, (b) indicate the testimony desired to be used, (c) allege that it might change the Court's view as to the guilt of the accused, (d) file an affidavit of his own; the Court declined to permit its use. *Rex* v. *Martin*, (1944) 60 B.C.R. 554; (1945) 1 D.L.R. 128; (1945) 1 W.W.R. 1; 82 C.C.C. 311.

12. Sittings of the County Court—fourteen days before.]—The term "sittings" as used in sec. 750 (a) of the Criminal Code embraces all the cases the Court sits to adjudicate upon, which were called on the opening or setting-down day of the sittings, or later set down for hearing, provided a subsequent sittings has not intervened. Where the appeal is to be filed fourteen days before a sittings it must be filed fourteen days before the beginning of the sittings. *Rex* v. *Samarodin*, (1945) 1 W.W.R. 124; 83 C.C.C. 302.

13. Setting aside acquittal—whether new trial should be ordered.]—Where a magistrate wrongly acquitted without calling on the defence, the Court of Appeal set the acquittal aside and in the absence of a submission by the Crown that a new trial be directed simply allowed the appeal. It was left to the Crown to decide whether or not the accused ought to be proceeded against further. Sec. 1013 (5) of the Criminal Code did not make a new trial mandatory. *Rex* v. *Olsen*, (1946) 63 B.C.R. 275; (1947) 2 D.L.R. 315; (1947) 1 W.W.R. 299; 87 C.C.C. 223.

C. Bail.

1. Appeal to Supreme Court of Canada—no leave to appeal.]—On an appeal to the Supreme Court of Canada bail will not be ordered until leave to appeal has been granted by a judge of that Court. Until then no appeal is pending. *Rex* v. *Guinness*, (1939) 54 B.C.R. 12; (1939) 4 D.L.R. 720; (1939) 3 W.W.R. 352; 73 C.C.C. 98.

2. Court of Appeal without jurisdiction to estreat.]—The Court of Appeal, as such, has no jurisdiction to grant bail or take any proceedings arising out of or in relation to bail. The Chief Justice or Acting Chief Justice is persona designata under sec. 1019 of the Criminal Code. *Rex* v. *Blanchard*, (1941) 56 B.C.R. 378; (1941) 3 D.L.R. 467; (1941) 3 W.W.R. 785; 75 C.C.C. 279.

3. Conditions of granting bail after conviction.]—Once there is a conviction different principles apply with respect to granting bail. Except with respect to appeals on questions of law (where no leave is necessary) there must first be leave to appeal granted. After conviction exceptional and unusual circumstances must be shown and the known previous character of the applicant is one of the essentials for consideration. *Rex* v. *Goverluk*, (1945) 61 B.C.R. 261; (1945) 3 D.L.R. 400; (1945) 1 W.W.R. 700; 83 C.C.C. 377.

4. Bail pending appeal—special circumstances.]—Sentences came at the end of the Assizes when it was too late to appeal to the next Court of Appeal. The evidence on which the applicant was convicted of robbery with violence was circumstantial. His age, record, industry, family relations, and previous character were all in his favour. Held, granting bail, the facts were excep-

tional and unusual within the principle of *Rex* v. *Goverluk,* (1945) 61 B.C.R. 261. *Rex* v. *Hemow,* (1946) 63 B.C.R. 42; (1946) 2 W.W.R. 730; 86 C.C.C. 446.

5. Bail after conviction—delay in procuring transcript for appeal books.]—The delay occasioned by the official stenographer's inability to supply the transcript was not considered such a special circumstance as to justify the granting of bail by a judge of the Court of Appeal. *Rex.* v. *Johnson* and *Bingham,* (1945) 1 W.W.R. 705.

6. Bail pending appeal to Supreme Court of Canada—conditions of.] —Bail was granted in the exceptional or unusual circumstances existing here. The appellant had enjoyed the standing of a reputable business man in the community. It was not shown that he had personally benefited in any way from the transactions which led to his conviction for theft. *Rex* v. *Duncan,* (1945) 3 D.L.R. 415; 84 C.C.C. 368.

7. Bail pending appeal—exceptional circumstances.]—The accused was convicted of unlawfully possessing a revolver for a purpose dangerous to the public peace. He had quarrelled with a woman G., and when she left in a taxi fired a shot through the rear window. The accused and G. had since made up and she no longer feared him. His record was otherwise good. He and G. owned property together. He had for a long time held a Government position. The appeal raised a point that required consideration. The circumstances were held to be exceptional and bail was granted. *Rex* v. *Clark,* (1946) 63 B.C.R. 401; (1946) 3 W.W.R. 196.

D. Case Stated.

1. Case stated—informality of application for.] — A magistrate dismissed a charge under the Summary Convictions Act. Counsel for the Crown wrote a letter to the magistrate concluding: "We have now received instructions . . . to appeal . . . by way of case stated and we shall be glad if you will accept this as notice to that effect." The magistrate replied that he would accept the letter as notice. The parties settled the form of the stated case and it was signed by the magistrate. At the hearing the accused took the preliminary objection that there was a failure to comply with sec. 89 of the Summary Convictions Act, which provides for an application to the justice to state a case, "setting forth the facts of the case and the grounds on which the proceeding is questioned." Held, dismissing the appeal for lack of jurisdiction, there was here not a sufficient compliance with the section. *Rex* v. *Chin Hong,* (1936) 50 B.C.R. 423; (1936) 3 D.L.R. 307; (1936) 1 W.W.R. 711; 65 C.C.C. 334.

2. Whether case stated is an appeal.] —Under sec. 104 of the Government Liquor Act no appeal lies unless the appellant makes an affidavit of innocence. Held, that a case stated is an appeal but is not subject to sec. 104. *Rex* v. *Carmichael,* (1940) 55 B.C.R. 117; (1940) 2 W.W.R. 588; 73 C.C.C. 350; reversing (1939) 54 B.C.R. 458; (1940) 1 W.W.R. 33; 73 C.C.C. 246.

3. Stated case—what to be included.]—The point of law to which the case was limited was whether certain regulations under order-in-council applied. Counsel for the accused moved to remit the case for the inclusion of additional facts. Held, refusing the motion, the question of the sufficiency of certain evidence turned not on whether the magistrate reached the right conclusion, but on whether there was any evidence to support that conclusion. *Rex* v. *Haslam,* (1944) 61 B.C.R. 226; (1945) 1 W.W.R. 368; 85 C.C.C. 221.

4. Case stated—notice to other side.] —The appeal was quashed on a preliminary objection where, although notice was given it was not given before the transmission of the case as required by sec. 761 (3) (c) of the Criminal Code. *Rex* v. *Ram. Singh,* (1945) 62 B.C.R. 159; (1946) 1 D.L.R. 735; (1946) 1 W.W.R. 94; 85 C.C.C. 224.

5. Forms and procedure on case stated under Summary Convictions Act.]—A case stated is a statutory appeal limited to points of law. Only those portions of the evidence necessary to meet the test "was there any evidence?" should be sent up. The application to the magistrate to state a case may be granted or refused—he may not of his own motion, amend it. Failure to specify the Court appealed to will not invalidate the stated case. It should not be intituled, "In the Supreme Court of British Columbia" but should be directed to the Supreme Court of British Columbia and the Chief Justice and judges thereof. It is the duty of the applicant to transmit the case. Here

it was remitted to the magistrate for amendment. *Rex* v. *Arthur,* (1946) 62 B.C.R. 408; (1946) 3 D.L.R. 202; (1946) 1 W.W.R. 580; 85 C.C.C. 369.

6. Informant not served with Notice of Appeal—whether he is respondent.]— As a crime is an offence against society as a whole an informant has no status to carry on the proceedings or be a party thereto after laying the information. If counsel for the informant is permitted to prosecute the case he does so as representing the Crown and not the informant. Held, there was no need to serve the informant with notice of appeal since he is not the respondent within sec. 750 of the Criminal Code. *Rex* v. *Whiteford,* 89 C.C.C. 74.

See APPEALS.

See CERTIORARI.

See HABEAS CORPUS.

See INTOXICATING LIQUORS.

See MANDAMUS.

CROWN.

1. Vancouver Harbour Commissioners—wrongful dismissal.]—The defendants contended that the plaintiff could not sue because they were servants or agents of the Crown. Held, that the Commissioners (a corporation by their statute) were servants or agents of the Crown under their Act of incorporation and as such had entered into the agreement of hiring with the plaintiff. An action on contract may be brought against a corporation upon a contract entered into by it as the servant or agent of the Crown. *McLean* v. *Vancouver Harbour Commissioners,* (1936) 51 B.C.R. 169; (1936) 3 W.W.R. 657.

2. Not compellable to give discovery.] —The rules of practice do not take away or lessen the prerogative right of the Crown to refuse discovery. Express words are necessary to take the right away. *Attorney-General for British Columbia* v. *Kandahar Consolidated Gold Mines Ltd.,* (1939) 53 B.C.R. 409; (1939) 1 D.L.R. 803; (1939) 1 W.W.R. 305.

3. Whether a relief project a "public work" under Exchequer Court Act — provincially owned highway.] — The Dominion Parliament appropriated funds, as a measure of relief for employables for the construction of a provincially-owned highway. In the course of the work the suppliant sustained damage through fire negligently allowed to escape from the work by a member of the project's personnel. The President of the Exchequer Court held that the operation was not a "public work" and that hence the suppliant's claim did not fall within those claims against the Crown under sec. 19 of the Exchequer Court Act (as it then stood), arising out of injury to property resulting from the negligence of servants of the Crown while acting within the scope of their duties upon a public work. Held, on appeal reversing the decision below, the project was a public work as defined by the Expropriation Act. It was not necessary that the work itself or the site of it should be the property of the Crown Dominion. Here the Dominion Government undertook by its servants to construct the work, and the money voted was not merely a subsidy. The arrangement between the two governments, although it was for the relief of distress, resulted in the creation of the relationship of employer and employee as between the Dominion and the relief recipients. The Dominion became responsible for their negligence. *Salmo Investments Ltd.* v. *The King,* (1940) 1 D.L.R. 262; (1940) S.C.R. 263; reversing (1939), 4 D.L.R. 215; (1939) Ex. C.R. 228.

4. Negligent take-off by R.C.A.F. plane —res ipsa loquitur—whether applicable to Crown.] — The suppliant claimed damages to its aircraft through the negligence of the servants of the Crown in taking off from the Vancouver Airport. The damaged aircraft was run into and destroyed while it stood stationary on the ground. Held, the maxim res ipsa loquitur applied as against the Crown. The accident was attributable to the negligence of the servants of the Crown acting within the scope of their duties or employment. Damages were awarded. *Yukon Southern Air Transport Ltd.* v. *The King,* (1943) 1 D.L.R. 305.

5. Status of Wartime Housing Ltd.—emanation or servant of the Crown.]— The plaintiff claimed that the defendant had wrongfully entered upon her property and erected a building thereon. Damages for trespass and a declaration of ownership were claimed. For the defence it was contended that (a) the property had been taken by the Crown under the Expropria-

tion Act after which the plaintiff had no title or right to possession; (b) the defendant was an emanation or servant of the Crown and the entry and building was made and done in that capacity. Held, the defendant was an emanation or servant of the Crown and acted in that capacity throughout. The action so far as it was one of tort would not lie against the Crown or its servant. So far as declaration of title was concerned that was a matter between the plaintiff and the Crown and should be brought in the Exchequer Court which alone had jurisdiction. *McClay* v. *Wartime Housing Ltd.,* (1944) 60 B.C.R. 306; (1944) 3 D.L.R. 729; (1944) 2 W.W.R. 397.

6. Attempt by Crown (Dominion) to recover from negligent railway company sums paid as compensation under Government Employees Compensation Act.] — The Deputy Judge of the Exchequer Court found the railway company liable for injuries to C. who was an employee of the Crown (Dominion) within the meaning of the federal Government Employees Compensation Act. The Crown had laid out money as compensation to C. and sought to recover it from the railway company. Held, dismissing the action, that although C. could have recovered against the railway company at common law the compensation paid by the Crown does not constitute damage in the legal sense, but is a statutory obligation created by the Act. The claim here is one for the recovery of monies which by federal statute the Crown must pay to its injured employees. Parliament could not legislate upon a matter of civil rights in the Province. The claim based on loss of services is not supported by the pleadings or the evidence. *The King* v. *C.P.R.,* (1946) 2 D.L.R. 158; (1946) Ex. C.R. 375; affirmed (1947) 2 D.L.R. 1; (1947) S.C.R. 185.

7. Dependent of workman killed through negligence of member of forces electing to take compensation—right of Board to recover from Crown (Dominion.]—Mrs. S. was entitled to damages against the Crown occasioned by the death of her husband through the negligence of a member of the armed forces. She elected to take compensation under sec. 11 (1) of the Workmen's Compensation Act and assigned her rights against the Crown to the Board. Under sec. 11 (3) of the Act as well, the Board became subrogated to her rights. The Board as co-suppliant with Mrs. S. then sued the Crown as equitable assignee of her claim and by virtue of the subrogation. Held, by the Deputy Judge of the Exchequer Court, giving damages to be paid to the Board; (1) the liability of the Crown (Dominion) is not affected since the question is one only of the disposition of the damages as between the Board and the dependents; (2) the objection as to parties is met by the two-fold character of the suppliant's claim; (3) the provisions of the Workmen's Compensation Act are applicable to the respondent notwithstanding the sections of the Interpretation Acts relieving the Crown unless it is expressly stated that he shall be bound. *Snell* v. *The King,* (1946) 1 D.L.R. 632; (1945) Ex C.R. 250; affirmed (1947) 2 D.L.R. 81; (1947) S.C.R. 219.

8. Whether bound by statute where not named.]—If it can be affirmed that at the time a statute came into operation, it was apparent from its terms that its beneficient purpose must be wholly frustrated unless the Crown were bound, then it might be inferred that the Crown had agreed to be bound, although the Crown is not expressly mentioned. *Erickson* v. *Fisher,* (1946), 63 B.C.R. 419; (1947) 2 D.L.R. 43; (1947) 1 W.W.R. 227.

9. Public Works — whether Engineer authorized to add to works under contract.] — The suppliant claimed for work done under a contract with the Crown to remove Ripple Rock in Seymour Narrows. Payment was by "cost" and a fixed fee. The fee and most of the "cost" were duly paid but certain insurance premiums, watchmen's wages, rentals and wages during a period when by arrangement operations were suspended, were not paid. The Crown contended that they were dehors the contract and that sec. 36 of the Public Works Act stood in the way. Held, the contract provided that additions, etc., might be added to the work by the Engineer and here they had been so added. They had also been approved for payment by the Engineer. The stand-by period was recognized and approved by the Department and the items sued for were incurred in respect thereof. *British Columbia Bridge and Dredging Co. Ltd.* v. *The King* (1947) Ex. C.R. 506.

See CONSTITUTIONAL LAW.

See MARKETING LEGISLATION.

See STATUTES.

DAMAGES.

I. In General, 235.

II. Measure of Damages, 237.

III. Death By Negligence, 243.

I. In General.

1. New trial limited to question of damages.] — The Court of Appeal in a negligence action reversed the trial judge and found for the plaintiff on the question of liability. The trial judge had not made any finding as to damages. Held, that the proper disposition of the matter was to direct a new trial for the sole purpose of assessing the damages. *Purdue* v. *Epstein,* (1934) 48 B.C.R. 115.

2. Consortium and servitium.] — In claiming damages for a tort committed against a wife, her husband may in a proper case include a claim for the loss of servitium (her services as housekeeper) and of consortium (her society and companionship). *Corkill and Corkill* v. *Vancouver Recreations Parks Ltd.,* (1933) 46 B.C.R. 532; (1933) 1 W.W.R. 413.

3. Consortium and servitium.]—For the loss of a wife the trial judge awarded a husband damages—one-half the amount for consortium (the loss or impairment of his right to her companionship and society) and one-half for servitium (the loss of her services). Held, on appeal, that the assessment of them separately, though not legally objectionable, should not take place, unless for some special reason. *Dallas* v. *Hinton,* (1937) 52 B.C.R. 106; (1937) 4 D.L.R. 260; (1937) 3 W.W.R. 145; affirming on this point (1936) 51 B.C.R. 327; (1937) 1 W.W.R. 350.

4. Canon to be followed on appeal as to damages.]—The tribunal which has the duty of assessing damages, whether it be judge or jury, has often a difficult task, but it must do it as best it can, and unless its conclusions are clearly erroneous they should not be interfered with on appeal. The advantage of seeing the witnesses is a matter of grave importance as to the quantum. *Richmond Wineries Western Ltd.* v. *Simpson,* (1940) S.C.R. 1.

5. Absence of wife from home—effect on claim for consortium.]—In an action for damages in which the husband joined as plaintiff claiming for loss of consortium, the claim was disallowed where for two years before the accident the wife was absent from home working for the defendant. *Bailey* v. *Society of Enderby General Hospital Inc.,* (1942) 1 W.W.R. 28; (1942) 1 D.L.R. 787.

6. Rejection of shareholder's vote — action for damages against chairman.]—At a meeting of the shareholders of a company the chairman erroneously refused to allow the plaintiff to vote, wrongly believing that he was an alien enemy. The latter brought an action against the chairman for damages. Held, dismissing the action, that the chairman honestly tried to do his duty and had not acted maliciously or from corrupt or wrong motives. The right of a shareholder to vote is not as in *Ashby* v. *White,* (1703) 2 Ld. Raym. 938, a public right. The act of the chairman was in the nature of a judicial act, deciding whether or not the plaintiff had a right to vote, and he was entitled, if he acted in good faith and without malice to be protected from liability. *Bluechel and Smith* v. *Prefabricated Buildings Ltd.,* (1944) 61 B.C.R. 325; (1945) 2 D.L.R. 725; (1945) 2 W.W.R. 309.

7. Continuing damages between commencement of action and trial in County Court—no jurisdiction.]—Apart from express legislation recovery of damages for breach of contract is limited to damages sustained at or prior to the commencement of the action. Supreme Court rule 482 authorizes their assessment in that Court down to the time of assessment but there is no similar rule in the County Court. Sec. 77 of the County Courts Act enables a judge where there is no provision in the Act or rules to import the Supreme Court rules in matters of practice or procedure. Held, this is not a matter of practice or procedure but of substantive right. Neither sec. 22 of the County Courts Act nor sec. 7 of the Laws Declaratory Act will avail since in each case the powers are limited by the ordinary jurisdiction of the Court. *Moore* v. *DeWolf,* (1945) 63 B.C.R. 161; (1946) 4 D.L.R. 357; (1946) 3 W.W.R. 358.

8. Too remote—the Polemis doctrine.] —The defendant, a furniture moving company, was moving a piano and during the operation one of its men slipped on the steps of the house being vacated. The defendant had the instrument repaired and while it was in the warehouse of the defendant it was

destroyed by a fire which was not caused by the negligence of the defendant. Held, the negligence if any, which resulted in the damage to the piano would not make the defendant liable for its destruction later by fire. The loss could not be said to be directly traceable to the accident on the steps. The loss by fire was too remote to render the defendant liable. *Mellish* v. *Campbell Storage,* (1946) 3 W.W.R. 157.

9. Workman's widow awarded compensation—whether employer entitled to recover against the Crown under indemnity agreement.]—In respect of a siding agreement the Crown undertook to indemnify the suppliant against loss or damage caused by the Crown's failure to comply with the orders of the Transport Board. A workman of the suppliant was killed through the failure of the Crown's servants so to comply. The Workmen's Compensation Board awarded his widow a substantial sum for compensation under its Act. The employer sought to recover the sum from the Crown under the indemnity agreement. Held, the employer was entitled to recover and the damage was not too remote. The suppliant was in a special position under the Act; it was the sole member of class 10 (railway companies) and although it was assessed in the usual way, it was obliged to repay to the Board whatever monies the Board paid out with respect to the suppliant's workmen. The circumstance that the assessments became part of the Consolidated Revenue Fund of the Province or that the award might be charged to the suppliant under the name of assessments could make no difference. *Canadian Pacific Railway Co.* v. *The King,* (1946) Ex. C.R. 372.

II. Measure of Damages.

1. Quantum — replacement of motor car.]—The plaintiff insisted that his car be put back into the same condition it was in before it was injured through the admitted negligence of the defendant. To do so would cost more than the value of the car. Held that the plaintiff was entitled only to the fair value of his car just before it was damaged. *Dewees* v. *Morrow,* (1932) 45 B.C.R. 154; (1932) 2 W.W.R. 228.

2. Wrongful conversion by stockbroker —measure.] — The measure of damages where securities are converted will be their market price at the time they were converted. *Blumberger* v. *Solloway Mills & Co. Ltd.,* (1931) 45 B.C.R. 66; affirmed (1932) 46 B.C.R. 241.

3. Wrongful seizure of engine in fishing-boat.]—The vendor of a gas-engine repossessed it under a conditional sale agreement and some time later discovered that full payment had in fact been made at the time of the seizure. In an action for a return of the engine and damages for loss of profits during the fishing season the trial judge awarded $125 as the value of the engine and $450 for loss of profits. Held, on appeal, varying the amount of damages, that as the vendor had returned the engine after learning of the error as to payment, to a co-owner of the plaintiff, a claim for its value could not be supported. The plaintiff was wrongfully prevented from carrying on his fishing operations and was entitled to recover on that head. *Robertson* v. *Vivian,* (1934) 48 B.C.R. 295; (1934) 2 D.L.R. 775.

4. Loss of money while unconscious as a result of defendant's negligence.]—The plaintiff was knocked down through the defendant's negligence. He claimed (inter alia) for $80.00 taken from his pocket while he was unconscious. Held, he was entitled to recover the amount. The supposed rule, that a wrongdoer is only responsible for the natural and probable consequences of his act, is no longer valid. *Patten* v. *Silberschein,* (1936) 51 B.C.R. 133; (1936) 3 W.W.R. 169.

5. Child's medical treatment—paid for by co-plaintiff.]—Where an infant plaintiff and the defendant were equally at fault, and the co-plaintiff (father) proved payment of the child's medical expenses, he was allowed only one-half of the amount. *Bowes* v. *Hawke,* (1937) 52 B.C.R. 315; (1938) 1 D.L.R. 791; (1938) 1 W.W.R. 191.

6. Assault — provocation by defendant —mitigation.]—The plaintiff made defamatory remarks about the defendant to the latter's mother. She reported them to the defendant who, without warning, struck the plaintiff and broke his jaw. Held there was provocation mitigating the damages. Damages of $500.00 plus special damages were awarded. *Doye* v. *Fairleigh,* (1938) 3 W.W.R. 368.

7. Contract partially performed.]—In an action for rescission based on fraud, it was established that the plaintiff had devoted the whole of his time to the carrying out

of the contract. It was held that the defendant could not escape by merely returning the plaintiff's contribution with interest and paying him a small salary. He was awarded damages in addition. *Havens* v. *Hodgson*, (1939) 54 B.C.R. 77; (1939) 4 D.L.R. 813.

8. Quantum—reduction on appeal.]—On appeal the damages awarded by the trial judge were reduced from $15,000 to $10,000 where a child lost a leg through the negligence of the defendant. The larger award was "beyond reason." *Katsumi Hanada* v. *British Columbia Electric Railway Co. Ltd.*, (1939) 54 B.C.R. 118, (1939) 4 D.L.R. 763; (1939) 3 W.W.R. 43.

9. Loss of profits—sec. 21 (a) of Sale of Goods Act.]—The defendant supplied the plaintiff, a manufacturer of baking-power, with a poisonous substance, instead of corn starch as ordered. The resulting baking power caused the death of a consumer and, it was alleged, ruined the plaintiff's business through the accompanying publicity. The damages recoverable were limited to the amount paid for the alleged corn starch and the value of the ingredients added to make the baking powder. Damages for loss of business were refused as not being such as might reasonably be supposed to have been in the contemplation of the parties when the contract was made. *Renewo Products Ltd.* v. *Macdonald & Wilson Ltd.*, (1938) 53 B.C.R. 328; (1938) 4 D.L.R. 799; (1938) 3 W.W.R. 418.

10. Breach by seller — no available market.]—Where upon breach of a contract to sell wine there was no available market to which the buyer might have recourse, sec. 56 (2) of the Sale of Goods Act applied. The measure of damages was the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach. The buyer was entitled to the profits which it might have expected to make on the sale of the amount not delivered. *Richmond Wineries Western Ltd.* v. *Simpson*, (1940) S.C.R. 1.

11. Breach of contract to advance money.]—The defendant agreed to finance the purchase of automobiles by a dealer in them. The cars having arrived, the defendant repudiated and the plaintiff lost the agency and was ruined so far as his business was concerned. The trial judge awarded substantial damages since the defendant had full knowledge of the circumstances under which the purchase was made. Held, on appeal to the Court of Appeal affirming the decision below, that it was not the case of a contract to loan money solus where, upon breach, it might be procured alsewhere in the market, possibly without loss. Held, on further appeal to the Supreme Court of Canada, affirming the decision below, that the loss by the plaintiff of its agency and the consequent destruction of its business and its loss on the sale of the cars were natural and probable results which must have been within the contemplation of the defendant. *Don Ingram Ltd.* v. *General Securities Ltd.*, (1940) S.C.R. 670; (1940) 3 D.L.R. 641; affirming (1939) 54 B.C.R. 414; (1940) 1 D.L.R. 220; (1940) 2 W.W.R. 350; affirming (1939) 54 B.C.R. 123; (1939) 4 D.L.R. 775; (1939) 2 W.W.R. 34.

12. Effect of provocation.]—The provocation proved did not justify an assault of the force used by the defendant. It was not established that the plaintiff struck, or even struck at, the defendant. The defendant's assault had a result which he did not intend or anticipate, but it flowed logically from the assault. There being some provocation the case was not one for exemplary damages. *Nystad* v. *McPhee*, (1941) 1 W.W.R. 118.

13. Refusal to accept car — difference between wholesale and retail price.] — Where a purchaser having entered into a contract to buy a new car from a dealer, refused to accept it, the vendor's damages will be the difference between the wholesale price and the retail price. This is so notwithstanding that the vendor was able to sell, and did sell, the car to someone else for the agreed price. *Manery* v. *Kampe*, (1941), 56 B.C.R. 280; (1941) 4 D.L.R. 493; (1941) 3 W.W.R. 687.

14. Infringement of trade-mark.] — Damages were based on the period extending from the time the defendants received notice of the infringement until it ceased using the plaintiff's trade mark. The decrease in the plaintiff's general business was put forward but not accepted as a basis for ascertaining the damages sustained. Nor was it proper to divide the total losses for the whole period of infringement by the proportion of the time during which the defendant had notice. There was evidence that as a result of the infringement it became useless to carry on, and the manufacture and advertising of the

trade-marked goods were discontinued. The advertising and sales under the offending trade-mark had a serious detrimental effect on the business of the plaintiff. $750.00 was awarded. *J. H. Munro Ltd.* v. *The T. Eaton Co. Western Ltd.*, (1942) 58 B.C.R. 446; (1943) 2 D.L.R. 27; (1943) 2 W.W.R. 195.

15. For loss of obsolete aeroplane—still useful for its role.]—While the suppliant's destroyed aeroplane, which was used for commercial transportation, was obsolete and no longer manufactured, it had been kept in good condition and could have given satisfactory service indefinitely. The suppliant had to pay a higher price for a newer and better plane to replace it. The suppliant was not entitled to the cost of the substituted plane. Held, its value to the owner at the time of the accident included the purchase price, the cost of repairs, improvements, additions, accessories as well as the revenue lost as a result of being deprived of its use. *Yukon Southern Air Transport Ltd.* v. *The King*, (1943) 1 D.L.R. 305; (1942) Ex. C.R. 181.

16. Taking and removal of liened logs.] —In a case where the defendant had removed logs which were subject to lien, to the loss of the assignee of the lienholders, the defendant contended that the plaintiff could not have taken the logs out of the woods and sold them at a profit, and that as a result no damages had been sustained. Held, having removed the logs and deprived the plaintiff of its lien the defendant is responsible in damages for the amount due upon the judgment for the liens. *Warehouse Security Finance Co. Ltd* v. *Oscar Niemi Ltd.*, (1944) 60 B.C.R. 321; (1944) 3 D.L.R. 568.

17. Mitigation of—whether union man expected to accept non-union employment.]—The defendant union had wrongfully expelled the plaintiff. By virtue of a closed-shop agreement the plaintiff was deprived of his employment until after the action was commenced when he was reinstated. The plaintiff was held entitled to recover damages during the period of expulsion, but the defendant contended that he was entitled to nominal damages only because he had not taken steps to obtain other employment. Held, awarding $1,000.00, that the plaintiff was not to be expected to seek employment as a non-union man at a time when he was insisting upon his right to be reinstated in his union. *Kuzych* v. *Stewart*, (1944) 61 B.C.R. 27; (1944) 4 D.L.R. 775.

18. Removal of plants after sale of property.] — The damages should be assessed on the basis of the replacement value of the plants at the date of the sale of the property. *Coates* v. *Paskin*, (1946) 3 W.W.R. 639.

19. Purchase of motor-car — damages for non-delivery.]—The deceased specifically bequeathed a Cadillac car to his widow who was also an executrix. She and her co-executor arranged a sale of the car to the plaintiff, an undertaker, who proposed to have it remodelled as a hearse. Before actual delivery the executors sought to cancel the sale and return the purchase money. The purchaser sued for specific performance and damages for non-delivery. Held, there was a binding contract of sale. Notwithstanding the bequest to the widow the executors had authority to sell. It was not a sale by one executor but by both. The widow, qua beneficiary, attempted to repudiate. After a legal sale made by the executors a beneficiary will not be entitled to repudiate. Specific performance was decreed. As to damages the plaintiffs could not buy a similar car hence the usual measure was not available. The rule in *Hadley* v. *Baxendale*, (1854) 9 Ex. 341 could not be applied because, although the purpose for which the car was to be used had been communicated to the defendants, it could not, in fact, be so used. The only damages allowed were the insurance premium paid and 5% on the purchase money. *Simmons & McBride Ltd.* v. *Kirkpatrick*, (1945) 61 B.C.R. 467; (1945) 4 D.L.R. 134; (1945) 3 W.W.R. 557.

20. Failure to take steps to minimize loss.]—The defendant contended that only nominal damages could be awarded in an action for wrongful dismissal where the plaintiff failed to take reasonable steps to minimize his loss. Held, the plaintiff should have sought other employment and as he did not do so his damages were limited to one week's wages. *Hnatnicky* v. *Pacific Pine Co. Ltd.*, (1947) 63 B.C.R. 460.

21. Action in tort for fraudulent misrepresentation.] — The plaintiffs claimed damages for fraudulent misrepresentation on the purchase by them of a restaurant business. The action was dismissed on the ground that the plaintiffs had not been deceived. The judge held, too, that there

was no proper evidence before him as to damages. The measure in such a case is the difference between the price paid for the chattels and their fair value at the time of the sale. Evidence of profits which the plaintiffs might have made, but for the misrepresentation is not an acceptable basis in an action of tort. *Blanke and Burke* v. *New Good Eats Cafe Ltd.*, (1947) 2 D.L.R. 431, see also *Levas v. Litras*, (1947) 2 D.L.R. 436; affirmed (1947) 3 D.L.R. 927.

III. Death by Negligence.

1. Death of wife and son — value of services.] — The pecuniary loss which a plaintiff must show may, in the case of a wife, be represented by the deprivation of services rendered gratuitously by her. Her condition of health and expectation of life will be taken into account in fixing the damages. As to a son, aged 23, working at home without wages who might leave it any time, no compensation was allowed. *Haines* v. *Williams*, (1933) 47 B.C.R. 69; (1933) 1 W.W.R. 478 and 644.

2. Families' Compensation Act (Lord Campbell's Act).]—In an action for damages brought by the parents for the death of a six-year old son in an accident, it was held, dismissing the action, that it was based upon the benefit which was lost by reason of the death. Mere speculation as to the boy's future usefulness to his parents was not enough to support a claim. It could not be found on the evidence that there was a reasonable expectation that the boy would at some later age be a benefit, in a pecuniary way, to his parents. *Craig* v. *Canadian Northern Pacific Railway Co.*, (1933) 47 B.C.R. 453; (1934) 1 D.L.R. 484.

3. Loss of wife—whether only actual pecuniary loss recoverable.]—Where the plaintiff's wife was run down and killed by the defendant's motor car his damages were limited to "pecuniary" ones. Nothing could be allowed for hospital, nursing, doctor or funeral expenses, nor anything by way of a solatium. While there was here no actual pecuniary loss in the strict sense there was a loss of a prospective advantage of a pecuniary value. Damages of $500.00 were awarded. *Agnew* v. *Ellen*, (1936) 3 W.W.R. 337.

4. Combined effect of Families' Compensation Act and Administration Act.] —The plaintiff claimed as administratrix of her late husband against the defendant as executrix of the latter's late husband. The claim was based on the alleged negligence of the defendant's husband, causing the death of the plaintiff's husband. The question was: does the 1934 amendment to the Administration Act make it possible for the administratrix of the estate of a person killed by the negligence of a motor driver to maintain an action against the estate of the tortfeasor in the event of his death, either on behalf of the estate, or for the relatives mentioned in the Families' Compensation Act, or both? Held, the Administration Act applies to actions based upon the death of a person wrongfully caused by another and brought under the Families' Compensation Act as well as under the Administration Act. The combined effect of the two Acts is to give such right of action for the benefit of those mentioned in the Families' Compensation Act. The 1934 amendment to the Administration Act does not make any change in the law with respect to damages for shock, anxiety or mental suffering. *Bowcott* v. *Westwood*, (1937) 51 B.C.R. 441; (1937) 1 W.W.R. 657.

5. Families' Compensation Act—amount of award to parents for son's death.] — The damages should be restricted to the actual pecuniary benefit the parents might reasonably have expected to enjoy had their son not been killed. *Leigh* v. *Lutz*, (1937) 52 B.C.R. 83; (1937) 4 D.L.R. 222; (1937) 3 W.W.R. 190.

6. Loss of expectation of life.]—Under sec. 71 (2) of the Administration Act added in 1934 the administrator may properly claim for the loss by the deceased of his expectancy of life and this may include a sum for the deprivation of the anticipated ability to care for one's dependants. Where a claim is also made for dependants under the Families' Compensation Act, care must be taken to avoid a duplication of damages. The judge awarded $15,000 by way of general damages under the Administration Act of which he ascribed $10,000 to the element of deprivation of privilege of caring for dependants. As to the claim under the Families' Compensation Act, he allowed general damages in the sum of $10,000. The $15,000 award was abated to the extent that the plaintiff is the beneficiary under the administration of the portion ascribed to such deprivation. *MacKenzie* v. *Harbour*, (1938) 53 B.C.R. 88; (1938) 3 D.L.R. 786; (1938) 2 W.W.R. 333 .

7. Remedies where husband killed through defendant's negligence.] — The widow as administratrix of the estate of her husband sued under sec. 71 (2) of the Administration Act and also under the Families' Compensation Act for the death of her husband through the negligence of the defendant. Under the Administration Act she was entitled to the same rights and remedies as the deceased, if living, would be entitled to with the exceptions set out in the Act. The trial judge allowed her on that footing (a) his wages up to the time of his death; (b) his medical and hospital bills; (c) damages for his loss from shortening his expectation of life fixed at $1000. Under the Families' Compensation Act she was entitled to such damages as the Court might think proportioned to the injury resulting to her from her husband's death, in this case $2500. *Mosher* v. *Parker,* (1938) 53 B.C.R. 380; (1938) 3 W.W.R. 570.

8. Families' Compensation Act—defect in statement of claim.] — The defendant objected that the statement of claim did not disclose the particulars required by sec. 6 of the Act. An amendment was granted which overcame the objection. Sec. 6 also requires that the nature of the claim be set out. The judge declined to dismiss the action although the plaintiff gave no particulars as to the occupation of the deceased, nor of the support which he was giving to his parents, nor did he allege except by implication that the parents had suffered any loss. *McGinnis* v. *Murphy,* (1939) 54 B.C.R. 460; (1940) 1 D.L.R. 787; (1940) 1 W.W.R. 92.

9. Claims under Administration Act and Families' Compensation Act.]—The plaintiff was the administrator of the estate of his deceased son, ten years old, who was killed through the negligence of the defendant. The boy was in good health and helpful to his parents. The damages accruing to his estate by reason of loss of expectation of life included something for deprivation of his anticipated privilege of caring for dependants and to prevent a duplication of damages, the judge deducted the factor common to both claims. *McGinnis* v. *Murphy* (1939) 54 B.C.R. 460; (1940) 1 D.L.R. 787; (1940) 1 W.W.R. 92.

10. Effect of sec. 12 of Workmen's Compensation Act on claim for loss of normal expectation of life.]—Sec. 71 (2) of the Administration Act creates no new cause of action but in a proper case enables a personal representative to claim with respect to a right of action vested in the deceased immediately prior to his death, viz. one for loss of a normal expectancy of life. A workman without dependants was killed through the negligence of his employer in an accident arising out of and in the course of his employment and his personal representative sued the employer for the shortening of his life expectancy. The defendant contended that by sec. 71 (6) the new remedy is subject to the Workmen's Compensation Act and that the latter Act (sec. 12) makes the right to compensation take the place of all the deceased workman's rights against the employer. Held, dismissing the action, that the personal representative could not recover. Any right vested in the deceased to a claim for shortening his expectation of life was extinguished by sec. 12 of the Workmen's Compensation Act. *Munro* v. *Bloedel Stewart & Welch Ltd.,* (1940) 3 W.W.R. 161.

11. Under Administration Act for loss of expectation of life.]—The thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life. In assessing damages for shortening of life, such damages should not be calculated solely, or even mainly, on the basis of the length of life which is lost. The Court should fix a reasonable figure to be paid for the loss of a measure of prospective happiness. *Cretzu* v. *Lines,* (1941) 56 B.C.R. 214; (1941) 1 W.W.R. 396; 75 C.C.C. 367.

12. Quantum—for shortening of expectation of life.]—The thing to be valued is not the prospect of length of days but the prospect of predominantly happy life. The question is one of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness. *Itoku Murakami* v. *Henderson,* (1942) 57 B.C.R. 244; (1942) 1 D.L.R. 784; (1942) 1 W.W.R. 654.

13. Claims under Administration Act and Families Maintenance Act — abatement.]—The plaintiff's wife and infant daughter were killed and liability was admitted. At the trial the judge awarded (a) under the Administration Act; for loss of wife's expectation of life $1000, (b) under the Families' Compensation Act; for loss of wife's services $125. He directed that the amounts were without abatement. Held, on appeal affirming the decision below, that the plaintiff could not recover twice, so that if

he recovered as administrator, at the same time taking the estate beneficially, under the intestacy, that factor reduced the damages he suffered as an individual. His rights under the Families' Compensation Act were limited to his actual pecuniary loss. What the trial judge meant by "without abatement" was that he, in effect, awarded $1125 under the Families' Compensation Act, and deducted the $1000 awarded under the Administration Act, leaving a balance of $125 allowed. Held, on further appeal to the Supreme Court of Canada, the evidence warranted the finding below. The case is governed by *Davies* v. *Powell Duffryn Associated Collieries Ltd.*, (1942) A.C. 601. *Ponyicky* v. *Sawayama*, (1943) S.C.R. 197; (1943) 2 D.L.R. 545; affirming (1942) 58 B.C.R. 299; (1943) 1 D.L.R. 165; (1942) 3 W.W.R. 719.

14. Negligence—claim by administrator.]—The 1934 amendment to the Administration Act did not create any new right of action. Its purpose was to preserve from abatement whatever rights were vested in the deceased at the time of his death. The executor continues the action and in relation thereto, stands in the shoes of the deceased with the exception that from the damages recoverable by him are excluded, for obvious reasons, compensation for physical disfigurement, or pain or suffering caused to the deceased and loss of expectancy of future earnings. The shortening of a plaintiff's life was recognized as a kind of damages a living person could claim for in a negligence action, and that right was carried over to the executor as "loss of life expectancy." Here the trial judge found that death was not due to the defendant's negligence, but that there was a novus actus interveniens, and allowed only hospital and medical expenses. Held, on appeal, affirming the decision below, there was no proof that the plaintiff's expectation of life had been shortened by the accident. Such proof might have been possible by medical evidence but that course was not attempted. *Mah Ming Yu* v. *Terminal Cartage Ltd.*, (1942) 58 B.C.R. 470; (1943) 2 D.L.R. 209; (1943) 1 W.W.R. 623.

15. Pecuniary benefit—death of husband and father.]—In assessing damages to a widow and infant children under the Families' Compensation Act the right to recover is restricted to the amount of actual pecuniary benefit which the family might reasonably have expected to enjoy had the deceased not been killed; a compassionate allowance is not to be added. *Moert* v. *Abraham*, (1944) 60 B.C.R. 405; (1944) 2 W.W.R. 381.

See FIRE.

See NEGLIGENCE.

See TORT.

DEFAMATION.

I. WHAT ACTIONABLE, 248.

II. PUBLICATION, 249.

III. DEFENCES, 249.

IV. PRACTICE, 252.

I. WHAT ACTIONABLE.

Fair and accurate report of judicial proceeding.]—The defendant publisher reported in its newspaper the fact that an order had been made for the plaintiff's committal to jail in connection with proceedings against him by his former wife. The head-line said "Husband jailed on wife's plea." The order was made in error and was revoked the next day. The trial judge dismissed an action for libel. Held, on appeal, affirming the decision below, the libel, if any, lay in the headline which it was contended conveyed the information that the plaintiff had, in fact, been taken bodily to the jail and confined there. It was not defamatory. It was the imputation that the plaintiff had been found guilty which defamed him—not the statement that sentence had been executed. The whole sting lay in the truth viz. that the plaintiff had had a committal order made against him. This was not a case of "justification" but solely as to a fair and accurate report of a judicial proceeding, there being no suggestion of malice. The trial judge sitting as a jury must be presumed to have held that the item was substantially accurate, that what was stated inaccurately was not the gist of the libel, and that it did not mislead the public mind. *Vroman* v. *Vancouver Daily*

Province Ltd., (1941) 57 B.C.R. 321; (1942) 2 D.L.R. 456.

II. Publication.

Libel—innocent disseminators.]—Two of the defendants having circulated a commission's report which was defamatory, contended that they did not know that the report contained, or was of a character likely to contain, a libel, and also that such ignorance was not due to negligence. These defendants were held to have published the libel; they were not in the position of booksellers and vendors of newspapers who may make the defence of being innocent disseminators. *Newton* v. *City of Vancouver et al*, (1932) 46 B.C.R. 67.

III. Defences.

1. Privilege.]—A commission of three doctors was duly appointed to make a survey of hospitals in and about Vancouver. Their report contained defamatory statements regarding the plaintiff as owner of a private hospital. The commissioners pleaded privilege. Held, dismissing the action against them, that the facts disclosed a qualified privilege based on the carrying out of their official duties resulting in a report which they honestly believed to be true. The plaintiff had failed to prove actual malice and hence had not displaced the qualified privilege. *Newton* v. *City of Vancouver et al*, (1932) 46 B.C.R. 67.

2. Libel—privileged occasion—whether necessary to prove malice.]—The defendant (employer) notified the bonding company covering the plaintiff that the latter was in default. The trial judge held that the occasion was a privileged one but that the defendant had "stepped outside the privilege" and was liable in damages. Held, on appeal, reversing the decision below as the occasion was privileged the onus was on the plaintiff to prove actual malice. The evidence fell short of establishing that the defendant was actuated by spite or ill-will or a desire for illicit gain. *Arthur* v. *Massey-Harris Co. Ltd.*, (1934) 2 D.L.R. 124.

3. Express malice on privileged occasion.]—The plaintiff was for a time employed as a salesman by company M. of which the defendant was a director. He took employment with another company, C., whose sales to M. dropped off after the plaintiff joined C. The defendant made to the manager of C. defamatory statements about the plaintiff and C. discharged the plaintiff. The trial judge awarded damages for slander to the plaintiff. Held, on appeal, reversing the trial judge, that the occasion, being a privileged one, the onus was on the plaintiff to establish express malice. The undisputed facts did not go further than to be equally consistent with the presence or absence of malice, and the action should have been dismissed. *Anderson* v. *Smythe*, (1935) 50 B.C.R. 112; (1935) 4 D.L.R. 72; (1935) 2 W.W.R. 442.

4. Qualified privilege.]—At a time when, as the defendant sincerely believed as a result of careful inquiry, a serious condition of labour unrest prevailed, the defendant prepared and filed a radio address which ascribed to the plaintiff, prominent in labour circles, certain inflammatory statements. The plaintiff alleged that he was referred to as being a communist and a revolutionary, and that he was injured in his business as secretary of various labour unions. The defendant did not know the plaintiff and had no doubt of the reliability of his information as to the language said to have been used by the plaintiff. At the trial the defendant did not prove that the inflammatory words were uttered and the plaintiff denied uttering them. Held, dismissing the action without costs, the occasion was privileged since the statements were made in the discharge of a public duty with respect to a serious situation. The defendant had not acted recklessly or without reasonable inquiry and there was no evidence to suggest malice. The fact that the defendant at the trial persisted that he believed that the inflammatory statements were made, did not, in the circumstances, constitute malice. *Showler* v. *MacInnes*, (1937) 51 B.C.R. 391; (1937) 1 W.W.R. 358.

5. Libel on candidate for public office — qualified privilege — whether abuse of privileged occasion.]—The defendant published defamatory matter of a candidate for the office of police commissioner. Held, the defendant had a common interest with those to whom the publication was made, in the selection of such an official and hence the occasion was one of qualified privilege. As a result the burden of proving express malice was put upon the plaintiff. There was some evidence of personal animosity on the part of the defendant. Moreover, he had allowed his mind to fall into such a state of anger or gross and unreasonable prejudice that he recklessly cast aspersions on the

plaintiff. Such an obsession is equivalent to malice and may destroy a privileged occasion even though the utterer honestly believes what he says. Damages were awarded. *Pearson* v. *Harris,* (1937) 3 W.W.R. 602.

6. Qualified privilege.] — The plaintiff conducted one of the two schools of pharmacy in the Province. Chemists were required to pass examinations under the control of the Pharmaceutical Association of which the defendant was president. There was no connection between the school and the Association but many students who would take the examinations took instruction at the plaintiff's school. At the annual meeting of the Association the defendant expressed concern at the number of failures by students in two subjects and suggested that they were not being properly taught. The plaintiff complained that he had been slandered in relation to his profession as a teacher. Held, dismissing the action, the occasion was a qualifiedly privileged one, being the statutory meeting of the members of the Association, where the matters complained of were proper for discussion. The onus of showing actual malice to displace the privilege was on the plaintiff and none was shown. The protection is not lost even if the defendant was rash or credulous, if he believed the statement to be true. The presence of a reporter at the meeting required by the bylaws of the Association, did not destroy the privilege. *McIntosh* v. *Scott,* (1937) 52 B.C.R. 351; (1938) 1 D.L.R. 790; (1938) 1 W.W.R. 74.

7. Privilege — newspaper.]—The plaintiff sued for libel in the defendant's newspaper which had imputed that he was guilty of murder and had been evading the police. The defendant claimed privilege founded upon the article being a fair and accurate report of the proceedings before the committing magistrate. The report was held not to be fair and accurate, (a) because it omitted the fact that the plaintiff stated he was not guilty of the charge of murder, (b) because it contained statements to which no reference was made before the magistrate, (c) because some of the statements were untrue. The reasonable latitude given to newspapers will not extend to cover an article which assumes the guilt of the plaintiff, and includes untrue statements not referred to in the proceedings. *Mitchell* v. *The Victoria Daily Times (No. 3),* (1943) 60 B.C.R. 39; (1944) 1 W.W.R. 400; 81 C.C.C. 42.

8. Newspaper article charging plaintiff with murder — whether criminal charge must first be disposed of.]—It was contended for the defendant that the plaintiff must prove that the criminal charge was terminated by plaintiff's acquittal before an action for libel would lie. Held, the cause of action arises immediately upon the publication. It may well be that the civil action will be stayed, but, that is not to say that such an action cannot be instituted or maintained pending the termination of the criminal charge. *Mitchell* v. *The Victoria Daily Times,* (1943) 60 B.C.R. 39; (1944) 1 W.W.R. 400; 81 C.C.C. 42.

9. Fair comment—rolled-up plea.]—The defendant pleaded that the words complained of, so far as they were allegations of fact, were true, and so far as they were expressions of opinion, were fair comments, made in good faith and without malice, upon the said facts, which were matters of public interest. The defence of fair comment failed since the imputation made was not an inference which could be properly drawn from the proven facts. *Mitchell* v. *Victoria Daily Times (No. 3),* (1943) 60 B.C.R. 39; (1944) 1 W.W.R. 400.

10. Innuendo not justified in terms — justification of libel generally.] — The defence did not in terms plead justification of the innuendo although it traversed it, and did justify the libel in its ordinary meaning. Here the innuendo was nothing more than the plain and natural meaning of the alleged libel. It was held that the wording "In answer to the statement of claim as a whole the defendant says that the statements as therein contained were true in substance and in fact" did as a matter of pleading, justify the statements in the statement of claim as to the innuendo, as well as the statement as to the libel in its natural meaning. If there was a lack of clarity particulars could have been demanded. Semble, a plea of justification goes to the libel, plus any importation it may reasonably bear. *Hare* v. *Better Business Bureau of Vancouver,* (1946) 63 B.C.R. 241; (1947) 1 D.L.R. 280; (1947) 1 W.W.R. 25; reversing (1946) 63 B.C.R. 24; (1946) 2 W.W.R. 630.

IV. Practice.

1. Interrogatories insufficiently answered resulting in order for oral examination.] —Where a plaintiff was unable to plead the precise words complained of and interroga-

tories were directed which were not fully answered an order was properly made requiring that the defendant be orally examined upon the interrogatories. *Shannon* v. *King* (*No. 2*), (1931) 45 B.C.R. 7; (1932) 1 W.W.R. 156; (1932) 1 D.L.R. 700.

2. Mere gossip causing no damage.]—Where the action was dismissed upon a finding that the remarks amounted to no more than gossipy expressions of suspicion which caused no damage to the plaintiff, the trial judge found that good cause existed for refusing costs. *Robertson* v. *Robertson*, (1932) 45 B.C.R. 460.

3. Newspaper sued for libel by plaintiff charged with murder—stay until criminal charge disposed of.]—The defendant was sued for libel arising out of a report of the plaintiff's arrest for murder. While the latter awaited his trial he proceeded with his civil action. The defendant applied for an extension of the time for filing a defence until the criminal trial should be had. The judge refused the order. Held on appeal, granting the extension, that it was tantamount to a stay of the action. It offends the judicial sense of propriety and is not consonant with public justice to have a civil action for libel, in which justification might well be pleaded, proceeding parallel with a criminal proceeding in the Assize Court in which the life of the plaintiff is at stake. Section 13 of the Criminal Code, if it is intra vires, might apply if the defendant had been indicted for publishing, as a defamatory libel, the item in question. *Mitchell* v. *Times Printing and Publishing Co. Ltd.*, (1943) 59 B.C.R. 449; (1944) 1 D.L.R. 192; (1943) 3 W.W.R. 496; 80 C.C.C. 318; reversing (1943) 59 B.C.R. 356; (1944) 2 D.L.R. 239; (1943) 3 W.W.R. 286.

4. Factors which may be taken into account.]—The plaintiff recovered damages for libel in the defendant's newspaper, which had imputed that he was guilty of murder and had been evading the police. It was shown that counsel for the plaintiff, at his preliminary hearing on the murder charge, had protested to the magistrate about the publication of the offending article, and had written the defendant complaining of it. The protest and letter were ignored. These were factors proper to be taken into consideration in assessing the damages. *Mitchell v. Victoria Daily Times* (*No. 3*), (1943) 60 B.C.R. 39; (1944) 1 W.W.R. 400; 81 C.C.C. 42.

DECEIT.

See MISREPRESENTATION AND FRAUD.

DEEDS AND OTHER INSTRUMENTS.

See CONTRACTS.

See SPECIFIC PERFORMANCE.

DENTISTRY.

1. Whether single act of practice amounts to offence under the Dentistry Act.]—The Dentistry Act contains particularly severe features and the Legislature will be presumed to intend that as the diagnosis of a condition, which is only a single act, constitutes an infringement, so the making of an impression, as here, for the purpose of building up a plate will also be an infringement. *Rex* v. *Sutcliff*, (1932) 4 D.L.R. 652; (1932) 3 W.W.R. 377; 59 C.C.C. 108.

2. Assisting corporation to practise.]—Sec. 71 of the Dentistry Act forbids a corporation to practise dentistry and makes it an offence for a member of the College of Dental Surgeons to assist a corporation to do so. A corporation was convicted under the section and a charge was laid against S. for assisting. The corporation was engaged in selling dental plates and customers were advised by its employees to have impressions of their gums taken, and for this purpose the accused was called in from an adjoining dental office operated by the accused's employer who was a shareholder of the corporation. Held, that the corporation did by the assistance and help of the accused commit an act of the practice of dentistry. As a participant S. was guilty. *Rex* v. *Simmons*, (1934) 48 B.C.R. 398; (1934) 2 W.W.R. 641; 62 C.C.C. 161.

3. Infamous and unprofessional conduct.] — The Council of the College of Dental Surgeons found C. guilty of infamous and unprofessional conduct. He had

been concerned in forming and was a director of a company advertising and manufacturing dental plates. The employees of the company would send customers to C. for the necessary impressions and afterwards to have the plates fitted. The judge, on an appeal from the Council's decision, affirmed it. Held, on appeal, reversing the decision below, that none of the things complained of was contrary to the provisions of the Dentistry Act. In *re Dentistry Act* and *the College of Dental Surgeons* v. *Coultas*, (1935) 49 B.C.R. 459; (1935) 2 D.L.R. 609; (1935) 1 W.W.R. 471; 63 C.C.C. 162; reversed by the Supreme Court of Canada, May 8, 1935 (not reported).

4. Taking impressions of the gums and fitting artificial dentures.] — The accused was convicted of unlawfully carrying on the practice of dentistry in that it took impressions of the gums or jaws of persons and fitted thereto artificial dentures for gain. The evidence showed that the accused advertised that it made and repaired dental plates. Its office was next to that of a practising dentist. When customers came to the accused's office they were sent to the dentist for the making of an impression. From the impression the plate was made and the dentist saw to the proper fitting of it. The accused collected for the plate and the dentist for his work. Held, on appeal, quashing the conviction, that the accused did not make the impression or fit the plate, its business being confined to making false teeth. There was no violation of the Dentistry Act. *Rex* v. *The School of Mechanical Dentistry Ltd.*, (1935) 50 B.C.R. 40; (1935) 3 D.L.R. 264; (1935) 2 W.W.R. 311; 63 C.C.C. 320.

5. Injunction to restrain dentist in Washington.] — The defendant, a dentist practising in Spokane, was advertising in British Columbia in a way, which if done by a member of the College of Dental Surgeons, would amount to improper and unprofessional conduct. An order was made restraining him, not with respect to anything being done in Spokane, but something being done in British Columbia. Held, on appeal, reversing the decision below, that the Dentistry Act is concerned alone with the practice of dentistry in British Columbia. Held, on further appeal to the Supreme Court of Canada affirming the decision of the Court of Appeal, that the respondent was not subject to the provisions of the Act which applied only to a person holding himself out within the Province as being qualified or entitled to do in the Province any of the things enumerated in sec. 63. *Attorney-General for British Columbia* v. *Cowen*, (1939) S.C.R. 20; (1939) 1 D.L.R. 288; affirming (1938) 53 B.C.R. 50; (1938) 4 D.L.R. 17; (1938) 2 W.W.R. 497; reversing (1937) 52 B.C.R. 305; (1938) 1 D.L.R. 758; (1938) 1 W.W.R. 48.

6. Services rendered outside the Province.]—Sec. 65 of the Dentistry Act does not bar an action here for charges for dental service rendered outside the Province by a dentist qualified there but not in British Columbia. *Cassutt* v. *Nelson*, (1939) 1 D.L.R. 798; (1939) 1 W.W.R. 78.

7. Foreign dentist—advertising in British Columbia—injunction.]—By an amendment to the Dentistry Act, it was made an offence for any person not registered under the Act, within the province to hold himself out as being qualified or entitled to practise dentistry either within the province or elsewhere, or to circulate or make public anything designed or tending to induce the public to engage or employ as a dentist any person not registered under the Act. The defendant publisher carried in its newspaper advertisements by the other defendant, a dentist practising in Spokane and not a person registered under the Act, inviting readers to go to his office there for dental work. The action was for an injunction to prevent further publication of the advertisements. The trial judge found for the plaintiff and his decision was upheld on appeal. Held, on further appeal to the Supreme Court of Canada affirming the decision below, the statute did not profess to prohibit people going beyond the limits of the province for dental services, or to regulate their conduct in doing so; nor did it prohibit the sending into the province from abroad of newspapers containing the advertising cards of practising dentists; nor did it prohibit any communication with British Columbia from abroad. Prima facie the legislation was intra vires and that conclusion had not been rebutted. *College of Dental Surgeons of British Columbia* v. *Cowen*, (1941) S.C.R. 321; (1941) 2 D.L.R. 687; affirming (1940) 55 B.C.R. 506; (1941) 1 D.L.R. 565; (1941) 1 W.W.R. 9; affirming (1940) 55 B.C.R. 370; (1940) 4 D.L.R. 755; (1940) 3 W.W.R. 242.

8. Unauthorized extraction of teeth — trespass — damages.]—The plaintiff about to have her tonsils removed, arranged

with her doctor, the defendant J., to have two teeth out at the same time. J. arranged with the defendant I., a dentist, to remove the teeth. Instead of two, all the plaintiff's upper teeth were extracted. Held, the defendants were equally at fault. I. acted without receiving proper instructions from his patient although he understood from J. that all the uppers were to be removed. *Yule* v. *Parmley,* (1945) S.C.R. 635; reversing (1944) 61 B.C.R. 116; (1945) 2 D.L.R. 317; affirming (1944) 60 B.C.R. 395; (1944) 4 D.L.R. 46; (1944) 3 W.W.R. 94.

9. Supplies or offers to supply to the public—single instance.]—The accused was acquitted by the magistrate on a charge of supplying to the public repairs to artificial dentures. As only one transaction of the kind was proved he held that the offence was not made out under sec. 63 (1) of the Dentistry Act. On appeal to the County Court judge's Criminal Court a conviction was entered. Held, on appeal to the Court of Appeal quashing the conviction, the proof of one sale to the public did not satisfy the plural meaning that must be assigned to the word "public" as used in the section. The expression "any person" is used four times in the section and then by amendment "the public" was introduced. The change in language indicates an intention that "the public" embraces more than one person. Where a statute is ambiguous the subject should be favoured as against the legislature. *Rex* v. *Kerr,* (1947) 63 B.C.R. 554; 88 C.C.C. 104.

See MEDICINE.

See NEGLIGENCE.

DESCENT AND DISTRIBUTION.

I. IN GENERAL.

II. INTESTATE ESTATE.

III. RELATIVES OF THE HALF-BLOOD.

I. IN GENERAL.

1. Adultery as a bar to wife's sharing in husband's estate.]—Sec. 127 (1) of the Administration Act bars a wife from sharing in her husband's estate if she has left him and is living in adultery at the time of his death. Held, on appeal to the Privy Council that what is meant is a state of affairs existing at his death, and proof of adultery some time before his death will not preclude inheritance by the widow. *Burns* v. *Burns,* (1938) 4 D.L.R. 513; (1938) 3 W.W.R. 477; affirming the decision of the Court of Appeal (not reported) affirming (1937) 52 B.C.R. 4; (1937) 2 W.W.R. 673.

2. Advancement of child—portions.]—During his lifetime M. paid to or for his son G., who predeceased him, about $16,000. M. died intestate leaving a widow, two daughters and G.'s son. His estate was about $26,000. Sec. 121 (3) of the Administration Act puts upon a person asserting that a child has been advanced, with a view to a portion, (except where there is a writing to support it), the onus of proving it. Held, no writing is necessary to satisfy the onus. Here a prima facie case was made out, and the one-third which G.'s son would otherwise have taken was disallowed him. There is a presumption that the giving of large sums will constitute an advancement by portion. *Blakeney* v. *Seed,* (1938) 53 B.C.R. 335; (1939) 2 D.L.R. 287; (1939) 1 W.W.R. 321.

II. INTESTATE ESTATE.

1. Status of grand-nephews.]—A grand-nephew shares with brothers and sisters and nephews and nieces of the deceased. *Carter* v. *Patrick,* (1935) 49 B.C.R. 411; (1935) 2 D.L.R. 811; (1935) 1 W.W.R. 383.

2. Valuation of shares comprising estate.]—Under sec. 114 of the Administration Act, the widow takes the whole estate if its value does not exceed $20,000. The estate consisted of a block of mining shares valued by the judge at less than $20,000 as at the date of death. He held the widow entitled to the whole estate. Held, on appeal, affirming the decision below, that the time of death was the relevant date. Held on further appeal to the Supreme Court of Canada, dismissing the appeal, that the price at which the shares were selling on the stock-market might be regarded as prima facie evidence, but should not be accepted as conclusive. *Collins* v. *The Toronto General Trusts Corporation,* (1936) S.C.R. 37; affirming (1935) 50 B.C.R. 122; (1935) 3 D.L.R. 603; (1935) 2 W.W.R. 550; affirm-

ing (1935) 49 B.C.R. 398; (1935) 1 W.W.R. 295; sub. nom. in *re Collins Estate*).

3. Former husband alleging invalid divorce decree.]—The husband had obtained a divorce in California. Upon his former wife's death, intestate, he claimed as husband alleging that the California divorce was granted without jurisdiction. Held, denying his claim, that having invoked the California Court in his claim for divorce he could not afterwards be heard to say that that forum acted without jurisdiction. *Carter* v. *Patrick,* (1935) 49 B.C.R. 411; (1935) 2 D.L.R. 811; (1935) 1 W.W.R. 383.

4. Date of ascertainment of shares.]—The date at which the interests of the beneficiaries are to be determined is the date of the death of the intestate. Sec. 3 of the Administration Act, postponing the distribution for one year, enables the administrator to inform himself and pay the debts before he is required to distribute. *Collins* v. *The Toronto General Trusts Corporation,* (1936) S.C.R. 37; affirming (1935) 50 B.C.R. 122; (1935) 3 D.L.R. 603; (1935) 2 W.W.R. 550; affirming (1935) 49 B.C.R. 398; (1935) 1 W.W.R. 295; sub. nom. in *re Collins Estate.*

5. Uncles and aunts entitled as against children of deceased aunts.]—The deceased, an only child of parents who had predeceased her, had never married. Several uncles and aunts (both paternal and maternal) survived her, as did children of two aunts who had predeceased her. Held, sec. 116 did not apply, and under secs. 117, 118 and 119 the uncles and aunts took all, per capita, to the exclusion of the children. In *re Cromarty Estate,* (1936) 51 B.C.R. 531; (1937) 2 W.W.R. 682.

6. Effect of invalid divorce on distribution of estate.]—The deceased died domiciled in British Columbia. While he was so domiciled his wife went to the United States and there obtained a decree of divorce. She could not afterwards question the validity of that divorce and hence could not claim as widow. The deceased married again but as the divorce had been decreed without jurisdiction the remarriage was invalid and the second wife could not share in the estate here. The assets were ordered to be distributed among the children pursuant to sec. 113 of the Administration Act. In *re Graham Estate,* (1937) 52 B.C.R. 481; (1937) 3 W.W.R. 413.

7. Concubine — sec. 102 of Administration Act.]—One who lived with and was maintained by the intestate as his wife for a number of years was held to be his "concubine" and thus entitled to an allowance under sec. 102 of the Administration Act. *Re Wilson,* (1938) 2 D.L.R. 800; (1938) 1 W.W.R. 856.

8. Next of kin — competition between uncle and cousins.]—The intestate died a bachelor without father, mother, brother or sister, nor were there any children of any deceased brother or sister. Under secs. 117, 118 and 119 of the "Administration Act" it was held that an uncle (or uncle and aunts as the case may be) took the whole estate to the exclusion of first cousins, the children of deceased uncles and aunts. In *re Robinson Estate,* (1941) 2 W.W.R. 86.

9. Whether children of deceased children of deceased sister share in estate.] — The deceased died intestate a bachelor, being predeceased by two brothers and a sister. Two of the sister's children were dead at the time of the intestate's death but they left issue. Held the issue were entitled to share in the interest which their parents would have taken. In *re McIver Estate,* (1941) 57 B.C.R. 139; (1941) 3 W.W.R. 849.

10. Status of child adopted in Manitoba — by agreement — validating statute.] — A man and his wife in Manitoba, adopted the applicant by agreement; they came to British Columbia and the man died intestate. By statute of that Province such adoptions were validated. Held, that the applicant was, by virtue of sec. 11 of the Adoption Act of this Province, entitled to share in the intestate estate of the parent. In *re Estate of George C. Niven, deceased,* (1942) 58 B.C.R. 176; (1942) 4 D.L.R. 285; (1942) 3 W.W.R. 692.

11. Administration Act secs. 116 - 118— exclusion of grand-nephews.]—The intestate left no widow, issue, parent, brother or sister surviving him. A brother predeceased him leaving five children alive at the date of the death of the intestate. A sixth died in the lifetime of the intestate leaving three children. The question was whether the estate went to the five children (nephews and nieces) or whether the children of the sixth (grand-nephews) were entitled to share as representing their mother (the sixth child). Held, only the nephews and nieces were entitled to

share. No right of representation is conferred by the statute except upon children of a deceased brother or sister. In *re Estate of Charles Minor, deceased,* (1944) 61 B.C.R. 401; (1945) 3 D.L.R. 474.

III. RELATIVES OF THE HALF-BLOOD.

Nephews and nieces of the half-blood.] —An intestate's parents predeceased him. His mother by her first husband had three children all predeceasing the intestate and all leaving issue surviving the intestate. The mother by her second husband had four children, viz., the intestate, two who predeceased him without issue, and a brother surviving him. The brothers and sisters of the half-blood inherit equally with those of the whole blood. The estate should be divided, one-quarter to the brother, and three-quarters to the nephews and nieces of the intestate. *Johnston* v. *Lineker,* (1936) 50 B.C.R. 508; (1936) 4 D.L.R. 435; affirming (1936) 50 B.C.R. 378; (1936) 1 W.W.R. 393.

See EXECUTORS AND ADMINISTRATORS.

See WILLS.

DISTRESS.

1. Delivery up of key to bailiffs amounting to abandonment of premises.] — The trial judge in dismissing an action for trespass and improper distraint found that the tenants had voluntarily surrendered the goods and abandoned the premises to the landlords. Semble, the result was a surrender by operation of law. *Wong Fong Hong* v. *Chansee Wong Fong,* (1931) 45 B.C.R. 14; (1932) 1 W.W.R. 89.

2. Landlord as purchaser—joint levy by mortgagee and landlord.] — The chattel mortgagee and the landlord arranged that both should levy and that the latter should sell on behalf of both, satisfying first the claim for rent and paying the balance to the mortgagee on his mortgage. The landlord, unknown to the mortgagee, procured a third party as purchaser in the interest of the landlord who as a result got possession of the distrained chattels. Held, varying the trial judge's decision, that the tenant's consent was immaterial and that the sale, not being to a third party was illegal. As there was no finding of fraud the damages should be the amount realized at the sale, less the landlord's claim for rent. *Hart* v. *Yarwood,* (1932) 45 B.C.R. 331; (1932) 4 D.L.R. 164; (1932) 2 W.W.R. 74.

3. Exemption of goods of "boarder or lodger"—no fixed rent or remuneration.] —A boarder or lodger within secs. 4 and 5 of the Distress Act means one who pays a fixed or certain rate and will not include a relative who pays unstated amounts intermittently for board and lodging and in addition performs certain household services. *Henderson v. McGugan,* (1933) 3 W.W.R. 230.

4. Bad ab initio where entry is forcible —illegal distress.]—Where a bailiff forces the door of the premises open to levy a distress the breaking is unlawful and the distress illegal. The subsequent entry through the forced door by another bailiff will not make the distress valid. *Henderson* v. *McGugan,* (1933) 3 W.W.R. 230.

5. Goods left with second-hand dealer for sale.]—The plaintiff left certain goods with the tenant, a second-hand dealer, for sale on commission. The landlord seized them under distress for rent. The plaintiff claimed that they were exempt as being goods delivered to a person exercising a public trade, to be managed in the way of such trade. Held, dismissing an action for illegal seizure, that the exemption is limited to tenants carrying on a public trade. The tenant here was dealing with the goods under a special arrangement inconsistent with the public trade of a commission agent. *Lawrence* v. *Turner, Meakin & Co.,* (1934) 49 B.C.R. 99; (1934) 3 W.W.R. 353.

6. Effect of so-called conditional sale agreement.]—Where a succession of documents was signed by a tenant viz., a chattel mortgage, a bill of sale, a promissory note and a registered conditional sale agreement, the Court will not be prevented by the form of the documents from ascertaining the real transaction. Here it was nothing more than a security for a loan although clothed finally in the form of a conditional sale. There was in fact no sale and sec. 4 of the Distress Act did not apply as against the landlord. *Monarch Securities Ltd.* v. *Gold,* (1940) 55 B.C.R. 70; (1940) 3 D.L.R. 124; (1940) 2 W.W.R. 615.

See LANDLORD AND TENANT.

See SALE OF GOODS.

DIVORCE AND MATRIMONIAL CAUSES

I. JURISDICTION, 263.

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VI. NULLITY OF MARRIAGE, 273.

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VIII. CUSTODY OF CHILDREN, 281.

I. JURISDICTION.

1. Jurisdiction to hear appeals.] — The Court of Appeal is without jurisdiction to entertain appeals in divorce and matrimonial causes. *Jamieson* v. *Tytler*, (1935) 50 B.C.R. 263; (1935) 4 D.L.R. 705; (1935) 3 W.W.R. 510. (But now see Cap. 4 Statutes of Canada 1937).

2. Domicile—desertion for two years—Divorce Jurisdiction Act.] — Where dissolution of marriage is sought the ordinary rule is that domicile is the test of jurisdiction and that the domicile of a wife is the domicile of her husband. The Divorce Jurisdiction Act of the Dominion provides that where a wife has been deserted for two years she may take proceedings against her husband in the Province where he is domiciled immediately prior to such desertion. The Act will not in British Columbia avail a wife who was deserted in Saskatchewan by a husband domiciled there. *Jolly* v. *Jolly*, (1940), 55 B.C.R. 61; (1940) 2 D.L.R. 759; (1940) 2 W.W.R. 148.

3. Declaration as to presumption of death—when to be made.]—The petitioner sought a declaration presuming the death of her husband, he having disappeared 18 years ago. Held, refusing the declaration, the Court has no jurisdiction to grant the declaration where, as here, it was sought to enable the petitioner to marry again. The declaration may be made as incidental to the exercise of some other jurisdiction, e.g. admitting a will to probate. In *re Debray*, (1942) 3 W.W.R. 335.

4. Soldier on active service—either in Canada or overseas.]—A wife can proceed in a divorce action against her husband although he may be a member of His Majesty's Canadian forces on active service either in Canada or overseas. *L.* v. *L.*, (1943) 1 W.W.R. 241, not followed. *Lawson v. Lawson*, (1943) 58 B.C.R. 484; (1943) 2 D.L.R. 249; (1943) 1 W.W.R. 476.

5. Domicile — declaration of intention.] —The respondent domiciled in Alberta came to Vancouver where he ceased to carry on as a musician and learned electric welding and became engaged in war work in the shipyards. There was evidence of admissions by him indicating his intention of making his home in British Columbia, or at least a preference for it over Alberta. Held, the evidence of domicile was not sufficient. As to declarations of intention they must be examined in the light of the circumstances and must be fortified and carried into effect by conduct and action consistent with the declared intention. A wife's petition for divorce was held to be properly dismissed. *Brewster* v. *Brewster*, (1945) 61 B.C.R. 448; (1945) 3 D.L.R. 541; (1945) 2 W.W.R. 382.

II. GROUNDS OF RELIEF.

1. Adultery.] — It is not necessary to prove the direct act of adultery. The fact will be inferred from circumstances which lead to it by fair inference as a necessary conclusion. No general rule can be laid down as each case must depend upon its own particular circumstances. *W.* v. *W. and M.*, (1933) 47 B.C.R. 468; (1933) 3 W.W.R. 588.

2. Delay by petitioner in seeking dissolution—discretion of Court.]—By sec. 16 of the Divorce Act the Court is not bound to pronounce a decree where there has been unreasonable delay in presenting a petition. Here the parties married in 1930 and parted in 1934. The husband's attitude toward his estranged wife for the next nine years was one of entire unconcern. Lack of funds to begin proceedings was not accepted as a reason for the delay. On the evidence he had no proof of misconduct until recently. In all the circumstances, the judge exercised his discretion in favour of the petitioner and granted the decree. *Joyce* v. *Joyce*, (1944) 1 W.W.R. 119.

3. Divorce sought by husband for benefit of wife who would be herself ineligible to petition.]—The wife left her husband

and family and after six years without any word from her he received a letter from her in New Zealand. She was living with another man and asked her husband to divorce her. She came into Court and asked to be heard. Her explanation (accepted by the Judge) was that her husband had been cruel to her, as a result of which she had left and had gone to New Zealand where she lived with another man as his wife. She asked her husband to release her after which she would return to New Zealand. Held, the marriage should be dissolved in view of the unusual circumstances and, upon finding no evidence of the existence of any of the recognized bars to relief. *Bell* v. *Bell,* (1944) 1 W.W.R. 191.

4. Respondent furnishing evidence — whether collusion by petitioner.] — The respondent husband, desiring to be divorced from his wife, went to a hotel with another woman. Next day he consulted a solicitor and gave him the facts concerning his misconduct together with the names of witnesses. The solicitor, instructed by the respondent, communicated with the petitioner's solicitor and counsel and gave him the information, whereupon the petitioner took proceedings for a dissolution of the marriage. The respondent did not defend but her solicitor explained his own position in the matter as above. Held, granting the decree, there was no collusion. The respondent did what he did for the purpose of inducing his wife to divorce him but she was no party to any collusion. The statement of the respondent's solicitor and the evidence of the petitioner were accepted in toto. *Duncan* v. *Duncan,* (1946) 3 W.W.R. 198.

III. Misconduct of Petitioner.

1. Connivance.]—A husband, suspecting that his wife was guilty of adultery, took a room in a hotel, where the co-respondent was a guest and employed others to watch the co-respondent's room, without interfering, for the purpose of obtaining proof of their guilt. Held that this did not amount to connivance. *W.* v. *W. and M.,* (1933) 47 B.C.R. 468; (1933) 3 W.W.R. 588.

2. Whether cruelty condoned—effect of resumption of cohabitation.]—The resumption of conjugal cohabitation, even apart from sexual intercourse, will carry condonation with it. Condonation, however, is always conditional. If the respondent's conduct subsequently amounted to cruelty the condonation would be wiped out. It was contended for the respondent that in any event a still later resumption of cohabitation constituted a fresh condonation of any cruelty existent or revived. Held, with hesitation, there was no such condonation. On the evidence, sexual intercourse took place away from home but there was certainly no restoration of conjugal cohabitation since the wife did not return to the marital home. The rule is not so strict against the wife as it is against the husband. Here the husband had proposed a scheme to settle their differences and condonation would only be established if the condition on which conjugal cohabitation was to be resumed, was fulfilled. On the facts, the condition was not fulfilled. Conugal cohabitation, apart from sexual intercourse, did not occur. *Halperin* v. *Halperin,* (1941) 2 W.W.R. 305.

3. Discretion of Court — intent to deceive the Court.]—At the hearing the judge granted a decree of dissolution but before it was signed he learned that in another divorce action the petitioner was a co-respondent and that a decree had just been granted in that action. That the other proceedings were before the Court was not disclosed. The judge reopened the case and found that the petitioner had not defended the other action; he nevertheless denied his guilt. The judge refused to believe him; he exercised his discretion and dismissed his petition. Held, on appeal affirming the decision below, the discretion of the judge was unfettered and at large. *Bailey* v. *Bailey,* (1944) 60 B.C.R. 378; (1944) 3 D.L.R. 474; (1944) 2 W.W.R. 238.

4. Petitioner's wilful neglect or misconduct conducing to the adultery—discretion.]—The trial judge found that the case against the respondent and co-respondent was proved, but that the petitioner's wilful neglect or misconduct had conduced to the wife's adultery (a) in causing the wife to seek companionship elsewhere by his deficiency in the ordinary husbandly duties of regard and attention, (b) through his relations with another woman, (c) by making no attempt to re-engage his wife's affection, (d) by his niggardliness in his financial arrangements for the home. The fact that a reconciliation was hopeless and only unhappiness and hatred would result from refusing to free them, weighed with the judge in exercising the discretion vested in him to grant a decree of divorce. *Fane* v. *Fane,*

(1944) 61 B.C.R. 48; (1945) 1 D.L.R. 638; (1945) 1 W.W.R. 312.

5. Connivance—constant spying on wife—whether volens.]—The husband petitioned for divorce. Connivance was not pleaded but in view of secs. 14 to 16 of the Act the judge had a duty to deal with it. If it existed it was based on a long campaign of spying by the petitioner on his wife and the co-respondent. He knew of their intimacy but made no protest. Held, connivance which is an absolute bar to relief, was not proved. The doctrine of connivance is based on volens. It means more than indifference; it implies consent. While not to be admired, such conduct does not amount to connivance. *Fane* v. *Fane,* (1944) 61 B.C.R. 48; (1945) 1 D.L.R. 638; (1945) 1 W.W.R. 312.

6. Condonation of petitioner's misconduct.]—If it is shown that the parties have voluntarily resumed cohabitation, that puts an end to any cause of complaint which the one party had or may have had against the other. *Fast* v. *Fast,* (1945) 61 B.C.R. 503; (1945) 3 W.W.R. 66.

7. Collusion—duty of Counsel to divulge reasons for sending detective to respondent's room.]—Where a petitioner's counsel instructs a detective to attend at a particular place where the respondent might be found in circumstances affording evidence of misconduct, the counsel should be in a position in adducing such evidence, to state frankly to the Court his reasons for so instructing the detective. A refusal to divulge such information would place either his client or himself under suspicion of collusion. *Brown* v. *Brown,* (1947) 1 W.W.R. 337.

IV. Alimony and Maintenance.

1. Maintenance claimed after decree.]—A petition for maintenance can be entertained after an absolute decree for divorce and a respondent cannot on the hearing of such a petition raise for the first time misconduct which might have been a bar to the granting of the decree absolute. *Bexon* v. *Bexon,* (1932) 46 B.C.R. 238; (1932) 3 W.W.R. 334.

2. Remedy to compel payment of alimony — attachment.] — An order for the payment of alimony is an order for the payment of money and is enforceable by execution under Divorce Rule 79 (a). It is not an order requiring a person to do an act other than the payment of money and hence is not enforceable by attachment. *MacPherson* v. *MacPherson,* (1932) 46 B.C.R. 435; (1933) 1 W.W.R. 199.

3. Alimony—arrears—right to examine defaulting respondent.] — While by rule 79A the provisions of the Execution Act are made applicable, it was not intended to import any procedure as to examination. *MacPherson* v. *MacPherson (No. 2),* (1933) 1 W.W.R. 464.

4. Capias for, as debt.]—Permanent alimony ordered in a divorce action is not a debt within the meaning of sec. 3 of the Arrest and Imprisonment for Debt Act. *McKay* v. *McKay,* (1933) 47 B.C.R. 241; (1933) 2 W.W.R. 78.

5. Attachment of Debts Act.] — As special remedies are provided for failure to comply with an order in divorce proceedings an application for a garnishee order (a common law remedy) will be refused for the purpose of collecting overdue instalments of maintenance. *Thompson v. Thompson,* (1933) 48 B.C.R. 68; (1933) 3 W.W.R. 511; (see (1935) 49 B.C.R. 555; (1935) 1 W.W.R. 723).

6. Equitable execution by way of receiver.]—Upon a wife's application for the appointment of a receiver of her husband's salary in aid of a decree for alimony, it was objected that there was no jurisdiction to make the order. Held, granting the application that sec. 36 of the Divorce and Matrimonial Causes Act gives the power. *Wightman* v. *Wightman,* (1934) 49 B.C.R. 92 (but see *Simpson* v. *Simpson,* (1934) 49 B.C.R. 288).

7. Examination as to means.] — The remedies against a defaulting husband for arrears of alimony are found in Divorce Rule 79, and an order will not be made for his examination under sec. 58 of the Supreme Court Act. *Barbour* v. *Barbour,* (1934) 48 B.C.R. 321; (1934) 1 W.W.R. 799.

8. Function of registrar under Divorce rule 69 (a).]—The registrar does not act judicially or make any decision as to a proper allowance to be made. He reports to the judge who himself judicially determines the question and makes such order as he deems proper. *Langford* v. *Langford,* (1933) 50 B.C.R. 303; (1936) 1 W.W.R. 174.

9. Enforcement by issue of garnishee order.]—Under the new Divorce Rule 79, orders made in any matter within the scope of the rules may be enforced in the same manner as orders of the Supreme Court in other matters. The intention of the rule was to provide, inter alia, a means of enforcing orders for payment of money and a person in whose favour an order is made is given the benefit of garnishee proceedings. *Thompson* v. *Thompson,* (1935) 49 B.C.R. 555; (1935) 1 W.W.R. 723.

10. Effect of failure to make demand for restitution of conjugal rights.]—In an action for alimony under Order LXXA r.1 (c), there is no rule in British Columbia requiring a written demand for restitution of conjugal rights prior to the issue of the writ. *Freeman* v. *Freeman,* (1935) 49 B.C.R. 554; (1935) 2 D.L.R. 809; (1935) 1 W.W.R. 477.

11. Maintenance after decree of nullity.]—The petitioner, husband, had obtained a decree of nullity on the ground that the respondent's husband, presumed to be dead, was still alive. The parties had lived together only five weeks. A petition by the respondent for maintenance was dismissed. The Court will take into consideration the length of time since the marriage and whether or not there was fault on the part of the husband. Here the time was short and there was no fault on the part of the husband. The petitioner had a husband whose duty it is to support her. *Hirst v. Inglett,* (1936) 51 B.C.R. 306.

12. Claim for arrears of alimony provided for by agreement.] — The parties had been divorced but no alimony was claimed or awarded. The husband made an agreement to pay apart altogether from the proceedings. Held, the County Court had jurisdiction in an action to recover arrears under the agreement. *Dillon* v. *Dillon,* (1938) 1 D.L.R. 790.

13. Action under Order LXXA—anomalous character of.]—The inference is that the Court is to proceed under this Order apart from its divorce and matrimonial jurisdiction which exists side by side with it. The Order is embarrassing, anomalous and unnecessary, even if the Deserted Wives' Maintenance Act did not offer a third alternative remedy. In order to give sub-clause (a) some effect, sub-clauses (b) and (c) become meaningless and superfluous. *Mainwaring* v. *Mainwaring* (*No. 2*), (1942) 57 B.C.R. 390; (1942) 2 D.L.R. 377; (1942) 1 W.W.R. 728; reversing (1941), 56 B.C.R. 448; (1941) 4 D.L.R. 324; (1941) 3 W.W.R. 6.

14. Action under Order LXX A—conditions of recovery—defence of wife's cruelty.]—Order LXX A, rule 1, allows a wife to sue for alimony who could petition for it either in England or in this Province, according to the law of 1893. She need not base her claim on her right to restitution of conjugal rights; if desertion has lasted more than two years, and if it was without cause, she would be entitled to a judicial separation with alimony, and hence would come under rule 1 (a) of the Order, without any need to invoke (c). Held on appeal, reversing an award of alimony to the wife, the defence of cruelty, based on the wife's nagging, quarrelling and false charges of infidelity which had endangered the husband's health, was established. *Mainwaring* v. *Mainwaring* (*No. 2*), (1942) 57 B.C.R. 390; (1942) 2 D.L.R. 377; (1942) 1 W.W.R. 728; reversing (1941) 56 B.C.R. 448; (1941) 4 D.L.R. 324; (1941) 3 W.W.R. 6.

15. Compassionate allowance to unsuccessful petitioner under Order LXX A.]—The petitioner's claim for alimony was dismissed by the Court of Appeal because the husband's desertion was held justifiable. She then applied on affidavit for a compassionate allowance; the husband contended that there was no jurisdiction to direct such an allowance. Held, refusing the application, under the Court's divorce jurisdiction there is no such power: the power exists only where the allowance is made as a term of or in consequence of the husband's obtaining a decree for divorce, judicial separation or nullity. Under Order LXX A the wife's position is even weaker. Under that Order she can sue only where she is entitled to alimony by the law of England or of this Province; the Court has no equitable powers that the wife can invoke in proceedings such as these. *Mainwaring* v. *Mainwaring* (No. 3), (1942) 58 B.C.R. 24; (1942) 3 D.L.R. 458.

16. Action for alimony — recovery claimed to be less than was offered.]—The plaintiff was awarded $60.00 per month with liberty to apply to vary. The defendant objected to the payment of costs contending that he had before action, offered that much. Held, directing costs, that all that was offered was a consent to pay as against a

judgment of the Court for the amount with liberty to apply. As the issues might have been limited to quantum the plaintiff was awarded two-thirds of her taxed costs. *Mainwaring* v. *Mainwaring*, (1942) 1 W.W.R. 359.

17. Effect on wife's right to apply for maintenance, of convenant not to apply, given before the marriage was dissolved.]—The parties prior to the dissolution of their marriage entered into an agreement for the maintenance of the wife and her infant child. It was intended to come into operation after a decree of divorce had been pronounced. It contained a covenant by the wife not to take proceedings to compel the husband to pay more than was agreed upon. The wife having obtained a decree of divorce nevertheless applied 3½ months later for leave to petition for maintenance and was met by her covenant in the agreement. Held, giving leave to file her petition, the parties could not validly make an agreement purporting to control the powers of the Court. When the application is made the agreement will be taken into account but it is not a bar to the making of the application. *Lear* v. *Lear*, (1943) 3 W.W.R. 106.

18. Permanent alimony—registrar's report—time for appealing against.]—On an application for permanent alimony following a decree of judicial separation the registrar investigated and reported. Held, a party objecting to the report is not in the position of appealing from it and is not limited by Rule 45. *Roach* v. *Roach* (*No. 2*), (1944) 1 W.W.R. 511.

19. Petition for maintenance—time for filing—one month after decree absolute.]—Rule 65 which requires a petition for maintenance to be filed not later than one calendar month after decree absolute (except by leave of a judge) is complied with if the petition is filed within one month from the entry of the decree. *Schofield* v. *Schofield*, (1944) 61 B.C.R. 34.

20. Grant of permanent maintenance to guilty wife.]—The jurisdiction to award permanent maintenance to a guilty wife is clear. The factors to be considered are (a) the fortune of the wife, (b) the ability of the husband and (c) the conduct of the parties. *Montgomery* v. *Montgomery*, (1946) 3 D.L.R. 139.

V. JUDICIAL SEPARATION.

1. Alleged settlement of differences after answer filed.]—The wife having petitioned for a judicial separation on the ground of cruelty entered into a so-called settlement which was not carried out by the husband who, nevertheless, put it forward as estopping the petitioner. Held, granting a decree, that the "settlement" had no force or effect, being merely a statement as to what the parties might do in the future. *Coldicutt* v. *Coldicutt*, (1932) 46 B.C.R. 354.

2. Cruelty as ground for judicial separation—petitioner's health impaired—no physical violence.]—The husband's intermittent abuse and outbursts of temper were so violent and protracted that, on the medical evidence, the petitioner's health was actually seriously impaired. If she returned to her husband the result would probably be further serious impairment of her health, so serious indeed that her death might be materially hastened. There must be danger to life, limb or health, bodily or mentally, or a reasonable apprehension of it to constitute legal cruelty. Held, cruelty was established, there being a reasonable apprehension of danger to her health. *Halperin* v. *Halperin*, (1941) 2 W.W.R. 305.

3. Whether cruelty established—medical evidence not necessary.]—The trial judge was in error in holding that there must be medical evidence to support the petitioner's testimony that her health had been injured; she had lost weight, her nerves were in bad condition and she still suffered from an injured thumb, the injury to which was caused by her husband. *Roach* v. *Roach*, (1943) 59 B.C.R. 435; (1944) 1 D.L.R. 481; (1944) 1 W.W.R. 91.

4. Wife's petition—husband in default on order for costs and alimony—application to dismiss petition for want of prosecution refused.]—The wife sued for a judicial separation. Orders were made requiring the husband to pay the wife's costs and for alimony. The husband, although in default as to both, moved to dismiss the petition for want of prosecution. Held, refusing the motion, the husband was in contempt. The order for payment of her costs was to enable her to prosecute the action. *Jackson* v. *Jackson*, (1945) 61 B.C.R. 241; (1945) 1 W.W.R. 356.

5. Desertion — domicile — effect of Divorce Jurisdiction Act on action for

judicial separation.]—The wife petitioner operated a business in Vancouver. Her husband went to Saskatchewan where, as the judge found, he intended to reside permanently. During his absence the wife kept in touch with him and, on the only occasion she asked for money, he sent it to her. Held, dismissing the petition, the husband had his domicile in Saskatchewan, the wife had not been deserted, the Divorce Jurisdiction Act (Dominion) of 1930 does not apply in actions for judicial separation. *Burnett* v. *Burnett,* (1945) 61 B.C.R. 342; (1945) 3 D.L.R. 319; (1945) 1 W.W.R. 583.

6. Whether unpleaded condonation should be considered.]—The wife claimed a judicial separation on the ground of cruelty. Sec. 6 of the Divorce and Matrimonial Causes Act imports the principles of the Ecclesiastical Courts with respect to proceedings for judicial separation. Under their jurisdiction evidence of condonation of cruelty in such proceedings was entertained although condonation was not pleaded. *Hrycenko* v. *Hrycenko,* (1946) 2 W.W.R. 695.

VI. Nullity of Marriage.

1. Jurisdiction — whether residence of petitioner alone sufficient.]—The petitioner and her husband were married and resided in Alberta. She left him and after a residence of two years in Vancouver, she sued to have her marriage annulled on the ground of impotence. The husband resided throughout in Alberta and did not appear in the action. The trial judge held that the Court was without jurisdiction because of the foreign domicile of the respondent. Held, on appeal, affirming the decision below in the result, residence alone of the petitioner in British Columbia will not give jurisdiction. Under the Divorce Act the Court's power, apart from that to dissolve a marriage, is to be exercised conformably to the principles and rules of the Ecclesiastical Courts. Those Courts took jurisdiction in nullity actions, (a) where the party cited resided within the jurisdiction, (b) where the parties were domiciled within the jurisdiction, (c) where the marriage had taken place within the jurisdiction. None of these factors was present here. *Shaw* v. *Shaw,* (1945) 62 B.C.R. 52; (1946) 1 D.L.R. 168; (1945) 3 W.W.R. 577; affirming (1944) 61 B.C.R. 40; (1945) 1 D.L.R. 413; (1945) 1 W.W.R. 156 (see *Gower* v. *Starrett,* (1948) 2 D.L.R. 853).

2. Non-consummation — malformation—defence of "insincerity".] — Seven years after the marriage the husband petitioned for a decree of nullity on the ground of impotence. The wife had undergone a surgical operation to correct the conditon but had failed to carry out the post-operational treatment prescribed with the result that the operation was useless. The defence was delay and "insincerity." As to delay, army service and frequent changes of residence afforded the explanation. Insincerity, as a defence, is based on the principle that where one of the parties to a marriage is incapable of properly consummating it, the other, being aware of his rights, may by acts and conduct, so approbate the marriage as to preclude the latter, on grounds of equity and public policy, from impeaching its validity. Here the trial judge gave effect to the doctrine and dismissed the petition. Held, on appeal, reversing the decision below, there was in the circumstances no such approbation by the husband. If he appeared to have recognized the validity of the marriage, he had not acted so inequitably, or in such opposition to public policy, as to estop him from challenging its validity. *Punter* v. *Punter,* (1945) 62 B.C.R. 249; (1946) 2 D.L.R. 353; (1946) 1 W.W.R. 361.

3. Mental incapacity as ground for decree of nullity.]—Before and after the marriage the respondent was suffering from schizophrenia, a mental disease. The medical evidence was that he would have had the appreciation of a child of seven as to his responsibility under the contract of marriage. There had been a progressive deterioration. His attitude toward a child of the marriage was one of indifference. Held, annulling the marriage, the respondent was at the time of the marriage incapable of understanding the nature of the contract and of the rights and duties that it created. *O'Neill* v. *O'Neill,* (1945) 2 W.W.R. 396.

VII. Practice.

1. When solicitor and client costs may be ordered.]—Although in England there appears to be no power to order costs in divorce proceedings as between solicitor and client, there is jurisdiction in this Province to make such an order in a proper case. *Trueb* v. *Trueb,* (1933) 47 B.C.R. 443; (1933) 3 W.W.R. 404.

2. Costs against co-respondent—remedy for failure to pay.]—The only remedy for

the recovery of the amount is by writ of fieri facias. The contention that a seaman's wages cannot be attached was probably not valid. *Weinbaum* v. *Weinbaum,* (1934) 1 W.W.R. 144 .

3. Effect of deputy district registrar's order to pay costs—committal for contempt for disobedience.]—The order of the deputy district registrar for payment of the wife's costs in an action for judicial separation is an order of the Court and a husband who disregards it may be guilty of contempt of Court. *Fitzpatrick* v. *Fitzpatrick,* (1934) 3 W.W.R. 734.

4. Discretion of Registrar as to wife's costs.] — The powers of the Registrar under Rule 91 are discretionary and are not subject to review, unless he has clearly proceeded on a wrong basis. *Davies* v. *Davies* (1934) 48 B.C.R. 436.

5. Exemption from payment of wife's costs.]—A wife (respondent) obtained from the Registrar under Rule 91 a direction that the husband (petitioner) pay a certain sum as security for her costs. The petitioner applied for an exemption alleging that the respondent had sufficient separate estate, that she was party to a separation agreement as a result of which she had lost her authority at common law to make him liable for necessaries, and that he was unable to pay. Held, dismissing the application; (a) that sufficient separate estate would be such as to enable her to pay her ordinary living expenses plus proper legal fees for her defence; (b) the common law principle with regard to necessaries has no application to the special powers given by Rule 91; (c) the fact that the petitioner is without funds cannot deprive the respondent of the power to make a proper defence. *Davies* v. *Davies,* (1934) 48 B.C.R. 436.

6. Intervener — verification of particulars.] — The petitioner (wife) named a woman, Y., who was given leave to intervene. It was ordered, on her application, that the petitioner file an affidavit verifying particulars of the allegation against her, and that the petitioner be given leave to amend the petition. The petition was amended but the petitioner failed to file the required affidavit. The proceedings were ordered to be stayed until the affidavit was filed. *Re P.* v. *P.; Y. Intervener,* (1935) 50 B.C.R. 201.

7. Style of cause on petition.]—There is nothing in the Divorce Rules or forms thereunder showing that a style of cause is required in a petition. Apparently it is required in the affidavit of service and entry of appearance. *Harrap* v. *Harrap,* (1934) 49 B.C.R. 401.

8. Effect of finding under Deserted Wives' Maintenance Act.] — Where there has been a finding of "no adultery" in proceedings under the Deserted Wives' Maintenance Act, an allegation of the same adultery in a petition for divorce will be struck out on the ground of res judicata. *Harrap* v. *Harrap* (*No. 2*), (1935) 49 B.C.R. 496; (1935) 2 D.L.R. 816; (1935) 1 W.W.R. 729.

9. Allegation of wife's misconduct in husband's answer.]—The respondent in his answer to his wife's petition alleged misconduct on her part and prayed that her petition be dismissed and the marriage dissolved. The petitioner's application to strike out that part of the prayer asking for dissolution was granted. A respondent can obtain such relief only by filing a petition. The Divorce Rules do not confer a new jurisdiction or affect the rights of parties; that is a subject for legislation. *Watkins* v. *Watkins,* (1935) 50 B.C.R. 306.

10. Wife's petition — claim for costs against woman charged with misconduct.] —Sec. 13 of the Divorce Act enables the Court to make the woman with whom the husband has misconducted himself, a respondent. Held, the material in support of the application need only show that costs are claimed and that a copy of the pleadings has been served on her. It is no longer necessary to allege that she has a separate estate in the case of a married woman. *Tibbits* v. *Tibbits,* (1935) 50 B.C.R. 243; (1936) 2 W.W.R. 65.

11. Writ of attachment against husband on failure to pay wife's costs.]— The registrar's order against a husband to pay money into Court to cover the wife petitioner's costs, or give a bond as security, was not complied with. The wife moved for a writ of attachment against the respondent. Held, dismissing the application, the order, whether for payment or a bond, is an order to pay money and there can be no imprisonment for contempt for the mere non-payment of money, except under the provisions of sec. 19 of the Arrest and Imprisonment for Debt Act, or of sec. 58 of the Supreme Court Act. *Humber* v. *Humber,* (1936) 50 B.C.R. 427; (1936) 2 W.W.R. 414.

12. Wife's Counsel's right to secured costs where she failed to appear at the trial.]—Where security for a wife's costs was given and the wife failed to appear at the trial, her counsel, unaware that she would not appear, was entitled to costs. *Thompson* v. *Thompson,* (1936) 2 W.W.R. 496.

13. Apportionment of costs—petition by husband—wife successfully alleges adultery by petitioner and together with co-respondent unsuccessfully denies adultery.] —The wife's adultery was proved by a decree of divorce in a former action in which she was intervener. Held, there was no reasonable justification for raising a defence on that issue. As to the co-respondent he raised only one issue, viz, the denial of his adultery on which he failed. The wife also raised the issue of the petitioner's adultery on which she succeeded. Held, as to the costs, the co-respondent should be liable only for such costs of the petitioner as were incurred on the issue on which the petitioner succeeded, viz. that of adultery. The respondent's party and party costs were ordered to be taxed and one-half of the amount paid by the petitioner. The petitioner's costs were ordered to be taxed, omitting those payable by him to the respondent, and one-half of the amount paid by the co-respondent to the petitioner. The respondent's costs were not to be paid until the petitioner's costs should be paid into Court by the co-respondent. *Emery* v. *Emery and Barbour,* (1937) 2 W.W.R. 141.

14. Wife's covenant no bar to order for costs under rule 91.]—A covenant in a separation agreement released the husband from all claims by the wife. She later petitioned for divorce and applied for costs under rule 91. Held, that the parties could not by agreement derogate from the statutory power of the Court to give to the wife her necessary and proper costs in the cause. *Mattock* v. *Mattock,* (1937) 51 B.C.R. 533; (1937) 2 W.W.R. 680.

15. Attachment or committal.] — The respondent was gaoled for contempt of Court for non-payment of costs. He applied for his release under Divorce Rule 78 alleging the petitioner's failure to pay maintenance under Order LXIX of the Supreme Court rules. Held, dismissing the application, that the order committing the respondent was not one of the writs referred to in Order LXIX. *Mattock* v. *Mattock (No. 3),* (1937) 52 B.C.R. 301; (1937) 3 W.W.R. 317.

16. Unrestricted examination for discovery of parties other than petitioner.]—An order will not be made for the examination for discovery of an intervener on which she must answer questions tending to show that she has been guilty of adultery. While the English practice in divorce is not binding in British Columbia, the Court here has so long followed that practice in this respect that it will not now be disturbed. *Mattock* v. *Mattock,* (1937) 52 B.C.R. 298; (1938) 2 D.L.R. 801.

17. Judicial separation—order for wife's costs—disobedience—barring from trial.] —The respondent failed to pay his wife's costs as ordered. She moved that he be debarred from appearing in answer to her petition for judicial separation. Judgment was reserved and was given on the day fixed for the trial. The judge then ruled that the respondent should have an opportunity of showing that his disobedience was due to inability or misfortune. His counsel, the husband not being present, sought an adjournment of the trial which the judge refused at the same time holding that as the husband was not present for the trial, it would be futile to consider the possibility of his showing that his default was due to inability or misfortune. Thus the opportunity to show cause was withdrawn almost as soon as it was granted. It was held, allowing the appeal, that even if the husband was contumacious an order so severe should not be enforced unless, after the debarring order, he was given a reasonable opportunity to purge his contempt before the trial was proceeded with. *Wessels* v. *Wessels,* (1940) 55 B.C.R. 476; (1941) 1 D.L.R. 606; (1941) 3 W.W.R. 500.

18. Examination for discovery of plaintiff—damages claimed.]—Divorce rules 38 and 97 authorize the examination of a party for discovery. Such an examination will not be ordered where the sole purpose is to prove adultery. Here the co-respondent seeks not to prove adultery but to disprove it. Moreover there is a claim for damages against the applicant. *Kovack* v. *Kovack,* (1941) 56 B.C.R. 559; (1942) 1 D.L.R. 134; (1941) 3 W.W.R. 863.

19. Admission by respondent to petitioner's solicitor.]—The only evidence of adultery consisted of testimony by a reputable lawyer acting for the petitioner's father

who interviewed the respondent. He had urged the respondent that he should furnish particulars of his misconduct. At a third interview the respondent had admitted an offence of some four years earlier with a woman whose name he refused to divulge. The evidence as to the conversations was accepted without qualification, but the trial judge refused to grant a divorce on it alone. Adultery is the basis of divorce, not the admission thereof, which may or may not be true. *Thomas* v. *Thomas,* (1942) 58 B.C.R. 1; (1942) 3 D.L.R. 746; (1942) 2 W.W.R. 398.

20. Necessity to ask for costs in petition.]—Where costs have not been claimed in the prayer of the petition against either the respondent or the co-respondent as the case may be, and no one appears for the respondent or co-respondent, it is not within the competency of the Court to grant costs against either of them. Costs, like damages, are a relief claimed in the action, and in accordance with Divorce Rule 1 (b) should be set out in the prayer. *Robilard* v. *Robilard,* (1942) 58 B.C.R. 293; (1943) 1 D.L.R. 120; (1942) 3 W.W.R. 497.

21. Necessity of jury where damages claimed—no stated amount.]—The effect of Rule 1 (b) is that particulars of the relief claimed be set out at the conclusion of the petition. A claim merely for "damages against the co-respondent" does not give the required particulars and will be treated as no claim for damages. As a result an action for divorce in such circumstances may be tried by a judge without a jury and no order dispensing with a jury is necessary. *Cupina* v. *Cupina,* (1944) 3 W.W.R. 335.

22. Claim for damages and costs against co-respondent—ignorant that respondent was married.]—The petitioner claimed damages and costs against the co-respondent. It was not shown that the latter knew or ought to have known that the respondent was a married woman. The petitioner was not entitled to damages. The co-respondent in the circumstances here should for the same reasons not be condemned in costs. *Logan* v. *Logan,* (1946) 63 B.C.R. 444.

23. Proof of marriage—further affidavit allowed on appeal.]—It was contended on a wife's appeal from a decree of divorce that the marriage had not been proved at the hearing. The Court of Appeal gave leave to the husband to file a supplemental affidavit in support of proof of the marriage. *Slater* v. *Slater,* (1944) 61 B.C.R. 166; (1945) 2 W.W.R. 612.

24. Respondent not appearing at trial —motion to extend time for appeal— proper remedy below.]—On a motion to extend the time for appealing it was objected that sec. 38 of the Divorce and Matrimonial Causes Act stood in the way of any extension. The objection was overruled. On the motion itself the proper remedy where an ex parte judgment is attacked is to apply to the Court below under rule 457 rather than to appeal. The motion was refused. *Miles* v. *Wilkinson,* (1945) 61 B.C.R. 474; (1945) 3 W.W.R. 70.

25. Petition imputing a crime viz. sodomy by respondent—degree of proof.] —Where a petitioner for divorce alleges a criminal offence as a ground for relief and where at the hearing the respondent denies it the rule in criminal proceedings applies and proof must be afforded beyond a reasonable doubt with due and cautious consideration of the witnesses and their evidence. The presumption of innocence must prevail until the guilt has been proved. *Fast* v. *Fast,* (1945) 61 B.C.R. 503; (1945) 3 W.W.R. 66.

26. Evidence of non-access — still-born child — rule in *Russell* v. *Russell.*] — The petitioner proved that the respondent had had a miscarriage, or gave birth to a still-born child, and offered evidence of non-access through absence overseas for some years. Held, distinguishing *Russell* v. *Russell,* (1924) A. C. 687, the evidence was admissible, since the rule is to prevent the bastardization of a child, and here there was no child. *Clare* v. *Clare,* (1946) 63 B.C.R. 343; (1947) 1 W.W.R. 542.

27. Co-respondent's costs — on what scale.]—A petition for dissolution of marriage, in which $500 damages against the co-respondent had been claimed, was dismissed with costs. The rule under Appendix N as to scale is that where the amount involved can be determined, the costs shall be taxed on the scale applicable to that amount. Subject to a proviso not applicable here, Column 2 is to be used in all other cases. Held, where as here, the issue is that of adultery alone, there is no amount involved which can be determined. The co-respondent's costs should be taxed on Column 2. *Crabbe* v. *Crabbe,* (1946) 62 B.C.R. 373; (1946) 2 W.W.R. 692.

28. Whether costs against co-respondent can be ordered to be taxed on a higher scale]—The petitioner applied for taxation on a scale higher than Column 2. The only ground open to him was "for special reason." The co-respondent did not defend or do more than appear by counsel. Held, dismissing the application, no special reason was shown. The conduct of the co-respondent had been reprehensible but that did not furnish a special reason within the rule. To direct taxation on a higher scale would be in effect to award damages where none were sought. *Hopgood* v. *Hopgood,* (1946) 62 B.C.R. 450; (1946) 2 W.W.R. 699.

29. Whether examination for discovery available.]—Discovery of documents may be had and interrogatories may be administered in a divorce action but one party may not examine the other for discovery, i.e. viva voce under oath. *Kenny* v. *Kenny,* (1946) 1 W.W.R. 218.

30. Degree of proof of misconduct.]—The same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so called. *De Voin* v. *De Voin,* (1946) 2 W.W.R. 304.

VIII. Custody of Children.

1. Right of access by guilty husband.] —In an undefended action the wife obtained a decree of divorce with the custody of a female child. The trial judge ordered that the husband have no access except by leave of the Court. The judge at the trial heard evidence of wrongdoing by the husband not alleged in the petition. A subsequent application for access was refused by the same judge. Held, on appeal, that access should be allowed. The usual practice is that a guilty father should have reasonable access although custody until further order is vested in the wife. In every case the benefit and interest of the child is the paramount consideration. The judge below was unaware of the decision in *Boynton* v. *Boynton,* (1861) 2 Sw. & Tr. 275. He acted on evidence that was irrelevant and his conclusions were not well founded. *Elvin* v. *Elvin,* (1941) 56 B.C.R. 253; (1941) 3 D.L.R. 379; (1941) 3 W.W.R. 653.

2. Whether maintenance can be secured by a charge on estate.]—Where an order was made following a decree for divorce, requiring the husband to pay a monthly sum for the maintenance of a child, there was no power to order that it be secured by way of a charge on the share of the husband in his father's estate. *Betsworth* v. *Betsworth,* (1941) 57 B.C.R. 206; (1942) 1 D.L.R. 613; (1942) 1 W.W.R. 445.

3. Respondent living with co-respondent —custody given conditionally to mother.] —In the circumstances an order was made giving the custody of the children to the mother so long as she and the children made their home with the petitioner's sister. Access was provided for the father, but the children were not to be brought into contact with the co-respondent with whom he was living. *Knox* v. *Knox,* (1942) 3 W.W.R. 695.

4. Time within which maintenance of children may be ordered — sec. 20 of Divorce and Matrimonial Causes Act — Divorce Rule 69 (a).]—While sec. 20 of the above statute does not permit the making of an order with respect to the maintenance of children after the final decree, Divorce rule 69 (a) which is procedural only, in effect, extends the time. The Divorce rules were given legal effect by the Court Rules of Practice Act 1925, if there was previously any doubt about it. *Betsworth* v. *Betsworth,* (1941) 57 B.C.R. 206; (1942) 1 D.L.R. 613; (1942) 1 W.W.R. 445.

5. Whether Court has jurisdiction as to custody of children outside the province.] —Upon the granting of a decree absolute the wife petitioner sought an order for the custody of the children residing in Montreal with the petitioner's mother. She had been supporting them there without assistance from the respondent. Held, there was jurisdiction to award the petitioner their custody. *Munroe* v. *Munroe,* (1942) 3 W.W.R. 656.

6. Father entitled to custody by divorce decree—application eight years later by mother.]—The father of the female child divorced her mother and was awarded the custody of the child then five years of ago. He left her for eight years in the custody of the mother who had married the co-respondent. The father learning that the mother had left her second husband and that the child remained with him took habeas corpus proceedings to get her custody. He was now married again to a woman with whom he lived prior to the divorce, and was able to provide a good home. The mother had a good position as housekeeper and could have the child with her. The child wished to go to her mother.

At her age—now thirteen, it was desirable that she should be with her mother and it was so ordered, subject to close supervision by the Superintendent of Child Welfare. *In re Carlson,* (1943) 3 W.W.R. 104.

7. Custody given husband—no access by wife—failure to consider issue.]—On appeal it appeared that the trial judge had granted a decree of divorce and given the custody of the children to the husband without hearing any evidence as to the issue of custody. It was now shown that one boy had by arrangement been in the wife's custody for some three years since her misconduct. Held that because of the dominating principle that the welfare of the children was paramount there should be a rehearing on this issue. *Slater* v. *Slater,* (1944) 61 B.C.R. 166; (1945) 2 W.W.R. 612.

See CONTEMPT OF COURT.

See CONFLICT OF LAWS.

See COSTS.

See HUSBAND AND WIFE.

See INFANTS.

DOMESTIC RELATIONS.

See DIVORCE.

See HUSBAND AND WIFE.

See INFANTS.

DOMICILE.

See CONFLICT OF LAWS.

See DIVORCE AND MATRIMONIAL CAUSES.

DONATIO MORTIS CAUSA.

See GIFT.

EASEMENT.

1. Right-of-way to get out timber.]—The powers given a judge to appoint arbitrators pursuant to sec. 54 of the Forest Act and secs. 52 and 53 of the Railway Act do not depend on the reasonableness or otherwise of the application. *Kapoor Sawmills Ltd.* v. *Laverock,* (1944) 60 B.C.R. 518; (1945) 1 D.L.R. 372.

2. Right of City of Vancouver to register easement protecting street—on sale of land.]—On a sale of land by the City the purchasers by the conveyance covenanted (a) not to require support from the adjoining street, (b) not to spill earth on the street, (c) that the City might enter and remedy any failure as to (a) or (b) and that the City might enter and remedy any such failure with a charge for the cost of doing so. Upon the purchasers becoming the registered owners of the lands the City applied to register its easement. The Registrar of Titles refused on the ground that the rights given the City were not registrable. Held, by the Court of Appeal, the rights created by the coveyance constituted an easement in favour of the City and they were registrable under sec. 148 of the Land Registry Act. In *re Land Registry Act* and in *re Harrie,* (1945) 2 W.W.R. 348; (1944) 61 B.C.R. 211.

DYKING DRAINAGE AND IRRIGATION.

1. Liability of Municipality for extension of drainage ditch.] — The plaintiff claimed that a municipality by lengthening a ditch across a slight ridge caused the ditch to receive more water than it normally would with the result that the plaintiff's land was flooded. He claimed and was awarded damages. Held on appeal, reversing the trial judge, that a claim in tort had not been made out as the facts did not support the finding below that the municipality was responsible for water being discharged in the way alleged. *Geall* v. *The Corporation of the Township of Richmond,* (1932) 46 B.C.R. 249; (1932) 4 D.L.R. 796; (1932) 3 W.W.R. 318.

2. Municipal ditch—surface water.] — The plaintiff alleged that the municipal authorities extended a ditch carrying surface

water to a point close to his property and that because no provision was made for carrying it away it flooded his truck garden and damaged it. Held, dismissing the action, that the onus was on the plaintiff to show that through some act of the municipality it had brought to his land water which caused damage thereto. The evidence showed that the ditch as constructed retarded rather than accelerated the flow on to the plaintiff's lands. *Angus* v. *The Corporation of the District of Burnaby,* (1932) 46 B.C.R. 335.

3. Ditch cut through natural water-shed —nuisance—consent.]—Where the owner of the flooded land sanctioned the location and construction of the offending ditch, that is a primary factor to be considered in an action for nuisance and damages against parties who acted on that sanction. While the consent of the owner would not enable the respondent to rely upon a statute as authorizing an act which it did not authorize, it would be contrary to common justice if the owner could now complain of the consequences of the acts so sanctioned. *McCallum* v. *Corporation of the District of Kent,* (1943) 59 B.C.R. 341; (1943) 3 W.W.R. 489.

See MUNICIPAL CORPORATIONS.

See WATERS AND WATERCOURSES.

ELECTIONS.

1. Effect of cancellation of registered judgment.]—In 1914 a candidate for election, in order to satisfy the property qualification required by the Vancouver Incorporation Act, induced his judgment creditor to vacate the registration in the Land Registry Office of a judgment against the property in question. The judgment creditor had no intention of releasing the judgment but merely sought to enable the candidate to qualify on the particular property. In 1933 the judgment creditor purported to re-register the judgment against the same property which was still being used by the judgment debtor to qualify upon. Held, cancelling the re-registration, that the cancellation in 1914 constituted a release for all time in the sense that it could never again be registered as a charge under the provisions of the Execution Act and the Land Registry Act against that property. *Hansen* v. *Taylor,* (1933) 46 B.C.R. 556; (1933) 2 W.W.R. 16.

2. Returning officer's duty at nomination.]—The Provincial Elections Act requiries that each candidate shall be nominated by a separate nomination paper and that the necessary ten assentors may sign as many nomination papers as there are members to be elected, viz., one in the case of Lillooet. At the close of nominations and after the Returning Officer had given receipts to each of the candidates under sec. 53 (2), objection was made that four of the assentors on candidate H.'s paper had already assented to candidate S.'s paper, which had been received shortly before H.'s. The Returning Officer declared H.'s paper invalid on the ground that S.'s paper had come first and had been found in order and publicly read aloud to those present before H.'s was dealt with; the four assentors having exercised their rights with repect to S.'s paper, could not be counted again. Held, refusing an application for a mandamus against the Returning Officer (a) the receipt given under sec. 53 (2) deals only with the production of the nomination-paper and is properly given when the paper is received, (b) the Returning Officer may continue his consideration of the nomination-papers after the close of nominations, (c) while there was no evidence as to which paper the four assentors signed first, the Returning Officer was right in deciding that the names of these assentors being already on S.'s paper could not be counted as assentors on H.'s paper. In *re Provincial Elections Act,* in *re Hartley,* (1933) 48 B.C.R. 15; (1934) 1 W.W.R. 108.

3. Dominion Elections Act — allowing employees time to vote.]—The Act (sec. 47) requires employers to allow every elector in their employ at least two additional hours other than the noon hour, for voting. The appellant was paid by the hour working from 8.00 a.m. to noon and 12.30 p.m. to 4.30 p.m.—an eight-hour day. The employer posted a notice that the work hours on election day would be 8.00 a.m. to 4.00 p.m. with pay for eight hours' work. The appellant quit at 4.00 p.m. having worked 7½ hours and was paid for eight hours' work. He charged the employer with an infraction of the section. The magistrate acquitted. On appeal to the County Court the appellant contended that he had been allowed only half an hour instead of

the prescribed two hours. Held, dismissing the appeal, the requirement is that if an employee has no time of his own, other than the noon hour, for voting, the employer shall allow him a reasonable period of time (and if necessary, as much as two hours) to do so without loss of pay. Here the appellant was not at work during all the polling hours —he was free at 4.30. *Rex* v. *Falconer Marine Industries Ltd.* (1945) 3 W.W.R. 653; 85 C.C.C. 192.

EMINENT DOMAIN.

See COMPULSORY PURCHASE.

ENGLISH LAW.

1. In forma pauperis] — The English statute "to help and speed poor persons in their suits" (11 Henry VII, Cap. 12) is, it seems, in force in British Columbia by virtue of the English Law Act of the Province. *Bland* v. *Agnew,* (1932) 46 B.C.R. 230.

2. Effect of sec. 29 of the Court of Appeal Act on right to appeal in forma pauperis.]—The English statute, 11 Henry VII, Cap. 12, is in force in British Columbia by virtue of the English Law Act of the Province. Sec. 29 of the Court of Appeal Act does not stand in the way of giving leave to appeal in forma pauperis, and is directory only. *Bland* v. *Agnew,* (1932) 47 B.C.R. 7; (1933) 4 D.L.R. 756; (1933) 3 W.W.R. 88.

EQUITY.

1. Sale of chattels.] — The respondent sold lumber to a tenant of the appellant under a written agreement whereby the title should not pass until payment was completed. The appellant as landlord of the purchaser took from him a chattel mortgage to secure his rent. The respondent then claimed the lumber (now made up into shelving, counters, etc.) and the appellant retained it relying on his mortgage. The trial judge awarded damages to the respondent holding that the appellant took his mortgage with express knowledge of the prior claim of the respondent. Held, on appeal, affirming the decision below, that the agreement withholding title created equities between the parties and anyone with notice thereof could only deal with with the property at his peril. *Fidelity Lumber Co. Ltd* v.*Roote,* (1934) 48 B.C.R. 429; (1934) 3 D.L.R. 158.

2. Order of revivor after long delay.]— It would not be in accordance with the principles of equity to reopen a matter that has been lying dormant for thirteen years, particularly as one of the parties interested, who would be an important witness, had died in the meantime. The Court has a discretion in cases of this kind and the element of laches may be taken into account. *Goddard* v. *Bainbridge Lumber Co. Ltd.* (1933) 47 B.C.R. 390; (1934) 1 W.W.R. 836 affirming (1933) 2 W.W.R. 292.

3. Laws Declaratory Act, sec. 2 (14) and (15)—when to be invoked.]—The equitable jurisdiction gave relief against oppressive contracts, that is contracts that gave harsher remedies for breach than would ordinarily be the result of those breaches. Here, however, the owner was not enforcing any contractual remedy; it was merely following those remedies given by the general law for breaches going to the root of the contract. The Act cannot be invoked. *Falleson* v. *Spruce Creek Mining Co. Ltd,* (1942) 58 B.C.R. 233; (1942) 4 D.L.R. 708; (1942) 3 W.W.R. 553; affirming (1942) 2 W.W.R. 121.

4. Restraining proceedings before County Court Judge pending decision in Supreme Court.]—The defendant had given notice of cancellation of the plaintiff's lease allegedly for non-payment of rent. The plaintiff sued for relief from the forfeiture and the next day the defendant began proceedings to recover possession under the Landlord and Tenant Act in the County Court. The plaintiff sought an injunction restraining the defendant from continuing the proceedings in that Court. Held, granting the order, the material disclosed attempts to pay the rent and a possibility of the plaintiff's claim being defeated if possession is acquired. There is here no restraint put upon the County Court judge—the restraint is upon the defendant from taking

any further proceedings in that Court. *Prevedoros* v. *Michaelovitch,* (1945) 61 B.C.R. 486.

See ESTOPPEL.

See SPECIFIC PERFORMANCE.

See VENDOR AND PURCHASER.

ESTOPPEL.

I. BY CONDUCT, 289.

II. BY RECORD, 290.

I. BY CONDUCT.

1. No estoppel as against statutory provision.]—Estoppel cannot be set up where the result of giving effect to such a plea would be in effect to repeal statutory provisions. *The Coporation of the District of Matsqui* v. *Western Power Co. of Canada Ltd.,* (1933) 47 B.C.R. 335; (1934) 1 D.L.R. 264, affirmed by Privy Council, (1934) 2 D.LR. 81; (1934) 1 W.W.R. 483; (1934) A.C. 322.

2. Company bound by agreement made by shareholders personally.]—Shareholders of a hotel company (the plaintiff) agreed to sell all the shares to the defendant and agreed that the defendant, pending the completion of his payments and the actual transfer of the shares, should be managing director of the company (with one share to qualify him) but should run the business at his own expense in the name of the company. A clause in the agreement provided that any profits were to go to the defendant. After operating the hotel for some time and retaining the profits he defaulted in his payments and was ousted. The other shareholders forfeited his down payment and the instalments paid and rescinded the agreement. The company sued him for an accounting of the profits while he was in possession. The trial judge found for the plaintiff and ordered an accounting. Held, on appeal, reversing the trial judge, that the whole arrangement was intended as a means of selling the company's business to the defendant; that although the company was not a party to the agreement, it had by various acts implemented and affirmed it and could not in good conscience be heard to say that it was not bound; the company by its acts led the defendant to believe that, as against it, he was entitled to the profits and he had altered his position accordingly. *Carlton Hotel Co. Ltd.* v. *Gardiner,* (1934) 48 B.C.R. 441 (1934) 4 D.L.R. 713; (1934) 3 W.W.R. 97.

3. Former husband alleging invalid divorce decree.]—Having obtained a divorce in California, the husband, on the death of his wife, claimed a share in her estate, contending that the divorce was granted him without jurisdiction. Held, denying the claim, that he having invoked the California court in his claim for divorce he could not afterwards be heard to say that that forum acted without jurisdiction. *Carter* v. *Patrick,* (1935) 49 B.C.R. 411; (1935) 2 D.L.R. 811; (1935) 1 W.W.R. 383.

4. Forged cheques—delay in notifying bank.]—Where the customer delayed warning his bank that forged cheques were being cashed on his account, he was estopped as to those paid after he learned of the forgeries, but not as to those paid prior to that time. *Keech* v. *Canadian Bank of Commerce,* (1938) 53 B.C.R. 77; (1938) 2 W.W.R. 291.

5 Ditch cut through natural water-shed —nuisance—consent.]—Where the owner of the flooded lands sanctioned the location and construction of the offending ditch, that is a primary factor to be considered in an action for nuisance and damages against parties who acted on that sanction. While the consent of the owner would not enable the respondent to rely upon a statute as authorizing an act which it did not authorize, it would be contrary to common justice if the owner could now complain of the consequences of the acts so sanctioned. *McCallum* v. *Corporation of the District of Kent,* (1943) 59 B.C.R. 341.

II. BY RECORD.

1. Res judicata—foreign judgment.]—The sum of $10,000 was held by a Seattle bank under an escrow agreement whereby the defendants gave the plaintiff's assignor an option to purchase mineral claims. The bank mailed cashier's cheques for the amount to the defendants but before the cheques reached them, the defendants had breached the agreement and payment was stopped. The defendants claimed the $10,000 and sued on the cheques in the Seattle

Courts. The plaintiff intervened in the action and on an issue between the plaintiff and the defendants judgment was given in the Superior Court of Washington awarding the money to the plaintiff. Later the plaintiff brought the present action in British Columbia for damages for breach of the escrow agreement and the defendants pleaded estoppel contending that the claim for damages could and should have been litigated in the Washington Court. Held, affirming the trial Judge, that the jurisdiction of the Washington Court on the proceedings before it was limited to the disposition of the $10,000, with the result that it was open to the plaintiff to claim damages in the Court in British Columbia. *Quickstad* v. *McNeill,* (1931) 46 B.C.R. 81; (1932) 4 D.L.R. 427.

2. Res judicata.]—C. brought, but did not set down for trial, an action against R. et al for salary. R. et al commenced an action against C. for a partnership accounting and dissolution. In that action C. counterclaimed alleging a conspiracy with respect to his salary. The second action came to trial first and the counterclaim was dismissed. Upon an application by R. et al to dismiss C.'s action for salary, it was held, that the action should be dismissed on the ground that the issues raised in C.'s action were the very same issues already decided between the parties in the other action. *Cameron* v. *Rounsefell,* (1933) 47 B.C.R. 401; (1933) 3 W.W.R. 121.

3. Res judicata.]—A wife took proceedings against her husband under the Deserted Wives' Maintenance Act. He defended on the ground that she had been guilty of adultery. The Magistrate, and a County Court Judge on appeal, both found that there had been no adultery as alleged. Subsequently the husband sued for divorce alleging the same adultery. The wife applied to strike out the part of the petition containing that averment on the ground that the matter was res judicata. Held, granting the application, that (a) the parties in the two cases were the same persons, both sets of proceedings being civil in character; (b) sec. 6 (3) of the Deserted Wives' Maintenance Act, providing that a finding of adultery shall not be evidence of adultery except for the purpose of proceedings under that Act, does not apply. Here there was a finding, not of adultery, but of "no adultery" and it would require clear language to deprive the wife of her right to set up estoppel. *Harrap* v. *Harrap,* (No. 2) (1935) 49 B.C.R. 496; (1935) 2 D.L.R. 816; (1935) 1 W.W.R. 729.

4. Res judicata—raising issues already decided in previous action.]—The plaintiff applied to the judge in bankruptcy to reagitate the issues which had been finally determined between the parties in other proceedings. The judge properly dismissed the application. Otherwise he would have been disregarding a judgment of the Court of Appeal holding that the allegations made did not disclose a reasonable cause of action, which involves a finding that there were no merits to be tried between the parties. *Gibson Mining Co. Ltd.* v. *Hartin* (1939) 55 B.C.R. 196; (1940) 2 D.L.R. 605; (1940) 2 W.W.R. 155, 21 C.B.R. 403.

5. Res judicata—leave to begin action—bankruptcy.]—The appellants applied to the judge in bankruptcy for leave to bring an action against the trustee. The leave was refused on the ground that the matters urged were res judicata. Held, on appeal, reversing the decision below, that it could not be said that no new issues arose. On a similar application for leave to bring an action, the leave was given and the defence there raised of res judicata was held by the Court of Appeal not to be in the way. The principles applicable to a previous motion to stay the action need not be applied to one for leave to bring one. The course followed by the Court on the similar application should be followed here. *In re the Bankruptcy of Daybreak Mining Co. Ltd.; May* v. *Hartin* (1942) 59 B.C.R. 39; (1943) 1 D.L.R. 650; (1943) 1 W.W.R. 653.

6. Res judicata—effect of bringing action in different capacity.]—Where issues in previous actions have been decided against a litigant he is not entitled to have the same issues relitigated. The fact that previous actions have been brought by or on behalf of the plaintiff in another capacity does not affect the matter if the same issue is involved. Where the issue of title to property is litigated and decided against a person he may not, by framing his action for possession, reopen the matter. *May* v. *Hartin,* (1945) 1 D.L.R. 417; reversing (1943) 60 B.C.R. 14; (1944) 3 W.W.R. 225.

7. Res judicata.]—Where the issues in the present action are not those in dispute in the former action, those in the present action are not res judicata. A counter claim resulted in a judgment for damages down

to the time of the assessment. The contract still subsisted and any continuing breach during its life, or until rescission, gave rise to a claim for continuing damages. The decision below that the counterclaim was res judicata was reversed. *Moore* v. *DeWolf* (1945) 61 B.C.R. 81; (1945) 1 D.L.R. 792; (1945) 1 W.W.R. 505.

8. Res judicata—second action involving same issues—unpaid costs.]—The plaintiff some five years earlier had sued under a partnership agreement for an accounting. That action was finally disposed of on appeal to the Privy Council, on the footing that the plaintiff had had all that he was entitled to under the agreement. Now he commenced a new action under the same agreement claiming breach of trust, fraud and conspiracy with respect to the same matters. On a motion by the defendants to dismiss the new action as frivolous and vexatious, or that it be stayed until the costs of the former action were paid, it was held, dismissing the action, that the findings of the Privy Council that the plaintiff had received his share of the partnersip assets, excluded any basis for a claim either of fraud or of conspiracy to deprive the plaintiff of his share of the assets. Held, further, it would be a scandal if the proceedings could be repeated at the risk of incurring still further costs. *Winsby* v. *Tait* (1943) 62 B.C.R. 9.

9. Res judicata—new defence raised—whether judgment in Ontario conclusive.]—The former wife sued on the agreement referred to in *Pope* v. *Pope* (1940) 55 B.C.R. 277, and the female defendant raised the defence that the agreement contained no covenant on her part to pay. On an action in Ontario the Court there had found her liable. Apparently the defence as to absence of a convenant was not raised in the Ontario Court. Held, whether the defence was raised or not the matter was res judicata and could not now be relied upon. *Pope* v. *Pope* (No. 3); (1943) 1 W.W.R. 467.

See CONTRACT.

See EQUITY.

See INTOXICATING LIQUORS.

See MORTGAGE.

EVIDENCE.

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I. JUDICIAL NOTICE.

1. Power of Court to take judicial notice of geographical areas.]—On an appeal to the County Court, the accused sought to quash the conviction on the ground that there was no evidence that Field, where the offence was laid, was within the geographical jurisdiction of the convicting magistrate. Held, dismissing the motion to quash, the Court could take judicial notice of the fact that a well-known locality is within the jurisdiction. Moreover, the defect if any, did not constitute the proceedings before the magistrate a nullity and on appeal there is a hearing de novo. *Rex* v. *Lombardo,* (1933) 3 W.W.R. 177.

2. Territorial jurisdiction of magistrate.]—While the Court may take judicial

notice that a town is within a particular county, evidence should be given where a magistrate's jurisdiction is limited to an Electoral District: *Rex* v. *Wong Sim,* (1934) 3 W.W.R. 253, 62 C.C.C. 268.

3. Rules, regulations or by-laws made in pursuance of a statute—orders of Marketing Board.]—Sec. 103 of the Summary Convictions Act requires that judicial notice be taken of "any rules, regulations or by-laws made in pursuance of a statute of the Province." Orders made by the British Columbia Vegetable Marketing Board under the Natural Products Marketing (British Columbia) Act are not made in pursuance of that Act. They derive their existence not from the statute but from the Lieutenant-Governor in Council which set up the Board and gave it certain powers. The Board's orders must be proved in the usual way. *Rex* v. *Fedler,* (1940) 54 B.C.R. 491; (1940) 3 D.L.R. 341; (1940) 1 W.W.R. 233; 73 C.C.C. 233.

4. Amendment to come into force upon proclamation.]—Where an amendment was not to come into force until proclaimed and the Crown did not prove the proclamation, the trial judge himself looked at the Canada Gazette and satisfied himself that it had been proclaimed. He further allowed the Crown to reopen the case and prove the proclamation. Held by the Court of Appeal that the reopening was in the circumstances permissible. *Rex* v. *Kishen Singh,* (1941) 56 B.C.R. 282; (1941) 3 D.L.R. 341; (1941) 2 W.W.R. 145, 76 C.C.C. 248.

5. The Court's own records.]—As proof that a notice of appeal was filed in time the Court looked at the original notice bearing the registrar's stamp showing the date of its receipt. The Court has at all times power to look at its own records, and to take notice of their contents, although they may not be formally brought before the Court by affidavit. *Rex* v. *Lewis,* (1941) 57 B.C.R. 83; (1941) 4 D.L.R. 640; (1941) 3 W.W.R. 575, 77 C.C.C. 95.

6. Territorial jurisdiction — offence on bridge (or approach) between two jurisdictions.]—Where the locus of the assault was at the ticket booth at the Second Narrows Bridge over Burrard Inlet and the evidence showed that the booth was at the north end of the bridge, it followed that the magistrate for the District of North Vancouver had jurisdiction. If the offence took place on the bridge proper, sec. 584 (a) gave him jurisdiction. If it took place on the northerly approach the locus was in the Municipality of the District of North Vancouver and the magistrate had jurisdiction. *Rex* v. *Allen,* (1946) 3 W.W.R. 552, 87 C.C.C. 253.

II. Presumptions and Burden of Proof

1. Cohabitation in China—no presumption of marriage.]—The evidence disclosed that cohabitation had taken place in China. If it had taken place here a presumption of marriage was possible but no such presumption, in the absence of evidence of Chinese law, arises from cohabitation in China. *Leong Sow Nom* v. *Chin Yee You,* (1934) 49 B.C.R. 244; (1934) 3 W.W.R. 686.

2. Declaration as to presumption of death.] A declaration of presumption of death will be made only as incidental to the exercise of some other jurisdiction, e.g. probate or administration. In *re Roberts,* (1942) 3 W.W.R. 718.

3. Declaration presuming death of spouse—when jurisdiction to grant.]—A declaration presuming the death of a spouse may be granted where it is incidental to the exercise of some jurisdiction, such as admitting a will to probate, but there is no jurisdiction to make such a declaration for the sole purpose of enabling the petitioner to remarry. *Re DeBray,* (1943) 4 D.L.R. 103.

4. When of importance—rebutting presumption of advancement by transfer to wife.]—Per McDonald C.J.B.C. In cases where findings are fully supported by evidence which the trial judge believes, the questions of presumption and onus have little bearing. They are only of importance where evidence is lacking or where it is so indirect that conclusions must rest on inference. *Cole* v. *Cole,* (1944) S.C.R. 166; (1944) 2 D.L.R. 798 affirming (1943) 59 B.C.R. 372; (1944) 1 D.L.R. 37; (1943) 3 W.W.R. 532.

5. Whether Commorientes Act or Insurance Act governs in distribution of life insurance.]—The Insurance Act (Sec. 123) provides that where an insured and a beneficiary perish in the same disaster the prima facie presumption is that the beneficiary died first. The Commorientes Act provides that in such a case the younger is presumed to have died first but the provision is made subject to that created by sec. 123 of the

Insurance Act. It was contended that the Insurance Act governs for the purpose of deciding the immediate destination of the insurance moneys but, once that is done, the other Act comes into play and governs its ultimate destination. Held, the Insurance Act governs for all purposes connected with the order of death. A presumption should not be regarded as having effect at one moment and a moment later to be set aside by another, when, as here, the first presumption is declared to be the prevailing one. Moreover, the Commorientes Act applies only where there is uncertainty as to which survived; here the matter is made certain by the operation of Sec. 123. In *re estate of George Thomas Law, deceased,* (1945) 62 B.C.R. 380; (1946) 2 D.L.R. 378; (1946) 2 W.W.R. 405.

II. Documentary Evidence.

A. In General.

1. Report of Royal Commission.]—For the purpose of examining the effect of legislation being attacked as ultra vires, the Court may look at a report of a Royal Commission laid before the Legislature before the passing of the impugned Act, to ascertain what was present to the mind of the Legislature at the time, but the statements therein contained are not to be taken as facts. *Home Oil Distributors Ltd.* v. *Attorney-General of British Columbia* (1940) 2 D.L.R. 609; affirming (1939) 54 B.C.R. 48; (1939) 3 D.L.R. 397. See 53 B.C.R. 355; (1939) 1 D.L.R. 573.

2. Proof of approval of President of the United States to regulations.]—The combined effect of Sec. 35 of the Canada Evidence Act and Sec. 28 (4) of the British Columbia Evidence Act is to afford proof of a state document viz. the Pacific Halibut Fishery Regulations as published in the Canada Gazette. Their approval by the "Governor-General in Council" is tantamount to approval by the "Governor-General." *Rex* v. *Wedge,* (1939) 4 D.L.R. 323, 73 C.C.C. 58.

3. Declaration of Railway Board—made after the event.]—In an action for negligence against a railway company based on an improperly placed and painted warning sign at a road crossing, the trial judge rejected a declaration of the Railway Board, made after the accident, that the protection afforded at the crossing was satisfactory. While the Board was a statutory Court and had plenary powers within the ambit of its jurisdiction, its declaration speaks and operates from the time when it was made. The declaration was properly rejected. *Chesworth* v. *Canadian Northern Pacific Railway Co.,* (1941) S.C.R. 201; (1940) 4 D.L.R. 577; reversing (1939) 54 B.C.R. 529; (1940) 2 D.L.R. 334; (1940) 1 W.W.R. 643.

4. Deposition taken on preliminary inquiry—witness deceased.]—Under Secs. 999 and 1000 of the Criminal Code the depositions of a deceased Crown witness, who was cross-examined at the preliminary hearing, may be used at the trial, notwithstanding that the charge upon which the accused was committed was not technically the one upon which the magistrate held the inquiry. *Rex* v. *Banta Singh* (1942) 58 B.C.R. 213; (1942) 4 D.L.R. 795 (1942) 3 W.W.R. 474, 78 C.C.C. 266.

5. Admissibility of documents produced in another proceeding by witness there protected by Sec. 5 of Canada Evidence Act.]—The appellants were convicted of conspiracy to defraud. Prior to their prosecution a commissioner under the Departmental Inquiries Act had required production of certain books and one of the appellants, in producing them, had claimed the protection of the Canada Evidence Act. The Crown put them in evidence at the trial against the objection that they were privileged, just as the answers, given by the witness before the commissioner, were. Held, on appeal, affirming the conviction, the books were properly admitted. The Departmental Inquiries Act empowered the Commissioner to compel their production whether they were incriminating or not. The Canada Evidence Act (Sec. 5) is limited to answers by witnesses and says nothing about documents. The claim that what was said amounted to a confession given under compulsion by the Commissioner was met by the principle that it was not the Commissioner who did the compelling but the statute. Statements made under compulsion of a statute are not inadmissible because they tend to incriminate. *Rex* v. *Simpson,* (1943) 59 B.C.R. 132, 79 C.C.C. 344; (1943) 3 D.L.R. 355; (1943) 2 W.W.R. 426. Leave to appeal to the Supreme Court of Canada refused (1943) 3 D.L.R. 367, 80 C.C.C. 78.

6. Whether conviction affords proof of matter against the same person in civil

action.]—The applicant in a proceeding to recover possession under Sec. 29 of the Landlord and Tenant Act proposed to prove that the tenant had maintained on the premises a disorderly house, and hence had broken his covenant not to maintain a nuisance thereon. He filed a certificate from the police court proving the tenant's conviction as keeper of a disorderly house on the premises. Held, dismissing the application, that the certificate was not proof that the tenant did maintain a disorderly house as alleged. *La Fonciere Compagnie d'Assurance de France* v. *Perras,* (1943) S.C.R. 165 followed. *Secretary of State* v. *Quon Hon* (1943) 59 B.C.R. 330; (1943) 4 D.L.R. 704; (1943) 3 W.W.R. 263.

7. Convicting judge's report under Sec. 1020 of the Criminal Code.]—The trial judge through illness was delayed in making his report under Sec. 1020 of the Criminal Code. By the time it reached the Court of Appeal it had already partly heard the appeal and had ruled certain evidence to be inadmissible. Held, the report should not in the circumstances be considered. *Rex* v. *Northey,* (1948) S.C.R. 135; (1948) 3 D.L.R. 145; reversing (1947) 63 B.C.R. 515; (1947) 4 D.L.R. 774; (1947) 2 W.W.R. 289.

8. Evidence taken by investigator under Department of Munitions and Supply Act.]—On a charge of conspiracy to defraud the Government, statements which had been made some time earlier to an investigator under the Department of Munitions and Supply Act were admitted in evidence. The Act states that no information with respect to an individual business which is obtained by virtue of the Act shall be disclosed without the consent of the person carrying on that business. Held, on appeal, the evidence was improperly admitted. *Rex* v. *Northey* (1948) S.C.R. 135; (1948) 3 D.L.R. 145, 91 C.C.C. 193; reversing (on another point) (1947) 63 B.C.R. 515; (1947) 4 D.L.R. 774, 89 C.C.C. 254.

B. Official Records.

1. Production of records of Provincial Department of Health re venereal diseases.]—A witness was under subpoena to produce certain records of the Department of Health compiled under the Venereal Diseases Suppression Act. The witness by direction of the Minister, objected to their production on the ground that they were confidential and that to produce them would be contrary to public interest. Held, the witness should not be required to produce the records and the same principle applies to the exclusion of oral evidence which if given would jeopardize the interests of the community. Quare, whether the Minister's objection should be taken as conclusive without more. *Murray* v. *Murray,* (1947) 63 B.C.R. 540; (1947) 3 D.L.R. 236.

2. Photostatic copy of certificate of naturalization abroad.]—In proceedings leading to forfeiture of a ship it was necessary to prove the identity of the person named in a declaration of ownership of a vessel, with one named in a United States naturalization certificate. Sec. 8 of the "Canada Evidence Act" authorizes the comparison of handwriting to be submitted as evidence. Held, that while it is not necessary to decide whether such comparison involves the actual production of the writings, the production of a photostatic copy of a certificate of naturalization issued by a foreign court, may not be used for the purpose of such comparison; the Court may examine it only for the purpose of ascertaining the contents of the original. *The King* v. *The ship "Emma K",* (1936) S.C.R. 256; (1936) 3 D.L.R. 385 affirming (1935) 50 B.C.R. 97; (1935) 3 D.L.R. 673 (1936) Ex. C.R. 92 (Distinguished, *State of New York* v. *Wilby* (1944) 60 B.C.R. 370).

3 Royal Commissioner's report.] — The report of a commissioner under the Public Inquiries Act of the Province is admissible in evidence in so far only as it finds facts which are relevant to the ascertainment of the alleged purpose and effect of the statute being construed. *Home Oil Distributors Ltd.* v. *Attorney-General of British Columbia,* (1938) 53 B.C.R. 355; (1939) 1 W.W.R. 49 (See (1940) 2 D.L.R. 609).

IV. Parol and Extrinsic Evidence.

1. Will—Affidavits to show intention of testator.]—There is but one case in which evidence of the intention of the testator can properly be admitted; that is, where the meaning of the will is neither ambiguous or obscure, and where the devise is, on the face of it, perfect and intelligible, but an ambiguity arises as to which of two or more things or persons is meant. In *re estate of Katherine Dixon, deceased,* (1935) 50 B.C.R. 285; (1935) 3 W.W.R. 118; (1936) 1 D.L.R. 593.

2. Meaning of words—"cost of annual overhaul" of vessel.]—The trial judge heard witnesses for both sides as to the meaning to be given the phrase "cost of annual overhaul" in an agreement for the hire of a ship. Held on appeal, varying the decision below, the phrase is an ambiguous expression of loose and inexact meaning, and accordingly evidence dehors the written agreeement was essential to explain the meaning or meanings of which it is capable in relation to the subject-matter respecting which it was used. It could not be ruled out on the ground that it was evidence of a custom or trade usage which had not been pleaded. Per Robertson, J.A. the construction or meaning of the words was for the Court, having in mind the surrounding circumstances which prevailed when the contract was made, unless there was something peculiar to the words by reason of the custom of the trade, or otherwise; and there was no evidence that such was the case. The evidence was not admissible. *Galt* v. *Frank Waterhouse & Co of Canada Ltd.,* (1943) 60 B.C.R. 81; (1944) 2 D.L.R. 158; (1944) 1 W.W.R. 657. Varying (1943) 59 B.C.R. 152; (1943) 3 D.L.R. 708.

3. Contract to be ascertained from letters—whether whole correspondence to be considered.]—It was contended that two letters of an extended correspondence contained the contract, if any, and that they alone should be looked at. Held, the whole should be considered. There was no evidence to show that the two letters were written to formulate precisely, or actually did reduce fully to writing, the intentions of the parties. *Lyford* v. *Cargill Co. of Canada Ltd.,* (1943) 59 B.C.R. 492; (1944) 1 D.L.R. 696; (1944) 1 W.W.R. 273; affirming (1943) 3 W.W.R. 81.

4. How extrinsic evidence of testator's circumstances is to be considered.]—Where there is a latent ambiguity, it must often be the case that its very existence can only be made apparent by the reception of parol evidence. The question was whether a brother's widow was included in the testator's bequest to "my brothers and their families". The judge admitted evidence of the number, age and status of the brothers, and the condition of the brother's wife. Held, the facts shown to have been known to the testator were such as to indicate that he meant the word "family" to bear the ordinary and primary meaning and that he intended to benefit persons of his own blood. *Matheson* v. *Norman* (1947) 1 D.L.R. 71.

V. Opinions.

1. Fingerprints—whether evidence per se as in the case of handwriting.]—Evidence given by an expert as to identity of fingerprints is opinion evidence and not evidence per se. There is no statutory provision as to fingerprints such as sec. 8 of the Evidence Act (Canada) dealing with disputed writing where a comparison may be evidence of the genuineness or otherwise of the writing. The Identification of Criminals Act and the orders in council thereunder merely authorize the fingerprints to be taken; they may be used for the purpose of assisting the expert to give his opinion, and to explain his opinion, but only for that purpose. *Rex* v. *DeGeorgio,* (1934) 3 W.W.R. 374.

2. Testimony of expert — question of unsoundness of mind.]—In an action for a declaration that a settlor was of unsound mind the judge declined to accept the conclusions of an expert who never saw or examined the settlor, and who based his opinions on assumptions, some not proved and others put to him in the absence of proof of the surrounding circumstances. Expert opinions should be carefully scrutinized and the Court should not abrogate its function of drawing its own conclusions. *Young* v. *Toronto General Trusts Corporation,* (1939) 54 B.C.R. 284; (1939) 4 D.L.R. 766; (1939) 3 W.W.R. 117.

3. Effect of fingerprinting person on bail—use of in another proceding.]—The accused was out on bail on another charge when the police took his fingerprints and as a result arrested and charged him. At his trial on this charge it was contended that the fingerprinting could not be used against him as he was not at the time under arrest or charged with this offence. Held, admitting the evidence, the accused was in lawful custody on the first charge when brought back as he was. *Rex* v. *Buckingham* (1946) 1 W.W.R. 425; 86 C.C.C. 76.

4. Fingerprints — opinion evidence and admissible as such—its weight is for the jury.]—There was no evidence for conviction except that of fingerprints. Held, where the experts have given the basis for their opinions the evidence is admissible. The weight and value of it are questions for the jury after the usual directions as to reasonable doubt and circumstantial evidence. The accused was acquitted. *Rex* v. *Buckingham,* (1946) 1 W.W.R. 425; 86 C.C.C. 76.

5. Handwriting—whether evidence sufficient.]—On a charge against a physician for giving a prescription for liquor to other than a bona fide patient in a case of actual need, it was necessary to prove that the prescription in question was signed by the accused. A witness said he concluded it was signed by the accused because of the similarity of the signature to that on many other prescriptions purporting to have been issued by the accused. Held, the evidence was not competent. *Rex* v. *Arthur,* (1946) 63 B.C.R. 557; 89 C.C.C. 204; reversing (1946) 3 W.W.R. 60; 86 C.C.C. 371.

VI. Hearsay.

A. In General.

1. Whether inadmissible as hearsay or admissible as secondary evidence.] — A police officer in giving evidence of the serial numbers of certain stolen articles refreshed his memory by looking at a typewritten list of the numbers. It was shown that the typewriten list had been copied from a written list made by an employee of the owner of the goods and that the original written list had been discarded. The Crown did not offer the typed list in evidence, but counsel for the defence insisted that it be filed as an exhibit. On appeal it was contended that what had occurred was tantamount to the witness repeating a conversation with the employee as to the numbers. Held, it was not hearsay but secondary evidence. The absence of the primary evidence, i.e. the written list, was explained and the secondary evidence, i.e. the typed list was permissible for the purpose for which it was used. *Rex* v. *Kearns,* (1945) 61 B.C.R. 278; (1945) 3 D.L.R. 645; (1945) 2 W.W.R. 477; 84 C.C.C. 357.

B. Statements by Persons Since Deceased.

1. Dying declaration.]—On a trial for counselling an abortion the judge allowed the dying declaration of the deceased woman to go to the jury. It was a lengthy narrative which, day by day, she had related to her mother, who wrote down the story. The jury convicted of manslaughter on the strength of the declaration. Held by the Court of Appeal, that it was part of the res gestae and admissible. Held, on further appeal to the Supreme Court of Canada quashing the conviction, that dying declaration are competent only in homicidal cases, and then only in so far as the statements therein could have been given in evidence by the deceased had she lived. A great part of the narrative was irrelevant and not part of the res gestae. The judge, notwithstanding his instructions to the jury to disregard portions of the narrative, erred in permitting the whole of such a lengthy statement to be put in evidence. *Rex* v. *Schwartzenhauer,* (1935) S.C.R. 367; (1935) 3 D.L.R. 711; 64 C.C.C. 1; reversing (1935) 50 B.C.R. 1; (1935) 2 D.L.R. 739; (1935) 2 W.W.R. 146; 63 C.C.C. 269.

2. Dying declaration.]—In cases of homicide dying declarations are admissible only after the most careful scrutiny of the circumstances in which the declaration was made. They need not be made in expectation of "immediate" death nor need the declarant to have died immediately. The test is: Was the declarant at the time of the declaration utterly without expectation of recovery from his then illness? If there is a doubt as to its admissibility it should be resolved in favour of the accused. *Rex* v. *Jean McIntosh,* (1936) 51 B.C.R. 148; (1936) 3 W.W.R. 456, 67 C.C.C. 143. New trial ordered on another point, (1937) 52 B.C.R. 249; (1937) 2 W.W.R. 1; (1937) 4 D.L.R. 478; 69 C.C.C. 106. (See also (1938) 1 W.W.R. 211).

3. Right to refute statements in dying declaration.]—Where a dying declaration as to the cause of death is admitted, it is open to the accused to challenge and refute the statements made against him. Where the evidence of a witness tended to contradict the declaration and the trial judge withdrew the evidence from the jury, a new trial was ordered. *Rex* v. *Jean McIntosh,* (1936) 51 B.C.R. 148; (1936) 3 W.W.R. 456; 67 C.C.C. 143; new trial ordered on another point, (1937) 52 B.C.R. 249; (1937) 2 W.W.R. 1; (1937) 4 D.L.R. 478; 69 C.C.C. 106. (See also (1938) 1 W.W.R. 211).

4. Dying declaration — interval before death occurred.]—To make a dying declaration admissible there must be a settled hopeless expectation of impending death. When the declarant lived for six and one-half weeks the declaration was nevertheless received. The lapse of a considerable interval does not make the declaration inadmissible if at the time it was made the declarant had a conviction of immediately impending death. *Rex* v. *Jean McIntosh,* (1937) 52 B.C.R. 249; (1937) 4 D.L.R. 478.

5. Statements made by deceased.] — On an application under the Testator's Fam-

ily Maintenance Act material and viva voce evidence containing statements by the deceased testator were admitted, not as proof of the facts stated by him, but as showing his state of mind. In *re Gouge Estate,* (1937) 52 B.C.R. 544; (1938) 2 D.L.R. 800; (1938) 1 W.W.R. 832.

C. Statements Made in Presence of a Party.

1. Statement made in presence of accused—no denial by him—effect of.] — On a charge of receiving stolen goods, it was necessary to prove that they were stolen. The alleged receiver was in police court when another man pleaded guilty to their theft. It was contended that the accused by remaining silent when the statement was made in his presence was bound by it. Held, quashing the conviction, that there was no proof that the goods were stolen. The rule is that no one shall be taken, from his silence, to admit the truth of a statement made in his presence unless it is made of an occasion when a reply from him might be properly expected. Here no one would expect the accused to rise in the midst of the trial of another person to protest against a statement being made by a person charged with an offence, or by anyone else. *Rex* v. *Keiwitz,* (1941) 57 B.C.R. 85; (1941) 4 D.L.R. 746 (1941) 3 W.W.R. 693; 76 C.C.C. 369.

2. Statement made in the presence of the accused.]—A police officer testified at a murder trial that shortly after the killing he heard a person in the presence of the accused say (indicating the accused) "he shot him" (indicating the deceased) and that the accused had said nothing in reply. The rule is that such a statement, even when a denial would reasonably be expected, is not evidence against the accused except in so far as he accepts the statement so as, in effect, to make it his own. In practice such evidence is not allowed in until a foundation has been laid by satisfying the trial judge that the accused had by his conduct, action or demeanor made the statement his own. *Rex* v. *Harrison (No. 2),* (1945) 62 B.C.R. 420; (1946) 3 D.L.R. 690; 86 C.C.C. 166.

D. Admission and Confessions.

1. Statement by accused to person in authority.] — While the accused was in hospital he made certain statements suggestive of his guilt to a doctor attending him. The trial judge allowed the statements to be put in evidence before the jury. Held, on appeal, that in the circumstances, the evidence was admissible, the doctor not being a person in authority within the rule as to voluntary statements. *Rex* v. *Roadhouse,* (1933) 48 B.C.R. 10; (1934) 1 W.W.R. 349; 61 C.C.C. 191.

2. When admissions of one defendant may be used against another.]—A mere allegation of the existence of a conspiracy and common design is not sufficient to render an admission competent against parties other than the declarant; it must appear that there existed at the time when the statement was made, an agreement to carry out the common purpose by united effort. *Consolidated Coal Co. Ltd.* v. *Big Chief Woodyard Ltd. et al,* (1933) 48 B.C.R. 241; (1934) 3 D.L.R. 668; (1934) 2 W.W.R. 433.

3. Whether statement voluntary or in answer to a command.]—A police officer executing a search warrant called together the accused and a woman who was there, and without warning them, elicited the information that the accused was the responsible tenant of the premises. Held, the admission was not a voluntary one as the officer's question was in the circumstances tantamount to a command, nothwithstanding that the accused was not under arrest and had not then been charged. *Rex* v. *Minogue,* (1935) 50 B.C.R. 259; (1935) 3 W.W.R. 337; 64 C.C.C. 318.

4. Effect of admission made by joint-contractor after death of defendant.] — At the close of the plaintiff's case, the defendants, executors of M., applied for a non-suit and called no evidence. To make out a case against them it would be necessary to accept an admission by a joint-contractor with M. taken on discovery. It was not necessary to decide whether the discovery evidence was admissible or not because the admission took place after M.'s death. Where a joint contract is severed by the death of one of the contractors, nothing that is subsequently done or said by the survivor can bind an executor of the deceased. *Bennett* v. *Fraser,* (1936) 2 W.W.R. 616.

5. Admissibility—trial within a trial.]—The issue as to the admissibility or otherwise of a statement by an accused person should be tried immediately, and all witnesses having any knowledge of the facts relating to

the making of the statement should be called. *Rex* v. *Pais,* (1941) 56 B.C.R. 232; (1941) 2 D.L.R. 748; (1941) 3 W.W.R. 278; 75 C.C.C. 318.

6. Statement excluded — cross-examination of accused thereon.]—The convicting magistrate excluded a statement alleged to have been made to a police officer, on the ground that it was not free and voluntary. He afterwards permitted the prosecution to cross-examine the accused on the statement. Held, on appeal ordering a new trial, that the magistrate erred in permitting the cross-examination; the excluded testimony should be treated as non-existent. It was further held that the Crown could not, at this stage, ask the Court to determine the question of the admissibility or otherwise of the alleged statement. *Rex* v. *Byers,* (1942) 57 B.C.R. 336; (1942) 2 D.L.R. 104; (1942) 1 W.W.R. 587; 77 C.C.C. 164.

7. Two accused tried together — one convicted wrongly because Crown cross-examined on excluded statement—effect on other accused.]—The convicting magistrate trying two accused together excluded a statement alleged to have been made by one of them but permitted the prosecution to cross-examine him on it. The Court of Appeal ordered a new trial in his case. On appeal by the other accused a new trial was also directed. The evidence of the one alleged to have made the statement was weakened by the cross-examination and his credibility destroyed. The magistrate was influenced in his decision against the other accused by that fact. *Rex* v. *Oleschuk,* (1942) 57 B.C.R. 344; (1942) 2 D.L.R. 104; (1942) 2 W.W.R. 49; 77 C.C.C. 172.

8. Murder — confession containing admission of theft of revolver—whether prejudicial to accused.]—The accused was convicted of murder. He had signed a statement confessing that he had shot the victim with a revolver stolen from the Seaforth Armories. The trial judge held the statement to be voluntary and admitted it in evidence. The accused gave evidence and denied the killing. On appeal it was contended that the introduction of the evidence of theft of the revolver was not material and was calculated to prejudice the jury against the accused. It was held, affirming the conviction, that the evidence was properly admitted as the weapon in question was the one, as the Crown alleged, from which the fatal shot was fired, and evidence tracing its possession to the accused was relevant and cogent even if in the process of proof, the fact that he had stolen it might emerge. Held, on further appeal to the Supreme Court of Canada, affirming the conviction, the evidence of the theft of the revolver was admissible and the mention in the confession of the circumstance that the revolver had been stolen did not vitiate it. *Thiffault* v. *Regem,* (1933) S.C.R. 509 explained. *Rex* v. *Beatty,* (1944) S.C.R. 73; (1944) 1 D.L.R. 689; 81 C.C.C. 1; affirming (1943) 59 B.C.R. 211; (1943) 3 D.L.R. 584; (1943) 2 W.W.R. 449; 80 C.C.C. 1.

9. Admissions against interest — questions of weight.]—In a case where a husband had put property in his wife's name and claimed it back, the trial judge admitted evidence of the wife's admissions that he was the real owner, made after her acquisition of title. Per McDonald C.J.B.C. Admissions against interest, whenever made, are always evidence against the maker, even though their weight will vary and may even dwindle to the vanishing point. *Cole* v. *Cole,* (1944) S.C.R. 166; (1944) 2 D.L.R. 798; affirming (1943) 59 B.C.R. 372; (1944) 1 D.L.R. 37; (1943) 3 W.W.R. 532.

10. Whether voluntary — statutory declaration.]—The accused was convicted of arson. The Crown put in evidence a statutory declaration in which he confessed that he had deliberately set fire to his house. At the trial within the trial it was shown that he had been amply warned and that no threats or inducements had been made or offered by the persons in authority who questioned him. Held, affirming the trial judge, the statement was voluntary and admissible. The accused may have believed that by making the confession he was shielding his brother, or was avoiding a prosecution for perjury, but that belief was not induced by the questioners. *Rex* v. *Weighill,* (1945) 61 B.C.R. 140; (1945) 2 D.L.R. 471; (1945) 1 W.W.R. 561; 83 C.C.C. 387.

11. Whether voluntary—trial within a trial.]—It was contended that the County Court Judge did not indicate that he was holding a trial within a trial and that he should have told the accused of his right to give evidence at that stage. Held, the accused was represented by counsel and in the circumstances the failure to tell the accused he might testify was not error. All the Crown's evidence on the point was put before the judge who found that the statement had been made voluntarily after a

proper warning. The appeal was dismissed. Per O'Halloran J.A. the voluntary statements were not confessions but exculpatory in character and did not come within the rule as to confessions. *Rex* v. *Mandzuk* (1945) 62 B.C.R. 16; (1946)1 D.L.R. 521; (1945) 3 W.W.R. 280; 85 C.C.C. 158.

12. Written statement—whether voluntary—trial within a trial.]—The constable who executed the warrant gave the accused the usual warning. He made no reply. Later at the police office the constable again warned the accused. In giving his evidence the constable said that as a result of the last warning the accused wrote out the statement in question in his own handwriting. The boy's father who was present at the arrest, was not called. There was no further cross-examination. The accused was not told of his right to testify as to the admissibility of the confession. There was no statement by the constable that the confession was made freely and voluntarily nor was he examined as to the circumstances under which the confession was made. Held, reducing the charge, there was not sufficient inquiry upon the trial within the trial to warrant the admission of the evidence. *Rex* v. *O'Hara,* (1946) 63 B.C.R. 380; (1947) 3 D.L.R. 154; (1947) 1 W.W.R. 472; 88 C.C.C. 74.

13. Confession or no confession.]—The accused was in a jewellery store about 4:30 p.m. At about 8 p.m. of the same day the police were questioning him about the theft of three watches from the store. He was asked what he had in his pockets and thereupon produced the stolen watches. On appeal it was objected that this was a confession and that there was no trial within a trial to ascertain whether the "confession" was free and voluntary. Held affirming the conviction, what took place was not a confession. All statements by an accused person to a police officer are not confessions, but only those which are inculpatory; not exculpatory or otherwise. The officer could have got the same result by searching the accused which he would have been entitled to do. *Rex* v. *Angelucci,* (1946) 63 B.C.R. 294; (1947) 1 W.W.R. 82; 88 C.C.C. 111.

VII. Relevancy and Materiality.

A. In General.

1. When statements by one defendant may be used against another.] — The plaintiff alleged that the defendants J. and M. (directors of the plaintiff company) had acquired a contract to carry on a lucrative business which ought to have belonged to the plaintiff. The trial judge found the defendants guilty of fraud as against the plaintiff and ordered them to pay the profits obtained. He based his decision largely on the actions, statements and admissions of J. and justified using the admissions of one against the other on the ground that they were joint contractors. Held, on appeal, directing a new trial, that it was improper to admit J.'s statements on the issue of M.'s credibility until the trial judge had satisfied himself that a prima facie case of fraudulent concerted action had been established. Statements of one of the persons alleged to be engaged in the common design are not admissible to prove its existence but may be received in corroboration if sufficient evidence is produced aliunde. *Consolidated Coal Co. Ltd.* v. *Big Chief Woodyard Ltd. et al,* (1933) 48 B.C.R. 241; (1934) 3 D.L.R. 668; (1934) 2 W.W.R. 433.

2. Res gestae.]—The accused was convicted of the murder of a police constable. Evidence was admitted of acts subsequent to the killing culminating in the disposal of the bodies of the constable and another officer. Held, the evidence was admissible as part of the res gestae, and it was necessary to present the whole story to the jury. *Rex* v. *George,* (1934) 49 B.C.R. 345.

3. To show intent and effect of orders of statutory Board.]—In certain cases, in order to avoid confusion extraneous evidence is required to facilitate the analysis of legislative enactments, and thus disclose their aims which otherwise would remain obscure or even completely obscured. If it were held that such evidence may not be allowed and that only the form of an Act may be considered, then colourable devices could be used by legislative bodies to deal with matters beyond their powers. *Turner's Dairy Ltd.* v. *Lower Mainland Dairy Products Board,* (1941) S.C.R. 573; (1941) 4 D.L.R. 209; affirming (1940) 56 B.C.R. 103; (1941) 2 D.L.R. 279; (1941) 3 W.W.R. 342 affirming (1940) 3 W.W.R. 42.

4. Evidence of another crime—possible influence on magistrate.] — The accused was convicted of living in part on the earnings of prostitution. There was evidence that the accused had supplied narcotics to the woman in question. In convicting, the magistrate attached great significance to that factor and the Court of Appeal ordered

a new trial on the ground that the narcotic aspect was given too great prominence, and might have influenced the magistrate in arriving at his decision to convict. *Rex* v. *Hong*, (1944) 1 D.L.R. 80; (1943) 3 W.W.R. 223; 80 C.C.C. 343.

5. Chiropractor—allegation of malpractice — character of evidence required.] — The plaintiff went to the defendant, a chiropractor, for treatment. In an action for malpractice medical experts were called for the plaintiff; they testified that the defendant's treatment was not beneficial to the plaintiff. Held, dismissing the action, that the plaintiff desired chiropractic treatment and should have offered evidence by persons engaged in treatment by chiropractic methods. It would be unfair to accept tests laid down by those who use a different method entirely and disapprove of chiropractic treatment. *Cawley* v. *Mercer*, (1945) 1 D.L.R. 904; (1946) 3 W.W.R. 369; 86 C.C.C. 410.

B. Similar Acts.

1. Criminal charge: proof of similar acts.]—On a trial for incest before a jury the judge allowed evidence to be given of earlier acts of the same kind. The accused was convicted. Held, on appeal, that the evidence was admissible. *Rex* v. *Pegelo*, (1934) 48 B.C.R. 146; (1934) 2 D.L.R. 798. (1934) 1 W.W.R. 573; 62 C.C.C. 78.

2. Prior similar acts — admissibilty.] — The accused was charged with having unlawfully used an instrument on another woman with intent to procure a miscarriage. The Crown called the woman upon whom the alleged operation was performed, and then tendered evidence that on previous occasions the accused had done the like with other women. The trial judge rejected the evidence and the accused was acquitted. Held, on appeal directing a new trial, that the evidence of other similar acts should have been admitted. The gist of the offense is intent and any evidence disclosing it is admissible. Repeated use tends to make it more probable that the intent was of a criminal nature. *Rex* v. *Anderson*, (1935) 50 B.C.R. 225; (1935) 4 D.L.R. 432; (1935) 3 W.W.R. 272; 64 C.C.C. 205.

3. Cross-examination of accused as to other acts—misconception by trial judge.] The accused was convicted of stealing potatoes. On appeal a new trial was ordered. The Crown Counsel at the trial had cross-examined the accused as to other acts which bore no similarity to the offence charged, e.g. as to his failure to pay for potatoes bought from others. In England, this questioning might be considered improper but there is not the same limitation on the right of cross-examination here. Although the other purchases involved only a payment in part and non-payment of the balance, the trial judge based his rejection of the accused's story of his conduct in respect of other purchases which he said was "so exactly and precisely in accordance with the treatment of others, that I do not believe him." There was no similarity whatever between the two transactions. *Rex* v. *Sidney Miller*, (1940) 55 B.C.R. 204; (1940) 4 D.L.R. 763; 74 C.C.C. 270.

4. Evidence to show abnormal criminal propensity—identity where alibi set up.] — The accused was convicted of indecent assault. His defence was an alibi and he went to the witness box and testified he was elsewhere at the time of the offence. The prosecution, on cross-examination, brought out that he had been convicted before of a similar offence. He was cross-examined at length on the previous proceedings. His counsel contended that although the accused could be questioned as to whether he had been previously convicted there was no right to go further and cross-examine. Held, affirming the conviction, that where the defence set up is mistaken identity, evidence was admissible which tended to show that the accused was a person with an abnormal criminal propensity of the nature disclosed by the offence with which he was charged. The propensity made the circumstances of the previous conviction relevant as to identification of the criminal in this case with the criminal in the former conviction. *Rex* v. *Lyons*, (1944) 60 B.C.R. 250; (1944) 4 D.L.R. 206; (1944) 2 W.W.R. 129; 81 C.C.C. 280.

5. Evidence of similar acts — false pretences.]—The accused was convicted of obtaining money by false pretences from a woman from whom he took $1,000 to build her a house, on the representation that he had bought and paid for and had the necessary materials for the purpose. The prosecution put in evidence of similar transactions by the accused. Held, on appeal, affirming the conviction, that evidence of similar acts if they tend to prove identity, intent or system are relevant to any issue before the Court. The impugned evidence here was

admissible to show that the pretence charged was part of a systematic fraud. *Rex* v. *Penney*, (1944) 60 B.C.R. 348; (1944) 3 D.L.R. 453; (1944) 2 W.W.R. 173; 81 C.C.C. 343.

6. Prior similar acts — whether admissible on charge of abortion where sole question was, "Did he do it?"] — The accused was convicted under sec. 303 of the Criminal Code. At the opening of the trial Crown Counsel said the defence was a simple denial; that the accused had had nothing to do with the complainant. Later the judge received evidence of similar operations performed by the accused, over the objection by his counsel that the defence was, as stated in the opening, that the accused had had nothing to do with the complainant. Held, on appeal directing a new trial, the evidence was wrongly admitted in a case where, as here, the defence was a categorical denial that the accused was the man who had committed the crime. It would have been relevant if it bore on the question whether the act to be proved was designed or accidental, but not for the purpose of suggesting that the accused was a person likely from his prior criminal conduct, to have committed the offence with which he was charged. Here the defence displaced any need on the part of the Crown to prove "intent"; it was left with the sole duty (after bringing forward the evidence of the complainant) of establishing that the accused was, in fact, the man. Upon proof of this single issue the accused must have been found guilty. The question of intent was not in issue and hence the impeached testimony was inadmissible. *Rex* v. *Campbell*, (1946) 63 B.C.R. 279; (1947) 1 D.L.R. 904; (1946) 3 W.W.R. 369; 86 C.C.C. 410.

7. Subsequent similar acts — admissible as showing a system or method.]—In a libel action the defendant sought to show that the plaintiff had made representations in her sales talk to G. which justified the alleged libel. The trial judge excluded the testimony of witnesses upon whom the plaintiff had called after her call on G. although it was common ground that the plaintiff's approach was the same throughout. Held, on appeal, ordering a new trial, that the evidence should have been admitted to show the plaintiff's method of approach, a systematic method pursued throughout aimed at making the same type of contract as that proposed to G. As the system was used both before and after the plaintiff's talk with G. the fact that the proposed evidence dealt with a subsequent occasion made no difference. *Hare* v. *Better Business Bureau of Vancouver*, (1946) 63 B.C.R. 241; (1947) 1 D.L.R. 280; (1947) 1 W.W.R. 25; reversing (1946) 63 B.C.R. 24; (1946) 2 W.W.R. 630.

VIII. Weight; Effect; Sufficiency.

A. In General.

1. Misdirection not to be assumed — attitude of Appellate Court.]—Unless the reasons of the trial judge point clearly to the contrary, an Appellate Court will not assume misdirection and where there is evidence on which a conviction can be supported and the judge has expressed the weight and value to be attributed to it, his finding should not be disturbed. *Rex* v. *Yip Sing*, (1935) 2 D.L.R. 479. Appeal to Supreme Court of Canada dismissed for lack of jurisdiction, (1935) 3 D.L.R. 798.

2. Circumstantial evidence — failure by magistrate to apply the principle in Hodge's case.]—The accused was convicted of theft. On appeal, directing a new trial, it was held that the magistrate misdirected himself by relying on circumstantial evidence in a way not consistent with the rule in Hodge's case. (1838) 2 Lewin C.C. 227. *Rex* v. *Asplund*, (1943) 1 W.W.R. 757.

3. Complaint of indecent assault by child to mother — 24 hours after alleged offence.] — A complaint is admissible only where it is made immediately after the offence, or at the first convenient or reasonable opportunity thereafter. Where the complaintant made a complaint to her mother 24 hours after the event although they had been together much of the time, the evidence was clearly inadmissible and must necessarily have been prejudicial to the accused. *Rex* v. *Marsh*, (1940) 55 B.C.R. 484; (1941) 1 D.L.R. 431; (1940) 3 W.W.R. 621; 74 C.C.C. 312.

4. Preponderance sufficient in Immigration Inquiry.]—The applicant was refused entry by a Board of Inquiry under the Immigration Act. On habeas corpus the judge refused the writ because he was not satisfied "beyond a reasonable doubt" that Canadian citizenship had been established. Held, on appeal, reversing the judge, the burden applicable to criminal proceedings should not have been imported into this matter, which is a civil one. A preponder-

ance of evidence is sufficient. *Rex* v. *Soon Gim An,* (1941) 56 B.C.R. 193; 75 C.C.C. 352.

5. One witness remembering, the other doubtful.]—As between truthful witnesses one who swears positively to the words used in a conversation will be believed rather than one who does not admit that the words were used, but says that it is possible they were. The case here is stronger than the principle in *Lane* v. *Jackson,* (1855) 20 Beav. 535, in respect of such witnesses. If "one states positively that it took place and the other as positively denies it, I believe that the words were said, and that the person who denies has forgotten the circumstances." *Lawson* v. *W. R. Carpenter Oversea Shipping Ltd.* (1944) 60 B.C.R. 536; (1944) 4 D.L.R. 784; (1945) 1 W.W.R. 5.

6. Imputation of crime in civil cases—degree of proof.]—There is in the law of evidence a legal presumption against the imputation of crime, requiring before crime can be held to be established, proof of a more cogent character than in ordinary cases where no such imputation is made. *Van Snellenberg* v. *Cemco Electrical Manufacturing Co. Ltd.,* (1946) 4 D.L.R. 305; (1947) S.C.R. 121; affirming (1945) 61 B.C.R. 507; (1946) 1 D.L.R. 105; (1945) 3 W.W.R. 369.

7. Experts as against eye witnesses.]—The Court should not permit the evidence of experts, simply because it is expert testimony, to outweigh and prevail over the testimony of eye witnesses, based on the evidence of their own senses. *McClure* v. *O'Neil,* (1945) 61 B.C.R. 544; (1945) 4 D.L.R. 373; (1945) 3 W.W.R. 641.

8. Dealing with forged cheque — circumstantial evidence.]—M. and the appellant were charged with dealing with a forged cheque and M. pleaded guilty. The evidence against the appellant fell short of proving that he had any actual part in "dealing with" the cheque. He stood near when M. cashed it; he was seen to hand something to M.; they were together shortly before and after the cheque was cashed; he had a quantity of ten dollar bills in his possession, but they were not identifiable as those given for the cheque. Held, quashing the conviction, the rule in Hodge's case was not satisfied. *Rex* v. *Rea,* 84 C.C.C. 110.

9. Sufficiency of evidence that appellant was a physician and that a prescription was given.]—A conviction that the appellant, being a physician, unlawfully gave a prescription for liquor to other than a bona fide patient was affirmed. The liquor vendor testified that he was well acquainted with the appellant's prescriptions for liquor and the one in question bore the usual signature in the green ink used by the appellant. It had printed on it the usual information found on prescriptions including the name, address and telephone number of the appellant. The evidence of the vendor stood unchallenged and there was no cross-examination on these points. *Rex* v. *Arthur,* (1946) 3 W.W.R. 60.

10. Contradictory statements to be weighed by the jury.]—On a question of the identification of the accused by two witnesses it was shown that they had made contradictory statements on previous occasions, and as to one of the witnesses, had sworn to the contrary on a previous trial. They gave explanations why they had done so. It was contended on appeal that the trial judge should have told the jury to discard their evidence entirely. Held, affirming the conviction, the weight of the evidence was for the jury. The fact that a witness made a statement under oath, or otherwise, differing from that made at the trial, does not prevent the jury from considering his testimony and giving it the effect they consider right. Here, the trial judge gave careful and sufficient instruction as to the impugned testimony of the Crown witnesses and the matter of its credibility was properly left to the jury along with their explanations. *Rex* v. *Waterfield,* (1946) 63 B.C.R. 407; (1947) 3 D.L.R. 362; (1947) 1 W.W.R. 365; 88 C.C.C. 221.

B. Corroboration in Criminal Matters.

1. Accomplice.]—Where on a charge of incest the complainant was merely submissive she was not an accomplice of the accused and corroborative evidence implicating the accused in a material particular was not required. *Rex* v. *Pegelo,* (1934) 48 B.C.R. 146; (1934) 2 D.L.R. 798; (1934) 1 W.W.R. 573; 62 C.C.C. 78.

2. Accomplice.]—Whether or not a witness is an accomplice is a question of fact for the jury, but if there is nothing more than a scintilla of evidence the judge may properly refrain from submitting it. Where a witness took a pretended part in a plot to publish a defamatory libel with the

object of exposing it, the trial judge was justified in concluding that the witness was not an accomplice. *Rex* v. *Williams,* (1934) 49 B.C.R. 379; (1935) 2 D.L.R. 651; 63 C.C.C. 216.

3. Corroboration — accomplice.] — Whether or not a witness is an accomplice depends upon whether the witness himself could have been indicted for the offence either as principal or as accessory. An accomplice is one who knowingly, voluntarily and with common intent with the principal offendor unites in the commission of a crime. *Rex* v. *Williams,* (1935) 2 D.L.R. 696.

4. Corroboration—living on earnings of prostitution—whether woman involved is an accomplice.] — Since the woman involved could not herself be charged under the same section (216) [1]) of the Criminal Code she was not an accomplice and corroboration was not essential. However, a direction to the jury to scrutinize her evidence carefully is justified. *Rex* v. *Williams,* (1935) 2 W.W.R. 640; 63 C.C.C. 360.

5. Accomplice.]—It was held to be misdirection where the judge told the jury, in effect, that it was their duty to convict solely on the evidence of accomplices, provided they believed them to be telling the truth. The rule requiring warning applies equally whether there is or is not corroborative evidence. The jury should be told that they "may" convict not that it is "their duty" to convict. *Rex* v. *Nowell,* (1938) 54 B.C.R. 165; (1938) 3 D.L.R. 650; 70 C.C.C. 329.

6. Accomplice—necessity of statement by Judge as to corroboration.]—Where a judge (without jury) convicts upon the uncorroborated evidence of an accomplice, it will be inferred that he is aware of the relevant rule as to corroboration, without any accompanying statement that he is. *Rex* v. *Bush,* (1938) 53 B.C.R. 252; (1939) 1 D.L.R. 428; (1939) 1 W.W.R. 42; 71 C.C.C. 269.

7. Accomplice—effect of change of intention and withdrawal from illegal enterprise.] — It was misdirection where the judge told the jury that an accomplice could cease to be an accomplice by abandoning his intention to go on with the unlawful enterprise and quitting the scene of the crime. There must also be the timely communication by the withdrawer to the continuer that from then on the continuer will have no assistance from the withdrawer. *Rex* v. *Whitehouse,* (1940) 55 B.C.R. 420; (1941) 1 D.L.R. 683; (1941) 1 W.W.R. 112; 75 C.C.C. 65.

8. Accomplice — necessity of warning jury.]—Where one of two accused persons being tried together goes into the witness-box and tells a story implicating the other, the necessity for warning the jury in the usual way does not arise. If the witness was not called by the prosecution and the jury was not asked to act on the evidence, the rule does not apply. *Rex* v. *Pavalini,* (1941) 56 B.C.R. 444; (1941) 4 D.L.R. 183; (1942) 1 W.W.R. 74; 76 C.C.C. 191.

9. Corroboration—necessity of directing jury as to, on charge of rape.] — It is settled that in cases of this nature, it is the duty of the trial judge to warn the jury of the danger of convicting upon the uncorroborated testimony of the prosecutrix. A complaint made by her does not afford corroboration; it only supports the credibility of her story. Corroboration must be evidence which implicates the accused, i.e., which confirms in some material particular not only the evidence that the crime has been committed, but that the accused committed it. *Rex* v. *Reeves,* (1941) 57 B.C.R. 90; (1942) 1 D.L.R. 713; 77 C.C.C. 89.

10. Wife of accomplice — warning to jury—whether required.] — Where at a criminal trial the wife of an accomplice gives evidence to corroborate the evidence of her husband, it is necessary to warn the jury as to the nature of her evidence, as in the case of an accomplice. A new trial was ordered where the trial judge gave the usual warning as to the evidence of the husband, but did not give any warning as to the evidence of the wife. *Rex* v. *Munevich,* (1942) 58 B.C.R. 4; (1942) 3 D.L.R. 482; (1942) 3 W.W.R. 127; 78 C.C.C. 77.

11. Under Section 1003 (2) of the Criminal Code—other material evidence implicating the accused.] — Evidence in corroboration must be independent testimony which affects the accused by connecting, or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. *Rex* v. *Hober,* (1943) 59 B.C.R. 362; (1944) 1 D.L.R. 485; (1943) 3 W.W.R. 393; 80 C.C.C. 332.

12. Accomplice — corroboration not to prove the guilty act but to fortify credibility of another witness.]—If there was testimony in the record which is in the legal sense corroborative, misdirection will not be assumed although no reasons for judgment were given by the convicting judge. Here it was not necessary that the principal witness should have been corroborated as to the very act of theft itself; it was enough that the evidence would confirm the trial judge in the belief that the principal witness was telling the truth. It should furnish some additional evidence rendering it probable that the story of the principal witness is true, and that it is reasonably safe to act upon it. *Rex* v. *James,* (1945) 61 B.C.R. 161; (1945) 3 D.L.R. 382; (1945) 1 W.W.R. 586; 83 C.C.C. 369.

13. Child of tenders years—whether inculpatory statement of accused amounts to corroboration.]—A child of eight was the chief witness: she was not sworn and corroboration was essential under sec. 1003 (2) of the Criminal Code. The Chief of Police handed the accused a copy of the charge and read it to him after which he gave the usual warning. The accused then voluntarily replied, "I guess it may be right according to the way you take it. Truth is truth. I don't think I hurt the little girl. Is there any way we can settle it? If we see Mr. McNiven, is there any way we can settle it?" Held, the statement constituted corroboration. It was additional evidence rendering it probable that the child's testimony was true. *Rex* v. *Richmond,* (1945) 61 B.C.R. 420; (1945) 4 D.L.R. 55; (1945) 2 W.W.R. 128, 84 C.C.C. 289.

14. Child understanding the nature of an oath—corroboration.]—It was contended that a proper foundation had not been laid to admit the sworn evidence of a child of eight. Even if, on the judge's enquiry as to her capability, he may have suggested the proper answers, there was corroboration which would have been sufficient had her evidence not been taken under oath. *Rex* v. *Cowpersmith,* (1946) 62 B.C.R. 401; (1946) 2 D.L.R. 725; (1946) 1 W.W.R. 596.

15. Conspiracy to extort by publishing a defamatory libel—whether informer an accomplice.]—The accused were convicted by a jury of conspiring to extort money under threat of publishing a libel about their victim. One of the accused consulted a solicitor who professed acquiescence but informed the police. The trial judge did not warn the jury as to the danger of convicting on the uncorroborated evidence of an accomplice. Held, affirming the conviction, that it was plain that the trial judge was of the opinion that there was no evidence from which the jury could reasonably infer that the solicitor was an accomplice. He was correct in this conclusion. Even if it were otherwise the Court of Appeal could under sec. 1014 (2) of the Criminal Code, have affirmed the conviction. *Rex* v. *Welch and Ackerman,* (1946) 63 B.C.R. 183; (1946) 3 W.W.R. 655, 87 C.C.C. 88.

C. Corroboration on claims against estates of deceased persons.

1. Need for corroboration: sec. 11 of Evidence Act.]—Under sec. 11 an opposite or interested party shall not obtain a decision on his own evidence without corroboration. Whether or not the section extends only to such a party personally, the facts disclosed at the trial afforded adequate corroboration. Apart from the statutory requirement, all claims of the living against the dead should be clearly and satisfactorily established. On further appeal to the Supreme Court of Canada the action was dismissed on the ground that no agreement was in fact entered into by the parties. *McEwan* v. *Cosens,* (1933) 3 D.L.R. 794; reversing (1933) 47 B.C.R. 142.

2. Claims against estates of deceased persons.]—The plaintiff claimed to be the donee of a share certificate given her by the deceased and at the trial made out a prima facie case (properly corroborated). The defence was that the plaintiff had given the certificate back to the deceased. On this issue the executor must prove the gift and the onus was on it. It is for the party seeking to establish a claim against an estate to have corroboration of something essential to be proved by him before he can succeed on his own evidence. The need for corroboration arises only where the onus rests on the plaintiff and has no application where the onus rests on the executor. *Sheppard* v. *The Toronto General Trusts Corporation,* (1937) 51 B.C.R. 449; (1937) 2 W.W.R. 9.

3. Corroboration — action against deceased person's estate.]—The corroboration required by sec. 11 of the Evidence Act must be of some fact essential to the success of the plaintiff although it is not re-

quired that all such facts be corroborated. Evidence which is consistent with two views corroborates neither. *Crump* v. *Smith,* (1940) 55 B.C.R. 502; (1941) 1 D.L.R. 513.

IX. WITNESSES.

1. Child of tender years.]—A child of five was allowed to be sworn and give evidence where the judge was satisfied that she was bright, intelligent and knew the religious sanction of an oath. The Court has a clear duty to administer the oath if satisfied that the child is competent. Mere years is not the test. *Strachan* v. *McGinn,* (1936) 50 B.C.R. 394; (1936) 1 W.W.R. 412.

2. Identification of accused.] — Where the main question was one of identity and the victim of the alleged assault picked the accused out in a "line-up" and, without assistance, selected his picture from a volume, as well as positively identifying him at the trial, there was no miscarriage of justice on the points raised and his conviction was affirmed. *Rex* v. *Minichello,* (1939) 54 B.C.R. 294; (1939) 4 D.L.R. 472, 73 C.C.C. 413.

3. Child of tender years—sec. 16 of Canada Evidence Act.]—Where in the opinion of the judge a child offered as a witness does not understand the nature of an oath, the evidence may be received if the judge thinks the child is possessed of sufficient intelligence to justify its reception and understands the duty of speaking the truth. It is not necessary that the judge himself should examine the child; the Crown Counsel may elicit the information from the child. *Rex* v. *Jing Foo,* (1939) 54 B.C.R. 202; (1939) 4 D.L.R. 812, 73 C.C.C. 103.

4. Cross-examination as to previous convictions.]—The accused was convicted of reckless driving. He adduced evidence to establish that he was and had been a careful driver and the accused was cross-examined as to previous convictions for speeding, and upon the fact that he had been a racing driver. Held, on appeal, affirming the conviction, that the accused having put in evidence to show that he was and had been a careful driver, it was open to the Crown to confront the accused, when he undertook to give evidence, with his record of previous convictions for speeding and reckless driving, and with the fact that he had been a professional automobile racing driver. Sec. 12 of the Canada Evidence Act permits such cross-examination. *Rex* v. *Green,* (1943) 59 B.C.R. 16; (1943) 2 D.L.R. 595; (1943) 1 W.W.R. 557, 79 C.C.C. 227.

5. Identity of accused—evidence given in rebuttal—whether merely confirmatory.]—On a charge of robbery with violence a witness was called for the defence who said he was the culprit and had visited the premises in question a few days before the robbery. The Crown in rebuttal called the landlady who identified the visitor as the accused and not the witness. The landlady's testimony was admissible to meet evidence which the Crown could not have foreseen, and it was not merely confirmatory of the original case. The complaint of the accused that he had no chance to meet this new evidence of identity was unsound; he could have asked leave to contradict it. *Rex* v. *Therien,* (1943) 59 B.C.R. 264; (1943) 3 D.L.R. 652; (1943) 3 W.W.R. 63, 80 C.C.C. 87.

6. Hostile witness—sec. 9 of Canada Evidence Act.]—During a protracted examination of a Crown witness she apparently did not say certain things counsel expected. He suddenly plunged into a forceful cross-examination without leave of the Court and led her to contradict her previous testimony and admit the truth of a previous unsworn statement. When the accused, who was not represented by counsel, objected, the judge ex mero motu ruled that she was a hostile witness and could be subjected to leading questions. Held, directing a new trial, it was not until the improper cross-examination had occurred, and brought out the contradictory statement, that the judge declared the witness hostile. The declaration came as a result of the improper cross-examination by Crown counsel of his own witness. The witness must be found by the Court to be hostile before she could be cross-examined by the party calling her. *Rex* v. *Darlyn,* (1946) 63 B.C.R. 428; (1947) 3 D.L.R. 480; (1947) 1 W.W.R. 449, 88 C.C.C. 269.

7. Child of tender years permitted to take oath—understanding nature and consequences of oath.]—Before permitting a child of tender years to be sworn as a witness, the judge should satisfy himself as to two things, (1) does the child understand the nature of an oath? (2) does the child understand the consequences of an oath?

The enquiry may be brief but it must cover both points. *Rev* v. *Antrobus,* (1946) 63 B.C.R. 372; (1947) 2 D.L.R. 55; (1947) 1 W.W.R. 157, 87 C.C.C. 118.

X. Privilege.

1. Claim of tendency to criminate.]—The section of the B. C. Evidence Act under which a witness is not to be excused from answering a question on the ground that the answer may tend to incriminate him deals only with witnesses and has no application to the production of documents. *Blumberger* v. *Solloway Mills & Co. Ltd.,* (1931) 45 B.C.R. 66; affirmed (1932) 46 B.C.R. 241.

2. Tendency to incriminate.]—Counsel having the custody of the defendant's books refused to produce them on the ground that their production would tend to incriminate the defendant. The Court ruled that they must be produced on pain of having the defence struck out whereupon Counsel produced them. On appeal the defendant argued that the order for production was wrong and the evidence disclosed by the books should be rejected. Held, the defendant through his counsel had deliberately elected to produce the books and could not now raise the point. *Lockett* v. *Solloway Mills & Co. Ltd.,* (1931) 45 B.C.R. 375; (1932) 3 D.L.R. 600; (1932) 1 W.W.R. 886.

3. Admissibilty of documents produced in another proceeding by witness there protected by sec. 5 of Canada Evidence Act.]—The appellants were convicted of conspiracy to defraud. Prior to their prosecution a commissioner under the Departmental Inquiries Act had required production of certain books and one of the appellants, in producing them, had claimed the protection of the Canada Evidence Act. The Crown put them in evidence at the trial against the objection that they were privileged just as the answers given by the witness before the commissioner were. Held, on appeal, affirming the conviction, the books were properly admitted. The Departmental Inquiries Act empowered the Commissioner to compel their production whether they were incriminating or not. The Canada Evidence Act (sec. 5) is limited to answers by witnesses and says nothing about documents. The claim that what was said amounted to a confession given under compulsion by the Commissioner was met by the principle that it was not the Commissioner who did the compelling but the statute. Statements made under compulsion of a statute are not inadmissible because they tend to incriminate. *Rex* v. *Simpson,* (1943) 59 B.C.R. 132; (1943) 3 D.L.R. 355. Leave to appeal to the Supreme Court of Canada refused (1943) 3 D.L.R. 367.

XI. Evidence Out of Court.

1. Adequacy of material on order to take evidence on commission.]—Where a plaintiff has chosen to bring his action here, then it is his duty prima facie to bring his witnesses here or to show that it is not in the interests of justice to compel him to do so. The only relevant statement in the material was that the expense of his attendance would be prohibitive. The grounds submitted to the judge were so meagre that they did not afford a reasonable basis for the exercise of his discretion in granting the order. *Romano* v. *Maggiora (No. 3),* (1936) 50 B.C.R. 362; reversing (1936) 50 B.C.R. 273; (1936) 1 W.W.R. 423.

2. Evidence de bene esse—status of at trial.]—In an Admiralty action the evidence of several witnesses was taken before trial de bene esse. The party on whose behalf the evidence is taken need not read it all into the record. Such evidence is regarded as an additional examination to be used, if necessary, only in the event that witnesses cannot be examined later in the action in the regular way. A party is not bound to use it if he does not wish to do so. *C. T. Gogstad & Co.* v. *S. S. "Camosun",* (1940) 56 B.C.R. 156.

3. Commission evidence — rights of parties on return.]—The evidence of a witness had been taken in New York on commission at the instance of the defendant. The plaintiff being without funds had not been represented at the taking of the evidence and now that it was in the hands of the registrar desired to see and copy it. The defendant objected that he should not have to disclose his evidence until the trial. Held, the plaintiff was entitled to have the commission opened and to make a copy of the evidence. *Wessels* v. *Wessels,* (1941) 56 B.C.R. 239; (1941) 3 D.L.R. 528; (1941) 2 W.W.R. 629.

XII. AFFIDAVITS.

1. Made on belief only.]—Where counsel made an affidavit and upon examination admitted that the statments therein were made on belief only, the affidavit was worthless. *Rex* v. *Crowe,* (No. 4); (1938) 53 B.C.R. 86; (1938) 2 W.W.R. 308.

2. Not setting forth the grounds or source of affiant's belief.]—It was contended that an affidavit which did not set forth the grounds or source of the affiant's belief was worthless and should not be looked at. Held, such an affidavit is not worthless if the Court can otherwise ascertain the source of the unstated information and belief. Here the affiant had been cross-examined on his affidavit. *The British Columbia Society for the Prevention of Cruelty to Animals* v. *Barr,* (1946) 63 B.C.R. 250; (1947) 1 D.L.R. 292; (1946) 3 W.W.R. 689.

See CRIMINAL LAW.

See DIVORCE AND MATRIMONIAL CAUSES.

See WILLS.

EXECUTION.

I. IN GENERAL, 325.

II. EQUITABLE EXECUTION, 326.

I. IN GENERAL.

1. Judgment for costs in criminal proceedings.]—The Execution Act gives certain rights to judgment creditors "in an action", and defines "action" to include actions at law and suits in equity, and all other proceedings, either at law or in equity. A criminal proceeding is none of these. If the Interpretation Act applies, the definition of "action" there excludes criminal proceedings by the Crown. A judgment for costs in criminal proceedings cannot be enforced under sec. 38. *Rex* v. *Beru,* (1936) 50 B.C.R. 444; (1936) 4 D.L.R. 805; (1936) 2 W.W.R. 574, 66 C.C.C. 295.

2. $500 exemption — whether right or privilege.]—The $500 exemption given by sec. 25 of the Execution Act is a privilege only and not an absolute right and if not exercised within a reasonable time will be deemed to be abandoned. *Carswell* v. *Pollard* (1939) 4 D.L.R. 767, 21 C.B.R. 41; (1939) 3 W.W.R. 225.

3. Whether allocatur necessary before issue of writ of fieri facias.]—Under the English practice where the taxation of costs and issue of the writ take place in different offices an allocatur or certificate of taxation is necessary. Here, the whole thing is done in the same office and there is not the same need for formal evidence of the result of the taxation. A motion to set an execution aside because there was no allocatur was refused. In *re Penticton Hotel Co. Ltd.,* (1937) 3 W.W.R. 36.

II. EQUITABLE EXECUTION.

Charging order on security for costs in Court.]—Moneys paid into Court as security for costs may be subject to a charging order to realize the amount due on a judgment. *Yick Chong* v. *Hong Sing Co.,* (1932) 46 B.C.R. 290.

See GARNISHMENT.

See PRACTICE.

See SHERIFF.

See SOLICITORS.

EXECUTORS AND ADMINISTRATORS.

I. PROBATE, 327.

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III. DUTIES OF THE REPRESENTATIVE, 329.

IV. POWERS AND RIGHTS OF, 329.

A. In General, 329.

B. Carrying on Deceased's Business, 332.

V. CLAIMS OF CREDITORS, 332.

VI. ACTIONS BY AND AGAINST REPRESENTATIVE, 333.

I. PROBATE.

1. Duty to be assessed and collected by Registrar of Court.]—Although the Deputy Minister of Finance had since the passage of the Succession Duty Act in 1907, been in the habit of assessing probate duties at the same time as he fixed the succession duty, there was no statutory warrant for his doing so. The Registrar of the Court had for 42 years previously been assessing and collecting the duties. The Registrar "an officer of the Court generally," was directed to deliver the letters probate to the executrix notwithstanding that the finance department had not passed on the probate duty. *Re Joseph Austen Sayward, deceased,* (1934) 49 B.C.R. 307.

2. Ancillary grant to one of three foreign executors.]—A testator domiciled in California died there and his three executors took probate from the California Court. One of them residing in this Province, applied here for ancillary probate. While there is a discretion in the Court to be exercised after consideration of the particular circumstances of each case, ancillary probate may be granted to one of several executors, notwithstanding the fact that there is a foreign grant of probate to all of them. In *re estate of A. M. Kaime, deceased,* (1938) 53 B.C.R. 190; (1938) 4 D.L.R. 806; (1938) 3 W.W.R. 224.

3. Resealing — Probates Recognition Act.]—An English probate, or a duplicate sealed with the seal of the Court granting the same, or a copy certified as correct by authority of the Court granting it, may be resealed. A mere unsealed extract from the original record deposited in the English Registry will not suffice. *Re Booth,* (1941) 4 D.L.R. 431; (1941) 3 W.W.R. 392.

4. Whether applicant is executrix according to the tenor of the will.]—If by the terms of the will a person has been appointed to perform the essential duties of an executor he will be an executor according to the tenor. Here, the applicant did not fulfill the requirements. There was no direction that she was to get in the estate, or pay the expenses and debts, or discharge the legacies generally. The testator left a wife in Ireland who was not a benficiary and who had not been notified of this application. The will left property to the applicant with a proviso that she pay from the estate or otherwise the sum of $1,500.00 to the testator's sister. The application was refused. In *re Long Estate,* (1942) 3 W.W.R. 696.

5. Whether ineffective codicil should be admitted to probate with will.]—A codicil contained a clause declaring that it should have effect only in a certain contingency. The contingency did not occur. The codicil should be admitted to probate along with the will. It would be otherwise in the case of a conditional will which is inoperative. In *re Estate of Thomas Frederic Young, deceased,* (1943) 60 B.C.R. 145.

6. Application by registered trust company—oath required of.]—A trust company registered under the Trust Companies Act in applying for probate need not submit an affidavit to faithfully administer and exhibit an inventory and render an accounting. Sec. 79 makes it unnecessary. In *re Rodger Estate,* (1943) 2 W.W.R. 445.

7. Application for probate by local executor and administration to attorney for outside executor.]—The testatrix named two executors, one here and one outside the jurisdiction. Both applied, the one here, for probate and the other by attorney for a grant of administration with the will annexed. Held, that the grant to the attorney should be refused; the grant to the executor should be adjourned ten days to give the outside petitioner the opportunity to join with his co-executor in applying for probate. If he fails to do so the grant should go to the local executor with leave to the other to apply later if he so desires. In *re estate of Belanie Grimard, deceased,* (1944) 60 B.C.R. 392; (1944) 4 D.L.R. 143; (1944) 3 W.W.R. 297.

8. Notarial copy of Quebec will.]—The original will was held by a notary in Quebec. A copy certified by the notary to be a true copy was offered for probate. Held, making the order, sec. 37 of the Evidence Act was enacted to meet the situation. In *re Brock Estate,* (1945) 2 W.W.R. 528.

II. LETTERS OF ADMINISTRATION.

1. Dispensing with taking of accounts and cancellation of bond.]—Sec. 24 of the Administration Act provides that where an administrator has passed his final account and completed the distribution of the estate, the Court may on notice to the beneficiaries cancel the bond. Here the administrator submits the consents of all the beneficiaries in lieu of his accounts. Held, the Court has power upon proper consents to direct the notice referred to in sec. 24 to be given by

filing, as no good purpose would be served by giving further notice. In *re estate of Mary E. Harrison,* (1945) 62 B.C.R. 201; (1946) 1 W.W.R. 28.

2. Right to have probate resealed—whether grant of administration to attorney of executors possible.]—While the Probates Recognition Act contemplates the resealing of English probates, it is open to the English executors to name an attorney in British Columbia to whom the Court may grant letters of administration with the will annexed. In *re estate of Georgina Hale, deceased,* (1945) 62 B.C.R. 321.

3. Citation to possessor of alleged will—no appearance—grant of letters of administration.] — Where the possessor of an alleged will has been cited to appear and propound it, with a warning that administration would in default be granted, administration will be granted to the attorney of the next of kin. In *re Administration Act* and in *re estate of William Bell, deceased,* (1946) 62 B.C.R. 400.

III. Duties of the Representative

Trustee remiss in failing to acquaint a beneficiary as to the latter's interest and the condition of the estate.]—Where a trustee proved the will and neglected for seven years to notify an infant beneficiary of her rights to benefit from the estate, and the beneficiary took proceedings to have her rights ascertained and protected, no costs were allowed the trustee until after the plaintiff's claim had been settled and paid. In *re Short Estate,* (1941) 1 W.W.R. 593.

IV. Powers and Rights of

A. In General.

1. Interest on legacy after period of one year.]—Where a testator empowered his executor to pay the legacies when and how he liked and directed that the estate was not to be sacrificed in any way to pay them, the general rule that interest is payable from one year after the testator's death will not apply. *Planta* v. *Greenshields,* (1932) 45 B.C.R. 228; (1932) 3 D.L.R. 423; (1932) 2 W.W.R. 60.

2. Whether salaried employee may as executor continue to be remunerated in both capacities.]—The executor of a person who held half the shares in a hotel company properly continued to carry on the business. He had been paid a salary by the company as joint-manager. The question arose as to whether he could retain the salary paid him while acting as executor, or must account to the estate for it. The fact that he received the salary from the company was held not to affect the situation. Held, the executor must account to the estate for the salary received. He was engaged in a transaction by which he acquired an interest adverse to his duty. If an executor is qualified to do the work required, he may in certain circumstances, elect whether he will do it or employ another. If he employs another he may pay him. If he does it himself, it becomes part of the work of administration to be paid for as ordinary remuneration. In *re Trustee Act* and *Vinnicombe Estate,* (1934) 1 W.W.R. 780.

3. Management fee.]—It is an established rule, in general, that apart from the Trustee Act, a trustee (which includes an executor), shall have no allowance for his trouble and loss of time. Sec. 80 of the Trustee Act confers a privilege upon a trustee which he would not otherwise enjoy. The section does not contain any power to allow a managing fee. In *re McIntosh Estate,* (1934) 49 B.C.R. 297; (1934) 3 W.W.R. 255.

4. Discharge—by virtue of secs. 33 to 38 of Administration Act.]—An executrix who joined in applying for and obtaining probate and swore the oath of executor, but took little part in the administration of the estate, applied under secs. 33 to 38 of the Administration Act to be discharged as executrix forthwith. Held, there is no power to order that she be discharged forthwith. The procedure set out in sec. 36 must be followed. The applicant is to pass her accounts and in the meantime the matter is adjourned. *Re Mary Jean Croft Estate,* (1937) 51 B.C.R. 359; (1937) 1 W.W.R. 463.

5. Some executors settling unfounded claim with their own funds—other executors protesting—costs of settlement.] — Four out of six executors (all beneficiaries) settled a claim against the estate with their own funds over the protests of the other two. Counsel had advised that the claim was unenforceable. The settlement released the estate. The four then sought to have the costs they had paid to their solicitor on the settlement, allowed against the estate as a disbursement when the accounts were taken. The registrar allowed them and the

judge affirmed the action of the registrar. Held, on appeal, reversing the decision below, that if the four wished to make a personal arrangement with a third party, using their own funds in doing so, and to settle a claim of this sort, they might do so, but it must be treated as a personal transaction throughout. They could not involve the estate, or the interest of the other two, by compelling them to pay part of the costs because gratuitously a condition was inserted releasing the estate. *Smith* v. *Woodward,* (1941) 56 B.C.R. 263; (1941) 3 D.L.R. 370; (1941) 3 W.W.R. 616.

6. Negligence—claim by administrator.]—The 1934 amendment to the Administration Act did not create any new right of action. Its purpose was to preserve from abatement whatever rights were vested in the deceased at the time of his death. The executor continues the action and in relation thereto, stands in the shoes of the deceased with the exception that from the damages recoverable by him are excluded, for obvious reasons, compensation for physical disfigurement, or pain or suffering caused to the deceased and loss of expectancy of future earnings. The shortening of a plaintiff's life was recognized as a kind of damages a living person could claim for in a negligence action, and that right was carried over to the executor as "loss of life expectancy". Here the trial judge found that death was not due to the defendant's negligence, but that there was a novus actus interveniens, and allowed only hospital and medical expenses. Held, on appeal, affirming the decision below, there was no proof that the plaintiff's expectation of life had been shortened by the accident. Such proof might have been possible by medical evidence but that course was not attempted. *Mah Ming Yu* v. *Terminal Cartage Ltd.,* (1942) 58 B.C.R. 470.

7. Payment of commission to real estate agent—whether allowable as disbursement.]—The principle to be followed is that where the work is not such as the executors themselves are qualified to do, it is reasonable that they should employ the service of such agents as may be necessary. Commissions paid to real estate agents on the sale of property are not on the same footing as commissions paid for the collection of mortgage interest, except in those special cases where the executor himself is a real estate agent. In *re Trustee Act* and in *re Estate of William Peter Sinclair, deceased,* (1943) 59 B.C.R. 559; (1944) 1 D.L.R. 624; (1944) 1 W.W.R. 509.

8. Sales made by agent-executor himself, and through other agents—commissions on collections.]—The executor was a real-estate agent. He disposed of some of the properties of the estate and sold some through other real-estate agents. He also collected various sums for the estate. Held, the executor could properly pay, and would be allowed for, commissions earned by outside agents. His own commissions as agent were not chargeable to the estate. For his remuneration he was allowed 2½% of the amounts paid other agents, to cover the listing of properties, completion of sales, distribution of purchase money, etc. The ordinary collecting was properly the duty of an executor, and could not be charged for. Subject to the above 5% was allowed on his receipts. In *re Estate of William Henry Gallagher, deceased,* (1944) 60 B.C.R. 269; (1944) 3 W.W.R. 40.

B. Carrying on Deceased's Buisiness.

1. No direction in will as to continuance of business—executor entitled to carry on.]—Apart from any express direction in a will a personal representative is entitled, where the business of the deceased is a valuable asset, to carry it on for a reasonable time so that it may be sold to advantage. In *re Vinnicombe Estate,* (1934) 1 W.W.R. 780.

2. Status of executors as guarantors.]—Executors were directed to carry on the testator's retail ice and coal business. The testator was concerned in another business, that of coal mining, and had given the bank a guarantee in connection with it. The executors gave the bank a further guarantee with respect to the coal mining business and action was brought against the surviving executrix on it. Judgment was given against the executrix, "de bonis testatoris". Held, on appeal, reversing the decision below, the executrix was permitted to carry on the retail business and might have given a guarantee with respect to it, but had no authority to guarantee another business entity. An application to amend the judgment to one "de bonis propriis" was refused. *Bank of Montreal* v. *Morrow,* (1936) 50 B.C.R. 540; (1936) 4 D.L.R. 331; (1936) 2 W.W.R. 566.

V. Claims of Creditors.

Recovery of Pensions Paid to Deceased —Workmen's Compensation Board as

pension authority.]—Under the Dominion Old Age Pensions Act the pension authority may recover as a debt due to the authority, from the estate of a deceased pensioner, the pensions paid with interest. The Workmen's Compensation Board became the pension authority in British Columbia. Upon the death of a pensioner the Board claimed such recovery and contended that it was entitled to payment, as a Crown debt, in priority to certain other debts. Held, awarding it priority, that for the convenience of collection the debt is made one due to the pension authority, but the moneys received by the pensioner were Crown moneys and the Board in administering the pensions was merely the agent of the Crown. *Dixon* v. *Workmen's Compensation Board,* (1935) 49 B.C.R. 407.

VI. Actions By and Against Representatives.

1. Right of executrix to reimbursement for costs of unsuccessful defence.]—Where the executrix acted on the advice of counsel and defended an action reasonably and in good faith, she will be entitled to her costs out of the estate. In *re Insurance Act*; in *re Morris Estate,* (1933) 47 B.C.R. 239 (1933), 2 W.W.R. 80.

2. Personal liability of representative.]—Where an executor or trustee makes a contract in relation to his trust, he is personally liable to the contractor for the price agreed upon. The converse, i.e. when moneys are due by the contractor to the trustee, is also true. Where a judgment in such a case refers to the defendant as "sole trustee of the estate of L. C., deceased", these words must be read as descriptive merely. *Hall* v. *McIntyre*: *Sartorio, Garnishee,* (1934) 48 B.C.R. 306; (1934) 3 D.L.R. 559; (1934) 2 W.W.R. 145; affirming (1934) 1 D.L.R. 571.

3. Families' Compensation Act.]—The plaintiff was injured while a passenger in a car driven by F. who was killed in the accident. The plaintiff sued F.'s administrator and recovered notwithstanding that a claim for tort was barred by the rule "Actio personalis moritur cum persona". Held, on appeal, reversing the judgment below, that, so far as the action was one of tort for personal injuries, it failed by reason of the rule. A claim for loss of certain personal chattels was upheld as being one in trespass, or trespass on the case, under sec. 71 of the Administration Act. An attempt to establish a claim under a contract of carriage did not succeed. *Kirk* v. *Lee,* (1934) 48 B.C.R. 233; (1934) 3 D.L.R. 373; (1934) 2 W.W.R. 175.

4. Families' Compensation Act—Proof of Chinese marriage.]—The plaintiff as administrator sued for the benefit of the wife and children of the deceased, a Chinese. Liability was admitted subject to proof, inter alia, of the marriage of the deceased which was alleged to have taken place in China. No expert in Chinese law was called as a witness. There was no proof of marriage by record, or by anyone present on that occasion. It was established that the parties cohabited together in China and were there regarded as man and wife. Held, dismissing the action, that there was no proof of Chinese law as to what, if any presumption would be drawn in China from cohabitation. *Leong Sow Nom* v. *Chin Yee You,* (1934) 49 B.C.R. 244; (1934) 3 W.W.R. 686.

5. Order of revivor after appeal launched.]—After the plaintiff had filed notice of appeal, she died and her executor applied to be added as appellant in substitution for the deceased under sec. 2 (4) of the Administration Act Amendment Act, 1934. It was contended that the words "action pending" as used in the section do not include an appeal. Held, making the order, "action pending" is a general expression meaning any proceeding in the nature of a litigation between a plaintiff and a defendant. The Court of Appeal Act (Sec. 10) refers to a cause as pending before that Court. *Dymond* v. *Wilson* (1936) 51 B.C.R. 206; (1937) 1 D.L.R. 286; (1937) 1 W.W.R. 417.

6. Unsuccessful action by administrator—order as to costs.]—Where an administrator alleging unsound mind failed in an action to set aside a deed of settlement, the costs taxed to the defendants were ordered to be paid out of the estate as far as it would go, and otherwise by the administrator personally. *Young* v. *The Toronto General Trusts Corporation (No. 2)*; (1939) 54 B.C.R. 410; (1940) 3 D.L.R. 768.

7. Death by accident in course of employment—action by administrator.]—The administrator of an employee who died (leaving no dependents) as the result of an accident arising in the course of his employment, has no claim for the employee's loss of expectation of life, since by sec. 12 of the Workmens Compensation Act the em-

ployee himself would have had no claim. *Munro* v. *Bloedel Stewart & Welch Ltd.*, (1940) 4 D.L.R. 683.

8. Effect of notice to creditors and others under sec. 78 of the Administration Act.]—Sec. 78 of the Administration Act provides that if a personal representative gives notice and warning to any creditor or person of whose claims against the estate he has notice, it shall be the duty of the claimant to sue within six months, otherwise the claim shall be barred. Held, the section has to do with debts due by the estate and does not extend to claims by beneficiaries. In *re Short Estate,* (1941) 1 W.W.R. 593.

See DAMAGES.

See EVIDENCE.

See TRUSTEES.

EXPROPRIATION.

See COMPULSORY PURCHASE.

EXTRADITION.

1. Whether demanding state must prove that facts constitute an offence in its jurisdiction.]—Where the evidence before the extradition commissioner shows a prima facie case of a crime known to the common law, the burden is upon the accused to show that it is not a crime under the law of the demanding state. In *re Sullivan* and *State of California* (1932) 3 W.W.R. 167.

2. Photostatic copies of cheques, entries in books etc.—proof of signature.]—The extradition judge received in evidence photostatic copies of cheques, deposit and withdrawal slips, entries in book, etc., as well as photostatic facsimiles of documents upon which the signature of the appellant was reproduced. Held these were properly admitted on an inquiry of this kind, and the decision in *The King* v. *The Ship "Emma K"* (1936) S.C.R. 256, is distinguishable. Moreover, the appellant was not on his trial, but in a position analogous to that of a person charged at a preliminary inquiry. *State of New York* v. *Wilby* (1944) 60 B.C.R. 370; (1944) 3 D.L.R. 693; (1944) 2 W.W.R. 356; 81 C.C.C. 371.

3. Premature surrender to demanding state—effect of order of Minister of Justice under sec. 25 of Extradition Act.]—While habeas corpus proceedings were pending and without knowledge of them, the Minister of Justice executed an order for the surrender of the fugitive under sec. 25 of the Act. The keeper of the Victoria lockup to whom the order was directed waited until the habeas corpus was refused and then released the fugitive to the officers of the demanding state. A new application for habeas corpus resulted in a return that the fugitive was held under the order of the Minister. The judge held the Minister's warrant illegal as having been issued while habeas corpus proceedings were pending and thus contrary to Sec. 23. The fugitive was ordered discharged. Held, on appeal, affirming the decision below, by Sec. 23 a fugitive is not to be ordered to be surrendered while habeas corpus proceedings are pending. "Surrender" as used in Sec. 23 does not include "delivery" as used in Sec. 26. The decision to release is one for the highest authority and cannot be held to be vested in the keeper of the lock-up, who if it were otherwise, could in a proper case disobey the Minister's order. Sec. 23 applies to the Minister, not to the keeper. Hence the document of surrender was invalid since it was made and released pending the decision of the habeas corpus proceedings. *Salayka* v. *Wilby,* (1944) 60 B.C.R. 407; (1944) 3 D.L.R. 697 (sub. nom. *State of New York* v. *Wilby*); (1944) 2 W.W.R. 362; 82 C.C.C. 1.

4. Minister's order for release held invalid—re-arrest of fugitive—whether effective.]—The extradition commissioner by warrant committed the fugitive to the keeper of the lock-up in Victoria for surrender in due course to the State of New York. The Minister of Justice by an order directed his delivery to the demanding state and the keeper complied. The order was held on habeas corpus to be invalid and his release followed. He was thereupon re-arrested under the original committal warrant. Held, on a fresh habeas corpus, confirming his detention, the warrant was not spent since there was no voluntary abandonment or voluntary escape. The Minister's order being a nullity the fugitive could be again taken into custody under the original war-

rant. *State of New York* v. *Wilby (No. 3)*, (1944) 60 B.C.R. 500; (1944) 3 D.L.R. 709; (1944) 3 W.W.R. 79, 82 C.C.C. 119; affirmed (1945) 1 D.L.R. 144; (1944) 3 W.W.R. 394; 82 C.C.C. 305.

FAMILIES' COMPENSATION ACT.

See DAMAGES.

See NEGLIGENCE.

FIRE.

1. Spread of fire from railway right-of-way.]—In an action for damages for negligence, the jury answered questions and upon their answers the trial judge gave judgment for the plaintiff. The Court of Appeal ordered a new trial. Upon a further appeal and cross-appeal to the Privy Council, it was held, allowing the appeal and dismissing the cross-appeal, that the only negligence found by the jury consisted of a delay and an omission in reporting the state of the fire, neither of which caused the damage. *Kapoor Lumber Co.* v. *Canadian Northern Pacific Railway Co.* (1933) 3 W.W.R. 513; reversing (1933) 47 B.C.R. 19.

2. Regulations under Fire Marshal Act—gasoline pump on highway.]—The Lieutenant-Governor in Council had made a regulation under the Fire Marshal Act forbidding the erection of gasoline pumps on the highway. The enabling section of the Act authorized the regulations of the sale, storage and disposal of any inflammable matter. The accused had lawfully erected such a pump before the regulation came into force and now replaced it with a new one, attaching it to the old tank. Held, on appeal, reversing the decision of the Magistrate and the County Court judge, that the installation was not merely repair work or a renewal of the existing apparatus. To say that the substitution of a newer and better pump lessens the risk will not avail. *Rex* v. *Island Pacific Oil Co. Ltd.*, (1939) 54 B.C.R. 508; (1940) 3 D.L.R. 263; (1940) 1 W.W.R. 276; 73 C.C.C. 392.

3. Liability for commencement — for spread.]—When there were no facts warranting an inference of negligence and the cause could not be ascertained, the fire was "an accidental one" within 14 Geo. III, 1774 (Imp.) Cap. 78 sec. 86, (in force in British Columbia) with the result that negligence must be shown on the part of a warehouseman to cause him to be liable for its commencement. As to its spread his obligation is only to use reasonable care and diligence. *DesBrisay* v. *Canadian Government Merchant Marine Ltd.* (1941) S.C.R. 230; (1941) 2 D.L.R. 209; affirming (1940) 56 B.C.R. 161; (1940) 4 D.L.R. 171; (1940) 2 W.W.R. 97; affirming (1938) 53 B.C.R. 207; (1938) 4 D.L.R. 798; (1938) 3 W.W.R. 209.

4. Sparks from locomotive — logging operations—abnormally dry conditions.]—There was evidence to justify the finding of the jury that the defendant was negligent in using steam equipment in the woods under extremely hazardous conditions without extraordinary precautions being taken. *Elk River Timber Co. Ltd.* v. *Bloedel, Stewart & Welch Ltd.*, (1941) 56 B.C.R. 484; (1941) 4 D.L.R. 792; (1941) 3 W.W.R. 97.

5. Damages for loss of firewood in woods.]—In an action for damages for the escape of fire the trial judge found that 3620 cords of firewood had been destroyed, but that it could not have been sold profitably owing to its distance from a market; he refused to allow damages on that head. Held, reversing the decision below on that point, the question for decision was the value of the wood in situ and not its market value at Nanaimo six miles away. *Gogo* v. *Eureka Sawmills Ltd.*, (1945) 61 B.C.R. 498; (1945) 4 D.L.R. 127; (1945) 3 W.W.R. 446; varying (1944) 4 D.L.R. 689; (1944) 3 W.W.R. 268.

6. Failure of Fire Marshal to give reasons—conviction voided.]—Under the Fire Marshal Act the Fire Marshal dismissed an appeal without giving his reasons, although the Act states that he "shall" communicate his reasons in writing to the appellant. Upon conviction for disregarding the Fire Marshal's order following the appeal, the County Court set the conviction aside. The requirement as to giving reasons was imperative. Here interference with private property was authorized by the statute and the Act should be strictly adhered to. *Rex* v. *Castle* 82 C.C.C. 318.

FORESHORE.

See CONSTITUTIONAL LAW.

See WATERS AND WATERCOURSES.

FRANCHISE.

1. Covenant not to charge more for electricity than that paid for similar service by any other municipality.]—Such a covenant was not limited to charges made by the supplier itself. "Similar service" did not refer to the character of the areas supplied but to the character of the demand viz. lighting, power, heating,, etc. *The Corporation of the District of Matsqui* v. *Western Power Co. of Canada Ltd.,* (1933) 47 B.C.R. 335; (1934) 1 D.L.R. 264; Affirmed by Privy Council, (1934) 2 D.L.R. 81; (1934) 1 W.W.R. 483; (1934) A.C. 322.

2. Status of Public Utilities Commission under Public Utilities Act and Motor Carrier Act—Certificate of public convenience and necessity.]—The two acts, generally speaking, confer administrative and not judicial duties upon the Commission. The judicial function imposed by some sections is not a factor in this case where matters of expediency and policy are involved. In deciding whether a certificate of convenience and necessity is to be granted, the Commission does not decide between the legal rights of parties—neither party has any right except to apply. The consent of the municipality concerned is necessary under both Acts before an applicant has any status to operate. *The Veterans' Sightseeing and Transportation Co. Ltd.* v. *Public Utilities Commission,* (1945) 62 B.C.R. 131; (1946) 2 D.L.R. 188.

FRAUDULENT AND VOIDABLE. TRANSACTIONS.

1. Transfer between relatives—suspicious circumstances.]—Where a husband, against whom divorce and alimony proceedings had been taken, conveyed certain property to his brother, the circumstances were so suspicious as to bring into play the principle of res ipsa loquitur and the conveyance was set aside. *Syrja* v. *Syrja and Hill,* (1931) 45 B.C.R. 321.

2. Fraudulent Conveyances Act—judgment for alimony and costs.]—The defendant when threatened with proceedings for alimony conveyed a property to his daughter. Then proceedings were taken and resulted in a judgment for a monthly sum and costs. Default was made in payment of both. The wife sued to set aside the conveyance. It was contended that the transaction was one whereby the daughter would keep the defendant for the rest of his life in consideration of the transfer. Held, setting the conveyance aside, the promise to support the father was a meritorious but not a valuable consideration. The fact that there were no other creditors did not affect the proceedings. The judgment for alimony alone would not support the claim as it did not establish a debt conclusively but the judgment for costs did. *Fuhr* v. *Fuhr,* (1936) 50 B.C.R. 438; (1936) 2 W.W.R. 237.

3. Transfer from husband to wife—suspicious circumstances.]—The defendants, husband and wife, were joint owners of a lot. He was sued for assault. The day before the trial they mortgaged the property and gave a second mortgage two days later. The husband suffered judgment for about $400 and then transferred his half interest to his wife subject to the mortgages. Four years earlier the husband had signed an informal declaration of trust acknowledging that the property was hers. The trial judge set the transfer to the wife aside. Held on appeal reversing the decision below, that assuming the declaration of trust, which was not challenged at the trial, to be genuine, all the suspicious circumstances disappeared so far as the mortgages were concerned. They were given in the ordinary course of business. The burden of explaining suspicious circumstances in respect of a transaction between relatives was fully discharged. *Henn* v. *Foreman,* (1939) 54 B.C.R. 471; (1940) 1 D.L.R. 714.

4. Bills of sale given to delay, hinder and defraud—made in anticipation of plaintiff's claim for alimony and costs.]—On March 19, 1940, the plaintiff in another action sought a judicial separation and alimony. On March 30, 1940, the defendant (husband) gave two bills of sale to the defendant Mrs. Brown. One covered farm

chattels and the other dental chairs and equipment. The wife claimed in this later action to have the bills of sale set aside as fraudulent and void under the Fraudulent Conveyances Act. Held, the transfers were voluntary. Mrs. Brown said the chattels were given her as a marriage gift and that the dental equipment was given her for services in connection with the other defendant's business and office, although she was paid a regular salary as dental nurse. The facts showed that the defendant (husband) was preparing to hinder the plaintiff in the event of her obtaining a judgment for alimony or for costs. *Wessels* v. *Wessels*, (1941) 3 W.W.R. 94.

See BANKRUPTCY.

GARNISHMENT.

I. PROPERTY SUBJECT TO GARNISHMENT, 341.

II. PROCEDURE, 343.

III. PRIORITIES, 345.

I. PROPERTY SUBJECT TO GARNISHMENT.

1. Debt for other than wages or salary.]—The defendant was employed as an interpreter at the Vancouver Police Court. He was paid by City cheque once a month on the basis of a fixed sum for each case in which he participated. Held, on an application to set aside a garnishing order based on a debt other than for wages or salary, that the defendant was a clerk or employee paid by wages or salary and hence entitled to exemption under sec. 3 of the Attachment of Debts Act. *Todd* v. *DePaolo*, (1932) 46 B.C.R. 278.

2. Effect of garnishee dealing with judgment debtor after debt attached.]—Following the service upon them of a garnishing order the garnishees returned certain cattle to the judgment debtor after the Court had voided the transfer of them as against the judgment creditor. With the cattle they handed over $350 received from the Government for cattle destroyed. On the hearing of the garnishee issue, these dealings were not disclosed and the judgment creditor's claim was dismissed. Held, allowing the appeal, after permitting the undisclosed facts to be put in evidence, that the $350 was attached from the time of service of the garnishing order and could not be paid away in disregard of that order. *Marshman* v. *Breadin*, (1933) 46 B.C.R. 537; (1933) 3 D.L.R. 312; (1933) 1 W.W.R. 668.

3. Issue between judgment creditor and administratrix.]—H. having done work and labour for M. who was trustee of the estate of one Campbell, recovered $632 from M. "sole trustee of the estate of Lewis Campbell, deceased". Then H. obtained a garnishee order against S. "administratrix of the estate of Herman Beckman, deceased". The garnishee disputed liability and an issue was directed to determine the liability of the garnishee, if any to M. The garnishee contended that the money payable to M. was not due to M. personally but only in his representative capacity. The trial judge ordered that the garnishee pay the amount in question to H., the judgment creditor. Held on appeal by the garnishee, affirming the decision below, (a) the judgment for work and labour, was one against M. personally and the words "sole trustee of Lewis Campbell, deceased" must be read as descriptive only; (b) the garnishee owed the attached debt to M. personally. *Hall* v. *McIntyre*: *Sartorio Garnishee*, (1934), 48 B.C.R. 306; (1934) 3 D.L.R. 559; (1934) 2 W.W.R. 145; affirming (1934) 1 D.L.R. 571.

4. Debtor must be in a position to compel payment by garnishee.]—In an issue between a garnishor and an assignee of the debt, the rights of the parties should be determined as at the date of the garnishee, and the garnishor, in order to compel the garnishee to pay him, rather than the judgment debtor, must show that the debtor is then in a position to maintain an action for the debt against the garnishee. *Kirkham* v. *Kirkham*, (1936) 50 B.C.R. 321.

5. Whether "credit note" on purchase of truck a garnishable debt.]—The judgment debtor upon relinquishing a vehicle to the dealer from whom he had bought it by instalments, took a "credit note" for $485.00 to be applied at some future time on the purchase of a truck. The judgment creditor sought an order for payment on a garnishing order against the dealer. Held there were no debts, obligations or liabilities owing, payable or accruing due from the garni-

shee to the judgment debtor. The credit was conditional on the purchase of a truck and the condition remained unfulfilled. *Trustee of Advanx Ty-Re-Pair Co. Ltd.* v. *Blackburn and Ferguson Truck & Equipment Co. Ltd.* (1940) 1 W.W.R. 653.

6. Debts owing payable or accruing due —test to be appplied.]—Where a garnishing order was served on the garnishee on one day, and the judgment debtor's salary was by his terms of employment not payable until the next day, there was no debt owing, payable or accruing due from the garnishee to the judgment debtor at the time of service. The test to be applied is whether or not the judgment debtor himself could have brought action against the garnishee at the moment when the order was served. *Quercetti* v. *Tranquilli,* (1941) 56 B.C.R. 481; (1941) 4 D.L.R. 63; (1941) 3 W.W.R. 901.

II. Procedure.

1. Source of information and belief.]—An affidavit sworn before action by the plaintiff's solicitor is sufficient if it follows the form provided for by subsec. 2 of sec. 3 of the Attachment of Debts Act without stating the source of his information, notwithstanding the fact that in such case the form requires the statement that he is aware of the facts. *Curley* v. *Sinser,* (1931) 45 B.C.R. 20.

2. "Writ" may include summons issued in County Court.]—The Attachment of Debts Act applies to both the Supreme and County Courts. The requirement that the plaintiff shall have issued a writ for the amount of his claim will be satisfied in a County Court proceeding by the issue of a County Court summons. *Fleishman* v. *T. A. Allan & Sons,* (1932) 45 B.C.R. 553.

3. Right of defendant who has not appeared to move against order.]—A defendant in a Supreme Court action who has not entered an appearance has no status to apply to set aside a garnishing order and an appearance entered after launching the application will not avail. *McDonald* v. *Cocos Island Treasures Ltd.,* (1932) 46 B.C.R. 360; (1933) 1 W.W.R. 189.

4. Order attaching debts due to two defendants—only one included in affidavit.]—A garnishing order attaching debts owing by the garnishee to two defendants was set aside where the supporting affidavit alleged an indebtedness of the garnishee to one of the defendants only. *Sokol* v. *Pacific Forwarding Co. Ltd.,* (1933) 3 W.W.R. 352.

5. Affidavit sworn before action commenced—how intituled.]—An affidavit in support of a garnishee summons before action was intituled in the action. The usual method is to head it "In the matter of an intended action". As strict compliance with the statute is required in garnishee proceedings and as the affidavit filed is not in fact what it purports to be on its face, the garnishee order should be set aside. Moreover, as there is no plaintiff until an action is begun, a statement by the person making the affidavit that he is the secretary-treasurer of the above-named plaintiff, is incorrect. *Neon Products of Western Canada Ltd.* v. *Bancroft,* (1935) 50 B.C.R. 81; (1935) 2 W.W.R. 337.

6. Unliquidated damages — action for breach of contract.]—Garnishment before judgment is confined to cases where the amount can be definitely ascertained at the time the action is brought. In the case of unliquidated damages there can be "no debt, claim or demand" that is "justly due and owing'" as required by the statute. *Black* v. *H. and F. Mill Co. Ltd.,* (1947) 2 D.L.R. 229.

7. Moving against order without filing dispute note.]—A defendant in a County Court action may, without filing a dispute note, apply to set aside a garnishee order. Moreover, such an application is not a "step in the action". *Trosell* v. *Gregov,* (1935) 50 B.C.R. 265; (1936) 1 W.W.R. 13.

8. Failure to verify claim as "due and owing."]—The omission from the affidavit of the words "due and owing" was more than an irregularity and could not be cured. The words "'justly and truly indebted" could not take the place of the required statement that the claim was "due and owing". The garnishing order was set aside. *Brown* v. *Strickland,* (1938) 1 D.L.R. 785; (1938) 1 W.W.R. 399.

9. Sufficiency of affidavit—judgment recovered—surplusage.]—Sec. 3 of the Attachment of Debts Act requires that the affidavit shall state that a judgment has been "recovered". The impugned affidavit said "entered"'. Held as the form to be used is as set out "or to the like effect", the word used was sufficient. As to the objection that the affidavit states that the garnishee is in-

debted "for other than wages or salary" while the order is limited to "other than wages", the statement is unnecessary here and is merely surplusage. *Wood* v. *Rennie,* (1940) 4 D.L.R. 656; (1940) 3 W.W.R. 191.

10. Defects in affidavit—strict compliance with Act required.]—A garnishing order was set aside where it did not disclose the nature of the cause of action as required by sec. 3 of the Attachment of Debts Act, nor did it verify that the alleged indebtedness was "justly due and owing". Sec. 6 which makes the forms in the schedule sufficient must be read in the light of the specific requirements of sec. 3. *McDonald* v. *Yanchuk,* (1941) 56 B.C.R. 441; (1941)) 4 D.L.R. 350; (1941) 2 W.W.R. 474.

11. Attachment of Debts Act—variance between sec. 3 and form in schedule—effect of sec. 6.]—An affidavit in support of a garnishing order, if it follows the form supplied in the schedule, is sufficient, as determined by sec. 6 of the Act. *Inland Collieries Ltd.* v. *Coal Consumers Co-operative Assn.,* (1944) 60 B.C.R. 114; (1944) 1 W.W.R. 698.

12. Whether attachment a form of execution—Order XII, rule 17 of County Court rules.]—The rule provides that where six years have elapsed since the date of a judgment the leave of a judge must be obtained before execution may issue. Here a garnishing order was issued after the elapse of more than six years. Held, that the ex parte order for attachment of debts issued by the registrar is a garnishing order nisi and not a process of execution. It may be that the garnishing order absolute is a form of execution. *Caple* v. *Caird,* (1944) 60 B.C.R. 60.

III. Priorities.

1. Competing assignment.]—A tie contractor completed his work but payment was not due until inspection and acceptance of the ties. The contract money was garnisheed before inspection or acceptance. Inspection and acceptance followed after which the contractor purported to assign the contract money to a Bank. Held, that the money was accruing due at the time of the garnishment and hence properly attached. *Rayner* v. *Neuranter,* (1932) 45 B.C.R. 353.

2. Discontinuance by attaching plaintiff — second action commenced — payment into Court by garnishee in first action.]—In the first action the Bank (garnishee) upon being served sent the attached money to its solicitors for payment into Court Then the plaintiff, having discovered a defect as to parties, discontinued the action and at once began the second one and again garnisheed the Bank. The Bank's solicitors paid the money into Court in the first action. On applications by the defendant for payment out and by the plaintiff to have the money paid to the credit of the second action, it was held, the garnishment proceedings automatically terminated on the discontinuance of the first action. It was ordered that the defendant's application (being in the first action) be struck out. The Bank must pay the money into Court in the pending action. *International Petroleum & Land Trading Co. Ltd.* v. *Ross, Royal Bank of Canada, garnishee,* (1933) 3 W.W.R. 648.

GIFT.

1. Whether gift inter vivos—intention —invalid bequest.]—A daughter owed a debt, covered by a promissory note, to her mother, who by an invalid codicil purported to bequeath it to the daughter. On the same day the testatrix put the note in the possession of the daughter's husband who was one of her executors. Held, the note remained part of the estate of the testatrix. There was no evidence of a donatio mortis causa and the invalid codicil negatived any intention of a gift inter vivos. The delivery to the son-in-law was one to her executor or agent. *Allen v. Graham,* (1934) 3 D.L.R. 797.

2. Advancement to wife and children.]—The deceased and his wife had a joint safety-deposit box in which after his death certain share certificates were found. They had all been bought by the deceased with his own money. Some were bought in the name of the wife and some in the name of each of two of the children. In addition he had bought certain other shares in the name of still another child. The dividend cheques in all cases were endorsed to the deceased and put in his own bank account.

In his income tax returns, he included the dividends as part of his income. Some of the certificates were not endorsed but those of the sons had been at a time when they were at college in the East. The deceased provided more money for the members of his family than he received as dividends from the shares in question. The evidence of the wife and children and an accountant employed by the deceased was to the effect that the deceased intended the shares to belong outright to the wife and children. Held, the shares belonged to the wife and children and were not part of the estate of the deceased; what took place when the shares were purchased was the determining factor; there is a presumption of gift where the person in whose name the purchase is taken, is the wife or child of the person who pays, which is fortified by the evidence of intention to make a gift by way of advancement. The receipt by the deceased of the dividends did not in the circumstances rebut the presumption. In *re estate of Stephen Jones deceased,* (1934) 49 B.C.R. 179; (1935) 1 W.W.R. 46.

3. Donatio mortis causa.]—A memorandum signed by the deceased purporting to give absolutely to T. for her own use and enjoyment, certain furniture and effects was handed to T. by the deceased some time before her death. Held, it was not a testamentary disposition, or a gift, inter vivos, but an expression of the intention of the deceased that T. should have the present possession but that the gift should not become effective until after the death of the deceased. Held, upholding the gift, that the memorandum was given at a time when the deceased knew she could not recover and that so far as possible in the circumstances, the furniture etc. had been abandoned to the possession of T. for some time after the deceased knew of her hopeless condition. In *re Estate of Elizabeth Sarah Rosemergey,* (1934) 49 B.C.R. 93.

4. No proof of physical delivery on parol gift.]—Where a husband made a gift of furniture to his wife and it remained in the house occupied by both of them, physical delivery need not be proved to support the gift. *Langer* v. *McTavish,* (1932) 45 B.C.R. 494.

5. Death of donor—alleged gift back—corroboration—onus.]—The deceased gave certain shares to the plaintiff and she became the registered holder of them. She endorsed the certificate in blank and, as she testified, left it with him to sell at a favourable opportunity. The dividend cheques came to her. The deceased opened a trust account in his own name in which the cheques were deposited. She held the bank book and received cheques on the account from time to time. Upon his death she claimed the certificate and being refused, sued for its delivery to her. Held, giving judgment for the plaintiff, the corroboration required by sec. 11 of the Evidence Act was satisfied by the evidence of the plaintiff's son and the circumstances, e.g. the fact that the certificate stood in her name. The defence that a gift back should be inferred (when she handed the deceased the certificate, as she said, for sale) was unsupported by any evidence. In the circumstances there was no presumption of a gift back, which requires the clearest evidence to support it and the onus on the defendant (once the gift to the plaintiff was established) was not discharged. *Sheppard* v. *The Toronto General Trusts Corporation,* (1937) 51 B.C.R. 449.

6. Joint bank account—survivor.] — A gift to the survivor is not established where the deceased signed a form prepared by his bank, authorizing his wife to withdraw money from his bank account. There was nothing in the form constituting a gift to the survivor or giving her title to any of the money. *Robertson* v. *Batchelor,* (1936) 53 B.C.R. 261; (1939) 1 D.L.R. 255; (1939) 1 W.W.R. 180 and 306; reversing on this point, (1935) 3 W.W.R. 292.

7. Undue influence—nurse and patient.] —The deceased a man of 94 made a gift to the defendant of bonds worth some $17,000. three months before his death. The defendant was a practical nurse who looked after him for several years and was always paid for her services. The deceased left no immediate relatives, only nephews and nieces. He had made other gifts to the defendant from time to time. His executors sued to set aside the gift of the bonds. Held, dismissing the action, there was nothing in the evidence to show any express undue influence, nor was there sufficient evidence to show that the defendant had a dominating influence over the deceased. In view of his age and condition of health and his own resources the gift was not improvident. The relationship was one of affection and high regard. The presumption of undue influence applies to the relation of solicitor and client, physician and patient, trustee and cestui que trust, and the like. The presumption also

arises where a dominating influence exists no matter what the relationship. If there is no dominating influence there will be no presumption. *Shaw* v. *Jancowski,* (1942) 61 B.C.R. 148.

8. Whether intended to take effect when made or after donor's death.]—The deceased, three years before her death, executed a deed to her husband of the property occupied by them as a home. It remained unregistered at the time of her death. The trial judge held that the deceased intended to make a gift effective at once. Held on appeal, reversing the trial judge, the gift was not to operate until after the grantor's death and hence was ineffective as not conforming to the Wills Act. The following facts were significant: the deed was left for three years with the deceased's agent, she continued to pay the taxes and insurance, she remained the registered owner, the evidence of the grantee was not satisfactory. *Conyers* v. *Orr,* (1943) 59 B.C.R. 455; (1944) 1 D.L.R. 201; (1943) 3 W.W.R. 418, reversing (1943) 3 W.W.R. 363.

9. Invalid marriage—transfer to woman thought to be wife—intention.]—At a time when the plaintiff believed he was married to the defendant he transferred property (land, shares, etc.) to her. When it was discovered that they were not, in fact, married he sued for a declaration that the property was his. The trial judge held there had been no intention of vesting the immediate beneficial interest in the defendant; a mistake of fact had occurred with respect to a basic and fundamental matter. The plaintiff was entitled to recover. Held on appeal,, affirming the decision below, no presumption of advancement or of a gift arose by reason of the defendant's going through a form of marriage with the plaintiff. In law the parties were strangers and the rebuttable presumption was that a resulting trust arose in favour of the plaintiff. She was to have no present beneficial interest but was to have all in the event of his death. The gift was not complete and rested in intention only, although the alleged gifts did not remain within the plaintiff"s sole control. *Clelland* v. *Clelland,* (1945) 61 B.C.R. 426; (1945) 3 D.L.R. 664; (1945) 2 W.W.R. 399; affirming (1944) 61 B.C.R. 19; (1944) 4 D.L.R. 703; (1944) 3 W.W.R. 234.

10. Gift of shares—whether revocable—held by Company's secretary.]—A company promoted by T. took from him a valuable property in consideration of the allotment to him or his nominees of all the shares except three. The plaintiff was by written direction of T. to the Company issued 40,000 shares in 1934 which were retained by the Secretary of the Company. T. told the plaintiff of the gift and that the Secretary held them. Five years later T. instructed the Secretary to cancel the plaintiff's certificate and transfer the shares to another name and this was done without the plaintiff's knowledge or signature on the share certificate. T. died. In an action for a declaration that the plaintiff was the owner of the shares the plaintiff succeeded. The allotment to the plaintiff was not a "sale or other disposition" within the meaning of the Company's by-law dealing with the manner in which shares might be transferred. This was not a transfer but an allotment pursuant to a proper resolution. T.'s statement to the plaintiff as to the gift was admissible as part of the res gestae. On the evidence T. had looked upon the shares as belonging to the plaintiff and when the change was made spoke of "taking them away" from the plaintiff. Shares are choses in action and are capable of transfer without physical delivery of the certificate. Sec 2 (25) of the Laws Declaratory Act applies. T. had done everything which according to the nature of the property was necessary to transfer the property and render the settlement binding on him. *MacDougall* v. *Johnson,* (1946) 3 W.W.R. 143.

GUARANTEE

I. Liability of Surety, 350.

II. Discharge of Surety, 352.

I. Liability of Surety.

1. Fidelity bond covering real estate agent.]—Under the Real-estate Agents' Licensing Act bonds were issued by the defendant in successive years to cover wrongful or dishonest dealing on the part of an agent. Several actions were brought as a result of his defaults and the aggregate amounts claimed exceeded the amount of the guarantee. Held that each of the bonds was a separate and distinct contract and the liablity depended on the amount stated in each bond to cover

damages sustained during the term of the license held by the agent under the Act. Held, further, that the Court had jurisdiction to distribute the amount for which the defendant was liable, rateably among the plaintiffs, instead of giving priority to the one who first commenced action. *Webster* v. *General Accident Assurance Co. of Canada,* (1933) 47 B.C.R. 226; (1933) 2 W.W.R. 60.

2. Proof of claim as against guarantors.]—The trial judge gave judgment against the principal debtor and two guarantors. Held, on appeal, reducing the judgment against the guarantors that the plaintiff had not, on the evidence, made out a case against the guarantors for a greater amount than they had conceded to be due. *Tooke Bros. Ltd.* v. *Al-Walters Ltd., Levin and Matoff,* (1934) 49 B.C.R. 195; (1935) 1 D.L.R. 295.

3. Status of executors as guarantors.]—Executors were directed by the will to carry on the testator's retail coal and ice business until a son should reach a named age. The testator was concerned in another business, that of coal mining, and had given to the plaintiff bank a guarantee in connection with it. The executors gave the bank a further guarantee with respect to the coal mining business and action was taken against the surviving executrix on it. The trial judge gave judgment against the executrix, "de bonis testatoris". Held, on appeal, reversing the decision below, that the executrix was permitted to carry on the retail business and might have given a guarantee with respect to it, but the executors had no authority to guarantee another business entity. An application to amend the judgment to one "de bonis propriis" was refused. *Bank of Montreal* v. *Morrow,* (1936) 50 B.C.R. 540; (1936) 4 D.L.R. 331; (1936) 2 W.W.R. 566.

4. Contractor's covenant to indemnify against claims by invitees—pile of gravel left on roadway at night—joint tortfeasors.]—The defendant as occupier was found liable to pay damages to an invitee who had fallen over a pile of gravel on a roadway left there by a building contractor (the third party). The defendant claimed to be indemnified under the contractor's covenant in the building contract providing, inter alia, that "the contractor shall use due care that no person is injured in or about the said work". On the trial of the issue between the judgment debtor and the third party the trial judge held that there should be indemnification on the footing that the accident was solely attributable to the negligence of the third party which was in violation of its covenant. Held on appeal, affirming the decision below, the accident was within the scope of the indemnity covenant. The tortious act of the third party was the primary cause of the injury against which it had covenanted to indemnify the occupier. The defence that one joint tortfeasor cannot claim indemnity from another was met by the exception that where both parties' negligence contributes to an accident, but one's negligence consists in commission, the other's merely in omission, the inactive party may claim indemnity from the other. *McFall* v. *Vancouver Exhibition Ass'n: Marble, third party,* (No. 4) (1943) 59 B.C.R. 1; (1943) 3 D.L.R. 39; (1943) 2 W.W.R. 225; affirming (1942) 58 B.C.R. 168; (1942) 4 D.L.R. 336; (1942) 3 W.W.R. 529.

5. Fidelity bond covering real estate agent — Real-estate Agents' Licensing Act.]—The plaintiff suffered losses at the hands of a licensed and bonded real-estate agent—some in each of four years. For each of those years the agent under the terms of the Act furnished a bond or renewal thereof for $1000. It was contended for the defendant bonding company that the total liability could not exceed $1000. Held, the liability was cumulative and the plaintiff was entitled to judgment for the aggregate of her losses. The intention was to protect the public to the extent of $1000 in each year. The attempt by the defendant to limit its liability to $1000 in all by virtue of a unilateral provision to that effect in its annual renewal certificate failed. *Smith* v. *Employers Liability Insurance Corp.,* (1947) 1 D.L.R. 849.

II. Discharge of Surety

1. Bond of indemnity against embezzlement.]—A municipality in applying for a bond covering an employee stated that quarterly audits were made. Later and without notice to the defendant the municipality adopted a "continuous audit" system. The municipal clerk upon a renewal of the bond stated in writing that the employee did not owe any money to the municipality although the fact was that the employee had then already embezzled considerable sums of money, of which fact the clerk had no knowledge. Held, that neither defence was

effective. The change in the audit was not so material as to invalidate the bond and the "owing" of money was not intended to cover embezzlement in the circumstances. *Corporation of the District of Penticton* v. *London Guarantee & Accident Co. Ltd.*, (1932) 45 B.C.R. 464; (1932) 1 W.W.R. 812. Reversed (1933) 46 B.C.R. 515; (1933) 3 D.L.R. 216; (1933) 1 W.W.R. 712.

2. Whether guarantee revocable by death of surety.]—Where the guarantee is from its nature not revocable by the surety and there is no express stipulation that it may be revoked, notice of the surety's death will not terminate the guarantee. *E. A. Towns Ltd.* v. *Harvey*, (1946) 4 D.L.R. 160, affirming (1946) 2 D.L.R. 72; (1945) 62 B.C.R. 168, affirming (1945) 2 D.L.R. 782; (1945) 61 B.C.R. 414.

See CONTRACT.

HABEAS CORPUS.

I. JURISDICTION, 353.

II. RIGHT TO DISCHARGE, 355.

III. PROCEDURE, 356.

IV. APPEALS, 357.

I. JURISDICTION.

1. Supreme Court of Canada—limited to cases under Acts of Parliament.]—The Supreme Court of Canada is (with certain exceptions) a purely statutory Court and in habeas corpus matters its jurisdiction (sec. 57 of the Supreme Court Act) is limited to criminal cases under an Act of Parliament. As attempting to steal, like stealing, was a common law offence it did not come within section 57 and the Court was without jurisdiction. Notwithstanding that the charge read "contrary to the Criminal Code" the jurisdiction extends only to offences which are criminal by virtue of the Code. *Smith* v. *The King*, 56 C.C.C. 51.

2. Record disclosing lack of jurisdiction.]—On the face of the record the accused consented to be tried by Judge Ellis in the County Court Judge's Criminal Court, but was tried and convicted by Charles James Lennox. Held, on habeas corpus, granting the order, that it did not appear from the record that Charles James Lennox was a judge, or what county the City of Vancouver was in, and since the jurisdiction to try the accused depended on his consent, the conviction is null and void. The County Court Judge's Criminal Court is not a competent Court of general jurisdiction and habeas corpus will lie. *Rex* v. *Yong Jong*, (1936) 50 B.C.R. 433; (1936) 3 D.L.R. 60; (1936) 2 W.W.R. 147; 66 C.C.C. 62.

3. No proof of consent by counsel for Attorney-General—Regulation 39A (c) of Defence of Canada Regulations.]—The Defence of Canada Regulations required the consent of counsel representing the Attorney-General of Canada or the Province, before a prosecution is instituted under Regulation 39A (c). Held on habeas corpus, dismissing the application, the magistrate had general jurisdiction by virtue of regulation 63 (2) and the Criminal Code. The matter of consent is one of procedure and of evidence only; want of consent is a matter of defence to be raised by an accused at his trial. *Rex* v. *Cooper*, (1941) 56 B.C.R. 301; (1941) 2 W.W.R. 206; 76 C.C.C. 277.

4. Applications to different judges.]—The decision of the Court of Appeal in *Rex* v. *Loo Len* (1923) 33 B.C.R. 213, which held that an applicant for habeas corpus is limited to a single application for the writ, must be held to be over-ruled. An applicant may go from judge to judge of the same court, and each is bound to hear and determine the application on its merits, notwithstanding that some other judge has already refused a similar application. *Ex parte Ciminelli*, (1943) 59 B.C.R. 148; (1943) 3 D.L.R. 294; (1943) 2 W.W.R. 139; 79 C.C.C. 362.

5. Inapplicability of remedy—alternative right of appeal.]—The accused was convicted of obtaining money under false pretences and making a false oath. The sentence included an order to pay the costs of the prosecution. Held, refusing his discharge on habeas corpus, on the contention that the convicting judge was without power to order the payment of costs, the trial Court had jurisdiction and was fully seized of the whole matter. There was adequate relief by way of appeal and a judge on habeas corpus should not be made to perform the functions of a court of review. *Rex* v. *Thoem*, (1933) 3 W.W.R. 637; 62 C.C.C. 276.

II. Right to Discharge.

1. Applicant discharged—re-arrested on "amended order"—effect of.]—The applicant was discharged on habeas corpus because the order of deportation was defective. He was re-arrested on an "amended order" sufficient in form. He was not again brought before a Board of Inquiry or given any opportunity to offer a defence to his arrest. A second application for habeas corpus was refused on the ground that the new order was effective, where, as here, the applicant had been freed as the result of an error in procedure. The Court of Appeal being equally divided dismissed the appeal. Held, by the Supreme Court of Canada quashing the "amended order", the order which had been set aside as defective could not be amended for there was nothing to amend. The order ceased to exist—it was a thing of naught. This was not a case of irregularity in the first order—it was wholly bad. *In re Immigration Act and Samejima,* (1932) S.C.R. 640, 58 C.C.C. 300; (1932) 4 D.L.R. 246 reversing (1932) 45 B.C.R. 401, 58 C.C.C. 250; (1932) 3 W.W.R. 201 affirming (1931) 44 B.C.R. 317; (1931) 3 W.W.R. 56, 57 C.C.C. 395.

2. Defence of Canada Regulations—sentence to be passed in public.]—The accused was, on appeal, convicted of being a member of an illegal organization contrary to regulation 39C of the above Regulations. Regulation 62(2) requires that sentence be passed in public. The convicting judge had reserved judgment at a public hearing but later when alone noted in his book the fact of conviction and sentence. Neither the accused nor his counsel was before the judge when sentence was passed. The accused was discharged. *Rex* v. *Stone,* (1941) 56 B.C.R. 321; (1941) 4 D.L.R. 427; (1941) 2 W.W.R. 63; 76 C.C.C. 288.

3. Warrant of commitment defective—not cured by fresh warrant.]—Where without jurisdiction and through an error, the warrant of commitment directed the keeper of the gaol to keep the prisoner at hard labour, a new warrant was issued leaving out the direction as to hard labour. Held on habeas corpus, discharging the prisoner, that the second warrant could not be relied on, particularly as part of the sentence with hard labour had already been served. *Rex* v. *Yohn,* (1941) 56 B.C.R. 184; (1941) 1 W.W.R. 639; 75 C.C.C. 395.

III. Procedure.

1. Proceedings brought up on certiorari—effect on return under habeas corpus.]—On an application for habeas corpus and after the return had been made, certiorari in aid was directed. The return upon certiorari included the evidence at the hearing. Held, the transcript ought not to be looked at to support the conviction and, indeed, ought not to form part of the return. Having held on the record as returned on habeas corpus that the conviction was void, the transcript, even if looked at, did not warrant a different conclusion. *Rex* v. *Yong Jong,* (1936) 50 B.C.R. 433; (1936) 3 D.L.R. 60; (1936) 2 W.W.R. 147; 66 C.C.C. 62.

2. Certiorari in aid—excess of punishment—right to look at depositions for purpose of sec. 1124 of Criminal Code.]—The convicting magistrate had exceeded the limit of punishment, and it became necessary for the judge to consider whether the defect could be corrected under sec. 1124 of the Code. This course required the judge to satisfy himself that the offence had in fact been committed. In such a case the judge has not only the right, but the duty of examining the depositions. *Rex* v. *Lillian Eldridge,* (1943) 60 B.C.R. 28; (1944) 1 D.L.R. 231, (1943) 3 W.W.R. 446; 80 C.C.C. 341.

3. Common law power to detain prisoner until proper warrant issued.]—The accused was convicted of an offence against The Canada Shipping Act and sentenced to eight weeks in gaol. On appeal the County Court Judge affirmed the conviction but reduced the sentence to seven weeks and three days. No warrant of commitment was made by the Judge or the Magistrate to cover the new sentence. Held, on habeas corpus, the original warrant was destroyed by the order imposing the new sentence and the accused was illegally held. The warrant ceased to have effect but the conviction still stood. It was ordered that the prisoner be held and an amended warrant of commitment issued. *Rex* v. *Tellier,* (1946) 62 B.C.R. 366; (1946) 1 W.W.R. 532; 85 C.C.C. 401.

4. Sufficiency of detention if validly shown on return.]—The accused was arrested without a warrant being exhibited to him. He was told that he was being arrested on a Saskatchewan warrant. On habeas corpus the return showed that he was held on a warrant from Saskatchewan which had been endorsed as required by the Crim-

inal Code. The endorsement was not made until two days after his arrest. Held, the accused was not entitled to be discharged for the irregularity of his arrest, where, as here, the original warrant in due form and duly endorsed is returned in answer to the writ. So long as a valid cause of detention is shown on the return, that is sufficient. *Rex* v. *Haagstrom,* (1943) 1 D.L.R. 236; (1943) 2 W.W.R. 442; 78 C.C.C. 332.

IV. Appeals.

1. Deportation proceedings civil in nature rather than criminal.]—A preliminary objection to the hearing of an appeal from the refusal of a judge to discharge on habeas corpus a person detained for deportation was dismissed, it being held that such proceedings are civil and not criminal in their nature and are within the jurisdiction of the Court. *Rex* v. *Sue Sun Poy,* (1932) 46 B.C.R. 321.

2. Writ set aside on appeal—civil or criminal matter.]—The prisoners were convicted of having opium in their possession. They were tried in the County Court Judge's Criminal Court and acquitted. On appeal a new trial was ordered and without any re-election another County Court Judge took the second trial and convicted them. Application for habeas corpus was refused by one Supreme Court Judge but a second one quashed the convictions, adjudged as nullities the orders of the Minister under the Immigration Act and the Opium and Narcotic Drug Act and ordered the release of the prisoners. The Crown appealed and the respondents took the objection that there was no jurisdiction to hear an appeal on habeas corpus in a criminal matter. Held, overruling the objection, that whether or not such an appeal lies in a purely criminal matter the order here went beyond the question of the conviction in that it dealt with the Minister's order which was a civil matter. Held, on the merits, allowing the appeal, that the Judge below had misconceived the effect of the order of the Court of Appeal directing a new trial. Its effect was to order a new trial in the same Court without a fresh election. That Court was not functus officio upon the acquittal at the first trial. The prisoners were ordered to be apprehended and returned to the gaol from which they had been released. *Rex* v. *Chow Wai Yam,* (1937) 52 B.C.R. 140; 69 C.C.C. 86; (1937) 4 D.L.R. 660, reversing (1937) 1 W.W.R. 435; (but see *In re Fred Storgoff* (1945) S.C.R. 526; (1945) 3 D.L.R. 673, 84 C.C.C. 1, overruling (1944) 60 B.C.R. 464.)

3. Right of appeal in so-called criminal proceeding.]—The writ is in the nature of a new suit brought to enforce a civil right which the person detained claims as against those who are holding him in custody. It is not a proceeding by or against the Crown, nor is it a step in the cause, civil or criminal, under which the detention has taken place. It is none the less a civil proceeding because it is used to get release from custody under a criminal prosecution. Has there been illegal detention whether brought about by civil or criminal proceeding? The remedy had no relation to the proceedings below because they were at an end. The guilt or innocence of the party was not in issue; only the question of the legality of his detention which is a civil matter. The remedy of habeas corpus, no matter how arising, is solely within the Provincial jurisdiction and does not trench on the criminal law; the Court of Appeal has power to hear an appeal from an order quashing a conviction upon habeas corpus with certiorari in aid. *Rex* v. *McAdam,* (1925) 35 B.C.R. 168 overruled; *ex parte Yuen Yick Jun,* (1938) 54 B.C.R. 541; 73 C.C.C. 289; (1940) 2 D.L.R. 432; (1938) 2 W.W.R. 274 and (1940) 2 W.W.R. 467 reversing (1937) 3 W.W.R. 143: (1937) 52 B.C.R. 158; (but see *in re Fred Storgoff* (1945) S.C.R. 526; (1945) 3 D.L.R. 673 overruling (1944) 60 B.C.R. 464).

4. Whether later decision of House of Lords affects right to hear appeals in criminal matters.]—It was contended that *Amand* v. *Home Secretary and Minister of Defence of Royal Netherlands Government* (1943) A.C. 147, had shaken the authority of the decision of the Court of Appeal in *Ex parte Yuen Yick Jun,* (1938) 54 B.C.R. 541, and that it should not be followed. Held, the Amand case does not detract from or furnish any real ground for doubting the correctness of the reasoning which prompted the decision in *Ex parte Yuen Yick Jun, State of New York* v. *Wilby,* (1944) 60 B.C.R. 370; (1944) 3 D.L.R. 693; (1944) 2 W.W.R. 356; 81 C.C.C. 371; (but see *in re Storgoff* (1945) S.C.R. 526; (1945) 3 D.L.R. 673, 84 C.C.C. 1 overruling (1944) 60 B.C.R. 464).

5: Whether appeal lies in habeas corpus matter where conviction is for crminal

offence.]—The provisions of sec. 6 of the Court of Appeal Act granting a right of appeal to the Court of Appeal in habeas corpus matters are inoperative if the applicant for the writ is detained by virtue of a conviction for an offence under the Criminal Code. The Dominion Parliament has exclusive jurisdiction to authorize such an appeal under sec. 91 (27) of the British North America Act and a Provincial legislature has no such power under sec. 92 (13). *Rex* v. *Storgoff*, (1945) S.C.R. 526; (1945) 3 D.L.R. 673; 84 C.C.C. 1; overruling (1944) 60 B.C.R. 464; 82 C.C.C. 153.

See CERTIORARI.

See CRIMINAL LAW.

See EXTRADITION.

See IMMIGRATION.

HIGHWAYS.

1. Status of highways in City of Vancouver—ownership of street.]—A taxicab driver who, contrary to a by-law, uses the streets without holding the licence required by the City by-law is not a trespasser and can recover for its failure to keep the streets in reasonable repair. In Vancouver the fee simple of the streets is vested in the municipality. The City is not as a result the owner in the full sense of the word. It holds the streets as trustee for the public, and they remain subject to the right of the public to "pass and repass". *Burchill* v. *City of Vancouver*, (1932) S.C.R. 620 affirming (1932) 1 W.W.R. 641.

2. Municipal Act—by-law resuming and expropriating—long user.]—Where under the Municipal Act a municipality was authorized both to resume the use of lands reserved by the Crown as highways up to a certain acreage and to expropriate lands for the same purpose, and it went beyond the acreage allowed to be resumed, the expropriating part of the by-law was held to be severable so as to validate the by-law as to the whole area. After a lapse of forty years with the records destroyed and the parties no longer alive, there is an irresistible presumption that the proper steps were taken. *Riches* v. *Richmond Township*, (1933) 3 D.L.R. 437.

3. Failure to turn out seasonably when meeting another—travelled portion of the highway.]—Sec. 19 of the Highway Act requires a person in charge of a vehicle, when meeting another vehicle, to turn out seasonably to the right from the centre of the travelled portion of the highway. The travelled portion of the highway is the part which has been "wrought for travelling", i.e. the part of the road allowance set apart by the authorities for the use of vehicles, and not necessarily the commonly travelled track which may vary from time to time. *Irizawa* v. *Corner*, (1940) 3 W.W.R. 430; (1940) 1 D.L.R. 786.

4. Action for recovery of possession—road—animus dedicandi.]—The defendant had been in possession fifteen years. The plaintiff held a certificate of indefeasible title which was subject, inter alia, to any public highway, and to the right of any person to show that the part in question was improperly included through a wrong description. The judge held that the onus was on the defendant in claiming that the disputed area was part of a public highway. To establish dedication two concurrent condition must be established: (1) there must be on the part of the owner the actual intention to dedicate; (2) it must appear that the intention was carried out by the way being thrown open to the public, and that the way had been accepted by the public. The evidence of user by the public was too slim to carry any inference of dedication. The disputed area was not at any time a public highway. *Young* v. *Workman*, (1942) 58 B.C.R. 414; (1943) 2 D.L.R. 306.

See MUNICIPAL CORPORATIONS.

HUSBAND AND WIFE.

I. RIGHTS AND LIABILITIES, 361.

A. In General, 361.

B. Separation Agreements, 363.

C. Deserted Wives' Maintenance Act, 364.

II. ALIENATING WIFE'S AFFECTIONS, 365.

III. PROPERTY RIGHTS, 366.

IV. MARRIAGE, 367.

I. RIGHTS AND LIABILITIES.

A. In General.

1. Ontario judgment—Reciprocal Enforcement of Judgments Act.]—The male defendant and the female defendant entered into an agreement with the plaintiff (then the wife of the male defendant) making provision for the latter's financial support in view of a contemplated divorce. The divorce took place and the defendants intermarried. The defendants paid for ten years and then ceased. The plaintiff brought action in Ontario. The defendants appeared and put in evidence contending that the agreement was based on an illegal consideration and was contrary to public policy. Judgment was given for the plaintiff and she registered the judgment in British Columbia under the above Act. The defendants applied to set the registration aside, renewing the contentions made at the trial and alleging want of jurisdiction in the Ontario Court. The judge refused to set the registration aside, holding, that by appearing and defending the Ontario action, the defendants had submitted to the jurisdiction there, and in the circumstances the agreement was not invalid as being against public policy. Held, on appeal affirming the decision below, it could not be said that the motive of the plaintiff was to do anything contrary to public policy; all she wanted was protection. There was no evidence that she knew there was any definite arrangement between the co-defendants to marry or that her former husband would not enter into such an agreement himself without the assistance of any one if able to perform it. The contract would have been legal between the first wife and her husband; the addition of the other defendant did not make it illegal. *Pope* v. *Pope*, (1940) 55 B.C.R. 277; (1940) 3 D.L.R. 454; (1940) 2 W.W.R. 509; affirming (1940) 55 B.C.R. 27; (1940) 2 D.L.R. 661; (1940) 1 W.W.R. 566.

2. Married Women's Property Act.]—Upon an application under sec. 29 of the Married Women's Property Act for an adjudication of rights as between husband and wife, it was held that the husband gave all his earnings to his wife on the understanding that their mutual savings should be invested and that while she took the investments in her own name, they were joint property. *Ward* v. *Ward*, (1932) 45 B.C.R. 248; (1932) 3 D.L.R. 774.

3. Action for alimony under Order LXXA.]—Proof of the fact that the plaintiff was the wife of the defendant depended on the death of her former husband. The trial judge held that she had failed to prove the validity of her marriage to the defendant and dismissed her action with costs. Held, on appeal, varying the decision below, that only the cash disbursements could be allowed as costs under Order LXXA.(6). *Hazelton* v. *Hazelton*, (1937) 52 B.C.R. 401; (1938) 1 W.W.R. 489.

4. Action for alimony under Order LXXA.] — The husband having left the plaintiff without any justification so far as she was concerned was held entitled to alimony. Under the divorce jurisdiction in England the amount usually allowed is one-third of the joint income of the parties but that rule, if it can be called a rule, is only a guide by analogy in these proceedings. The station in life, the position of the parties and the nature of the husband's property are factors to be taken into account. The basis of the claim is her right to pledge his credit to provide herself with maintenance according to his station in life. An award of $100 per month was made but there was no jurisdiction to order the husband to set up a trust to insure payment for the future. *Martin* v. *Martin*, (1939) 54 B.C.R. 434; (1939) 4 D.L.R. 822; (1939) 3 W.W.R. 537.

5. Medical and other expenses—wife having adequate means.]—A physician sued the husband for medical services to the wife who, he knew, was a married woman and to whom the account was charged. The trial judge found that the husband had expressly prohibited her from pledging his credit, but had given her an allowance. The treatments began before and continued after she left her husband and began proceedings for a judicial separation. The trial judge held that what happened at the first engagement of the doctor did not amount to a pledging of her husband's credit. As to the period after she left her husband there was no new contract made by her as the agent of necessity of her husband. Here it could not be said that she was left without adequate means. On appeal the decision of the trial judge was affirmed. *Lineham* v. *Holden*, (1933) 4 D.L.R. 187.

6. Husband agent of wife—judgment recovered against husband—election.]—The plaintiff was employed by the husband as agent of the wife. He sued both for wages and having discontinued against the wife took a consent judgment against the

husband. Later he sued the wife on the same cause of action. Held, dismissing the second action, the plaintiff had elected to look to the agent, the husband. There was only one contract of service. He could not, after he had sued one to judgment, maintain another action against the other. *Gardiner* v. *Chapple,* (1932) 4 D.L.R. 804.

B. Separation Agreements.

1. Whether payments under agreement cease when marriage dissolved.]—By the terms of a separation agreement the husband undertook to pay his wife $60.00 per month during the term of the agreement. There was nothing to show how long the agreement should continue except that they were to live apart "for the future". The husband obtained a decree of divorce as a result of her misconduct and ceased making the monthly payments. There was no "dum casta" clause in the agreement. Held, the obligation ceased when the marriage status was put an end to by the divorce. *Montgomery* v. *Montgomery,* (1945) 61 B.C.R. 229; (1945) 2 D.L.R. 601; (1945) 1 W.W.R. 636.

2. Defence that parties not husband and wife—onus as to fact of dissolution of previous marriage—mutual mistake.]—The plaintiff, domiciled with her husband in Canada, parted from him and took divorce proceedings in Oregon. Then she purported to marry G. who left her telling her that he had had his marriage to her annulled. The defendant and the plaintiff believing that she was free to marry went through a ceremony of marriage in Vancouver. Twelve years later they separated under an agreement whereby the defendant agreed to pay her a monthly amount, to cease if the marriage should be dissolved or annulled. The plaintiff sued for arrears under the agreement in the County Court. Held, the action should be dismissed. It must be assumed that the plaintiff's original marriage is still subsisting until shown to be dissolved. The rights of the parties under the separation agreement can be decided here, without purporting to deal with the question of the validity of the marriage of the parties. The defendant's application to amend the pleadings to set up mutual mistake as to the effect of the Oregon decree was granted. It was held that there was such mutual mistake and that it voided the agreement. *Evans* v. *Evans,* (1941) 2 W.W.R. 81.

C. Deserted Wives' Maintenance Act

1. Right of Appeal.]—A garnishee paid certain money to the magistrate under the Act. The appellant claimed the money by virtue of an assignment and appealed against the refusal of the magistrate to order the trial of an issue. Held, by the County Court Judge, that no appeal lies against such a refusal. *Chapelas* v. *Coukes,* (1932) 45 B.C.R. 417.

2. Jurisdiction to make order against husband domiciled and resident abroad.]—Following the issue of a summons directed to the husband in New Zealand, the wife obtained an order from a magistrate for service by registered mail. The husband moved for a writ of prohibition. The judge held that the language of the Act contemplated proceedings against husbands abroad and dismissed the motion. Held, on appeal, affirming the decision below, that the offence was committed within the magistrate's jurisdiction and the order for service was properly made. While prima facie such a statute is territorial in its application, yet if a contrary intention is expressed or implied in the Act, the Courts will give effect to it. *Gagen* v. *Gagen,* (1934) 48 B.C.R. 481; (1934) 4 D.L.R. 409; (1934) 3 W.W.R. 84; 62 C.C.C. 286; affirming (1934) 1 W.W.R. 491.

3. Imprisonment of pensioner for failure to pay.]—The husband against whom an order had been made under the Deserted Wives' Maintenance Act refused to pay on the ground that the Board of Pension Commissioners for Canada had the sole jurisdiction in regard to the disposition of his pension. It was held, affirming the order, that once the pension money reaches his hands, it loses its character of pension and is just the same as any other money the pensioner may have. In re *Deserted Wives' Maintenance Act: Harrap* v. *Harrap,* (1936) 51 B.C.R. 219.

4. Mandamus—Deserted Wives' Maintenance Act.]—A magistrate had made an order against the husband for weekly payments to a deserted wife under the Act. The husband appealed to the County Court judge but had not made the payments as ordered. A show-cause summons had been served upon the husband under section 10 of the Act. The judge adjourned the hearing of the appeal pending the outcome of the show-cause proceedings. The husband moved for a mandamus directing the judge to hear the

appeal. Held, dismissing the motion, that in view of the very stringent provisions of the Act the Legislature intended that every protection possible should be given to the wife to ensure her proper maintenance during the pendency of the proceedings taken against the husband. The Act expressly provides that where the husband is the appellant there shall be no stay pending appeal. In re *Deserted Wives' Maintenance Act* and in re *Ada Sarah Stephanie,* (1945) 61 B.C.R. 285; (1945) 2 D.L.R. 408; (1945) 1 W.W.R. 654.

5. Deserted Wives' Maintenance Act—new action to enforce order under.]—Since an order for maintenance under the Act is subject to variation and termination it is not a final and conclusive judgment upon which an independent action for arrears may be based. Moreover the Act affords complete machinery for compelling payment and a separate action ought to be stayed. *Holme* v. *Holme,* (1947) 1 D.L.R. 361; (1947) 1 W.W.R. 633.

6. Right to sue in the County Court for arrears of maintenance ordered by magistrate.]—The wife had obtained a magistrate's order under the Deserted Wives' Maintenance Act. She sued for the arrears. The undoubted right of a judgment creditor to sue on a judgment is subject to the limitation that it must be final and conclusive. Here the magistrate's order may be by him altered or rescinded (secs. 5 and 6). Held, the action must be dismissed. The fact that the parties were afterwards divorced without any consideration of alimony or maintenance by the Supreme Court did not put an end to the magistrate's power to vary or rescind. *Spanos* v. *Spanos,* (1943) 3 W.W.R. 260.

II. Alienating Wife's Affections.

1. Enticement not proved—loss of consortium—harbouring.]—In an action for damages for loss of consortium and for unlawfully harbouring a wife, the evidence showed that the wife had done the enticing rather than the defendant. Held, dismissing the action, that the plaintiff had not made out a case on this claim. As to harbouring there was no refusal by the defendant to deliver the wife back to the husband. *Brune* v. *Stensto,* (1938) 52 B.C.R. 532; (1938) 2 D.L.R. 795; (1938) 1 W.W.R. 746.

2. Whether husband entitled to damages for loss of consortium.]—The plaintiff claimed damages for the loss of the services, society and affection of his wife. Held, dismissing the action, it was not proved that the defendant persuaded his wife to leave the plaintiff or induced her to leave, or incited her to leave, or procured her leaving him. *Guilbault* v. *St. Onge,* (1946) 2 W.W.R. 607.

III. Property Rights.

1. Execution — interpleader — effect of parol gift by husband.]—The claimant in an interpleader issue claimed certain furniture seized by the Sheriff under execution against her husband. He had acquired the chattels under a conditional sale agreement and before he had completed his payments he gave them to the claimant (before their marriage) by word of mouth and the claimant and her husband together made use of the furniture for some years. Held, on appeal, affirming the trial Judge, that a physical delivery need not be proved where the subject of the gift remained in the same place before and after the gift. *Langer* v. *McTavish,* (1932) 45 B.C.R. 494; (1932) 4 D.L.R. 90.

2. Transfer by wife to husband without independent advice.]—Following a quarrel a wife conveyed to her husband her interest in their home. After their divorce, the wife sued in the County Court for cancellation of the conveyance on the ground of undue influence on the part of her husband. She testified that he had taken her to a solicitor's office to arrange for a divorce and that she had signed the conveyance thinking it was a document connected with the divorce proceedings. The solicitor testified that he had made her fully aware of the nature of the conveyance out of the presence of her husband and that she executed it voluntarily. The trial judge dismissed the action. Held, affirming the decision below that the trial judge was justified in believing the solicitor and that the quarrel and separation had ended the fiduciary relationship between husband and wife and shifted the onus of proof. *Heathorn* v. *Heathorn,* (1932) 46 B.C.R. 413.

3. Acquiescence by wife in husband's handling of securities.]—The wife joined with her husband in delivering certain securities of hers to the defendant who advanced funds (by the use of certain debentures) to enable the plaintiff and her family to live. The defendant disposed of the

wife's securities and by the time the action for their return or damages was commenced, he claimed that the plaintiff was still in his debt for advances made. The trial judge dismissed the action. Held, dismissing the appeal, on an equal division of the Court, that the plaintiff knew that she and her family were living on the proceeds of the advances; the fact that the debentures were delivered to her husband and not to the plaintiff was met by her acquiescence and a delay of three years before commencing action, during which time she knowingly shared in the proceeds; the contention that only the existing debt was covered ignored the whole object of the transaction. *Piper* v. *Unverzagt*, (1936) 51 B.C.R. 379; (1937) 2 D.L.R. 319.

IV. Marriage.

1. Proof of Chinese marriage.]—The parties were domiciled in China and evidence was given as to their intention to marry and of a betrothal contract. No expert was called as to the Chinese law. There was no proof by record or by witnesses. The parties cohabited together in China and were regarded there as man and wife. Held, that no marriage was proved. If the cohabitation had taken place in British Columbia the necesssary presumption could be made but the Court could not, in the absence of proof of the Chinese law, say what presumption could be drawn from the cohabitation. *Leong Sow Nom* v. *Chin Yee You*, (1934) 49 B.C.R. 244; (1934) 3 W.W.R. 686.

2. Authority to solemnize under Marriage Act.]—The Marriage Act forbids others than "ministers or clergymen" registered under the Act to solemnize any marriage. The Victoria City Temple, incorporated under the Societies Act, and being a religious body as defined by the Act, applied for the registration of T. as one authorized to solemnize marriage. Although T., an ordained minister of the Congregational Church in England, had been duly appointed pastor of the Temple, the registrar refused registration. Held, on appeal, that the application for registration should be granted. The registrar erred in holding that the applicant must be the governing authority of the religious body by which the minister was ordained. Ordination is not a necessary qualification. The registrar also erred in holding that the Temple was not sufficiently established as required by the Act. The evidence showed otherwise. Re *Marriage Act and application of Victoria City Temple*, (1934) 49 B.C.R. 277; (1934) 3 W.W.R. 761.

3. Petition for leave to marry notwithstanding refusal of parents.]—The County Court Judge had refused to authorize a marriage against the wishes of the girl"s parents. The evidence showed that she was 17, in delicate health, and pregnant by the applicant. They were not of the same religious denomination. He was a private in the army and agreed to assign half his pay to supplement her separation allowance. The marriage would legitimate the child when born. Held, dismissing the appeal, the judge below saw the witnesses and no doubt gave proper weight to all the factors and his decision should not be disturbed. In re *Marriage Act* and in re *H.*, (1944) 60 B.C.R. 444; (1944) 3 D.L.R. 665 (sub nom. re *Horne*).

See Divorce.

See Gift.

IMMIGRATION.

I. Jurisdiction, 368.

II. Who Liable to Deportation, 369.

III. Practice, 372.

I. Jurisdiction.

1. Premature deportation order.]—On the termination of his imprisonment on a conviction for having opium in his possession, an alien was detained and ordered to be deported. On appeal from the refusal of a writ of habeas corpus, it appeared that the convict while serving his sentence was the subject of an inquiry under the Immigration Act which had resulted in the deportation order. Sec. 26 of the Opium and Narcotic Drug Act provides that a person so convicted shall "upon the expiration or sooner determination of the imprisonment" be kept in custody and deported after enquiry as provided under the Immigration Act. Held, allowing the appeal, that there is no power to hold the inquiry until the "expiration or sooner determination of the

imprisonment." *Rex* v. *Sue Sun Poy*, (1932) 46 B.C.R. 321; (1932) 3 W.W.R. 212.

2. Review by Court barred by sec. 23.]—A Board of Inquiry under the Immigration Act ordered that the appellant be deported. Notwithstanding sec. 23 of the Act which says that no Court or Judge shall have jurisdiction to interfere with such an order (except on grounds not material here), a Judge on habeas corpus quashed the deportation order. A fresh arrest led to a second habeas corpus application which was refused by another Judge. On appeal from the refusal, held, (upon an equal division of the Court of Appeal), that the order to quash was made contrary to sec. 23 of the Act and was a nullity. The Board's deportation order still stood notwithstanding his re-arrest and the subsequent proceedings. The appeal was dismissed. In *re Immigration Act* and *Munetaka Samejima*, (1932) 45 B.C.R. 401; Reversed by Supreme Court of Canada, (1932) S.C.R. 640; (1932) 4 D.L.R. 246; 58 C.C.C. 300.

II. Who Liable to Deportation.

1. Applicability of sec. 42 of Immigration Act.]—Where on an application for habeas corpus the return showed that the arrest was based on sec. 26 of the Opium and Narcotic Drug Act, sec. 42 of the Immigration Act is not applicable. Sec. 26 limits the applicable provisions of the latter Act to those relating to "enquiry, detention and deportation". In *re Immigration Act* and *Sue Son Poy*, (1932) 46 B.C.R. 232; (1932) 4 D.L.R. 721; (1932) 3 W.W.R. 220.

2. Effect of passport—certificate of registration.]—The applicant for habeas corpus was arrested and in the course of being examined by a Board of Inquiry as to his entry into Canada, it was contended that the fact that he had a passport amounted to a formal admission of his right to be in Canada. Held, the issue of a passport had nothing to do with the Immigration Act or whether or not the holder had duly entered Canada. The certificate of registration was merely permission to go to Seattle and return. It was contended that there was estoppel; a previous inquiry had dealt with only one of the matters open to it, and until the Board proceeded on the charge already dealt with, no estoppel could arise. *Re Banta Singh and the Immigration Act*, (1937) 52 B.C.R. 321; (1938) 1 D.L.R. 789; (1938) 1 W.W.R. 328.

3. Sec. 43 of the Immigration Act.]—The accused served his sentence for having drugs in his possession. Sec. 26 of the Opium and Narcotic Drug Act provides for the detention and deportation of aliens at the end of their imprisonment, in certain cases. The machinery for ascertaining whether a person is an alien or not is sec. 42 of the Immigration Act. If the Board under that section finds him deportable the actual deportation is carried out under sec. 43 (since amended, in 1937), which is unworkable because it cannot become operative until after the sentence is determined (*Rex* v. *Sue Sun Poy*, (1932) 46 B.C.R. 321) and after the Board has made its finding. Here the Board's order was not made until February, 1937, while the order of the Minister of Justice under sec. 43 was made in the previous October. The accused was discharged on habeas corpus. *Rex* v. *Low Kee*, (1937) 52 B.C.R. 151; (1937) 3 W.W.R. 97.

4. Chinese Immigration Act—review of Controller's decision.]—It cannot be held that the only Canadian citizens of Chinese origin or descent permitted to enter Canada are such as fall within sec. 5 (b) of the Act. The return of the Controller was insufficient to establish conclusively that his detention of the appellant was a lawful one, and to preclude inquiry into the issue of citizenship, for it is virtually limited to setting forth his decision that the appellant did not fall within any of the classes enumerated in sec. 5. The judge who heard the original application was right in ordering the discharge of the appellant on habeas corpus. *The King* v. *Shin Shim*, (1938) S.C.R. 378; (1938) 4 D.L.R. 88; 70 C.C.C. 321; reversing (1937) 52 B.C.R. 79.

5. Domicile—loss of—objections to procedure.]—The respondent was a native of India and a British subject. He came to Canada in 1908 and acquired a Canadian domicile and became a Canadian citizen. In 1926 he entered the United States by stealth. In 1935 he returned to Canada by stealth. He was arrested and ordered by a Board of Inquiry to be deported. The judge below ordered his release on habeas corpus. Held, on appeal reversing the decision below, (a) it was open to the Board to proceed under sec. 33 (7) instead of under secs. 40 and 42 of the Immigration Act; (b) having resided abroad for a year he ceased to have Canadian domicile or citizenship for the purposes

of the Act and was thus deportable; (c) the form of order set out in the Act was adhered to and cannot be said to be in excess of the Board's jurisdiction. The power to deport had been delegated to the Board, and other officials in its absence, and the depositories of that power could exercise it effectively. *The King* v. *Jawala Singh,* (1938) 53 B.C.R. 179; (1938) 4 D.L.R. 381; (1938) 3 W.W.R. 241; 71 C.C.C. 96.

6. Whether petitioners have Canadian domicile—domicile of wife and child follow that of husband.]—The wife and minor son of a man who after seven years in British Columbia had returned to Scotland for good, were ordered to be deported when they returned to Canada. The petitioners claimed to be Canadian citizens and to have a Canadian domicile under sec. 18 of the Immigration Act. Held, on habeas corpus, affirming the deportation order, that the status of the petitioners followed that of the husband and that he, having acquired a Canadian domicile, had abandoned it when he returned to Scotland. *In re Immigration Act and in re Mary C. Carmichael,* (1942) 57 B.C.R. 316; (1942) 3 D.L.R. 519; (1942) 2 W.W.R. 84; 77 C.C.C. 281.

7. Board of Inquiry—right to amend quashed order.]—The applicant was ordered to be deported by an order of a Board of Inquiry merely mentioning the section of the Immigration Act. He was released on habeas corpus because the order did not specify the reason. The applicant was re-arrested on a new order of the Board with due particularity, but he was given no opportunity to offer a defence to the new order. A fresh order for his release on habeas corpus was refused on the ground that the new order was valid. Held, on appeal (on an equal division of the Court) that the order was properly refused. Held, on further appeal to the Supreme Court of Canada, reversing the decision below, there was no evidence that a complaining officer (sec. 42) had initiated the proceedings; where jurisdiction is conditioned upon the existence of certain things, their existence must be established before jurisdiction can be established. The original order having been quashed it was a thing of naught and could not be amended. Here it was attempted to amend the order after it had been quashed by adding the necessary particulars to satisfy the statute. The second order was not simply tainted with irregularity in procedure, but was wholly bad. *In re Immigration Act and Munetaka Samejima,* (1932) 4 D.L.R. 246; 58 C.C.C. 300; (1932) S.C.R. 640; reversing (1932) 45 B.C.R. 401; (1932) 3 W.W.R. 201; 58 C.C.C. 250 affirming (1931) 44 B.C.R. 317; (1931) 3 W.W.R. 56; 57 C.C.C. 395.

III. Practice.

1. Omission of notice of right of appeal on deportation order.]—Form C under the Immigration Act contains a notice that a deportee has a right of appeal from a deportation order to the Minister of Mines and Resources. The notice is not an essential part of the order and its omission is no more than an irregularity which does not go to the extent of invalidating the order itself. *The King* v. *Chin Shuk,* (1938) 54 B.C.R. 158; (1940) 1 D.L.R. 157; 73 C.C.C. 93.

2. Chinese Immigration Act.]—A strict adherence to statutory requirements may be excused where no injustice is done or the requirements are directory and not imperative. *Rex* v. *Jung Suey Mee,* (1932) 46 B.C.R. 533.

3. Onus of establishing Canadian citizenship—rule in criminal proceedings not applicable.]—The appellant sought entry into Canada claiming to be a Canadian citizen. A Board of Inquiry refused the right of entry and the Minister dismissed his appeal. On habeas corpus the judge refused the order saying that he was not satisfied "beyond a reasonable doubt" that the appellant had made out his case. Held, on appeal reversing the decision below, it was not the obligation of the appellant to establish his Canadian citizenship beyond a reasonable doubt. That rule relating to the burden of proof is limited in its application to criminal proceedings. He had successfully met the onus upon him by adducing a preponderance of evidence in his favour on that issue. *Rex* v. *Soon Gim An,* (1941) 56 B.C.R. 193; (1941) 3 D.L.R. 125; (1941) 3 W.W.R. 219; 75 C.C.C. 352.

4. Degree of proof required to establish Canadian citizenship.]—The applicant for re-entry claimed that he was a Canadian-born citizen. The Immigration authorities held that he was not the person who, it was established, had been born at Vancouver in 1920. On habeas corpus the applicant was discharged, there being in the view of the judge a preponderance of evidence to support his contention. The need

of satisfying a tribunal "beyond reasonable doubt" does not apply in civil proceedings. *In re Lee Wo Haw,* (1941) 3 W.W.R. 223; 76 C.C.C. 403.

See CONFLICT OF LAWS.

See HABEAS CORPUS.

INDIANS.

1. Non-Indian residing on reserve—what evidence admissible.]—The accused was convicted under sec. 115 of the Indian Act that not being a member of the band he resided on an Indian Reserve without authority of the Superintendent General. The conviction was affirmed after hearing evidence (a) that the accused had formerly pleaded guilty to an offence involving the fact that he was not an Indian; (b) that his name did not appear in a census of Indians made by the Indian Agent; (c) that he had had his name placed on the Voters' List (not open to Indians); (d) that he had received a grant of land in circumstances not open to an Indian. *Rex* v. *Tronson,* 57 C.C.C. 383.

2. Shooting on Reserve as infraction of Provincial Game Act.]—The appellant (not an Indian) was convicted of unlawfully killing a pheasant during the close season contrary to sec. 9 of the Act. The offence took place on an Indian Reserve and it was contended that the Indian Act of Canada applied to the exclusion of the Game Act. Held, on appeal, that the imposition of a close season was legislation with respect to civil rights and was within the power of the Province. The Game Act deals with the protection of game generally and the Indian Act with the protection of Indians on a reserve. The appeal was dismissed. *Rex* v. *Morley,* (1931) 46 B.C.R. 28; 58 C.C.C. 166.

3. Status of Indian's personal property outside of a Reserve as to execution.]—The judgment creditor seized a boat of which the debtor, an unenfranchised Indian, was part owner. The latter used the boat for fishing and for going from one reserve to another. It was scarcely ever actually on a reserve. The test of its exigibility under section 105 of the "Indian Act" depended on whether or not the boat was subject to taxation as being personal property outside of the reserve. Held, it was personal property subject to taxation and an application to set the execution aside was refused. *Pope* v. *Paul,* (1937) 2 W.W.R. 449.

INFANTS.

I. GUARDIANSHIP, 374.

A. Custody of Person, 374.

B. Guardianship of Estate, 376.

II. NEGLECTED CHILDREN, 377.

III. ADOPTION, 380.

I. GUARDIANSHIP.

A. Custody of person.

1. Equal Guardianship of Infants Act—appointment by surviving parent.]—By sec. 10 of the "Equal Guardianship of Infants Act" a surviving parent may by will transfer the parents' right in respect of the custody and control and of the management of the property of minor children to any fit persons. The section gives the surviving parent the right to "transfer" all rights in respect of the custody and control of their infant children, and the management of their property, to one or more persons, who will be guardians. *In re Bullen Estate,* (1935) 1 W.W.R. 725.

2. Equal Guardianship of Infants Act.]—The mother left her husband and child for another man and the husband placed the child in another home where the child has since remained. The husband divorced his wife and obtained a decree of sole guardianship, custody and control, with liberty to apply. There was no declaration of unfitness of the wife. The husband died, and by his will, pursuant to sec. 6 of the Act, appointed his own father to be guardian of the child. The wife, having married the man she left her husband for, petitioned for the guardianship, possession and control of the child but did not seek to remove the grandfather as guardian. Held, ordering that the child should remain with the grandfather but permitting the mother to visit her once a week, that the child has been brought up by the people who took her when her mother left, and she knows very little of the mother, and would not benefit by a change of guard-

ianship. On the question of access the matrimonial offence is not a bar. An interim order should be made which can be varied as occasion may require. *Re Ray and Helen E. J. Christian,* (1936) 50 B.C.R. 447; (1936) 2 W.W.R. 263.

3. Right of mother of illegitimate child as against widow of the child's father.]—The child's mother was a girl brought from China and taken into his home by a married Chinese who was the father. The mother left the child with the married pair and after the death of the father claimed the custody from the widow. Both the claimant and the widow were in a position to give the child a good home. Held, although the welfare of the infant was the paramount consideration the rights of the mother should, in the circumstances, prevail. *In re Lee Lai King,* (1936) 3 W.W.R. 471.

4: Equal Guardianship of Infants Act.]—The judge gave the custody of a child to the mother. On appeal it was held that the effect of the Act was to make the interest of the child the paramount factor, and the wide discretion of the judge who exercised it would not be interfered with, unless there is a strong case and a lack of proper material for the exercise of that discretion. *In re Richard Arlan Porteous,* (1937) 51 B.C.R. 522; (1937) 3 D.L.R. 592.

5. Civil liability by father for child's maintenance—effect of Equal Guardianship of Infants Act.]—Under a separation agreement provision was made for the joint custody of the child but nothing was said about his maintenance. The wife sued in an ordinary common law action for payment of one-half the cost of maintenance. The trial judge gave effect to her claim. Held on appeal, reversing the decision below, the common law recognizes no civil liability by a parent for maintenance. Sec. 21 of the Equal Guardianship of Infants Act has no application. It refers to claims brought by third parties. The claim here is not one by a wife who pledges her husband's credit for necessaries. *Mayell* v. *Mayell,* (1940) 4 D.L.R. 623; (1940) 3 W.W.R. 295.

6. Contest between grandmother and paternal aunt—welfare of child.]—The dominant matter for the consideration of the Court is the welfare of the child. For the following reasons the custody was given the aunt as against the grandmother. (1) The grandmother was eighty years of age; any arrangement could not be expected to continue very long. (2) The aunt had a better home for the child. (3) The child herself (14) expressed a preference to be with her aunt. Access at all reasonable times was given the grandmother. *In re Dorothy Marian McGhee,* (1941) 56 B.C.R. 411; (1941) 4 D.L.R. 419; (1941) 2 W.W.R. 593.

7. Whether seven-year-old boy should be with father or mother.]—The father and mother were living apart. Under the Equal Guardianship of Infants Act their rights were equal while living together. Under sec. 11, the Court is to decide where they are living apart and there is no agreement for the custody. The welfare of the child will be the determining factor. Here the father was better able to provide a good home and could give the boy the benefit of the companionship of his older sisters. Held, the child should remain with the father until further order with access at all reasonable times to the mother. *In re Equal Guardianship of Infants Act—In re Holden,* (1942) 3 W.W.R. 670.

8. Illegitimate child—rights of mother as to custody.]—The father of an illegitimate child, only a few months old, took habeas corpus proceedings to recover possession of it from third parties to whom the mother, without the father's knowledge or consent, had placed it for adoption. Held, refusing the order, the child would be better cared for by the third parties and during the age of nurture the mother has a natural right to the custody, and her wishes should govern, subject always to what is best for the child. The Adoption Act recognizes that principle by providing that on adoption of an illegitimate child only the consent of the mother is necessary. *In re Edward Chan Quong,* (1945) 61 B.C.R. 282.

B. Guardianship of estate.

Commission payable to Province under Official Guardian Act.]—The appellant upon reaching his majority became entitled to sums in the hands of the Official Guardian which had been voluntarily paid him by trustees in England. The Official Guardian proposed to deduct the commission payable to the Province under sec. 18 of the Act. On the hearing of an originating summons, it was held that the moneys so received formed part of the gross value of the estate being administered by the Official Guardian; that the Province was entitled to the com-

mission, and that the commission did not constitute a tax which was ultra vires of the provincial legislature to impose. *Haddon* v. *Fillmore*, (1933) 47 B.C.R. 299; (1933) 4 D.L.R. 582.

II. Neglected Children.

1. Adoption by persons of religion other than that of child's parents.]—The child, whose parents were Roman Catholics, had been found to be a "neglected child" under the provisions of the Infants Act and she was committed to the Victoria Children's Aid Society. The respondents, who were Protestants, took steps to adopt her under the Adoption Act and the consent of the Society as guardian was accepted in the place of that of her actual parents. An order of adoption having been made, the appellants submitted that sec. 93 of the Infants Act applied; that the welfare of the child required that her adopting parents should be Roman Catholics, and that the consent of her actual parents could not be dispensed with. Held, dismissing the appeal, that the committal order made the Society the child's guardian; that sec. 93 of the Infants Act applies to committal orders and not to adoption orders; that the welfare of the infant is the paramount consideration and that it is not unlawful for a Protestant to adopt a Roman Catholic child or for a Roman Catholic to adopt a Protestant child. *Bland* v. *Agnew*, (1933) 46 B.C.R. 491; (1933) 2 D.L.R. 545; (1933) 1 W.W.R. 681; leave to appeal refused, (1933), S.C.R. 345.

3. Neglected child: status of Official Guardian: religious persuasion.]—A child born of Roman Catholic parents was left with a Protestant foster-mother where she received proper care. The agent of the Catholic Children's Aid Society applied to a judge for her commital to the Society as a "neglected" child under the provisions of the Infants Act. An order was made under sec. 56 of the Act holding that there was "no proper guardianship", presumably on the ground that the Official Guardian under the Equal Guardianship of Infants Act did not furnish the necessary care, oversight and attention. Held, allowing the appeal that the child was not "neglected" within the meaning of the Act; it was receiving with the assent of the Official Guardian proper care and guardianship. Held, further, that the application was really based on the question of religious faith and it cannot be held that a child of Roman Catholic parentage found in a Protestant home (or the converse) must per se be regarded as a neglected child. *In re Ward, an infant: Dill* v. *The Children's Aid Society of the Catholic Archdiocese of Vancouver*, (1933) 46 B.C.R. 552; (1933) 3 D.L.R. 467; 60 C.C.C. 384.

4. Municipality to which the child belongs.]—A Juvenile Court Judge in making an order for the committal of two neglected children to a Children's Aid Society under the Infants Act made no order against a municipality for their maintenance. Subsequently the Society applied to a Judge of the Supreme Court and the City of New Westminster was ordered to pay for the children's maintenance. Held, on appeal by the City, reversing the order for maintenance, that the children did not "reside" in, much less "belong to" the appellant municipality. The phrase "belongs to a municipality" imports an element of ownership or attachment to a locality beyond mere residence in the ordinary sense. *In re Johnson* (1932) 46 B.C.R. 1; (1932) 4 D.L.R. 626; (1932) 2 W.W.R. 593.

5. Religion of parent of neglected child.]—Five children were found to be neglected and were committed to a Children's Aid Society by a magistrate sitting as a judge under the Infants Act. The order contained the following words, "The said children are of the (not known) religion". The mother applied for a writ of habeas corpus, with certiorari in aid, alleging that the provision of sec. 93 requiring the magistrate to endeavor to ascertain the religious persuasion to which the child belonged had not been complied with. Held, (a) the evidence before the magistrate could be looked at in a proceeding under the Infants Act, which is not a trial of a charge against a child; (b) the provision as to ascertaining the religious persuasion is not merely directory but is a condition precedent to the exercise of the jurisdiction; (c) no real endeavour to enquire as to the religious persuasion of the children was made by the committing magistrate and the order should be quashed. *In re Bland and Children's Aid Society*, (1933) 48 B.C.R. 45; (1934) 1 D.L.R. 546; 60 C.C.C. 339.

6. Responsibility of Village Municipality for maintenance.]—A village municipality is not a "municipality" within the

meaning of the Infants Act and a village municipality willl not be required to obey an order for maintenance made under sec. 80 of the Act. *Re Riley and Children's Aid Society* v. *Corporation of the Village of Mission,* (1932) 46 B.C.R. 330; (1933) 1 W.W.R. 20.

7. Neglected child—municipality responsible for maintenance.]—A child was committed to a Children's Aid Society with a direction for her maintenance by the municipality of the City of Salmon Arm. The municipality on certiorari obtained an order quashing the direction that the municipality pay for her maintenance. Held, on appeal affirming the order made on certiorari, that there are two municipal corporations of Salmon Arm viz., the city and the district. There is nothing in the record to show which is meant. Certiorari will lie in such a case and *Rex* v. *Nat Bell Liquors Ltd.,* (1922) 91 L.J.P.C. 146, does not apply. A decision by a court, as here, without any evidence to support its decision is not an exercise of the judicial function at all. *The Children's Aid Society of the Catholic Archdiocese of Vancouver* v. *The Municipality of the City of Salmon Arm,* (1940) 55 B.C.R. 495; (1941) 1 D.L.R. 532; (1941) 1 W.W.R. 68.

8. No appeal from judge of Juvenile Court—order against municipality for maintenance.]—There is no appeal to the County Court under the Summary Convictions Act from an order of a judge of the Juvenile Court requiring a municipality to maintain a neglected child. Sec. 77 provides for an appeal from a conviction or order made by a Justice. "Justice" as defined does not include a Juvenile Court judge and nothing in the Juvenile Courts Act indicates that the word can be held to include a judgment of the juvenile court. *The King* v. *City of Armstrong,* (1942) 57 B.C.R. 241; (1942) 2 W.W.R. 50; 77 C.C.C. 386.

9. Complaint by guardian under Industrial School for Boys Act—whether Children's Aid Society a guardian.]—When a child is committed to a Children's Aid Society under the Infants Act the society becomes the legal guardian of the child and remains so while the child is placed in a foster home under the provisions of the Act. As such guardian the Society has the status to make a complaint to a judge of a Juvenile Court under sec. 8 of the Industrial School for Boys Act. *John Riddell* v. *Judge of the Juvenile Court of Vancouver,* (1944) 60 B.C.R. 352; 82 C.C.C. 38; (1944) 2 W.W.R. 618; (sub. nom. *J. R.* v. *Wood*).

10. Which municipality liable for maintenance — Residence and Responsibility Act.]—In computing the continuous period of one year which goes to fix responsibility upon a municipality for the maintenance of a child committed to a Children's Aid Society (sec. 4 (1)), the governing date is that of the apprehension of the child. *In re City of Prince Rupert and in re Sharon Dexter, an infant,* (1944) 61 B.C.R. 460.

11. Municipality appealing from order for maintenance—case stated not proper remedy.]—An appeal by a municipality from a magistrate's' order for maintenance may not be taken by way of case stated under the Summary Convictions Act. The remedy is provided in sec. 40 of the Protection of Children Act. *In re the Protection of Children Act* and *in re Lewis,* (1944) 3 W.W.R. 317; 82 C.C.C. 323.

12. Maintenance of child committed to Children's Aid Society—Residence and Responsibility Act.]—The period of one year which fixes upon a local area, responsibility under the Act for the child's maintenance does not run during residence in barracks (sec. 4 (2)). Here the father of the child, during the period of one year, spent some months in barracks in Vancouver. Held the time in barracks would not count. It was unsuccessfully contended that as he was an "orderly" at the barracks he came within the exception covering persons who are regular members of the paid staff of an institution. *In re Superintendent of Child Welfare* and *in re Frances Nystrom, an infant,* (1945) 61 B.C.R. 457.

III. Adoption.

1. Special leave—adoption order.]—Sec. 41 of the Supreme Court Act of Canada provides that special leave to appeal may be granted from the highest court of final resort in certain cases with a proviso that it may be granted in any case whatever involving (inter alia) "other matters by which rights in future of the parties may be affected". Here leave had been refused by the Court of Appeal on the validity of an adoption order. Held, dismissing the application, that such "matters" are restricted in scope to matters involving or affecting something in the nature of a pecuniary or

economic interest. *Bland* v. *Agnew,* (1933) 3 D.L.R. 639.

2. Adoption elsewhere than in this Province—status to share in parent's estate.]—Under sec. 11 of the Adoption Act a person adopted elsewhere than in this Province shall, in the case of intestacy of an adopted parent have the same rights in respect of the property of such parent as he would have if the property were situate in the country where the adoption took place. Here the applicant was adopted by the intestate and his wife by agreement in Manitoba; later the Child Welfare Act of that Province validated such agreements and provided that children then adopted by agreement should be deemed to have been adopted under the Act. Held, that the applicant was the adopted child of the deceased intestate adopting father and entitled to share in his estate. *In re estate of George C. Niven, deceased,* (1942) 58 B.C.R. 176; (1942) 4 D.L.R. 285; (1942) 3 W.W.R. 692.

3. Whether informally adopted children give rise to exemption—sec. 2 (f) of Income War Tax Act.]—The taxpayer, unmarried, adopted by a verbal agreement two minor children and maintained them in a self-contained domestic establishment as defined by the Act. The Minister ruled that "adoption" under the definition of "householder" in the Act means "legal adoption" and disallowed the exemption. Held, allowing the appeal, the appellant kept, maintained, educated and cared for the children and treated them as if they were her own. That was what the Act meant by adoption. Parliament did not intend that "adoption" must be accomplished with the requirements of the various provincial adoption acts which are concerned with civil status and civil rights. *Anderson v. Minister of National Revenue* ,(1947) Ex C.R. 389.

See CHILDREN OF UNMARRIED PARENTS.

See DIVORCE AND MATRIMONIAL CAUSES.

See NEGLIGENCE.

INJUNCTION.

I. BASIS FOR GRANTING, 382.

II. INTERLOCUTORY INJUNCTION, 383.

III. UNDERTAKING AS TO DAMAGES, 386.

I. BASIS FOR GRANTING.

1. Against dentist practising in United States.]—The defendant, a dentist practising in Spokane, was advertising in British Columbia in such a way that if he had been a member of the College of Dental Surgeons, he would have been guilty of improper and unprofesseional conduct. He was restrained. Held on appeal reversing the decision below that the Dentistry Act is concerned alone with the practice of dentistry in British Columbia. Held, on further appeal to the Supreme Court of Canada, and dismissing the appeal, that the respondent was not subject to the provisions of the Act. *Attorney-General for British Columbia* v. *Cowen,* (1939) S.C.R. 20; (1939) 1 D.L.R. 288; affirming (1938) 53 B.C.R. 50; (1938) 4 D.L.R. 17; (1938) 2 W.W.R. 497; reversing (1937) 52 B.C.R. 305; (1938) 1 D.L.R. 758; (1938) 1 W.W.R. 48.

2 Damages or injunction.]—The plaintiff was owner of water-lots abutting on a strip of land intended to be used by the defendant for railway purposes. The defendants constructed a fill on its own property but at the base it encroached on the plaintiff's water-lots. The plaintiff claimed damages and an injunction directing the removal of the deposit made upon its property. The cost of removal was stated to be $20,000. The defendant contended that damages would be the proper remedy (if any) but the trial judge granted an injunction and gave the defendants three months to remove the encroaching material. Held, on appeal, that the mandatory injunction should stand but that the time for removal should be extended for two years, with a monthly charge of $200 until complete removal. *Vancouver Waterfront Ltd.* v. *Vancouvevr Harbour Commissioners,* (1935) 50 B.C.R. 294; (1936) 1 D.L.R. 461; (1936) 1 W.W.R. 210.

3. Restraining proceedings before County Court Judge pending decision in Supreme Court.]—The defendant had given notice of cancellation of the plaintiff's lease allegedly for non-payment of rent. The plaintiff sued for relief from the forfeiture and the next day the defendant began proceedings to recover possession under the Landlord and Tenant Act in the County Court. The plaintiff sought an injunction restraining the defendant from continuing the proceedings in that court. Held, granting the order, the material disclosed attempts to pay the rent and a possibility of

the plaintiff's claim being defeated if possession is acquired. There is here no restraint put upon the County Court Judge—the restraint is upon the defendant from taking any further proceedings in that Court. *Prevedoros* v. *Michaelovitch,* (1945) 61 B.C.R. 486; (1945) 4 D.L.R. 79; (1945) 2 W.W.R. 270.

II. Interlocutory Injunction.

1. Necessity of showing "irreparable injury".]—Where the applicant for an injunction to restrain the City from borrowing under a by-law swore that irreparable damage would be suffered, but gave no particulars regarding it the application was refused. The action would be tried before any taxes in respect of the by-law could be payable. *Smith* v. *City of Vancouver,* (1935) 3 W.W.R. 116.

2. When interim order granted—preservation of matters in statu quo.]—The plaintiff sought an interim injunction restraining the defendant company from passing certain resolutions which, it was alleged, would be oppressive to the minority shareholders. The meeting was ordered to be adjourned and the trial of the action speeded. If the meeting were to proceed, mischief of an overwhelming nature could result while an adjournment could not seriously hurt the defendants. *Carr* v. *B.C. Nickel Mines Ltd.,* (1937) 2 W.W.R. 399.

3. Circumstances warranting interim order.]—Where the plaintiffs showed that there was a substantial question to be investigated and a probability that they were entitled to relief, and the Court was of the opinion that it was both just and convenient to continue the injunction to the trial, it was so continued. In view of the exceptional public importance of the matter the plaintiffs were put on terms to speed the trial. *Home Oil Distributors Ltd.* v. *Attorney-General of British Columbia,* (1938) 53 B.C.R. 355; (1939) 1 D.L.R. 573; (1939) 1 W.W.R. 49.

4. Restraining Board of Review before it makes finding—premature.]—Under the Farmers' Creditors Arrangement Act, a Board of Review is set up to which a farmer may apply through its official receiver for a composition with his creditors. The defendant made such a proposal and a date was fixed for a hearing. The plaintiff obtained an interim injunction halting further proceedings under the Act. On an application by the defendants to set aside the injunction it was held, dissolving the restraining order, that the Board had jurisdiction to decide the issues in question and until it does decide them the injunction is premature. The Board had formulated no scheme and might never do so, since it may decide that the applicant is not a farmer or that there is no proper proposal. Notwithstanding the report of the official receiver it remains open to the Board to decide the applicant's status and the other matters raised. It will be time enough to apply for an injunction if and when the Board decides the issues against the plaintiff. *National Trust Co. Ltd.* v. *Christian Community of Universal Brotherhood Ltd.,* (1939) 54 B.C.R. 321; (1939) 4 D.L.R. 770; (1939) 3 W.W.R. 294; 21 C.B.R. 110.

5. Order would give entire relief claimed in action—grounds for refusing interim injunction.]—The defendant insisted that the action be tried, he wanted the issues defined by pleadings, he wanted discovery. Held, refusing an interlocutory order, (a) where the effect would be to grant the whole relief claimed in the action it is not usual to make the order, (b) on the balance of convenience the action should go to trial, (c) where a statute is sought to be invoked which restricts common law rights the fullest inquiry should be made by means of a trial before the rights of the parties are determined. *Shaughnessy Heights Property Owners' Association* v. *McAndless,* (1942) 58 B.C.R. 180; (1942) 3 W.W.R. 504.

5. Purported assignment of right to telephone number—company sought to be restrained.]—The defendant W. sold his dental practice, including the telephone number theretofore used by him, to the plaintiff. Some time later he instructed the Telephone Company to transfer the telephone and number to his own office. The plaintiff obtained an interim injunction against W. and the Telephone Company. It was dissolved upon evidence that the Company's regulations forbade an assignment of any rights to a telephone or number, and provided that a subscriber should have no property right in a telephone number. Held, on appeal, affirming the dissolution of the injunction, that the Court should not interfere by way of an injunction pending litigation unless the applicant who seeks the aid of the Court shows a fair prima facie case in support of the title which he asserts.

He should show that there are substantial grounds for doubting the existence of the alleged legal right, the exercise of which he seeks to prevent. *Thompson* v. *British Columbia Telephone Co.*, (1943) 59 B.C.R. 241; (1943) 3 W.W.R. 31.

6. Grounds for granting.]—Since the application is made to the discretion of the Court, the plaintiff is required to prove (a) a strong prima facie case that the plaintiff will succeed at the hearing, (b) that some wrong has been suffered or threatened not sufficiently or appropriately to be covered by a money payment, (c) that the preponderance of convenience is in favour of the injunction. *Bruce* v. *Baker*, (1944) 60 B.C.R. 246.

7. Preservation in statu quo—strong case not necessary.]—A person who applies for an interlocutory injunction to preserve property in statu quo is not required to make out a case which will entitle him at all events to relief at the trial. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges, and can satisfy the Court that the property should be preserved in its present actual condition until the question can be disposed of. *Wheatley* v. *Ellis*, (1944) 61 B.C.R. 55; (1944) 3 W.W.R. 462.

8. Sought on basis that statute is ultra vires—unusual to reverse refusal below.]—Pursuant to regulations passed under the National Emergency Powers Act, the Administrator of Motor Vehicles and Parts cancelled the plaintiff's business permit and seized its cars, books, etc. The plaintiff sued for a declaration that the Act and regulations were ultra vires and for an injunction. The judge refused an interlocutory injunction holding that what was really sought was a mandatory order to restore the permit and not one merely to preserve conditions as they were. Held, on appeal, affirming the decision below that where an interlocutory injunction is refused below, it is very seldom that a Court of Appeal will grant it. It would be most unusual to grant such an injunction where the matter in debate involves the question of the validity of a statute. One who seeks an interim mandatory injunction, as here, must satisfy the Court that there is a serious question to be tried at the hearing, and that he is clearly in the right. Here, it cannot be said that there is a clear case for holding that the National Emergency Powers Act is beyond the competence of the Dominion Parliament. *Campbell Motors Ltd.* v. *Gordon*, (1946) 62 B.C.R. 481; (1946) 4 D.L.R. 36; (1946) 3 W.W.R. 177; affirming (1946) 3 D.L.R. 305; (1946) 2 W.W.R. 554.

9. Failure to swear that the applicant has a good cause of action.]—An applicant must show that he has a fair question to argue, and that should appear from the material in support of the application. He must disclose the nature of his right and the infringement alleged. Semble, there is no specific rule that a good cause of action must be deposed to. *The British Columbia Society for the Prevention of Cruelty to Animals* v. *Barr*, (1946) 63 B.C.R. 250; (1947) 1 D.L.R. 292; (1946) 3 W.W.R. 689.

III. Undertaking as to Damages.

Effect of undertaking as to damges.]—The plaintiff obtained an interim injunction ex parte. It contained the usual undertaking to abide by any order as to damages which the Court might make in case it should be of the opinion that the defendant had sustained any, by reason of the injunction. The plaintiffs discontinued the action and the defendant applied for an inquiry as to the damages. Held, directing an inquiry, that the plaintiffs acted wholly without justification and there were no special circumstances to take this case out of the general rule. *British Columbia Interior Vegetable Marketing Board* v. *Kamloops Produce Co.*, (1938) 52 B.C.R. 523; (1938) 1 W.W.R. 773; (1938) 2 D.L.R. 797.

INSANITY.

See Lunatics.

INSURANCE.

I. Accident Insurance, 387.

II. Automobile Insurance, 389.

III. Fire Insurance, 394.

IV. Life Insurance, 397.

V. Marine Insurance, 400.

I. Accident Insurance.

1. Continuous disability.] — Liability under a policy was limited to injury at once and continuously after the accident wholly disabling the insured. Following a knee injury, the plaintiff claimed and received indemnity for the time lost. Thinking he was completely recovered, he accepted the amount in full satisfaction of all claims under the policy and returned to work for three weeks. Synovitis returned and the plaintiff, again disabled, claimed for indemnity since the relapse. The trial judge gave judgment to the plaintiff as and for a continuous total disability holding that the continuity was not broken upon a reasonable interpretation of the policy. On appeal, reversing the trial judge, it was held that the continuity of disablement was broken and the action must be dismissed. *Matthews* v. *The Continental Casualty Co.*, (1932) 46 B.C.R. 213; (1932) 4 D.L.R. 667; (1932) 3 W.W.R. 289.

2. Beneficiary, how designated.]—By his will the insured designated his wife and children to be the beneficiaries of all policies then or thereafter taken out and named the plaintiff as trustee to receive the insurance money. Years afterwards he instructed an insurance company to renew an accident policy with the defendant as beneficiary, For some unexplained reason the beneficiary was the insured himself. He gave the policy to the defendant, believing as the judge held, that she was the beneficiary. The company when the error was discovered wrote the defendant advising that she was the beneficiary. Upon the death of the insured by accident, both the plaintiff as trustee and as representing the estate, and the defendant claimed the money. Held, dismissing the action, that (a) the power, under condition 19 of the statutory conditions, to designate or alter a beneficiary may be exercised by will; (b) the will of the insured contained such a designation and (c) the insured by word of mouth, designated the defendant as beneficiary. As insurance did not form a part of the estate of the deceased, the plaintiff could succeed, if at all, by virtue of Condition 19, but if that section is invoked the whole of it must apply and its outstanding feature is that the insured may change the beneficiary as he sees fit. In the result the final declaration is the one under the policy and it overrides the earlier one under the will, which is subject to change like any other designation. *The Toronto General Trusts Corporation* v. *Sheppard*, (1937) 52 B.C.R. 224; (1937) 3 W.W.R. 22.

3. Non-payment of premiums—estoppel.] —Where an insurer has consistently accepted premiums after the expiry of the days of grace, it is estopped from refusing to pay a claim, after accepting the premium, when an accident occurs after expiry of the days of grace and before payment of the premium. *Brunk* v. *Continental Casualty Co.*, (1938) 1 D.L.R. 783; (1938) 1 W.W.R. 283.

4. Non-disclosure—materiality.]—In his application for sickness insurance the plaintiff failed to disclose a previous illness some years earlier similar to the one in respect of which the plaintiff now sued. The insurer set up a material misrepresentation. The evidence indicated no connection between the two illnesses. The action was dismissed; had the insurer known of the previous illness it would have considered it a danger signal and would have weighed the risk. *Pentreath* v. *Home Assurance Co.*, (1938) 1 D.L.R. 806.

5. Delay in payment of premium—accident intervening before reinstatement—estoppel and waiver.]—The policy provided for monthly premium payments. A statutory condition stated that in case of default and a subsequent acceptance of a premium by the company the policy was to be reinstated but only as covering injuries sustained after the reinstatement. The insured failed to pay a premium as stipulated and having suffered an injury forwarded the amount to the Company. In an action on the policy the insurer claimed the policy had lapsed and had remained inoperative until after the date of the injury whereupon it was reinstated so as to cover subsequent injuries only. Each receipt given by the company contained a warning that the acceptance of late payments would not constitute a waiver. Held, the insured was entitled to recover. The Company was estopped by its course of conduct in previous years when it had repeatedly accepted late payments and had even paid previous claims based on late payments without question. A statutory condition could be waived like any other. *Brunk* v. *Continental Casualty Co.*, (1938) 1 W.W.R. 283; (1938) 1 D.L.R. 783.

6. Dealing with agent of insurer—formality of getting new application.]—On Jan. 30th the agent for the insurer received an application for accident insurance to-

gether with the premium. On April 1 the insurer sent the policy to its agent with a new application to be signed by the insured. Early in May the agent sent the policy to the insured but it was returned because of a change in his address. The insured was injured May 15, and in July the agent delivered the policy to the insured. The agent did not turn the premium in to the insurer until June 28. The insurer disputed liability because (a) the premium did not reach it before the accident, (b) the new application was not signed before the accident with the result that there was in law no contract. The trial judge found for the insured. Held on appeal, affirming the decision below, the premium had been paid to the insurer's agent, and where an agent solicits insurance from the general public, collects the premiums, and forwards the applications all on behalf of the insured and for the benefit of the company, he has authority to accept delivery of the policies. A policy becomes a binding contract when issued and delivered in the terms of the application to one authorized to receive it on behalf of the insured. As the policy reached the agent's office (he being away) before May 15, it was delivered before the accident occurred. The second application was a mere formality, otherwise the policy would not have been issued. *Gaydich* v. *Mutual Benefit Health and Accident Association,* (1940) 55 B.C.R. 345; (1940) 4 D.L.R. 236; (1940) 3 W.W.R. 116.

II. Automobile Insurance

1. Whether statutory conditions complied with—status of adjusters.]—The plaintiff claimed under the defendant's policy as a result of a collision in the State of Washington. The defence was based on a claim that the statutory conditions in the policy were not complied with by the plaintiff. (a) As to the condition requiring prompt written notice, the adjusters were not, as such, agents to receive the notice. (b) A condition that the insured should not assume any liability was broken when the plaintiff to get his car out of an attachment by the local Court gave his cheque to the Court for security. (c) The condition that before suit against the insurer there must be a judgment after trial, or an agreement with the insurer's consent, was not complied with. The proceedings in the Washington Court did not result in such a judgment. The action was dismissed. *Marsh* v. *Queens Insurance Co. of America,* (1932) 1 W.W.R. 721.

2. Status of party other than the insured.]—R. to whom the insured entrusted his motor-car carried a passenger who was killed in an accident. The administrator of the deceased recovered a barren judgment against R. The insured then brought action on behalf of R. against the insurer and recovered under a term in the policy purporting to indemnify persons in the position of R. Held, on appeal reversing the trial judge, and dismissing the action, that the principle of *Vandepitte* v. *Preferred Accident Insurance Company of New York,* (1933) A.C. 70, applied and that the insured had no status to claim on R.'s behalf. *Hornbrook* v. *Toronto Casualty Fire and Marine Insurance Co.,* (1932) 46 B.C.R. 383; (1934) 1 D.L.R. 350; reversing (1932) 1 W.W.R. 706.

3. Failure to co-operate with insurer.]—Under sec. 24 of the Insurance Act where the insured being liable to another, fails to satisfy a judgment and proves execution-proof, the other may sue the insurer. The insured had been held liable for negligence causing injury to his mother, a passenger in a motor-car driven by the insured. Execution proving fruitless, she sued the insurer under sec. 24. The policy contained the statutory condition calling for co-operation between the insured and the insurer in defending any action that might result. The trial judge dismissed the action holding that throughout, the insured had ignored this obligation. Held, on appeal, affirming the decision below, that the condition is part of the contract, and recovery cannot be had unless it is complied with; that the evidence showed that the insured promoted the action to the detriment of the insurer with whom he was bound to co-operate; that there was no basis for the claim of waiver on account of delay in repudiating. *Walters* v. *The Ocean Accident and Guarantee Corporation Ltd.,* (1935) 49 B.C.R. 428; (1935) 1 W.W.R. 516; (1935) 2 D.L.R. 241.

4. Person, who with insured's consent uses, or is responsible for the use of, a car.]—The owner and licensee of the vehicle was the insured company; it entrusted it to the plaintiff's father, who was a salesman for the company. He was allowed to keep it in his own garage, and was paid a flat rate for its maintenance (except for major repairs which the company assumed). The plaintiff, with his father's permission, took the car for his personal use and had an accident resulting in a judgment against him for damages. The policy, by the Insurance

Act, covered the company and every other person, who, with its consent, used, or was responsible for the use of, the car and provided that such other person might recover under it as if he were named as an insured. The plaintiff sued the insurance company. Held, dismissing the action, that no express or implied consent was proved and while the father would have been covered the son was not. *Bennett* v. *General Accident Assurance Co.,* (1935) 50 B.C.R. 316.

5. Misstatements in application.]—The plaintiff, H., an infant, bought a car and became the registered owner of it; the plaintiff, K., his mother, assumed responsibility for him so that he could get a permit to drive. She made an application for insurance but, being unable to read English, signed the form as drawn up by an insurance salesman who was apprised of all the facts. It contained misstatements of fact e.g. that she was the registered owner of the car. The application called, inter alia, for passenger hazard coverage. The insurance salesman took it to an intermediate agent who took it to the general agents of the defendant. Before any policy was issued an accident occurred and a passenger in the car was injured. He was awarded damages against the plaintiffs and they in turn claimed against the defendant insurance company. Held, reversing the decision below, per Macdonald, C.J.B.C., the salesman was K.'s agent; the intermediate agent acted simply as a broker forwarding the application; there was no evidence of fraud. Per Martin J. A. No contract of insurance was established; evidence of the relationship of principal and agent was lacking. *Harris* v. *Bankers and Traders Insurance Co.,* (1936) 51 B.C.R. 406; (1937) 1 D.L.R. 493; (1937) 2 W.W.R. 305; reversing (1936) 50 B.C.R. 412; (1936) 1 W.W.R. 657.

6. Order making insurer third party.]—Where an insurer having repudiated liability under its policy, and having withdrawn from the defence of an action applied to be added as a third party, under sec. 48 of the Insurance Act Amendment Act, 1935, the judge refused to make it a term of the order that the fact that the insurer was a party should not be disclosed to the jury. The rule was well-recognized and need not be stated in the order. *McDermid* v. *Bowen,* (1937) 51 B.C.R. 401; (1937)1 W.W.R. 548.

7. Insurer's repudiation of liability after defending action for insured.]—An insurer unsuccessfully defended an action taken against the insured, in which it was held that the insured had entrusted her car to a youth without a driver's license, with the result that she was held liable for his negligence. The insurer then repudiated liability under the policy and when sued by the insured contended that she had broken a statutory condition in the policy by entrusting the car to an unqualified person. The trial judge found for the plaintiff (insured) holding that the insurer, with full knowledge of the breach complained of, had elected to carry on the insured's defence in the earlier action and as a result had waived any right to dispute liability for such breach of condition. Held, on appeal reversing the decision below, that it was not until the trial judge in the earlier action found that the car had been entrusted to the youth, that the insurer knew that to have been a fact, and therefore the insurer when it undertook the defence in the earlier action did not have the full knowledge necessary to constitute a waiver. *Anderson* v. *Caledonian Insurance Co.,* (1938) 53 B.C.R. 41; (1938) 4 D.L.R. 126; (1938) 2 W.W.R. 401; reversing (1938) 52 B.C.R. 370; (1938) 1 D.L.R. 788; (1938) 1 W.W.R. 322.

8. Application through agent—no contract made.]—An action against an insurance company was dismissed where there was no proof, (a) that the agent had any authority beyond that of submitting applications to the company for its acceptance or rejection; (b) that any application had ever reached the company; (c) that the plaintiff had signed an application to the defendant rather than some other company. *Trewin* v. *Wawanesa Mutual Insurance Co.,* (1938) 53 B.C.R. 284; (1938) 2 D.L.R. 454.

9. Master claiming against servant for negligence—claim subrogated to insurer—whether owner's policy.]—The plaintiff lent a car to the defendant who struck and injured L. Under sec. 74A (1) of the Motor-vehicle Act the defendant was deemed to be driving the car as the agent or servant of the plaintiff and in the course of his employment. This made the plaintiff jointly liable for the injuries to L. The plaintiff was insured and the insurer's adjuster made a settlement with L. and took a release. The insurer then sued (in the name of the plaintiff) for the amount it had paid. The trial judge held, dismissing the action. that the

policy was an "owner's policy" which covered the defendant. Held, on appeal reversing the decision below, it was not an owner' policy, but an open one, designed to protect the applicant from liability arising out of the specified use or operation of cars by the applicant and certain employees. The defendant was not covered. The action by reason of sec. 74A (1) was, in effect, one by a master against his servant for damage sustained by the negligence of the servant. The insurer was subrogated to the master's rights and could sue in his name. *Trapp Motors Ltd.* v. *Pawson*, (1938) 53 B.C.R. 485; (1939) 2 D.L.R. 365; (1939) 1 W.W.R. 350; reversing (1938) 3 D.L.R. 789.

10. Insurer becoming third party on denial of liability under policy—form of order.]—Under sec. 175 (7) of the Insurance Act an insurer denying liability under a policy has the right to be made a third-party where a claim against an insured might result in a claim against the insurer. The form of order should follow that in *McDermid* v. *Brown*, (1937) 51 B.C.R. 401, except that there should be a direction added that disclosure should not be made to the jury (if it is tried by a jury) that the insurer is a party to the action. *Obradovich* v. *Proulx*, (1939) 54 B.C.R. 465; (1940) 2 D.L.R. 771.

11. Insurer repudiating — whether entitled to defend action against insured.]—The defendant insured was notified by the insurer that it repudiated liability under its policy. Some correspondence ensued between the solicitors for the parties as to the conduct of the defence. The insured insisted that the insurer assume the defence in accordance with the policy or stand by its notice of repudiation. The insurer had its solicitor enter an appearance but it insisted that it could thereafter nevertheless repudiate. Held, on appeal reversing the decision below, that the insurer did not intend to waive, and did not waive, its right to repudiate liability. That being so it had no right to take up the defence of the action. Per O'Halloran, J.A., the privilege given the insurer to represent the insured was conditioned upon its prior acceptance of the validity of his claim under the policy. The appearance entered by the solicitor for the insurer was struck out. *Heads* v. *Brownlee*, (1943) 59 B.C.R. 256; (1943) 4 D.L.R. 513; (1943) 3 W.W.R. 257; reversing (1943) 2 D.L.R. 787; (1943) 2 W.W.R. 177.

III. Fire Insurance.

1. Equitable assignment.]—An unpaid vendor took a covenant from his purchaser to insure certain chattels with loss payable to the vendor. The policy made no reference to the vendor. The vendor was entitled to recover as the agreement constituted an equitable assignment. *Budge* v. *Marbin Lumber Co. Ltd.*, (1932) 45 B.C.R. 479; (1932) 2 W.W.R. 64.

2. Loss of profits.]—In arriving at the loss suffered by a merchant the arbitrator took the cost of doing business into account and awarded only net profits. On appeal from an order of a judge refusing to set the award aside, it was held, dismissing the application, that a merchant does not realize a profit until he deducts the expenses incurred in earning it. *Famous Cloak & Suit Co. Ltd.* v. *Phoenix Assurance Co. Ltd.*, (1932) 46 B.C.R. 349.

3. Oral contract—authority of agent.]—In an action on an oral contract of fire insurance, it is not necessary for the insured to show that the agent had authority to bind the insurer. After the fire the insurer issued a written policy but this did not prevent the insured from suing on the oral contract nor was rectification necessary. *Hochbaum* v. *Pioneer Insurance Co.*, (1933) 46 B.C.R. 455; (1933) 1 W.W.R. 403.

4. Use and occupation coverage.]—In a consolidated action against seven companies the plaintiff after a fire which destroyed its plant claimed for the loss sustained in respect of fixed charges and expenses during total suspension of business, such fixed charges and expenses being such as would have been earned had no fire occurred. The liability under the policies was limited to the actual loss sustained, not exceeding a per diem figure, due consideration being given to the experience of the business before the fire and the probable experience thereafter. The plaintiff submitted to the jury an arbitrary figure of $15 per thousand as the cost of production and made no attempt to make a valuation piece by piece. The Court of Appeal dismissed an appeal from a verdict for the plaintiff. Upon a further appeal to the Privy Council, it was held, affirming the judgment below, that there was evidence fit for the consideration of the jury which entitled them to make use of the arbitrary figure. That method was shown to have been generally accepted in British Columbia and the actual valuation

of each item was impracticable. *Cameron Lumber Co. Ltd.* v. *Mount Royal Assurance Co.*, (1933) 103 L.J.P.C. 34; (1934) 1 D.L.R. 785; (1934) 1 W.W.R. 193; (1934) A.C. 313; affirming (1933) 47 B.C.R. 52; (1933) 3 D.L.R. 402; (1933) 2 W.W.R. 129.

5. Privity beween Insurance Company and sub-agent.]—A sub-agent authorized under the Insurance Act and dealing with and accounting to the company's general agents, was held to be the agent of the company, notwithstanding the maxim "delegatus non potest delegare". *Norwich Union Fire Insurance Society Ltd.* v. *Leong*, (1935) 50 B.C.R. 149; (1935) 3 D.L.R. 445; (1935) 2 W.W.R. 480.

6. Coverage while occupied only as a private dwelling—circumstance material to the risk.]—Where a policy provided coverage on a house while occupied only as a private dwelling and the insured, when contracting for the insurance, failed to notify the insurer that it was unoccupied, that circumstance was held to be one material to the risk, the insurer's agent being unaware of the vacancy. The insurance was held never to have been in force. *McGettigan* v. *Guardian Assurance Co. Ltd.*, (1936) 3 W.W.R. 345.

7. Coverage only while occupied as a private dwelling—effect of vacancy followed by fire during subsequent occupancy.]—After the policy had come into force the insured building became unoccupied for more than the stipulated thirty days. Thereafter it was reoccupied and while so reoccupied it was destroyed by fire. The insurer contended that the vacancy had invalidated the contract. Held, the insurance was dormant during the vacancy and was revived when reoccupation took place. The insured was entitled to recover. *McGettigan* v. *Guardian Assurance Co. Ltd.*, (1936) 3 W.W.R. 345.

8. False statements in proof of loss declaration.]—Statutory Condition 16 provided that any fraud or wilfully false statement in a declaration as to the amount of the loss would vitiate the claim of the person making the declaration. In an action by the assignee of the insured, the trial judge held, dismissing the action, that the insured was guilty of fraud and wilfully false statements with respect to household furniture etc. He held that the position of the assignee was no better than if the insured had been plaintiff in the action. The fraud with respect to the furniture vitiated the whole of the plaintiff's claim, although no fraud or wilfully false statement was proved as to the house, which was also covered by the policy. *Sokolowsky* v. *Fire Association of Philadelphia*, (1938) 53 B.C.R. 195; (1938) 4 D.L.R. 796; (1938) 3 W.W.R. 148.

9. Attempt to share in benefit of insurance placed by stranger.]—The defendant acquired by bill of sale certain goods on which he placed a policy of fire insurance. The bill of sale was set aside and the judge ordered the defendant to store the goods in a specified place pending their sale. While there they were destroyed by fire; the insurance money was paid to the defendant. The judge ordered him to disclose the amount he had received and account for the surplus over his own claim as ascertained in the earlier proceedings. Held on appeal, reversing the decision below, that as at the time the insurance was effected, there was no contractual or fiduciary relation between the parties, nor did the defendant insure as the plaintiff's agent, or for his benefit, or intend to insure any interest belonging to the plaintiff, the plaintiff had no claim. The plaintiff could have insured his own interest and cannot take the benefit of the defendant's diligence. *Bellhouse* v. *Mah F. Gore*, (1941) 56 B.C.R. 455; (1941) 4 D.L.R. 56; (1941) 3 W.W.R. 503.

10. Floater policy—right to insure interests other than that of the insured.]—A person having an insurable interest may insure on behalf of other persons as well as for himself. The precise nature of the insurable interest is immaterial, and an equitable or beneficial interest is insurable equally with a legal interest. A husband has an insurable interest in his wife's property, so long as they are living together and sharing its use. A parent has an insurable interest in the property of a dependent child. *Spencer* v. *Continental Insurance Co.*, (1945) 4 D.L.R. 593; (1945) 3 W.W.R. 161.

11. Floater policy—status of parties under policy taken out by another—ratification.]—The policy was taken out by a party since deceased and it disclosed the names of members of his family as being covered. In an action by his executors and a transferee (his wife) from him and by his son, it was held that the assured acted as agent for the wife and son and his agency was ratified. Such ratification could take place before or after the loss. Here the policy was clearly intended to be more than a personal

indemnity for the deceased. The others interested were in existence and ascertainable when the policy was written. The assured intended to insure on their behalf. These factors enabled the wife and son to claim under the policy in their own names. *Spencer* v. *Continental Insurance Co.*, (1945) 4 D.L.R. 593; (1945) 3 W.W.R. 161.

12. Floater policy—all risks—overvaluation on proof of loss—whether amounting to fraud vitiating policy.]—A claim for insurance will not be vitiated by mere overvaluation in the proof of loss. An over estimate is evidence of fraud but is not conclusive without proof that it was fraudulently and dishonestly made. Here the declarant honestly believed in the values and estimates of damages she swore to however wrong they may, in fact, have been. *Spencer* v.*Continental Insurance Co.*, (1945) 4 D.L.R. 593; (1945) 3 W.W.R. 161.

IV. Life Insurance.

1. Effect of codicil on declaration in favour of preferred beneficiary.]—The insured by declaration altered the beneficiaries under the policy and made his wife a preferred beneficiary under the Life Insurance Act. Subsequently he added a codicil to his will which, it was claimed, nullified the declaration naming his wife as preferred beneficiary and made the proceeds distributable under his will. Held, that the rule whereby a codicil operates as a revival of the will may be disregarded where a contrary intention is shown as was shown in this case. *The Royal Trust Co.* v. *Shimmin*, (1932) 46 B.C.R. 273; (1932) 3 W.W.R. 447; affirmed (1933) 47 B.C.R. 138; (1933) 3 D.L.R. 718.

2. No part of the estate under Testator's Family Maintenance Act.]—Insurance made payable to beneficiaries does not form part of a testator's estate and is not subject to disposition under the Testator's Family Maintenance Act. *In re Testator's Family Maintenance Act* and *the estate of Donald Alexander Macdonald*, (1938) 52 B.C.R. 473; (1938) 2 D.L.R. 798; (1938) 1 W.W.R. 758.

3. Effect of restriction as to aeronautics.]—The insured was killed while making an aerial flight. The insurer contested a claim by the beneficiaries under its policy because of a clause providing that the insured if he should make an aerial flight as pilot or student pilot within two years, must first notify the insurer and pay extra premiums, and providing that if the insured failed to comply with the condition and death occurred through flying as a pilot or student pilot, the insurer's liability would be limited to the return of the premiums paid. The trial judge found that he did make an aerial flight as a student pilot within the two-year period without giving the requisite notice. He was killed four years later. The trial judge found for the beneficiaries. Held, on appeal, affirming the decision below, that the defence under the clause was limited to cases of death within the two-year period, or subsequently as the result of injuries received while flying during that period, with no notice given. *Reynard* v. *The Mutual Life Assurance Co. of Canada*, (1940) 55 B.C.R. 161; (1940) 3 D.L.R. 61; (1940) 2 W.W.R. 145; affirming (1939) 4 D.L.R. 790.

4. Waiver of proof of death and claim by beneficiary—lapse through failure to pay assessment.]—Where an insurer repudiated liability and advised the plaintiff that claim forms would be supplied only upon the death of an insured in good standing the plaintiff was relieved of the obligation to file them. The action was dismissed where the contract had lapsed because of default by the insured in paying the last assessment levied before his death. *Castron* v. *The Empire Home Benefit Association*, (1943) 59 B.C.R. 161; (1943) 2 W.W.R. 221.

5. Policy payable to concubine—claimed by widow as administratrix.]—The deceased and his wife had separated and lived apart for some eight years. He took out a policy of insurance payable to a woman who lived with him as his concubine and housekeeper. Upon his death his widow, as administratrix, claimed the insurance money. It was paid into Court under sec. 127 of the Insurance Act. The beneficiary named in the policy sued for a declaration that the money was hers and the widow resisted the claim. The latter contended that the plaintiff was not a dependent under sec. 3(2) of the Societies Act under which the Insurance Company was formed. Held, awarding the proceeds to the plaintiff, the administratrix had no claim to the insurance money; the plaintiff was a dependent; she was not named as a beneficiary in consideration of the adulterous relationship, but out of gratitude for her services in making him a home. Held, on appeal, affirming the decision below, the

plaintiff was in fact and in law a dependant. The term should not be limited to cases where the deceased was under legal or moral obligation to support the beneficiary, nor could it be said that it is unlawful for a man to support his mistress. *Ronan* v. *Hortin*, (1944) 61 B.C.R. 1; (1945) 1 D.L.R. 17; (1944) 3 W.W.R. 609; affirming (1944) 60 B.C.R. 264; (1944) 3 D.L.R. 114; (1944) 3 W.W.R. 537.

6. Against bodily injury through violent and accidental means—death through aneurism.]—Two policies gave special death benefits if the insured sustained bodily injury, solely through external violent and accidental means resulting in the death of the insured. The insured was at a dance with her husband when a loud noise, thought to be a firecracker, startled her and she died almost immediately. An autopsy disclosed that she died from a ruptured aneurism in the brain which may have been there for years. The shock of the explosion might have caused her blood pressure to mount with fatal results. Held, dismissing the action, and without deciding whether or not a shock could be a bodily injury, death did not result from it, but from the bursting of the aneurism which was the proximate cause of her death. *Hopper* v. *Prudential Insurance Co. of America*, (1945) 61 B.C.R. 489; (1945) 3 D.L.R. 783.

7. Whether Commorientes Act or Insurance Act governs in distribution of life insurance.]—The Insurance Act (sec. 123) provides that where an insured and a beneficiary perish in the same disaster the prima facie presumption is that the beneficiary died first. The Commorientes Act provides that in such a case the elder is presumed to have died first but the provision is made subject to that created by sec. 123 of the Insurance Act. It was contended that the Insurance Act governs for the purpose of deciding the immediate destination of the insurance moneys but once that is done the other Act comes into play and governs its ultimate destination. Held, the Insurance Act governs for all purposes connected with the order of death. A presumption should not be regarded as having effect at one moment and a moment later be set aside by another, when, as here, the first presumption is declared to be the prevailing one. Moreover, the Commorientes Act applies only where there is uncertainty as to which survived; here the matter is made certain by the operation of sec. 123. *In re Estate of George Thomas Law, Deceased*, (1945) 62 B.C.R. 380; (1946) 2 D.L.R. 378; (1946) 2 W.W.R. 405.

V. Marine Insurance.

1. Insurable interest.]—The purchaser of a vessel was given possession although further payments were to be made. The unpaid vendor took a policy of insurance, the loss being payable "for the account of concerned". Upon damage to the vessel, the loss was paid to the vendor. Subsequently the purchaser paid the balance of the purchase price and became the registered owner of the vessel. In an action by the Insurance Company to recover the money paid on the ground that the vendor had no insurable interest, held, dismissing the action, that the vendor had an insurable interest, and had a right to collect for all concerned. *Queen Insurance Co. of America* v. *Hoffar-Beeching Shipyards Ltd.*, (1932) 46 B.C.R. 233; (1932) 3 W.W.R. 240.

2. Perils of the seas—proximate cause.]—The defendant insured the plaintiff against damage to a cargo of rice caused by "perils of the seas". Some of the rice became heated and damaged during the voyage, caused, according to the jury's findings, by the closing of certain ventilators on the ship. The jury also found that the state of the weather during the time they were closed constituted a peril of the seas. Judgment was entered for the plaintiff. On appeal, reversing the decision below, the Court of Appeal held that there was no evidence of peril of the seas and, even if there were, it was not the proximate cause of the loss—the deliberate act of the master of the ship in closing the ventilators, was. Held, on further appeal to the Privy Council, affirming the decision at the trial, that there is prima facie a loss by perils of the sea where there is an accidental incursion of seawater into a vessel at a part of the vessel and in a manner where seawater is not expected to enter in the ordinary course of things, and there is consequent damage to the thing insured. It may result from negligence, stress of weather, or like causes. The rush of seawater which but for the closing of the ventilators would have reached the cargo was due to a storm sufficiently out of the ordinary to bring seas or spray to the orifices of the ventilators. It is the fortuitous entry of the seawater which is the peril of the seas in such cases. On the question

whether the damage which was caused, not by the incursion of seawater, but by action taken to prevent it, is recoverable as a loss by the perils of the sea, it was held that the master's closing of the ventilators was not an intervening cause but a mere matter of routine seamanship and the jury were justified in finding that the damage to the rice was due to action properly taken to prevent the peril of the seas from affecting the cargo. *Canada Rice Mills Ltd.* v. *The Union Marine and General Insurance Co.*, (1941) A.C. 55; (1941) 1 D.L.R. 1; (1941) 3 W.W.R. 401; reversing (1938) 53 B.C.R. 440; (1939) 2 D.L.R. 306; (1939) 1 W.W.R. 450.

INTEREST.

On dishonoured cheque.]—A cheque is a bill of exchange drawn on a bank, payable on demand. The Bills of Exchange Act provides that its provisions (with exceptions not germane here) applicable to a bill of exchange shall apply to a cheque. Sec. 134 makes interest a part of the damages recoverable on a dishonoured bill. Hence interest is recoverable on a cheque. *Mohan Singh* v. *Kirpa*, (1936) 50 B.C.R. 399; (1936) 1 W.W.R. 559.

INTERPLEADER.

See PRACTICE.

INTOXICATING LIQUORS.

I. IN GENERAL, 401.

II. ONUS AND PRESUMPTION, 403.

III. PROCEDURE, 405.

I. IN GENERAL.

1. Police spy purchasing liquor — whether guilty as an accomplice.]—The accused was employed to obtain evidence of infractions of the Government Liquor Act. He was sworn in as a police officer and paid a salary. The magistrate found that he had purchased liquor from a person who had since been convicted in respect of the transaction. Held, acquitting the accused, he was not an accomplice in the sense that he became liable for a breach of the law. *Rex* v. *Berdino*, (1924) 34 B.C.R. 142, followed *Rex* v. *Gerwin*, 68 C.C.C. 282.

2. Criminal Code, sec. 285 (4)—driving a car while intoxicated.]—To obtain a conviction under this section the Crown must prove that the accused was so intoxicated that, if permitted to drive a motor car, it would be a danger to the public. *Rex* v. *Leahy*, (1939) 54 B.C.R. 104; (1939) 4 D.L.R. 764; 73 C.C.C. 99.

3. Consuming liquor in a public place—whether driveway on private property is public place.]—The accused was convicted of consuming liquor in a public place, to wit; in a motor-vehicle parked near the Island Highway at Royston etc. The car was parked in an open space, off the highway, but adjoining it. The space was in front of a barbecue building to and from which motorists and others were permitted to go, and upon which drivers could park at will. Held dismissing the appeal, the appellant's car was in a public place when it was parked in the open space or on the highway in front of the space. *Rex* v. *Mario Galeazzi*, (1942) 57 B.C.R. 486.

4. Keeping liquor for sale—married woman selling in house owned or leased by her husband.]—A married woman may be convicted of keeping liquor for sale in a house leased by her husband where the circumstances are such as to raise a prima facie case against her which she fails to displace. *Rex* v. *Lawson*, (1942) 1 D.L.R. 672; 77 C.C.C. 59.

5. Taxidriver as agent of buyer from Government Liquor Store.]—The accused, a taxi driver, was acquitted by the magistrate of selling liquor contrary to the Government Liquor Act. A police operative had telephoned the accused to get him a bottle of liquor. The accused had purchased it at a government liquor store using his own permit. He had delivered the bottle to the operative taking from him the amount paid for the liquor plus 45 cents for taxi fare which was entered up in the usual way in takings for the day. Held on appeal, affirming the acquittal, that whatever might be

said as to other offences under the Act, the accused was not guilty of selling. He was acting as purchasing agent for the police operative. *Rex* v. *Poulsen,* (1939) 3 W.W.R. 11; 72 C.C.C. 264.

6. Corporation — mens rea — whether corporation can have.]—A corporation can be convicted of unlawfully permitting a person to have liquor in a restaurant of which it is the keeper. The contention that even with knowledge of a manager there can be no mens rea on the part of a corporation, and that without such mens rea there can be no conviction, was not given effect to. *Rex* v. *National Cafe Ltd.,* (1942) 58 B.C.R. 401; (1943) 1 D.L.R. 153; (1943) 1 W.W.R. 141; 78 C.C.C. 322.

7. Sufficiency of evidence that appellant was a physician and that a prescription was given.]—A conviction that the appellant, being a physician, unlawfully gave a prescription for liquor to other than a bona fide patient was affirmed. The liquor vendor testified that he was well acquainted with the appellant's prescriptions for liquor and the one in question bore the usual signature in the green ink used by the appellant. It had printed on it the usual information found on prescriptions including the name, address and telephone number of the appellant. The evidence of the vendor stood unchallenged and there was no cross-examination on these points. *Rex* v. *Arthur,* (1946) 3 W.W.R. 60; reversed 89 C.C.C. 204; (1946) 63 B.C.R. 557.

II. Onus and Presumptions.

1. Presumption of guilt—how far to be pressed.]—The accused was convicted (of keeping liquor for an unlawful purpose) on the presumption afforded by secs. 90 and 91 of the Government Liquor Act. It was based on the seizure in the accused's car of a number of bottles of liquor. The accused did not testify. Held, quashing the conviction, the facts disclosed did not establish a situation inconsistent with innocence. The absence of doubt required in criminal matters had not been established. *Rex* v. *Long,* (1933) 3 W.W.R. 211.

2. Statutory onus.]—On a charge of keeping liquor for sale contrary to the Government Liquor Act, it was proved that the accused had in his possession or charge or control, liquor in respect of, or concerning which he was being prosecuted. Held, that as a result, by virtue of secs. 91 and 92 (1) of the Government Liquor Act, a prima facie case was established, and that thereupon the burden was upon the accused to prove that he did not commit the offence, and remained upon him until he reasonably satisfied it to the Court's satisfaction. *Rex* v. *Minogue,* (1935) 50 B.C.R. 259; (1935) 4 D.L.R. 504; (1935) 3 W.W.R. 337; 64 C.C.C. 318.

3. Keeping for sale.] — The accused woman was charged with keeping liquor for sale. The facts were that she made a sale on one occasion on premises owned by her husband. The magistrate convicted and the County Court Judge affirmed the conviction. Held, on appeal quashing the conviction, that the wife sold but did not keep for sale. The husband who owned the premises was the person who kept for sale, and not the wife. The section of the Government Liquor Act which makes proof of one unlawful sale establish the intent or purpose of keeping for sale, does not assist. *Rex* v. *Cramer,* (1936) 51 B.C.R. 310; (1937) 2 D.L.R. 76; (1937) 2 W.W.R. 93; 68 C.C.C. 129.

4. Onus to establish innocence—Sec. 96 of Government Liquor Act.] — Where a person in charge of a taxicab office was found in possession of a large quantity of liquor, sec. 96 of the Act shifted the onus to him and he was required to establish his innocence of the charge of unlawfully keeping liquor for sale. *Rex* v. *Valente,* (1939) 4 D.L.R. 776; (1939) 3 W.W.R. 24.

5. Keeping for sale—husband of accused owner of premises—conflicting presumptions—whether admission voluntary.] —The judge allowing an appeal from the conviction of the accused for keeping beer for sale under the Government Liquor Act, said that if anyone should be charged it was the husband of the accused, the owner of the premises. Held on further appeal, affirming the decision below, there was some evidence upon which it could be found that the accused was the wife of the owner. The presumption under the Act of guilt upon proof of possession and sale were neutralized by the other presumption that in the circumstances the husband was the keeper and not the wife. It could not be said that the judge erred in excluding evidence elicited by a Police Officer from the accused without the usual warning. Per Sloan J. A. a more extended meaning is given to the word "voluntary" when excluding a statement than when admitting it. *Rex* v. *Anderson,* (1942)

58 B.C.R. 88; (1942) 3 D.L.R. 179; (1942) 2 W.W.R. 302; 77 C.C.C. 295.

6. Keeping for sale—Government Liquor Act.]—The accused was convicted by a magistrate of keeping liquor for sale. The evidence was that of frequenters of the accused's premises and of police officers. No liquor was found on the premises. The County Court Judge quashed the conviction holding that there was proof of "selling" but not of "keeping for sale". He took the view that one sale, or several sales, does not afford evidence of keeping for sale. Held, on appeal to the Court of Appeal, ordering a new trial, there was ample evidence, apart from the effect of sections 91 (2) and 95 of the Act, that the accused was keeping liquor for sale on his premises. *Rex* v. *Gris,* (1944) 60 B.C.R. 238; (1944) 2 D.L.R. 799; (1944) 1 W.W.R. 653; 81 C.C.C. 255.

III. Procedure.

1. Affidavit of merits—whether required on case stated.]—Under sec. 104 of the Government Liquor Act an appellant is required to file an affidavit of merits. This requirement is not applicable to an appeal by way of case stated which is limited to a question of law. *Rex* v. *Carmichael,* (1940) 55 B.C.R. 117; (1940) 2 W.W.R. 588; (1940) 3 D.L.R. 304; 73 C.C.C. 350; reversing 73 C.C.C. 246; (1939) 54 B.C.R. 458; (1940) 1 W.W.R. 33.

2. Order of interdiction set aside—when effective.]—The accused was interdicted in June 1937. By sec. 73 of the Government Liquor Act a county court judge may set aside the order of interdiction and it was set aside July 21, 1939. Sec. 73 provides that upon the judge's order being filed with the Liquor Control Board the interdicted person shall be restored to all his rights under the Act. The order was filed July 31, 1939. In the meantime he was found with liquor in his possession on July 26, 1939, and convicted as an interdicted person. The magistrate, and the judge on a case stated, held that he remained an interdicted person until the filing of the order. Held on appeal reversing the decision below, the interdiction order was set aside on July 21 and was operative from that date. The fact that the accused was restored to all his rights at the time of filing did not make him an interdicted person after the interdiction order had been set aside. *Rex* v. *Carmichael* (No. 2), (1940) 55 B.C.R. 237; (1940) 4 D.L.R. 784; (1940) 2 W.W.R. 721 and (1940) 3 W.W.R. 192; 74 C.C.C. 238.

3. Charge of permitting a person to have liquor in a restaurant—lack of essential averment.]—A conviction was quashed where the charge of permitting a person to have liquor in a restaurant did not state that the accused was the keeper of the restaurant or the person in charge of it. *Rex* v. *National Cafe Ltd.,* (1942) 58 B.C.R. 401; (1943) 1 D.L.R. 153; (1943) 1 W.W.R. 141; 78 C.C.C. 322.

4. Seized liquor returned to accused under Sec. 81 of Act—new charge of keeping for sale—whether legality of possession res judicata.]—The accused successfully invoked sec. 81 of the Government Liquor Act and was by a magistrate awarded a quantity of liquor seized by the police. In the meantime she was charged and convicted of keeping the same liquor for sale. The County Court Judge on appeal refused to consider the ruling under sec. 81 and affirmed the conviction. Held on further appeal to the Court of Appeal quashing the conviction, the question whether the accused was in legal possession of the liquor had already been litigated between the Crown and herself and the judgment was conclusive. *Rex* v. *Lawson,* (1943) 59 B.C.R. 536; (1944) 2 D.L.R. 752; (1944) 1 W.W.R. 451; 81 C.C.C. 139.

5. Failure to prove essentials—physician giving prescription to other than patient.]—The accused was convicted by a magistrate that being a physician he gave a prescription for liquor to other than a bona fide patient in a case of actual need (sec. 22 of the Government Liquor Act). Held, on appeal quashing the conviction, the prosecution had failed to prove that the accused was a physician, or that he had signed the prescription. As a result the time never arrived at which the onus under sec. 97 (2) of the Act could be invoked. *Rex* v. *Arthur,* (1946) 63 B.C.R. 557; (1947) 4 D.L.R. 555; (1947) 1 W.W.R. 1054; 89 C.C.C. 204; reversing 86 C.C.C. 371.

See Criminal Law.

See Evidence.

JUDGMENTS AND ORDERS.

I. Entry, 407.
II. Effect and Conclusiveness, 407.
A. Power to Reopen, 407.
B. Conditions of Reopening, 409.
III. Judgments of Foreign and Other Courts, 411.
IV. The Lien, 413.

I. Entry.

1. Inclusion of recital showing grounds of decision.]—It is contrary to the established jurisprudence of the Courts of British Columbia to recite or include arguments or reasons in their formal judgments or orders. *The Bishop of Victoria* v. *The Corporation of the City of Victoria,* (1933) 47 B.C.R. 264; (1933) 3 W.W.R. 332; (1933) 4 D.L.R. 524.

2. Form where both claim and counterclaim dismissed.]—The order as to costs should read "that the defendant recover against the plaintiffs their costs of defence to the claim to be taxed and that the plaintiffs recover against the defendant their costs of defence to the counterclaim to be taxed." *Alert Logging Co. Ltd* v. *Standard Marine Insurance Co. Ltd.,* (1933) 47 B.C.R. 450; (1933) 3 W.W.R. 375.

II. Effect and Conclusiveness.

A. Power to reopen.

1. Interest of applicant.]—For the purpose of obtaining a pension an order was made allowing a woman to swear to her husband's death. Subsequently she married the petitioner but differences arose and litigation ensued. The petitioner applied to rescind the order on the ground that the Court had been deceived and that the woman had made use of the order to lead him to believe that she was free to marry him. Held, dismissing the petition, that the petitioner had failed to establish that, at the time the order was made or since, he had an interest which was affected by it. *In re Holl: in re Cowper,* (1932) 46 B.C.R. 297; (1933) 1 W.W.R. 17.

2. Reopening of trial after judgment reserved.]—After the completion of the evidence and argument by counsel judgment was reserved. Before any judgment was pronounced the defendant applied to reopen the trial to adduce further evidence to contradict a witness for the plaintiff. The application was dismissed, both on the ground that the re-opening was not in the interests of justice, and, if the general principles as to diligence and conclusiveness applied, on the ground that the new evidence was not of such a character that if it had been adduced at the hearing it would have changed the result. *Woodworth* v. *Gagne,* (1935) 50 B.C.R. 216; (1935) 3 W.W.R. 49.

3. Power of Judge to set aside his own Capias.]—A County Court Judge made an ex parte order for the arrest of the defendant. Later he set aside his own order on the defendant's application. On appeal it was contended that it was not open to the judge to review his own original order even though it was granted ex parte, and that only the Court of Appeal could deal with it. Held, dismissing the appeal, the practice in this Province for more than 50 years has been for the judge granting such an order to review it upon the materials originally before him as well as upon new ones. *Hartney* v. *Onderdonk,* (1884) 1 B.C.R. (Pt. 2) 88 followed, rather than *Oliphant* v. *Alexander* (1912) 2 W.W.R. 908. *Mit Singh* v. *Kehar Singh Gill,* (1935) 50 B.C.R. 332; (1936) 1 W.W.R. 396; 65 C.C.C. 263.

4. Judgment pronounced but not entered—application to reopen trial.]—While the power exists to reopen the trial as requested it is one which ought to be exercised with the very greatest care and under circumstances which must be rare indeed. Here it was not shown that the new witness could not have been called at the trial, and in the opinion of the judge his testimony, if admissible, would not change the result already arrived at. *Guarascio* v. *Porto,* (1939) 54 B.C.R. 297; (1939) 4 D.L.R. 715; (1939) 3 W.W.R. 316.

5. Rehearing by second judge.]—An application was dismissed; the applicant in person asked leave to make further representations and the judge requested another judge to deal with it. The order dismissing the application had been duly taken out and entered. Held that the applicant's remedy was by appeal and the request of another judge added nothing to the jurisdiction of the judge who was asked to rehear the matter. *In re The Bankruptcy of Daybreak Mining Co. Ltd.,* (1942) 58 B.C.R. 154; (1942) 3 W.W.R. 686.

6. Whether order may be vacated or re-opened.]—A judgment duly pronounced as the Court intended, and duly entered, cannot be set aside except on appeal, and it cannot be amended except where there has been a slip in drawing it up and where there has been an error in expressing the manifest intention of the Court. *Stephen* v. *Stewart,* (1943) 59 B.C.R. 410; (1944) 1 D.L.R. 305; (1943) 3 W.W.R. 580; reversing (1943) 59 B.C.R. 84.

7. Respondent not appearing at trial—motion to extend time for appeal—proper remedy below.]—On a motion to extend the time for appealing it was objected that sec. 38 of the Divorce and Matrimonial Causes Act stood in the way of any extension. The objection was overruled. On the motion itself the proper remedy where an ex parte judgment is attacked is to apply to the Court below under rule 457 rather than to appeal. The motion was refused. *Miles* v. *Wilkinson,* (1945) 61 B.C.R. 474.

8. New trial ordered—no direction as to mode of—whether Court of Appeal can supplement order after entry.]—The accused had consented to be tried summarily and pleaded guilty. A new trial was ordered by the Court of Appeal and the order contained no direction as to the mode of the new trial. The accused moved to amend the judgment to provide for a trial by jury. Held, dismissing the motion, the power to give such a direction under sec. 1014 (4) of the Criminal Code cannot be exercised after the order is entered and perfected. Here the order as entered is in the terms pronounced by the Court and the Court is functus officio. It follows that the case was remitted for trial before the tribunal from which the appeal was taken. There is no power in the Court to permit the accused to have a further right of election. The consent once given by the accused remains in effect and is no part of the trial. But an experienced magistrate would be expected in the circumstances to turn the hearing into a preliminary inquiry rather than proceed with the trial. *Rex* v. *Hand,* (No. 2) (1946) 62 B.C.R. 384.

B. Conditions of reopening.

1. Motion to re-open trial—conditions of re-opening.]—The discretion to re-open a trial should be exercised with the greatest care. Held, dismissing the motion, it was not in the interests of justice that the case should be re-opened for further evidence. *Larsen* v. *Hassard,* (1934) 3 W.W.R. 224.

2. Power of judge to re-open trial, up to entry of judgment.]—Before entry of judgment the trial judge may re-open the trial. The rules as to the admission of new evidence by an Appellate Court, viz., the necessity to show diligence etc., are not applicable. *Clayton* v. *British American Securities Ltd.,* (1934) 49 B.C.R. 28; (1935) 1 D.L.R. 432; (1934) 3 W.W.R. 257.

3. Amending Act passed between making of order and its entry.]—After an order was made under the Municipal Act holding that a Commissioner for a municipality was not the successor in office of a Board of School Trustees, the Legislature amended the Act by declaring that for all purposes a Commissioner should be deemed to be such successor and making the change retroactive. The order so made had not been signed or entered. The judge, granting an application to rehear the matter, held (a) that he was not functus officio as the order had not been passed and entered; (b) there being a substantive change in the law, the Legislature had, in effect, decreed that a person who, when the writ was issued, had no cause of action, should nevertheless be deemed to have had one. *Porteous* v. *Board of School Trustees of the District of North Vancouver, (No. 2)* (1935) 50 B.C.R. 78; (1935) 2 W.W.R. 280.

4. Power to vary order after four years.]—Where an order does not carry out the intention of the judge who made it, he has jurisdiction to vary it by a subsequent order. *The Royal Trust Company* v. *Bainbridge Lumber Co. Ltd.,* (1937) 52 B.C.R. 129; (1937) 4 D.L.R. 94.

5. Judgment pronounced but not entered—application to re-open trial.]—Where all the new facts were within the knowledge of the plaintiff at the time of the trial and could readily have been given in evidence, there was not the necessary diligence in adducing all available evidence at the trial, to warrant the re-opening of the trial. *De Lamprecht* v. *De Lamprecht,* (1939) 54 B.C.R. 332.

6. Application to re-open trial and call new evidence—discretion.]—Counsel was not taken by surprise and there was no failure to prove a particular point arising through inadvertence or misconception of the burden of proof. The evidence sought to be introduced could have been secured

before trial on a commission issued for that purpose. Held, refusing the application, that a party cannot where the issue is clearly defined and the burden of proof obvious, go down to trial on evidence which he considers sufficient and then having found it is insufficient, secure an order for the admission of further evidence which was available but which he failed to submit in the first instance. *Scott* v. *Anglo-Canadian Investments Ltd.,* (1944) 60 B.C.R. 460.

7. Amending order after entry—error in expressing intention of Court.]—On an application to extend the time for filing the appeal books and factums, counsel for the respondent objected that there was no jurisdiction to make the order because the appeal had already been dismissed. An order was produced made some weeks before (on a motion to dismiss the appeal for want of prosecution) which contained a direction that unless certain things were done by a named date the appeal was to stand dismissed without further order. The things to be done had not been done. Held, overruling the objection, the Court had jurisdiction. Notwithstanding that an order has been drawn up and entered it may be amended where, as here, there has been an error in expressing the manifest intention of the Court. The stenographic record, the registrar's note and the judges' bench books all bore out the fact that no order for the dismissal was made. The offending clause was ordered to be struck out. *Craig* v. *Sinclair,* (1944) 61 B.C.R. 253.

III. Judgments of Foreign and Other Courts.

1. Foreign judgment.] — The plaintiff having obtained a judgment in the State of Washington sued on it in British Columbia and moved under Order XIV for judgment. The defendant swore that he had never been served with any process of the Washington Court and had no knowledge of it. Held, dismissing the application, judgments of a foreign court will be treated as valid if the foreign court had jurisdiction and they are not contrary to the principles of natural justice. Failure to serve the defendant or bring the proceedings to his attention would invalidate the proceedings. Whether the defendant was served or notified is a triable issue and the defendant is entitled to have it tried. *Romano* v. *Maggiora,* (1935) 50 B.C.R. 66; (1935) 2 W.W.R. 524.

2. Ontario judgment — Reciprocal Enforcement of Judgments Act.] — The plaintiff recovered a judgment against the defendant and his wife in Ontario and registered it pursuant to an ex parte order in British Columbia. The defendants applied to set the registration aside on the grounds that the Ontario Court had no jurisdiction and that the judgment was based on an agreement contrary to public policy. Held, refusing the application, the defendants having appeared and defended the Ontario action they must be held to have submitted to that jurisdiction. As to the other point the defendants were seeking to take advantage of their own wrong by contending that the agreement was one whereby the defendants had, in effect, agreed to pay money to the then wife of the male defendant (the plaintiff) if she would divorce her husband so that the other defendant could marry him. Held, on appeal, affirming the decision below, the agreement would have been legal if made between the plaintiff and the male defendant and it will not be illegal because the other defendant came forward to supply the means to carry it out. *Pope* v. *Pope,* (1940) 55 B.C.R. 277; (1940) 3 D.L.R. 454; (1940) 2 W.W.R. 509; affirming (1940) 55 B.C.R. 27; (1940) 2 D.L.R. 661; (1940) 1 W.W.R. 566.

3. Right to sue in the County Court for arrears of maintenance ordered by magistrate.]—The wife had obtained a magistrate's order under the Deserted Wives' Maintenance Act. She sued for the arrears. The undoubted right of a judgment creditor to sue on the judgment is subject to the limitation that it must be final and conclusive. Here the magistrate's order may be by him altered or rescinded (secs. 5 and 6). Held, the action must be dismissed. The fact that the parties were afterwards divorced without any consideration of alimony or maintenance by the Supreme Court did not put an end to the magistrate's power to vary or rescind. *Spanos* v. *Spanos,* (1943) 3 W.W.R. 260.

4. Settlement between parties after reasons for judgment handed down.]—After reasons for judgment had been given the parties made a compromise by written release and satisfaction. The plaintiff filed a notice that he had no further interest in the action. Eighteen months later one of the defendants sought to enter the judgment and applied to settle its terms. Held, dismissing the application, that although in ordinary cases the signing and filing of the reasons

for judgment is equivalent to its formal pronouncement in Court or to its formal entry, here the reasons for judgment required further steps to be taken before the order was completed, and control was retained by the trial judge over the subject matter. Moreover, this was a creditor's action and the judgment enures to the benefit of all the creditors of the defendant company. To accede to the application would enable the applicant in effect to be released from the plain effect of the compromise. It is not open to the applicant to have the carriage of the judgment. *Fakir Chand* v. *Lashman Singh,* (1947) 2 D.L.R. 589.

IV. The Lien.

1. Priority as against unregistered mortgage.]—A mortgage executed on the 24th of January 1931 was not immediately registered. The defendant registered certain judgments against the property on and prior to the 24th of February 1931. In March 1931, the mortgagee applied to register and having been refused, sued for a declaration giving him priority over the judgments. The trial judge dismissed the action following *Bank of Hamilton* v. *Hartery,* (1919) 58 S.C.R. 338. Held on appeal, reversing the trial judge, that in view of the amendments to the Land Registry Act since the decision in *Bank of Hamilton* v. *Hartery* applications of this class fall within the decision of *Entwisle* v. *Lenz & Leiser,* (1908) 14 B.C.R. 51, and the mortgage should be registered in priority to the judgments. *Gregg* v. *Palmer,* (1932) 45 B.C.R. 267; (1932) 2 W.W.R. 241.

2. Re-registration in Land Registry Office after cancellation.]—A judgment creditor released his judgment in the Land Registry Office as against a particular lot in order that the judgment debtor, a candidate for the office of Mayor, might qualify upon it. Some years later he re-registered the judgment against the lot in respect of which the judgment debtor still qualified. Held, that the re-registration should be cancelled in the Land Registry Office. The effect of the release was to free the lot for all time from the possibility of such a charge and the re-registration was illegal and void. *Hansen* v. *Taylor,* (1933) 46 B.C.R. 556; (1933) 2 W.W.R. 16.

See Appeals.

See Practice.

See Registration of Title to Land.

JURY.

I. Right to Trial by Jury, 414.

II. Application for Trial by Jury, 415.

III. Verdict and Answers to Questions, 416.

I. Right to Trial by Jury.

1. Malpractice by surgeon—scientific investigation.]—In a negligence action a plaintiff is entitled to a jury under Order XXXVI rule 6 unless the defendant shows that the right should not be granted under rule 5 of the same Order. Held, on appeal, that the jury was properly ordered, this being a case of negligence primarily rather than of scientific investigation. *Plowright* v. *Seldon,* 45 B.C.R., 481; (1933) 2 D.L.R. 804; affirming (1932) 1 W.W.R. 792.

2. Where equitable jurisdiction of the Court is invoked.]—Where the pleadings show that the action is one in which the equitable jurisdiction of the Court is invoked, the case falls within rule 427 so far as the mode of trial is concerned. The party whose case falls within its provisions has the onus cast upon him, when asking for a trial by jury, to satisfy the Court that the trial should be by jury rather than without. *Bruce v. Wilson,* (1935) 49 B.C.R. 557; (1935) 2 W.W.R. 186.

3. Refusal to order trial by jury—Order XXXVI, rule 6—whether Appeal Court should interfere.]—The judge, without any special affidavit, ruled that the case should be tried without a jury as falling within the exceptions mentioned in rule 5. Held, on appeal, affirming the decision below, that an appellate tribunal ought not merely to substitute its own exercise of discretion for that already exercised by the judge. But if it reaches a clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations, then a reversal may be justified. *Creasey* v. *Sweney,* (1942) 57 B.C.R. 457; (1942) 2 D.L.R. 552; (1942) 3 W.W.R. 65; affirming (1942) 1 W.W.R. 576.

4. Action for life insurance—scientific investigation by medical experts.]—The deceased died after the explosion near her of a giant fire cracker. Double indemnity benefits were claimed on the basis of an explosion as the cause of death. Held, dis-

missing an application for a jury, the policies of insurance would have to be interpreted and medical testimony dealing with the cause of death weighed. Scientific investigation would be involved. *Hopper* v. *Prudential Insurance Co.*, (1944) 3 W.W.R. 24.

5. Whether rule 429 applies—issues of an intricate and complex character.]—Under rule 430 a plaintiff in a negligence action is entitled to a jury as of right subject to that right being displaced by a judge under rule 429. The judge refused to order the case to be tried by a jury. Held, on appeal the judge having exercised his discretion, it should not in the circumstances be interfered with. It was shown that there were issues to be tried turning upon the testimony of medical and surgical experts relating to highly technical matters. The question as to whether the element of scientific investigation is present, depends on the facts of each particular case and is one of degree. The test to be applied was as to whether or no the examination by medical doctors had not attained the height of scientific investigation within the meaning of the rule. *Taylor* v. *The Vancouver General Hospital*, (1945) 62 B.C.R. 42; (1945) 4 D.L.R. 737; (1945) 3 W.W.R. 510.

6. Prolonged examination of documents involved.]—An application for a jury was refused where a prolonged examination of documents would be required. They were of an intricate and complex character. *Rose* v. *Vancouver Exhibition Association*, (1946) 2 W.W.R. 606.

II. Application fot Trial by Jury.

1. Extending time for application for jury.]—The plaintiff applied for a jury in a negligence action but, through an error by his solicitor, not within four days after notice of trial. On objection being taken an order extending the time was made under rule 967. Held, on appeal, affirming the extension, that under rule 430 the plaintiff in this action had, if properly applied for, an absolute right to a trial by jury. That absolute right was lost through the solicitor's slip but was restored by the order granting the extension. The contention was rejected that the judge should have gone into the question of whether or not it was a proper case for trial by jury. His primary consideration concerned the circumstances surrounding the default. There could be special cases where the judge, in the exercise of his discretion, might take into consideration, on an application under rule 967, the question of whether the action should be triable by a judge without a jury, but this was not one of them. *Whitehead* v. *Corporation of the City of North Vancouver*, (1937) 51 B.C.R. 540; (1937) 3 D.L.R. 804; (1937) 2 W.W.R. 588; affirming (1937) 2 W.W.R. 95.

2. New trial—no direction for trial by jury—same method as at first trial.]—The order of the Court of Appeal directing a new trial contained no direction as to whether it should be by jury or not. The plaintiff applied for a jury. Held, that there was an implied direction that the new trial be held by the same method of trial as the first. Since there had been no change in the circumstances existing at the time the action was first set down for trial, the Court was not disposed to exercise the discretion given to order a change. *Guenette* v. *British Columbia Electric Railway Co. Ltd.*, (*No. 2*) (1944) 60 B.C.R. 261; (1944) 3 D.L.R. 379; (1944) 3 W.W.R. 67.

III. Verdict and Answers to Questions

1. Duty of trial Judge — Sec. 40 of Supreme Court Act.]—The Judge should refer to the different issues and point out to the jury the evidence referable thereto. The requirement of sec. 60 that the jury be given a proper and complete direction upon the law and as to the evidence applicable to the issues, was met in part by the framing and submission of questions. *Budd* v. *Canadian Pacific Railway Co.*, (1932) 45 B.C.R. 161; (1932) 2 W.W.R. 85.

2. Obligation of judge to submit questions.]—Questions should be put to the jury in negligence cases as a general rule, and though it is within the discretion of the judge to dispense with them in a proper case, yet when they are put it is the duty of the jury to answer them if possible, and they should not be diverted from that duty by being told that they have the right to return a general verdict, which however, they may properly do, ex mero motu. *Willis* v. *The Coca Cola Co. of Canada Ltd.*, (1933) 47 B.C.R. 481; (1934) 2 D.L.R. 173; (1934) 1 W.W.R. 145.

3. Evidence to support jury's findings.]—The jury in answer to a question as to the character of the negligence found, gave an answer which the respondent contended

had no support from the evidence and was not pleaded or put forward at the trial. On appeal, affirming the verdict on an equal division of the Court, held that the answer was a reasonable explanation of what had happened; it was open to the jury on the pleadings and evidence so to find. Held, on further appeal to the Supreme Court of Canada, dismissing the appeal, that the Court should not construe too narrowly and too critically the language of the jury in the answers they give to questions submitted to them. *Warren* v. *Grinnell Co. of Canada Ltd.*, (1937) S.C.R. 353; (1937) 1 D.L.R. 705; affirming (1935) 50 B.C.R. 512; (1936) 4 D.L.R. 544; (1936) 2 W.W.R. 600.

4. Answers contradictory and irreconcilable.]—A new trial was ordered where the jury in answer to questions held, in effect, (a) that the plaintiff was wholly responsible, (b) that the defendant was wholly responsible, (c) that both were equally responsible. By no process of reasoning could the answers be reconciled nor could any legal effect be given them. *James* v. *McLennan McFeely & Prior Ltd.*, (1940) 56 B.C.R. 1; (1941) 1 D.L.R. 555; (1941) 1 W.W.R. 487.

See CRIMINAL LAW.

See NEGLIGENCE.

See PRACTICE.

JUVENILE DELINQUENTS.

See CRIMINAL LAW.

LABOUR LAWS.

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LANDLORD AND TENANT.

I. RELATION OF, 418.

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III. COVENANTS, 424.

IV. OVERHOLDING TENANTS, 427.

V. FIXTURES, 428.

I. RELATION OF.

1. Trap—railing of porch of demised premises.] — The plaintiffs (husband and wife) occupied one of two suites consisting of the upper part of a store building owned by the defendant. The claim was with respect to injuries sustained when the female plaintiff leaned against a porch railing which gave way. The porch was used by the tenants of both suites and the landlord exercised no rights with respect to it. Held, dismissing the action, that the porch was included in the demise and that even if it was a "trap" there could be no recovery unless it existed with respect to a portion of the building which the landlord had not demised and which was under his control as landlord. *Agnew* v. *Hamilton*, (1932) 46 B.C.R. 147; (1932) 3 W.W.R. 57; affirmed (1932) 46 B.C.R. 362.

2. Creation of relationship by attornment clause in agreement for sale.]—An agreement for the sale of premises contained a clause by which the purchaser attorned to and became the tenant of the vendor at a rent equivalent to the interest covenanted for. The vendor was given the right on default to enter and distrain for the rent. Held, the agreement expressly created the relation of landlord and tenant, reserved a rent and conferred the power to distrain. *Henderson* v. *McGugan*, (1933) 3 W.W.R. 230.

3. Duty to invitee—parties.] — The defendant, lessee of the Horse Show Building in the Exhibition Grounds at Vancouver, sublet it for one day to the Boy Scouts and Girl Guides. The plaintiff on that day was injured by a fall on the stairs in the building and was awarded damages against the defendant. Held, on appeal, reversing the decision below, that the defendant was not liable because it had given up possession and control of the premises for the day in question. The Boy Scouts and Girl Guides had control and occupation of the building and were in the position of lessees, or something in legal effect equivalent thereto, of the defendant. *Bentley* v. *Vancouver Exhibition Association*, (1935) 50 B.C.R. 343; (1936) 1 W.W.R. 480; reversing (1935) 3 W.W.R. 129.

4. Collection of rent by person divested of right.] — The defendant permitted the plaintiff to occupy and improve a portion of his lands. Then he formally leased the whole to the Crown but went on collecting rent from the plaintiff, telling him that he had an arrangement with the Crown that he could collect and retain such rent. The plaintiff demanded the return of the rent paid since the date of the lease. Held, awarding the amount to the plaintiff, that the formal lease could not be varied by oral evidence to establish the alleged arrangement, and the plaintiff was entitled to recover the rent as money had and received by the defendant for the use of the plaintiff. *Scott* v. *Spearin,* (1936) 50 B.C.R. 466.

5. Foreclosure action—occupation rent—status of receiver.] — In a foreclosure action in the Supreme Court an occupation rent was fixed and a receiver appointed. The receiver applied in the County Court under the provisions of the Landlord and Tenant Act for possession in default of payment of the occupation rent. Held, dismissing the application that it was never intended that a receiver in the pending foreclosure action should have the benefit of this remedy. *Coulson* v. *Gunn,* (1935) 50 B.C.R. 330.

6. Association—entity not known to the law—judgment null and void.]—An unincorporated association, not being a partnership, has no status to sue or be sued. A judgment rendered against such an association as a tenant is a nullity and the Court of Appeal in the exercise of its inherent jurisdiction struck out the judgment, making no order as to costs. *Yue Shan Society* v. *Chinese Workers' Protective Association,* (1944) 2 D.L.R. 287.

II. The Lease.

A. In General.

1. Bed-bugs introduced during tenancy—untenantlike user.]—The tenant's implied covenant to use the premises in a tenantlike manner is broken by his importation of bed-bugs into the premises. Damages were awarded. *Martin* v. *Larsen,* (1943) 59 B.C.R. 398; (1944) 1 D.L.R, 303.

2. "For the duration of the war"—void for uncertainty—presumption of year to year tenancy.]—The owner of a farm rented it to the plaintiff "for the duration of the war." The owner later agreed to sell the farm to the defendant but the documents said nothing about the lease to the plaintiff. The trial judge found that the defendant knew of the lease and in fact received rents under it. After some months the defendant dispossessed the plaintiff who sued to recover possession. Held, the lease was void for uncertainty but the plaintiff was entitled to a tenancy from year to year. Where a tenant enters under a lease which is void for uncertainty and pays rent on the basis of a yearly tenancy, there arises a tenancy from year to year by presumption of law, provided there are no circumstances to rebut it. The same principle applies here. The plaintiff was wrongfully dispossessed and was entitled to damages. *Trerise* v. *Evanocke,* (1944) 60 B.C.R. 301; (1944) 3 D.L.R. 220; (1944) 3 W.W.R. 319.

3. Damages rather than specific performance—possession.] — The trial judge having found that the plaintiffs were monthly tenants and the Court of Appeal having decided that they were wrongfully ejected the question arose whether the plaintiffs should be restored to possession (in effect specific performance) or be given damages. In the circumstances, having regard to the uncertainty of the right to possession under the Wartime Leasehold Regulations the remedy should be in damages. A reference to the registrar was directed as to damages for trespass and ejectment, damages for trespass to goods, etc. *Chin Chun* v. *Yue Shan Society,* (1945) 61 B.C.R. 406; (1945) 1 W.W.R. 600.

4. Where rent payable.]—The rent was throughout paid to the landlord at the rented premises. The general rule is that where no place of payment is specified, either expressly or by implication, the debtor must seek his creditor. Here in the circumstances, by implication, the payment of the rent was to be made at the rented premises. The judge found that the tenant was always ready and willing to pay. Held, on appeal, the tenant was not in default. *Browne* v. *White,* (1947) 63 B.C.R. 402; (1947) 2 D.L.R. 309; (1947) 1 W.W.R. 622.

B. Notice to Terminate.

1. Termination in event of sale—same terms to be offered tenant.] — The lease provided that if the lessor effected a sale he might give the tenant 45 days notice to quit and then be at liberty to re-enter. It

was also provided that if the lessor proposed to effect a sale, he must first offer to sell to the tenant at the same price and on the same terms as to any other purchaser. The lessor found a purchaser and tentatively arranged for a sale and at once gave 45 days notice to determine the lease at the same time offering the like terms to the tenant. The tenant did not accept the offer to sell. He refused to vacate and the lessor re-entered. The trial judge awarded damages to the plaintiff holding that the notice was defective in that, upon arranging a sale, the lessor should have made a similar offer to the tenant, and then after waiting a reasonable time to see if the tenant would buy, sent the 45 day notice. Held, on appeal, reversing the decision below, that the notice was effective. The tenant was relying on a technical construction to secure damages to which equitably he was not entitled. *Heide* v. *Brisco*, (1934) 50 B.C.R. 161; (1935) 2 D.L.R. 407; (1935) 2 W.W.R. 429 (sub nom. *Brisco* v. *Heide*).

2. Landlord's notice to quit—monthly tenancy.]—The tenancy was a monthly one commencing at the beginning of the month and ending at midnight on the last day of the month. On June 27, 1939, the landlord gave the following notice, "We herewith give you notice to vacate your premises in the Medical-Dental Building by July 31, 1939." If the notice meant that the tenant was to vacate before July 31 or at some time during that day, it would not be a good notice to quit. It was held to be the clear intention of the parties that the tenant might remain for the whole of July 31 and the notice might be so construed. When he was asked to vacate "by July 31," the meaning was that when that day ended the tenant had no further right to remain. *J. H. Munro Ltd.* v. *Vancouver Properties Ltd.*, (1940) 55 B.C.R. 292; (1940) 3 D.L.R. 766; (1940) 3 W.W.R. 26; affirming (1940) 2 D.L.R. 772; (1940) 2 W.W.R. 32.

3. Notice to vacate "on or before" a certain date.]—The landlord, on October 28th, 1942, gave his tenant three months' notice to vacate "on or before the 31st day of January, 1943". The tenant remained in possession and the landlord took proceedings under the Landlord and Tenant Act to evict him. The County Court Judge dismissed the application on the objection that the notice was not sufficient in form in that the addition of the words "or before" rendered the notice invalid as one of less than the required three months. Held, remitting the matter to the Judge to be heard, the notice was sufficient. *Rowley* v. *Adams*; (1943) 59 B.C.R. 36; (1943) 2 D.L.R. 538; (1943) 2 W.W.R. 47.

4. Service of landlord's notice to quit.]—A notice to quit need not be served personally on the tenant if addressed to him. It may be left with his wife or servant. Where it was sent by registered post and was duly received by the tenant it was properly served. In *re Landlord and Tenant Act* and in *re Urquhart and Lee*, (1944) 2 W.W.R. 463.

5. Length of notice required—one year's tenancy changed to one from year to year.]—Where the tenant on a year's lease held over and the landlord continued to accept the same rent for some years, the tenancy became one from year to year requiring a six months' notice to terminate it. The monthly payment of the rent had no significance. In *re Anderson and Doroschenko*, (1944) 2 W.W.R. 527.

6. Notice to quit "at the end of the term"—one year "from" September first.]—The landlord was entitled to give his tenant six months' notice to quit "at the end of the term". The lease was for "one year to be computed from the first day of September" and the rent was payable on the first day of September and of each month during the term. The landlord gave six months' notice to quit on August 31. The tenant contended that the lease did not commence until September 2 with the result that the end of the term was not until September 1 and thus the notice was invalid. Held, affirming the decision below, "from" is sometimes inclusive and sometimes exclusive and the context should be looked at to determine what the parties intended. The fact that the rent is payable on the first day of each month imports that the tenant had the right to possession for the entire month of September. Hence here "from" is inclusive and the term expired August 31. *West* v. *Barr*; (1945) 61 B.C.R., 108; (1945) 2 D.L.R. 42; (1945) 1 W.W.R. 337.

7. Written notice to vacate on a stated date—whether notice conditional.]—M. was landlord to the defendant of a dwelling on a monthly basis. M. sold to the plantiff who went to see the defendant with the idea of getting early possession. The defendant referred to an arrangement he had with M. to move if he could get a house. The plaintiff asked the defendant to confirm the arrange-

ment in writing. Then the defendant wrote the plaintiff in confirmation and stated "I will vacate on or before August 31st, 1945, in consideration of M. assisting me to locate other premises in Vancouver, and paying my moving expenses". Other premises were not found and the plaintiff, invoking a War Regulation which enabled possession to be obtained where a tenant gives written notice of intention to vacate by a stated date and does not vacate, secured an order for possession. Held, on appeal reversing the decision below, the notice was conditional upon the defendant finding other accommodation. The letter was not a written notice of an intention to vacate on a stated date within the meaning of the War Regulation. *Cook* v. *Munro;* (1945) 62 B.C.R., 294; (1946) 2 D.L.R. 36; (1946) 1 W.W.R. 225.

8. Duty of tenant to seek landlord and pay the rent — valid notice to quit.]— Where the tenant allowed the rent to go unpaid and the landlord gave a valid notice to quit on February 2nd, and on March 5 served a demand for possession, the tenancy was at an end and the landlord was entitled to enter peaceably, which she did. Held the tenant suffered no legal damage. *Montgomery* v. *Alexander;* (1946) 3 W.W.R. 444.

C. Termination.

1. Lease determined by forfeiture of deposit.]—The parties entered into an agreement for a lease of five years at a stipulated rent. The document provided that $100 be deposited by the defendant as good faith, and should he not enter by a certain date, the deposit would be forfeited. The defendant did not enter and the plaintiff retained the deposit. He sued the defendant for the rent, or in the alternative, damages for breach of the agreement. Held, dismissing the action, that the agreement meant that if the defendant failed to occupy the premises he would forfeit the deposit and that was the end of the matter. *Pitt-Cross* v. *Malnick,* (1936) 51 B.C.R. 77; (1936) 3 W.W.R. 276.

2. Effect of secs. 29 and 30 of Landlord and Tenant Act—incorrect affidavit leading to summons.] — The affidavit leading to the issue by the Registrar of a summons to the tenant under sec. 29 was alleged not to be true in that it erroneously stated that the tenant had no right of set-off whereas, it was contended, the tenant was entitled to a set-off for damages because the landlord had cut off the light and gas. Held, the filing of the affidavit is merely the basis for the issue of the summons and the facts are to be determined at the hearing itself. The judge summarily decides whether possession should be given or not but, before the execution of an order for possession, the tenant may escape its consequences if he pays the rent and costs; hence the judge must ascertain the amount of the rent, after considering any claims by the tenant for damages or otherwise. The giving of notice by the landlord under sec. 19 will not invalidate the proceedings under sec. 29 and 30. *Sherwood* v. *Lewis,* (1939) 54 B.C.R. 72; (1939) 4 D.L.R. 774; (1939) 2 W.W.R. 49.

3. Re-entry for breach of condition — relief against.] — Assuming that a "lay" agreement for the working of placer claims is a lease, the lessor cannot, without an express term in the lease, re-enter for mere breach of a covenant. He can always, however, enter for breach of condition, which, in general, is a term that the parties mean to make the foundation of an agreement. Relief from forfeiture will not be granted where there is no oppressive contract but only a following out of the remedies given by the general law for breaches going to the root of the contract. *Falleson* v. *Spruce Creek Mining Co. Ltd.,* (1942) 58 B.C.R. 233; (1942) 3 W.W.R. 553; (1942) 4 D.L.R. 708; affirming (1942) 2 W.W.R. 121.

8. Whether suite in nursing-home let to a non-patient protected by Housing Order.]—The Federal Housing Regulations (No. 294) provide that they shall not apply to rooms in a nursing home. The tenant here was not a patient and occupied under an ordinary dwelling-house tenancy. Held, setting aside an order giving possession to the landlord, the premises intended to be protected by the regulation are those used as a nursing-home. Here the landlord had by his own act divested this part of the premises of that character and removed the suite from that description. The suite was ordinary housing accommodation and subject to Order 294. *Blaney* v. *Rodda,* (1946) 62 B.C.R. 559; (1946) 2 W.W.R. 511.

III. COVENANTS.

1. Covenant not to assign without leave—when broken.]—The plaintiff as tenant, who had given a covenant not to

assign without leave, permitted a proposed assignee of the term to enter. The defendant (landlord) evicted the occupant and dispossessed the plaintiff who sued for trespass and breach of covenant for quiet enjoyment. The trial judge dismissed the action holding that the covenant not to assign had been broken notwithstanding the contention that the person let into possession by the tenant was not an assignee but merely a temporary occupant. Held on appeal, affirming the decision below, the findings of the trial judge had not been displaced. *Running* v. *Marshall,* (1933) 2 D.L.R. 629.

2. Rent to be increased when it shall be possible to procure a licence to sell liquor.]—The lease of a hotel property contained a proviso that the rent would go up if at any time during the term "it shall become possible to procure a licence" to sell liquor. Held, by the County Court Judge as arbitrator, that the time did not arrive when, after a plebiscite, the result in favour of licences in the City was formally promulgated, but after such reasonable time as was required to enable the lessee to make his application to the Liquor Board and after the granting thereof. *In re Central Hotel and Homfray and Bral,* (1934) 3 W.W.R. 360.

3. Covenant by tenant to repair, wear and tear excepted—effect of.]—Under the usual covenant to repair, wear and tear excepted, the tenant was notified to make good defects caused by rot. On the facts the judge found that the acts of the tenant may have accelerated but did not cause the condition. The action by the landlord for the cost of the repairs was dismissed. *Nelson* v. *Borthwick,* (1938) 3 D.L.R. 790; (1938) 3 W.W.R. 47.

4. No covenant by lessor to repair—leaking roof.]—In the absence of express contract or fraud the lessor of accommodation other than a furnished house, is not liable for defects making it unfit for the purpose for which it was rented, even though the lessor is aware of such defects. Where the roof of premises to be used for religious purposes developed a leak an action for damages by the tenant was dismissed, there being no covenant as to the condition of the premises or for repair on the part of the lessor. *Gilbanks* v. *City of Vancouver,* (1944) 3 W.W.R. 47.

5. Agreement for lease as rooming house—whether covenant waived by entry into one room.]—The plaintiff agreed to lease a 24-room building as a rooming house, the term to commence when the lessor should complete certain alterations. The alterations were delayed beyond a reasonable time (three months) as the Court held, but the plaintiff to the knowledge of the lessor moved in and occupied one room. He could not however operate the premises as a rooming house until the alterations were made. Held, in an action for damages by the tenant, that he was entitled to recover for revenue lost through the delay. The occupation of one room did not constitute a waiver of the tenant's right to insist that the work be done. *DeWolfe* v. *Moore,* (1944) 3 W.W.R. 143.

6. Quiet enjoyment—minor assaults off the demised premises—no breach.]—The claim was framed on the pleadings and developed at the trial as one for damages for breach of an implied covenant for quiet enjoyment of a rented apartment. The alleged breaches consisted of slapping the tenants' children and using threatening language, not on the premises. Held, reversing the trial judge who had awarded damages, there was no breach of the implied covenant. There must be some physical interference with the enjoyment of the demised premises. *Hormidge* v. *Magur,* (1946) 63 B.C.R. 188; (1947) 1 D.L.R. 415; (1946) 3 W.W.R. 668.

7. Covenant not to sublet without leave—permitting third person to occupy.]—The lease contained a covenant not to assign or sublet without leave. The leave was asked and denied. The lessee then let her brother into occupation under a written arrangement whereby, disclaiming any intention of assigning or subletting, he was to have the temporary use of the premises determinable at the will of the lessee. The lessee gave her brother "leave and licence" to move in as her agent and she was throughout to have the right to use the premises as she might wish. The brother was under no circumstances to do anything to endanger the lessee's position as tenant. The County Court Judge under sec. 19 of the Landlord and Tenant Act held there was a subletting and gave possession to the lessor. Held, reversing the decision below, the mere act of the lessee in letting her brother into possession under the arrangement made did not amount to a breach of the covenant so long as the lessee herself retained the legal possession of the premises. She permitted her brother to use the premises but on revocable licence only, being careful to retain legal

possession at all times. If a lessor intends to prohibit an arrangement of this kind his remedy is to provide against it in the lease. *Carmichael* v. *Dolmage,* (1946) 63 B.C.R. 352; (1947) 1 D.L.R. 559; (1947) 1 W.W.R. 193.

IV. Overholding Tenants.

1. Landlord's notice to vacate for failure to pay rent—"relief from forfeiture".]—The landlord had given a proper notice to vacate, the rent being over fifteen days in arrear. The landlord applied for possession under sec. 19 of the Landlord and Tenant Act. The tenant asked "relief from forfeiture". Held the landlord was entitled to possession. Under sec. 19 there was no forfeiture because the lease was allowed to run its regular and full course until the term expired. Under sec. 29 it is provided that upon payment of the rent before execution of the order for possession the tenant may continue as of his former holding. *Millard* v. *McEwan,* (1945) 1 W.W.R. 509.

2. Rental regulations—effect on proceedings for possession under Landlord and Tenant Act.]—The landlord applied for possession under sec. 19 of the Landlord and Tenant Act on the footing that, the rent being in arrears, the tenancy had been determined by notice to quit. The tenant at the hearing offered to pay all rent but an order for possession was made against him. Held, on appeal by the tenant, affirming the decision below, (a) the objection that the location of the premises was wrongly described in the writ of possession was capable of amendment, (b) an offer to pay all rental accrued was not made prior to the commencement of the proceedings, (c) the landlord, in the circumstances, was entitled to give notice to quit, (d) the objection that the order did not specify which sheriff was to act was overruled. *Barre* v. *McManus,* (1946) 63 B.C.R. 345; (1947) 1 W.W.R. 263.

3. Notice by landlord to quit—rent afterwards paid and accepted—effect.]—The tenant was in arrears and the landlord gave notice to quit. On the eve of proceedings to obtain possession the rent was paid and accepted. The application for possession was met by the contention on the part of the tenant that the default had been waived by the acceptance of the rent and that in any event the forfeiture (if any) should be relieved against under the Laws Declaratory Act. Held, dismissing the landlord's application for possession under Order 108 of the Wartime Prices and Trade Board, the forfeiture where merely rent is involved, is readily relieved against when the landlord is put in the same position as before. Federal Order 108 does not affect the application of equitable principles as to penalties and forfeitures. *In re Ostanek and Schwartz,* (1943) 1 W.W.R. 506.

4. Effect of accepting payment of rent after giving notice to quit.]—The landlord gave due notice to quit to which the tenant made no objection. The latter approached the landlord and asked to be allowed to retain possession for three months to enable him to find other premises. The landlord agreed and $35.00 was paid and accepted for that period. Held, the notice to quit was not waived, and no new tenancy was created. Possession was directed to be given the landlord. Where payments have been made to and accepted by the landlord after notice to quit the question is whether they were paid in pursuance of a renewal of the former tenancy, of an agreement for a new tenancy, or as compensation for occupation without prejudice to the landlord's right to possession and without waiving the notice to quit. The question is one of fact. The tenant has the first right to appropriate the payment. If no special arrangement is made the notice to quit is waived. *Allen* v. *McAlpin,* (1944) 1 W.W.R. 110.

5. Sec. 23 of Landlord and Tenant Act—County Court Judge to send up the proceedings.]—Under section 23 a Supreme Court Judge may require the County Court Judge to send up the proceedings. While the word is "may" and not "shall" the rule is that it is imperative on those having authority by statute to do a judicial act to exercise the authority when the case arises, and its exercise is duly applied for. This notwithstanding that by the Interpretation Act "may" is permissive and "shall" imperative. *Walls v. Heal,* (1947) 1 W.W.R. 95.

V. Fixtures.

1. Fanning-mill on grain merchant's premises.]—A fanning-mill affixed to the freehold passed with the sale of the premises. There was sufficient annexation in the circumstances to bring the case within *Reynolds* v. *Ashby,* (1904) A.C. 466. *Banford* v. *Buckerfield's Ltd.,* (1932) 2 D.L.R. 804.

2. Logging railway, telephone line and unloading outfit.]—A logging company (since bankrupt) had installed a railway telephone line and unloading outfit (including a donkey engine) for the purpose of its logging operations. The trustee (as plaintiff) claimed the equipment as chattels passing on the bankruptcy and the defendant as one of the owners of the land upon which the equipment stood claimed that they were so affixed to the freehold as to become part of the realty. Held, upholding the plaintiff's claim (a) that the bankrupt had placed the equipment in the capacity of tenant or licensee as to the other landowners and probably as vendee in possession (and hence tenant at will) as to the defendant; (b) that the usual practice in such cases is to sever and remove such equipment when the operation is completed; (c) it was the intention of all parties that the equipment was to be removed; (d) that the real question was as to the object and purpose of the annexation, to be inferred from the circumstances of the case; (e) that the equipment could not be said to constitute fixtures belonging to the landowners, but constituted chattels belonging to the bankrupt. *Canadian Credit Men's Trust Association Ltd.* v. *Ingham* (1932) 46 B.C.R. 300; (1933) 1 W.W.R. 8; affirmed on appeal by an equal division of the Court (1933) 47 B.C.R. 358; (1933) 4 D.L.R. 626; (1933) 3 W.W.R. 305.

3. Severance of fixtures from freehold.]—A chattel mortgage included certain fixtures (boiler, laundry machinery, etc.). The assignee of the mortgagee seized the fixtures without obtaining leave under the Mortgagors' and Purchasers' Relief Act. The mortgagor sued for damages and an injunction. The trial judge held that the mortgage did not effect a severance of the fixtures and that they continued to be a part of the freehold. The test is, has there been an actual severance or does the mortgage provide for an immediate severance? He granted an injunction. Held, on appeal, affirming the decision below, there was no severance, and the seizure was illegal without the leave required by the Act, in cases where an instrument affected land. *Sam Sick Hong* v. *Mah Pon*, (1933) 48 B.C.R. 362; (1934) 3 D.L.R. 758; (1934) 2 W.W.R. 626; affirming (1933) 3 W.W.R. 249.

4. Loading crane—severance and sale by tenant.]—A large loading crane, electrically motivated, was built on a wharf over the Fraser River on Crown property leased to the owner of the adjoining upland. The crane was attached to the owner's mill buildings by heavy "stiff legs" and guy wires. The owner made an assignment in bankruptcy and the trustee gave a bill of sale of the chattel property (including the crane) to the plaintiff. In the meantime the defendant as mortgagee of the mill premises had completed foreclosure. The trial judge held that the crane was a fixture and passed to the mortgagee on the foreclosure. Held, on appeal, reversing the decision below as to the crane, that it was a trade fixture on Crown property which the tenant, the bankrupt, had the right to, and did, sever and sell during the tenancy, to the plaintiff. The mortgagee by retaining it was liable for its conversion and the plaintiff was entitled to the crane or its value. *North West Terminals Ltd.* v. *Westminster Trust Co.*, (1938) 53 B.C.R. 463; (1939) 2 D.L.R. 343; (1939) 1 W.W.R. 642.

5. Fixtures annexed to any building or structure—sec. 2 of the Municipal Act.]—Improvements include "all machinery and fixtures annexed to any building or structure." Certain machines, and switch-board and other equipment of the appellant Telephone Company were held by the assessor to be improvements within the definition. The chief items were all attached or annexed to different parts of the building—whether by wood screws, metal screws or lag screws. Some of the items merely rested on the floor and were not actually attached. Held, affirming the assessment that having regard to the annexation and the object and purpose and intention of the annexation the articles were improvements. They were permanently put in place by the owner of the building. In *re Okanagan Telephone Co.* and *City of Kelowna*, (1941) 1 W.W.R. 545.

See DISTRESS.

See TORT.

See WAR LEGISLATION AND REGULATIONS.

LAW SOCIETY.

See SOLICITORS.

LIBEL.

See DEFAMATION.

LIMITATION OF ACTIONS.

I. In General, 431.

II. Special Statute, 432.

III. Acknowledgement, 433.

I. In General.

1. Return of the defendant from beyond the seas.]—The plaintiff recovered judgment against the defendant in Saskatchewan in 1930. In 1933 the defendant came to British Columbia. In 1937 the plaintiff sued the defendant in this Province on the judgment. The only defence raised was the Statute of Limitations as it applied to the judgment, which is treated as a simple contract debt with a limitation period of six years. Held, giving judgment for the plaintiff, that the statute did not run while the defendant was "beyond the seas." The phrase is not to be taken literally, but as meaning "outside the jurisdiction" and the time runs against the plaintiff only from the arrival of the defendant within the jurisdiction of our Courts. *Commercial Securities Corporation Ltd.* v. *Davies*, (1937) 51 B.C.R. 481; (1937) 2 W.W.R. 25.

2. Judgments — effect of sec. 43 of Statute of Limitation.]—The twenty year limitation prescribed by sec. 43 applies to a judgment for debt as well as to judgments relating to real property. *Thakar Singh* v. *Pram Singh*, (1942) 57 B.C.R. 372; (1942) 2 D.L.R. 492; (1942) 1 W.W.R. 737.

3. Effect of order of revivor—whether time begins to run afresh from date of order.]—G. obtained judgment in the County Court in 1916. He died in 1922 and in 1925 his administrator obtained an ex parte order authorizing him to carry on the proceedings. In 1941, sixteen years after the order of revivor and twenty-five years after the judgment the administrator, as judgment creditor, garnished the bank account of the judgment debtor. The County Court judge held that the judgment was statute-barred under sec. 43 of the Statute of Limitations. The section bars proceedings to recover money secured by a judgment, but within twenty years next after the right to the same has accrued. Held on appeal, affirming the decision below, the order of revivor did not stop the Statute of Limitations from running and the garnishee proceedings were statute-barred. There is no authority for saying that mere substitution of an executor has any effect on the Statute of Limitations. *Thakar Singh* v. *Pram Singh*, (1942) 57 B.C.R. 372; (1942) 2 D.L.R. 492; (1942) 1 W.W.R. 737.

II. Special Statute.

1. Consolidated Railway Company's Act —application to employees.]—The benefit of sec. 60 of the Act extends to employees of the company as well as to the company itself. *Bentley* v. *Allen*, (1932) 45 B.C.R. 55; (1932) 1 W.W.R. 399.

2. Six months—British Columbia Electric Railway Co. Ltd.]—The general period of limitation for injuries caused by a railway under provincial jurisdiction is one year. (British Columbia Railway Act, sec. 42.) Sec. 60 of the Consolidated Railway Company's Act of 1896 (the benefit of which was vested in the British Columbia Electric Railway Co. Ltd.), fixed a period of six months and excluded the operation of sec. 42 of the general Act. The Railway Act had been amended and re-enacted many times always preserving the advantage to the company of sec. 60 of its own Act, until in 1924 when it was further amended by including in the definition of "tramway" the term "street railway" and imposing on operators of tramways the provisions of the Railway Act. It was held that the provisions of sec. 60 fixing a six months' period, remained unimpaired; that tramways had always included street railways; and that nothing less than express language in a general act would serve to nullify an express provision in a special act. *Scott* v. *British Columbia Electric Railway Co. Ltd.*, (1938) 53 B.C.R. 233; (1938) 4 D.L.R. 801; (1938) 3 W.W.R. 273.

3. Hospital Act—injury at birth—action commenced at majority—limitation of one year.]—The plaintiff, injured in the defendant's hospital one day after her birth, commenced action for damages within one year after she came of age. The Hospital Act (sec. 31) requires all such actions to be commenced within one year after the cause of action arose, and bars absolutely all actions not so commenced. The judge held that the section passed during the plaintiff's minority applied and the action was barred. Held on appeal reversing the decision below, that the section did not have a retrospective effect and did not bar the plaintiff's claim.

Unless the language used plainly manifests in express terms or by clear implication a contrary intention (a) a statute divesting vested rights is to be construed as prospective, (b) one merely procedural is to be construed as restrospective, (c) one which while procedural in its character, affects vested rights adversely, is to be construed as prospective. Sec. 31 falls within either (a) or (c) but not within (b). The language in which it is couched does not plainly manifest an intention that the section is to be applied retrospectively. *Dixie* v. *Royal Columbian Hospital,* (1941) 56 B.C.R. 74; (1941) 2 D.L.R. 138; (1941) 1 W.W.R. 389.

4. Families' Compensation Act—whether action premature.]—The parents commenced action within a week of the death of their son. The defendant obtained an order setting the writ aside on the ground that it was premature as no administrator had yet been appointed. Held, on appeal, reversing the decision below, that Probate Rule 35 which requires a lapse of fourteen days before the issue of letters of administration, does not affect the provisions of the Families' Compensation Act enabling the plaintiffs to sue "if there be no executor or administrator". Where there is no administrator action may be commenced at once. *Hamilton* v. *Oleson,* (1941) 56 B.C.R. 204; (1941) 2 D.L.R. 595.

5. Public Schools Act—Sufficiency of notice of action.]—Sec. 133 of the Public Schools Act requires that actions for damages shall be brought within six months after the act committed, and "upon four months' previous notice thereof in writing". The solicitors for the plaintiff wrote a letter to the solicitor for the School Board stating that they had been "instructed to take the necessary steps to recover damages." Held, the notice was sufficient; a notice of action is not to be construed with extreme strictness and it will be sufficient, as a general rule, if it fairly and reasonably discloses the ground of complaint relied on. Although the notice did not give specific notice of the action and was not addressed or sent to the Board, the solicitor received it and it had the immediate attention of the Board. *Pearson* v. *The Board of School Trustees of Vancouver,* (1941) 58 B.C.R. 157.

III. Acknowledgment.

Running account.]—Where there is an open running account on which payments were made by the defendant from time to time, the case is taken out of the statute. *Cameron* v. *Parsons,* (1936) 51 B.C.R. 70; (1936) 3 W.W.R. 237.

See County Court Practice.

See Statutes.

LORD CAMPBELL'S ACT.

See Damages.

See Negligence.

LUNATICS.

1. Stay of action against makers of medical certificates.]—Some time after the defendants had given medical certificates that the plaintiff was suffering from a mental disorder, she was charged before a magistrate with being insane and dangerous to be at large. The charge was dismissed. She brought action for conspiracy and malicious prosecution against the doctors and her husband, the informant. Held, on the application of one of the defendants, that it was a proper case for the application of sec. 45 of the Mental Hospitals Act, as he had acted in good faith and with reasonable care, and the action was stayed as against him. *Owens* v. *Dobson,* (1934) 49 B.C.R. 283.

2. Defence of insanity in negligence action.]—The onus is on the defendant to make out the defence of insanity. The standard of criminal liability is not applicable to civil liability in negligence cases. It is possible that if the lunacy of the defendant was proven to be of so extreme a type as to preclude any general intention to do the act complained of, there would be no voluntary act, at all, and therefore no liability. *Baron* v. *Whalen,* (1937) 52 B.C.R. 359; (1938) 1 D.L.R. 787; (1938) 1 W.W.R. 145.

3. Deed of settlement—whether settlor of unsound mind.]—The administrator brought action for a declaration that the intestate (his sister) was of unsound mind when she executed a deed of settlement. Held, dismissing the action that the settlor's

mind and memory were sufficiently sound to enable her to know and understand the nature and effect of the act in which she was engaged and the extent of the property of which she was disposing and to comprehend and appreciate the claims to which she ought to give effect. *Young* v. *Toronto General Trusts Corporation*, (1939) 54 B.C.R. 284; (1939) 4 D.L.R. 766; (1939) 3 W.W.R. 117.

4. Lunatic not so found by inquisition—whether upon release from detention entitled to discharge of quasi-committee.]—The appellant being detained, an order was made appointing a quasi-committee to manage her affairs, she being held through mental infirmity incapable of managing them. Upon her release from detention it was contended that she became entitled, ipso facto, to have the quasi-committee discharged and the management of her property restored as of right. Held, that upon the cessation of the detention an order is necessary to remove the quasi-committee and it will be made only if the Court is satisfied that the delusions which led to the detention have disappeared. While the evidence showed that the appellant was no longer a lunatic in the popular sense, the Court was not satisfied that she had the steady capacity to manage her property. In *re Jane Quinn Mann*, (1942) 58 B.C.R. 241; (1942) 4 D.L.R. 726; (1942) 3 W.W.R. 631.

5. Right of Attorney-General as Committee to costs—Crown Costs Act.]—On an application to sell a property of a deceased person the Attorney-General, as ex officio committee of a lunatic, appeared in behalf of the lunatic who was a beneficiary of the deceased. The order for sale was made with costs payable out of the estate of the deceased, but the costs of the Attorney-General were refused. He was held to be an "officer, servant, or agent of and acting for the Crown" within the meaning of the Crown Costs Act (sec. 2) and there was no statute which expressly authorized an order in his favour. *In re Estate of E. S. Browne deceased*, (1943) 60 B.C.R. 23; (1944) 1 D.L.R. 365; (1944) 1 W.W.R. 266.

6. Not guilty on account of insanity—confinement in Mental Home—petition for inquisition as to sanity.]—M. charged with murder was found "not guilty on account of insanity" and was confined in a Provincial Mental Home. Six years later his wife petitioned a Judge in Lunacy under the Lunacy Act for an order directing an inquisition whether M. was sane or insane. Her own affidavit alone was used in support of the application and the Deputy Attorney-General filed an affidavit in reply. The Judge in Lunacy dismissed the petition. Without deciding that the procedure adopted was open, the appeal was dismissed on the ground that the evidence did not show that the Judge in Lunacy had wrongly exercised the wide discretion given him by the Act. *Murdoch* v. *The Attorney-General of British Columbia*, (1939) 54 B.C.R. 496; (1940) 2 D.L.R. 74; (1940) 1 W.W.R. 267; 73 C.C.C. 222.

MALICIOUS PROSECUTION AND FALSE IMPRISONMENT.

I. Malicious Prosecution, 436.

II. False Imprisonment, 437.

I. Malicious Prosecution.

1. Reasonable and probable cause—a question of fact for the trial judge—effect of Attorney-General's direction to prosecute.]—The trial judge found that there was not want of reasonable and probable cause and that there was absence of malice. The defendant had laid two charges, the second of which was prosecuted by direction of the Attorney-General after a preliminary hearing. The action was dismissed. Held, on appeal affirming the decision below that there was evidence to support the trial judge's findings. The onus was on the plaintiff to establish two things—absence of reasonable and probable cause, and malice. The action of the Attorney-General in directing a prosecution may have affected the question of reasonable and probable cause. *Crawford* v. *Gardom*, (1940) 55 B.C.R. 390; (1940) 4 D.L.R. 268; (1940) 3 W.W.R. 91; 74 C.C.C. 352.

2. Questions for jury—basis for finding of reasonable and probable cause—malice.]—To succeed the plaintiff must prove (1) the charge and his acquittal, (2) want of reasonable and probable cause, (3) that the proceedings were initiated in a malicious spirit, i.e. from an indirect and improper motive and not in the furtherance of justice. The question of reasonable and probable cause is for the judge and where any dispute

as to the facts exists there should be included among the answers sought from the jury conclusions upon which he may decide that question. Here he should have asked the jury to say whether the defendants honestly believed the plaintiff was guilty when they laid the charge. The judge did not declare his view on the question of reasonable and probable cause until after the jury's verdict had been recorded. In effect he left the question to the jury to decide. Even if there was a lack of reasonable and probable cause, it was still necessary to prove malice because while such lack is some evidence from which malice may be inferred, it is quite possible for a person actuated by honest motives to lay a charge without any enquiry whatever, without being liable to the action. Here there was no evidence of malice and the Court of Appeal set the verdict aside. *Leighton* v. *Hood*, (1945) 62 B.C.R. 186; (1946) 2 D.L.R. 144; (1946) 2 W.W.R. 681.

II. False Imprisonment.

1. Arrest without warrant.]—Four men held up a bank in Vancouver and one of its staff was shot and killed. The criminals, using a stolen taxi belonging to The Vancouver Taxi Company, escaped. On the same day the plaintiff driving a taxi for the same company took three men to Stanley Park. He was found some time later bound and gagged. Taken to the police station he failed to identify his assailants among the photographs of criminals there and said he would be unable to identify any of them. He was not charged but was photographed and finger-printed and kept in custody for five days under instructions by the defendant chief constable. Held in an action for wrongful arrest and false imprisonment that the defendant on all the facts, did not believe that the plaintiff had committed an offence and should not have had him arrested without a warrant. He did think that the plaintiff knew a great deal more about the matter than he had been willing to admit. Even assuming that he had the right to direct his arrest, a charge should have been laid so that a justice could decide what should be done. As the defendant was justified in a strong suspicion, not amounting to a belief, that the plaintiff might have been associated in a criminal way with the murderers, and as he acted without malice, the damages were small. *Warnock* v. *Foster*, (1936) 51 B.C.R. 179; (1936) 3 W.W.R. 625.

2. Voluntary submission to detention and search—whether false imprisonment.]—The plaintiff was a night worker at the defendant's department store. As a result of many thefts the management made a check on the night staff and asked the plaintiff to go to the manager's office. There she was searched after agreeing to submit to such an examination and was also questioned. She was not accused of stealing. Held, dismissing the action, she was not detained. *Stephens* v. *Hudson's Bay Co.*, (1939) 54 B.C.R. 293; (1939) 4 D.L.R. 465; (1939) 3 W.W.R. 179.

3. Detention during examination—submitting to search.]—The plaintiff was employed as a cleaner at night in the defendant's department store. Thefts had been taking place and the management suspected one of the cleaners. As the plaintiff was about to leave the store after completing his work, he found the door locked; the head janitor told him he could not go out and he was asked to go to the manager's office. He was there searched by a detective and questioned by the manager. Held that the locking of the door and what followed constituted false imprisonment for which the plaintiff was entitled to damages. *Cannon* v. *Hudson's Bay Co.*, (1939) 54 B.C.R. 290; (1939) 4 D.L.R. 465; (1939) 3 W.W.R. 177.

4. Detention and examination by store detective and others.]—The defendant's food department opened thirty minutes earlier than the rest of the store. The plaintiff during that period entered the food department and without being challenged went through various departments to a washroom on the second floor. Being discovered there at that unusual time, she was detained and questioned for almost forty-five minutes. Her bags were searched and her clothing examined by a detective and a nurse. It was submitted for the defendant that its employees were justified in thinking the plaintiff had been hiding all night in the store for the purpose of stealing. Held awarding damages, the circumstances merely justified an inquiry and the plaintiff's explanation should have been accepted. *Whiffin* v. *David Spencer Ltd.*, (1941) 56 B.C.R. 260; (1941) 2 D.L.R. 727; (1941) 2 W.W.R. 30.

.5 Police officer—arrest without warrant—offence being committed.]—The defendant, a police officer, having received a

complaint that the female plaintiff had committed an offence for which he could not arrest without a warrant, ordered her to accompany him to the police station. While investigating he detained the plaintiff for about one hour until he had interviewed witnesses as a result of which he released her. He acted without malice and with reasonable and probable cause and at the time of the detention, he believed honestly and reasonably that the plaintiff had committed the offence. The plaintiff sued for false arrest and imprisonment. Held, dismissing the action, that the arrest and subsequent detention could be justified, in a case where the nature of the suspected offence required prompt action, by sec. 648 of the Criminal Code, whereby a peace officer may arrest without warrant any one whom he finds committing any criminal offence. Moreover, the defendant would be justified under sec. 30 of the Code as interpreted in *Whitworth* v. *Dunlop,* (1934) 48 B.C.R. 161, which authorizes an officer, who on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not, and who on such grounds believes that a person has committed that offence, to arrest such person without warrant, whether such person is guilty or not. *Leighton* v. *Lines,* (1941) 57 B.C.R. 232; (1942) 1 D.L.R. 568; (1942) 1 W.W.R. 201; 77 C.C.C. 264.

6. Detention of customer in department store implied threat to use force.]—A customer was illegally detained and questioned as to an article which she had purchased elsewhere. A woman detective required the plaintiff to go to a private room for investigation. The fact that no force was actually used will not exonerate the defendant where the element of force was present and the plaintiff did not comply voluntarily. *Sinclair* v. *Woodward's Store Ltd.,* (1942) 2 D.L.R. 395; (1942) 1 W.W.R. 636.

MANDAMUS.

I. In General, 439.

II. Procedure, 443.

I. In General.

1. Discretion of immigration official—Disregarding Court's decision—Bars to remedy.]—Where the Court has decided upon the validity of the certificate held by an immigrant under sec. 17 of the Chinese Immigration Act, and where the controller of Chinese Immigration subsequently sought to disregard the decision and reopen the matter, mandamus will lie notwithstanding that an appeal may be made to the Minister and that by sec. 37 certain rights of review by the Courts are taken away. *In re Chinese Immigration Act and Chin Sack,* (1931) 45 B.C.R. 3.

2. Pensions—whether petition of right proper remedy—income includes applicant's assets.]—The judge held that if the result of the old-age pension legislation was to impose a legal duty on the Board to pay the applicant a pension then it follows that he might maintain an action for it. If no such duty exists then the Board in administering the Act was performing a duty it owed to the Crown as servants or agents of the Crown. He dismissed the application for a mandamus. Held, on appeal affirming the decision below, but on the merits, that the Board had the power to take into account as "income" the property and assets that the applicant already possessed. Otherwise a wealthy miser would be able to come upon the country for an old-age pension. *Gartley* v. *Workmen's Compensation Board,* (1932) 57 B.C.R. 217.

3. To compel Minister of Finance to make payment out of Assurance Funds.]—A Minister of the Crown simply acting as a servant of the Crown and discharging his duties as such is not subject to the writ of mandamus, but where a fund is built up out of fees under the Land Registry Act to compensate persons defrauded through registration, which fund is not the public money of the Crown, and which under the Act is to be paid out by the Minister under certain conditions, a mandamus will lie in a proper case . It was held, reversing the Court of Appeal and setting the mandamus aside, that recovery from the Assurance Fund is based on a judgment for damages and that the damages were never ascertained. *The King* v. *Minister of Finance,* (1935) 3 D.L.R. 316; reversing (1934) 49 B.C.R. 223; (1935) 1 D.L.R. 333; (1935) 1 W.W.R. 113.

4. Minister of Finance.]—Under the Taxation Act of the Province the Minister is given discretion to determine certain acquisition costs in respect of mining properties. Provision is further made for an appeal

from his decision to the Lieutenant-Governor in Council whose decision is to be final. A mining company being dissatisfied with the determination made by the Minister appealed to the Lieutenant-Governor in Council who allowed the appeal in part. Some time later the company obtained a peremptory writ of mandamus directed to the Minister requiring him forthwith to ascertain and take into account the acquisition costs as provided by the Act. The Court of Appeal set the mandamus aside and it was held by the Supreme Court of Canada, affirming the decision of the Court of Appeal, that the determination of the Minister was appealable, that it had been appealed, that the appeal was duly considered by the Lieutenant-Governor in Council and a decision given which the Act declared to be final. The effect of the mandamus was to require the Minister several months after he became functus officio to act in disregard of the appeal from his decision, which appeal the statute declared to be final. *The King* v. *Minister of Finance*, (1935) S.C.R. 70; (1935) 1 D.L.R. 232; affirming (1934) 48 B.C.R. 412; (1934) 4 D.L.R. 27; (1934) 2 W.W.R. 501.

5. County Court Judge—depriving accused of right of election.]—Where the judge deprived the accused of their right of election under sec. 827 of the Criminal Code, mandamus will lie. What occurred was a violation of an essential of justice. Where an inferior Court has refused or eluded the performance of its express duty the superior Court will interfere by mandamus. *Rex* v. *Lennox*, (1940) 55 B.C.R. 491; (1941) 1 D.L.R. 779; (1941) 1 W.W.R. 65; 75 C.C.C. 158.

6. Commissioner of Provincial Police—agent of Legislature.]—The Commissioner of Provincial Police, dealing with the suspension of licenses under the Motor-vehicle Act, does not act as a servant of the Crown but merely as an agent of the Legislature to do a particular act, and in such capacity mandamus will lie against him. The writ will be granted, if the circumstances warrant it, unless there is another remedy equally convenient, beneficial and effective. *Dumont* v. *Commissioner of Provincial Police*, (1941) S.C.R. 317; (1941) 3 D.L.R. 204; 76 C.C.C. 148; affirming (1940) 55 B.C.R. 298; (1940) 4 D.L.R. 721; 74 C.C.C. 200.

7. Not a substitute for appeal.]—Mandamus is not a substitute for appeal, and must not be used to review a judicial decision, it being a remedy for compelling action by a tribunal, which has jurisdiction but refuses to exercise it. Here, the County Court Judge erroneously held that the appeal was never before him because of faulty service of the notice of appeal. Where a tribunal thus refuses to act because of a preliminary objection that is unfounded, it has declined jurisdiction and mandamus will lie, at least where the refusal is based on mistake of law and the facts are not in dispute. *The King* v. *The Judge of the County Court of Westminster and Heinrich*, (1941) 57 B.C.R. 70; (1941) 4 D.L.R. 641; (1941) 3 W.W.R. 577; 76 C.C.C. 325.

8. Whether remedy by appeal equally convenient and beneficial.]—Although an appeal may be taken to the Court of Appeal, mandamus will lie where, as here, such an appeal would be less expeditious and more expensive. *Rex* v. *Anderson*, (1942) 1 D.L.R. 58; 77 C.C.C. 49.

9. Requiring County Court Judge to hear appeal—sec. 130 of County Courts Act.]—On an appeal from a conviction by a magistrate the appellant, before the Crown called any evidence, moved to quash the conviction for lack of evidence in the depositions below. The County Court Judge refused to hear evidence de novo but made use of the depositions although they were not proved in any way, and quashed the conviction. The Crown launched mandamus proceedings under sec. 130 of the County Courts Act calling on the judge and the appellant to show cause why the hearing and determination of the appeal should not be proceeded with. The mandamus was refused on the ground that what had occurred was a hearing on the merits. On appeal to the Court of Appeal the decision below was affirmed. Mandamus proceedings to compel an inferior tribunal to exercise its proper functions are civil in their nature notwithstanding that the matter in question in the inferior tribunal is of a criminal character, and the objection to the jurisdiction was overruled. There is no distinction in this respect between mandamus and habeas corpus proceedings. *The King* v. *The Junior Judge of the County Court of Nanaimo and McLean*, (1941) 57 B.C.R. 52; (1941) 4 D.L.R. 584; (1941) 3 W.W.R. 753; 77 C.C.C. 32; affirming (1941) 56 B.C.R. 273; sub nom *Rex* v. *McLean*, (1941) 3 D.L.R. 702; (1941) 2 W.W.R. 41; 76 C.C.C. 295.

10. Old age pension—applicant wrongly deprived of—whether mandamus proper

remedy.]—The Pension Board (in this Province the Workmen's Compensation Board) discontinued the respondent's pension on the ground that he had made a voluntary assignment of certain real estate without the approval of the Board. The trial judge held that the Board had no authority to do so and directed a mandamus to compel the Board to pay the pensions. On appeal, affirming the decision below, it was held that there was a statutory obligation on the Board to pay the pension; that the Board was not the servant of the Crown but merely an agent of the Legislature; the money in the hands of the Board was not money which was in the hands of the Crown or belonged to the Crown; the existence of another remedy was not of itself sufficient to oust the jurisdiction of the Court to grant the writ. *The King* v. *Workmen's Compensation Board,* (1942), 57 B.C.R. 412; (1942) 2 D.L.R. 665; (1942) 2 W.W.R. 129; affirming (1942) 57 B.C.R. 298; (1942) 1 D.L.R. 488; (1942) 1 W.W.R. 352.

11. Building by-law—duty of building inspector to issue permit if relevant by-laws complied with.]—Where a by-law provides for the issue of a building permit by the Building Inspector, if satisfied that the applicant has complied with all by-laws, the Inspector cannot where there is such compliance, refuse the permit on the ground that the Council so directed, and a mandamus will issue. *The Murray Co. Ltd.* v. *District of Burnaby,* (1946) 2 D.L.R. 541.

II. Procedure.

1. New point taken after proceedings launched.]—Where a building inspector had refused a permit on grounds based upon a defective bylaw, he will not be allowed to rely on other grounds raised for the first time after mandamus proceedings have been launched. *In re Homfray and Building Inspector of the City of Kamloops,* (1933) 46 B.C.R. 475.

2. Basic facts not yet determined.]—Where a mandamus has been granted on affidavits and cross-examination thereon which were of such a character that the main issue had still to be tried, the mandamus should be set aside. For an irrevocable decision to be made at that stage would not be just or convenient. *Bain* v. *Bank of Canada,* (1935) 50 B.C.R. 138; (1935) 4 D.L.R. 112; (1935) 3 W.W.R. 25.

3. Crown Office Rule 76—necessity of affidavit.]—Rule 76 requires that an affidavit be made by someone stating that the motion is made at his instance as prosecutor. A statute does not touch the Crown unless expressly named and a fortiori a regulation will not. Rule 76 need not be considered as a binding rule. It seems to be an anachronism. *The King* v. *The Judge of the County Court of Westminster and Heinrich,* (1941) 57 B.C.R. 70; (1941) 4 D.L.R. 641; (1941) 3 W.W.R. 577; 76 C.C.C. 325.

4. Whether costs should be awarded against County Court Judge.]—The applicant succeeded on a motion in the nature of a mandamus under sec. 130 of the County Courts Act and sought an order for costs against the County Court Judge. Held, refusing the order, the judge acted in good faith and merely erred in his construction of a statute. *Re Anderson,* (1942) 2 D.L.R. 140.

MARKETING LEGISLATION.

1. Right to recover levies where scheme held ultra vires.]—The scheme was declared ultra vires and the plaintiff sued for repayment of tolls and levies paid to the defendant thereunder. The trial judge found for the plaintiff, holding that it had paid under compulsion and without any choice and that a mistake of law, under such circumstances would permit of recovery. Held, on appeal reversing the decision below, that the retention of levies and tolls was submitted to willingly, and the payments made voluntarily under an assumed liability creating in law no obligation to repay. *Vancouver Growers Ltd.* v. *G. H. Snow Ltd..,* (1937) 52 B.C.R. 32; (1937) 4 D.L.R. 128; (1937) 3 W.W.R. 121; reversing (1937) 51 B.C.R. 433; (1937) 1 W.W.R. 670.

2. Seizure of potatoes for export—Natural Products Marketing (B.C.) Act.]—Growers were transporting potatoes on a highway preparatory to exporting them. They were stopped by officials of the B.C. Coast Vegetable Marketing Board and the potatoes were seized as not being tagged in the manner designated by the Board. The growers contended that the Act referred to marketing in the Province and did not extend to products intended for export. The judge granted an injunction against the

Board pending the trial. Held, on appeal, dissolving the injunction, that what the Board had done was within the authority of the Act, and so long as the property was in the Province, it was subject to the law of the Province. Nothing had been done to prevent export and if the regulations had been observed the growers would not have been interfered with. *Chung Chuck* v. *Gilmore,* (1936) 51 B.C.R. 189; (1937) 1 D.L.R. 119; (1936) 3 W.W.R. 575; 67 C.C.C. 264.

3. Whether Secretary to Marketing Board an agent of the Crown under Crown Costs Act.] — The B.C. Lower Mainland Dairy Products Board is not an agent of the Crown and its secretary as informant and prosecutor, may be ordered to pay the costs of quashing a conviction. *Rex* v. *Hassell,* (1937) 1 W.W.R. 726.

4. The Federal Natural Products Marketing Act—whether intra vires of Parliament.]—The provisions of the Act cover transactions in any natural products completed within a province and have no connection with interprovincial or export trade; hence property and civil rights are affected. It was, however, contended that the Act fell within class 2 of section 91 of the British North America Act (the regulation of trade and commerce) but such regulation of trade and commerce does not permit the regulation of individual forms of trade or commerce confined to a province. The Act invades the provincial field and is invalid. Notwithstanding section 26 as to the severability of ultra vires provisions the whole structure of the Act is so inextricably interwoven that there are no severable provisions. Moreover the sections claimed to be severable are incidental and ancillary to the main legislation and fall with it. *A.G. for British Columbia* v. *A.G. for Canada re Natural Products Marketing Act,* (1937) A.C. 377; (1937) 1 W.W.R. 328; affirming (1936) S.C.R. 398.

5. Funds in hand when scheme declared ultra vires.]—The plaintiff paid tolls, without objection, to the defendant, B.C. Lower Mainland Dairy Products Board, for some months. Differences having arisen it ceased to pay and about a year later the scheme was declared ultra vires, whereupon the plaintiff claimed the return of the amount paid as money received by the defendant to the use of the plaintiff, alleging that it had been illegally demanded and extorted. It was held, dismissing the action, that the payments had been made under a mistake of law. The fact that the receiving party was ab initio without authority to receive it, does not affect the rule that money paid under a mistake of law cannot, as a general thing, be recovered. There was here no question of duress or coercion and the equities were against the plaintiff. *Independent Milk Producers Co-operative Association* v. *British Columbia Lower Mainland Dairy Products Board,* (1937) 51 B.C.R. 423; (1937) 1 W.W.R. 679.

6. Attitude of Court to declarations of invalidity of schemes.]—The Courts should not, without the strongest reasons, make it difficult to carry out, through Boards and officials, legislation enacted by the Provincial or Federal Parliament—Acts which may, sometimes, after many years be declared invalid on one or more of many grounds. *Vancouver Growers Ltd.* v. *G. H. Snow Ltd.,* (1937) 52 B.C.R. 32; (1937) 4 D.L.R. 128; (1937) 3 W.W.R. 121; reversing (1937) 51 B.C.R. 433; (1937) 1 W.W.R. 670.

7. Natural Products Marketing (British Columbia) Act.]—Upon a reference to the Court of Appeal under the Constitutional Questions Determination Act, it was held that the Marketing Act was not in any particular beyond the powers of the Legislature and specifically: (a) there was no illegal delegation of its functions by the Legislature, (b) the Act did not interfere with the Federal power to regulate trade and commence, (c) the license fees imposed did not constitute indirect taxation, (d) the fact that the Dominion Natural Products Marketing Act was ultra vires did not vitiate the Provincial Act because of references in the latter to the former, and (e) the licensing contemplated by the Act was within the power of the Province. In *re Constitutional Questions Determination Act* and in *re Natural Products Marketing (British Columbia) Act,* (1937) 52 B.C.R. 179; (1937) 4 D.L.R. 298; (1937) 3 W.W.R. 273.

8. Natural Products Marketing (British Columbia) Act.]—A scheme for controlling the marketing of milk was set up under the Act and a marketing board was given authority to appoint agencies, of whom the defendant was one, through which all producers must sell their milk. For the purposes of the equalization of the burden among its own pool members, the defendant imposed an equalization levy. The plaintiff was not a member of the defendant's pool and the pool

contemplated by the Act had never been established. The trial judge held the plaintiff entitled to recover the levies. Held, on appeal, affirming the judgment below, and rejecting the contention that the defendant derived a right to make the levy from authority conferred by the marketing scheme, that the pool operation was not authorized by the marketing scheme. *Brooke* v. *The Independent Milk Producers Co-operative Association,* (1937) 52 B.C.R. 61; (1937) 4 D.L.R. 362; (1937) 3 W.W.R. 401.

9. Effect of statute barring action.]—An action to recover moneys paid as tolls and levies under an ultra vires scheme was pending when the Legislature enacted that no action should be brought or continued against the defendants (inter alia) for anything done in good faith in the performance of their duties. Held, on appeal, setting aside the judgment for the plaintiff below, the action should not have been proceeded with after notice of the enactment. The right to invoke the aid of the Court was taken away. There was no issue of good faith on the pleadings nor was there any finding of bad faith by the trial judge. *Vancouver Growers Ltd.* v. *McLenan,* (1937) 52 B.C.R. 42; (1937) 4 D.L.R. 143; (1937) 3 W.W.R. 119; reversing (1937) 1 W.W.R. 670; (1937) 51 B.C.R. 433.

10. License fee imposed repugnant to natural justice.]—The accused was convicted under the Natural Products Marketing (British Columbia) Act of operating a packing house without a license. He was a small grower and packer. Held quashing the conviction, the members of the Fruit Board had set up a "sham" corporation to do indirectly what they could not do directly. The $500 fee for a license was exhorbitant and repugnant to natural justice. *Rex* v. *Ritchie,* (1938) 3 D.L.R. 782.

11. Natural Products Marketing Act—whether encroaching on Dominion powers.]—The Natural Products Marketing (British Columbia) Act was held by the trial judge to be ultra vires. The Court of Appeal following its decision (1937) 4 D.L.R. 298 upon a reference under the Constitutional Questions Determination Act, held that the Act was intra vires. On further appeal to the Privy Council, it was held, affirming the decision below; (a) the Act does not encroach on the class of subjects enumerated in sec. 91 (2) of the British North America Act. It is clearly confined to dealings with natural products situate within the province. The power of the Dominion as to trade and commerce does not interfere with the regulation for legitimate provincial purposes of particular trades or businesses so far as the trade or business is confined to the province. The pith and substance of the Act is the regulation of particular businesses entirely within the province; (b) the regulation being intra vires the ordinary method of regulating, viz. by a system of licenses, is valid. If licenses are granted it follows that the collection of license fees is unobjectionable as raising a revenue for local or provincial purposes or as fees for services rendered. The licensing feature does not constitute an invasion of sec. 91 (3) of the British North America Act; (c) within its appointed sphere the Provincial Legislature is as supreme as any other Parliament and the objection that it has not authority to delegate its legislative powers to the Lieutenant-Governor in Council is without substance. *Shannon* v. *Lower Mainland Dairy Products Board,* (1938) 4 D.L.R. 81; (1938) 2 W.W.R. 604; (1938) A.C. 708.

12. Lower Mainland Dairy Products Board.]—The order of the Board that no license shall be issued to an applicant who is in arrears on account of any license fee imposed by the Board, was made with jurisdiction, since these licence fees are fees for services rendered by the Province, or its authorized instrumentalities. *Rex* v. *Hoy's Crescent Dairy Ltd.,* (1938) 53 B.C.R. 321; (1938) 4 D.L.R. 223; (1939) 1 W.W.R. 255.

13. Natural Products Marketing (British Columbia) Act.]—A so-called clearing house authorized by the Lower Mainland Dairy Products Board as an exclusive agency within a specified area for the marketing of milk, was incorporated under the Co-operative Associations Act. It was operating as a pool association. Sec. 27 of that Act requires that if it carries on business as a "pool association" it must make rules for various matters there enumerated. Here no such rules were made and it was contended that the clearing house could not carry on its business as a pool association. It was argued for the defence that the pool was not being operated under the Co-operative Associations Act, but under orders from the Marketing Board under the authority of the Natural Products Marketing (British Columbia) Act. Held, reversing the decision below and granting an injunction, that the Marketing Board could not order the clear-

ing house to do things which the latter had no corporate power to do. *Hayward* v. *Park, (No. 2)* (1939) 54 B.C.R. 299; (1939) 4 D.L.R. 765; (1939) 3 W.W.R. 339; reversing (1939) 54 B.C.R. 196; (1939) 3 D.L.R. 799; (1939) 2 W.W.R. 226.

14. Milk marketing scheme—whether ultra vires.]—An action for a declaration that the scheme set up under the National Products Marketing (British Columbia) Act was ultra vires, was dismissed. Held, reversing the decision below that the judgment in *Hayward* v. *Park,* (1939) 54 B.C.R. 299, rendered the scheme inoperative as it was then sought to be enforced. Hence the validity of the scheme itself need not be determined. *Crystal Dairy Ltd.* v. *Lower Mainland Products Board,* (1939) 54 B.C.R. 306; (1939) 4 D.L.R. 765; (1939) 3 W.W.R. 341; reversing (1939) 3 D.L.R. 799; (1939) 2 W.W.R. 234.

15. Marketing Board — necessity of license for private purchase and transportation home.]—The accused was charged with unlawfully transporting potatoes without having first obtained a license so to do. The evidence showed that he had bought three sacks for his own use and was taking them home in his passenger car. The magistrate held that the Board's order forbidding the transporting of the regulated product was aimed at transportation in a mercantile way and did not include a person bringing home a sack of potatoes lawfully purchased, for his own use. Held, on a case stated affirming the magistrate's acquittal, that on the facts, there being no evidence that the accused was in the business of buying and selling, or trucking or carrying or storing potatoes, an offence had not been made out. Held on appeal, reversing the decision below, that on the plain meaning of the order, the accused was guilty. In the absence of any reasonable alternative interpretation a sense of possible injustice of an interpretation ought not to induce judges to do violence to well-settled rules of construction. *Rex* v. *Lee Sha Fong,* (1940) 55 B.C.R. 129; (1940) 3 D.L.R. 317; (1940) 2 W.W.R. 160; 73 C.C.C. 375; reversing (1939) 54 B.C.R. 380; (1939) 4 D.L.R. 772; (1939) 3 W.W.R. 459.

16. Natural Products Marketing (B.C.) Act—doing indirectly what could not be done directly.]—The Board set up under the Act passed orders which were attacked as being an attempt to take from one milk producer supplying the fluid market, a portion of his real returns and give it to other producers supplying the non-fluid market, for the purpose of equalization. A similar practice had been held ultra vires in *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd.,* (1933) A.C. 168. The trial judge found that the Board by concealment and a colourable use of its powers sought to accomplish indirectly what it could not do directly, and granted an injunction. Held, on appeal affirming the decision below, that the Board under cover of a broad scheme to regulate the milk industry had embarked upon a plan resulting in the imposition of an indirect tax. Held, on further appeal to the Supreme Court of Canada, affirming the decision below, that the impugned orders of the Board went beyond the powers assigned to it and could not stand. The orders purported to impose indirect taxation as constituting a tax on one farmer with a consequent bonus to another. *Turner's Dairy Ltd.* v. *Lower Mainland Dairy Products Board,* (1941) S.C.R. 573; (1941) 4 D.L.R. 209; affirming (1940) 56 B.C.R. 103; (1941) 2 D.L.R. 279; (1941) 3 W.W.R. 342; affirming (1940) 3 W.W.R. 42.

17. Transporting potatoes without authority.]—The accused was convicted of "transporting" potatoes without authority. He was driving his car on a street in Vancouver when inspectors stopped him and demanded to see what he had in the rear compartment of the car. The accused explained that he had not the key with him and drove back to the farm where he got the key and opened the rear compartment in which were five sacks of untagged potatoes. The county Court Judge quashed the conviction. Held on appeal, affirming the decision below, transporting would mean taking up potatoes at one point and putting them down at another. There was no proof that the accused was interfering with supervised marketing, viz. by selling or delivering potatoes to some one in Vancouver. *Rex* v. *McMyn,* (1941) 56 B.C.R. 475; (1941) 4 D.L.R. 268; (1941) 3 W.W.R. 337; 76 C.C.C. 379.

See CONSTITUTIONAL LAW.

See STATUTES.

MARRIAGE.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

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II. Liability of Master in Case of Accident, 452.

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B. Workmen's Compensation Act, 458.

I. Remedies for Breach of the Contract.

1. Contract between bakery company and driver distributor of bread.] — The driver contracted in writing that the value of any deliveries made on credit, except where authorized by the company, should be made good by him. Held, debts of customers authorized by the company need not be made good by a driver, and a written return of the day's business will not bind the driver where, as here, the return is the work of three separate parties. *Newcomb* v. *Robertson Bakeries Ltd.,* (1933) 1 W.W.R. 271.

2. Fishermen working on "lay" agreement.]—The plaintiffs were paid a certain share of the proceeds after the deduction of expenses. The boats and gear were the property of the defendant. The defendant deducted the workmen's compensation assessments from each plaintiff depending on the man's gross earnings. Although the deductions were made in good faith, less than the amount deducted was required to be paid over to the Workmen's Compensation Board. The plaintiffs sued for the total amount deducted by the defendant and relied on sec. 14 of the Workmen's Compensation Act. Held, awarding the retained moneys to the plaintiffs the action was not one on the statute but arose out of the contract of employment; hence the period of limitation is six years and not twenty as it would be under the statute. *Bilan* v. *Canadian Fishing Co. Ltd.,* (1938) 53 B.C.R. 241; (1938) 4 D.L.R. 803; (1938) 3 W.W.R. 123.

3. Wrongful dismissal—duty to mitigate loss.] — The trial judge found that the plaintiff had not used due diligence in trying to get other employment; he nevertheless awarded damages to the end of the contract year. On appeal a new trial was ordered limited to the quantum of damages. Held, on further appeal to the Supreme Court of Canada affirming the decision appealed from, the true test was whether the plaintiff took all reasonable steps to mitigate the loss consequent on the breach. The defendant having broken the contract, the plaintiff was not entitled to consider it as still subsisting. Hence the plaintiff was not entitled as of right to the amount awarded him. In the result the sum awarded should be reduced by the amount which the plaintiff could have earned from the time of his dismissal to the end of his contract year. The new trial should be restricted to that question. *Van Snellenberg* v. *Cemco Electrical Manufacturing Co. Ltd.,* (1946) 4 D.L.R. 305 (1947) S.C.R. 121; affirming (1945) 61 B.C.R. 507; (1946) 1 D.L.R. 105; (1945) 3 W.W.R. 369.

4. Failure to take steps to minimize loss.]—The defendant contended that only nominal damages could be awarded in an action for wrongful dismissal where the plaintiff failed to take reasonable steps to minimize his loss. Held, the plaintiff should have sought other employment and as he did not do so his damages were limited to one week's wages. *Hnatnicky* v. *Pacific Pine Co. Ltd.,* (1947) 63 B.C.R. 460; (1947) 4 D.L.R. 468; (1947) 2 W.W.R. 141.

II. Liability of Master in Case of Accident.

1. Cook—housekeeper—whether domestic servant under Workmen's Compensation Act.]—The plaintiff was cook-housekeeper in the defendant's hospital. She occupied a room there and received her board. She looked after the stores and cooked for the staff and prepared special diets for the patients. Held, she was not a domestic servant and was entitled to damages for injuries on a defective stairway, which amounted to a defect in the condition of the ways used in the business of her employer. *Bailey* v. *Society of Enderby General Hospital Incorporated,* (1942) 1 D.L.R. 787.

2. Defective rail on fire escape — known to plaintiff but not to defendant.] —The plaintiff, employed in a private hospital was injured by falling while shaking a

cloth on the fire escape near her room. She knew the day before that the rail against which she leaned was detached at one end. She had not reported it to her employer. Held, the plaintiff was responsible for her own misfortune. The duty of the employer in the circumstances was to take reasonable care to provide safe premises upon which the employee was required to work and to use reasonable care to keep them safe. The employee need not prove that the employer actually knew of the defective rail, but she must show that the employer ought to have known if he had used reasonable care. Here there was regular inspection and no evidence that the employer knew of the defect. *Bergeron* v. *Reilly*, (1945) 62 B.C.R. 208.

III. Liability of Master to Third Persons.

1. Scope of employment.] — The plaintiff was injured by defendant, a messenger boy employed by the defendant company. P. had been sent by his employer to deliver by bicycle a parcel and return with a receipt as proof of delivery. Before returning he telephoned the company and received permission to go home for lunch at that time. While going home on his bicycle, the accident occurred. The trial judge awarded damages against both defendants. Held, allowing the appeal as to the defendant company and dismissing it as to P., that the company was not responsible for the negligent act of P. at the time in question. *Gibson* v. *B. C. District Telegraph and Delivery Co. Ltd.*, (1936) 50 B.C.R. 494; (1936) 4 D.L.R. 582; (1936) 3 W.W.R. 241.

2. Independent contractor where danger may result.]—The defendant as owner employed an architect and a contractor to erect a building with concrete walls immediatedly adjoining the plaintiff's building. A wall of the new building was to be built against the adjoining wall of the plaintiff's building. The forms for this new wall were so improperly made that, when the fluid concrete was poured in, they gave way and pushed in a portion of the plaintiff's wall. The defence was that the defendant had employed an architect and an independent contractor and therefore was not liable. Held, awarding damages to the plaintiff, that while the general rule is that one employing another is not liable for his collateral negligence unless the relationship of master and servant exists, the situation is different when, as here, a person does work near another's property which involves danger to that property unless proper care is taken. In such a case if damage results from the failure to take proper care, the defence of "independent contractor" will not avail. *Peter* v. *Yorkshire and Pacific Securities Ltd.*, (1937) 52 B.C.R. 166; (1937) 3 W.W.R. 49.

3. Servant acting as water bailiff for Minister of Lands.]—The defendant G. was held to be negligent in the management of a truck owned by O., his employer, and co-defendant. Judgment went against both. G. was the employer's superintendent and the employer procured him to be appointed as a water bailiff under the Water Act apparently because the appointment would be of some advantage to O. Under the Act a bailiff takes his orders from the engineer of the Water District and is a servant of the Crown. The accident occurred while he was acting as bailiff outside the area controlled by O. Held, allowing the appeal as to O., that where a master permitted his servant to assume a public office under the Crown, with duties defined by statute and with direction and control vested solely in a public official, the master would not be responsible for his servant's acts while so engaged, although by design or otherwise there might be some advantage to the master. *Offerdahl* v. *Okanagan Centre Irrigation and Power Co. Ltd.*, (1937) 52 B.C.R. 23; (1937) 4 D.L.R. 405; (1937) 3 W.W.R. 130.

4. Course of employment.]—A salesman for the defendant company was held guilty of negligence causing serious injuries to the plaintiff in a motor car accident. The salesman was at the time driving home to New Westminster from a company lecture for salesmen in Vancouver, at which his presence was not compulsory but desirable. He was paid a salary and his car was serviced by the defendant company. His place of residence was no part of his contract. The trial judge held that he was acting in the course of his employment and that his employer was liable. On appeal to the Court of Appeal the decision below on this point was reversed, and on further appeal to the Supreme Court of Canada, it was held, dismissing the appeal, that the salesman attended the lecture on his master's invitation and, at least to some extent, for his master's benefit. He returned home to the place of residence of his own choice, not that of his master. After leaving the meeting his day's work was done; he was free

to do as he pleased and to go home without any control as to the route, mode of transportation or otherwise; his only obligation was to be at work the next morning. *Dallas* v. *Hinton*, (1938) 2 D.L.R. 673; (1938) S.C.R. 244; affirming (1937) 52 B.C.R. 106; (1937) 4 D.L.R. 260; (1937) 3 W.W.R. 145; reversing (1936) 51 B.C.R. 327; (1937) 1 W.W.R. 350 .

IV. Statutes.

A. Hours of Work Act.

1. Whether Hours of Work Act applies to metalliferous mines.] — The Hours of Work Act in effect fixes an eight-hour day and a forty-four-hour week. It contains a clause providing that it shall not in any way limit or affect the provisions of The Metalliferous Mines Regulation Act. The latter act also provides for an eight-hour day but is silent as to a work-week. Held, on a reference under the Constitutional Questions Determination Act, the provisions of the Hours of Work Act apply since the two statutes can be read together. It was contended that P.C. 1003 — Wartime Labour Relations Regulations — having fixed hours of work in the metalliferous mines the Provincial power is ousted. P.C. 1003 however deals with procedural matters and the bargaining parties are left free to make their own agreements in conformity with the relevant provincial laws. P.C. 1003 and the Hours of Work Act can be read together, each applicable in its own legislative sphere. Reference *re application of Hours of Work Act to Metalliferous Mines*, (1947) 2 D.L.R. 737; (1947) 1 W.W.R. 841.

2. Whether Provincial Hours of Work Act applied to employees of hotel operated by railway company under Dominion jurisdiction.]—The Provincial Hours of Work Act in effect fixes an eight-hour day and a forty-four-hour week. It was referred to the Court of Appeal under the Constitutional Questions Determination Act to determine whether the Hours of Work Act applied to employees of the Empress Hotel at Victoria operated by the C.P.R. The Court of Appeal held that it so applied. On appeal to the Supreme Court of Canada the decision was affirmed. On further appeal to the Privy Council it was held, dismissing the appeal, (a) the argument that the company's activities have become so important that Parliament could deal with them as relating to the peace, order and good government of Canada, was invalid. They fell within sec. 92 of the B.N.A. Act, (b) The hotel was not a part of the company's railway works and undertaking within sec. 92 (10) (a), but was a separate undertaking, (c) The hotel did not fall within the definition of "railway" in the Railway Act and hence was not a work for the general advantage of Canada under sec. 92 (10) (c) of the B.N.A. Act. Reference *re application of Hours of Work Act to C.P.R. hotel employees*, (1950) A.C. 122; (1950) 1 D.L.R. 721; (1950) 1 W.W.R. 220 affirming (sub. nom. C.P.R. v. A.G. B.C.) (1948) S.C.R. 373; (1948) 3 D.L.R. 417; affirming (1947) 1 W.W.R. 927; (1947) 2 D.L.R. 723.

B. Minimum Wage Act.

1. Employer "requiring or permitting" employees to work for longer hours.]—A conviction of an employer for employing a cook for longer hours than those prescribed by the Minimum Wage Board, was quashed. Where sec. 8 (2) makes it an offence to "employ" an employee for longer than the prescribed time the word "employ" is used in the sense of "contracts with" and it is the entering into a contract to do the forbidden thing that is struck at. The evidence did not disclose that the employer knew, or ought to have known, when he made the contract, that it would take more than the statutory hours to perform the work the cook was to do. The doctrine of mens rea applies. *Rex* v. *Brearley*, (1930) 48 B.C.R. 458; 62 C.C.C. 202.

2. Control or direction.] — The respondent was convicted of unlawfully employing a hairdresser for less than the minimum wage. He had set up an annex to his hairdressing establishment where girls were paid a percentage of the gross receipts of the annex for their services. He rented the premises and supplied the equipment. He fixed the prices to be charged and installed a manager to supervise the place. The amount received by the complainant was less than the minimum wage. On appeal to the County Court the conviction was quashed. Held, on further appeal, restoring the conviction, that the respondent was not an independent contractor but an "employer" as defined by the Act. He exercised control and direction of the operatives in the annex. *Rex* v. *Gautschi*, (1934) 48 B.C.R. 287; (1934) 3 D.L.R. 582; (1934) 2 W.W.R. 196.

3. Independent contractor.]—On the question of whether a contract under which sales brokers worked on a commission basis came within the Male Minimum Wage Act, it was held that it was a contract of service reserving to the defendant such a measure of control and direction as to negative the defence. The power to designate territory; the duty to co-operate with the dealer and other sales brokers; the prohibtion against giving guarantees; the obligation to conform to policies of the defendant; the necessity to forward serial tags; the fact that the goods to be sold remained the property of the defendant until completion of the sale; all indicated that the defendant retained such oversight and direction as to bring the sales broker within the Act. *McGregor* v. *The Hoover Co. Ltd.*, (1934) 49 B.C.R. 312.

4. Employee in mercantile industry.]—The order of the Board of Industrial Relations fixed a minimum wage for certain people in the "mercantile industry". It defined the term to include all establishments operated for the purpose of wholesale or retail trade. The plaintiff was employed in assembling golf clubs and in repair work in the defendant's store. Held, that he came within the Board's order. An employee in an establishment which is conducting a mercantile industry is within the scope of the Act. The fact that he is assisting in the operation of the establishment by participating in the manufacture of products sold to the public, cannot deprive him of the benefits of the Act. *Stevenson* v. *B.C. Leather Co. Ltd.*, (1935) 50 B.C.R. 166 (1935) 4 D.L.R 143; (1935) 3 W.W.R. 254.

5. Construction industry.]—A labourer was engaged in the construction and painting of a building at $1.50 per day of seven hours and the minimum wage fixed by the Board of Industrial Relations was 40c per hour in the "construction industry". Held that as the definition of "construction industry" did not include painting, the labourer was entitled to be paid the agreed rate for the painting and the statutory rate for the actual construction work. *Fenton* v. *Haskamp*, (1935) 50 B.C.R. 241.

6. Whether restaurant business a trade within the Act.]—A minimum wage was fixed for the "mercantile industry" which included operatives for the purpose of retail trade. The business was that of a restaurant or lunch counter where candy, cigarettes and soft drinks were sold. Held, the business carried on was not a trade as defined in the order. The sale of candy, etc., was merely incidental to the restaurant business. *Rex* v. *Brearley*, (1935) 3 W.W.R. 63.

C. Truck Act.

Whether plaintiff a workman—acquiescence immaterial.]—The plaintiff sued for wages and invoked the provisions of the Truck Act. The trial judge found that he was a "workman" as defined by the Act. The defence was that he had accepted shares in the defendant company in lieu of wages and was a director and its secretary. Held on appeal, affirming the decision below, that there was evidence to support the finding of fact that he was a workman. The Act expressly prohibits an employer from deducting the purchase price of shares from a workman's wages. Every contract made in contravention of the Act is illegal, null and void, and the workman may recover his wages notwithstanding any such contract. *W. H. Arnett* v. *Alouette Peat Products Ltd.*, (1941) 57 B.C.R. 161; (1942) 1 D.L.R. 175; (1924) 1 W.W.R. 33.

D. Workmen's Compensation.

1. Recovery of deductions illegally made by employer from workman's pay.]—A truck-driver who acts throughout under the orders and control of, and subject to dismissal at the hands of, the defendant company is not an independent contractor but a workman within the meaning of the Workmen's Compensation Act and he is entitled to recover any sums illegally deducted from his pay on the footing that he is an independent contractor who had contracted out of the protection of the Act. Such a contracting out is forbidden by sec. 13 of the Act. *McAllister* v. *Bell Lumber and Pole Co. Ltd.*, (1931) 45 B.C.R. 30.

2. Method of assessment upon employers.] — The plaintiffs (employers) claimed for a declaration that the Board was disregarding the provisions of the Act and was not entitled to pay out moneys collected in one year to cover accidents in previous years. Held, that sec. 74 precludes any enquiry into the material upon which the Board comes to a decision upon anything within the scope of the Act and held, further, that the language of sec. 33 does not cut down the power given the Board under

sec. 32 to levy a general assessment for medical aid. The item for administration costs (those of levying, collecting and disbursing the assessments) is part of the "sufficient funds" authorized by sec. 32. *Merrill Ring Wilson Ltd.* v. *Workmen's Compensation Board,* (1933) 4 D.L.R. 57; (1933) 3 W.W.R. 110; (1933) A.C. 727; affirming (1933) 46 B.C.R. 506; (1933) 2 D.L.R. 650; (1932) 46 B.C.R. 110.

3. Priority of Board's Assessment.]—The Board claiming under sec. 46 of the Act seized the chattels of the respondent whereupon the mortgagees of the chattels intervened. An issue was directed which the trial judge decided in favour of the mortgagees. Held, allowing the appeal and distinguishing in *re Campbell River Mills Ltd*: *Dinning* v. *Ingham,* (1933) 44 B.C.R. 412, that the language of sec. 46, which gives to the Board a priority over all liens charges or mortgages, whenever created, is effective to constitute the whole mortgaged property, and not merely the equity of redemption, security for the charge. *Workmen's Compensation Board* v. *Sumas Oil & Gas Co. Ltd.,* (1933) 47 B.C.R. 12; (1933) 3 D.L.R. 489; (1933) 2 W.W.R. 121.

4. Farm labourers.]—Farming is an industry within the meaning of section 2 (1) of the Workmen's Compensation Act. *Hindley* v. *Burns,* (1933) 48 B.C.R. 73.

5. Board's status as pension authority.]—In administering the Old Age Pensions Act, the Board is merely acting in its capacity as agent of the Crown, although by statute it can recover money in its own name. *Dixon* v. *Workmen's Compensation Board,* (1935) 49 B.C.R. 407.

6. Effect of sec. 12 of Workmen's Compensation Act on claim for loss of normal expectation of life.]—Sec. 71 (2) of the Administration Act creates no new cause of action but in a proper case enables a personal representative to claim with respect to a right of action vested in the deceased immediately prior to his death, viz. one for loss of a normal expectancy of life. A workman without dependants was killed through the negligence of his employer in a accident arising out of and in the course of his employment and his personal representative sued the employer for the shortening of his life expectancy. The defendant contended that by Sec. 71 (6) the new remedy is subject to the Workmen's Compensation Act and that the latter Act (sec. 12) makes the right to compensation take the place of all the deceased workman's rights against the employer. Held, dismissing the action, that the personal representative could not recover. Any right vested in the deceased to a claim for shortening his expectation of life was extinguished by sec. 12 of the Workmen's Compensation Act. *Munro* v. *Bloedel Stewart & Welch Ltd.,* (1940) 3 W.W.R. 161.

7. Whether Part II applies — whether hospital housekeeper a domestic servant.]—The female plaintiff, a cook and housekeeper in a hopital was held not to be a "domestic servant" under the Workmen's Compensation Act. She received injuries when a flight of stairs at the defendant's hospital gave way under her, on account of a defect in the condition of the ways used in the business of her employer. Held, Part II of the Act applied and the plaintiff was entitled to damages, there being no contributory negligence and no voluntary acceptance of the risk on her part. *Bailey* v. *Society of Enderby General Hospital Inc.,* (1942) 1 W.W.R. 28.

8. Dependent of workman killed through negligence of member of forces electing to take compensation—right of Board to recover from Crown (Dominion).]—Mrs S. was entitled to damages against the Crown occasioned by the death of her husband through the negligence of a member of the armed forces. She elected to take compensation under s. 11 (1) of the Workmen's Compensation Act and assigned her rights against the Crown to the Board. Under sec. 11 (3) of the Act as well the Board became subrogated to her rights. The Board as co-suppliant with Mrs. S. then sued the Crown as equitable assignee of her claim and by virtue of the subrogation. Held, by the Deputy Judge of the Exchequer Court, giving damages to be paid to the Board; (1) the liability of the Crown (Dominion) is not affected since the question is one only of the disposition of the damages as between the Board and the dependants; (2) the objection as to parties is met by the two-fold character of the suppliant's claim; (3) the provisions of the Workmen's Compensation Act are applicable to the respondent notwithstanding the sections of the Interpretation Acts relieving the Crown unless it is expressly stated that it shall be bound. *Snell* v. *The King,* (1946) 1 D.L.R. 632; (1945) Ex. C.R. 250; affrmed (1947) 2 D.L.R. 81; (1947) S.C.R. 219.

9. Workman's widow awarded compensation—whether employer entitled to recover against the Crown under indemnity agreement.]—In respect of a siding agreement the Crown undertook to indemnify the suppliant against loss or damage caused by the Crown's failure to comply with the orders of the Transport Board. A workman of the suppliant was killed through the failure of the Crown's servants so to comply. The Workmen's Compensation Board awarded his widow a substantial sum for compensation under its Act. The employer sought to recover the sum from the Crown under the indemnity agreement. Held, the employer was entitled to recover and the damage was not too remote. The suppliant was in a special position under the Act; it was the sole member of class 10 (railway companies) and although it was assessed in the usual way, it was obliged to repay to the Board whatever monies the Board paid out with respect to the suppliant's workmen. The circumstance that the assessments became part of the Consolidated Revenue Fund of the Province or that the award might be charged to the suppliant under the name of assessments could make no difference. *Canadian Pacific Railway Co.* v. *The King*, (1946) Ex. C.R. 372.

See CONTRACT.

See NEGLIGENCE.

See PRINCIPAL AND AGENT.

See TORT.

MECHANICS' LIENS.

I. THE RIGHT: WHEN LIEN EXISTS, 461.

II. PERFECTING, 464.

III. ENFORCEMENT: PROCEDURE, 465.

IV. AMENDMENT, 466.

I. THE RIGHT: WHEN LIEN EXISTS.

1. Temporary alterations in sports arena.]—The plaintiffs claimed liens for wages and materials in respect of the erection of a special race-track inside a building for the staging of a six-day bicycle race. It was contended by the owner that the installation was only temporary and that the race-track was not so affixed to the building as to become a part of the realty. The trial Judge found that the race-track was nailed to the arena structure and was installed for the purpose of improving the building's usefulness, and upheld the liens. Held, on appeal, affirming the trial Judge's decision that the test is whether or not the work was done on the building and the materials furnished therefor. The question of "temporary" or "permanent" use or attachment is not the test to be applied under the sweeping language of the Act. *Stirn* v. *Vancouver Arena Co. Ltd.*, (1931) 46 B.C.R. 161; (1932) 4 D.L.R. 361; (1932) 2 W.W.R. 651.

2. Delivery of receipted payrolls—failure to insist upon.]—Sec. 15 of the Mechanics' Lien Act provides that receipted payrolls are to be posted on the works and goes on to say that no payment made without them shall defeat or diminish any lien in favour of a labourer or materialman. Held, since the owner failed to avail himself of the protection afforded him by sec. 15 he was liable to both the labourers and the materialmen. Sec. 15 did not conflict with sec. 8 which, apart from six weeks' wages for labourers, limits an owner's libility to the amount payable by the owner to the contractor. *Robertson & Hackett Sawmills Ltd.* v. *Metropolitan Tabernacle*, (1933) 2 D.L.R. 797; (1932) 45 B.C.R. 538.

3. Timber supplied for use in mine.]—A materialman supplying posts and timber for a mine is entitled to a lien even though they have not yet all been placed in the mine. The contention that they were not used for the construction, maintenance, alteration and repair of the mine, as being not construction but depletion, was not acceded to. *Pavich* v. *Tulameen Coal Mines Ltd.*, (1936) 51 B.C.R. 210; (1937) 1 D.L.R. 72; (1936) 3 W.W.R. 593.

4. Status of unregistered agreement holder.]—Notwithstanding that the agreement holder had not registered her agreement, the builder of a house for her was held entitled to a mechanic's lien thereon prior to a registered mortgage as against the increase in value of the premises by reason of the plaintiff's works and improvements. She was an owner within the definition of that term in sec. 2 of the Mechanics' Lien Act. It was not necessary that the consent agreeing to an extension of the time for instituting proceedings should be signed by any-

one but the purchaser—the party to be charged. *Clarke* v. *Williams*, (1939) 54 B.C.R. 370; (1939) 4 D.L.R. 771; (1939) 3 W.W.R. 481.

5. Mining property — whether lienholder must have miner's certificate.]—It was contended that a lien claimant in respect of work in a mine made him the holder of a right or interest in the property and that accordingly he could not enforce his rights unless he possessed a free miner's certificate under the Mineral Act. It was held that what a lien claimant acquires is a statutory right to enforce payment for his work by a sale under supervision of the Court. A person who does work on a building or a mine does not acquire an estate therein by virtue of the Mechanics' Lien Act and he need not hold a miner's certificate to assert his rights. *Watt* v. *Sheffield Gold & Silver Mines Ltd.*, (1940) 55 B.C.R. 472; (1941) 1 D.L.R. 671; (1941) 1 W.W.R. 60. But see *Warehouse Security Finance Co. Ltd.* v. *Niemi Logging Co. Ltd.*, (1942) 57 B.C.R. 346.

6. Liability of owner beyond contract price—sec. 8 of Mechanics' Lien Act.]—The general contractor failed to complete his contract to build certain apartments and as a result there was nothing "actually owing" to him and he had no lien. (The owner was forced to intervene, and complete them himself.) A subcontractor was in no better position, because when he completed his work there was nothing due from the owner to the general contractor. Sec. 8 of the Act barred the subcontractor's right to a lien. The fact that the owner had made payments to some other lien claimants, ignoring the subcontractor, made no difference. They, too were barred by sec. 8 and the payments made to them were purely voluntary and the subcontractor could have no ground for complaint. *Smith* v. *Stubbert*, (1941) 57 B.C.R. 328; (1942) 2 D.L.R. 124; (1942) 1 W.W.R. 601.

7. Subcontractor — work negligently done—right to lien.]—Although the subcontractor had done his work negligently he was held entitled as against the contractor to recover the contract price less deductions necessary to complete the work as specified in the contract. As the owner of the property knew the work was being done it was held to have been done at his instance and request. The subcontractor was entitled to a lien for the balance of the contract price less whatever sum is required to have the work set right. *Holliston v. Zaluski*, (1946) 63 B.C.R. 1; (1946) 3 W.W.R. 468.

II. Perfecting.

1. Effect of failure to file copy of miner's lien and lis pendens with mining recorder — whether substantial compliance.]—Where all the requirements of the Mechanics' Lien Act were complied with, save only the filing with the mining recorder, a lien claimed by a miner was upheld by virtue of the curative effect of sec. 20. There could be no possible prejudice to the defendants since the same man was Mining Recorder and registrar of the Court. As registrar he had duly received the filing. *Henrich* v. *Hall*, (1940) 3 W.W.R. 409.

2. Time for filing — abandonment as completion.]—The plaintiff claimed as a material man for material supplied to a contractor for a dwelling the construction of which was never completed and was held by the judge to have been abandoned by the owner. It was contended that abandonment was tantamount to completion and as the claimant's lien affidavit had not been filed within 31 days after the abandonment, the lien had ceased to exist. The trial judge so held. On appeal it was held, reversing the decision below, that abandonment was a failure to complete — not a completion. Sec. 6 of the Mechanics' Lien Act entitled the claimant to a lien and sec. 19 (1) (b) provides that it will cease to exist upon the expiration of 31 days after the completion of the house; it cannot expire until the house is, in fact, completed and a period of 31 days has elapsed. *Hodgson Lumber Co. Ltd*, v. *Marshall*, (1940) 55 B.C.R. 467; (1941) 1 D.L.R. 474 (sub. nom. *Hodgson Lumber Co. Ltd.* v. *Wendlund*, (1941) 1 W.W.R. 24.

3. Contractor — continuing contract.]—The plaintiff had an oral contract to renovate and alter an office building. He supplied the labour and material as the owner directed and received ten per cent of the cost in addition to his own wages as foreman. Payments having fallen into arrear and the work still continuing from time to time, the plaintiff filed a lien. The trial judge held that the lien was not filed in time and dismissed the action. Held, on appeal reversing the trial judge, that the contract was a continuing one and that the lien did not

expire until 31 days after the work was completed. *J. Davies* v. *E. B. Eddy Co. Ltd.*, (1941) 57 B.C.R. 200; (1942) 1 D.L.R. 511; (1942) 1 W.W.R. 596.

4. Failure to file lis pendens in Land Registry Office—fatal to claim.]—Sec. 23 (2) of the Mechanics' Lien Act requires that the claimant shall file a lis pendens in the appropriate Land Registry Office. In view of Sec. 23 (1) of the Interpretation Act "shall" is to be construed as imperative. Held, dismissing the action, the requirement is obligatory, not merely directory. *McCoubrey* v. *Carver Construction Co. Ltd.*, (1942) 57 B.C.R. 476; (1942) 3 W.W.R. 648.

III. Enforcement: Procedure.

1. Affidavit of claim made by bookkeeper without personal knowledge.] — Actions to enforce mechanics' liens were dismissed where it was shown that the affidavits of claim were made by a bookkeeper for the plaintiff who had no personal knowledge of the facts. The Act (Sec. 19) requires that the agent have such knowledge. Sec. 20, which permits a substantial compliance with the requirements (inter alia), did not avail to enable the affidavit to be amended at the trial where it was clear that the bookkeeper did not in fact have the necessary personal knowledge. *Kydd Bros.* v. *Taylor*, (1932) 3 W.W.R. 109.

2. Affidavit by agent without personal knowledge of facts.]—An action to enforce a mechanic's lien for materials was dismissed where the affidavit for the lien was made by an agent who had not the personal knowledge of the facts required by Sec. 2 (3) of the Mechanics' Lien Amendment Act, 1927. *Empire Brass Manufacturing Co. Ltd.* v. *Milligan*, (1935) 3 W.W.R. 189.

3. Status of assignment of lien—interest on ascertained amount.]—A company declared entitled to a mechanic's lien assigned it to the plaintiff and notice was duly given. It was contended by the defendant, a mortgagee, that the assignment not having been registered in the Land Registry Office, the plaintiff took nothing by reason of sec. 34 of the Land Registry Act. It was also contended that interest should not have been allowed. Held, allowing the appeal in part, non-registration of the assignment could not deprive the trial judge of jurisdiction to order the lien's enforcement. The Mechanics' Lien Act is the master statute. There is nothing in either Act requiring an assignment to be filed anywhere. The interest should not have been allowed because the lien is limited to the amount "actually owing". *Triangle Storage Ltd.* v. *Porter*, (1941) 56 B.C.R. 422; (1941) 4 D.L.R. 301; (1941) 3 W.W.R. 892.

4. Money paid into Court to secure cancellation of the lien.]—The defendant was permitted to pay the amount claimed into Court and the lien was vacated. The plaintiff discontinued because his lien was filed before the completion of the work. The defendant applied for payment out of the money in Court but the judge required it to remain in Court pending the result of an action for the balance claimed by the plaintiff against the defendant. Held, on appeal reversing the decision below, the order made was unwarranted and should be set aside. *Nixon* v. *Sumner*, (1937) 4 D.L.R. 806.

IV. Amendment.

Amendment of affidavit.]—In a case where a lien claimant had been permitted to amend his plaint by increasing the amount of his claim, he applied at the trial to amend the affidavit of lien in like manner. Held, where no prejudice is caused to the defendant such an amendment may be allowed under sec. 20 of the Act. *Richardson* v. *Lohn*, (1932) 46 B.C.R. 224.

See Woodman's Lien.

MEDICINE.

1. Offering to treat disease for hire, gain, or hope of reward.]—Sec. 67 of the Medical Act forbids unregistered persons to practise medicine "for hire, gain, or hope of reward, whether promised, received, or accepted". A private detective consulted the accused, an osteopathic physician, who offered to give treament and requested part of his fee in advance. The detective said he might return and left without paying any money. The magistrate dismissed a charge of unlawful practice. Held, on appeal, affirming the decision below, that the words "promised, received, or accepted", must

apply to "hope of reward" as well as to "hire and gain". *Rex* v. *McLeod,* (1934) 49 B.C.R. 96; (1934) 3 W.W.R. 426.

2. Proof of unlawful practice of chiropractic—oath against oath.]—The accused was acquitted by the magistrate of practising chiropractic without a license under the Chiropractic Act. The prosecution appealed. At the hearing of the appeal a female witness gave testimony which, if believed, showed that the accused had treated her spine in such a way as to amount to practising chiropractic. The accused categorically denied her evidence and was unshaken in cross-examination. The appeal was dismissed as the burden was on the appellant and it had not been discharged. *Rex* v. *Holtum,* (1937) 1 W.W.R. 199.

3. Chiropractors — care and skill required of.]—The plaintiff claimed damages against a registered chiropractor for negligent treatment resulting in painful and serious injuries. The defendant justified the violence and severity of his manipulations on the ground that diagnosis was not permitted under the Chiropractic Act and that what he had done was to give the regular chiropractic treatment in the orthodox manner. Held, dismissing the action, the treatment was not different from that usually given by chiropractors and it was not established that the defendant was negligent or unskilful. The plaintiff knew that the defendent merely used the chiropractic method. *Rutledge* v. *Fisher,* (1940) 3 W.W.R. 494.

4. "Executive Committee" as distinguished from "Committee of Inquiry"—power of expulsion.]—Under the Medical Act, two separate tribunals are set up. One is the "Executive Committee", the other a "Committee of Inquiry". A "Committee of Inquiry" may on the hearing of complaints associate with themselves as a member of the committee one of the judges of the County Court. The "Executive Committee" has not this power. A member of the College of Surgeons was the subject of an inquiry as to his conduct before the "Executive Committee" with which was associated a County Court Judge. The member's name was ordered erased from the register. On appeal to a Supreme Court Judge his name was restored to the register. The tribunal that held the inquiry was entirely without jurisdiction and there was no authority under the Act for it. *Rogers* v. *The Council of the College of Physicians and Surgeons of British Columbia,* (1942) 58 B.C.R. 287; (1942) 3 W.W.R. 510.

5. Dangerous treatment.]—A physician is required to exercise proper and reasonable care and skill. The defendant doctor was held liable in damages where (a) knowing his treatment for diabetes was dangerous he did not provide for daily tests, (b) he delegated to the patient the duty of deciding what course he would take. *Marshall* v. *Rogers,* (1943) 59 B.C.R. 165 (1943) 4 D.L.R. 68; (1943) 2 W.W.R. 545.

6. Chiropractor — damages for injuries through lack of skill.]—The defendant gave the plaintiff the orthodox chiropractic treatment. The latter voluntarily applied to the defendant so to be treated. The chiropractic system is lawful under the provisions of the Chiropractic Act. The onus was on the plaintiff to show that reasonable care and skill were not exercised. Evidence by medical experts using different methods does not provide a proper test. There was here no chiropractic practitioner called to show that the defendant's treatment was unskilful or not in conformity with good chiropractic practice. The plaintiff's action for damages was dismissed. *Cawley* v. *Mercer,* (1945) 3 W.W.R. 41; (1945) 4 D.L.R. 718.

7. Unauthorized extraction of teeth—trespass—damages.]—The plaintiff, about to have her tonsils removed, arranged with her doctor, the defendant J., to have two teeth out at the same time. J. arranged with the defendant I. a dentist to remove the teeth. Instead of two, all plaintiff's upper teeth were extracted. Held, the defendants were equally at fault. I. acted without receiving proper instructions from his patient although he understood from J. that all the uppers were to be removed. *Yule* v. *Parmley,* (1945) S.C.R. 635; reversing (1944) 61 B.C.R. 116, (1945) 2 D.L.R. 317; affirming (1944) 60 B.C.R. 395; (1944) 4 D.L.R. 46; (1944) 3 W.W.R. 94.

See DENTISTRY.

See NEGLIGENCE.

MINES AND MINING.

1. FREE MINER'S CERTIFICATE, 469.

II. LOCATION, 469.

III. Certificate of Improvements, 470.

IV. Conflicting Claims, 470.

V. Agreements Relating To Mining Property, 471.

VI. Placer Claims and Leases, 471.

I. Free Miner's Certificate.

1. Forfeiture through lapse.] — The plaintiff lawfully holding a free miner's certificate under the Mineral Act, duly located two mineral claims, but when his certificate expired he did not take out a new one until the expiration of two weeks, when he took out a new one. He neglected to cure the defect by reviving his title under sec. 8. In an adverse action against locators of the same ground, the trial judge held that the lapse of the certificate was an irregularity which was cured by sec. 80 and gave judgment for the plaintiff. Held, on appeal, reversing the decision below, that by sec. 13 (2) the plaintiff was, on the expiration of his certificate completely deprived of all rights and interest held or claimed by him as he had allowed the certificate to lapse, without renewal and without availing himself of the curative provisions of sec. 8, and sec. 80 based on "irregularities" does not apply. *Turner* v. *Vidette Gold Mines Ltd.*, (1935) 50 B.C.R. 202; (1935) 4 D.L.R. 216; (1935) 3 W.W.R. 259.

2. Claim for accounting by partner—right to without certificate.]—The question as to whether options of mining properties could be held by a person who had no free miner's certificate was decided in the affirmative by the trial judge, in the negative by the Court of Appeal, and in the affirmative by the Supreme Court of Canada. On further appeal to the Privy Council the decision of the Supreme Court of Canada was set aside on other grounds and it was not necessary to decide whether or not the lack of the certificate was fatal. *Winsby* v. *Tait* (1943) 1 D.L.R. 81; reversing (1941) 2 D.L.R. 81; reversing (1939) 54 B.C.R. 335; (1940) 4 D.L.R. 798.

II. Location.

Rock in place—Fractions.]—Since rock in place is the very foundation of lawful locations of mineral claims under the Mineral Act, the absence of such will be fatal to a location of a fraction, as it is of a full claim. *The Cariboo Gold Quartz Mining Co. Ltd.* v. *Island Mountain Mines Co. Ltd.*, (1936) 53 B.C.R. 257; (1937) 2 D.L.R. 207.

III. Certificate of Improvements.

Forfeiture — notice to deceased co-owner.]—A notice under sec. 28 of the Mineral Act, addressed to the deceased as a delinquent co-owner, calling on him to pay his proportion of expenditures for assessment work, with the alternative of forfeiture, was published by the defendant in a newspaper. The person addressed died June 28, 1936, and the notice was published in 1937. The trial judge found that the defendant was aware of his death when the publication was made. In an action by the administrator of the deceased for a declaration that his interest had not been forfeited, it was held that the forfeiture section in the Act must be strictly construed and the notice was a nullity. *James Edward Beck* v. *Armstrong* (1937), 52 B.C.R. 377; (1938) 1 D.L.R. 792; (1938) 1 W.W.R. 295.

IV. Conflicting Claims.

1. Effect of forfeiture of company's charter.]—At the time an Idaho Company forfeited its charter there, it owned a mineral claim in British Columbia; it held a free miner's licence good for some months, and it had done and recorded the necessary work to keep it in good standing for the same length of time. Held, the mineral claim so held when the forfeiture took place, ceased to be a valid claim when the charter lapsed. A mineral claim cannot exist in vacuo; it must have an owner. Moreover, the owner must be a free miner, which in the case of a company must, as defined by the Mineral Act, be an existing incorporated company. *Andersen* v. *Omineca Silver King Mines Ltd.*, (1935) 49 B.C.R. 341.

2. "Rock in place"—necessity of showing.]—"Rock in place" is the very foundation of a lawful mineral claim under sec. 30 of the Mineral Act; where none is found the claim is not established. The rule applies to fractional claims. *Cariboo Gold Quartz Mining Co.* v. *Island Mountain Mining Co.*, (1937) 2 D.L.R. 207; (1936) 53 B.C.R. 257.

3. Jumping of claims — declaration of validity—fraud.] — The plaintiff claimed that the defendants had fraudulently "jumped" half of his claim and had gone on and obtained a certificate of improvements and eventually a Crown grant. Under sec. 61 of the Mineral Act a recorded certificate of improvements cannot be impeached except for fraud. It was contended for the defendants (relying on *Hand* v. *Warren* (1899) 7 B.C.R. 42) that the certificate could be attacked only by adverse proceedings, and that the reservation as to fraud was in favour of the Crown only. The judge dismissed the action without hearing any evidence. Held, ordering a new trial, the facts here were quite different from those in *Hand* v. *Warren*. Assuming that the Crown grant could not be set aside the plaintiff might be entitled to an order converting the defendant into a trustee. Or the plaintiff might be entitled to damages by reason of the alleged fraud. *Erickson* v. *Fisher*, (1946) 63 B.C.R. 419; (1947) 2 D.L.R. 43; (1947) 1 W.W.R. 227.

V. Agreements Relating to Mining Property.

1. Lay agreement as interest in land.] —A lay agreement (one under which the layman pays rent depending on the amount of the clean-up) is equivalent to a lease and is assignable. *Beaton* v. *Schulz* (1934) 3 W.W.R. 179; (1934) 49 B.C.R. 1; (1934) 4 D.L.R. 488.

2. Lay agreement—whether a lease—entry by owner for failure to work in "miner-like" manner.] — Where no time limit is fixed and the rental is a fraction of the gold recovered it is of the utmost importance to the owner of the claims that they should be worked continuously and that the rate of working should be maintained. The observance of this duty will be a condition the breach of which entitles the owner to re-enter without any express clause to that effect. The agreement here falls short of being a lease; what the layman has is an interest coupled with a licence. *Falleson v. Spruce Creek Mining Co. Ltd.*, (1942) 58 B.C.R. 233; (1942) 4 D.L.R. 708; (1942) 3 W.W.R. 553; affirming (1942) 2 W.W.R. 121.

VI. Placer Claims and Leases.

Forfeiture of plaintiff's lease and restaking by defendant.]—Notwithstanding that the plaintiff was in default under the provisions of the Placer-mining Act, the trial judge leaning against forfeiture and, holding that the relevant sections (110 and 114) could not be reconciled, gave effect to the later one and held that, there being no declaration of forfeiture by the Minister, the lease was not forfeited. On appeal, the Court being equally divided, the decision of the trial judge was affirmed. On further appeal to the Supreme Court of Canada, the appeal was allowed and it was held that there is no conflict between the relevant sections of the Act. *East Kootenay Ruby Co. Ltd.* v. *Morrison*, (1934) S.C.R. 5; (1934) 1 D.L.R. 468; reversing (1933) 47 B.C.R. 214; (1933) 4 D.L.R. 75; (1933) 1 W.W.R. 460.

See Companies.

See Mechanics' Liens.

MISREPRESENTATION AND FRAUD.

1. Damages upon rescission.]—In an action for rescission based on fraud, damages may be awarded to cover losses which the plaintiff incurred in partially carrying out the contract. *Havens* v. *Hodgson* (1939) 54 B.C.R. 77; (1939) 4 D.L.R. 813.

2. Sale of business—affirming contract after becoming aware of misrepresentations.]—The plaintiff sold the assets and goodwill of a business to the defendant payable by instalments. On default the plaintiff sued for ten instalments; the defendant counterclaimed for damages for fraudulent misrepresentation. The trial judge dismissed the action and allowed $500 damages on the counterclaim. Held, on appeal, varying the judgment below, that since the defendant purchaser had confirmed the contract the action should not have been dismissed. The fraudulent misrepresentation was proved and the damages awarded the defendant were affirmed. In the result the plaintiff was entitled to judgment for $500 against the defendant who had elected to continue to operate the business and the defendant was awarded $500 damages for misrepresentation. The remainder of the instalments were not to be affected by the judgment *Zauscher* v. *Earl*, (1943) 59 B.C.R. 233; (1943) 2 W.W.R. 697.

3. Remedies of plaintiff granted rescission—cost of house erected on property.]—The plaintiffs agreed to buy certain lots from the defendants; they paid $1000 down and took an interim receipt containing a statement that the lots were served by sewer and water. They were not so served. The judge held that there was not fraudulent misrepresentation; they believed the representation they made and it was not made recklessly so as to make it fraudulent. Hence the plaintiffs could not affirm the contract and recover damages; nor could they have rescission based upon fraudulent misrepresentation with damages. They were entitled to rescission for innocent misrepresentation with consequent relief, i.e., equitable compensation. The plaintiffs were awarded (a) the return of the money paid, and (b) the cost of the construction of the house which they had built before they learned that it could not be connected with the sewer. *Wiley* v. *Fortin,* (1946) 62 B.C.R. 396; (1946) 2 D.L.R. 712; (1946) 2 W.W.R. 93.

4. Whether plaintiffs deceived—sale of restaurant.]—The plaintiffs sued in tort for fraudulent misrepresentation. They claimed that the vendor had fraudulently misrepresented that he had a menu, i.e., that a list of prices to be charged had been approved by the Wartime Prices and Trade Board. The evidence did not show that the defendant ever expressly represented that he had such a menu. The inference would support the view that that was the understanding, but for the interim receipt signed by all parties which exculpated the vendor from all responsibility with respect to the menu. Held, dismissing the action, the plaintiffs were not deceived, but went ahead with full knowledge of the situation. *Blanke and Burke* v. *New Good Eats Cafe Ltd.,* (1947) 2 D.L.R. 431.

See INSURANCE.

MISTAKE.

See CONTRACT.

MORTGAGE.

I. NATURE, VALIDITY, AND EFFECT, 474.

II. RIGHTS AND LIABILITIES OF PARTIES, 475.

III. ENFORCEMENT, 476.

A. In General.

B. Mortgagors' and Purchasers' Relief Act.

C. Default as to Taxes.

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1. NATURE, VALIDITY, AND EFFECT.

1. Rectification as result of mistake.]—A mortgage deed omitted a parcel which the judge found the mortgagor had intended to be included and which the mortgagee thought for many years was, in fact, included. Held, ordering rectification of the deed on the ground of mutual mistake, that in such a case the Court can rectify a contract although, apart from the rectified contract, there is no memorandum to satisfy the Statute of Frauds. *Elkington* v. *Willett,* (1934) 49 B.C.R. 316.

2. Right to foreclosure — whether instrument really a conveyance or trust for sale.]—The plaintiffs, suing on behalf of themselves and all other shareholders except the defendants T. and M. claimed damages for conspiracy to defraud the company and for negligence against M., the solicitor-defendant. T. had advanced money and credit from time to time and the company gave him as security a mortgage over all its assets. On default T. foreclosed and sold the property almost immediately. It was contended that the mortgage was really a conveyance in trust for sale and did not carry with it the right to sue for foreclosure and that this fact should have been disclosed on the application for the order nisi. The trial judge dismissed the action. Held, on appeal, affirming the decision below, the instrument was a mortgage which contained a power of sale, but this was in addition to the incidental right to foreclosure. The parties called it a mortgage; there was no conveyance to trustees. It contained an express proviso for redemption and a right to foreclosure is incident to the power to redeem. The correlative and reciprocal remedy to redemption is foreclosure. *Levi* v. *MacDougall,* (1944) 60 B.C.R. 273 (affirmed by Supreme Court of Canada, unreported).

3. Estoppel raised by receipt in mortgage—status of assignee.]—The mortgagee assigned to the plaintiff who sought foreclosure against the mortgagor who was the mortgagee's father. The plaintiff was a purchaser for value without notice of the alleged dealings between the mortgagor and mortgagee. The defendant contended that he had not received the mortgage money and that there was no mortgage because some other condition had not been performed. Held, the defendant was estopped, as against the assignee of the mortgage by the receipt in the mortgage from asserting his title. *Hart* v. *Nelson,* (1940) 2 D.L.R. 776; (1940) 1 W.W.R. 633.

II. Rights and Liabilities of Parties.

1. Obligation of purchaser of equity of redemption to indemnify vendor.] — The defendant (a trust company) acting as nominee and bare trustee for C. took transfers, absolute in form, of properties, already mortgaged to the plaintiff, from a company, P., indebted to the Royal Bank. The basis of the transaction was an advance by C. to N. (who controlled the company P.) to enable P. to pay off the bank. The documents were so drawn as to indicate an out and out sale, subject to the plaintiff's mortgages. The plaintiff knew that the defendant trust company was a mere nominee for an undisclosed principal in the transaction. Some time later the plaintiff took from P. an assignment of all its rights including the right of indemnity and having given notice of the assignment, commenced an action, claiming that the defendant, as purchaser of the equity of redemption, was bound to indemnify P. and that P. had assigned the obligation to the plaintiff. The trial judge gave judgment for the plaintiff. Held, on appeal, affirming the decision below that the documents set out the transaction between the parties which was a sale and not a mortgage and the defendant was bound by the implied obligation to indemnify. On further appeal to the Privy Council, it was held, that the appeal should be allowed and the action dismissed without deciding whether or not the transaction was a mortgage or a sale. The fact that the apparent purchaser of an equity of redemption is to the knowledge of the apparent vendor, a trustee for a third party may, or may not, of itself be sufficient to rebut the prima facie implication of the obligation to indemnify but very little is sufficient in such a case to show that no such implication can fairly be made. There was no estoppel because there was no evidence of a change of position to the prejudice of the plaintiff. *The British Columbia Land and Investment Agency Ltd.* v. *Montreal Trust Company,* (1935) 3 W.W.R. 566; (1936) 1 D.L.R. 1; reversing (1935) 49 B.C.R. 441; (1935) 2 D.L.R. 435.

2. Whether set-off available to debtor against assignee where assignor had defaulted on mortgage assumed by the assignor.] — On a trade of an apartment house for a residence each party agreed to assume the existing mortgages and the plaintiff, as transferee of the apartment house, gave a second mortgage to the W. company to balance the trade. The W. company defaulted its obligation in assuming the mortgage on the residence and the original borrower suffered judgment and threatened the plaintiff who then sued the W. Company and recovered judgment against it after crediting the amount due under the second mortgage of the apartment house. The judgment contained a declaration that the second mortgage was satisfied. After the W. Company had made default and at a time when the plaintiff's indebtedness on the apartment house mortgage had stood at $2500.00 and the W. Company owed the plaintiff $10,000.00 on the first mortgage of the residence, the W. Company had assigned the second mortgage on the apartment house to the defendant and gave notice to the plaintiff accordingly. It was held that the plaintiff was entitled to a declaration that a set-off existed and had been exercised in the former action and that the mortgage sought to be asssigned had been paid and satisfied. The defendant took it subject to all equities including the right of the plaintiff to the set-off. Here the claim under the assignment and the assignor's default had a common origin and the obligations arose, not out of separate and distinct transactions, but out of single contract. The defendant was ordered to execute a release of the assignment so far as it related to the mortgage. *Macdonald Apartments Ltd* v. *False Creek Lumber Co. Ltd.,* (1936) 1 W.W.R. 543.

III. Enforcement.

A. In General.

1. Reconveyance, right to.] — A mortgage and the foreclosure order with respect

thereto required a reconveyance upon payment. The mortgagee refused to give a conveyance relying upon sec. 183 of the Land Registry Act. Held, on appeal, that the mortgagor was entitled to a reconveyance. The effect of sec. 183 is limited to cases where cancellation of the registration of a charge has been made and does not come into operation except in those cases. *Richardson* v. *The Royal Trust Co.*, (1932) 45 B.C.R. 512.

2. Wrongful interference by receiver.] —In an action to foreclose a farm mortgage the defendant counterclaimed for losses alleged to have been caused by the interference of a receiver appointed under the mortgage by the plaintiff. It was held, dismissing the counterclaim, that the losses sustained were attributable to the depressed condition of the milk industry rather than to the acts of the receiver. *Westminster Mortgage Corporation Ltd.* v. *Adair*, (1932) 47 B.C.R. 1.

3. Foreclosure — defendant added after judgment nisi—terms imposed.] — After the order nisi and after the accounts were taken a judgment creditor (unregistered) of a former owner was permitted to be added as a party defendant. The plaintiff was justified in not making him a party originally and a condition of adding him should be that he must accept the accounts as taken. *Radermacher* v. *Radermacher (No. 1)*, (1934) 1 W.W.R. 795.

4. Time for redemption for added defendant.]—In a foreclosure action after order nisi and after the accounts had been taken and a day fixed for payment W. applied to be and was added as a defendant. Pleadings were delivered and at the trial an order for foreclosure was made against W. He asked for the usual six months within which to redeem. Held, that the time for redemption be one month from the date of the registrar's certificate on the taking of further accounts, occasioned by the receipt of certain moneys by the receiver. *Radermacher* v. *Radermacher*, (1934) 49 B.C.R. 103; (1935) 1 W.W.R. 29.

5. Order for immediate foreclosure.]—Immediate foreclosure, in default of defence, may be ordered if it appears that there is no possibility of redemption and the property cannot be rented, or sold for the amount of the mortgage until a considerable sum is spent in repairs. *Elkington* v. *Willett (No. 2)*, (1935) 49 B.C.R. 325.

6. Collateral security held by first mortgagee.] — A first mortgage of land, held by the plaintiff, was by its terms further secured by certain shares. A second mortgage to a Bank was secured by the land alone. Default having occurred, the plaintiff sued the mortgagor and the Bank (as second mortgagee), claiming on the covenant as against the mortgagor and generally for an accounting and in default of payment, foreclosure of both the land and the shares. Neither defendant appeared and an order nisi was made, the accounts taken and a motion for the final order launched, when the Bank entered an appearance and moved to set aside the writ and all subsequent proceedings. It was contended that a claim to realize on the land had been joined with one to realize on personal security contrary to rule 189, and that the plaintiff should have realized on the shares before taking foreclosure against the land. The judge refused to interfere and made the final order. Held, on appeal reversing the decision below, that there was no misjoinder and the action was properly constituted, but the plaintiff must realize upon its collateral security before it can obtain foreclosure, in view of the second mortgagee's right to redeem by payment of the sum properly due. *Okanagan Loan and Investment Trust Co.* v. *McDonald* (1935) 49 B.C.R. 468; (1935) 2 D.L.R. 278; (1935) 1 W.W.R. 481.

7 Improvident sale by mortgagee.]—The plaintiff sued for damages for an improvident sale of mortgaged property. The defendant bank had obtained from time to time securities for the plaintiff's indebtedness. Finally it took a quit-claim deed of a hotel property, already under mortgage to the bank, with a bill of sale of its furnishings and equipment, on the terms that the debtor could repurchase it within fifteen months upon payment of the amount then due the bank. When the time elapsed the bank sold the hotel property for a few dollars less than the indebtedness. Then it sold certain bonds which had been taken as further security for the general indebtedness, and liquidated the balance of the debt. The trial judge held the sale of the hotel property to be a provident one, made in good faith. Held, on appeal, affirming the decision below, there was no improvidence in the sale. As

to the bonds, it makes no difference whether the bank sold under its power of sale or took title under the quit-claim and dealt with the property as owner. In either case the bank would have the right to realize on the bonds which were hypothecated to secure not only the mortgage debt but advances subsequent to and apart from the moneys secured by the mortgage. *Captain J. A. Cates Co. Ltd* v. *Bank of Montreal,* (1937) 52 B.C.R. 410; (1938) 2 D.L.R. 65; (1938) 1 W.W.R. 449; affirming (1937 3 W.W.R. 87.

8. Solicitor and client costs allowed.]—A mortgage contained an agreement by the mortgagor that all costs, charges and expenses, solicitor's or otherwise, which might be incurred in realizing the moneys secured, should be a charge on the mortgaged lands. Held, the plaintiff in an action for foreclosure was entitled ex contractu to tax his costs on a solicitor and client basis and add the amount to the mortgage debt. *Manufacturers Life Insurance Co.* v. *Independent Investment Co. Ltd.,* (1939) 54 B.C.R. 5; (1939) 4 D.L.R. 811.

9. Nature of foreclosure.]—A right to foreclose is not a chose in action. Foreclosure is not an active remedy; it is merely a calling on the mortgagee to exercise his power of redemption now or never. The right to foreclose follows the legal estate and the only risk the mortgagee in the position of an assignee takes in not giving notice where the estate lies, is that if he does not, the mortgagor must be credited with bona fide payments made to the original mortgagee. *British American Timber Co. Ltd.,* v. *Jones* (1944) 60 B.C.R. 174, (1944) 2 D.L.R. 481, (1944) 2 W.W.R. 577 varying (1943) 59 B.C.R. 270; (1943) 4 D.L.R. 686 (1943) 2 W.W.R. 654.

B. Mortgagors' and Purchasers' Relief Act.

1. Seizure of fixtures under a chattel mortgage). A chattel mortgage of a boiler, electric motor, mangles and washers (found to be fixtures and part of the freehold), was held to be an instrument (as defined by sec. 2 of the Mortgagors' and Purchasers' Relief Act) and their seizure, made without leave of a Judge under the Act, was illegal. *Sam Sick Hong* v. *Mah Pon,* (1933) 48 B.C.R. 362. (1934) 3 D.L.R. 758 (1934) 2 W.W.R. 626 affirming (1933) 3 W.W.R. 249.

2. Mortgagors' and Purchasers' Relief Act.] Only one order granting leave to commence or continue proceedings is contemplated by the Act, and an order giving leave will include all such steps as may be necessary to be taken either before or after judgment. In *re B.C. Realty Development Corporation Ltd.* (a bankrupt), (1934), 49 B.C.R. 86; (1934) 3 W.W.R. 136; 16 C.B.R. 40.

3. Mortgagors' and Purchasers' Relief Act.]—The plaintiff in an action on a mortgage recovered a sum for interest and costs, and in default of payment, foreclosure. He then registered the judgment in the Land Registry Office and proceeded to execution, also issuing an attachment order on the judgment. The Act was not in force when the action was begun but came into force before the proceedings after judgment were taken. The judge refused to set aside the subsequent proceedings. Held, on appeal affirming the decision below, that sec. 4 of the Act which forbids a party to continue proceedings for foreclosure or to proceed to execution to enforce a judgment, whether entered before or after the commencement of the Act, for recovery under an instrument, is the general section and gives way to the particular section viz. sec. 3 (2) (e) providing that the Act shall not apply to any instrument upon which proceedings are pending at the commencement of the Act. *Freedman* v. *Howard* (1935), 49 B.C.R. 417, (1935) 2 D.L.R. 285 (1935) 2 W.W.R. 267.

C. Default As To Taxes.

1. Arrangements by mortgagor with municipality to pay tax arrears by instalments.]—Where a mortgagor being in arrears as to municipal taxes makes an arrangement with the municipality for payment by monthly instalments, he will be entitled to relief from the consequences of his default. *Tillet* v. *Carlson,* (1932) 45 B.C.R. 52, (1932) 1 W.W.R. 463.

2. Failure to pay taxes as ground.]—When a mortgagor covenants to pay taxes his obligation is to pay them at or before the time they become delinquent. In an action for foreclosure for such default it is no defence that the mortgagee himself has not first paid them. *Tatroff* v. *Ray* (1935) 3 W.W.R. 41 varying (1934) 49 B.C.R. 24, (1934) 3 W.W.R. 493.

3. Allegation of default in payment of taxes where mortgagee pays them.] — Foreclosure proceedings may be taken for default in taxes where they have been paid by the mortgagee but in the special circumstances the usual period of six months for redemption was extended to twelve months. *The Canada Life Assurance Co.* v. *Coughlan* (1935) 50 B.C.R. 194, (1935) 3 W.W.R. 38.

See RECEIVER.

See REGISTRATION OF TITLE TO LAND.

MOTOR VEHICLES LEGISLATION

I. IN GENERAL, 481.

II. VICARIOUS RESPONSIBILITY, 483.

I. IN GENERAL.

1. Effect of failure to hold driver's licence and chauffeur's permit.]—The requirement in the Motor-vehicle Act as to a chauffeur's permit, and of the Vancouver by-law as to a licence, do not operate to modify civil rights or relieve the City from the consequences of its negligence arising out of non-repair of a highway. The failure to take the licence or the permit is a failure to comply with the Act and the sanction is the penalty. *Burchill v. City of Vancouver* (1932) S.C.R. 620; affirming (1932) 45 B.C.R. 169, (1932) 1 W.W.R. 641.

2. Penal section as affecting civil liability.]—Sec. 53 of the Motor-vehicle Act is a penal section involving penalties for its breach and does not affect civil liability. *McDermid* v. *Bowen* (1937) 51 B.C.R. 525, (1937) 2 W.W.R. 347; affirmed (1938) 53 B.C.R. 98; (1938) 3 D.L.R. 617; (1938) 2 W.W.R. 510.

3. Dealt with in Criminal Code.]—Sec. 285 (2) of the Criminal Code deals with the same subject matter (failure by the driver of a motor-vehicle to remain or return to the scene of an accident) as Sec. 60 (7) of the Motor-vehicle Act, with the result that the Provincial enactment is inoperative. *Rex* v. *Salt* (1937), 51 B.C.R. 485; (1937) 1 W.W.R. 785.

4. Sec. 18A—Separate actions for same tort.]—The plaintiff having in 1928 recovered a barren judgment against the defendant's daughter (then a minor) later sued the defendant in respect of the same tort and claimed under sec. 18A, which makes a parent liable in certain cases for the negligent driving of a child. Held, the section imposed a new and additional liability on the parent and no question of joint tort-feasors arises. The plaintiff's election to sue the daughter in 1928 would not create an estoppel against a right given by statute. The Legislature intended that a plaintiff in these circumstances is to have the right of pursuing his claim for damages against both the minor and the parent. *Vandepitte* v. *Berry* (1938) 53 B.C.R. 161; (1938) 3 D.L.R. 788; (1938) 3 W.W.R. 11.

5. Motor-vehicle Act—suspension of license by reason of unsatisfied judgment.] — In an action between the appellant and B. both the claim and the counterclaim were dismissed. After taxation the appellant was indebted to B. for $466.25. Under sec. 84 (1) of the Motor-vehicle Act, the Commissioner of Provincial Police suspended the appellant's driver's and owner's licenses on the ground that he had failed to satisfy a judgment in an action for loss resulting from damage to property of another person in excess of $100. An application for a mandamus to compel the return of the licenses was rejected. Held, on appeal granting the order for a mandamus, that the applicant did not come within sec. 84 and the licenses should have been returned. Held on further appeal to the Supreme Court of Canada affirming the decision below, that sec. 84 did not apply in the circumstances. *Dumont* v. *Commissioner of Provincial Police* (1941) S.C.R. 317; 76 C.C.C. 148; (1941) 3 D.L.R. 204; affirming (1940) 55 B.C.R. 298; (1940) 4 D.L.R. 721; (1940) 3 W.W.R. 39, 74 C.C.C. 200.

6. Injury to passenger—not liable unless transported for "hire or gain".]—Sec. 74B of the Motor-vehicle Act bars actions by passengers against the owner or driver but does not relieve "any person transporting a passenger for hire or gain". The defendants about to drive from Kelowna to Vancouver arranged with the plaintiffs to take them along. The plaintiffs volunteered to pay part of the expenses. The trial judge dismissed the action for injuries to the passengers holding that the defendant was not transporting the plaintiffs for

hire or gain. Held on appeal affirming the decision below, that the arrangement to share expenses did not create any legal obligation on either side. The accommodation extended was not done with the object of obtaining hire or gain and sec. 74B (a) was a bar to the action. *Guerard* v. *Rodgers* (1942) 57 B.C.R. 481; (1942) 2 D.L.R. 646; (1942) 2 W.W.R. 59; affirming (1941) 57 B.C.R. 171; (1941) 3 W.W.R. 830.

II. Vicarious Responsibility.

1. Collision—both drivers minors—liability of parents.] — Both drivers were minors living with or as members of the families of their respective parents and as a result of sec. 18A of the Motor-vehicle Act, the parents became civilly liable for the negligence of their children. The trial judge held the drivers to be equally blameworthy in respect of a collision and each car owner was entitled to half the damages proved. The claim for personal injuries by the mother of one of them was apportioned in the same way. *Thornloe* v. *Stirling* (1934) 1 D.L.R. 615.

2. Motor-vehicle entrusted to minor.]—Where a motor-vehicle was owned by a minor there could be no entrustment of it to him by his parent; and sec. 18A of the Act does not apply. *Fraser v. Harris;* (1936), 51 B.C.R. 509; (1937) 3 D.L.R. 78; (1937) 2 W.W.R. 488.

3. Licensee charged—offence by person entrusted.]—The accused licensee of a motor-vehicle, entrusted it under a "Drive Yourself" arrangement, to another who drove it to the common danger. The licensee was convicted for that he did "drive an automobile to the common danger upon a public highway". On appeal the County Court Judge quashed the conviction holding that sec. 34 of the Motor-vehicle Act had created a new offence. Held by the Court of Appeal, restoring the conviction, that the accused was properly charged; it made no difference whether he transgressed by himself or by a driver to whom he entrusted the car. Sec. 34 made him "liable as a principal offender" and did not create a new offence distinct from driving to the common danger. *Rex* v. *Patry;* (1935) 52 B.C.R. 1; (1937) 3 D.L.R. 736; 69 C.C.C. 70.

4. Person living with and as a member of owner's family deemed to be agent.]—The defendant's son was wholly responsible for the accident. He was driving his father's car while the latter was absent in Alberta and contrary to his father's instructions. The trial judge awarded damages against the defendant as owner of a car driven by one who was living with and as a member of the defendant's family, under sec. 74A (1) of the Motor-vehicle Act. Held on appeal reversing the decision below that the son was not living with and as a member of the defendant's family. Held, on further appeal to the Supreme Court of Canada, restoring the judgment at the trial, that consent is not a factor, that the defendant's temporary absence from home did not mean that the son had ceased to live with and as a member of his family, and that no question of entrustment arose under sec. 45 of the Act. Sec. 74A, a later enactment has its foundation on ownership. It covers a much wider field than sec. 45 and applies to every person, even to the parent and guardian, when they happen to be owners and when the driver lives with and as a member of the family. The defendant is liable not because he was a father who entrusted the car to a minor, but because his car was driven by a person living with and as a member of his family. *Gonzy* v. *Lees;* (1941), S.C.R. 262; (1941) 3 D.L.R.1; reversing (1940) 55 B.C.R. 350; (1940) 4 D.L.R. 330; (1940) 3 W.W.R. 81.

5. Acquisition of possession of a motor-vehicle with the consent, express or implied of the owner.]—Under sec. 74A (1) of the Motor-vehicle Act one who acquires possession of a car with the consent, express or implied, of the owner, shall be deemed to be the servant of the owner operating the car in the course of his employment. The defendant rented a car to A. on terms in writing that A. would not permit any other person to operate it. A. turned it over to G. who was held to be negligent in driving it and responsible for the plaintiff's injuries. It was contended that the defendant as owner was liable under sec. 74A (1). Held, dismissing the action, there was no express consent—in the contract of hiring, the defendant did what it could to prevent the lending of the car. There was no evidence upon which an implied consent could be based. The lending was entirely without the knowledge of the defendant. *Child* v. *Vancouver Motors U Drive Ltd;* (1941) 1 D.L.R. 75; (1940) 3 W.W.R. 477.

6. Consent under sec. 74A—induced by false statements.]—The defendant Walker

(held to be solely at fault in a motor-car accident) rented a car from the owner, the other defendant, giving the name of another man and exhibiting the other man's driver's license. He also signed the name of the other man to the rental contract. While driving the car he injured the plaintiff. Sec. 74A of the Motor-vehicle Act makes a person driving a motor-car the agent or servant of its owner, if the driver acquired possession of it with the consent, express or implied, of the owner. The trial judge found the owner liable, holding that the owner's rental man intended to give possession of the car to the defendant Walker. The Court of Appeal affirmed the decision of the trial judge. Held on further appeal to the Supreme Court of Canada, affirming the decision below, that an express consent was given, within the meaning of the section, when possession was acquired as the result of the free exercise of the owner's will. If there had been duress the owner would not have been at liberty to exercise his free will. If the car had been stolen, there would be no consent in fact. The word "consent" may have different meanings in different statutes. Here express consent was given by the owner's employees to Walker's possession of the car even though the action of the employees was induced by Walker's false statements. *Terry* v. *Vancouver Motors U Drive Ltd. and Walter,* (1942) S.C.R. 391; (1942) 4 D.L.R. 399; affirming (1941) 57 B.C.R. 251; (1942) 1 D.L.R. 407; (1942) 1 W.W.R. 503; affirming (1941) 56 B.C.R. 460; (1941) 3 D.L.R. 752; (1941) 2 W.W.R. 402.

7. Whether person charged under by-law was entrusted with possession of Vehicle.]—Section 74 of the Motor-vehicle Act makes an owner liable for breach of a municipal traffic by-law by a person entrusted with the possession of the motor-vehicle. Here, the vehicle was found parked and unattended on the street. While the onus was on the owner to prove there was no entrustment the onus did not arise until it was proved that someone was so in possession. Held, quashing a conviction, the car might have been stolen and abandoned on the street. *Rex* v. *Shannon* (1946) 62 B.C.R. 557; (1946) 2 W.W.R. 499, 87 C.C.C. 61.

8. Requirement as to sounding horn-turning signal.]—A member of the armed services was driving an army truck on the rear of which was painted "Caution Right Hand Drive Vehicle—No Signals". He made a left-hand turn at a street intersection without looking in the mirror, but giving a hand signal on the right-hand side of the truck. As he turned he collided with the respondent's taxi which was about to overtake and pass the army truck. The trial judge (Exchequer Court) found the driver of the army truck wholly at fault. Held on appeal to the Supreme Court of Canada, affirming the trial judge's decision, the driver of the army truck had failed to observe the statutory requirement (sec. 3 (j)) of the regulations passed under the Motor-vehicle Act. The warning on the truck was smeared and dirty and there was no evidence that it could be seen by the driver of the other vehicle. There was in the circumstances, viz., a situation where there was no warning of a change of course by the vehicle being overtaken, no reason why the driver of the overtaking vehicle should have sounded his horn. *The King* v. *Anderson* (1946) S.C.R. 129.

See NEGLIGENCE.

See STATUTE.

MUNICIPAL CORPORATIONS.

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VI. ACTIONS BY AND AGAINST, 508.

I. Government and Procedure.

1. Police Commissioners—injunction to restrain.]—The Board of Police Commissioners for Vancouver purported to dismiss the Chief Constable. He obtained an interim injunction enjoining the members of the Board from dismissing him, which was set aside by another judge whereupon the Chief Constable appealed to the Court of Appeal and obtained from that Court an ex parte interim injunction until the hearing of the appeal. Before the last-mentioned interim injunction was served the Board met and passed resolutions ratifying the dismissal and appointing a new Chief Constable. On the hearing of the appeal these facts were disclosed on affidavit and the Court took judicial notice of the action of the Legislature which in the meantime had abolished the Board as it was then constituted. Held, dismissing the appeal, that in the face of a fait accompli, there was nothing to restrain but that there was good cause for depriving the successful respondents of their costs. *Edgett* v. *Taylor*, (1933), 47 B.C.R., 191; (1934) 1 D.L.R. 113; (1933) 2 W.W.R. 465.

2. Status of Board of School Trustees.] —A commissioner was appointed under sec. 467 of the Municipal Act for the District of North Vancouver. The statute vests in him all the powers and authority theretofore vested in or exercised by the Board of School Trustees and provides that the members of the Board (which is by statute a corporation) shall be deemed to have retired from office. Elaborate provision is made in the Public Schools Act for the selection of a successor when a member retires. A writ was issued against the Board and served on the commissioner. He moved to set it aside contending that the Board had ceased to exist. Held, granting the application, the continued existence of the corporation depends so far as the provisions of the Public Schools Act are concerned, upon the existence of trustees selected under that Act. As sec. 467 of the Municipal Act in no way relates the commissioner to the corporation, but merely deprives it of its powers and authority, and vests same in the commissioner, he is not a successor in office. The defendant has ceased to exist as a legal entity. *Porteous v. The Board of School Trustees of the District of North Vancouver* (1935), 49 B.C.R., 476. (See 50 B.C.R. 78 and (1935) 2 W.W.R. 280).

3. Appointment of officials by resolution instead of by-law.]—Where an assessor and collector were illegally appointed but their acts were held as binding against the plaintiff under the de facto doctrine, secs. 184 and 185 of the Municipal Act are not a bar to a claim for a declaratory judgment that no legal appointment was made. The general limitation section (451) would afford a defence to the action after six months. *Cudmore* v. *The Corporation of the District of Salmon Arm*, (1936) 51 B.C.R., 280.

4. Justice not to sit or act "in any case for a city" where there is a police magistrate.]—"Cases for a city" under sec. 407 of the Municipal Act means not only cases where the offence is committed in the city but also cases in which the offender was apprehended within the city, or where the initiatory proceedings were taken there or the trial was proposed to be held there. *Rex* v. *Cross*, (1946) 62 B.C.R. 376; 85 C.C.C. 406.

II. Powers, Duties and Liabilities.

A. In General.

1. Price of water supplied by City of Victoria to Oak Bay.]—By statute passed in 1911 the City was obligated to supply Oak Bay municipality with water at all times and Oak Bay was bound to receive, accept and pay for it. No agreement implementing the terms of the Act was entered into. In 1925 another Act was passed which gave the right to Oak Bay to compel the City to supply water, if so requested and it provided that any dispute as to price should be settled by arbitration. The City without any such request continued by successive agreements to supply Oak Bay with water and the last one expired in 1937. The water was not cut off and in 1938 the City sued for water supplied on the basis of charges made to City consumers. Oak Bay counter-claimed and invoked the 1911 agreement which contained a clause authorizing the Comptroller of Water Rights to fix the price under certain conditions. Held, this clause had never come into operation; there could be no arbitration because no request had been made under the 1925 Act; the obligations to deliver and pay for the water under the 1911 Act remained unimpaired, but in the action as framed there was no means by which the price could be deter-

mined. *Corporation of the City of Victoria* v. *Corporation of the District of Oak Bay* (1939) 54 B.C.R. 517; (1940) 2 D.L.R. 260.

2. Right of property-owner to open roadway at own expense.] — Under sec. 323 of the Municipal Act, no person shall undertake any construction or work on a highway in a municipality without the consent of the Council. If the Council unreasonably withholds such consent a judge may give relief. Held a property-owner merely as such has not, and never has had, any right to construct works of any kind on the highways in a municipality. Apparently the section was passed in respect of certain companies who by various statutes had obtained authority to do construction work upon such streets. In *re Municipal Act and George Frederick Strong,* (1941), 57 B.C.R. 81; (1942) 1 D.L.R. 524; (1942) 1 W.W.R. 190.

3. Reservation of easement by City of Vancouver — whether registrable.] — The City of Vancouver sold a lot and in the conveyance the purchaser covenanted with the City (a) not to require support for the land, (b) not to spill earth on the abutting street, (c) that the City might enter and remedy any default and charge the cost to the purchasers. These covenants were to be binding on the persons in whom, from time to time, the lands might be vested. The City claimed to register its interest as a charge. The registrar refused. The judge held that the City had under the conveyance an interest in land proper to be registered under Section 148 of the Land Registry Act. Held on appeal, affirming the decision below, the registrar's contention that the covenants did not comprise an easement and hence were not registrable, was not made out. The fact that the City held no certificate of title to its streets (although owned by it in fee simple) does not deprive it of its rights under sec. 148. *City of Vancouver* v. *Registrar, Vancouver Land Registration District* (1944) 61 B.C.R. 211; (1945) 2 W.W.R. 348.

4 Status of Public Utilities Commission Under Public Utilities Act and Motor Carrier Act—Certificate of Public Convenience and Necessity.]—The two acts, generally speaking, confer administrative and not judicial duties upon the Commission. The judicial function imposed by some sections is not a factor in this case where matters of expediency and policy are involved. In deciding whether a certificate of convenience and necessity is to be granted, the Commission does not decide between the legal rights of parties—neither party has any right except to apply. The consent of the municipality concerned is necessary under both Acts before an applicant has any status to operate. *The Veterans' Sightseeing and Transportation Co. Ltd.* v. *Public Utilities Commission,* (1945) 62 B.C.R. 131.

B. As to Highways.

1. Failure to give notice of street accident.]—Under the Vancouver Incorporation Act a 60-day notice to the City is required. The want or sufficiency of the notice may be waived by the Court if (a) there was reasonable excuse for the failure, and (b) the City was not prejudiced. The plaintiff had not given the required notice but suggested that the pain and worry she had suffered would be an excuse. Evidence was given that her daughter had orally reported the accident to an employee of the City who had nothing to do with the condition of the streets. Held, dismissing the action, that the onus both to show a reasonable excuse and to show that the City was not prejudiced was on the plaintiff and she had failed on both counts. *Schuman* v. *City of Vancouver,* (1934), 48 B.C.R. 191.

2. Duty to repair—City of Vancouver.]—The plaintiff alighting from a street car claimed damages for failure to keep the street in reasonable repair as required by sec. 320 of the Vancouver Incorporation Act. Her evidence was that one of her heels went into a hole alongside the track causing her to fall and suffer injuries. She was not able to identify the exact place of the accident with any certainty but it was somewhere in the unpaved part of the street adjoining the car tracks. Held, dismissing the action, that the hole in the dirt could have been caused by a heavy truck which other traffic might have filled up. It would be placing an impossible burden on the City to say that a dirt road was not in a reasonable state of repair, which had a hole in it of the kind described. *Reynolds* v. *City of Vancouver,* (1937) 52 B.C.R. 275; (1937) 3 W.W.R. 46.

3. Case of failure to keep in reasonable repair or of nuisance.] — Where a post, bearing the name of the street, erected on a highway fell and injured the plaintiff as she passed, the claim was one for failure to repair under sec. 320 of the Vancouver Incorporation Act, rather than one for nuis-

ance, and the limitation imposed by that section applied. The action was dismissed as being out of time. *Long* v. *City of Vancouver,* (1938) 52 B.C.R. 547; (1938) 3 D.L.R. 785.

4. Reasonable state of repair—Vancouver Incorporation Act—sec. 320.]—Where the unevenness of a paved sidewalk in the City of Vancouver did not exceed one-half inch, it was held that the street was in a reasonable state of repair under sec. 320 of the Act. *Lammers* v. *City of Vancouver* (1936) 53 B.C.R. 373; (1939) 1 D.L.R. 800; (1939) 1 W.W.R. 129.

5. Reasonable repair—unevenness of the panels in concrete sidewalk.]—A panel or slab in the sidewalk had sunk so that there was a rise as between it and the adjoining one. At most the difference was less than an inch. The defendant had chiselled off the edge and thus reduced the abruptness of the rise. The trial judge held that there was a lack of reasonable repair, as required by sec. 320 of the Vancouver Incorporation Act, and gave damages. Held, on appeal reversing the decision below, that there was no evidence to support a finding of want of reasonable repair within the meaning of the section. The defect was obvious to anyone exercising ordinary powers of observation. The plaintiff had used the sidewalk for a long period of time. It had been inspected regularly. No one should expect an absolutely smooth surface. *Gregson* v. *City of Vancouver,* (1939) 55 B.C.R. 40; (1940) 3 D.L.R. 105; (1940) 2 W.W.R. 85; reversing (1939) 54 B.C.R. 21; (1939) 2 D.L.R. 750; (1939) 1 W.W.R. 347.

6. Reasonable repair—City of Vancouver.]—The obligation of the City under sec. 320 of the Vancouver Incorporation Act is to keep a street in such a reasonable state of repair that those requiring to use it may, using ordinary care, pass to and fro upon it in safety. In order to succeed in a claim for damages, there must be shown not only to be a danger but also a concealed danger in the sense that the danger would not be apparent to a pedestrian exercising reasonable powers of observation and taking ordinary care for his own safety. *Stewart* v. *City of Vancouver,* (1939) 55 B.C.R. 50; (1940) 3 D.L.R. 112; (1940) 2 W.W.R. 121 affirming (1939) 1 D.L.R. 799; (1939) 1 W.W.R. 76.

7. Judgment against City for non-repair of street—remedy over against adjoining owner—conditions of.]—Under the Vancouver Incorporation Act, the City has a remedy over where it is liable for an obstruction on the street if such obstruction was put there by some person other than a servant or agent of the City. The obstruction here was a stone which had been dislodged from a rockery near a sidewalk. Damages were given against the City and the adjoining owner. The City claimed in third-party proceedings to be indemnified by its co-defendant. The trial judge dismissed the claim against the third party. Held on appeal, affirming the decision below, the section relied on (229) had no application because (a) it was not shown that the adjoining owner either had erected or maintained the rockery; (b) the City was found to be liable for its injury (75%) and as a corporation can act only through agents, the negligence so found could only have been that of the City's "servants or agents" and the section in terms does not apply. *City of Vancouver* v. *Putnam,* (1943) 59 B.C.R. 462; (1944) 1 D.L.R. 422.

C. As to Water.

1. Augmented flow of water in ditch.]—The municipality diverted water from a highway into a stream thereby causing damage to the plaintiff through whose property the augmented stream flowed lower down. Sec. 299A of the Municipal Act bars the commencement or continuance of any action in respect of the user of a ditch authorized by sec. 297. The latter section confirms the right of a municipality to collect water from a highway and discharge it into the most convenient natural waterway. Held the sections are an absolute bar and 299A is retroactive. *Murray v. District of West Vancouver,* (1937) 52 B.C.R. 237; (1937) 3 W.W.R. 269.

2. Drainage system—prescriptive right to spill water on plaintiff's land.]—A municipality by means of a ditch brought water to and spilled it on the plaintiff's property. It claimed a prescriptive right to do so. The onus of showing the necessary 20 years of uninterrupted user was on the defendant and it had not been discharged. Moreover, the ditching was of a temporary character and could not give rise to the right claimed here. *Fraser* v. *City of Vancouver,* (1942) 58 B.C.R. 81; (1942) 3 D.L.R. 728; (1942) 1 W.W.R. 608.

D. As to Contracts.

1. Commissioner for defaulting municipality.]—The appointment of a commissioner under sec. 467 of the Municipal Act, is not a matter of discretion and the order should be made upon its being shown that there has been failure by a municipality to provide for the payment of either principal or interest on its debentures. *Whitehead* v. *The Corporation of the District of North Vancouver,* (1932) 46 B.C.R. 430.

2. Debentures payable in Canadian funds or sterling equivalent.]—No matter in what foreign currency an obligation is payable, in Canada any judgment for it must be an amount in the currency of this country. Where debentures were payable in dollars or in sterling "at the rate of $4.86 2/3 to the one pound sterling" and English money was at a premium when they matured, the holder was not entitled to more than the number of dollars that would be produced by the stipulated rate. *The Royal Trust Co.* v. *The Corporation of the District of Oak Bay,* (1934) 48 B.C.R. 514; (1934) 4 D.L.R. 697; (1934) 3 W.W.R. 210.

3. Mutual obligations—term going to root of contract.]—The plaintiff agreed to build a terminal warehouse and the defendant municipality guaranteed a profit for the plaintiff for ten years. The plaintiff failed to make a profit and sued the municipality. It was shown that the failure was due to the fact that the plaintiff had not put up the necessary working capital as it had agreed to do. Held, dismissing the action that the failure of the plaintiff went to the root of the contract and that it not having carried out its obligation, could not compel performance of the defendant's guarantee. *Victoria Cold Storage & Terminal Warehouse Co.* v. *Victoria* (1938), 2 D.L.R., 798; (1938) 1 W.W.R. 742.

4. Victoria City Debt Refunding Act.]—A provincial act which enabled a municipality to extend the time for repayment of its debentures and alter the rate of interest during the extended period, was held to be intra vires as, in effect, an extension of the moratorium legislation passed from time to time by the Legislature since 1914. *Day* v. *Corporation of the City of Victoria* (1938), 53 B.C.R. 140; (1938) 4 D.L.R. 345; (1938) 3 W.W.R. 161.

III. By-Laws.

A. In General.

1. Municipal Act — By-law resuming and expropriating—long user.]—Where under the Municipal Act a municipality was authorized both to resume the use of lands reserved by the Crown as highways up to a certain acreage and to expropriate lands for the same purpose, and it went beyond the acreage allowed to be resumed, the expropriating part of the by-law was held to be severable so as to validate the by-law as to the whole area. After a lapse of forty years with the records destroyed and the parties concerned no longer alive, there is an irresistible presumption that the proper steps were taken. *Riches* v. *Richmond Township,* (1933) 3 D.L.R. 437.

2. Money by-law based on rateable property including improvements—subsequent exemptions of improvements.] — A municipality in 1910 passed money by-laws, duly assented to by the electors, to borrow substantial sums for waterworks purposes. Each by-law provided for the levy of an annual tax "on all the rateable property" in the municipality. In the 1932 and 1933 rating by-laws, the debt still being unpaid, the Council exempted improvements from taxation, with the result that the plaintiff, with only unimportant improvements, was adversely affected in the amount of her taxes. She sued for a declaration that the taxes for 1932 and 1933 were invalid and for an injunction. The trial judge dismissed the action. Held, on appeal, affirming the decision below, the "rateable property" might vary from year to year and under sec. 231 of the Municipal Act express power was given the Council to limit it to land alone. The rating by-laws of 1932 and 1933 were passed under the authority of that power and provided for a legal assessment. *Macdonald-Buchanan* v. *The Corporation of the District of Coldstream* (1934), 49 B.C.R. 163; (1935) 1 D.L.R. 213.

3. Attacked for uncertainty, discrimination, unreasonableness and as being ultra vires—attitude of the Courts.]—A municipal by-law will not be held bad for uncertainty if the intention is reasonably clear. By-laws are benevolently interpreted by the Courts and supported if possible. Where the Legislature has given the Council the power by by-law to discriminate it need not be prefaced by another by-law in terms authorizing it to do so. Unreasonableness is by

Section 339 of the "Vancouver Incorporation Act" removed as a ground of attack. The judgment of a Council (in matters within its jurisdiction) as to the relative balance of convenience or detriment to different persons if bona fide exercised in what it believes to be the public interest, will not be interfered with by the Courts which have no right to interfere unless the Council purposes to transcend the limits of the jurisdiction conferred by the Legislature. In *re "Vancouver Incorporation Act"*, 1921, and in *re Bent* (1940) 2 W.W.R. 697.

4. Whether the "Hours of Work Act" supersedes the "Vancouver Incorporation Act" as to hours of taxicab operation by owners.]—While the "Hours of Work Act" prescribes maximum working hours for employees, the hours fixed by the Vancouver by-law (under powers given by the "Vancouver Incorporation Act") for employers remains unimpaired. If a subsequent statute merely creates an exemption or exception from the operation of a previous statute, or modifies its operation by the annexation of a condition, the previous statute is not necessarily held to be repealed. In *re "Vancouver Incorporation Act*, 1921", and in *re Bent* (1940) 2 W.W.R. 697.

5. Effect of municipal by-law on provisions of Motor-vehicle Act.]—The provision (sec. 11) of the Motor-vehicle Act requiring motorists to stop behind street cars when discharging passengers, cannot, it seems, be altered by a City by-law. The control of the streets enjoyed by the municipality cannot alter the civil rights of citizens as defined by the Act. *Macdonald* v. *Bailey*, (1934) 1 W.W.R. 342.

6. Whether Milk Act or Vancouver Incorporation Act prevails—pasteurization of milk.]—The Vancouver Incorporation Act enabled the City Council to pass by-laws for regulating and controlling all persons selling or dealing in milk by retail. The Milk Act gave municipalities (including Vancouver), the power to prohibit the sale of unpasteurized milk, except Grade A milk. Held, on a reference under the Constitutional Questions Determination Act, that the City had not the power to prohibit the sale of all unpasteurized milk. The Milk Act constitutes a complete code of standards of fitness of milk for human consumption intended to have general application throughout the Province including Vancouver. Assuming that the City's powers were wide enough to require pasteurization, those powers are repugnant to and inconsistent with the provisions of the Milk Act and must be taken to have been repealed by implication. And this will be so whether the Vancouver Incorporation Act is special or general. Semble, the Milk Act is special as setting up a complete code relating to milk supplied for human consumption; the City Act is general giving powers of a general nature to the City for the control of a variety of foodstuffs including milk. In *re Constitutional Questions Determination Act* and in *re Vancouver Incorporation Act*, 1921; (1945), 62 B.C.R. 114; (1946) 1 D.L.R. 638; (1946) 1 W.W.R. 177.

7. Motor-Vehicle Inspection—proof of "operation" of vehicle.]—The Vancouver Motor Vehicle Inspection By-law requires periodical inspection of motor vehicles. It provides that no person shall operate a motor-vehicle on the streets of the City without having affixed thereto a current certificate from the proper official. A motor-vehicle of which the accused was the registered owner was found parked on a City street. There was no evidence that any person was in possession of or operating the vehicle. Held, quashing the conviction, as it was not proved that anyone was in possession, the onus put upon the owner by sec. 74 of the Motor-vehicle Act did not come into play. The car might have been stolen and abandoned on the street. *Rex v. Shannon*, (1946) 62 B.C.R. 557; (1946) 2 W.W.R. 499; 87 C.C.C. 61.

8. Obstructing a police officer—"tagging" on city street—refusal to desist.]—The accused was convicted of wilfully obstructing a police officer in the execution of his duty. The occasion was a tag-day in Vancouver and the accused with others was standing on street corners soliciting contributions in support of a strike. There was no law banning such soliciting but a City by-law forbade persons from standing or loitering on any street in such a manner as to obstruct or impede or interfere with traffic thereon. An officer ordered the accused to move on which he refused to do. The evidence of impeding or obstruction was general in character and did not refer specifically to the accused. Held, on appeal to the Court of Appeal, affirming the conviction, that persistence in doing what a person is told by a police officer in the execution of his duty, not to do, is obstruction of the officer. Held on further appeal to the Supreme Court of Canada, quashing the conviction, the evidence of infraction of the

by-law was not brought home to the accused. The evidence did not show that the police in directing the accused to move, was proceeding on any anticipated obstruction of the public. It was not obstruction but tagging which was in the mind of the police. It cannot be said that tagging per se is obstructing. The evidence proved only tagging and there was no by-law against tagging. *Rex* v. *Johanson,* (1947) 4 D.L.R. 337; 89 C.C.C. 305; reversing (1946) 63 B.C.R. 393; (1947) 2 D.L.R. 458; 87 C.C.C. 201.

9. Half-holiday for shops—classes to be taken into account.]—Under sec. 7 of the Shops Regulation and Weekly Half-holiday Act a council may by by-law make regulations as to the classification of shops and as to the evidence respecting the proportion of persons signing an application for a half-holiday by-law. The Council of Kamloops passed such a by-law and in it provided for three classes and then lumped all other businesses in a fourth class. The by-law also made the certificate of the Licence Inspector respecting the proportion of signers, conclusive evidence thereof. Held, quashing certain sections of the by-law, the power to classify was for convenience and must not depart from classes according to their natural meaning. It was not the intention that fruit-dealers and milliners could be grouped together so that milliners could have a say as to whether fruit-dealers should be required to close. Moreover, the certificate of the Licence Inspector could not be made conclusive evidence by the by-law. It was proper to make it evidence, but not conclusive evidence. *Re Kamloops City By-law No.* 990 (1947) 2 D.L.R. 541.

B. Building By-Laws.

1. Building by-law — Council exceeding powers given by Municipal Act.]—Where a Council instead of providing by by-law for dealing with applications for building permits, in the manner prescribed by the Act, sets up machinery of its own for the purpose, a mandamus will lie against a building inspector requiring him to issue the permit. In *re Homfray and Building Inspector of the City of Kamloops* (1933) 46 B.C.R. 475.

2. Refusal of permit by Building Inspector—"requiring" as distinguished from "regulating".]—The Municipal Act enables municipal councils to pass by-laws requiring owners to obtain a building permit before commencing the erection of a building. Under such a by-law the accused was convicted of erecting a part of a building without a permit. On certiorari, a judge quashed the conviction and held the by-law to be invalid. Held on appeal, reversing the decision below, that on the question of jurisdiction, which was the only relevant one on certiorari, the magistrate under the authority of sec. 59 (52) of the Municipal Act and sec. 2 (1) of the by-law was clothed with the necessary jurisdiction to try and convict. There was here no prohibition under the guise of "regulating"—the word is "requiring" which is synonymous with "demanding". *Rex v. Nychuk* (1939) 54 B.C.R. 30; (1939) 3 D.L.R. 456; (1939) 2 W.W.R. 257; 72 C.C.C. 97; reversing (1938) 53 B.C.R. 272; (1939) 1 D.L.R. 797; (1939) 1 W.W.R. 108.

3. Mandamus not necessary where by-law invalid.]—Where a municipal by-law has been declared ultra vires and a building permit had been refused thereunder, there is no need for a mandamus to compel the issue of the permit. The by-law being invalid, no permit is required. *Rex v. Nychuk (No. 2),* (1939) 1 D.L.R. 798; (1939) 1 W.W.R. 112.

4. Building by-law—duty of building inspector to issue permit if relevant by-laws complied with.]—Where a by-law provides for the issue of a building permit by the Building Inspector, if satisfied that the applicant has complied with all by-laws, the Inspector cannot where there is such compliance, refuse the permit on the ground that the Council so directed, and a mandamus will issue. *The Murray Co. Ltd.* v. *District of Burnaby* (1946) 2 D.L.R. 541.

C. Zoning By-laws.

1. Zoning by-law as affecting Indian Reserve.]—On an application to set aside an award in respect of the expropriation of land on an Indian Reserve within the City of Vancouver, it was claimed that the arbitrators had wrongly taken into account the effect on values caused by Zoning By-laws. Whether or not municipal zoning by-laws extend to an Indian Reserve, it was held that in this case the arbitrators did not take them into account and the award was upheld. *The King* v. *City of Vancouver* (1933) 47 B.C.R. 243.

2. Building and Zoning by-laws—basement—three-storey apartment house.] — The Building by-law of the City of Vic-

toria defines a basement to be the habitable space between two floors, the lower floor of which is placed more than one foot, but less than five feet, below the grade of the adjoining ground. Held, that part of the ground floor may be basement and another part may not. The floor of the part in question is, or will be, less than one foot below the grade and thus is not within the definition. In counting the storeys the basement should not be included, hence this remains a two-storey building. The changes contemplated will not add to the height or weight of the building. The Zoning by-law requires a setback of fifteen feet for three-storey apartment houses; having found that this remains a two-storey building, the Zoning requirement does not apply. *Johnson* v. *Grossman,* (1943) 59 B.C.R. 88; (1943) 3 D.L.R. 134; (1943) 2 W.W.R. 314.

3. Zoning by-law—whether Land Registry Act overrides.]—Under the powers of the City of Vancouver it passed a Zoning by-law fixing the minimum area of lots. An owner had divided his property into parcels smaller than those permitted and applied to the Registrar of Titles to be registered. The question was did the by-law govern the matter of registration, or did the registrar as the agent of the Legislature. Held, on appeal that registration is a matter for Registrars of Titles under the Land Registry Act and the City's general powers are necessarily related to the superior jurisdiction of the registrar. It was never intended that the by-law should take away the discretion vested in the registrar. The municipal statute does not expressly repeal the relevant sections of the Land Registry Act and there is no repeal by implication. In *re Land Registry Act* and in *re R. D. J. Guy,* (1943) 59 B.C.R. 406, overruled. *Caponero* v. *Brakenridge,* (1943) 60 B.C.R. 1; (1944) 1 D.L.R. 773; (1944) 1 W.W.R. 481.

4. Zoning by-law—direction by Council to withhold building permit pending change in zoning.]—Under sec. 15 of the Town Planning Act, a Council may hold up a building permit for two months if an application for re-zoning has been made under sec. 11. The time runs from the date of the receipt of the application for the permit and not from the date of the application to re-zone. *The Murray Co. Ltd. v. District of Burnaby* (1946) 2 D.L.R. 541.

5. Powers of Zoning Board of Appeal—Relaxations.]—The Town Planning Act sets up two bodies to deal with zoning which co-exist side by side. The council may enact zoning by-laws and the Board under sec. 16 may, while adhering to the spirit of the by-laws, make such relaxations as special cases call for, endeavouring to see that substantial justice is done and that the interests of the individual are not unduly or unnecessarily sacrificed for the benefit of the community. "Relaxations" are not equivalent to "amendments" and the Board has jurisdiction to relax the rigours of a zoning by-law. In *re Zoning by-laws, City of Kamloops* (1935) 3 W.W.R. 206.

D. Effect of Failure to Enforce.

1. Permitting cars to be unlawfully parked on city streets.]—The infant plaintiff while leaving school was struck by a car driven by a third party. There were several cars parked parallel to the curb on the street which she attempted to cross. In an action for damages against the City of Vancouver, it was claimed that the cars so parked constituted a common law nuisance for which the City was liable and that they amounted to a state of disrepair of the street under sec. 320 of the Vancouver Incorporation Act. A city by-law prohibited parking during school hours on the school side of any street fronting on the school grounds. Held, dismissing the action, that the breach of a permissive by-law such as the one in question, does not render the city liable; if a parked car was a common law nuisance, the person parking it would be liable but the city would only be responsible if it knew, or might have known, of it and permitted it to continue, and there was no evidence of that; even if it was a nuisance its presence on the street was not a failure on the party of the city to keep the same in reasonable repair under sec. 320. *Bertrand* v. *Neilson and City of Vancouver* (1934), 49 B.C.R. 150; (1934) 3 W.W.R. 433.

2. Nuisance—whether failure of municipality to act under a by-law gave rise to damages.]—In a claim for damages against a municipality by reason of a nuisance caused by defective sewage disposal it was contended that a by-law attached responsibility to the municipality to prevent or abate the nuisance, and that not having done so the corporation became liable to any one who had suffered special damage in consequence. Held, that would make the City liable for a nuisance, however caused, if it arose in consequence of a breach of the by-law. It was not the intention of the by-

law to create, for the benefit of individuals, any right enforceable by action in the circumstances here. *Wilson* v. *Corporation of the City of Greenwood,* (1946) 62 B.C.R. 549; (1946) 3 D.L.R. 780; (1946) 2 W.W.R. 678.

IV. Licenses.

1. Status of unlicensed taxi-driver on highways in City of Vancouver—ownership of street.]—A taxicab driver who, contrary to a by-law, uses the streets without holding the licence required by the City by-law is not a trespasser and can recover for failure to keep the streets in reasonable repair. In Vancouver the fee simple of the streets is vested in the municipality. The City is not as a result the owner in the full sense of the word. It holds the streets as trustee for the public, and they remain subject to the right of the public to "pass and repass". *Burchill* v. *City of Vancouver* (1932) S.C.R. 620 affirming (1932) 45 B.C.R. 169; (1932) 1 W.W.R. 641.

2. Licensing of vending machines — whether powers under Vancouver Incorporation Act are adequate.]—The City of Vancouver has power (subsection 88 of sec. 163) to regulate and license slot machines and devices for selling "goods, wares, merchandise or articles". It passed a by-law requiring persons keeping machines and devices emitting music, playing games, etc. to have a licence. Held, under the power given, only machines and devices selling "goods, wares, merchandise or articles" could be the subject of licensing. *Rex v. Wakely,* (1943) 3 W.W.R. 481; 80 C.C.C. 368.

4. Carrying on business—agent.]—The accused was convicted of carrying on a business in the City of Vancouver without a licence. The phrase "carrying on a business" was held to mean carrying on a business of the accused and not that of someone else. Here the business was that of the Seattle Company who rented and paid for the use of the office. The provision in the Summary Convictions Act that a person who aids or abets a party to an offence is himself a party, did not avail as no guilty knowledge was proved. The questions in a case stated were answered adversely to the validity of the conviction. *Rex v. Coy,* (1938) 53 B.C.R. 3; (1938) 2 D.L.R. 796; (1938) 1 W.W.R. 784.

4. Licence under Highway Act—Hope to Vancouver.]—The holder of a provincial licence to operate a freight truck from (terminus) Hope to (terminus) Vancouver on the transprovincial highway, is not entitled to make deliveries and pick up freight in Vancouver without having the ordinary city license. *Rex and City of Vancouver* v. *Woods* (1939) 54 B.C.R. 503; (1940) 2 D.L.R. 477; (1940) 1 W.W.R. 629, 73 C.C.C. 386; reversing (1939) 54 B.C.R. 25; (1939) 2 D.L.R. 749; (1939) 1 W.W.R. 337; 72 C.C.C. 136.

V. Taxation.

A. In General.

1. Recovery from owner abroad.]—The owner resided and was domiciled in England. The municipality sued for payment of taxes and enforcement of the lien for taxes. Held, on an application to set aside an order for service ex juris, that such a claim is one to enforce an obligation affecting lands within the jurisdiction, and was properly made. *The Corporation of the District of Coldstream* v. *Macdonald-Buchanan* (1934), 48 B.C.R. 409; (1934) 2 W.W.R. 383.

2. Appointment of officials by resolution instead of by-law—de facto doctrine.]—The assessor and collector of the defendant municipality were appointed by resolution instead of by by-law as required by the Municipal Act. In an action for a declaration that no taxes were payable, it was held that the de facto doctrine applied, and where, as here, the acts of a person assuming to exercise the functions of an office, to which he has no legal title, are, as regards third persons, that is to say, with reference to all persons but the holder of the legal title to the office, legal and binding. The acts of the persons who acted as the assessor and the collector were therefore as against the plaintiff legal and binding. The assessment and rolls were good. *Cudmore v. The Corporation of the District of Salmon Arm* (1936), 51 B.C.R. 280.

B. Assessment.

1. "Actual value" where no market activity.]—On an assessment appeal to a Judge of the Supreme Court under the Municipal Act, it was held that the actual value of the building under appeal was what could be

got for it at a forced sale. The property consisted of a new building specially designed by its owner as a college and there was at present no possibility of a sale. Held, on appeal, reversing the decision below, that the test of what a purchaser would pay at a forced sale was an erroneous one as was also the principle applied by the Court of Revision that the dominant factor should be the structural cost of the building. The proper test is that of value in exchange and where there is no market in sight, it is what a prudent person attempting to measure the forces at work making for a present shrinkage and again making for an increase, would be likely to pay as an investment in the property. *The Bishop of Victoria* v. *The Corporation of the City of Victoria*,.(1933) 47 B.C.R. 264; (1933) 4 D.L.R 524; (1933) 3 W.W.R. 332.

2. Appeal from Court of Revision to judge—when time begins to run.]—Sec. 223A of the Municipal Act provides that where a person leaves with the clerk an address to which notice may be sent, the clerk shall send to that person a notice setting out the decision of the Court. Sec. 228 (2) requires notice of appeal to be served upon the clerk within one week after the decision complained of. Held a solicitor's letter giving notice of appeal to a Supreme Court Judge may constitute a notice under sec. 223A and the time runs from the date when the clerk gives the notice "setting out the decision of the Court". *Re Grice and Municipal Act Assessment Appeal* (1933) 2 D.L.R. 206.

3. Assessment of three parcels together without valuing each.]—Two lots in Vancouver and the foreshore in front of them were treated by the assessor as a single parcel and valued in bulk notwithstanding a section of the Vancouver Incorporation Act requiring each and every rateable parcel to be set down on the assessment roll. Such an assessment will be invalid unless there is some curative section to prevent that result. Sec. 16 of the Vancouver Enabling Act which validates "rates" is not explicit enough to effect a cure. Nor will sec. 55 of the Vancouver Incorporation Act validate the assessment; that would be contrary to the principles laid down with regard to remedial sections. Sec. 226 of the last-mentioned Act barring actions after 12 months will not prevent an injunction to restrain a tax sale of property based on illegal assessments and taxes. *Vancouver Waterfront Ltd.* v. *City of Vancouver* (1936) 1 W.W.R. 248.

4. Railway right of way—assessment for school purposes.]—Sec. 223 (4) of the Municipal Act provides that single-track railway shall be assessed at $5280 per mile. Sec. 114 of the Public Schools Act provides that railway right of way shall be valued for the purposes of that Act at $3000 per mile. The railway company appealed with respect to its right of way not within the City of Vernon, but within the Vernon municipal school district. Sec. 70 of the Public Schools Act makes the assessment for such a school district the same as that of the municipality so far as school purposes are concerned. Held, affirming the assessment as fixed by the Court of Revision, that sec. 114 of the Public Schools Act applies only to rural school districts, as is indicated by the headings in the statute. In *re Vernon Municipal School District and Canadian Pacific Railway Co.* (1939) 54 B.C.R. 98; (1939) 4 D.L.R. 774; (1939) 3 W.W.R. 47.

5. Part of bridge in municipality—Municipal Act, sec. 223.]—Improvements must be affixed to the soil (Sec. 2 of the Municipal Act), i.e., they must be situate within the vertical planes of the boundaries of the parcel of land under consideration. Here a portion only of the bridge is an improvement on the property within the municipality. Without evidence that the portion of the bridge would attract an additional sum from an investor no value can be assigned to it. *Re Lions Gate Bridge Assessment* (1940) 1 W.W.R. 624; (1940) 2 D.L.R. 597.

6. Bridge—partly in and partly outside the municipality—method of assessment.]—Of the First Narrows Bridge only some 900 feet is within the City of Vancouver. Assuming that it could be looked upon as an "improvement" the assessment should not treat the portion of the bridge within the City as part of and connected with those portions lying outside its taxing authority. The portion within the City must be valued as so much steel, cable, cement and other material used in its construction. In place, as a disconnected part of a bridge, it would be valueless and not worth dismantling. In the result the so-called "scrap-iron" rule was applied and the part of the bridge within the city held of no assessable value. The *First Narrows Bridge Co.* v. *City of Vancouver,* (1940) 55 B.C.R. 304; (1940) 4 D.L.R. 467 (See *King* v. *Bridge River Power Co. Ltd.* (1948) 4 D.L.R. 593); (1940) 3 W.W.R. 272.

7. Actual value—elements to be taken into account.]—In determining actual value for assessment purposes under sec. 223 (1) of the Municipal Act several factors should be taken into account in addition to the selling value, i.e., the price the property should bring in the existing market. In respect of buildings the original cost of construction, the replacement cost and the depreciation should have consideration. The trend of business and traffic, assessments of other neighbouring properties and the revenue earned are also to be considered. In *re Municipal Act and Dixon* (1940), 55 B.C.R 546.

8. Fixtures annexed to any building or structure—sec. 2 of the Municipal Act.]—Improvements include "all machinery and fixtures annexed to any building or structure". Certain machines, the switchboard and other equipment of the appellant Telephone Company were held by the assessor to be improvements within the definition. The chief items were all attached or annexed to different parts of the building—whether by wood screws, metal screws or lag screws. Some of the items merely rested on the floor and were not actually attached. Held, affirming the assessment, that having regard to the annexation and the object and purpose and intention of the annexation, the articles were improvements. They were permanently put in place by the owner of the building. In *re Okanagan Telephone Co. and City of Kelowna.* (1941) 1 W.W.R. 545.

9. Actual value—facts to be taken into consideration.]—Where there is no market the actual value will be what a prudent person, attempting to measure the forces at work making for shrinkages and increases will pay as an investment. The assessor should look to the past, present and future. He should consider sales of similar property, the chances of successful subdivision, war conditions, the competition of other properties. Held, there was no actual market in sight for the property. It was not an opportune time to sub-divide. There was much competing property. The assessment was reduced from $82,000 to $50,000. In *re the Municipal Act* and in *re Hudson's Bay Co's Assessment* (1942) 2 W.W.R. 1.

10. Actual Cash Value—Vancouver Incorporation Act—principles of assessment.]—The property was bought in 1929 for $300,000 and the office building erected on it cost $850,000. It was assessed for the year 1945 at $557,000 in all. The property failed from the start to pay interest on the mortgage of $530,000, and in 1944, the mortgagee sold it for $412,000. Held, allowing the appeal, the sale by the mortgagee most accurately represented the actual cash value. That term does not include a forced sale, a speculative sale price or a sale at an excessively high or unduly low price. Actual cash value, fair market value, actual value—all mean the same thing. Exchangeable value has been generally accepted as the most practical indication of value for taxation purposes. Such value is governed by (a) past or present sales or offers; (b) the property's revenue producing record; (c) present value of prospects within the immediate future. *Stock Exchange Building Corporation Ltd.* v. *City of Vancouver* (1945) 61 B.C.R. 205; (1945) 2 D.L.R. 663; (1945) 2 W.W.R. 248.

11. Appeal against assessment of improvements—judge voids assessment roll.]—Owners of property at Ladysmith appealed to the Court of Revision against the assessment on improvements. Failing to get relief they appealed under sec. 243 of the Municipal Act to a County Court judge. The judge not only allowed the appeal, but declared the entire assessment roll for the year null and void and ordered a new one to be prepared. Held, on appeal by the City of Ladysmith, that the question of the validity of the roll was not before him and the declaration voiding it was set aside. The owners disclaimed any interest in the declaration so far as it affected any property but their own, and no costs were awarded against them. *Giovando* v. *City of Ladysmith* (1945) 61 B.C.R. 478.

C. *Crown Property.*

1. Taxation of tenant of Crown property—tenant on Indian Reserve.]—Under the Vancouver Incorporation Act, all real property in the city is liable to taxation, with certain exceptions. One is property vested in His Majesty in trust for a band of Indians, but only if occupied officially or unoccupied. Here the occupation was by a Chinese gardener holding by lease from an Indian. Under sec. 46 the holder of the right or interest was personally liable for the tax but no lien for taxes attached to the property. The trial judge found that the lessee was liable personally for the tax and that by virtue of sec. 46 (3a) the

amount was the same as if it was privately owned. Held, on appeal, affirming the decision below, that the power of the Legislature to pass the enactment was well established. *City of Vancouver* v. *Chow Chee* (1941) 57 B.C.R. 104; (1942) 1 W.W.R. 72.

2. Land leased to the Crown—buildings erected thereon by the Crown—whether taxable.]—The plaintiff railway company was the registered owner of a large parcel of real property in Vancouver. It leased a portion to the King in the right of Canada and a second portion jointly to the King in the right of Canada and the King in the right of British Columbia. On these portions the Crown erected substantial buildings affixed to the land. The City taxed the railway company for the whole registered parcel in the usual way, including the value of the buildings in the assessment. It was contended that the buildings as property of the Crown were non-assessable and non-taxable. The trial judge gave effect to that contention and the Court of Appeal upheld him. Held on further appeal to the Supreme Court of Canada, reversing the decision below, that no attempt had been made to impose any liability on the Crown. The railway company was clearly assessable as registered owner and the value of the buildings was properly taken into account in measuring the value of its interest. For the purposes of the relevant statutes the buildings were part of the land and the property of the owner of the registered fee, subject to the rights of the lessees under the leases. Even an express agreement that the buildings were to remain chattels would operate only in the way of an estoppel between the parties, and without effect as to the taxing authority. The leasehold interest was neither taxed nor made the subject of a tax lien. The Crown's exemption remained unimpaired. *Attorney-General of Canada* v. *City of Vancouver* (1944) S.C.R. 23; (1944) 1 D.L.R. 497 reversing; (1942) 58 B.C.R. 371; (1943) 1 D.L.R. 510; (1943) 1 W.W.R. 196.

D. *Tax Sale.*

Tenant of former owner—damages to contents on demolition of building.]—An owner of dilapidated premises having rented them to the plaintiff failed to pay his taxes with the result that the property fell to the City of Vancouver which in due course acquired title to it. The plaintiff continued to make use of the building on the premises for the storage of junk. The City as owner undertook to demolish the building but in order to give the plaintiff time to remove his goods left the part of the building in which they were stored intact for a time although only a loosely built partition protected them on two sides. The goods were damaged by the weather. Held, dismissing the action, that from the date the City became the owner of the property the plaintiff was a trespasser by virtue of the statutory result of the tax sale proceedings. A trespasser has no recourse against an owner exercising his legal rights. *Weinstein* v. *City of Vancouver* (1939), 54 B.C.R. 440; (1939) 4 D.L.R. 823; (1939) 3 W.W.R. 529.

VI. Actions By and Against.

1. Effect of failure to hold driver's licence and chauffer's permit.]—The requirement in the Motor-vehicle Act as to a chauffeur's permit and of the Vancouver by-law as to a licence do not operate to modify civil rights or relieve the City from the consequences of its negligence arising out of non-repair of a highway. The failure to take the licence or the permit is a failure to comply with the Act and the sanction is the penalty. *Burchill* v. *City of Vancouver* (1932) S.C.R. 620 affirming (1932) 45 B.C.R. 169; (1932) 1 W.W.R. 641.

2. One year from the date when the damages were first sustained.]—Under the Vancouver Incorporation Act, certain claims for injurious affection must be made within one year from the date when the alleged damages were first sustained. In a claim based on loss of access to a waterfront property arising out of the construction of a bridge over False Creek in the City of Vancouver, it was contended that the time began to run when a certain crib-work was placed in position. Held, that the damages would be first sustained when the permanent pier first interfered with the access to the wharf on the property. The crib-work was only a temporary arrangement giving no right to damages. The expropriation sections of the Act are a code and the general limitation section in the Act is inapplicable. *London* v. *City of Vancouver,* (1934) 49 B.C.R. 328.

3. Whether remedy by action or for compensation by arbitration.]—In an action by a land owner for damages for the

spilling of water upon his premises by a system of ditching carried out by a municipality, the defendant objected that the remedy was for compensation under secs. 357-358 of the Municipal Act. Held, on appeal, affirming the decision below, that the damage did not arise from a specifically authorized work, but from the method of carrying it out, which was in the discretion of those doing it, and it not having been established that the damage was the inevitable result of what was specifically authorized, the plaintiff was entitled to his remedy by action. *Fraser* v. *City of Vancouver* (1942), 58 B.C.R. 81; (1942) 3 D.L.R. 728; (1942) 1 W.W.R. 608.

4. Necessity of showing "irreparable injury".]—Where the applicant for an injunction to restrain the City from borrowing under a by-law swore that irreparable damage would be suffered, but gave no particulars regarding it, the application was refused. The action would be tried before any taxes in respect of the by-law could be payable. *Smith v. City of Vancouver* (1935) 3 W.W.R. 116.

See COMPULSORY PURCHASE.

NARCOTIC DRUGS.

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NEGLIGENCE.

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I. GENERAL PRINCIPLES.

1. Effect on claim for damages of failure to hold required chauffeur's permit or taxi-driver's licence.]—The members of the family of a person killed while operating a taxicab on a street in Vancouver are not precluded from recovering damages by reason of the fact that the deceased had no chauffeur's permit as required by the Motor-vehicles Act and had no driver's licence as required by the City by-law. *Burchill v. City of Vancouver* (1932) 45 B.C.R. 169. Affirmed by Supreme Court of Canada (1932) S.C.R. 620; (1932) 4 D.L.R. 200; (1932) 1 W.W.R. 641.

2. Defective ladder in place upon premises.]—Where the plaintiff (a painter) used a ladder, fixed in place, which the defendant intended the plaintiff to use and where through exposure to the elements, a part of it fails whereby the plaintiff was injured, he being unaware of its condition, the plaintiff is entitled to recover. The defendant ought to have known of the ladder's condition and owed the plaintiff a duty to see that it was fit for the purpose for which it was intended to be used. *McGrath* v. *J. Leckie & Co.* (1932) 45 B.C.R. 534.

3. Res ipsa loquitur — pleading.] — Where a plaintiff has pleaded and attempted to prove specific acts of negligence, the principle of res ipsa loquitur does not apply. *Hyde* v. *British Columbia Electric Railway Co. Ltd.* (1933) 46 B.C.R. 443.

4. Failure by employer to supply hay-hook.]—The plaintiff was employed in carrying and piling bales of hay and while so doing was injured. He alleged that if hay-hooks had been supplied his vision would not have been obscured and the accident would not have happened. Held, dismissing the action, that the employer was negligent in not supplying these tools but that such

negligence did not cause the accident. *Hindley* v. *Burns* (1933) 48 B.C.R. 73.

5. Defence of joint-adventure.]—In an action by passengers against the person in control of a motor-car, it is a sine qua non of such a defence to prove that as the result of an arrangement, express or implied, made between the plaintiffs and such person, they had joint control with him of the car at the time of the accident. *Williams* v. *Tang* (1933) 47 B.C.R. 81; (1933) 2 W.W.R. 113.

6. Duty of police constable in controlling traffic.]—A jury had found both the plaintiff and the defendant (a police officer) negligent. The defendant observing that one of the headlights was not burning on a car in heavy traffic, which was two cars ahead of the plaintiff on a motor-cycle, stepped into the street and signalled the car to stop and come to the curb. The plaintiff could not stop quickly enough and in trying to avoid striking the car ahead was injured. The jury found the defendant negligent for stepping into the street instead of blowing his whistle. Held, on appeal, that there was no evidence of any obligation or duty on the part of the officer to blow a whistle and a verdict based on that obligation should be set aside. *Dangerfield* v. *Smith* (1934) 48 B.C.R. 125; (1934) 2 D.L.R. 505; (1934) 1 W.W.R. 577.

7. Independent contractors.]—The plaintiff sued the operators of a theatre for injuries sustained when he fell in the vestibule of the building. He stepped into the vestibule to avoid ladders and scaffolding blocking the sidewalk which were being used in painting the canopy at the front of the theatre. A slight covering of snow on the floor of the vestibule caused him to fall injuring him seriously. The painting was being done and the scaffolding etc. placed by a contractor who without specific instructions from the defendant was told to do the work. The defendant paid no attention to the placing of the obstructions and gave no direction whatever with respect to them. Held, dismissing the action, that the defendant had not retained any power of controlling the work and the contractor was an independent contractor. *Balcovske* v. *Stanley Theatre Co. Ltd.* (1934) 48 B.C.R. 433.

8. Waitress falling on slippery floor.]—The plaintiff was employed in a restaurant and bits of food fell from time to time on the floor making it slippery. Rubber mats had been supplied but had later been removed. Before they were replaced the plaintiff fell and was injured. Complaints had been made of the absence of the mats. The employer was held to be negligent and the plaintiff was exonerated from contributory negligence. The plaintiff's employment was not that of a domestic servant and it was not one to which Part I of the Workmen's Compensation Act applies. *Taylor* v. *Hudson's Bay Co.* (1935) 50 B.C.R. 157; (1935) 2 W.W.R. 590.

9. Insanity as defence.]—The defendant as a result of negligent driving of a motor car seriously injured the plaintiff. The onus of making out the defence of insanity is on the defendant. The trial judge held that he was sane to the extent required to make him liable for his negligence. He held further that even if the standard of criminal liability applied, the onus upon the defendant to prove that he was insane was not discharged; he knew the nature of the act and knew that it was wrong. *Baron v. Whalen* (1937) 52 B.C.R. 359; (1938) 1 D.L.R. 787; (1938) 1 W.W.R. 145.

10. Independent contractor—extra hazardous acts.]—The defendant company undertook for reward to give the plaintiff practical and theoretical instruction in acetylene welding. It discontinued its course in that subject on its own premises and arranged that another company would provide it. While being instructed by the other company on its premises, the plaintiff was injured by an explosion due to negligence. In an action against the defendant company, it contended that the negligence was that of an independent contractor; that the doctrine of *volenti non fit injuria* applied; and that a term in the contract exculpated the defendant. Held, awarding damages, that where a person employs an independent contractor to do work which involves special danger, he must take reasonable precautions to see that damage does not result. There was no evidence that the plaintiff assumed the risk with full comprehension of its character. If the defence based on the clause in the contract was open on the pleadings, it did not provide a defence in a case of negligence. *Sanford* v. *Hemphill Diesel Engineering Schools Ltd.* (1936) 51 B.C.R. 268; (1937) 1 W.W.R. 220.

11. Motor-vehicle entrusted to minor.]—Section 18A of the Motor-vehicle Act provides that so long as a minor lives with or as

a member of the family of his parent, the latter is civilly liable for the minor's negligence in operating a motor-vehicle entrusted to him by such parent. Where the minor was himself the owner of the motor-vehicle there could be no entrustment and the section does not apply. *Fraser* v. *Harris* (1936) 51 B.C.R. 509; (1937) 3 D.L.R. 78; (1937) 2 W.W.R. 488.

12. Penal section of Motor-vehicle Act as affecting "volens".]—A jury in answering questions found that the plaintiff had with full knowledge voluntarily accepted the risk of driving in dense fog. He contended that the jury's answer was based on a statutory obligation imposed by sec. 53 of the Act and that "volens" did not apply in such a case. Held, that sec. 53 is a penal section involving penalties for its breach and does not affect civil liability. The action was dismissed. *McDermid* v. *Bowen* (1937) 51 B.C.R. 525; (1937) 2 W.W.R. 347; affirmed (1938) 53 B.C.R. 98; (1938) 3 D.L.R. 617; (1938) 2 W.W.R. 510.

13. Warehouseman.]—In an action for damages for the loss of a shipment of canned salmon, the defendant steamship company was a warehouseman. The goods were lost in a fire which destroyed the wharf where they were stored. Semble, the onus was on the plaintiff to prove that the fire was a negligent one and did not "accidentally begin" within the meaning of 14 Geo. III, C. 78 S. 86. Here there was no evidence that the fire had its origin through the negligence of the defendants. The steamship company had exercised the same care as might be expected from a skilled storekeeper. As to liability for the spread of the fire the question of fact as to whether or not there was negligence was resolved against the plaintiff. *DesBrisay* v. *Canadian Government Merchant Marine Ltd.* (1941) S.C.R. 230; (1941) 2 D.L.R. 209, affirming (1940) 56 B.C.R. 161; (1940) 4 D.L.R. 171; (1940) 2 W.W.R. 97, affirming (1938) 53 B.C.R. 207; (1938) 4 D.L.R. 798; (1938) 3 W.W.R. 209.

14. Question first raised on appeal.]—The case for the plaintiff was formulated on the pleadings and developed at the trial as an action of negligence. The case went to the jury, without any objection, on the basis of an action for negligence in which the burden lay on the plaintiff. The Court of Appeal ordered a new trial on the ground that the doctrine of res ipsa loquitur applied and that the trial judge had misdirected the jury as to the burden of proof. Held, on further appeal to the Supreme Court of Canada, reversing the decision below, that res ipsa loquitur was not relied on at the trial and could not be raised on appeal. *Field* v. *Spencer* (1939) S.C.R., 36, reversing (1938) 52 B.C.R. 447; (1938) 2 D.L.R. 245; (1938) 2 W.W.R. 385.

15. Negligence — inevitable accident.]—The defendants were respectively the owner and tenant of premises on the upstairs windows of which a window-cleaner was working. He fell from a ledge and struck the plaintiff, a pedestrian in the street. There was no evidence as to any state of disrepair or dangerous condition of the building nor as to what caused the window-cleaner to fall as he did. Held, dismissing the action, that the plaintiff had not satisfied the onus placed upon him to establish negligence. The regulations of the Workmen's Compensation Board as to safety devices, etc., had no application. *Stromme* v. *Woodward Stores Ltd.* (1938) 53 B.C.R. 30; (1938) 3 D.L.R. 784; (1938) 2 W.W.R. 251.

16. Driveway across sidewalk to store —snow and ice.]—The defendant operating a department store in the City of Vancouver was permitted to have a driveway leading from the part of the street used for vehicular traffic across the sidewalk into the defendant's premises. The driveway remained a part of the street and thus was the property of the City. The defendant was not the occupier of it but had the right of egress and ingress and was obliged under the agreement to maintain it. During freezing and snowy weather, the plaintiff slipped and fell on the driveway suffering injuries for which he sued the defendant. Held, dismissing the action, the defendant owed no duty to pedestrians in respect of the driveway. An abutting owner is not liable at common law for injuries resulting from snow or ice coming on the sidewalk from natural causes. *Hobbs* v. *David Spencer Ltd.* (1939) 54 B.C.R. 153; (1939) 3 D.L.R. 799; (1939) 2 W.W.R. 449.

17. Effect of not having latest improvements and appliances.]—Merchants are not obliged to keep their premises in such a condition that no one can possibly get hurt. It is sometimes said that one is not bound at once to adopt the latest improvements and appliances. It would be unreasonable to impose liability because newer and probably more efficient equipment is now turned out by manufacturers, thus requir-

ing that equipment reasonably satisfactory should be discarded when an improvement in design appears. Negligence is absence of care according to circumstances and according to accepted standards demanded by reasonable men at the time an accident occurs. A jury today might impose liability with respect to an appliance in respect of which a jury of thirty years ago would exonerate. *Cameron* v. *David Spencer Ltd.* (1940) 55 B.C.R. 167; (1940) 3 D.L.R. 286; (1940) 2 W.W.R. 273.

18. Carrier by air—injury to passengers —contract excluding liability.]—The plaintiffs sued as passengers in respect of injuries caused by the negligent operation of the defendant's plane. The tickets signed and understood by the plaintiffs provided that the flight should be entirely at the risk of the passengers and exonerated the defendant entirely from liability for negligence. The defendant was licensed under the Transport Act and its tariff of charges was filed with the Transport Board. The trial judge gave damages holding that the defendant as a carrier could not attach conditions abolishing its liability. The Court of Appeal reversed the decision of the trial judge and held that the common law right of a carrier to limit his liability was not impaired by any provision of the Transport Act. Held on further appeal to the Supreme Court of Canada, affirming the decision below, that the special conditions were valid and binding. Held on further appeal to the Privy Council dismissing the appeal, that the obligation of a carrier of passengers at common law to carry with due care might, apart from statute, be superseded by a special contract to enlarge, diminish, or exclude liability. There was here no reason to hold that any statutory restrictions had been violated, and nothing in the Transport Act stood in the way of giving effect to the contract. *Ludditt v. Ginger Coote Airways Ltd.* (1947) A.C. 233; (1947) 2 D.L.R. 241; (1947) 2 W.W.R. 591 affirming (1942) S.C.R. 406; (1942) 4 D.L.R. 353; affirming (1941) 57 B.C.R. 176; (1942) 2 D.L.R. 29; (1942) 1 W.W.R. 465; reversing (1941) 56 B.C.R. 401; (1941) 3 D.L.R. 504; (1941) 2 W.W.R. 397.

19. Whether Part II of Workmen's Compensation Act applies — whether hospital housekeeper a domestic servant.] The female plaintiff, a cook and housekeeper in a hospital was held not to be a "domestic servant" under the Workmen's Compensation Act. She received injuries when a flight of stairs at the defendant's hospital gave way under her due to a defect in the condition of the ways used in the business of her employer. Held, Part II of the Act applied and the plaintiff was entitled to damages, there being no contributory negligence and no voluntary acceptance of the risk on her part. *Bailey v. Society of Enderby General Hospital Inc.* (1942) 1 W.W.R. 28.

20. Invitee—pile of gravel left on roadway — accident at night.]—The female plaintiff having completed her duties for the defendant on one part of the area occupied by the defendant was on her way home, late at night, by the normal route when, while still on the defendant's premises, she fell over an unlighted pile of gravel on the road, put there by contractors employed by the defendant. The lights in the area had been turned off. Held, awarding damages to the plaintiff, she was an invitee and her failure to carry a flashlight was not contributory negligence. The defendant's duty as occupier was to take reasonable care that the premises were safe and to prevent injury to the invitee from unusual dangers which were more or less hidden, of whose existence the occupier was aware or ought to have been aware. The injury was caused by leaving the pile of gravel on the roadway without any warning light or other protection. *McFall* v. *Vancouver Exhibition Assn.* (1942) 58 B.C.R. 161; (1942) 4 D.L.R. 336; (1942) 3 W.W.R. 278.

21. Defective rail on fire escape—defect known to plaintiff but not to defendant.] —The plaintiff, employed in a private hospital was injured by falling while shaking a cloth on the fire escape near her room. She knew the day before that the rail against which she leaned was detached at one end. She had not reported it to her employer. Held, the plaintiff was responsible for her own misfortune. The duty of the employer in the circumstances was to take reasonable care to provide safe premises upon which the employee was required to work and to use reasonable care to keep them safe. The employee need not prove that the employer actually knew of the defective rail, but she must show that the employer ought to have known if he had used reasonable care. Here there was regular inspection and no evidence that the employer knew of the defect. *Bergeron* v. *Reilly* (1945) 62 B.C.R. 208.

22. Negligent take-off by R.C.A.F. plane —res ipsa loquitur—whether applicable to

Crown.]—The suppliant claimed damages to its aircraft through the negligence of the servants of the Crown in taking off from the Vancouver Airport. The damaged aircraft was run into and destroyed while it stood stationary on the ground. Held, the maxim res ipsa loquitur applied as against the Crown. The accident was attributable to the negligence of the servants of the Crown acting within the scope of their duties or employment. Damages were awarded. *Yukon Southern Air Transport Ltd.* v. *The King,* (1943) 1 D.L.R. 305.

23. Fishery Officers' seizure and failure to care for nets.]—The defendants as Fishery Officers seized certain nets as not being properly marked. When they were returned it was alleged they had been damaged through lack of proper care. The owners brought action for damages for negligence. The jury were asked to answer questions and without mentioning negligence or any other basis for their findings fixed the loss through damage to the nets and for deprivation of their use. Judgment was entered for the total. Held, on appeal, directing a new trial, that while it was the obligation of the defendants to do all that was reasonably necessary to protect the nets while under seizure, and while it could not be said that they were confiscated at the time the damage occurred, and while the judge had charged the jury as to negligence, there was in fact no finding of negligence. *McKay* v. *Tait* (1946) 62 B.C.R. 506; (1946) 4 D.L.R. 248; (1946) 2 W.W.R. 705.

24. Car being transported on steamer—failure to secure to deck.]—A car and trailer were shipped from Nanaimo to Vancouver. While the ship was making an abrupt turn, the vehicles were put in motion and the owner's wife standing on the deck was struck and injured. Held, awarding damages, the carrier, although not an insurer against all defects, is an insurer against all defects which care and skill can guard against. The blocking of the wheels here was insufficient or improperly done. The owner of the car was not warned to put on the emergency brake. The requirements of the Motor-vehicle Act with respect to the brakes on cars being operated on a highway have no application here. As to contributory negligence, the owner was entitled to assume that whatever precautions were necessary would be taken by the carrier. *Olsen* v. *C.P.R.,* (1946) 4 D.L.R. 776; (1946) 2 W.W.R. 668.

25. Defective fence — injury to child, whether owner liable.]—A heavy fence out of repair was propped up against posts. A neighbour's child playing near it was injured when it fell. There was no evidence to show what made it fall. The fence stood on the property (let to B) of a lunatic whose committee had repaired another part of it. The agent for the committee had been notified that the fence needed repairs where it was propped up, but nothing was done. The trial judge gave damages against the owner and exonerated B. Held, on appeal, reversing the trial judge, when an outsider is injured by the dangerous condition of rented premises prima facie his claim is against the occupier. Here there was no evidence to show that the owner (landlord) had any duty to the tenant to repair. The fact that the owner had undertaken some repairs did not put the premises under the owner's control as occupier. *Cavalier* v. *Pope* (1906) A.C. 428, lays it down that a stranger to the contract between landlord and tenant, who is well aware of the danger, has no claim for want of repair. The plaintiff claimed nuisance but liability is limited to a public nuisance and does not apply to a defect of this kind. As to negligence it must be based on a duty not to set a concealed trap. The position of a child is the same as that of an adult. There was no proof here that there was a trap. *Ingle* v. *Hanson* (1947) 63 B.C.R. 481; (1947) 4 D.L.R. 420.

II. Nature of Act.

A. Use of Firearms and Dangerous Things.

1. Fatal shooting by arresting peace officer.]—The defendant officer, believing on reasonable and probable grounds that the deceased had been abetting a person, who he believed, had broken into a shop, fired several revolver shots to induce the deceased and others to stop so that an arrest could be made. The deceased was struck and killed. In an action for damages against the officer sec. 41 of the Criminal Code was invoked for the defence and it was held, dismissing the action, that in shooting as he did, the officer was acting in a proper manner and doing no more than his duty required him to do in the circumstances while engaged in protecting public interests. *Merin* v. *Ross* (1932) 46 B.C.R. 471; (1933) 1 W.W.R. 109; 60 C.C.C. 18.

2. Claim by Crown for damage to buoys —leaving unattended boomsticks.] — The defendant's tug was towing 395 boomsticks down the Fraser River. They were tied up to a dolphin and left there. They broke loose and caused damage to certain aids to navigation in the river. In an action for damages the tug owner contended the boomsticks were properly moored but that some unknown person must have released them. Held, awarding damages, the burden of proof had shifted because the injurious agency was within the defendant's control. The doctrine of res ipsa loquitur applied. The current was too swift where the boomsticks were moored; they should not have been left unattended. *King* v. *Canadian Tug Boat Co. Ltd.* (1933) Ex C.R. 104.

3. Hair dye—failure to warn user of possible danger.]—The plaintiff purchased hair dye from defendant P; defendant I was the manufacturer and defendant W the wholesale distributor. The evidence showed that while it had a harmful effect only as to very few persons, its toxic qualities were very harmful to the few. The plaintiff whose skin was in a healthy condition was seriously injured in using it. The label said "Directions for use enclosed in the box". Held defendant P. was not liable because sec. 21 of the Sale of Goods Act negatived any warranty as to fitness in the circumstances. The plaintiff succeeded against the other defendants on the ground that toxic matter of the kind must be sold only with the clearest warning to the user, of the danger involved in its use. It was being sold for private use by inexperienced persons. The warning ought to have been on the container and not in an accompanying pamphlet. *O'Fallon* v. *Inecto Rapid (Canada) Ltd.* (1939) 55 B.C.R. 341; (1940) 4 D.L.R. 276; (1940) 2 W.W.R. 714 affirming (1938) 53 B.C.R. 266; (1939) 1 D.L.R. 805; (1939) 1 W.W.R. 264.

4. Management of hotel elevator—intoxicated passenger.]—The plaintiff, a guest at the defendant company's hotel, was seriously injured as he was boarding the elevator, when it suddenly began to ascend. The accident was caused by the failure of the defendant operator to take precautions against interference with the controls by a drunken man already in the cage. Extraordinary care and diligence are required in the operation of elevators and allowing an intoxicated man to be in the cage might be expected to result in consequences of the kind experienced here. The defence that the intervening act of the drunken man saved the defendants from liability did not avail. The rule is that where the injury would not have happened but for the action of more than one person, none of them will be answerable unless his action caused it; but it should be held to have caused it, if a man of ordinary prudence ought to have anticipated the injury as a not improbable consequence of his action. *Pearson* v. *Vintners Ltd.* (1939) 53 B.C.R. 397; (1939) 2 D.L.R. 198; (1939) 1 W.W.R. 271.

5. Gift of airgun to minor—accident—liability of father.]—The defendant gave his son (18) an airgun. The son accidently shot the plaintiff injuring his eye. The defendant was not present and was unaware that the plaintiff had come upon his premises. All concerned were old and intelligent enough to realize what was being done with the gun. Held, dismissing the action, that it was not negligence on the part of the defendant to provide the gun for the amusement of his sons, nor was it connected with the damage complained of. *Hook* v. *Davies* (1939) 53 B.C.R. 437; (1939) 3 D.L.R. 496; (1939) 1 W.W.R. 539.

6. Damage from permanent wave — volens.] — The plaintiff having bleached her hair went to the defendant's establishment for a permanent wave. The attendant cautioned her that the operation might damage her hair in its bleached condition and took from the plaintiff a written statement that the wave would be administered at the risk of the plaintiff. In the result her hair returned to its former colour and came out in quantities. An action for damages for negligence was dismissed. There was no negligence and the plaintiff was volens. The plea of res ipsa loquitur was made but the onus put upon the defendant by the application of that maxim shifts when a reasonable explanation is given. *Mercer* v. *The Moler System of Barber Schools.* (1939) 53 B.C.R. 478; (1939) 3 D.L.R. 802.

7. Spring-gun—responsibility of father for injuries by minor.]—A father was held liable for personal injuries caused by a spring-gun in the hands of his eleven-year-old son. It was shown that the defendant had forbidden his son to use it except in the presence of his parents. It was kept in a readily accessible place in the defendant's home. Held, on appeal affirming the award of damages, that the defendant's responsibility depended on whether he took

reasonable precautions to prevent the boy from using the gun as he did. The liability is based on the principles of negligence rather than on the relationship of parent and child. The law requires a very high degree of care on the part of anyone who leaves anything potentially dangerous in a place where it is possible that children may meddle with it. The defendant was liable for permitting a dangerous thing to come into the hands of an immature boy without control in circumstances under which he should have anticipated that harm might be done. *Edwards* v. *Smith* (1940) 56 B.C.R. 53; (1941) 1 D.L.R. 736 affirming (1940) 4 D.L.R. 638; (1940) 3 W.W.R. 234.

8. Police officer arresting fugitive—accidental shooting.]—The defendant, a police officer, received a complaint that two children had been molested and went to the scene where two little girls identified a man walking away as the culprit. The defendant followed him and called upon him to stop. The man ran and the defendant fired a revolver shot in the air. The fugitive did not stop and the defendant fired in the air again. As he fired he stumbled and hit the man, who died some weeks later. The defendant learned later that the molesting had not taken place that day but two weeks earlier. The offence for which the deceased would have been arrested was not one for which an arrest could be made without a warrant. Held, the defendant used a type or threat of force which was not justified in the circumstances. If he had continued the pursuit without firing, he would have caught up with the fugitive. He was negligent in pursuing the deceased at a short distance over uneven ground with a loaded revolver with no safety catch. *Cretzu* v. *Lines* (1941) 56 B.C.R. 214; (1941) 2 D.L.R. 413; (1941) 1 W.W.R. 396 75 C.C.C. 367.

9. Burning of scalp during permanent wave operation—whether patron volens because operator learning trade and charging reduced price.]—The defendant carried on a hairdressing school, where learners practised on customers attracted by a reduced price. The plaintiff while having a permanent wave suffered a burn on the scalp through the negligence of the learner although an experienced instructress was present. Held, awarding damages, that those who undertake such work are required to use the ordinary skill of duly qualified practitioners. It was contended that the plaintiff was volens. There was here no consent permitting the defendant to take less than due care. The most that could be said was that a plaintiff paying a lower fee must be satisfied with an inferior permanent wave. *Taylor* v. *Kinnon* (1937) 3 W.W.R. 94.

B. *In Managament of Street and Other Railways.*

1. Infant as trespasser killed by train.] The railway line ran through an artificial cut or ravine which was very attractive to boys as a place for games etc. The railway officials made every reasonable effort to prevent the boys from frequenting the place. While in the ravine, with other boys, the plaintiff's six-year-old son attempted to board a train and was so injured that he died. It was held, dismissing the action, that the boy was a trespasser and although of tender years, he must be held to have come on the premises at his own risk. *Craig* v. *Canadian Northern Pacific Railway Co.* (1933) 47 B.C.R. 453; (1934) 1 D.L.R. 484.

2. Street-car stopping with jerk.]—The mere happening of a jerk upon the stopping of a street-car does not of itself bespeak negligence, and a person claiming damages in connection with a fall as she was alighting, must prove negligence affirmatively. *Hyde* v. *British Columbia Electric Co. Ltd.* (1933) 46 B.C.R. 443; (1933) 1 W.W.R. 174.

3. Collision — both parties equally at fault.]—In cold weather, the plaintiff's truck was backed out into a street upon which street-cars were being operated. A look-out man signalled that it was safe for the truck to move as it did. The truck stalled on the track and was struck by the street-car. The trial judge found that the truck-driver was negligent in that the stalling was caused either by the flooding of the engine or its coldness. He found that the driver of the street-car failed to use the sand provided for frosty conditions and was negligent accordingly. The trial judge found both drivers equally negligent. Held, dismissing the plaintiff's appeal, on an equal division of the Court, that there was common and continued negligence by the drivers of both vehicles, excluding the element of ultimate negligence, and by reason of the Contributory Negligence Act, both parties are liable for the consequences. *Petroleum Heat & Power Ltd.* v. *British Columbia Electric Railway Co. Ltd.* (1932) 46 B.C.R. 462.

4. Railway work-truck standing on the street at night.]—G. the plaintiff's son was driving at night and came into collision with the defendant's work-truck standing on the line. The street lighting was good and the work-truck had two lights on it. G. who was killed was driving on the wrong side of the road when the accident occurred. Questions were put to the jury and they found the defendant negligent and G. guilty of contributory negligence. On the question of ultimate negligence, they found that the deceased could have avoided the accident notwithstanding the negligence of the defendant. They apportioned the damages. When the answers were read plaintiff's counsel contended that the jury had misunderstood the question on ultimate negligence and prevailed upon the judge to redirect the jury on that question. They then exculpated G. from ultimate negligence and judgment was entered for the plaintiff. Held, on appeal, directing a new trial, that what had occurred amounted to a mistrial. *Grant* v. *British Columbia Electric Railway Co. Ltd.* (1937) 52 B.C.R. 66; (1937) 4 D.L.R. 113; (1937) 3 W.W.R. 164.

5. Motor-vehicle stalled on crossing under repair.]—The defendant's repair gang removed some planks from a road crossing. The driver of a car, about to cross the track, stopped, and as the workmen picked up some tools and stood back, went on. The car became stalled on the track and was struck by the defendant's train and an occupant of the car was killed. The workmen knew that the train was due in a short time. The jury found the defendant negligent in removing the planks so close to train time and failing to replace them for the use of the driver of the car. They acquitted the driver of contributory negligence. On appeal a new trial was ordered. Held on further appeal to the Supreme Court of Canada, reversing the decision below, that the defendant by removing the planks created a situation which, it was open to the jury to find, attached a wholly unnecessary risk to the user of the highway. The jury may have found that the driver was guilty, at most, of a mistake of judgment which was excusable. The original negligence of the defendant's employees continued down to the time of the impact. *Staley* v. *British Columbia Electric Railway Co. Ltd.* (1938) 3 D.L.R. 81; (1937) 2 W.W.R. 282; (1938) S.C.R. 387 reversing (1937) 51 B.C.R. 499; (1937) 3 D.L.R. 578.

6. Extent of onus on plaintiff.]—Where a passenger on a train was about to alight and sustained injuries because of a swinging door which was put in motion by a fellow-passenger, there was a failure on the part of the plaintiff to use ordinary care. Such failure was the sole cause of the accident. *Haddock* v. *British Columbia Electric Railway Co. Ltd.* (1937) 51 B.C.R. 483.

7. Crossing tracks in front of interurban tram — whether trespasser.] — The plaintiff ran across the track in the path of an oncoming tram in the hope of catching it. She crossed not at the crosswalk provided but some distance from it. The motorman failed to stop in time and the front step of the tram struck her. The trial judge held the motorman solely to blame and awarded damages. Held, on appeal, reversing the decision below, that whether the plaintiff was a trespasser or not, the plaintiff's action was so rash that the motorman could not be expected to anticipate it. The motorman was in no way negligent as he took all possible precautions once the possibility of danger emerged. *Thompson* v. *British Columbia Electric Railway Co. Ltd.* (1939) 54 B.C.R. 230; (1939) 4 D.L.R. 761; (1939) 2 W.W.R. 184.

8. Defective warning sign at railway crossing—effect of Railway Board's order.] —The plaintiff and his wife driven by V. intending to cross the defendant's railway line on a rainy night, stopped on the tracks. The car was struck by a train and the wife was killed. The warning sign required by the Dominion Railway Act was alleged not to be properly placed or properly painted. The driver did not see it. The trial judge dismissed the action holding that the driver had not used appropriate care and that the condition of the sign had not contributed to the accident. He rejected a declaration of satisfaction with the protection provided at the crossing, made by the Railway Board after the accident. On appeal it was held reversing the decision below, that the warning sign was defective and had contributed to the accident. The declaration of the Board was rightly rejected. Held on further appeal to the Supreme Court of Canada, restoring the judgment of the trial judge, that the question was: was there evidence connecting the alleged default of the railway company in respect of its obligation to maintain a sign in accordance with the regulation, and the accident? The evidence upon examination did not justify the finding by the Court of Appeal that the defective

sign materially contributed to the accident. The evidence as to the subsequent declaration by the Board was inadmissible. *Chesworth* v. *Canadian Northern Pacific Railway Co.*, (1941) S.C.R. 201; (1940) 4 D.L.R. 577; reversing (1939) 54 B.C.R. 529; (1940) 2 D.L.R. 334; (1940) 1 W.W.R. 643.

9. Pedestrian walking on railway track —failure to step off.]—The plaintiff's wife was killed while walking on the railway tracks in the daytime approaching a curve which obscured the view of the track ahead. The track was habitually used by people in the neighborhood as a short cut and the railway company was aware of the practice. The trial judge found joint negligence on the part of the engineer and the deceased. Held on appeal, exonerating the engineer, the deceased had time to avoid the accident by stepping off the tracks; the engineer could not stop after she came into view. The fact that the defendant knew that people walked on the track did not absolve the deceased from responsibility for the final negligent act which was the sole cause of the accident. Assuming negligence by both viz. excessive speed and failure to look, she alone could have averted the tragedy. The trial judge, having found negligence on the part of both, did not go on to consider whether one or the other might by subsequent action have averted the accident. *Jacobsen* v. *Vancouver, Victoria and Eastern Railway and Navigation Co.* (1941), 56 B.C.R. 207; (1941) 3 D.L.R. 140.

10. Fire — sparks from locomotive in logging operations.]—The jury in answer to questions found the defendant negligent in "using steam equipment in the woods under extremely hazardous conditions, without extraordinary precautions being taken". There was evidence to justify the jury's answers and in law they connoted liability. There was no misdirection or non-direction so prejudicial to the defendant as to warrant a new trial. *Elk River Timber Co. Ltd.* v. *Bloedel, Stewart & Welch Ltd.* (1941) 56 B.C.R. 484; (1941) 4 D.L.R. 792; (1941) 3 W.W.R. 97.

11. Pedestrian on railway track—whether thickly-peopled locality.]—The plaintiff's husband was killed while attempting to cross the defendant's double track. He stood on the southerly track waiting for a train to pass on the other one and was struck by a train approaching from the other direction on the track on which he stood. The trial judge dismissed the action, holding that the locality was not a "thickly-peopled" one which called for a speed not exceeding 10 miles per hour. The train was going about 25 miles per hour when the fireman saw the plaintiff's husband on the track. Held on appeal affirming the decision below, per McDonald C.J., the deceased was a trespasser, even if he had leave and licence to cross the tracks, because he was not crossing; he was loitering. Only wilful or reckless disregard of ordinary humanity would make the defendant liable to a trespasser. Per McQuarrie J.A. this case is indistinguishable from the Jacobsen case (1941) 56 B.C.R. 207. Per Fisher J.A. the deceased knew of the passing of this train every day at the same hour on the southerly track and was grossly negligent in standing on the track. The deceased was guilty of ultimate negligence on the principles of the Jacobsen case. *Lind* v. *Canadian Pacific Railway Co.* (1942) 58 B.C.R. 253; (1942) 4 D.L.R. 659; (1942) 3 W.W.R. 577.

12. Ultimate negligence—effect of answer by jury to question.]—In a case where the plaintiff drove his car into the side of the defendant's train during a fog, questions were submitted to the jury. They found both parties guilty of negligence, but went on and added that the plaintiff could have avoided the consequences of the defendant's negligence by reasonable care. The trial judge entered judgment on the basis of an equal apportionment of the blame. Held, on appeal by the defendant, reversing the decision below, the added answer when considered in the light of the evidence and the direction of the trial judge must be regarded as a finding by the jury that the plaintiff was guilty of ultimate negligence. Notwithstanding the Contributory Negligence Act, the rules relating to ultimate negligence still apply. *Towne* v. *British Columbia Electric Railway Co. Ltd.*, (1943) 59 B.C.R. 61; (1943) 3 D.L.R. 572; (1943) 2 W.W.R. 337.

13. Pedestrian hurrying across in front of approaching street-car into path of oncoming truck.]—The plaintiff intending to board an approaching street-car (which did not stop for him) hurried across in front of it and was struck by a truck running alongside the street-car. The jury apportioned the fault, 10% to the plaintiff, 45% to the truck driver, 45% to the street railway company. On appeal to the Court of Appeal the verdict was confirmed. Held on further appeal to the Supreme Court of Canada, re-

versing the decision below as to the street railway company, the possibility of the plaintiff crossing as he did was a circumstance that affected the duty of the motorman, but that duty was met; he avoided striking the plaintiff. He was not required to act so as to give the plaintiff, in the event of his negligently crossing ahead of the street-car, protection against the result of his own rashness in relation to the truck driver of whose presence he was unaware. He was under no duty to ascertain before entering the intersection where and in what manner motor-vehicles were proceeding behind him at or near his street-car. In general the duty rested upon those driving behind or to the rear to use due care in relations to vehicles and circumstances created by those ahead of them. *Protopappas* v. *British Columbia Electric Railway Co. Ltd.* (1946) 4 D.L.R. 1; reversing (1945) 62 B.C.R. 218; (1946) 2 D.L.R. 330; (1946) 1 W.W.R. 232 affirming (1946) 1 D.L.R. 271.

14. No evidence to support jury's finding of negligence—answers to questions.]—In an action arising out of a collision between a train and a truck the jury apportioned the blame 25% to the train and 75% to the truck. In answer to questions the jury found the motorman guilty of negligence in that he did not cut his speed sooner to enable him to come to a full stop if the truck seemed about to cross the track. Held, on appeal, exonerating the railway company from any share of the blame, the answer negatived all other charges of negligence. In the result although the statutory duty of the railway company had been duly performed, the jury had added the duty to reduce speed in anticipation that the truck might cross the track. There was here no such added duty. The speed of the oncoming truck was moderate. There was nothing to suggest that the truck-driver had not heard the signals or seen the train. The motorman expected the truck would stop before the crossing. He was not guilty of the negligence imputed to him by the jury's answer, since in the absence of special circumstances, no duty was cast upon him to take steps to reduce speed before he did so. *British Columbia Electric Railway Co. Ltd.* v. *Buckerfield's Ltd.*, (1946) 63 B.C.R. 385.

15. Street railway—duty of motorman and pedestrians.]—The plaintiffs crossing Hastings Street at McLean Drive in Vancouver did so without looking or listening for the defendant's street car. The motorman saw them but did not realize until it was too late that the plaintiffs were "dead to their surroundings" and did not intend to stop. In an action for injuries claimed to have been sustained through the motorman's negligence the plaintiffs failed. In determining whose conduct was the proximate cause one should consider whether the victims were ignorant of the danger and if so whether the motorman knew or should have known of that ignorance in time to avoid the accident. Here the contention that the motorman after he knew or ought to have known that the plaintiffs did not intend to stop might have avoided the accident was not made out. Any error on his part was excusable and he displayed that reasonable measure of competent judgment required in the emergency while the plaintiffs were remiss in not taking reasonable care. *Parsons* v. *B.C. Electric Railway Co. Ltd.* (1940) 3 W.W.R. 612.

16. Injury to passenger entering street-car — position of gates.]—The plaintiff while in the act of entering a street-car was injured. She testified that the gate was open and the car was moving slowly forward as she was mounting the step. Then the car was stopped abruptly throwing her down and injuring her. It was admitted that mechanically it was possible to open the gates while the car was in motion. Held, the plaintiff was entitled to damages. *Beasley* v. *British Columbia Electric Railway Co. Ltd.* (1942) 1 W.W.R. 623.

C. *Motor Vehicles.*

1. Collision at highway intersections.

1. Duty of driver approaching intersection.]—The rule of the road as to intersections is to be interpreted as laid down in *Hall* v. *Tinck*, (1932) 45 B.C.R. 540; (1932) 3 W.W.R. 104.) The action was dismissed where the plaintiff and the defendant came to the intersection at practically the same time, but the plaintiff came on without making sure that no one was coming from the right. The plaintiff's vision to the right was obscured. *McLeod* v. *Consterdine* (1934) 1 W.W.R. 19.

2. Right of way at intersection.] — Where the plaintiff's car had entered the intersection before the other car coming from the right was within it, the driver of the other car should have slowed down

or stopped. The plaintiff's car having reasonably and substantially occupied the intersection, should be able to cross safely in front of a car coming from the right unless the latter is coming too fast or is out of proper control. *Reed* v. *Lawson* (1934) 48 B.C.R. 103; (1934) 2 D.L.R. 564; (1934) 1 W.W.R. 405.

3. Right of way at intersection.]—The trial judge dismissed the action of the plaintiff who as he neared the intersection saw the defendant's truck approaching on the right about 100 feet away. Instead of stopping, the plaintiff went on and was struck by the defendant on the side at the rear. On appeal to the Court of Appeal the decision below was reversed on the ground that the plaintiff was substantially in the intersection before the defendant reached it and that the party in possession should be allowed to proceed. On further appeal to the Supreme Court of Canada, it was held, restoring the judgment of the trial judge, and dismissing the action; that the plain meaning of sec. 21 of the Highway Act requires a driver nearing an intersection to keep a lookout for drivers approaching upon the right and make way for them; that the plaintiff had failed in this plain duty; that although he had seen the defendant approaching, he had disregarded the law giving to the defendant the right of way, had speeded up his car and taken a chance. The defendant having the right of way was entitled to assume that the plaintiff would follow the rule. *Wills v. Swartz Bros. Ltd.* (1935) S.C.R. 628; (1935) 3 D.L.R. 277; reversing (1934) 49 B.C.R. 140; (1934) 4 D.L.R. 735; (1934) 3 W.W.R. 441.

4. "Full stop" at intersection.]—A driver who has ceased to go forward long enough for him to make, and has made, the necessary observations as to all the then existing relevant circumstances, on the "through highway" and elsewhere around him, has come to a "full stop". *Haines* v. *Williams* (1933) 47 B.C.R. 69 ;(1933) 1 W.W.R. 478 and 644.

5. Collision; right of way.]—In a collision at an intersection a gratuitous passenger in one of the cars charged negligence against both drivers. The trial judge held both liable. On appeal by the driver carrying the passenger, it was held, reversing the trial judge, that the appellant having the right of way had kept a proper look-out but that the other driver had disregarded the stop-sign and failed to yield the right of way. *Henderson* v. *Dosse* (1932) 46 B.C.R. 401.

6. Status of passenger on vehicle operated contrary to Motor-vehicle Act.]—The plaintiff was riding as a passenger on a motor-cycle, the driver of which was in a position forbidden by the Act. In a claim for injuries in a collision it was contended that the plaintiff's civil rights were destroyed by the driver's non-compliance with the Act. Held that the plaintiff was entitled to recover, the non-compliance not bringing about or contributing to the collision. *Gamon* v. *Eastman* (1932) 46 B.C.R. 23; (1932) 2 W.W.R. 622.

7. Right of way at intersections.]—The section (21) of the Highway Act giving the right of way to the person driving the vehicle on the right, does not cease to operate because the vehicle on the left reaches the intersection first. The person driving the vehicle on the left is called upon to explain, in the first place, how he got into a position where he should not be had he observed the statute. *Hall* v. *Tinck* (1932) 45 B.C.R. 540; (1932) 3 W.W.R. 104.

8. Boy on bicycle turning at intersection.]—The plaintiff's infant son was riding a bicycle and as he approached a street intersection, he turned left, putting out his hand to signal his intention. The defendant driving a car overtook the boy and failing to see the signal or to slow down, struck the boy as a result of which he died. Held that the defendant was going too fast and did not have his car under proper control. The boy was guilty of contributory negligence in not putting out his hand as a signal sooner than he did. The degrees of fault were 75% as to the defendant and 25% as to the boy. *Irvine* v. *Mussallem* (1935) 50 B.C.R. 72.

9. Crossing arterial highway]. — The plaintiff was entitled to succeed where he was crossing the highway some 150 feet ahead of the oncoming defendant who had a clear vision for a long distance and ought to have avoided him either by passing to the rear or by coming to a stop. *Hollum* v. *Robertson* (1936) 50 B.C.R. 551.

10. Right of way at intersection.]—The plaintiff brought his car to a stop at a stop sign marking an intersection. He looked both ways and proceeded to cross. He saw the defendant approaching on the right but was satisfied he had plenty of time to cross in safety. The defendant coming at about

30 miles per hour did not look to his left or see the plaintiff's car until he was within the intersection and a collision ensued. Held, awarding damages to the plaintiff, the accident was due solely to the negligence of the defendant in not keeping a proper look-out and in not giving way to the plaintiff who had come into the intersection substantially ahead of the defendant. In the circumstances the plaintiff did not disregard the law giving to the defendant (on his right), the right of way, but had displaced the right of way of the defendant who was then obliged to wait upon the other car which was entitled to proceed as a matter of right. The plaintiff had satisfied the onus of explaining how he got into the position he was in and of proving that he was acting with reasonable care in entering the intersection. *Welch* v. *Grant,* (1936) 50 B.C.R. 388; (1936) 1 W.W.R. 312.

11. Taking a chance at intersection.]—The defendant, with the plaintiffs as his passengers, drove into an intersection at 15 to 20 miles per hour, although he saw another car approaching from the left at a high rate of speed. The defendant could have stopped but believing he had the right of way and could get across safely, he proceeded. In the resulting collision, the plaintiffs were injured. Held awarding damages to the plaintiffs, that the defendant should have stopped and in failing to do so he "took a chance" and must be held liable. Held, on appeal, reversing the decision below, the driver of the other car should have conceded the defendant's right of way and avoided the collision. *Groh* v. *Ritter* (1935) 50 B.C.R. 129; (1935) 4 D.L.R. 243; (1935) 2 W.W.R. 472 reversing (1934) 49 B.C.R. 272.

12. Failure to stop immediately as negligence.]—Where the negligence charged consisted in the defendant not stopping immediately after the impact, the Court of Appeal declined to interfere with the decision of the trial judge that negligence had not been established. *Barnes* v. *Bradshaw* (1936) 51 B.C.R. 338; (1937) 2 D.L.R. 203.

13. Parties equally negligent.]—Two cars collided in the full light of day in the centre of a highway with no distracting conditions existing. Both drivers were experienced and the cars were under control and adequately equipped. Each had a clear and sufficient field of vision at all material times. Both were in equal degree guilty of the negligence that caused the collision. *Funk* v. *Pinkerton* (1938) 52 B.C.R. 528; (1938) 3 D.L.R. 781.

14. Left-hand turn at busy intersection—boy on bicycle.]—The defendant driving north on Main Street, in the City of Vancouver in the evening turned west at Georgia Street and struck the infant plaintiff coming south on Main Street on his bicycle without a light. Held the plaintiff's own negligence was the cause of the accident and the defendant had proceed with care and at a very low speed. *Frederickson* v. *Burt,* (1938) 53 B.C.R. 313; (1938) 4 D.L.R. 801; (1938) 3 W.W.R. 323.

15. Intersection—duty of driver having right of way.]—Although a driver who is on the right of another approaching an intersection has the right of way, the obligation is nevertheless on him to use due care in the circumstances. *Cornish* v. *Reid* (1939) 54 B.C.R. 137; (1939) 2 W.W.R. 133.

16. Boy on bicycle ignoring stop-sign—truck turning into alley.]—The plaintiff on a bicycle was emerging from an alley to a main thoroughfare as the driver of the defendant's truck was in the act of turning to the right to enter the alley. The plaintiff ignored the stop-sign and ran into the truck. The trial judge found the plaintiff to be solely to blame. Held, on appeal, affirming the decision below, that there was evidence to support the finding. *Boyden* v. *Belshaw* (1940) 55 B.C.R. 557; (1941) 2 D.L.R. 777.

17. Motor-car and cycle—fog—whether defendant solely responsible.]—Where the range of visibility was only 50 to 60 feet it was proper for a cyclist, having halted for a stop sign, to proceed to cross an intersection after looking both ways. He was substantially on the intersection when the defendant driving a motor-car, and having the right of way, saw him and assuming that the cyclist would give way kept on going at from 15 to 20 miles per hour. Here there was no negligence on the part of the cyclist prior to the negligence of the defendant; hence the doctrine of ultimate negligence, or "last chance" did not apply. It is predicated on the assumption that one party can by the exercise of reasonable care, avoid the consequences of the other's prior negligence. The defendant's right of way was displaced by the fact that the plaintiff was substantially in the intersection and reasonably so. The defendant was wrong in assuming that the plaintiff would give

way and should have stopped or slowed down. Failure to do so made him solely responsible. *Alonzo* v. *Bell* (1942) 58 B.C.R. 220; (1943) 1 D.L.R. 63; (1942) 3 W.W.R. 657.

18. Police officer on motor cycle answering call—siren being sounded—duty to let him pass.]—The plaintiff, a police officer on a motorcycle, was going west on Broadway in the City of Vancouver sounding his siren. The defendant driving east on Broadway and proposing to turn north at Burrard did not remain at a standstill as required by section 56 of the Motor-vehicle Act but started up and crossed to the left in front of a Broadway street car stopped on the easterly side of Burrard, and into the path of the oncoming plaintiff. A collision followed. The trial judge held the defendant to be two-thirds to blame (for failing to remain at a standstill until the plaintiff had passed) and the plaintiff one-third (for failing to take appropriate action when he saw the defendant start his car and turn to the north.) Held, on appeal by the defendant affirming the decision below, the defendant had failed to observe the statutory requirements as to driving in a careful and prudent manner, and as to stopping when required to enable police officers to pass. The contention that the officer, having seen the defendant start up and begin to cross must assume that he would continue in that course, could not prevail. Nor could it be said that if the defendant was guilty of negligence, his negligence had exhausted itself before the collision and that hence there was ultimate negligence on the part of the plaintiff. *Eggins* v. *Beechey* (1943) 58 B.C.R. 547; (1943) 2 D.L.R. 699; (1943) 1 W.W.R. 682.

19. Intersection—substantial entry into—effect on right of way.]—The plaintiff was a passenger in a taxicab driven by M. and was injured when it collided at a street intersection with a car driven by A. The trial judge apportioned the plaintiff's damages, 65% against M. because the other car had the right of way, and 35% against A. for failing to keep a proper look-out. Held on appeal, dismissing the action against M. and holding A. solely responsible, the taxicab had made reasonable and substantial prior entry into the intersection before A. had reached the entrance to the intersection. The vehicle coming from the right has the right of way, but where the other vehicle has reached the intersection substantially ahead of the one having the right of way, it is not obliged to wait upon the other if the way appears to be clear. M. having so reached the intersection was entitled to believe that A, not yet within the intersection, would respect the priority of his position. *Fewster* v. *Milholm* (1943) 59 B.C.R. 244; (1943) 4 D.L.R. 566; (1943) 3 W.W.R. 27; reversing (1943) 58 B.C.R. 466; (1943) 1 W.W.R. 303.

20. Intersection—stop sign—failure to slow down.]—The plaintiff driving on the highway was approaching a road intersection at about 60 miles per hour. Seeing the defendant coming toward the intersection he slowed down by about 10 miles per hour and held that speed on the assumption that the defendant would stop at the stop sign before entering the highway. The defendant slowed but did not stop and a collision occurred. Held, the defendant was 75% to blame in ignoring the stop sign and failing to keep a proper look-out. The plaintiff was 25% to blame for not bringing his car under control by reducing speed when he saw the defendant coming. *Adams v. Friesen* (1943) 59 B.C.R. 351; (1943) 3 W.W.R. 644.

21. Intersection—stop sign—failure to take ordinary precautions.]—The defendant driving on the highway approached a cross-road, marked by stop signs, at about forty miles per hour. The plaintiff stopped at the stop sign and then slowly crossed the highway with the defendant some 750 feet away. The defendant did not reduce speed or sound his horn and ran into the plaintiff as he was completing his crossing of the pavement on the highway. Held on appeal, affirming the decision below, the defendant failed to take ordinary precautions to avoid a collision. Even if the plaintiff was careless that was not a causative factor since the oncoming defendant by the exercise of ordinary care, could have avoided the consequences of any lack of care attributable to the plaintiff. *Wilson* v. *Cline* (1946) 63 B.C.R. 81; (1946) 3 W.W.R. 353.

22. Street intersection—right of way—no proper look-out.]—In the day time and with good road conditions the parties collided at the intersection of Blenheim Street and 31st Avenue in Vancouver. The plaintiff was east-bound on 31st Avenue and the defendant was north-bound on Blenheim Street (a paved highway and the more important of the two streets). The collision took place near the intersection of the middle lines of the two streets.

Neither car was speeding. Held, the cars entered the intersection at approximately the same time, the plaintiff being slightly ahead of the defendant. The plaintiff owed a duty to keep a proper look-out for traffic approaching from his right hand and to make way for it. He had not made a substantial entry into the intersection before the defendant. The latter could not do more than apply his brakes which he did. The action was dismissed. Held on appeal, varying the decision below, the defendant ought to have seen the plaintiff in the circumstances. The defendant was guilty of negligence contributing to the collision when he drove into a dangerous intersection at such speed. He should bear one-third of the blame. *Craig* v. *Sinclair* (1945) 61 B.C.R. 256 varying (1944) 60 B.C.R. 157.

23. Intersection—right of way—excessive speed.]—The trial judge found that the defendant was wholly at fault by reason of excessive speed and failure to yield the right of way. There was no evidence that the right of way was displaced by a prior reasonable and substantial entry into the intersection. While the sufficiency of the look-out kept by the plaintiff was questioned, it must be taken that the trial judge was satisfied with it. In any case the plaintiff's failure to see the defendant was not the decisive cause of the accident. The appeal was dismissed. *Hunter* v. *Lake of the Woods Milling Co. Ltd. and White.* (1946) 63 B.C.R. 33; (1946) 3 W.W.R. 340.

24. Arterial highway—entering from intersecting street.]—Arterial highways have been created for rapid traffic and the practice is well established that the driver of a car on such a highway may expect one entering the stream of traffic on the highway from an intersecting street to give priority, although the driver on the highway is some distance away. *Murdoch* v. *Davis* (1939) 3 D.L.R. 800.

25. Right of way at intersection—whether recovery over against driver on the left.]—The defendants were held to be negligent and liable to the plaintiff. Relief over against the third party, viz., the driver approaching the intersection from the left, was refused, where it was shown that the third party was substantially in the intersection and proceeding therein at the time the other car reached it. *Littlewood* v. *Walker* (1935) 1 W.W.R. 576.

26. Collision with bicycle at intersection.]—The plaintiff, a minor, riding an unlighted bicycle at dusk on a well-lighted city street was struck by the defendant's truck at an intersection when it turned from an easterly course to a northerly one across the path of the plaintiff. The defendant was negligent in making a short turn before reaching the intersection and in failing to keep a proper lookout. The plaintiff was negligent in not having a light on his bicycle but the accident was attributable to the negligence of the defendant. *Davis* v. *Hall* (1936) 1 W.W.R. 419.

27. Collision at intersection—right-of-way—arterial as against intersecting highways.]—Quickly moving cars on arterial highways (protected by stop signs) are not required to give way to cross traffic as readily as are cars on non-arterial highways. The arterial car takes priority over an intersecting car when the former is still a half block or more from the intersection. *Murdoch* v. *David* (1939) 2 W.W.R. 621.

28. Collision at intersection—effect of "Stop" sign.]—The cars came into collision at Victoria Drive and Twelfth Avenue in Vancouver after dark. Pursuant to a city by-law, a "stop" sign required motorists to come to a full stop and give the right-of-way to traffic on Twelfth Avenue. The defendant ignored the sign and struck the plaintiff's car. Held, the defendant's negligence caused the collision. The plaintiff was not guilty of contributory negligence by proceeding when he saw that the defendant was not slackening speed as he approached. The plaintiff was entitled to assume that the defendant would stop. *Howell* v. *Wallace and Green* (1939) 1 W.W.R. 177.

29. Collision at intersection—failure to yield right-of-way.]—The plaintiff was driving east on 12th Avenue, a through street in Vancouver. The defendant coming up Cedar Street from the left struck the plaintiff at the latter's rear left wheel. Held the plaintiff was entitled to recover. The plaintiff had the right-of-way by statute and moreover the defendant disregarded the stop sign at the through street. The plaintiff's speed was not unreasonable. The principle enunciated in *Swartz Bros. Ltd.* v. *Wills* (1935) S.C.R. 628 applied. *Evans* v. *Dann* (1937) 3 W.W.R. 610.

30. Requirement as to sounding horn-turning signal.]—A member of the armed

services, was driving an army truck on the rear of which was painted "Caution Right Hand Drive Vehicle—No Signals". He made a left-hand turn at a street intersection without looking in the mirror but giving a hand signal on the right-hand side of the track. As he turned he collided with the respondent's taxi which was about to overtake and pass the army truck. The trial judge (Exchequer Court) found the driver of the army truck wholly at fault. Held on appeal to the Supreme Court of Canada, affirming the trial judge's decision, the driver of the army truck had failed to observe the statutory requirement (sec. 3 (j)) of the regulations passed under the Motor-Vehicle Act. The warning on the truck was smeared and dirty and there was no evidence that it could be seen by the driver of the other vehicle. There was in the circumstances, viz., a situation where there was no warning of a change of course by the vehicle being overtaken, no reason why the driver of the overtaking vehicle should have sounded his horn. *The King* v. *Anderson*, (1946) S.C.R. 129.

2. Collision elsewhere.

1. With horse-drawn vehicle.] — The driver of a milk-wagon permitted the horse to proceed along the street unattended while he delivered the milk. For him to allow the horse to turn corners uncontrolled would be an act of negligence. *Price v. Fraser Valley Milk Producers Assn.* (1932) 45 B.C.R. 285; (1932) 3 D.L.R. 55; (1932) 2 W.W.R. 65.

2. Ultimate negligence.]—The defendant L. was engaged in removing his damaged car from the street after an accident when it was struck by the defendant W. The trial judge found both defendants equally liable to the plaintiff who was injured by the impact. Held, on appeal, reversing the trial judge, that the defendant W. was alone responsible, he having failed to keep a proper look-out. Even if the defendant L. was guilty of some negligence, the collision could have been avoided by the exercise of ordinary care and skill on the part of W. and the doctrine of ultimate negligence applied. *Crosbie* v. *Wilson and Langlois* (1933) 47 B.C.R. 384.

3. Running into car properly parked on highway.]—The fact that a third-party negligently created a situation in the roadway by nearly colliding with another car and thus confusing the defendant, did not excuse the defendant for running into the plaintiff's car parked at the curb. The defendant instead of looking where he was going, gave his attention to the difficulties of other cars in the mix-up. Notwithstanding the negligence of the third party the defendant could and should have avoided the accident. *Pelle* v. *Bersea* (1936) 50 B.C.R. 546; (1936) 4 D.L.R. 517.

4. Driver swerving to left side of the highway.]—The finding of negligence on the part of the defendant by the trial judge could not be interfered with where the defendant had negligently swerved to the left and invaded that part of the roadway reserved to the plaintiff and all others proceeding in the same direction. *Beazley* v. *Mills* (1936) 51 B.C.R. 197; (1937) 1 D.L.R. 205.

5. Car standing on highway.] — The plaintiff, accompanied by N., was driving a truck at night. Owing to engine trouble it stopped and remained in a position where the larger portion of the vehicle was to the left of the centre of the road. The plaintiff got under the truck to make repairs while N. watched for approaching cars. N. saw the lights of the defendant's car and warned the plaintiff who got up and ran back to signal the defendant. When the defendant going about 30 miles per hour came close to him, the plaintiff jumped to one side of the road and the defendant turned sharply to the same side, striking and running over him. Held that the defendant was 60% to blame for not keeping a proper look out. The plaintiff was 40% to blame for remaining too long on the road before stepping off. The position of the truck on the road was not, in the circumstances, negligence on the part of the plaintiff. *Tilley* v. *Wilson* (1935) 50 B.C.R. 276; (1936) 1 W.W.R. 72.

6. Truck left standing on highway.]— The defendant's truck after stopping for repairs was left parked at the edge but on the paved portion of the highway. The driver left for the purpose of telephoning, first putting on the lights as it was dark. While he was away, the plaintiff driving in the same direction struck the rear of the truck at a time when still another car had just met and passed him with its headlights on. The jury acquitted the plaintiff of negligence and found the defendant to be at fault for leaving the truck unattended and making no effort to park it off the pave-

ment. Held, on appeal, affirming the jury's verdict, that there was evidence of the defendant's negligence and that the presence of the third car with the headlights, enabled the jury to exonerate the plaintiff. *Hall* v. *West Coast Charcoal and Wood Products Co. Ltd.* (1935) 50 B.C.R. 18; (1935) 3 D.L.R. 53; (1935) 2 W.W.R. 134.

7. Overtaking car cutting in while passing.]—Where one car overtakes and passes another, it is the duty of the overtaking driver to be clear before crossing to the right side of the road. The failure of the other driver to apply his brakes was not negligence on his part in the circumstances. *Putnam v. Macneill* (1938) 52 B.C.R. 519; (1938) 2 D.L.R. 794; (1938) 1 W.W.R. 780.

8. Highway Act—Driving on wrong side of road.]—The defendant driving on the wrong side of the road came around a blind curve and was confronted by the plaintiff's car coming toward him on his proper side. In the agony of collision the plaintiff turned to the left and at almost the same moment the defendant swung to his proper side and the collision ensued. The defendant was found to be negligent and the plaintiff justified in the course he took. Held, on appeal, affirming the decision below, that the plaintiff was entitled to rely on the defendant observing the rule of the road and he could not be held at fault for endeavouring to avoid a collision by leaving his own side of the road. *Wood* v. *Paget* (1938) 53 B.C.R. 125; (1938) 4 D.L.R. 325; (1938) 3 W.W.R. 33.

9. Driver turning across highway in path of oncoming traffic.]—G. driving on an arterial highway crossed over to enter a service-station and was struck by a car driven by B. coming up on his own side of the pavement. The trial judge found that B. was travelling too fast and not keeping a proper lookout. He exculpated G. although finding that he had crossed too slowly and should have sounded his horn. Held, on appeal, applying the Contributory Negligence Act, that G. when about to turn across the stream of traffic should have exercised the greatest care not to expose others coming up on the other side, to danger. G. could not be exonerated from responsibility in the circumstances. Fault was apportioned 70% to G. and 30% to B. *J. W. Bailey* v. *Grogan* (No. 2) (1937) 52 B.C.R. 422; (1938) 2 D.L.R. 313; (1938) 1 W.W.R. 520 varying (1937) 52 B.C.R. 241; (1937) 3 W.W.R. 29.

10. Overtaking car cutting in while passing.]—Where the defendant driving the overtaking car passed the plaintiff and cut in so sharply as to catch the front end of the plaintiff's car, negligence was established. The error of the plaintiff in accelerating instead of braking was excusable in the difficult circumstances and the defendant who created the danger ought not to be minutely critical of what was done by one whom he involved in the danger. *Fujiwara* v. *Osawa* (1938) S.C.R. 170; (1938) 3 D.L.R. 369 affirming (1937) 52 B.C.R. 383; (1937) 3 W.W.R. 670 and (1938) 1 W.W.R. 377 affirming (1937) 51 B.C.R. 388, (1937) 2 D.L.R. 133; (1937) 1 W.W.R. 364.

11. Opening left-hand door of car in traffic.]—The plaintiff on a motor-cycle was following the defendant driving his car. The defendant slowed down, swung to the right (but not completely off the paved portion of the street) and stopped. He then opened the left-hand door which caught the plaintiff as he passed. Held, awarding damages to the plaintiff, that the defendant was negligent in opening the door as he did in the traffic instead of pulling off the paved portion of the street before doing so. The plaintiff was entitled to assume that the door would not be opened in the circumstances. *Looy* v. *Elley* (1940) 54 B.C.R. 557; (1940) 2 D.L.R. 774; (1940) 2 W.W.R. 238.

12. Milk-wagon making U turn in middle of block—taxicab driver not keeping look-out.]—In the early morning of a December day the defendant's milk-wagon while making a U-turn was run into by the plaintiff's taxi. The trial judge dismissed the action and allowed damages to the defendant on its counterclaim. Held on appeal, both parties were at fault—the milkman for turning in the middle of the block when he saw the approaching lights of the taxi. Such a turn was prohibited by by-law. The plaintiff was at fault in not recognizing sooner that the slow-moving milk-wagon was in fact turning in the middle of the street. The Contributory Negligence Act applied. *Ivey and Owl Cabs* v. *Guernsey Breeders' Dairy Ltd.* (1941) 56 B.C.R. 342; (1941) 4 D.L.R. 791.

13. Truck left standing on highway.]—The defendant, being out of gasoline, left his truck standing on the highway at night near Cloverdale. The right hand wheels were off the pavement and the remaining part of the truck extended over the pavement for 5½ or 6 feet. Although the evidence indicated that the lights were left on, they were found to be out at the time the plaintiff collided with the truck. Held, giving damages to the plaintiff, that the defendant was negligent in abandoning his efforts to get gasoline, or to get assistance that would have enabled him to shift the truck. *Renner* v. *Hadden* (1942) 57 B.C.R. 488.

14. Truck left on highway—darkness and fog—three overtaking vehicles damaged.]—On a foggy morning before daylight, X left his truck on the highway occupying substantially half the roadway. He went home to get a wheel to replace a damaged one. Shortly afterward the plaintiff A, driving in the same direction, crashed into the truck. He went back to warn other drivers but in spite of his warning B ran into A's car with only slight damage. Then C came along at about 25 miles per hour and in spite of A's warning, crashed into B's car causing it to damage A's car. The road was slippery. The trial judge dismissed the action against B and held X and C jointly liable for A's damage. He found X negligent for leaving the truck where he did and C for going too fast. Held on appeal, varying the judgment below, A was negligent as well as X with respect to the first collision; C was travelling at too high a speed in the circumstances of his collision. In the result A and X were equally liable under the Contributory Negligence Act in the first collision and C in his collision was solely responsible for A's damage. *Brown* v. *Walton* (1943) 58 B.C.R. 498; (1943) 2 D.L.R. 437; (1943) 1 W.W.R. 717.

15. Motorist overtaking cyclist—whether hand signal given before turning to cross highway.]—The defendant driving his car was overtaking the plaintiff riding a bicycle. The latter turned to the left intending to cross to his home when he was struck by the defendant's car. The plaintiff said he was giving the usual hand signal for some time before he began to cross. The defendant denied it. A witness testified that she saw the plaintiff's hand out, but only just as he turned. The judge found the defendant 75% to blame. Held, affirming the decision below, the trial judge did, in effect, make a finding of credibility in favour of the plaintiff, by accepting the testimony of the witness on a point in respect of which it seemed more consistent with the plaintiff's story than the defendant's. *Panosuk* v. *McQuarrie* (1945) 61 B.C.R. 198; (1945) 2 W.W.R. 508.

16. Driving too close to middle line while passing—both at fault.]—The drivers about to meet and pass on a road of adequate width saw each other when 500 yards apart. Neither was speeding and each maintained that he was on his proper side of the road. Held, they were equally negligent (a) because they both kept too close to the middle line, (b) neither of them kept a proper look-out; (c) neither of them made any effort to change course to the right so as to avoid the collision. *Gates* v. *Hodgson* (1945) 61 B.C.R. 337; (1945) 2 W.W.R. 137.

17. Foggy night — overhanging rack — narrow bridge.]—A person driving a vehicle with an overhanging rack on a foggy night owes a special duty to take care in approaching a narrow bridge. The following considerations are to be taken into account: (a) the nature of the physical object by which the accident was caused; (b) the place of the accident; (c) the physical conditions, time, weather, etc.; (d) the conduct of the persons. *Baldwin* v. *Bell* (1933) S.C.R. 1; reversing (1932) 45 B.C.R. 234; (1933) 1 D.L.R. 232.

18. Highway Act — "travelled portion of the highway"—allowing one-half when meeting vehicle.]—The plaintiff after a heavy snowfall did not turn out to the right beyond one-half the beaten track, although a much wider strip was easily travellable over. Held, the plaintiff was solely responsible. By the centre of the road is meant the centre of that portion of the road allowance set apart by the authorities for the use of vehicles, and not necessarily the centre of the commonly travelled track, the location of which on the highway may vary from time to time. *Irizawa* v. *Corner* (1940) 1 D.L.R. 786; (1940) 3 W.W.R. 430.

19. Motor car collision—skidding on icy hill—whether inevitable accident.] — The temperature was dropping suddenly from about 6 p.m. and icy road conditions were present. The plaintiff was driving easterly

on Robson Street in Vancouver on his proper side. The defendant, proceeding westerly at about 8 p.m. went over the brow of the Robson Street hill in high gear at about 20 m.p.h. When he applied his brakes the car skidded, and after travelling sideways swung to the south side of Robson Street and collided with the plaintiff's car at Cardero Street. Held, the defendant was negligent. He was remiss in starting down the hill in high gear at such a speed. He should have known of its slippery condition. There was nothing the plaintiff could do. *Burling* v. *Buckee* (1941) 2 W.W.R. 351; (1941) 3 D.L.R. 750.

20. Motorist overtaking and running down cyclist.]—The plaintiff was riding her bicycle when the defendant, driving a motor car, overtook her and caused her serious injuries. It was about 9 p.m., on a moonnight night in July. The plaintiff's bicycle had no headlight but at the rear was the required red glass reflector and white strip on the rear mudguard. The defendant testifield that his headlights were good, that he was driving at about 20-25 m.p.h., that the lights of an approaching car so blinded him that he slowed and was about to stop when he struck the plaintiff's cycle. Held, dismissing the action, the evidence showed that the plaintiff's long coat covered and obscured the reflector and white strip. The defendant would not be liable unless he should have seen the plaintiff. *Slater* v. *Stokes* (1941) 2 W.W.R. 215.

3. Injury to Pedestrians

1. Duty to pedestrian—whether sounding of horn enough]—If the driver of a car sees that a pedestrian is not heeding the warning given by the horn he should slow down and stop if necessary, to avoid the possibility of the pedestrian suddenly swerving into the path of the car. *Wood* v. *Powell* (1932) 3 W.W.R. 100.

2. Rights of pedestrians at street crossing.]—Where a pedestrian crosses the road to board a street-car he is entitled to expect that an on-coming automobile driver, coming from a distance, would see him and slacken speed and that he would have his car under such control that it could be stopped almost instantly. *James* v. *Piegl* (1932) 46 B.C.R. 285; (1932) 3 W.W.R. 365.

3. Crossing in middle of City block.]—The plaintiff was entitled to recover where before leaving the sidewalk she looked both ways and seeing no vehicle approaching, and without looking again, succeeded in nearly reaching the other side of the street (at a place where crossing was prohibited by a municipal by-law), when she was struck by the defendant's car. *Hocking* v. *B. C. Motor Transportation Ltd.* (1932) 46 B.C.R. 307; (1932) 1 W.W.R. 14.

4. Boy crossing highway from behind standing car.]—The trial judge dismissed the action holding that the infant plaintiff was alone responsible in that he placed the defendant in a position from which he was unable to extricate himself in time to avoid the accident. The Court of Appeal held that the defendant was going at too great a speed and ordered a new trial. Held on further appeal to the Supreme Court of Canada, allowing the appeal, that the trial judge's judgment should be restored. *Reopel* v. *Ross* (1938) S.C.R. 171, reversing (1937) 52 B.C.R. 333; (1937) 4 D.L.R. 571; (1937) 3 W.W.R. 471.

5. Child darting out in path of car.]—On the afternoon of a dark winter day at a time when traffic, pedestrian and vehicular, was heavy, the defendant made a right hand turn at about 10 to 12 miles per hour through an opening in the stream of pedestrians He gave no warning of his intention to turn. The plaintiff, a girl of nine, ran out from the kerb and was struck down and injured. Held, the defendant was negligent on two grounds—excessive speed at that place, and by reason of his failure to give due warning of his intention to turn. The plaintiff was equally negligent. *Dobroski* v. *MacKay,* (1938) 53 B.C.R. 32; (1938) 3 D.L.R. 783; (1938) 2 W.W.R. 47.

6. "Blind" intersection—bicycle and car in collision—pedestrian injured.]—Where a motorist and a cyclist collided at a blind corner, it was held that each was going too fast in the circumstances. The motorist's car went out of control and struck the plaintiff walking on the sidewalk. The negligence of both the motorist and the cyclist was a factor in the pedestrian's injuries and the blame was apportioned equally against them. *Schofield* v. *Roche,* (1938) 53 B.C.R. 324; (1938) 4 D.L.R. 802; (1938) 3 W.W.R. 349.

7. Failure to keep proper lookout—pedestrian crossing in path of on-coming car.]—Where the defendant's speed was not excessive but he did not keep a proper lookout and struck the plaintiff, a pedestrian,

on a rainy evening, damages were awarded against him. The plaintiff was guilty of contributory negligence in crossing the street without paying strict attention to the defendant's oncoming car. He saw the car and assuming he had time to cross did not look again. The parties were equally negligent. *Banks* v. *City of Vancouver* and *Kidston,* (1939) 54 B.C.R. 364; (1939) 4 D.L.R. 821; (1939) 3 W.W.R. 473.

8. Failure to keep proper look-out—pedestrian run down.] — The trial judge found the defendant driving his car and the deceased woman stepping on to the road equally guilty of negligence. He held the defendant negligent because when his attention was attracted to a boat on the river nearby, he took his eyes from the road at a time when if he had been keeping a proper lookout he could have avoided running down the deceased. He held the deceased equally guilty because had she looked at all before stepping on to the road she must have seen the car coming. Held on appeal finding the defendant solely guilty of negligence, the deceased was justified in walking on the road with every assurance that approaching drivers would see her and avoid running her down. The trial judge found, that the defendant could have avoided the accident had he been keeping a proper lookout. That was a finding that the defendant failed in his duty to avoid the risk of collision. He became solely responsible because he did not avoid the consequences of the deceased's lack of care when he had the ability to do so. *Lauder* v. *Robson,* (1940) 55 B.C.R. 375; (1940) 3 D.L.R. 769; (1940) 3 W.W.R. 33; reversing (1940) 2 W.W.R. 191.

9. Degrees of fault — running-down case.]—The trial judge apportioned the fault 60% against the defendant and 40% against the deceased and gave damages accordingly. Held on appeal, affirming the trial judge's decision, that only substantial error would justify interference. The defendant had driven at an excessive speed through a busy street when it was wet, in the Chinese section of the City of Vancouver where, as he knew, pedestrians were in the habit of crossing elsewhere than at the corners. The deceased became confused and committed an error of judgment by dashing across the street as he did. *Jung Hon Mann* v. *Northwestern Messenger & Transfer Ltd.,* (1940) 55 B.C.R. 404.

10. Right of way under city bylaw—failure to keep proper lookout—partnership of three defendants.]—While crossing a street on the crosswalk the plaintiff was run into by a car. The City bylaw gave her the right of way in the circumstances and she was not herself guilty of negligence. The driver of the car was solely at fault. The three defendants were dealers in motor cars and had associated themselves for the purpose of disposing of used cars turned in to them on sales of new ones. The car which struck the plaintiff was a used car in the process of being moved from the premises of one defendant to those occupied by the group. Held, the plaintiff was entitled to recover against all three defendants. The association of the three dealers made them partners in the enterprise. *Barnes* v. *Consolidated Motor Co. Ltd. et al,* (1942) 57 B.C.R. 270; (1942) 1 D.L.R. 736; (1942) 2 W.W.R. 43.

11. Driving at night during "black-out"—use of headlights prohibited.]—The defendant was driving at night during a "blackout" with parking lights only and those masked in such a way that only a slit was uncovered. He was driving at ten to fifteen miles per hour although he could not see anything ahead of him beyond the hood of his car, unless it came directly into the feeble rays of the parking lights. He was driving on a street on which street-cars were running. He was guilty of the grossest negligence. As to the plaintiff, a pedestrian on a street in a "blackout" must take more care than is required under ordinary conditions. In the circumstances there was no negligence on his part which contributed to the accident. *Macdonald* v. *Star Cabs Ltd.,* (1942) 58 B.C.R. 313; (1943) 1 D.L.R. 420; (1943) 1 W.W.R. 299.

12. Motor-bus crossing pedestrian lane in turning corner—both failing to keep proper look-out.]—The accident was the result of the combined negligence of the plaintiff and the bus-driver. The plaintiff stepped blindly off the kerb into the path of the oncoming and plainly visible vehicle. The bus-driver failed to see him. They were equally to blame. Under the City by-law the pedestrian had the right of way, but that did not relieve the plaintiff of the duty of keeping a proper look-out. *Doig* v. *B.C. Motor Transportation Ltd.,* (1944) 60 B.C.R. 488.

13. Boy of five years—darting out from behind parked car — The plaintiff, a boy

of five, came without warning, and apparently without looking, out on the highway from behind a car from which he had just alighted, into the path of the defendant's car and was struck. The defendant was driving at 20 miles per hour and saw the other car stop and the boy get out. He did not sound his horn or slacken speed as he passed. The trial judge found the defendant entirely to blame; he had failed to slacken his speed and did not sound his horn. He should have anticipated that the plaintiff's conduct might be unpredictable and should have exercised more than ordinary care. Mere compliance with statutory and municipal regulations was not enough. The plaintiff was not of sufficient age and intelligence to appreciate the risk he ran so as to be capable of contributory negligence. Held on appeal to the Court of Appeal, reversing the decision below the trial judge had imposed a standard of conduct which in the circumstances was too exacting. The standards to be applied are not standards of perfection. Held on further appeal to the Supreme Court of Canada, restoring the judgment at the trial, the trial judge had reached the proper conclusion. *Boyd* v. *Kuhn*, (1948) 2 D.L.R. 800; reversing (1947) 63 B.C.R. 545; (1947) 3 D.L.R. 741; (1947) 1 W.W.R. 706; reversing (1946) 3 W.W.R. 589.

14. Motorist running down passenger leaving street-car.]—The plaintiff, with her child, alighted from a street-car halted in front of the defendant's car. She was struck by the defendant's car while crossing from the street-car to the sidewalk. The defendant did not see the plaintiff. The Motor-vehicle Act (sec. 11) requires a driver to stop and thus puts the onus on the motorist to make sure that pedestrians are in safety before proceeding. Damages were awarded. *Macdonald* v. *Bailey*, (1934) 1 W.W.R. 342.

15. Failure to keep careful look-out—no explanation by defendant's driver.]—The plaintiff about to cross a street looked both ways and saw no vehicles. She crossed without looking further and was struck just before she reached the sidewalk on the opposite side. The driver was not called as a witness and no explanation was offered as to how the vehicle came to strike the plaintiff. The by-law forbade crossing at the place where she crossed. Held, the plaintiff was entitled to recover and contributory negligence had not been made out. In the absence of some explanation there was an inference that the driver was not keeping a proper look-out. *Hocking* v. *B.C. Motor Transportation Ltd.*, (1932) 46 B.C.R. 307; (1933) 1 W.W.R. 14.

16. Duties of motorist and of pedestrian—both negligent.]—The plaintiff was crossing 16th Avenue in Vancouver at night at a place other than an intersection. He stopped to observe another car at the curb when he was struck by the defendant's car going at a moderate speed. The defendant did not see the plaintiff. The plaintiff who paused in the street for two seconds could admittedly have avoided the accident by taking one step had he seen the defendant's car approaching. Held, the defendant was 75% to blame for failing to see the plaintiff and the plaintiff was also negligent in not looking before he undertook to stand in the street as he did. *Dixon* v. *Sinclair*, (1936) 3 W.W.R. 527.

17. Duties of driver of motor car and pedestrian in heavy fog.]—The plaintiff on foot attempted to cross Alma Road in Vancouver in a very heavy fog. It was daytime. Before beginning to cross he looked and listened, but after starting did not look again. The defendant driving south on Alma in low gear struck and injured the plaintiff. Held, the defendant was guilty of negligent driving. His duty in charge of a "lethal weapon" in dense fog was to proceed very carefully and be able to stop in the space he could see ahead. He should have sounded his horn. The plaintiff acted reasonably. *Bertrand* v. *Hall*, (1940) 3 W.W.R. 425.

4. Unauthorized Use of Master's Vehicle.

Employee on master's business—deviation from normal duties.]—A motor car salesman was permitted to operate the defendant's car night or day on the defendant's business or for his own private personal use. While on a business errand he picked up the plaintiff with the intention of driving her to her destination, first, however, completing the errand. En route the plaintiff was injured in a collision caused, as the trial judge found, solely by the negligence of the salesman. Held, that the onus of showing that the injuries were caused by the negligence of the salesman while on his employer's business having been established in the view of the trial Judge, and being supported by the evidence and fair inferences, it should not be interfered with. *Jarvis* v. *Southard Motors Ltd.*, (1932) 45 B.C.R. 144; (1932) 2 D.L.R. 218; (1932) 2 W.W.R. 221.

III. Relationship of Parties.

A. Patients of Doctors and Hospitals.

1. Physicians and surgeons.] — The plaintiff suffered a dislocated shoulder. The defendant who in his professional capacity, for reward, undertook to diagnose and treat the injury was held by the trial Judge to be negligent in that he did not direct an X-ray examination. Held, allowing the appeal, that the fact that a surgeon, in these circumstances, does not advise the taking of an X-ray after applying the recognized tests and giving the usual instructions, does not necessarily constitute negligence, even when his diagnosis was erroneous. *Moore and Moore* v. *Large,* (1932) 46 B.C.R. 179; (1932) 4 D.L.R. 793; (1932) 2 W.W.R. 568; reversing (1931) 45 B.C.R. 45; (1932) 1 W.W.R. 390.

2. Exposure to small-pox in hospital.] —The infant plaintiff was a diphtheria patient in the hospital and developed small-pox a few days after leaving it. It was proved that cases of small-pox were being treated in the hospital in close proximity to where the plaintiff was quartered. The trial judge found the defendant guilty of negligence. On appeal, affirming the trial judge's decision, it was held that there was a failure to follow a system approved by medical authority whereby nurses attending small-pox patients would be segregated and whereby dishes, utensils etc. would not be indiscriminately used by patients having small-pox and other patients. On further appeal to the Privy Council, it was held dismissing the action, that the question for decision was as to the hospital technique adopted by the defendant. It had been shown that the technique was in accord with the general if not universal practice today in Canada and the United States. *McDaniel* v. *The Vancouver General Hospital,* (1934) 3 W.W.R. 619; (1934) 4 D.L.R 593; reversing (1933) 47 B.C.R. 304; (1934) 1 D.L.R. 557.

3. Lack of proper care and skill—dangerous treatment.]—The obligation of a physician is to exercise proper and reasonable care and skill in treating his patient. The trial judge held the defendant liable for damages (a) because he knew the treatment he was giving for diabetes was dangerous, but did not provide for daily tests or observation; (b) because he delegated to the patient himself the duty of deciding what course he should take. Held, dismissing the appeal, that there was evidence to justify the finding below, and as it was based on credibility of witnesses, it should not be reversed unless the Court of Appeal was convinced that the judgment appealed from was wrong. *Marshall* v. *Rogers,* (1943) 59 B.C.R. 165; (1943) 4 D.L.R. 68; (1943) 2 W.W.R. 545.

4. Unauthorized extraction of teeth—trespass—damages.]—The plaintiff about to have her tonsils removed arranged with her doctor, the defendant J., to have two teeth removed at the same time. J. undertook to get a dentist and arranged with his brother, the defendant T., to come to the hospital and extract the teeth. T. was led to believe by J. that all the upper teeth were to be extracted. T. did not see or speak to the plaintiff before the anaesthetic was administered. Having lost all her upper teeth, the plaintiff sued both J. and T. for trespass. Held, both defendants were liable. The dentist had proceeded with the extractions on the basis that the consent of the plaintiff had been given to the doctor and through the doctor to him. The trial judge held that there was no obligation on T. under the circumstances to obtain any further instructions from the plaintiff. In third-party proceedings between T. and J. the doctor was held liable to indemnify the dentist. The Court of Appeal affirmed the decision below. On further appeal by J., as to the third-party proceedings, to the Supreme Court of Canada, it was held that T. was not entitled to indemnity against J. but as the parties were equally at fault each should pay half the damages awarded the plaintiff. T. was acting in his professional capacity and knew he was without proper instructions from his patient. Even if J. should have prevented T. from removing the teeth that did not excuse T. whose duty to his patient remained throughout. It was for the patient to decide after examination, diagnosis and advice whether so serious an operation should be undertaken. This was not a case of emergency where a doctor or dentist may act without the patient's consent. Even if a request was proven the rule is that one who claims indemnity against the consequences of an act done at the request of another, must have acted without negligence, and the injury to the third party must be the direct result of doing the particular act the claimant was requested to do, and not a consequence merely arising from the manner in which the act is done. *Yule* v.

Parmley, (1945) S.C.R. 635; reversing (1944) 61 B.C.R. 116; (1945) 2 D.L.R. 316; affirming (1944) 60 B.C.R. 395; (1944) 4 D.L.R. 46; (1944) 3 W.W.R. 94.

B. Gratuitous Passenger.

1. Defective steering gear—duty to gratuitous passengers.]—The plaintiffs were gratuitous passengers with the defendant and were injured when his car left the road and overturned in a ditch. It was found that there was a defect in the steering-gear. The evidence showed that the defendant had driven the car for six months, that when he bought it he had trouble with the steering and took it back twice to the vendor (whose guarantee he had) telling him on the second occasion that it should have the attention of a specialist in steering defects. He picked it up at the specialist's shop and assumed, without enquiring, that the steering-gear had been repaired. The trial judge held that as the defendant was himself a motor mechanic he should have inspected the work before driving the car and awarded damages. Held, on appeal, reversing the decision below, that his obligation to the passengers was to use reasonable care and the burden should not be placed on him to investigate the work of experts, even though he himself was an auto mechanic. *DeLanois & Johnson* v. *Flesh*, (1937) 52 B.C.R. 133; (1937) 4 D.L.R. 209; (1937) 3 W.W.R. 104; reversing (1937) 1 W.W.R. 122.

2. Injury to passenger—not liable unless transported for "hire or gain".]—Sec. 74B of the Motor-vehicle Act bars actions by passengers against the owner or driver but does not relieve "any person transporting a passenger for hire or gain". The defendants about to drive from Kelowna to Vancouver arranged with the plaintiffs to take them along. The plaintiffs volunteered to pay part of the expenses. The trial judge dismissed the action holding that the defendant was not transporting the plaintiffs for hire or gain. Held on appeal affirming the decision below, that the arrangement to share expenses did not create any legal obligation on either side. The accommodation extended was not done with the object of obtaining hire or gain and sec. 74B (a) was a bar to the action. *Guerard* v. *Rodgers*, (1942) 57 B.C.R. 481; (1942) 2 D.L.R. 646; (1942) 2 W.W.R. 59; affirming (1941) 57 B.C.R. 171; (1941) 3 W.W.R. 830.

3. Gross negligence—gratuitous passenger—whether excessive speed.]—The Motor-vehicle Act provides that an action lies by a gratuitous passenger in a case where there has been gross negligence on the part of the driver, contributing to the plaintiff's injuries. "Gross negligence" means a marked departure from the standards by which responsible and competent people in charge of motor-cars habitually govern themselves. Per O'Halloran, J.A., it connotes conduct of an aggravated or reprehensible character which often accompanies (although it is not an essential ingredient of) that more common breach of duty which denotes the distinctive tort of negligence. It suggests the concept of aggravated negligence. *Murdock* v. *O'Sullivan* (1944) S.C.R. 143; (1944) 1 D.L.R. 790; affirming (1943) 59 B.C.R. 249; (1943) 3 D.L.R. 773; (1943) 3 W.W.R. 162.

C. Manufacturer and Ultimate Consumer.

Manufacturer's responsibility for caustic soda in soft drink.]—The plaintiff purchased from a grocer a sealed bottle of coca cola and suffered injury from drinking a part of it. The contents were noxious, containing caustic soda, a substance used by the defendant in cleaning bottles preparatory to filling them with the beverage. The bottle was intended to be opened only by the consumer; it had not been tampered with and an inspection would not have disclosed the poisonous contents. The jury found for the defendant, the manufacturer, and the action was dismissed. Held, on appeal, affirming the verdict of the jury, on an equal division of the Court, that the principle of *Donoghue* v. *Stevenson*, (1932) A.C. 562, applied and the defendant as manufacturer owed the consumer a duty to take care. The onus of proof was however on the plaintiff, and if the maxim *res ipsa loquitur* applied, then the presumption thus arising was completely rebutted by the evidence showing with what care bottles were cleaned and dealt with. *Willis* v. *Coca Cola Co. of Canada Ltd.*, (1933) 47 B.C.R. 481; (1934) 2 D.L.R. 173; (1934) 1 W.W.R. 145.

D. Auditors.

Failure to question assets listed on balance sheet of company.]—W. was president and managing director of a company throughout its existence and up to its bank-

ruptcy. The books showed that he withdrew, without authority, some $41,607 from the company and altered its books by crediting his account with $25,000 and charging the amount to "Western Trading Syndicate". The company's auditors, having challenged this transaction were told by W. that he did not wish to disclose the personnel of the syndicate and offered to, and did, guarantee the account in writing. This the auditors accepted and did not enquire further. They disclosed the guarantee in the balance sheet and the matter was briefly discussed at the next shareholders' meeting; upon its being stated that W. had personally guaranteed the account the matter was dropped. At that time W. was considered to be a wealthy man and well able to implement the guarantee. The trustee in bankruptcy recovered a barren judgment against W. and then sued the auditors alleging negligence in failing to report the withdrawal of the money taken by W. The trial judge held the auditors liable for $25,000. Held, on appeal, reversing the trial judge (a) the shareholders must have realized that the advances to the syndicate were not on a sound basis as otherwise a guarantee would not have been necessary; (b) the shareholders accepted the guarantee and could have realized upon it at that time; (c) the auditors were not remiss in their duty in accepting W.'s guarantee instead of insisting upon a further investigation of the syndicate's activities; auditors may to a large extent rely for explanations on hitherto trusted officers of the company under audit. *The trustee of the property of Blue Band Navigation Co. Ltd., a bankrupt,* v. *Price Waterhouse & Co.,* (1934) 48 B.C.R. 325; (1934) 3 D.L.R. 404; 15 C.B.R. 434; (1934) 2 W.W.R. 49; reversing (1933) 3 W.W.R. 53; 15 C.B.R. 6.

E. Bailee.

Car stolen while being repaired.]—A garage operator was held liable for the damage caused by the theft of a car left with him for repairs, where he left it in an open shed, unattended and with the ignition key in place. *Rutherford* v. *Stewart-Warner Sales Co. Ltd.,* (1935) 50 B.C.R. 256; (1935) 3 W.W.R. 472.

IV. Contributory Negligence.

1. Both to blame—apportionment of damages and costs.]—Sec. 2 of the Contributory Negligence Act permits the method of apportionment made in *The Cairnbahn* (1914) P. 25 to be applied. *Price* v. *Fraser Valley Milk Producers Assn.,* (1932) 45 B.C.R. 285; (1932) 3 D.L.R. 55.

2. Power of Court to apportion the degree of fault on appeal from jury's verdict.]—The Court of Appeal, having found that there was contributory negligence on the part of the plaintiff, where none had been imputed to him by the jury, has jurisdiction to apportion the degree of fault and need not send the case back to the jury for the purpose. *Ritchie* v. *Gale,* (1934) 49 B.C.R. 251; (1935) 1 D.L.R. 362; (1934) 3 W.W.R. 703.

3. Effect of Contributory Negligence Act—ultimate negligence.]—The plaintiff's husband intending to board a ferry, drove his car at night down a vehicular ramp to the end of which the ferry was moored when receiving and discharging passengers. There was no guard or barrier, and the ferry having departed, he drove off the end of the ramp and was drowned. In an action under the Families' Compensation Act the jury was asked to answer questions but instead merely found both parties guilty of negligence and apportioned the fault 60% against the defendant, the occupier of the ferry landing, and 40% against the deceased. Judgment was entered accordingly. On appeal, affirming the decision below, it was contended, invoking *Indermaur* v. *Dames* (1866) L.R. 1 C.P. 274, that with a finding of negligence on the part of the deceased the action must fail and that the Contributory Negligence Act had no application. Held that the common law and the theory that an occupier owes no duty to an invitee who fails to use reasonable care on his part for his own safety, was altered by the passing of the Contributory Negligence Act, which applies to all cases where the loss arises through the fault of both parties. The jury having found joint negligence the former decisions cannot now be used to upset the verdict. The argument based on *British Columbia Electric Railway Co. Ltd.* v. *Loach,* (1916) 1 A.C. 719, that the negligence of the deceased must be held to be ultimate negligence, the sole cause of the accident, cannot be accepted. *Whitehead* v. *Corporation of the City of North Vancouver,* (1937) 53 B.C.R. 512; (1939) 3 D.L.R. 83; (1939) 1 W.W.R. 369.

4. Costs—how apportioned as between parties equally to blame.]—On a finding of

joint liability each party is obliged to pay such percentage of the costs of the other party as corresponds to the degree in which each party was held in fault. Held, where they were equally to blame each party must pay one-half the costs of the other, with a set-off. An allocatur will then issue for the balance which is due to one or the other. This method of apportionment applies whether for damages or costs and whether the liability be equal or unequal. *Musgrave* v. *Schutz*, (1942) 58 B.C.R. 78; (1942) 3 D.L.R. 703; (1942) 2 W.W.R. 391.

5. Contributory Negligence Act—fault —whether limited to negligence.]—Where the plaintiff recovered damages against a doctor and a dentist for trespass in extracting teeth, without her consent, the dentist claimed a right of contribution against the doctor under the Contributory Negligence Act. It was contended that as the action was founded on trespass there could be no contribution under the Act on the basis that it was restricted to cases of negligence—that "fault" was synonymous with "negligence" and therefore did not include "trespass". Held, here there were two persons whose joint fault caused them to suffer "damage or loss" and the Court must determine whether it is a proper case for apportionment of the damage or loss between these parties. Their fault or negligence led them so to conduct themselves that in law they committed a trespass. "Fault" includes negligence but whether it is wider than negligence need not here be determined. *Yule* v. *Parmley*, (1945) S.C.R. 635; (1945) 4 D.L.R. 81; reversing (1944) 61 B.C.R. 116; (1945) 2 D.L.R. 317; (1945) 1 W.W.R. 405; affirming (1944) 60 B.C.R. 395; (1944) 4 D.L.R. 46; (1944) 3 W.W.R. 94.

6. Boy of five years—not old enough to be capable of contributory negligence.]—A boy of five had darted out from behind a parked car into the highway and was struck by the defendant driving at 20 miles per hour. The defendant was held liable for not slackening speed and not sounding his horn as he passed. The boy was found not to be of sufficient age or intelligence to realize and appreciate the risk so as to be capable of being guilty of contributory negligence. *Boyd* v. *Kuhn*, (1948) 2 D.L.R. 800; reversing (1947) 63 B.C.R. 545; (1947) 3 D.L.R. 741; (1947) 1 W.W.R. 706; reversing (1946) 3 W.W.R. 589.

7. Collision at intersection—stop sign.]—The stop sign was set well back from the highway. The driver on the highway saw that the car coming at right angles overran the stop sign but assumed he would stop before actually entering the intersection. It was contended that the driver on the highway was guilty of contributory negligence because he did not slow down. Held, there was no contributory negligence. The driver on the highway was entitled to expect the other to stop at least before reaching the intersection. *Howell* v. *Wallace & Green*, (1939) 1 D.L.R. 802.

8. Two defendants guilty of negligence in different degrees—order as to costs.]—The plaintiff recovered against the defendant H. as to 85% and the defendant P. as to 15%. The contest was in effect, between the defendants rather than against the plaintiff. The defendants as parties under Sec. 4 of the Contributory Negligence Act will have the costs divided accordingly. *Patterson* v. *Hale* and *Pugh*, (1932) 3 W.W.R. 280.

See DAMAGES.

See MOTOR VEHICLES LEGISLATION.

NEW TRIAL.

1. Plaintiff non-suited — reversal on appeal.]—When a defendant asks for and gets a non-suit on the ground that the plaintiff has failed to make out a case and this is reversed, a new trial is not generally ordered. *Manery* v. *Kampe*, (1941) 56 B.C.R. 280; (1941) 4 D.L.R. 493; (1941) 3 W.W.R. 687.

2. Inadequacy of charge to jury.]—By sec. 60 of the Supreme Court Act, it is provided that nothing shall prejudice the right of a party to have the issues for trial by a jury left by the judge to them with a proper and complete direction upon the law and as to the evidence applicable to such issues, and it is further provided that the said right may be enforced by appeal without any exception having been taken at the trial. Held, on appeal, ordering a new trial, that the trial judge had failed to define certain vital issues or to refer to the evidence on them. *Fletcher, Turney & Hanbury Ltd.* v. *Colquhoun de Wolfe & Co. Ltd.*, (1934) 49 B.C.R. 113.

See PRACTICE.

NOTARY PUBLIC.

2. Notaries Act — grounds for enrolment.]—An applicant for an order for enrolment under the Notaries Act must show that there is a need of a notary public in the place where the applicant desires to practise, and an application should be decided on the particular exigencies and necessities of each case. In *re Notaries Act and Hercules Worsoe,* (1939) 53 B.C.R. 376; (1939) 4 D.L.R. 814.

2. Notaries Act — necessity to show need on application for enrolment.] — The "need' of which under the statute, the judge must be satisfied, is a public need in the nature of a public necessity as distinguished from an individual need occasioned by the personal or commercial considerations of an applicant. Here there are more than a hundred notaries in the neighborhood of the place where the applicant desires to practise. The order for enrolment was set aside. *The Law Society of British Columbia* v. *Gallagher,* (1945) 62 B.C.R. 247; (1946) 2 W.W.R. 409.

3. Costs of appeal to Court of Appeal against order for enrolment.] — The Law Society of British Columbia successfully appealed against an order to enrol the respondent as a notary. On the settlement of the judgment the appellant was refused a direction that the costs should be paid to the Society. Good cause was in the circumstances shown. *The Law Society of British Columbia* v. *Callagher,* (1946) 62 B.C.R. 349; (1946) 2 W.W.R. 409.

NUISANCE.

1. Right of tenant to damages for emission of smoke from adjoining premises.]—As between the landlord and the tenant the latter is entitled to claim against an adjoining owner in respect of a nuisance. *Billingsgate Fish Ltd* v. *British Columbia Sugar Refining Co. Ltd.,* (1933) 46 B.C.R. 543; (1933) 1 W.W.R. 530.

2. Whether municipality's failure to act is actionable.]—A municipal health by-law as to sewage disposal was not complied with. It was contended that the corporation became liable to anyone who suffered special damage as a result. Held, the by-law did not create for the benefit of individuals any right enforceable by action. *Wilson* v. *Corporation of the City of Greenwood,* (1946) 62 B.C.R. 549; (1946) 3 D.L.R. 780; (1946) 2 W.W.R. 678.

PARTNERSHIP.

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II. Relations of Parties *inter se,* 559.

III. Legal Proceedings, 561.

I. Creation and Duration.

1. Mining property—single adventure—dissolution upon formation of syndicate.] —The plaintiff and the defendant formed a partnership to exploit certain mining properties. Efforts to sell having failed and assessment work being due a syndicate was formed with one P. by means of which money could be raised by the sale of units. Units were distributed among the parties according to their interests and the plaintiff agreed to the settlement. Then the defendant and P. acquired certain other mining properties in the same area which proved to be very valuable. The plaintiff having made no claim for two years came forward and claimed that the partnership had continued to the time when these new and valuable properties had been acquired on behalf of the partnership. He sued for an accounting. One of the defences was that the plaintiff's claim was in any event barred because at the material time he was was not the holder of a free miner's certificate. The trial judge held that the partnership was for a single adventure but that the relationship persisted until the syndicate sold to a company formed to take over the properties; the plaintiff, however, did not share in the valuable claims acquired by the defendant and P. He held that the lack of a miner's certificate was not a bar. The Court of Appeal held that the lack of such a certificate was fatal to the plaintiff's claim and dismissed the action. The Supreme Court of Canada held that the plaintiff was entitled to an accounting throughout and that the lack of

the certificate was no bar. On further appeal to the Privy Council it was held that the partnership was formed for a single adventure; that it was dissolved when the syndicate was formed and that what took place after that was no concern of the plaintiff's. The action was dismissed. It was not necesssary to decide whether or not the lack of the certificate was fatal. *Winsby* v. *Tait,* (1943) 1 D.L.R. 81; reversing (1941) 2 D.L.R. 81; reversing (1939) 54 B.C.R. 335; (1940) 4 D.L.R. 798.

2. Motor car dealers—associated for selling used cars.]—The three defendants were dealers in motor-cars and had associated themselves for the purpose of disposing of used cars turned in to them on sales of new ones. They occupied premises for the display of cars, employed salespeople, ran advertisements and had a bank account —all in the name of the organization. They were financed by the three defendants in proportion to the sales of each member's cars. Held, the business was carried on for the mutual benefit of the three defendants and it contained all the necessary ingredients of a partnership. *Barnes* v. *Consolidated Motor Co. Ltd.,* (1942) 57 B.C.R. 270; (1942) 1 D.L.R. 736; (1942) 2 W.W.R. 43.

3. Partners or co-adventurers—mining syndicate.]—By a syndicate agreement the defendants M. and P. became trustees for the holders of "units" which they were authorized to sell to the public. The defendant M. induced the plaintiff by fraud to contract for the purchase of forty units. The latter claimed rescission of the contract and added the members of the syndicate as defendants. It was held that the unit-holders were not partners but co-adventurers and that they were not liable for M's fraud. Rescission was ordered as against M. *Wearmouth* v. *MacPherson,* (1936) 1 W.W.R. 623.

II. Relations of Partners *inter se.*

1. Rights of assignee of part of partner's interest.] — Nothwithstanding a provision in the partnership agreement that no partner might sell his share without the written consent of the others, one partner purported to sell to the plaintiff's assignor a fraction of his interest. The partners transferred the partnership property to an incorporated company in consideration of shares in that company. The plaintiff's action, which was dismissed by the trial Judge, claimed a declaration that he had a one-twenty-third interest in the partnership, that the transfer was void and that the partner who had sold the fraction was a trustee for the plaintiff. Held, dismissing the appeal, that the lack of consent prevented the plaintiff from acquiring any interest in the partnership or the incorporated company. His only remedy against the partner who sold the fraction was, as assignee, for an accounting after dissolution under sec. 34 of the Partnership Act but no claim for that relief was raised on the pleadings and no amendment should now be made. *Harnam Singh* v. *Kapoor Singh et al.,* (1932) 46 B.C.R. 195.

2. Equitable charge against one partner's share of firm property.]—Where in proceedings to settle partnership affairs after dissolution one party is awarded costs against the other, there is no authority for making them a charge or equitable lien on the interest of the other in the absence of any equity supporting it. *Eberts* v. *Taylor,* (1932) 45 B.C.R. 390; (1932) 2 W.W.R. 287.

3. Dissolution—farming partnership.]—The agreement provided that "the dwelling-house now built on the said land... is to be and remain the exclusive and separate property of the vendor." Upon a dissolution it became necesssary to ascertain what was meant by the term "dwelling-house" and it was interpreted as allowing with it such land as is reasonably necesssary for the enjoyment of the building. This must be determined by the particular situation and circumstances of the property at the time. Three-quarters of an acre was allowed as this was the fenced area surrounding the house when the agreement was made. *Olafson* v. *Melsted,* (1939) 54 B.C.R. 358; (1939) 4 D.L.R. 761; (1939) 3 W.W.R. 375.

4. Formation of private company—really a partnership.]—Where in substance and reality the venture was a partnership in the guise of a private company, the acquisition of a corporate entity will not alter the character of the basic agreement between the parties. Use of legal machinery to do an illegal act will not purge its

illegality, nor will the indirection of the means rid the act of its illegality. *Williamson* v. *Slater,* (1943) 60 B.C.R. 502.

III. Legal Proceedings.

1. Style of cause.] — In an action against a firm the style of cause may properly include the names of the individual partners as well as the name of the firm, thus "A and B carrying on business as the XY company and the said XY company." *Dominion Bank* v. *Palitti,* (1931) 45 B.C.R. 89.

2. Direction to take accounts—finding as to terms of partnership implicit in direction.]—The trial judge did not in terms make a finding as to the rights of the parties under the agreement. He directed judgment "as claimed in the amended statement of claim". Held, dismissing the appeal, the pleading set out the terms of agreement. *Swartz Bros. Ltd.* v. *Swartz,* (1941) 2 D.L.R. 735.

PATENTS.

1. Exercise of inventive faculty.]—The plaintiff held a patent in respect of sawdust burners for cook-stoves. The defendant made and sold an article alleged to be an infringement. The defendant contended that the plaintiff's patent was invalid as being merely the application of an old contrivance to an analogous purpose. Held, dismissing an action for infringement, that the plaintiff's burner was similar to burners in common use in connection with furnaces and other heating units; that all the plaintiff had done was achieved by good shop practice and no exercise of the inventive faculty was shown; in the result there was no valid patentable invention. *Horton* v. *The Central Sheet Metal Works,* (1935) 49 B.C.R. 303; (1935) 2 D.L.R. 760.

2. Jurisdiction of provincial Court—defence of invalidity.]—In an action by a patentee for damages for infringement taken in the Supreme Court of British Columbia, the plaintiff, on appeal, contended that a provincial court had no jurisdiction to entertain the defence of invalidity of the patent and that the Exchequer Court alone could do so. Held, that the objection could not be sustained. Held, on further appeal to the Supreme Court of Canada, affirming the decision below, that the combined effect of secs. 54 (1), 59 and 63 of the Patent Act clearly gives jurisdiction to the provincial courts to deal with the defence of invalidity in actions for infringement of a patent. *Skelding* v. *Daly,* (1941) S.C.R. 184; (1941) 1 D.L.R. 305; affirming (1939) 55 B.C.R. 427.

PLEADING.

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VI. Striking Out Pleadings and Allegations, 570.

I. Parties.

1. Revivor: discretion to refuse after long delay.]—An application by a defendant to revive an action under M.R. 181 after the lapse of thirteen years was refused on the ground of laches, particularly as one of the parties interested, who might be an important witness had died. Held on appeal, affirming the decision below, that the discretion of the judge should not in the circumstances be interfered with. *Goddard* v. *Bainbridge Lumber Co. Ltd.,* (1933) 47 B.C.R. 390; (1934) 1 W.W.R. 836; affirming (1933) 2 W.W.R. 292.

2. Attorney-General as representing the Crown.]—In an action for a declaratory judgment to enforce a claim against the provincial Superannuation Fund, the Crown is not a proper party defendant. As the Crown has no beneficial interest in the fund the Attorney-General may be sued as representing the Crown. Leave to amend

was granted. *Knox v. Baker,* (1936) 51 B.C.R. 62.

3. Trustees of Trade Union.]—In an action for damages in the County Court for negligent driving it developed that the defendant was driving a car belonging to a Trade Union in the course of his employment by the Union. The Union was not incorporated or registered and its trustees asked to be added as parties defendant in their representative capacity. Held, making the order, that the trustees could fairly be said to represent the members of the Union as people proper to be authorized to defend. *Hemmingsen* v. *Bergen,* (1937) 52 B.C.R. 161; (1938) 1 D.L.R. 786.

4. Claim by one of three parties to agreement—divisibility of contract.]—The defendant as agent for the sale of certain timber made an informal agreement agreeing in the event of a sale to share his commission with three others, among them the plaintiff. After a sale largely through the plaintiff's efforts, the defendant repudiated the agreement and the plaintiff sued the defendant alone. On appeal the defendant raised the question of the failure of the plaintiff to add the other two participants as defendants. Held, affirming the decision below, the plaintiff's contractual relations were with the defendant only; the trial was conducted on that basis and the agreement should be so construed. No question of law arose and, even if it did, it might have disappeared if raised at the trial. *Hoy* v. *Gibson,* (1940) 55 B.C.R. 137; (1940) 3 D.L.R. 23.

5. Absence of personal representative.]—The plaintiff company sued for a declaration that J. was at the time of his death indebted to the company and that he had deposited certain shares of the plaintiff as security for the indebtedness. The action was brought pursuant to order against R., a son of the deceased J., both personally and as representing the heirs and next of kin of J. R. entered an appearance. J.'s estate had been administered in the State of Washington by another son, M., who in a declaration made in connection with the administration valued the shares in question as nil. At the trial it was objected that M. was a necesssary party to the action. Held, R. by his appearance accepted the representative capacity. Rule 168 may be invoked in the absence of the legal personal representative in a case of this kind. M. if made a party would not be heard to deny the debt due the plaintiff, or the pledge of the shares, in view of his declaration to the Washington Court. On appeal it was contended that there was no jurisdiction to make the order. Held, the question is one of discretion rather than jurisdiction and the declaratory order does not require the appointment of a personal representative nor is his presence required in these proceedings. The defendant could have applied for administration at any time during the last twenty years and cannot now object, especially when it was clear that the equity of redemption was worthless as described by the personal representative in the Washington Court. *British American Timber Co. Ltd.* v. *Jones,* (1944) 60 B.C.R. 174; (1944) 2 D.L.R. 481; (1944) 2 W.W.R. 577, varying on another point (1943) 59 B.C.R. 270; (1943) 4 D.L.R. 686; (1943) 2 W.W.R. 654.

6. Association—entity not known to the law—judgment null and void.]—An unincorporated association, not being a partnership, has no status to sue or be sued. A judgment rendered against such an association as a tenant is a nullity and the Court of Appeal in the exercise of its inherent jurisdiction struck out the judgment, making no order as to costs. *Yue Shan Society* v. *Chinese Workers' Protective Association,* (1944) 2 D.L.R. 287; (1944) 3 W.W.R. 497.

7. Whether defendants should be added —common question of law or fact.]—Where the defendants, sought to be added by the plaintiffs might have to spend many days on the trial of issues which, so far as they were concerned, might be disposed of in a short time, it was made a term of the order adding them that the plaintiff must pay all costs thrown away by reason of the amendment. *Whieldon* v. *Fraser Valley Milk Producers Assn.,* (1933) 3 W.W.R. 377.

II. Statement of Claim.

Res ipsa loquitur.]—Where a plaintiff pleads and attempts to prove specific acts of negligence, he may not invoke the principle of *res ipsa loquitur. Hyde* v. *British Columbia Electric Railway Co. Ltd.,* (1933) 46 B.C.R. 443.

III. Defence.

Innuendo not justified in terms—justification of libel generally.]—The defence did not in terms plead justification of the innuendo although it traversed it, and did justify the libel in its ordinary meaning. Here the innuendo was nothing more than the plain and natural meaning of the alleged libel. It was held that the wording "In answer to the statement of claim as a whole the defendant says that the statements as therein contained were true in substance and in fact" did as a matter of pleading justify the statements in the statement of claim as to the innuendo, as well as the statement as to the libel in its natural meaning. If there was a lack of clarity particulars could have been demanded. Semble, a plea of justification goes to the libel, plus any importation it may reasonably bear. *Hare* v. *Better Business Bureau of Vancouver,* (1946) 63 B.C.R. 241; (1947) 1 D.L.R. 280; (1947) 1 W.W.R. 25; reversing (1946) 63 B.C.R. 24; (1946) 2 W.W.R. 630.

IV. Particulars.

1. Endorsement on stock certificate; photostatic copy.]—The plaintiff alleged the deposit of his stock certificate by a customer with the defendant bank. Upon a demand by the bank for particulars of its endorsement the plaintiffs replied that it could be seen in the hands of B., a solicitor of the Court. Held, not sufficient, and that a photostatic copy should be furnished. *Hutchinson* v. *Bank of Toronto,* (1933) 48 B.C.R. 284; (1934) 1 W.W.R. 444.

2. Statement of counsel as answer.]—In reply to a demand for particulars of an agreement counsel for the plaintiff replied that there was no agreement except the oral one set up in the statement of claim and that it was for the Court to say on the trial what legal results flowed from it. Held, in view of counsel's statement, no order for further particulars would be made, but he would be precluded at the trial from offering any evidence beyond that set up in the pleading. *Hutchinson* v. *Bank of Toronto,* (1933), 48 B.C.R. 284; (1934) 1 W.W.R. 444.

3. Pleading Insurance Act as a whole—necessity to specify the sections relied on.]—The plaintiffs pleaded "the Insurance Act". The defendants demanded particulars and received the answer: "The plaintiffs plead each and every section of the Insurance Act". Held, on an application for further and better particulars, the plaintiff must state the particular section relied on. The object of pleading is to narrow down the issues and to avoid either party being taken by surprise at the trial. *Catherine J. Spencer* v. *The Continental Insurance Co.,* (1943) 60 B.C.R. 35; (1944) 1 D.L.R. 614; (1944) 1 W.W.R. 249.

4. Facts peculiarly within the knowledge of the opposite party—application refused.]—The claim was for the value of equipment lent gratis to the defendant and destroyed by fire through the defendant's negligence. On such a claim based on a gratuitous bailment, the least neglect will support the action. The defendant demanded particulars of negligence and the reply was that they were peculiarly within the knowledge of the defendant and should not be given until after discovery. Held, dismissing the application for particulars, that discovery should precede particulars. Any given now would be more inventive than factual. *Brown* v. *Batco Development Co.,* (1946) 62 B.C.R. 371.

5. Whether particulars are sufficient—claim of flooding by municipality.]—The claim was for wrongful diversion of a stream flooding the plaintiff's land. The defendant demanded particulars of "the alleged wrongful acts" and the answer was "the acts which made such diversion wrongful were the acts by which defendant diverted water into the stream of the plaintiff". Held, the answer was insufficient. An answer giving the dates of the wrongful diversion as "every day for a year", and giving the points of diversion as all points above the plaintiff's property up to the source of the stream, was held sufficient. *Murray* v. *District of West Vancouver,* (1935) 3 W.W.R. 127.

6. Whether particulars to be given of consideration or as to who made presentment in action on promissory note.]—The defendant was sued as the maker of a promissory note. The plaintiff alleged that he was endorsee and holder of the instrument and that it had been presented and not paid. Held, the defendant was not en-

titled to particulars of the consideration given for the note nor as to who presented it. *Scott* v. *Anglo-Canadian Investments Ltd.*, (1942) 1 W.W.R. 619.

V. AMENDMENT.

1. New cause of action.]—An action for negligence was commenced within the statutory limitation period. After the expiration of that period the plaintiff sought to amend by setting up an alternative claim based on new grounds. Held, dismissing the application, that an entirely new ground upon which to base a cause of action after the time limit had expired, should not be permitted to be raised. *Barker* v. *British Columbia Electric Railway Co. Ltd.*, (1934) 48 B.C.R. 427.

2. Setting up new cause of action.]—Several plaintiffs joined in an action based on breach of contract and in the statement of claim a written contract was set out in extenso as having been made between the defendant and the plaintiff J. After delivery of a statement of defence denying any such contract, it was disclosed on examination for discovery that the contract sued upon was not made with the plaintiff J. but with the plaintiff M. On an application to amend by substituting M. for J., it was held that the plaintiffs were not, in fact, setting up an entirely new cause of action and an order for amendment was made with costs to the defendant in any event. *Johnson* v. *Northern Packing Co. Ltd.*, (1934), 48 B.C.R. 407; (1934) 2 W.W.R. 381.

3. Defendants wrongfully sued as public officers.]—The action was for damages for personal injuries against a minister of the Crown, his deputy and a road foreman. On a motion to strike out the statement of claim as disclosing no cause of action against these officials, as such, the plaintiff was allowed to amend in such a way as to make it clear that the defendants were sued in their private capacities. *Gray* v. *Paterson*, (1933) 48 B.C.R. 70; (1933) 3 W.W.R. 558.

4. Necessary averment—amendment on appeal.]—In an action for work and labour the pleading failed to allege that it was done at the request of the defendant. The plaintiff was allowed to amend by the Court of Appeal but forfeited part of his costs. *McDonald* v. *Wolverton*, (1932) 45 B.C.R. 385; (1932) 3 D.L.R. 317; (1932) 2 W.W.R. 354.

5. Defence delivered inadvertently while still a draft.]—Application was made to deliver an amended statement of defence on the ground the one delivered was a mere draft filed inadvertently. The plaintiff claimed that the defence as delivered contained admissions and contended that no amendment should be granted until it was shown that the admissions were inadvertently made, and further that they were not correct. Held, following *Halpin* v. *Fowler*, (1907) 12 B.C.R. 441, that the amendment should be allowed. In any event the defence delivered was so ambiguous that it should be amended to save trouble later. *Robertson* v. *Batchelor*, (1935) 49 B.C.R. 559; (1935) 2 W.W.R. 29.

6. Setting up new cause of action.]—After a jury had disagreed in a negligence action the plaintiff sought to amend his statement of claim so that the operation of two street cars would be brought into question instead of one. Held, that the endorsement on the writ was broad enough to cover the new claim so that no question of the statutory bar after twelve months arose. As the negligence now sought to be alleged was identical in character with that already pleaded, the amendment was allowed. *Smith* v. *British Columbia Electric Railway Co. Ltd.*, (1937) 52 B.C.R. 231; (1937) 3 W.W.R. 718.

7. Setting up new cause of action.]—An amendment to the statement of claim was allowed, notwithstanding six years' delay in applying, where there was no substantial departure from the original cause of action but a reaverment thereof in a more artistic and precise form. *DesBrisay* v. *Canadian Government Merchant Marine Ltd.*, (1936) 51 B.C.R. 396; (1937) 2 D.L.R. 415.

8. On appeal.]—The plaintiff was injured while a passenger on a street car of the defendant's. She was walking toward the exit when a sudden jolt threw her down and injured her. Her pleadings based her claim on a sudden stop whereas the evidence established that it was a sudden start that was the cause of her injury. The plaintiff was permitted on the appeal to

amend her pleading to conform with the evidence. *Wilkinson* v. *British Columbia Electric Railway Co. Ltd.,* (1939) 54 B.C.R. 161; (1939) 3 D.L.R. 623; (1939) 3 W.W.R. 238.

9. Statement of claim disclosing no cause of action—right to amend.]—An action was commenced by two shareholders of the defendant company on behalf of themselves and all others except the defendants. It was held at the opening of the trial that the statement of claim disclosed no cause of action because the necessary allegations had not been made to furnish a foundation for the action by these plaintiffs. An application by them for an amendment was not granted and the action was dismissed. The Court of Appeal affirmed the decision of the trial judge. Held on further appeal to the Supreme Court of Canada, that the amendment should have been granted. The action should not have been dismissed on the ground that the pleadings were insufficient, without giving the plaintiffs an opportunity to amend. *Levi* v. *MacDougall,* (1941) 4 D.L.R. 340; reversing (1940) 56 B.C.R. 81; (1941) 2 D.L.R. 171; (1941) 3 W.W.R. 301; affirming (1940) 4 D.L.R. 666; (1940) 3 W.W.R. 317.

10. Statement of Claim in libel action—discretion.]—The tendency has been to permit considerable latitude in allowing amendments. The allowing of such amendments as may be necessary for determining the real controversy between the parties is a matter within the discretion of the judge. *Willet* v. *Fallows,* (1943) 58 B.C.R. 490; (1943) 2 D.L.R. 319; (1943) 1 W.W.R. 616.

11. General permission to amend—should be specific and should be filed.]—A direction in the formal judgment that "all pleadings herein (should) be deemed to have been amended in order to give effect to this judgment" was disapproved. No such general permission should be given. Amendments allowed should be specific, and should be actually filed before judgment is entered. *Stephen* v. *Stewart,* (1943) 59 B.C.R. 410; (1944) 1 D.L.R. 305; (1943) 3 W.W.R. 580; reversing (1943) 59 B.C.R. 84.

12. Effect of amendment authorized by judge after judgment pronounced—non-compliance with rule 311.]—Having given judgment for the plaintiff the judge, a week later, gave leave to the plaintiff to amend, apparently to make the pleadings conform to the evidence given. No application for the purpose had been made and the defendant had no opportunity to be heard. The leave to amend was not implemented as required by rule 311. On the appeal against the judgment the appellant contended that the amendment was ipso facto void under the rule and that without it the judgment was not supported by the pleadings. Held, ordering a new trial, the amendment should not have been directed without hearing the other side whereupon further evidence would, no doubt, have been adduced. There was a mistrial. Moreover the amendment became void under the rule through lapse of time. *McKnight* v. *Rudd Mitchell & Co. Ltd.,* (1945) 62 B.C.R. 75; (1945) 3 W.W.R. 552.

VI. Striking Out Pleadings and Allegations.

1. Material to be used.]—An application to strike out a pleading on the ground that it discloses no reasonable cause of action should be based only on the facts that appear in the impugned pleading and, if made on that ground only, the pleading cannot be attacked as frivolous or vexatious, or under the inherent jurisdiction of the Court. *Eastman* v. *Pacific Forwarding Co. Ltd.,* (1934) 48 B.C.R. 197; (1934) 3 D.L.R. 516; (1934) 3 W.W.R. 199.

2. Frivolous and vexatious.]—In a foreclosure action the defendant denied everything except the giving of the mortgage and set up no case of his own. The plaintiff moved to strike out the defence under rules 223 and 284 and under the inherent jurisdiction of the Court. Soon after the action was commenced the defendant had unsuccessfully moved against the service of the writ and had made certain admissions in his affidavit on that motion. Held, striking out the defence, that it was a mere sham, framed with a view to gain time. An appeal to the inherent jurisdiction of the Court is not limited to what appears in the pleading. *Ford* v. *Foot,* (1934) 49 B.C.R. 81.

3. Action for libel—impugned pleadings best left to trial judge.]—The judge declined to strike out certain paragraphs of

the statement of claim as disclosing no "reasonable cause of action". Held, on appeal, that a claim should not be dismissed as demurrable unless it is one that could not be cured by amendment; and that is a matter best considered at the trial. It is of little use attempting to apply principles or decisions until the evidence has been sifted and the facts stabilized. *Willett* v. *Fallows*, (1943) 58 B.C.R. 490; (1943) 2 D.L.R. 319; (1943) 1 W.W.R. 616.

4. Embarrassing — rule 223 — allegation of trusteeship.]—In order that an allegation should be struck out of a pleading upon the ground of embarrassment, its irrelevancy must be quite clear and, so to speak, apparent at the first glance. Here, it is not clearly manifest (quite apart from what might appear after considerable argument) that the impugned allegations do not admit of plausible argument. *Westminster Mills* v. *Ingham*, (1943) 59 B.C.R. 486; (1944) 2 D.L.R. 203.

5. Departure—new ground of claim raised in reply—Rule 212.]—In an action for damages for wrongful seizure and conversion of a truck the plaintiff alleged that there was no written authority whatsoever for the seizure. The defendant pleaded a defaulted conditional sale agreement signed by the plaintiff. In reply the latter admitted the agreement but challenged its validity, thus raising his real claim by way of reply. Held, the offending paragraphs in the reply should be struck out. The plaintiff may not in his reply set up a new ground of claim inconsistent with or contradictory to those in his statement of claim (Rule 212). *Ranjit Singh Mattu* v. *Industrial Acceptance Corporation Ltd.*, (1944) 60 B.C.R. 401; (1944) 2 W.W.R. 300.

6. Statement of claim disclosing no cause of action—dismissing action.]—The plaintiff's action was dismissed at the trial, without any evidence having been called, on the ground that the statement of claim (admitting all the facts alleged) disclosed no cause of action. Held, ordering a new trial, the power so to dismiss should be used only where the case is perfectly clear. In *Watson* v. *Girardi* (1946) 62 B.C.R. 406, it was held that a judge had no power to dismiss an action after hearing counsel's opening, where he wished to call evidence. Whatever difficulties may be in the way of the ultimate success of the appellant's case, he should not by a summary order be prevented in the circumstances from having it tried in the ordinary course. *Erickson* v. *Fisher*, (1946) 63 B.C.R. 419; (1947) 2 D.L.R. 43; (1947) 1 W.W.R. 227.

7. Disclosing no reasonable cause of action.]—A claim will not be struck out merely because it is unusual or novel. The common law is very flexible and new and unfamiliar claims have been constantly given effect to. A pleading should not be struck out if it may possibly found a cause of action. *Kelley Logging Co. Ltd.* v. *Pacific Coyle Navigation Co. Ltd.*, (1940) 4 D.L.R. 789; (1940) 2 W.W.R. 655.

8. Motion to dismiss action as an abuse of legal process.]—The plaintiff claiming to be a director and shareholder of the defendant company alleged that he had been wrongfully excluded from participating in its management. The defendants moved on affidavit, denying that the plaintiff was a shareholder or director, for a dismissal of the action. The judge refused to dismiss it. Held, on appeal, affirming the decision below, the inherent power to dismiss an action as an abuse of legal process, even where the pleadings are good on their face, will be exercised only in exceptional circumstances, e.g. res judicata. This was not such a case. *Howarth* v. *Dench*, (1942) 2 D.L.R. 177; (1942) 1 W.W.R. 260.

9. Whether Court may look at its own records.]—On a motion to strike out an endorsement on a writ the affidavit in support was defective and could not be used. The applicant called the Registrar to produce the documents in his custody. Held, the Court proceedings might be looked at without their being verified by affidavit. *Levi* v. *Cowan* (1933) 2 W.W.R. 140.

10. Failure to amend within the time allowed—effect of stay until costs be paid.]—The order giving the plaintiff leave to amend did not fix a time; as a result under O. 28, R. 7, fourteen days were allowed. Failure to comply within the time voided the order. The order provided that the costs of the application to amend should be taxed and the action stayed until the costs were paid. Held the defendant was entitled to have the writ and statement of claim struck out; (a) because the amendment was not made within the fourteen

days, (b) the costs had not been paid wherefore the stay was operative, (c) no extension of time should be granted where the order already made had become void, (d) the proceedings disclosed no cause of action. *Pullan* v. *Donaldson* (1946) 1 W.W.R. 133.

11. No cause of action disclosed—invoking Identification of Criminals Act.]—The Identification of Criminals Act was enacted for the purpose of assisting in the identification of persons who are engaged in breaking the laws of the country; it did not create any special cause of action for persons subjected to its operation. The writ and statement of claim were struck out. *Pullan* v. *McLellan* (1946) 1 W.W.R. 130.

12. No cause of action disclosed—publication of records under Identification of Criminals Act.]—The federal Identification of Criminals Act was enacted for the purpose of assisting in the identification of criminals and is not concerned with causes of action by persons who come within its operation. The plaintiff claimed for the unlawful publication of certain criminal records made regarding him. Held, assuming that the Act creates a duty by implication not to publish the records to unauthorized persons, that the plaintiff's claim based, as it is, solely on the Act, cannot be supported on the theory that, wherever a statutory duty is created, any person who can show that he has been injured by the nonperformance of that duty, can recover damages from the person on whom the duty is imposed. The writ and statement of claim were struck out. *Pullan* v. *McLellan* (1946) 2 D.L.R. 606.

See DAMAGES.

See PRACTICE.

POST OFFICE.

Order refusing use of mails.]—The plaintiff carried on "cross-word puzzle" competitions. The defendant, the Postmaster General, under sec. 7 of the Post Office Act, having satisfied himself that the post office was being used for a "fraudulent or illegal" purpose, declared the correspondence dealing with the competitions not to be "mailable matter". The plaintiffs claim for damages and an injunction was dismissed at the trial. Held, on appeal, affirming the dismissal that the Postmaster General was authorized in his discretion to exclude from the mails whatever he thought was not mailable matter. *Literary Recreations Ltd.* v. *Sauve,* (1932) 46 B.C.R. 116; (1932) 4 D.L.R. 553; (1932) 3 W.W.R. 123; 58 C.C.C. 385.

PRACTICE.

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I. WRIT OF SUMMONS.

A. Service Out of the Jurisdiction.

1. Affidavit in Support.]—Service of a concurrent writ ex juris in a libel action and the order authorizing its issue will be set aside where the affidavit in support discloses merely the plaintiff's claim and that someone

believes he has a good cause of action. *Smith* v. *Harris Investments Ltd.* (1932) 46 B.C.R. 264; (1932) 3 W.W.R. 303.

2. Sufficiency of affidavit.]—The plaintiff a Presbyterian minister was removed from office by a commission appointed by the General Assembly of the church. He issued a writ claiming a declaration that the decrees of the commission were void and for an injunction against their enforcement. An order was made for service out of the jurisdiction. The order having been set aside, it was held on appeal that the material in support of the application for service ex juris did not disclose a cause of action. The Court must be satisfied, not that the plaintiff can establish his cause of action at the trial, but that the facts (not opinions) deposed to on the application, if proved, reasonably disclose a cause of action. *Orr* v. *Brown* (1932) 45 B.C.R. 323; (1932) 3 D.L.R. 364; (1932) 2 W.W.R. 626.

3. Municipal Taxes.]—A writ claiming payment of taxes and the enforcement of the lien for taxes, due to a municipality from an owner resident and domiciled in England may be issued for service out of the jurisdiction. Such a claim is one to enforce an obligation affecting lands within the jurisdiction. *The Corporation of the District of Coldstream* v. *Macdonald-Buchanan*, (1934) 48 B.C.R. 409; (1934) 2 W.W.R. 383.

4. Failure to stamp as being "not for service outside the jurisdiction"—effect of.]—A writ was set aside where the address of one defendant was stated to be in New York but the writ bore no notification that it was not for service out of the jurisdiction. *Levi* v. *The British Columbia Distillery Co. Ltd.* (1935) 50 B.C.R. 401.

5. Contract which ought to be performed within the jurisdiction.]—The contract was one for the sale of shares which means that the vendor need only execute and deliver proper forms of transfer together with the requisite share certificates. That obligation need not be performed within the jurisdiction. The word "ought" in rule 64 (e) means "must". It was contended that there were other terms in the contract which must be performed within the jurisdiction e.g., the payment of the company's creditors in British Columbia. The fact remained, however, that apart from the transfer of the shares none of the other terms was susceptible of individual performance in this country, independently of the fate of other and distinguishable parts of the contract. Where some terms are to be performed within and some without the jurisdiction service ex juris should not be allowed unless individual performance of the former terms can be exacted independently of the fundamental terms to be performed without the jurisdiction. *Smith & Osberg Ltd.* v. *Hollenbeck*, (1939) 54 B.C.R. 141; (1939) 4 D.L.R. 119; (1939) 2 W.W.R. 625.

B. Substituted Service.

No affidavit in support.]—An order for substitutional service should not be granted unless an affidavit setting forth the ground upon which the application is made, has been filed. Rule 63 requires it. *Reid* v. *McKinnon*, (1936) 51 B.C.R. 188.

II. Appearance.

1. Application to set aside — whether appearance necessary.]—A defendant may move to set aside a writ, or the service thereof, for irregularity, without first appearing to it. *Levi* v. *The British Columbia Distillery Co. Ltd.* (1935) 50 B.C.R. 401.

2. Conditional appearance—Solicitor appointed by Court to enter.]—Where it was alleged that a writ had been issued without instructions, and where the defendant company could not move against the writ because one of its two directors, said to be colluding with the plaintiff, refused to cooperate, the Judge made an order appointing solicitors to act for the defendant and gave them leave to enter a conditional appearance so that they could move against the writ. *Mayo Lumber Co. Ltd.* v. *Kapoor Lumber Co. Ltd.* (1939) 54 B.C.R. 1.

3. Submission to jurisdiction by appearing to oppose petition.]—Where counsel appeared in answer to a petition only to challenge the Court's jurisdiction, he had not thereby given the Court jurisdiction. In *re Testators' Family Maintenance Act* and in *re petition of Laura Elsie Elliott* (1941) 56 B.C.R. 178; (1941) 1 W.W.R. 356, affirmed (1941) 56 B.C.R. 465, sub nom. In *re William Stewart Herron, deceased.*

III. Judgment by Default.

1. Agreement of sale — foreclosure — whether default judgments and hence capable of being set aside.]—After the successive steps leading to foreclosure had been taken (with no appearance or defence by the defendants) they moved to set aside the various orders and asked leave to bring into Court all moneys due. The judge refused the order holding that he had no jurisdiction to make it. Held, on appeal, reversing the decision below, that the judgments sought to be set aside were default judgments capable of being set aside under Order XXVII, rule 15. *Hayes* v. *MacKinnon* (1943) 59 B.C.R. 335; (1943) 4 D.L.R. 286; (1943) 3 W.W.R. 289.

2. Statement of Claim alone to be looked at.]—Under Order XXVII, rule 11, the Court may give such judgment, in default of defence, on the statement of claim, as the Court or a judge shall consider the plaintiff to be entitled to. On such a motion (a) the statement of claim is alone to be looked at, and the facts in it must be taken to be admitted, (b) the relief given should not go beyond that claimed in the prayer to the statement of claim, (c) the exact language of the prayer need not be followed nor need the full relief claimed be granted. *The Society of the Love of Jesus* v. *Smart* (1944) 60 B.C.R. 172.

3. County Court—Setting aside — whether long delay a bar.]—Judgment was entered in default of a dispute note in 1931. The judgment creditor applied in 1945 to be let in to defend. The judge dismissed the application in view of the length of time since the judgment. Held, allowing the appeal, the time should not be held to commence running until the defendant knew of the judgment. Here the defendant swore that in 1931 when served with the summons and some garnishee orders, he went to the plaintiff and arranged that the amount attached should be accepted as the amount due to the plaintiff. He did not therefore enter a dispute note or collect from the garnishees on the assumption that the plaintiff was to look to them for his money. He heard nothing more of the matter in the meantime. Held further it might be possible at the trial for the defendant to establish an accord and satisfaction. *Petkovich* v. *Potkonjak* (1945) 62 B.C.R. 164; (1945) 3 W.W.R. 476.

IV. Summary Judgment.

1. Foreign judgment—allegation of no service of process.]—Where the defendant swears that he was never served with, or notified of, the proceedings "abroad", that question goes to the matter of the principles of natural justice. It is a triable issue and the judgment obtained in a foreign jurisdiction will not support an application under Order XIV. *Romano* v. *Maggiora* (1935) 50 B.C.R. 66 .

2. Time for application under Order XIV.]—The application should be made before delivery of the defence and if a plaintiff applies after the delivery of a defence, he must assume the onus of justifying the delay. *Motorcar Loan Co. Ltd.* v. *Warner,* (1932) 45 B.C.R. 456.

V. Payment Into and Out of Court.

Up to what time plaintiff who accepts money in Court is entitled to costs.] — Where there is a payment into Court with the defence under rule 255 the plaintiff may under rule 261, without leave, at any time before reply accept it and tax his costs. The plaintiff's right is absolute under rule 259. In rule 261 the words "before reply" mean "before the expiration of the time limited for reply". Held, the plaintiff is, of course, entitled to his costs up to the time of payment in. Then followed the period of seven days mentioned in rule 261 wherein the plaintiff might make up his mind whether to accept or not. Neither side should have any costs during that period. The plaintiff gave notice of acceptance the day before the trial, thus conceding that on the quantum the defendant had been right when payment in was made. The defendant should have his costs from the expiration of the seven days on. *Whalen* v. *Cariboo Greyhound Lines Ltd.* (1946) 62 B.C.R. 303; (1946) 1 W.W.R. 682.

VI. Discontinuance.

Rule as to costs upon discontinuance.] —While a plaintiff who discontinues by notice under rule 286 must pay costs, he may escape such costs if he applies for leave to discontinue and the Judge so directs. *Shannon* v. *King (No. 3)*, (1932) 45 B.C.R. 65; (1932) 1 W.W.R. 411.

VII. Discovery.

A. Discovery of Documents.

1. Relevancy of documents.]—In an action against a bank as pledgee of securities left by the plaintiff with his stockbroker upon a specific agreement as to their rentention, the plaintiff applied for a further and better affidavit of documents dealing particularly with correspondence between the bank and its head office as to the financial position of the pledgor at the time. Held, dismissing the application, that the plaintiffs' claim on the pleadings was restricted to the question of whether the bank had knowledge of the limited authority of the broker in dealing with the securities and the correspondence with respect to the broker's financial condition would be irrelevant. *Hutchinson* v. *Bank of Toronto (No. 2)*, (1933) 48 B.C.R. 315; (1934) 1 W.W.R. 446.

2. Once privileged, always privileged.]—The insured suffered judgment for damages. The judgment remaining unpaid, the judgment creditor sued the insurer under sec. 175 of the Insurance Act. The insurer claimed that the insured had violated certain statutory conditions in the policy and that it was not liable. In reply the plaintiff said that the insurer defended the former action and was estopped from disputing the liability. In its affidavit of documents, the insurer claimed privilege for certain adjusters' reports and confidential correspondence with its legal advisers. The same solicitors acted in both actions—in the earlier one for the insured and in this one for the insurer. The plaintiff pressed for these documents for the purpose of showing that the insurer was, in effect, the real defendant in the previous action. The judge ordered that the documents be produced. Held, on appeal reversing the decision below, that if they were privileged in the first action that protection continued in this one. They were either professional confidential communications or documents prepared for the purpose of litigation to be laid before the legal advisers of the insured and the insurer for advice. *Mann* v. *American Automobile Insurance Co.* (1937) 52 B.C.R. 460; (1938) 2 D.L.R. 261; (1938) 1 W.W.R. 538.

3. Attorney-General as plaintiff—Crown not required to make discovery.] — The rules do not take away or lessen the prerogative right of the Crown to refuse discovery. Only precise words will take away that right. *Attorney-General for British Columbia* v. *Kandahar Consolidated Gold Mines Ltd.* (1939) 53 B.C.R. 409; (1939) 1 D.L.R. 803; (1939) 1 W.W.R. 305.

B. Examination for Discovery.

I. Corporation Officers.

1. Appointment served on solicitor seven days before examination of corporation officer.]—The machinery of rule 370 (g) applies only to parties and an officer of a corporation will not be compelled to attend for examination where the appointment was served on the solicitor seven days before the day appointed. *Eastman* v. *Pacific Forwarding Co.* (1934) 1 W.W.R. 539.

2. Officer of company in bankruptcy.]—In an action against the trustee in bankruptcy of a company the plaintiff sought to examine an officer of the company. The application was refused because the company was not a party to the action and further the trustee ought not to be bound by the admissions of one who was an officer prior to the bankruptcy of the company. *May* v. *Roberts* (1934) 48 B.C.R. 411; (1934) 1 W.W.R. 798.

3. Inspector of traffic for City.] — A police officer employed by the Police Commission who has charge of traffic matters is examinable under M. R. 370 c (1) as an officer or servant of the corporation. *Howes* v. *City of Vancouver* (1934) 48 B.C.R. 195; (1934) 1 W.W.R. 800.

4. Examination for discovery—Corporation, officers of—"chief trader" as a past officer of a company carrying on business as stock-brokers.]—The "chief trader" for the Vancouver office of the defendant having charge of the order department and the handling of buy and sell orders, is an officer of the company within rule 370 c (1) and subject to examination for discovery. *Johnson* v. *Solloway Mills & Co. Ltd.*, (1931) 45 B.C.R. 35.

5. Insurance adjuster.]—An insurance adjuster is an agent but not an officer of an insurer and hence is not subject to examination as an officer of an insurance company under Rule 370 c (1). *Kapoor Lumber Co. Ltd.* v. *Canadian Northern Pacific Railway Co.* (1932) 45 B.C.R. 213; (1932) 2 W.W.R. 417.

6. Examination of "any other officer."] Rule 1 of Order XXXIA provides that any officer may be examined without any special order and anyone who has been an officer may, by order, be examined. Rule 2 provides that after the examination of an officer "a party shall not be at liberty to examine any other officer or servant without an order." After the plaintiff had examined the president of the defendant company, he applied under Rule 2 for leave to examine one who had been one of its officers. Held, there was no power to make the order as the word "officer" in Rule 2 does not include one who has been an officer. *Harrison Mills Ltd.* v. *Abbotsford Lumber Co. Ltd.* (1934) 49 B.C.R. 301; (1935) 1 W.W.R. 32 or 480.

7. Past officer.]—Under Rule 370c (1) an order may be made for the examination of a past officer of a party notwithstanding that an officer has already been examined. *Harrison Mills Ltd.* v. *Abbotsford Lumber Ltd.* (1934) 49 B.C.R. 301, distinguished. *DesBrisay* v. *Canadian Government Merchant Marine Ltd.* (1936) 51 B.C.R. 57; (1936) 3 W.W.R. 383.

8. Status of agent with limited authority as officer.]—An agent who has no authority to bind an insurance company but merely takes applications for insurance and submits them for acceptance or rejection is not an "officer" and is not subject to examination as a "past officer" under Rule 370 c. *Trewin* v. *Wawanesa Mutual Insurance Co.* (1937) 52 B.C.R. 357; (1938) 1 D.L.R. 793; (1938) 1 W.W.R. 303.

9. Examination of officer under rule 370 (u).]—The man sought to be examined was the pilot of an aeroplane which, according to the affidavit, was under his sole management and control as the servant or agent of the defendant. As an officer of the corporation he was subject to examination under rule 370 (u). Each case depends on its particular circumstances. *McDonald* v. *United Air Transfer Ltd.*, (1939) 54 B.C.R. 101; (1939) 3 D.L.R. 27; (1939) 2 W.W.R. 253 reversing (1939) 53 B.C.R. 377; (1939) 2 D.L.R. 270; (1939) 1 W.W.R. 301.

10. Past officer of party in gaol—hostility—order refused.]—M. being in prison for having stolen from the plaintiff, was a shareholder and director of the defendant company. Before his conviction M. was an officer of the plaintiff bank. The application of the defendant to examine M. as a past officer of the bank under rule 370c (1) was rejected. Such examination is not a matter of right but of judicial discretion on the part of the judge. Here it would be against natural justice because he was convicted of theft from the bank on the information of one of its officers. He was clearly interested in having the defendant succeed as he is the owner of half its shares. *The Royal Bank of Canada* v. *Quadra Greenhouse Co. Ltd.* (1940) 55 B.C.R. 135.

11. Chinese manager—in prison — former officer—rule 370c (1)]—The plaintiff, wife of M. sued the defendant bank for the conversion of two cheques under circumstances said to be peculiarily within the knowledge of M. as former Chinese manager of the bank, and now in prison for theft from the bank. Under rule 370c (1) former employees may be ordered to submit to examination if they were "officers" but not if they were "servants". It was contended that M. was a mere servant being under the branch manager and accountant and that he little or no authority. Held, he was examinable. His title as manager implied a certain control or authority. The object of the rules is to discover the truth relating to the matters in question, and the examination ought to be of such "officer" of the defendant as is best informed as to such matters. The fact that he may be unfriendly to the defendant goes to the weight of his evidence, not the right to examine him. *Shou Yin Mar* v. *The Royal Bank of Canada* (1940) 55 B.C.R. 76; (1940) 3 D.L.R. 331; (1940) 2 W.W.R. 330.

12. Past officer or servant of corporation—when examinable.]—As of right, in the case of a corporation, an officer or servant may be examined without special order and where an officer has been examined under such right, another officer may be examined but only by order. A party has no right to examine a *past* officer or servant of a corporation as of right, whether any officer or servant has or has not already been examined. Rule 370c (2) does not add to or take away from the power contained in rule 370c (1) to examine a past officer of a company. *McFall* v. *Vancouver Exhibition Association (No. 3)*, (1942) 58 B.C.R. 290.

13. Whether more than one past officer can be examined.]—Rule 370c (1) provides that any officer of a corporation may, without any special order, and any one who has been one of the officers of such corporation

may by order of a Court or judge be examined. The judge held that the rule did not permit him to order the examination of more than one past officer. Held, reversing the decision below, the rule confers jurisdiction to order the examination of a second past officer if the judge in the exercise of his discretion sees fit. *Fenchurch Export Corporation* v. *Sitka Spruce Lumber Co. Ltd.* (1946) 63 B.C.R. 362; (1947) 2 D.L.R. 139; (1947) 1 W.W.R. 182.

14. Whether former street-car motorman an examinable officer.]—The motorman who drove the street-car involved in an accident causing injuries to the plaintiff had left the defendant's employ. Held, he was an officer and hence examinable under M.R. 370c (1). The term "officer" should have a broad signification and the circumstances of the particular case should be looked at. *MacRae* v. *British Columbia Electric Railway Co. Ltd.* (1942) 1 W.W.R. 532.

2. Scope.

1. Examination for discovery — scope of.]—The rules contemplate only one examination for discovery. Where the order for discovery directs an examination touching the matters in question in the action, i.e., the issues in the action, the examination will be limited to the issues as they appear from the pleadings. An order for discovery was improperly made at a time when the statement of claim had been substantially amended and before an amended defence was filed. *Johnson* v. *Solloway Mills & Co. Ltd.*, (1931) 45 B.C.R. 35.

2. Examination directed to collateral matters known to party professionally.]—In an action by a trustee in bankruptcy (who was an auditor), against a firm of auditors for negligence, the plaintiff was asked if he did not, when conducting an audit, find it necessary to rely upon information supplied by officers of a company. Upon the plaintiff refusing to answer, an application to compel him to do so was dismissed. Held, on appeal, affirming the dismissal, that the plaintiff, suing as trustee in bankruptcy in furtherance of his statutory duty of administering the bankrupt estate, could not be compelled to give evidence as an expert in the field of auditing merely because he happened to be a member of the same professional group as the defendant. *The Trustee of the property of Blue Band Navigation Co. Ltd.* v. *Price Waterhouse Ltd.* (1933) 47 B.C.R. 258; (1933) 4 D.L.R. 447; (1933) 3 W.W.R. 49; 15 C.B.R. 1.

3. To test credibility.]—In an action for breach of contract, two of the defendants admitted on examination for discovery that the breach had taken place but refused to give reasons for their action. The plaintiff claimed that other defendants had induced those being examined to break the contract. Held, it was open to the plaintiff to ask what had taken place between the other defendants and those being questioned, to test their credibility, if for no other reason. *Wright* v. *Macdonald* (1934) 48 B.C.R. 319; (1934) 1 W.W.R. 447.

4. Party adverse in interest.]—A defendant refused to answer questions not in issue between the plaintiff and himself but in issue between the plaintiff and other defendants. A judge ordered him to answer. Held, on appeal, reversing the order below, that discovery is limited to that which is relevant to the matters in question between the party examining and the person questioned, and does not extend to discovery relevant to matters in question between the party examining and other parties to the action. *Whieldon* v. *Morrison* (1934) 48 B.C.R. 492; (1934) 4 D.L.R. 366; (1934) 3 W.W.R. 126 reversing (1934) 48 B.C.R. 317; (1934) 1 W.W.R. 751.

5. Relevancy of question to issue.] — The issues involved the existence of a contract and its breach. On examination an officer of the defendant company admitted sending a telegram to the defendant's agent, "Terms of option not complied with. Go ahead with your prospect". The officer refused to divulge the name of the "prospect". Held, affirming the decision below, excusing him from answering, that the plaintiff was unable to show in what way the answer might advance his case or damage that of his adversary, confined as it was to the issues, viz., establishment of a contract, its breach and the quantum of damages. *Levi* v. *The British Columbia Distillery Co. Ltd.* (1936) 50 B.C.R. 481; (1936) 4 D.L.R. 205.

6. Administrative Board under statute —whether immune from questioning as to lack of bona fides.]—The chairman of the Lower Mainland Dairy Products Board refused on examination for discovery to answer questions intended to show that the

Board was not acting bona fide in making certain orders with respect to the marketing of milk. Held, ordering the chairman to answer the questions, that the Board is not a legislative but an administrative body and stands no higher than a municipal council, whose members may be questioned on matters of this kind. *Turner's Dairy Ltd.* v. *Williams* (1939) 54 B.C.R. 241; (1939) 4 D.L.R. 769; (1939) 3 W.W.R. 241. Reversed by 55 B.C.R. 81; (1940) 3 D.L.R. 214; (1940) 2 W.W.R. 193.

7. Refusal to answer—tendency to incriminate.]—The defendant in a libel action refused to answer questions which he said if answered, would tend to incriminate him. The judge held that he must attend and answer the questions as he was protected by sec. 5 of the Evidence Act. Held on appeal reversing the decision below, sec. 5 of the Provincial Evidence Act relates only to Provincial crimes and affords no protection as to crimes under the Code, e.g., defamatory libel. If rule 370c makes an examinee a witness, he is such only in relation to Provincial crimes. As to sec. 5 (2) of the Canada Evidence Act, the protection there is limited to witnesses and rule 370c is inoperative to make an examinee a witness within the meaning of the Code section. Hence the defendant could not be compelled to answer on discovery examination those questions the answers to which would tend to incriminate him. The result would be the same as to the production of documents on such an examination. *Staples* v. *Isaacs (No. 3)*, (1940) 55 B.C.R. 189; (1940) 3 D.L.R. 473; (1940) 2 W.W.R. 657; 74 C.C.C. 204; reversing (1939) 54 B.C.R. 403; (1939) 4 D.L.R. 769; (1939) 3 W.W.R. 452.

8. Confined to issues between examining party and examinee—rule 370c.]—In an accident case involving motor cars the plaintiff alleged that the defendant W. was at the time of the accident driving a car belonging to defendant H., his father. The defendants denied the allegation. On discovery the plaintiff sought on W.'s examination to ascertain if someone else, who it was suggested was driving the car at the time, had had H.'s permission to do so. Held on appeal, discovery is limited to relevant issues between the examining party and the examinee and does not extend to issues relevant only between the examining party and another defendant. *Nolan* v. *McCulloch* (1941) 56 B.C.R. 420; (1941) 3 D.L.R. 447; (1941) 3 W.W.R. 824.

9. Refusal to answer on ground of incrimination.]—A mere refusal to answer is not sufficient; the opposite party is entitled to have on oath the examinee's statement that he honestly believes the statement will or must tend to incriminate him. The case of the party examining as alleged in the pleadings must be assumed to be true in deciding what questions should be answered. *Hare* v. *Better Business Bureau of Vancouver* (1946) 2 W.W.R. 157.

10. Alleged fraudulent misrepresentation—question involving whole conversation.]—In an action for damages for a fraudulent misrepresentation on the sale of a farm the defendant was on discovery, asked "Just tell me the conversation. What did you do and what did you say?" Counsel explained that the question was related to the negotiations which led up to the sale. The judge held that the defendant was justified in refusing to answer because the question went outside the issues on the pleadings. Held, on appeal, reversing the decision below, that the question is not objectionable only because it may raise matters that are irrelevant in addition to those that are relevant. The plaintiff was entitled to inquire as to the substance of the whole conversation and was not bound to confine his examination wholly to the alleged misrepresentations. *Tisman* v. *Rae* (1946) 62 B.C.R. 477; (1946) 4 D.L.R. 78; (1946) 2 W.W.R. 641.

3. Who Liable To.

1. Action for forfeiture.]—In an action for forfeiture of a lease the party against whom forfeiture is sought cannot be forced to submit to examination for discovery. *Hodgson and Tait* v. *Turner* (1937) 51 B.C.R. 308.

2. Whether third party examinable for discovery—no issue between plaintiff seeking discovery and third party.] — Rule 370b (1) permits examinations for discovery "touching the matters in question by any party adverse in interest". As there was here no issue between the plaintiff and the third party, the plaintiff was not entitled to examine. *Peters* v. *Yorkshire Insurance Co.* (1937) 2 W.W.R. 303.

3. Testator's Family Maintenance Act —no issue defined by pleadings.]—Discovery is obtainable only from parties between

whom and the applicant there is an issue defined by the pleadings. The purpose of rule 370d (1) is to declare that a person who comes within its terms and who is not otherwise a party, shall be regarded as such for the purpose of the examination. It has no application to persons who are themselves parties to the proceedings. In *re Testator's Family Maintenance Act and the estate of Charles Henry Hitchen, deceased,* (1943) 60 B.C.R. 117; (1944) 1 W.W.R. 245.

4. During course of trial—"before the trial".]—It was not intended that the orderly conduct of a trial should be interrupted by ordering discovery after the trial commences, and such an examination cannot be ordered during the course of the hearing. The words of the rule are "before the trial". *McFall* v. *Vancouver Exhibition Association (No. 3),* (1942) 58 B.C.R. 290.

5. Adding unnecessary party in order to get discovery from him.]—The Lower Mainland Dairy Products Board, created under the Natural Products Marketing (British Columbia) Act, was by statute clothed with all the powers of a body corporate. In the action the plaintiffs claimed a declaration that the Board's orders were ultra vires, and for an injunction. The plaintiffs added the individual members of the Board as defendants and sought to examine one of them, W., not as an officer of the Board but as a defendant. He refused on the advice of counsel to answer some 50 questions. The judge required W. to attend and answer the questions. Held, on appeal, reversing the decision below, that W. was not a necessary or proper party and the members of the Board had been added in order to get discovery from them. No allegations were made against the members on the pleadings and all the relief claimed could be had against the Board itself. If W. had been properly joined with separate issues he could not even then have been questioned in respect of matters between the plaintiffs and the defendant Board. *Turner's Dairy Ltd.* v. *Williams* (1939) 55 B.C.R. 81; (1940) 3 D.L.R. 214; (1940) 2 W.W.R. 193; reversing (1939) 54 B.C.R. 241; (1939) 4 D.L.R. 769; (1939) 3 W.W.R. 241.

6. Second examination after amendment of pleadings.]—Where pleadings have been amended and new issues raised after examination for discovery, an order may be made allowing a second examination of the same party, limited to the matters raised in the amendment. *Fletcher, Turney & Hanbury Ltd.* v. *Colquhoun, DeWolfe & Co. Ltd.* (1934) 48 B.C.R. 322; (1934) 1 W.W.R. 752.

4. Use of.

1. Effect of putting in parts of examination of opposite party.]—Counsel putting in part of the evidence on discovery of an opposite party is at the risk that the judge will rule that other "connected" parts, not merely "explanatory" parts, are also to be put in, although they are unfavourable to counsel's case. The examination when put in evidence is merely an admission made under oath before an examiner. If an admission is put in it must be used in its entirety, that is everything must be read that is necessary to its understanding. Once in, it is evidence for both parties but the party putting it in can qualify or contradict such parts of it as may not be necessary to his case, but may be valuable to the other side. *W. E. Sherlock Ltd.* v. *Burnett* (1937) 52 B.C.R. 345; (1938) 1 D.L.R. 381; (1938) 1 W.W.R. 141.

2. Rejection of parts of discovery examination—new trial.]—A new trial was ordered where the trial judge, following *Westminster Woodworking Co.* v. *Stuyvesant Insurance Co.,* (1915) 8 W.W.R. 112, and ignoring the amendment to the rule, rejected the evidence of the defendant's servants taken under rule 370c (1), and where the excluded evidence would have supported the plaintiff's case. *Chesworth* v. *Canadian Northern Pacific Railway Co.* (1938) 53 B.C.R. 292; (1939) 1 D.L.R. 335.

3. When admissible as evidence—opposite party.]—The trial judge while holding that the examination for discovery of one defendant was not admissible against the other defendant nevertheless looked at the evidence and said "her evidence is before the Court. It is favourable to the plaintiff's case". Held on appeal, ordering a new trial, if it was favourable to the plaintiff's case, it must have been unfavourable to the other defendant's case, and having been held inadmissible as against the other defendant, should not have been looked at at all. *Carlson* v. *Hawkins* (1941) 56 B.C.R. 198; (1941) 3 W.W.R. 92.

VIII. Summons and Notice of Motion.

1. Defective summons.]—Where a summons omitted to mention the time at which it was returnable a preliminary objection was upheld and the application dismissed. *Humber* v. *Humber,* (No. 2) (1936) 50 B.C.R. 429.

2. Question arising in the administration of an estate.]—Where the question is one of conflict as to which of two estates a property belongs and where the issue will have to be decided dehors the two wills, it is not a "question arising in the administration" of an estate and there is no jurisdiction to hear it under rule 765 (g). *Rattenbury* v. *The Royal Trust Company,* (1937) 51 B.C.R. 513; (1937) 3 D.L.R. 204; (1937) 2 W.W.R. 481; reversing (1936) 51 B.C.R. 334; (1937) 1 W.W.R. 451.

3. Waiver by appearance at hearing.]—Counsel for the defendants appeared on the return day and objected that the two days' notice of motion required by Order LII, Rule 5, had not been given. Held, overruling the objection, the notice of motion was not a nullity but was merely affected with an irregularity which was waived by counsel's appearance on the motion at the time fixed by the defective notice. *The Society of the Love of Jesus* v. *Smart,* (1943) 60 B.C.R. 71; (1944) 2 D.L.R. 551; (1944) 1 W.W.R. 534.

IX. Reference.

1. Attempt to vary judgment after reference and report under it.]—A judgment directed an inquiry before the registrar to ascertain certain damages, and that judgment be entered for the damages certified to by the registrar. The registrar held the inquiry and found the damages as directed by the judgment The judge when the report was moved against, said that he had not intended that damages of a kind awarded by the registrar should be included and struck them out as being too remote. Held, on appeal, reversing the decision below, that the judgment had not been appealed against, nor had there been any application to correct it in the appropriate way; hence it stood and could not be curtailed in its effect as the trial judge sought to do. On the question of damages a wrongdoer will be liable whether he could have foreseen the consequences or not. *Brodt* v. *Wearmouth,* (1936) 51 B.C.R. 344; (1937) 2 D.L.R. 457; (1937) 1 W.W.R. 777.

2. Registrar assessing damages on basis of issues not open on the pleadings.]—In an action for damages for infringing a patent for saw-dust burners the plaintiff succeeded and it was referred to the registrar to assess the damages and report. He arrived at his total by estimating the loss of profit by the plaintiff on each burner made by the defendant and multiplying that by the number of such burners. In ascertaining the latter the registrar counted burners made by another person on the defendant's premises whom he held to be the alter ego of the defendant. Held, allowing the appeal, that the question of the defendant's responsibility for the burners made by the other person was not open on the pleadings and the number included on that footing was disallowed. *Skelding* v. *Daly,* (1941) 57 B.C.R. 121; (1942) 1 D.L.R. 355; (1942) 1 W.W.R. 489.

3. Accounting between joint tenants—rooming house business.]—At common law there was no obligation to account between joint tenants, but (1705) 4 Anne, Cap. 16, which is in force in British Columbia, gave a right of action where one receives more than his just share or proportion. Under the statute it had been held that where one tenant of a farm property risked his capital and labour in a hazardous crop and made a profit, his co-tenant could not claim to share in it—it was the return for the other's labour and capital to which the co-tenant had no right. Similarly, here, the claim of a co-tenant for a share of the profits of running a rooming-house will be refused—the keeper collects, not merely for the rooms, but for the services of care-taking, housecleaning, bed-making, etc. Moreover the registrar on such an accounting could not segregate the returns for dwelling space from those for services and the expenditure of capital. *Spelman* v. *Spelman,* (No. 2) (1943) 59 B.C.R. 551.

X. Interpleader.

1. Framing of issue.]—It is improper to break an issue into questions. *Peake* v. *Carter,* (1915) 85 L.J.K.B. 761; (1916) 1 K.B. 652, referred to; *Marshman* v. *Scott,* (1932) 46 B.C.R. 59; (1932) 3 W.W.R. 161.

2. Position where necessary parties not included in issue.]—Where an issue was

not so framed as to enable the claims of all persons interested to be disposed of, the Court of Appeal remitted the matter to the Court below to reframe the issues. *The Dominion Bank* v. *The authorized trustee of R. P. Clark & Co. (Vancouver) Ltd.*, (1933) 46 B.C.R. 486; (1933) 3 D.L.R. 424.

XI. Third Party Proceedings.

1. Insurer a third party—non-disclosure to jury.]—Where an insurer becomes a third party under sec. 48 of the Insurance Act, Amendment Act, 1935, it is not necessary to include a term in the order that it be not disclosed to the jury that the third party is an insurer. The rule is well recognized and need not be stated in the order. *McDiarmid* v. *Bowen*, (1937) 51 B.C.R. 401; (1937) 1 W.W.R. 548; (see *Obrodovich* v. *Proulx* infra).

2. Insurer becoming third-party on denial of liability.]—Under sec. 175 (7) of the Insurance Act an insurer denying liability under a policy has a right to be made a third-party where a claim against the insured might result in a claim against the insurer. The fact that the insurer is a party should not be disclosed to the jury and the order should so direct. *Obradovich* v. *Proulx*, (1939) 54 B.C.R. 465; (1940) 2 D.L.R. 771.

3. Directions as between two defendants—right to appeal—terms.] — One defendant should have the right to cross-examine the witnesses of the other in the discretion of the trial judge. In the event that the plaintiff recovers against T. and if T. obtains indemnity against J. it may be that T. would not wish to appeal. In such a case J. should be entitled to do so in the name of T., but on the terms that he give to T. security for all costs which T. may incur. *Amanda P. Yule* v. *J. R. Parmley* and *T. F. Parmley*, (1944) 60 B.C.R. 169; (1944) 1 W.W.R. 421.

4. Form of order where action based on negligence.]—In settling an order for directions it must be kept in mind that (a) the third party is not a defendant, (b) that at common law there is no right to contribution as between joint tort-feasors. The liability here so far as the third party is concerned must arise under the Contributory Negligence Act. The first enquiry is whether the defendant is liable to the plaintiff. If yes, then the question of contribution arises. *Anderson* v. *MacKenzie, Boultbee, Third Party*, (1934) 1 W.W.R. 303.

5. Principles upon which order will be made.]—The plaintiff claimed for negligence; the defendant claimed over against the owner of the road alleging that it was highly dangerous and unprotected. Held, the owner should be added as a third party. All parties should be before the Court so that if circumstances warrant there may be contribution or other relief over as the situation demands. *Anderson* v. *MacKenzie*, (1934) 1 W.W.R. 192.

6. Whether third party examinable for discovery—no issue between plaintiff seeking discovery and third party.]—Rule 370b(1) permits examinations for discovery "touching the matters in question by any party adverse in interest". As there was here no issue between the plaintiff and the third party, the plaintiff was not entitled to examine. *Peters* v. *Yorkshire Insurance Co.*, (1937) 2 W.W.R. 303.

XII. Trial and Notice of Trial.

1. Notice of trial by defendant; effect of vacation.]—M.R. 436 enables a defendant to give notice of trial, where the plaintiff does not do so, within six weeks after the close of the pleadings. Held, the six weeks does not run against the plaintiff during vacation and consequently he had not lost his right to give notice of trial. *Standard Equipment Ltd.* v. *Prest-o-lite Battery Co. Ltd.*, (1933) 47 B.C.R. 461; (1933) 3 W.W.R. 175.

2. Power of judge to reopen trial up to entry of judgment.]—Before entry of judgment the trial judge has power to reopen the trial and the Court of Appeal will not review an exercise of that power. The rules as to the admission of new evidence by an Appellate Court, viz., the necessity to show diligence etc., are not applicable. *Clayton* v. *British American Securities Ltd.*, (1934) 49 B.C.R. 28; (1935) 1 D.L.R. 432; (1934) 3 W.W.R. 257.

3. Re-opening of trial after judgment reserved.]—After the completion of the evidence and the argument of counsel and before any judgment was pronounced the defendant applied to re-open the trial and call further evidence to contradict a witness for

the plaintiff. The application was dismissed both on the ground that the re-opening was not in the interests of justice, and, if the principles as to diligence and conclusiveness applied, because the new evidence would not have changed the result had it been put in at the hearing. *Woodworth* v. *Gagne*, (1935) 50 B.C.R. 216; (1935) 3 W.W.R. 49.

4. Jury's answer reversed after redirection.]—A jury in answering questions found the plaintiff's son guilty of ultimate negligence but went on and awarded damages. Plaintiff's counsel stated that they had not understood that the effect of their answer would be to debar the plaintiff from succeeding and prevailed upon the judge to redirect them on ultimate negligence. The jury then brought in a new answer exculpating the plaintiff's son of ultimate negligence and judgment was entered accordingly. Held, what occurred amounted to a mistrial. *Grant* v. *British Columbia Electric Railway Co. Ltd.*, (1937) 52 B.C.R. 66; (1937) 4 D.L.R. 113; (1937) 3 W.W.R. 164.

5. Trial judge's power to interfere where moral turpitude disclosed.]—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 Court 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. *Winter* v. *Schulte*, (1938) 53 B.C.R. 157; (1938) 4 D.L.R. 285; (1938) 3 W.W.R. 201.

6. Failure of judge to direct the jury—sec. 60 of Supreme Court Act.]—A new trial was ordered where the issues were not submitted and left by the judge to the jury with a proper and complete direction upon the law and as to the evidence applicable to the issues. As no objection was taken at the trial, the costs of the appeal must (under sec. 60 of the Supreme Court Act) be paid by the successful appellant. *Pike* v. *British Columbia Electric Railway Co. Ltd.*, (1939) 54 B.C.R. 279; (1939) 4 D.L.R. 373; (1939) 3 W.W.R. 220.

7. Whether reference to "res ipsa loquitur", misdirection—failure of counsel to object.]—In charging a jury in an action for negligence caused by a fire the judge erroneously said that the plaintiff invoked the doctrine of "res ipsa loquitur". Plaintiff's counsel asked the judge to correct the statement but the judge declined to alter his charge. Counsel for the defendant said nothing. On the appeal the defendant contended that the jury had been misdirected and that a new trial must be ordered. Held, that having in the interests of his client, as he saw them, once taken a stand, he could not on appeal take a different position. Counsel for the defendant should have complained at the time and having failed to do so could not on appeal rely upon it. Moreover if there was any misdirection, it was of a very minor nature and did not affect the result reached by the jury—there had been no miscarriage of justice. *Elk River Timber Co. Ltd.* v. *Bloedel, Stewart & Welch Ltd.*, (1941) 56 B.C.R. 484; (1941) 4 D.L.R. 792; (1941) 3 W.W.R. 97.

8. Dismissal of action without hearing plaintiff's evidence.]—A new trial was ordered where the judge dismissed the action without hearing the plaintiff's evidence. The parties should be allowed to present their evidence and their submissions in accordance with the established rules and practice of the Courts. A judge has no right, without the consent of the plaintiff's counsel, to non-suit the plaintiff upon counsel's opening statement of the facts. *Watson* v. *Girardi*, (1946) 62 B.C.R. 406; (1946) 2 D.L.R. 671.

9. Court to be held in public—when exclusion permitted.]—In addition to certain statutory exceptions, (e.g. under the Criminal Code) there are three well recognized conditions under which the Court may exclude the public. (1) In suits affecting wards, (2) in lunacy proceedings, (3) in cases where secrecy is of the essence of the cause, (e.g. trade secrets, inventions, etc.) (1) and (2) are truly private affairs and an appeal for the protection of the Court should not involve placing domestic affairs in the light of publicity. (3) depends on the fact that rights are bound up with the preservation of the secret. There are other instances based on general principles and not on expedience or convenience. Agreement of the parties, or considerations of delicacy, or a willingness to abandon rights rather than be exposed to publicity might not be sufficient to justify a case being held in camera. In *re Legal Professions Act and the Benchers of the Law Society and F., appellant*, (1945) 62 B.C.R. 1; (1945) 3 W.W.R. 31; (1945) 4 D.L.R. 702.

10. Motion to take case from the jury—motion reserved at suggestion of trial

judge.]—Where counsel for the defence desires to make a submission of "no case" he must elect to call no evidence, otherwise the judge will refuse to rule. And having elected, he will be bound. Here the judge with the acquiescence of the defence reserved the motion saying "I will consider your motion on the evidence I have heard up to this time". After the verdict he dismissed the motion. The rule is that in such circumstances the plaintiff is entitled to rely on any evidence adduced by the defendant. Although the defence did not call evidence its counsel cross-examined a witness called by a co-defendant. As this was tantamount to calling evidence the defence lost its right to pursue the motion for a non-suit. *Protopappas* v. *British Columbia Electric Railway Co. Ltd.*, (1945) 62 B.C.R. 218; (1946) 2 D.L.R. 330; affirming (1946) 1 D.L.R. 271; reversed on another point (1946) 4 D.L.R. 1.

11. Application to adjourn trial refused —reasons therefor.]—Notice of trial was given October 24th for December 4th. At the hearing in Vancouver adjournment was asked for because one defendant was in Prince George and without means to attend. No alternative date was suggested. The application was refused because (a) it should have been made before the day of trial, (b) admissions already made on discovery made it unlikely that the defendant's evidence in Court would be accepted, (c) the other defendants could have required his presence by subpoena if they felt his evidence was necessary for their protection. *Warner* v. *Graham*, (1945) 62 B.C.R. 273; (1946) 2 D.L.R. 277.

12. Dismissal where no cause of action.]—The power to dismiss an action on the ground that a statement of claim discloses no cause of action should not be exercised except where the case is perfectly clear. *Erickson* v. *Fisher*, (1946) 63 B.C.R. 419; (1947) 2 D.L.R. 43; (1947) 1 W.W.R. 227.

XIII. Execution, Discovery in Aid.

1 Necessity of notice.]—An order for the examination of a judgment debtor under sec. 19 of the Arrest and Imprisonment for Debt Act was set aside on the ground that it should not have been made ex parte. *Morrison* v. *Mulry*, (1934) 49 B.C.R. 287.

2. Stay of proceedings pending result of another action between the parties.]—The judgment creditor had obtained an order to examine the judgment debtor under sec. 19 of the Arrest and Imprisonment for Debt Act. The debtor applied for a stay on the ground that he is plaintiff in another action against the judgment creditor and that the examination should be delayed until after judgment in the other action. Held, directing a stay, that the order may be made under the inherent jurisdiction of the Court but that the judgment debtor must speed the other action. *Morrison* v. *Mulry*, (*No. 2*), (1935) 49 B.C.R. 326; (1935) 1 W.W.R. 423.

3 Right of debtor to have counsel on examination.]—On the examination of a judgment debtor under rule 610 and section 19 of the Arrest and Imprisonment for Debt Act, as the liberty of the subject is involved, and there is no provision to the contrary, it is the inherent right of the debtor to have the assistance of counsel if he chooses. *Pope* v. *Pope*, (1942) 58 B.C.R. 283; (1942) 4 D.L.R. 692; (1942) 3 W.W.R. 412.

XIV. Stay of Proceedings.

1. No jurisdiction in Court appealed from to stay proceedings after notice of appeal—Sec. 30 of Court of Appeal Act.] —The trial judge directed an inquiry before the registrar, and payment of the amount certified by him. Following the launching of an appeal the judge was asked to postpone the inquiry pending the determination of the appeal; he granted a stay on terms. The appellant, not satisfied with the terms, applied to the Court of Appeal for the same relief. It was objected that the Court of Appeal had no jurisdiction, (a) because the order below granting the stay had not been appealed against, and (b) because what was sought was really a stay of execution under sec. 30 (d) of the Court of Appeal Act and hence a matter exclusively for the Court appealed from. Held, granting the stay without terms, the first objection failed because there was no jurisdiction in the Court below to make the order—it was a nullity. As to the other objection, the order sought was a "stay of proceedings" and not a "stay of execution" within sec. 30, and even if the motion could be regarded as one for a "stay of execution" nevertheless the subject-matter of the order for judgment did not fall within the classes of judgments enumerated in sec. 30 as exceptions to its overriding initial mandatory enactment that stay of

execution occurs automatically once security for costs of the appeal has been perfected. *Stephen* v. *Stewart,* (No. 2) (1943) 59 B.C.R. 297; (1943) 4 D.L.R. 642; (1943) 3 W.W.R. 225.

2. Dismissal of action as frivolous and vexatious.]—In the protracted litigation by the May plaintiffs, on their own behalf and on behalf of the shareholders of the Gibson Co., which was carried to a final conclusion, the defendants were successful. Then as a result of the decision in *Ferguson* v. *Wallbridge,* (1935) 1 W.W.R. 673, the Mays brought a new action adding the Gibson Co. as plaintiff on the footing that they (the Mays) had not been proper plaintiffs in the earlier litigation. This attempt to begin the litigation afresh was met by an application to dismiss the new action as frivolous and vexatious. The judge refused the application holding, in effect, that only now for the first time were the proper parties before the Court, and that all the previous proceedings were to be disregarded. Held, on appeal, reversing the decision below and dismissing the action, that the previous litigation could not be disregarded; the whole case for the plaintiffs was brought forward in the previous actions and no new issues were now being raised; that there should be an end to this litigation; and that it would not only be frivolous and vexatious, but it would be futile to permit the action to proceed. *May* v. *Hartin,* (1939) 53 B.C.R. 411; (1939) 2 D.L.R. 104; (1939) 1 W.W.R. 657.

3. Costs—registrar postponing taxation pending appeal—to save possible expense.]—Where a party became entitled to costs under an order, the registrar had no discretion to postpone the taxation because an appeal had been launched and, if allowed, might make the taxation unnecessary. There is ample provision for dealing with a stay of execution in a proper case but it cannot be accomplished in this way. In *re Edward Bowman Welsh,* (1942) 57 B.C.R. 559; (1942) 2 D.L.R. 264; (1942) 1 W.W.R. 565.

XV. Time.

1. Vacation: effect on notice of trial.]—M.R. 436 enables a defendant to give notice of trial where the plaintiff does not do so within six weeks after the close of the pleadings. Held, the time does not run against the plaintiff during vacation. *Standard Equipment Ltd.* v. *Prest-o-lite Battery Co. Ltd.,* (1933) 47 B.C.R. 461; (1933) 3 W.W.R. 175.

2. Families' Compensation Act—whether action premature.]—Parties claiming under the Families' Compensation Act need not wait fourteen days under Probate Rule 35 and need not have administration before commencing action. *Hamilton* v. *Oleson,* (1941) 56 B.C.R. 204; (1941) 2 D.L.R. 595.

See Pleading.

PRINCIPAL AND AGENT.

I. Formation of the Relation, 598.

II. Relations Between Principal and Agent, 599.

III. Relations between Agent and Third Parties, 603.

I. Formation of the Relation.

1. Delegation—status of sub-agent for insurance.]—B. the general agent of the plaintiff, an insurance company, employed the defendant as sub-agent to solicit fire insurance. The latter issued policies and collected premiums accounting to B. The general agency of B. was cancelled whereupon the plaintiff demanded of the defendant payment of the premiums collected and not turned over. The trial judge, giving judgment for the plaintiff held that the principle "delegatus non potest delegare" did not, in the circumstances, apply, and that there was privity of contract between the plaintiff and the defendant. Held, on appeal affirming the decision below, that the defendant was authorized as an agent pursuant to the Insurance Act and was acting under authority given by the plaintiff. By reason of the nature of the business the general agent was able to delegate authority in such a way as to make the sub-agent the agent of the plaintiff. *Norwich Union Fire Insurance Society Ltd.* v. *Leong,* (1935) 50 B.C.R. 149; (1935) 3 D.L.R. 445; (1935) 2 W.W.R. 480.

2. Conditions of ratification—payment made by one not purporting to be agent.]—The defendant made an agreement to pay a monthly sum to his former wife. He contended that a payment made by his

father satisfied the claim. The father's evidence showed that he had made the payment not as agent for or on behalf of his son but out of compassion for the plaintiff, and her infant child. Held, the defendant could not be allowed to say that the payment was made on his behalf. Liability by virtue of ratification can arise only where in doing the act to be ratified the agent purports to act as such and on behalf of the principal. *Dillon* v. *Dillon,* (1938) 1 W.W.R. 363; (1938) 1 D.L.R. 790.

II. Relations between Principal and Agent.

1. Agent's negligent failure to protect principal's interest.]—The defendant, a real estate agent, undertook to invest money of the plaintiff. He put it in an unfinished building; the builder failed to complete and permitted liens to be filed. Held, the agent was liable for negligence in failing to protect the lender by seeing that existing liens were discharged. *Lefevre* v. *Andrews,* (1932) 1 W.W.R. 122.

2. Stock-broker — duty to customer — alleged "bucketing".]—The plaintiff as trustee of F. (a stockbroker in Kamloops) claimed against the defendant company (also a stockbroker) and its directors alleging that the defendant company over a long course of buying and selling at the instance of F. had been guilty of "bucketing", i.e. failing to buy and sell as instructed but itself betting against the rise and fall of the securities traded in, at the same time porting fictitious transactions. F. acted for many local clients although some of the orders were for F.'s own account. Held, at the trial that the defendant company was guilty of "bucketing" without proof that each individual transaction was fraudulent; that the plaintiff as trustee in bankruptcy was entitled to recover the amounts paid and the value of the securities deposited, from the defendant company, and from the directors who were parties to the fraud. The Court of Appeal affirmed the judgment at the trial. Held, on further appeal to the Privy Council by one of the directors, reversing the decisions below, the claim was based on *Rothschild* v. *Brookman,* (1831) 5 Bli. N.S. 165, in that the defendant company was alleged to have adopted a fraudulent system of not making independent contracts and that the appellant director was a party thereto. It had not been shown in evidence that the fraudulent system had been used in connection with any particular contract. F.'s customers were undisclosed principals and with the bankruptcy all authority of F. as agent came to an end and no title to sue for the moneys claimed ever vested in the plaintiff as trustee in bankruptcy. Moreover, the appellant was not liable in the absence of proof of loss. *Johnson* v. *Solloway Mills & Co. Ltd.,* (1934) A.C. 193; (1934) 2 D.L.R. 241; (1934) 15 C.B.R. 319; (1934) 1 W.W.R. 516; reversing ,1932) 46 B.C.R. 260; (1932) 3 W.W.R. 316; 14 C.B.R. 133; affirming 45 B.C.R. 420; (1932) 1 W.W.R. 481; 13 C.B.R. 359.

3. Stock-broker — wrongful conversion of securities.]—The trial judge found that the broker's books showed that the agreement made with the customer had been ignored and that the brokers had dealt with securities deposited for cover as their own. The Court of Appeal upheld the trial judge in finding that wrongful conversion had been established. Held on appeal to the Supreme Court of Canada, that the parties dealt with each other subject to the rules and customs of the Vancouver Stock Exchange under which "street certificates" are treated as dollar bills and need not be kept intact. The onus of proving conversion was upon the customer and the entries in the books, having regard to the usage established, did not support any improper use of the customer's securities. *Blumberger* v. *Solloway Mills & Co. Ltd.,* (1933) S.C.R., 163; reversing (1932) 46 B.C.R. 241; (1933) 3 D.L.R. 86; and (1931) 45 B.C.R. 66.

4. Stock-broker—obligation to have securities available for delivery.] — After bankruptcy the trustee's assignee claimed for money paid as stockbroker for the defendant in respect of shares etc. bought for his account. The defendant resisted payment on the ground that the shares so bought had become the defendant's property and that he was entitled to the identical shares before he could be made to pay. Held, that the broker's obligation was satisfied by having available for delivery on demand enough of the kind of shares that had been bought for him. It was for the defendant to tender the amount due before he would be entitled to delivery *Stobie Forlong Assets Ltd.* v. *Barker,* (1932) 45 B.C.R. 394; (1932) 3 D.L.R. 182; (1932) 2 W.W.R. 274; 13 C.B.R. 437.

5. Negotiable securities entrusted to agent..]—The plaintiff having endorsed cer-

tain shares in blank entrusted them to an agent who wrongfully hypothecated them with the defendant bank The bank having acted in good faith and without notice of any lack of capacity in the agent was entitled to retain the shares which had become negotiable instruments. *Robinson* v. *Bank of Toronto,* (1932) 45 B.C.R. 518; (1932) 2 W.W.R. 91.

6. Stock-broker — principal alleging "bucketing" as defence to action.]—The defendant resisted a claim by his broker for the balance due on the purchase and sale of securities on the ground that the transactions were a violation of sec. 231 of the Criminal Code. Held that all the transactions having conformed to Stock Exchange regulations and the defendant having failed to show any lack of bona fides as required by the section, the defence failed. *O'Brian* v. *Bentham,* (1932) 45 B.C.R. 532.

7. Negotiable securities entrusted to agent.]—Where the plaintiff entrusted share certificates endorsed in blank to an agent for a specific purpose and the agent wrongfully pledged them to a bank, the plaintiff will be unable to recover them if the bank acted in good faith. The certificates became negotiable instruments. *Patrick* v. *The Royal Bank of Canada,* (1932) 45 B.C.R. 437.

8. Duty of stock-broker.] — The trial Judge found that the broker had shares available for the customer upon payment of the balance due the broker and was entitled to recover. The appeal (on an equal division of the Court) was dismissed. *H. E. Hunnings & Co. Ltd.* v. *Hall,* (1932) 46 B.C.R. 12; (1932) 4 D.L.R. 270; (1932) 2 W.W.R. 541.

9. Commission—new terms preventing completion of sale.]—The plaintiff obtained from the defendant an option covering a valuable property and was negotiating for its disposal to an interested party when the defendant asked the plaintiff to stand aside. He agreed to do so on the understanding that he would be paid $20000 for abandoning his option. New terms were introduced in the negotiations between the defendant and the prospective purchaser and the sale was never consummated. Held, awarding the plaintiff the amount claimed, that the plaintiff had done everything which persons in this kind of work undertake to do and should not be deprived of the fruits of his efforts because the parties introduced, when they got together, chose to alter the terms of the subject-matter, or indeed, declined to deal further with each other. *Rostein* v. *Canadian National Steamship Co. Ltd.,* (1934) 49 B.C.R. 105.

10. Commission earned by real estate agent.]—The defendant listed the property with the plaintiff and others at various times at various prices. The plaintiff kept trying to effect a sale to S., who was the logical purchaser, if any. Finally an exclusive listing at $27000 was given and the plaintiff continued to negotiate with S. At this stage the defendant's solicitor arranged a sale to S. at $27000. Held, it was the plaintiff who really brought about the relationship of buyer and seller although the transaction was closed by another than the plaintiff. It was entitled to damages in the amount of the usual commission. *Macaulay, Nicolls, Maitland & Co. Ltd.* v. *Burman,* (1937) 52 B.C.R. 9.

11. Sale of timber holdings—agreement to share commission.]—The defendant as the agent for the sale of certain timber employed the plaintiff to assist him in making a sale and promised him a share of the commission. The sale having been consummated and a portion of the promised share having been paid, the defendant refused to pay anything further because, he alleged, the plaintiff was in receipt of a commission from the purchaser although the plaintiff had assured the defendant when the agreement was made that he would receive no such commission. The plaintiff testified that the defendant was fully aware of his arrangement with the purchaser. The trial judge found for the plaintiff and his decision was affirmed by the Court of Appeal. The findings of the judge below were supported by the evidence. *Hoy* v. *Gibson,* (1940) 55 B.C.R. 137; (1940) 3 D.L.R. 23.

12. Commission "on any sales you might negotiate"—sale to plaintiff's prospect through another agent—double commission.]—The defendant as owner of timber property agreed to pay the plaintiff a commission of 5% on any sale he might negotiate. The listing was not an exclusive one. The plaintiff interested P.M. in the property and opened negotiations which ultimately resulted in a sale to P.M. Meanwhile the defendant gave authority to S. to negotiate for a sale and it soon became clear to the defendant that S. was dealing with P.M. who, the defendant knew was the party whom the plaintiff had interested in the property. The defendant did not tell

S. that his prospect had already been introduced by the plaintiff nor did he tell the plaintiff of S.'s activities. The sale to P.M. took place and the defendant paid a commission to S. The trial judge held that the defendant negotiated with the plaintiff's prospect behind the back of the plaintiff, whose work and services were the effective cause of the sale which ultimately took place. He awarded the plaintiff the agreed commission. Held, on appeal affirming the decision below, for the plaintiff to have negotiated the sale it was not necessary that he should, in addition to introducing the parties, have to bring them together and influence them till the price, terms and conditions were agreed upon. To expect that was contrary to the position taken by the defendant throughout the correspondence. When the name of P.M. had been submitted by the plaintiff, the defendant had the right to complete the negotiations and sell to the plaintiff's prospective purchaser, but in such case the defendant could not avoid liability for the commission, if the plaintiff's efforts were the effective cause of bringing about the sale. The event had happened which entitled the plaintiff to his commission and no act of the defendant could deprive him of that right. *Lyford* v. *Cargill Co. of Canada Ltd.*, (1943) 59 B.C.R. 492; (1944) 1 D.L.R. 696; (1944) 1 W.W.R. 273; affirming (1943) 3 W.W.R. 81.

III. Relations between Agents and Third Parties.

1. Warrant of authority—basis of action.]—The plaintiff claimed damages for breach of warranty by an agent in the acquisition of certain premises. In such a claim the plaintiff seeks to make the defendant (agent) personally liable for making an unauthorized contract, and claims damages for losses sustained through the owner's repudiation of the contract which the agent impliedly warranted that the plaintiff should have. Two things must be shown, (1) that the agent's authority was lacking, (2) the existence of a contract which, but for the lack of authority would be enforceable. Here there was no completed contract; if there was, it did not satisfy the Statute of Frauds. *Burt* v. *Woodward*, (1942) 58 B.C.R. 65; (1942) 2 W.W.R. 464.

2. Written agreement for a lease—approved by one of four owners—no proof of warranty.]—The defendant was one of four co-owners of the property in question. A prospective tenant submitted a memorandum of a proposed tenancy which the defendant marked O.K. and signed. The claim made at the trial was for damages for breach of the agreement alleged to be contained in the memorandum. The trial judge at the conclusion of the hearing gave the plaintiff leave to amend by setting up a claim for damages for breach of warranty of authority and judgment was awarded the plaintiff. Held, on appeal, reversing the trial judge, the judgment below afforded the plaintiff a relief that had not been sought, upon a ground that was not pleaded or suggested in argument. When the defendant O.K.ed the memorandum he intended to say, and the plaintiff knew he intended to say, that the terms so far as they were expressed, would be satisfactory to the defendant if they turned out, upon enquiry, to be equally satisfactory to the other owners. There was no concluded agreement. Moreover the writing did not satisfy the Statute of Frauds because it lacked some terms of the agreement. The evidence did not admit of the inference that the defendant represented that he had authority from his co-owners to enter into an agreement for a lease. *Saperstein* v. *Drury*, (1943) 59 B.C.R. 281; (1943) 4 D.L.R. 191; (1943) 3 W.W.R. 193; appeal to Supreme Court of Canada quashed (1944) S.C.R. 148; (1944) 2 D.L.R. 511.

PROHIBITION.

1. Application launched after judgment appealed against.]—A writ of prohibition will not issue to a Judge of the County Court where the application for it is made after an appeal had been launched to the Court of Appeal. *Grevas* v. *Almas* (1935) 50 B.C.R. 491; (1936) 2 W.W.R. 644, affirming (1936) 2 W.W.R. 128.

2. Mere misnomer.]—Continental Marble Company Limited took a judgment by default in the County Court in the name of Continental Marble Co. Limited. The defendant obtained a writ of prohibition on the ground that there was no such person, firm or company as was described in the proceedings. Held, on appeal setting the writ aside, the judge should have refused to grant the writ, or else enlarged the application to give the plaintiff an opportunity to

amend. The irregularity was merely a trifling misnomer or clerical error quite capable of amendment under the rules. *Continental Marble Co. Ltd.* v. *Langs* (1937) 52 B.C.R. 47; (1937) 4 D.L.R. 39; (1937) 3 W.W.R. 336.

3. Not to be used as means of appealing.]—The extraordinary remedy of prohibition cannot be invoked as a means of appealing from the decision of a County Court judge when the question which he decided was within his jurisdiction to determine. *In re pending action*: *McKee* v. *Halverson* (1937) 52 B.C.R. 404; (1938) 2 D.L.R. 201; (1938) 1 W.W.R. 465.

4. Suspended sentence—so-called recognizance—new charge laid.]—Where a convicting magistrate released the accused on suspended sentence taking from him a document which was not the recognizance provided for in sec. 72 of the Summary Convictions Act, and thereafter proposed to deal with the same matter on a fresh summons based on the same charge, prohibition was granted. *Rex* v. *Eveleigh,* (1939) 54 B.C.R. 94; (1939) 2 D.L.R. 541; (1939) 1 W.W.R. 323; 71 C.C.C. 387.

5. When granted—order already entered.]—Where an order purporting to vary in substance a duly entered judgment, was not made at the instance of or upon notice to any of the parties to the action, and had not been made under the "slip rule", prohibition was directed to the Judge and Registrar of a County Court. In re *Pavich* v. *Tulameen Coal Mines Ltd.* (No. 2); (1939) 53 B.C.R. 371; (1939) 1 D.L.R. 802; (1939) 1 W.W.R. 299.

6. Justice not to sit or act in "any case for a city" where there is a Police Magistrate.]—Sec. 407 of the Municipal Act provides that a Justice shall not act in "any case for a city" where there is a Police Magistrate except in the case of illness, or absence, or at the request of the Police Magistrate. Prohibition was sought to prevent a stipendiary magistrate for the County of Nanaimo from proceeding with an information laid at Nanaimo for an offence committed at Port Alberni where there was a duly appointed Police Magistrate. Held, refusing the writ, that "cases for a city" means not only cases where the offence is committed there, but cases having other elements as well, e.g., where the offender was apprehended within the limits, or where the administration of the act was in the hands of officials of the city or where the initiatory proceedings were taken or the trial was proposed to be held there. To hold otherwise would mean that the magistrate at Nanaimo had no jurisdiction in respect of an offence committed at Port Alberni because there is a Police Magistrate there. *Rex* v. *Cross,* (1946) 62 B.C.R. 376; 85 C.C.C. 406.

See MARKETING LEGISLATION.

PUBLIC LANDS.

Forest Act—liability for royalties.]—The defendant bank having acquired a timber licence by assignment entered into a contract with R. to cut and remove the timber. Before the completion of the cutting R. became bankrupt and the Minister brought action against the defendant bank for royalties unpaid. Held that under sec. 127 of the Act, the action failed because the timber in question was not "cut for or received by" the defendant bank. *Attorney-General of British Columbia* v. *The Bank of Montreal* (1933) 46 B.C.R. 453; (1933) 1 W.W.R. 476 affirmed (1933) 47 B.C.R. 555; (1934) 2 D.L.R. 348; (1934) 1 W.W.R. 359.

PUBLIC BODIES AND OFFICERS

1 Injunction — Customs officer.] — A customs officer was restrained from interfering with or preventing the importation from the United States of a publication known as the Pacific Daily Racing Form The officer held that the importation was illegal in view of sec. 235 (g) of the Criminal Code. It was pointed out in support of the application for an injunction, that the publication mainly contained information of interest to horse breeders and racehorse owners, and only incidentally pertained to gambling. *Hardy* v. *Hopgood* (1936) 50 B.C.R. 392; 65 C.C.C. 400.

2. Vancouver Harbour Commissioners.]—The general rule is that a servant of the Crown, although engaged for a fixed term, holds his position at the pleasure of the

Crown, a condition to that effect being implied as a term of the contract, unless it is excluded by statute or by reason of some term in the contract. In an action for wrongful dismissal, awarding damages, it was held that the rule was excluded because provision was made in the contract of employment that illness would not be a ground for dismissal. The implication of a power to dismiss at pleasure is excluded. *McLean* v. *Vancouver Harbour Commissioners* (1936) 51 B.C.R. 169; (1936) 3 W.W.R. 657.

3. Public Utilities Commission — appeal to Lieutenant-Governor in Council on question of fact.]—The City of Victoria had for many years been supplying water to the Municipality of Oak Bay; from 1929 to December 31, 1937, under an agreement which expired on the latter date and subsequently with no satisfactory arrangement as to the rates to be charged. Oak Bay invoked sec. 19 of the Public Utilities Act, 1938, complaining that the existing rates were unjust, and the Commission reduced the rates. The City appealed under sec. 105 (which limits the appeal to questions of fact), to the Lieutenant-Governor in Council, who under sec. 106 referred the appeal to the Court of Appeal. Counsel for Oak Bay objected in limine to the jurisdiction contending that some of the questions raised on the appeal were questions of law. The objection was overruled on the ground that the questions were pure questions of fact.

By an amendment of 1939, the question of whether a rate was unjust or unreasonable was declared to be one of fact of which the Commission was to be the sole judge. On the hearing of the appeal, it was contended that the amendment by implication repealed secs. 105 and 106 as to appeals on questions of fact. Held, that at every step the Commission was dealing with questions of fact and not of law. What the amendment did was (1) make it clear that injustice or unreasonableness in a rate was a question of fact and not of law, (2) make the Commission the sole judge of that fact, but as a judge of first instance only. Thus the right of appeal under secs. 105 and 106 was preserved. *The Corporation of the District of Oak Bay* v. *The Corporation of the City of Victoria* (1941) 56 B.C.R. 345; (1941) 3 D.L.R. 680; (1941) 2 W.W.R. 425.

4. Power of provincial park board to require trespasser to remove his buildings.]—The defendant owned a property abutting on an area of foreshore set apart as a provincial park under the Provincial Parks Act. He built a house partly on his property and partly on the foreshore. As a result of provisions of the Forest Act, Interpretation Act and certain orders-in-council the plaintiffs were constituted a Park Board with power to manage, administer, regulate and control the areas including the right of possession and of demanding that the defendant as a trespasser remove his buildings. *Brentwood Bay Provincial Park Board* v. *Pendray*. (1943) 3 W.W.R. 389.

5. Status of Public Utilities Commission under Public Utilities Act and Motor Carrier Act — Certificate of public convenience and necessity.]—The two acts, generally speaking, confer administrative and not judicial duties upon the Commission. The judicial function imposed by some sections is not a factor in this case where matters of expediency and policy are involved. In deciding whether a certificate of convenience and necessity is to be granted, the Commission does not decide between the legal rights of parties—neither party has any right except to apply. The consent of the municipality concerned is necessary under both Acts before an applicant has any status to operate. *The Veterans' Sightseeing and Transportation Co. Ltd.* v. *Public Utilities Commission* (1945) 62 B.C.R. 131; (1946) 2 D.L.R. 188.

6. Form of judgment on appeal to the Court of Appeal—costs.]—Section 103 of the Public Utilities Act contemplates that on the disposition of an appeal on questions of law the Court shall give judgment on the questions, and any certificate given to the Public Utilities Commission is merely ancillary to the judgment and not a substitute for it. The Court can award costs of an appeal under the Act. *The Veterans' Sightseeing and Transportation Co. Ltd.* v. *Public Utilities Commission* (1946) 62 B.C.R. 351.

7. —Workmen's Compensation Board—superannuation plan for employees.]—On an originating summons the question was asked as to the position of employees who had not served fifteen years but were retired within five years of their retirement age. Held, the Board is authorized to pay them superannuation allowances. They are entitled to the whole balances shown for each employee in one lump sum. There is no provision for payment by instalments. *In the matter of the Trustee Act and in the matter of the Workmen's Compensation Act.* (1946) 62 B.C.R. 554.

PUBLIC UTILITIES.

See FRANCHISE.

See PUBLIC BODIES AND OFFICERS.

QUO WARRANTO

1. Police Commissioner.]—On an application for a quo warranto where the conviction has never been drawn up, proof of an indictable offence may be made by the affidavit of the convicting magistrate exhibiting the complaint, the Court calendar and a copy of the quarterly return of convictions. *Rex* v. *Burgess* (1932) 45 B.C.R. 132; (1932) 2 D.L.R. 181; (1932) 1 W.W.R. 662; 58 C.C.C. 38.

2. Recount—Dominion Elections Act.]—The Court has a discretion to grant or refuse the order and must consider whether or not the circumstances are such that it should interfere and allow an information to be filed. Before the relator moved, the judge making the recount had completed his work and certified the result to the returning officer who, in turn, had made his declaration accordingly and had transmitted his return to Ottawa where the result was gazetted. The motion was dismissed and it was held that the relator's remedy was, at the state the matter had reached, under the Dominion Controverted Elections Act. *The King* v. *Ellis* (1935) 50 B.C.R. 325.

RAILWAYS.

1 Railway Commission's order excusing fencing pending settlement of vicinity — right of Court to determine whether settlement had taken place.]—The company's obligation to fence its right-of-way had some twenty years earlier been excused by an order of the Board until such time as the area in the vicinity became settled. In an action for damages for cattle killed on the unfenced right-of-way the judge found as a fact that settlement of the area had in the meantime taken place, but he held that he had no right to make a declaration to that effect. The Board and the Board only, had the right or power to declare whether its order should be rescinded, varied or in any way interfered with. *Jaremko* v. *Nelson & Fort Sheppard Ry. Co.* (1937) 3 W.W.R. 696.

2. Pedestrian on railway track—whether thickly-peopled locality.]—The plaintiff's husband was killed while attempting to cross the defendant's double track. He stood on the southerly track waiting for a train to pass on the other one and was struck by a train approaching from the other direction on the track on which he stood. The trial judge dismissed the action, holding that the locality was not a "thickly-peopled" one which called for a speed not exceeding 10 miles per hour. The train was going about 25 miles per hour when the fireman saw the plaintiff's husband on the track. Held on appeal affirming the decision below, per McDonald C.J., the deceased was a trespasser even if he had leave and licence to cross the tracks because he was not crossing; he was loitering. Only wilful or reckless disregard of ordinary humanity would make the defendant liable to a trespasser. Per McQuarrie J. A. this case is indistinguishable from the Jacobsen case (1941) 56 B.C.R. 207. Per Fisher J.A. the deceased knew of the passing of this train every day at the same hour on the southerly track and was grossly negligent in standing on the track. The deceased was guilty of ultimate negligence on the principles of the Jacobsen case. *Lind* v. *Canadian Pacific Railway Co.* (1942) 58 B.C.R. 253.

3. No evidence to support jury's finding of negligence—answers to questions.]—In an action arising out of a collision between a train and a truck the jury apportioned the blame 25% to the train and 75% to the truck. In answer to questions the jury found the motorman guilty of negligence in that he did not cut his speed sooner to enable him to come to a full stop if the truck seemed about to cross the track. Held, on appeal, exonerating the railway company from any share of the blame, the answer negatived all other charges of negligence. In the result although the statutory duty of the railway company had been duly performed, the jury had added the duty to reduce speed in anticipation that the truck might cross the track. There was here no such added duty. The speed of the oncoming truck was moderate. There was nothing to suggest that the truck-driver had not heard the signals or seen the train. The motorman expected the truck would stop before the crossing. He was not guilty of

the negligence imputed to him by the jury's answer, since in the absence of special circumstances, no duty was cast upon him to take steps to reduce speed before he did so. *British Columbia Electric Railway Co. Ltd.* v. *Buckerfield's Ltd.* (1946) 63 B.C.R. 385.

4. Whether contract one for carriage of goods by rail or haulage contract — shipper's undertaking to "get it ready for shipment"]—The defendant railway company received for transportation a flat car upon which was built a heavy revolving crane with ballasting to offset the weight of the boom. The boom was detached and the flat car with the crane in place on it formed one car of a train made up by the defendant. The plaintiff had undertaken to "get it ready for shipment". En route the lashings and wedges, used by the plaintiff's employees in getting it ready, failed and the heavy ballast swung out causing the car to become derailed with several other cars with consequent damage to the railway. The owners of the crane sued for damages and the railway company counterclaimed for its freight and damages. The trial judge found for the plaintiff on the general duty of a railway to a shipper of goods. It had the obligation to see that the crane was in a proper condition for the journey. The Court of Appeal upheld the trial judge. Held on further appeal to the Supreme Court of Canada, dismissing the action and allowing the counterclaim, the contract was not one for the carriage of goods but one of haulage. Hence the obligation of the defendant was, as bailee for hire, only for negligence after taking delivery of the crane. A railway accepts goods for haulage (as here) on condition that the shipper has done what is adequate to prepare the goods for transportation and it is a condition of the railway's liability that any resulting loss is not due to the neglect of the shipper. Such a condition does not infringe sec. 242 of the Railway Act (Provincial). *Bridge River Power Co. Ltd.* v. *Pacific Great Eastern Railway* (1944) 2 D.L.R. 673; reversing (1943) 58 B.C.R. 420, affirming (1942) 57 B.C.R. 247; (1942) 2 D.L.R. 78; (1942) 1 W.W.R. 529.

See CARRIERS.

See NEGLIGENCE.

REAL PROPERTY.

1. Accounting between joint tenants—rooming house business.]—At common law there was no obligation to account between joint tenants, but (1705) 4 Anne, Cap. 16, which is in force in British Columbia, gave a right of action where one receives more than his just share or proportion. Under the statute it was held that where one tenant of a farm property risked his capital and labour in a hazardous crop and made a profit, his co-tenant could not claim to share in it; it was the return for the other's labour and capital to which the co-tenant had no right. Similarly, here, the claim of a co-tenant for a share of the profits of running a rooming-house will be refused—the keeper collects, not merely for the rooms, but for the services of caretaking, housecleaning, bed-making, etc. Moreover, the registrar on such an accounting could not segregate the returns for dwelling space from those for services and the expenditure of capital. *Spelman* v. *Spelman* (No. 2) (1943) 59 B.C.R. 551; (1944) 2 D.L.R. 74, (1944) 1 W.W.R. 691.

2. Effect of mutual wills on property held jointly.]—When mutual wills, whether contained in a joint will or separate documents, relate to a joint property, the agreement to make the mutual wills, and the making of the dispositions in pursuance of the agreement, sever the joint tenancy, and convert it into a tenancy in common. In re *estate of Noah C. Skippen, deceased* (1946) 63 B.C.R. 75.

3. Title to foreshore—60 years in possession—title from Crown through Hudson's Bay Company royalties.]—The petitioner applied under the Quieting Titles Act with respect to a strip of land between high and low-water marks adjoining the petitioner's upland property. He claimed by virtue of 60 years uninterrupted possession as well as by various grants and conveyances. Held, the petitioner had established his right to a declaration as to the title, both by prescription and by virtue of the documents of title. (1) As to prescription, the petitioner and his predecessors had continuous, exclusive, uninterrupted and undisturbed possession for over sixty years, and exercised acts of ownership during the whole of that period to the exclusion of all others including the Crown. The area was taxed by the City of Nanaimo as private property. (2) As to title, the original grant from the Crown to the Hudson's Bay Com-

pany in 1849 of Vancouver Island included "all royalties of the seas upon these coasts". Each of the subsequent grants and conveyances in turn passed the title of the Hudson's Bay Company under the 1849 grant. "Royalty" is a right held by the Crown and in the circumstances here included the right to the land between high and low water mark and hence the grant of 1849 was effective to pass title to the foreshore. In *re Quieting Titles Act and in re application of the Hirst Estate Land Co. Ltd.* (1943) 59 B.C.R. 321.

RECEIVER.

1. Mortgage action: order requiring tenants to attorn to receiver.]—The mere service of an order to attorn and pay rent to a receiver does not create the relationship of landlord and tenant between the receiver and the tenant where the mortgage antedated the creation of the tenancy between the mortgagor and the tenant, and where the mortgagee allowed the mortgagor to remain in possession after default. *Manufacturers Life Insurance Co.* v. *David Spencer Ltd.* (1933) 46 B.C.R. 451; (1933) 1 W.W.R. 319.

2. For future earnings of a judgment debtor.]—The Court has no jurisdiction to enforce payment of a judgment by appointing a receiver of the future earnings of a judgment debtor. *Simpson* v. *Simpson,* (1934) 49 B.C.R. 288.

3. Sale of rooming house property — tenants in common.]—Although the property might bring a better price as a going concern, only the real estate was involved in the litigation. The furnishings could not be included without the consent of the parties. In the meantime the receiver was directed to collect a proper rental for the premises commensurate with that of like properties. *Spelman* v. *Spelman,* (No. 3) (1944) 61 B.C.R. 31; (1944) 4 D.L.R. 794.

4. Claim for, when garnishing order set aside.]—The plaintiff sought to attach monies on a claim based on unliquidated damages and in the alternative claimed a receiver, alleging that if not prevented the defendant would remove the monies out of the jurisdiction. The garnishing order having been set aside, the plaintiff pressed for the appointment of a receiver. Held, dismissing the application, the defendant would not be prevented by injunction from dealing with his own property pending trial, and a fortiori a receiver would not be appointed. *Black* v. *H. & F. Mill Co. Ltd.,* (1947) 2 D.L.R. 229.

REGISTRATION OF TITLE TO LAND.

I. Registration, 614.

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I. Registration.

1. Subdivision—meaning of "frontage".] N. owned two lots (roughly 60 x 120 each) divided by a line running north and south. He lawfully cancelled the line leaving him with a square block of land with 120 feet on Fourth Avenue and 120 feet on Columbia street in Vancouver. He built four dwellings facing on Columbia street and sold one of them on a lot 30 x 120. The buyer claimed registration on the footing that he was the owner of a new parcel created by "dividing the frontage of a lot" under sec. 105 (a) of the Land Registry Act. The judge on appeal from the registrar held the applicant was not entitled to registration—he was seeking not to divide the frontage of an existing lot, but to create a new frontage on Columbia street. *In re Land Registry Act* and *in re application of R. D. J. Guy,* (1943) 59 B.C.R. 406; (1944) 1 W.W.R. 38. (But see (1943) 60 B.C.R. 1 infra).

2. Fees for registering Crown's title as constituting taxation.]—The Crown (Dominion) having acquired real property under the Expropriation Act applied to register in the Land Registry Office. The registrar required payment of one-fifth of one per cent of the value up to $5000 and one-tenth of one per cent on the additional

value as well as the other usual fees. The Crown refused to pay these ad valorem charges as being taxation contrary to sec. 125 of the British North America Act. Held, on appeal, affirming the registrar's decision, that the Crown's title under the Expropriation Act was perfect without any registration. It would be purely voluntary on the part of the Crown and hence the charge, not being compulsory, is not a tax. *Attorney-General of Canada* v. *Registrar of Titles of Vancouver Land Registration District,* (1934) 48 B.C.R. 544; (1934) 4 D.L.R. 764; (1934) 3 W.W.R. 165.

3. Duty of vendor to register.]—The vendor of a farm who notwithstanding repeated demands failed to register his own title sued his purchaser for instalments of the purchase money. The purchaser successfully counterclaimed for rescission and the return of the payments he had made. An attempt to make him pay for use and occupation of the farm while he was in possession, failed. *Cox* v. *Whieldon,* (1934) 48 B.C.R. 522; (1935) 1 D.L.R. 8; (1934) 3 W.W.R. 145.

4. Attempt to use Land Registry Act to commit a fraud.]—The father of the defendants sold one acre of 203 to the Crown for the purpose of a school site. The Crown did not register the conveyance but erected and maintained a school on the acre for years. The father agreed to sell the whole 203 acres to the defendants who, knowing of the unregistered deed to the Crown, stood upon their agreement as registered. They said that their father had told them that the school site was to revert to its former owner if the school was discontinued. It was discontinued. The trial judge held that it was a fraud for the defendants to persist in their contention that the Crown had no title. Held, affirming the decision below, the provisions of the Land Registry Act did not bind the Crown; the defendants knew that the Crown was always in possession; it would be inequitable to permit them to set up the provisions of the Act to enable a fraud to be committed. *Attorney-General of British Columbia* v. *Parker,* (1937) 52 B.C.R. 99; (1937) 4 D.L.R. 242; (1937) 3 W.W.R. 705.

5. Subdivision—meaning of "frontage" —new frontage brought about by physical change in premises.]—Under sec. 105 (a) of the Land Registry Act, the registrar may summarily and without the consent of the approving officer of the municipality, permit registration of a new parcel if it is created "by dividing the frontage of a lot". N. owned two lots (each roughly 60 x 120) fronting on Fourth Avenue in Vancouver. The dividing line between them running north and south, was lawfully cancelled, leaving him with a single parcel abutting on Fourth Avenue on the north and Columbia Street on the east. He then built four dwellings on the property facing on Columbia Street and by fencing gave each of them a lot 30 x 120. N. sold one of these lots to the applicant who applied to register. The approving officer for the City objected. The registrar, but for the Guy decision (supra) would have held that a new parcel was created by dividing the frontage of a lot into four, and would have registered. He refused to register. On appeal the judge followed the Guy decision and held that the applicant was seeking, not to divide the frontage, but to create a new frontage on Columbia Street, and affirmed the registrar's refusal. Held, on further appeal to the Court of Appeal, reversing the judge below, the registrar had jurisdiction under sec. 105 (a) to register the applicant's conveyance. It was obvious that the two inside lots at least fronted on Columbia Street and on nothing else. *In re Land Registry Act* and *in re application of R. D. J. Guy,* (1943) 59 B.C.R. 406, was overruled. *Caponero* v. *Brakenridge,* (1943) 60 B.C.R. 1; (1944) 1 D.L.R. 773; (1944) 1 W.W.R. 481.

6. Refusal to register—summary hearing before a judge in chambers—Sec. 230 of Land Registry Act.]—Sec 230 makes provision for a full and complete inquiry and the judge need not direct that the matters in question be determined in an action or by the trial of an issue. *Schmunk* v. *Brook,* (1944) 60 B.C.R. 428; (1944) 3 D.L.R. 643; (1944) 2 W.W.R. 437.

7. Notice of bankruptcy in Canada Gazette—not of itself registration and notice of charge on bankrupt's lands.]—The mere filing of the Canada Gazette with the registrar of titles pursuant to sec. 28 (2) of the Bankruptcy Act (as it stood in 1927) and the notification of the fact of bankruptcy therein advertised in the bankruptcy index in the registry office, does not constitute registration. *In re Land Registry Act* and *in re Chambers,* (1943) 1 W.W.R. 297; 24 C.B.R. 121.

8. Whether change in statute from "in all Courts of Justice" to "at law and in equity" changes the meaning.] — The

amendment to the Land Registry Act in 1913 whereby the words "at law and in equity" were substituted in sec. 37 for "in all Courts of Justice" did not change the true meaning of the section. *Davidson* v. *Davidson,* (1945) 2 W.W.R. 576.

9. City of Vancouver as owner of streets—lack of certificate of title.]—By sec. 319 of its charter the streets are vested in fee simple in the City. By sec. 111 (1) of the Land Registry Act no certificate of title shall be issued for any highway. Held, the streets nevertheless became registered for the purposes of the Land Registry Act by virtue of the earlier parts of that subsection. *In re Land Registry Act* and *in re Harrie,* (1945) 2 W.W.R. 348.

II. Unregistered Instruments.

1. Sec. 34 of Land Registry Act—passing of interest.]—The section while it declares that an unregistered deed conveys no interest in the land, limits its operation "except as against the person making the same". As between the parties the instrument has its full operation according to its terms—the interest of the grantor in the property is deemed to pass. Moreover, the grantee acquires the right to apply to be registered, a right enforceable by mandamus to require the Registrar to register him as owner of the property. The possessor of that right is in a position to make a sale of the property. *In re M. D. Donald Ltd.,* (1933) S.C.R. 411, reversing (1932) 46 B.C.R. 406.

2. Judgment—priority as against unregistered transfer.]—Prior to the registration of the judgment creditor's judgments, the judgment-debtor had transferred the property in question but the transfer remained unregistered. The judgment creditor sought to sell the property under the Execution Act. The judge ordered a sale and the Court of Appeal reversed the decision below. Held, on further appeal to the Supreme Court of Canada, affirming the decision appealed from, the addition in 1921 to sec. 34 of the Land Registry Act of the words "except as against the person making the same" expressly made the transfer here operative to pass whatever estate the judgment debtor had. As a consequence he had divested himself of his interest in the land before the judgments were registered. Secs. 175, 176 and 177, enacted in 1921, read with sec. 34, retain the common law rule with respect to rights of judgment creditors, viz., an execution creditor can only sell the property of his debtor subject to all such charges, liens and equities as the same was subject to in the hands of his debtor. *Davidson* v. *Davidson,* (1946) S.C.R. 115; (1946) 2 D.L.R. 289; affirming (1945) 62 B.C.R. 161; (1945) 2 W.W.R. 576.

3. Sale of timber with right to cut—assignment of—effect of failure to register.]—The defendant sold to M. certain standing timber with the right to enter and cut. M. duly assigned his rights to the plaintiff and gave the proper notice. Neither the agreement nor the assignment was registered in the Land Registry Office. The action was to enjoin the defendant from refusing entry to the plaintiff and damages. The trial judge found for the plaintiff. Held on appeal, affirming the decision below, per McDonald C.J.A. apart from the interest in land the plaintiff acquired contractual rights which the defendant interfered with. There is direct privity and the action lies. Section 34 of the Land Registry Act cannot be taken literally; its real purpose is merely to protect purchasers and encumbrancers for value without notice, and enable them to rely on the state of the register when they search the title. Per O'Halloran J.A. sec. 34 ought not to be read as enabling the vendor to deny the vendee's assignee the benefit of the equities existing between the vendee and the vendor. Per Fisher J.A. some beneficial interest passed and the plaintiff was not a trespasser; the defendant was not justified under section 34 in preventing the plaintiff from enforcing the rights acquired from M. *L. & C. Lumber Co. Ltd.* v. *Lundgren,* (1942) 58 B.C.R. 270; (1942) 4 D.L.R. 637; (1942) 3 W.W.R. 557.

III. Maps and Plans

Registrar's power to accept metes and bounds description instead of subdivision plan.]—The Registrar may dispense with a subdivision plan and accept a metes and bounds description (a) when a subdivision plan creating blocks of lots has been duly registered and the new parcel is created by dividing the frontage of a lot, (b) where it is an isolated transaction and the acceptance is not against the public interest. The district lot was subdivided into twenty parcels. Held, each of the twenty parcels was a block which could be subdivided into lots, any one of which lots (if shown on a reg-

istered plan) could be subdivided by dividing the frontage into new parcels. But there must be a lot in one of a number of "blocks of lots" created by a registered subdivision plan in order to come within (a). As to (b) this was not an isolated transaction. It was also against the public interest since access to all new parcels was not shown. *In the matter of the Land Registry Act* and *in re Coville,* (1946) 63 B.C.R. 177.

IV. CHARGE.

1. Restrictive covenant — endorsement as charge.]—Sec. 148 of the Land Registry Act provides that upon an application to register in fee-simple under an instrument whereby a restrictive covenant is entered into by the grantee, a new certificate of title is to issue having endorsed upon it the estate or interest remaining in the grantor, and the endorsement shall be equivalent to a registered charge. The petitioner sold property containing a restriction in perpetuity as to the business to be carried on, and a special covenant supporting it was given by the grantee. The registrar refused to endorse the covenant as a charge, holding that it was personal in character, unenforceable and was not within the definition of charge in the Act. Held, directing the registrar to make the endorsement, sec. 148 is mandatory and when such conveyance is offered for registration the registrar must determine whether or not the covenant is restrictive and if it is, he must endorse it on the certificate. Whether it is an interest in land or is enforceable does not come up for his decision. *Home Oil Distributors Ltd.* v. *Bennett,* (1936) 50 B.C.R. 382; (1936) 1 W.W.R. 385.

2. Easement—reservation of by City of Vancouver — whether registrable.] — The City of Vancouver sold a lot and in the conveyance the purchasers covenanted with the City (a) not to require support for the land, (b) not to spill earth on the abutting street, (c) that the City might enter and remedy any default and charge the cost to the purchasers. These covenants were to be binding on the persons in whom, from time to time, the lands might be vested. The City claimed to register its interest as a charge. The registrar refused. The judge held that the City had under the conveyance an interest in land proper to be registered under section 148 of the Land Registry Act. Held on appeal, affirming the decision below, the registrar's contention that the covenants did not comprise an easement and hence were not registrable, was not made out. The fact that the City held no certificate of title to its streets (although owned by it in fee simple) does not deprive it of its rights under sec. 148. *City of Vancouver* v. *Registrar, Vancouver Land Registration District,* (1944) 61 B.C.R. 211; (1945) 3 D.L.R. 304; (1945) 2 W.W.R. 348.

V. JUDGMENTS.

1. Effect of cancellation with respect to re-registration.]—A judgment creditor released his judgment in the Land Registry Office as against a particular lot in order that the judgment debtor, a candidate for the office of Mayor, might qualify upon it. Some years later he re-registered the judgment against the lot in respect of which the judgment debtor still qualified. Held, that the re-registration should be cancelled in the Land Registry Office. The effect of the release was to free the lot for all time from the possibility of such a charge and the re-registration was illegal and void. *Hansen* v. *Taylor,* (1933) 46 B.C.R. 556; (1933) 2 W.W.R. 16.

2. Priority as against unregistered mortgage.]—A mortgage executed on the 24th of January, 1931, was not immediately registered. The defendant registered certain judgments against the same property on and prior to the 24th of February, 1931. In March, 1931, the mortgagee applied to register and, having been refused, sued for a declaration giving him priority over the judgments. Fisher J. dismissed the action following *Bank of Hamilton* v. *Hartery,* (1919) 58 S.C.R. 338. Held, on appeal, that in view of the amendments to the Land Registry Act since the decision of *Bank of Hamilton* v. *Hartery* applications of this class fall within the decision of *Entwisle* v. *Lenz & Leiser,* (1908) 14 B.C.R. 51, and the mortgage should be registered in priority to the judgments. *Gregg* v. *Palmer,* (1932) 45 B.C.R. 267; (1932) 3 D.L.R. 640; (1932) 2 W.W.R. 241.

3 Fraudulent preference — contest between judgment and unregistered mortgage.]—A judgment creditor moved to set aside a transfer of real property from the judgment debtor, K., to his wife and that the certificate of title held by one T. be delivered up. The events took place in this

order; (1) service of a summons on K.; (2) transfer of the property from K. to his wife, upon which she obtained a certificate of indefeasible title; (3) transfer from Mrs. K. to T. (not registered) for an advance of $300; (4) judgment against K.; (5) registration of the judgment in the Land Registry Office. Held, the transfer to the wife was a fraudulent preference but it was not established that T. knew of the fraud; Mrs. K.'s certificate was subject to the exception arising where fraud was shown on the part of her vendor, and it was not conclusive against the judgment creditor. T. acquired only a right to apply for registration which was valueless where a subsequent innocent grantee for value had registered. It was ordered that Mrs. K.'s certificate be cancelled and the conveyance to her set aside thus restoring the title to K. where it would be open to the right of the judgment creditor to realize upon it under the Execution Act. T., not having registered, is deprived of his status as innocent purchaser for value without notice. *In re Fraudulent Preferences Act* and in *re Commercial Securities Corporation Ltd., Kovach and Tyson,* (1937) 52 B.C.R. 307; (1937) 3 W.W.R. 711.

VI. Assurance Fund.

Mandamus to Minister of Finance to compel payment.]—Under an agreement of sale the conveyance was put in escrow pending completion of payments. The purchaser fraudulently obtained the conveyance and having registered it in the Land Registry Office, borrowed $30,000 on a mortgage of the property. The vendors sued to set aside the registration and revest the property in themselves and for an accounting, and they were awarded judgment for a sum in excess of $30,000. A return of nulla bona having been made to a writ of fieri facias, the vendors demanded payment from the Minister under sec. 218 of the Land Registry Act, and upon his refusal obtained a writ of mandamus commanding him to pay the amount of the judgment and costs. The Court of Appeal affirmed the order for the writ. Held, on appeal to the Supreme Court of Canada, reversing the decision below, the statutory obligation of the Minister to pay is based upon an award of damages. Upon the face of the record here, no damages, strictly speaking, were either sought or awarded. If the substantial effect of the judgment was the establishment of the amount of the damages actually suffered, the form of the action or judgment should not be allowed to becloud the real substance of the matter, but no such damages were, in fact, established. *The King* v. *The Minister of Finance,* (1935) S.C.R. 278; (1935) 3 D.L.R. 316; reversing (1934) 49 B.C.R. 223; (1935) 1 W.W.R. 113; (1935) 1 D.L.R. 333.

REPLEVIN.

1. Whether Supreme Court rule or replevin rule governs.]—With the writ there was served a notice of motion for a replevin order and a copy of the affidavit in support. No leave to serve the notice with the writ had been obtained. On a motion to set aside the replevin order it was held that there is an inconsistency between Marginal Rule 704 and Replevin Rule 8 and that, as the latter was a rule for a special matter, it should prevail. *Clelland* v. *Mariacher,* (1945) 3 W.W.R. 207.

2. Effect of purported sale without authority by wife of owner of a motor car.]—The plaintiff, going overseas, left his car with his wife. She sold it to B., who knew the plaintiff was the owner and asked no questions. B. sold under conditional sale to M., an innocent purchaser now in possession. Then B. assigned the agreement to U. The plaintiff sued for an order replevying the car and for damages against B. Held, the plaintiff's wife had no interest in the vehicle, nor was she her husband's agent. The sale to B. was illegal and he in turn could pass on no better title than he himself had. The provisions of the Sale of Goods Act did not apply to assist B. or his successors in title. The car was not sold in market overt. The plaintiff was entitled to have the car back with damages against B. *Lexau* v. *Brandes,* (1946) 2 W.W.R. 697.

RES JUDICATA.

See Estoppel.

RESTRAINT OF TRADE.

See CONTRACTS.

See MARKETING LEGISLATION.

SALE OF GOODS.

I. IN GENERAL, 623.

II. WARRANTY, 624.

III. CONDITIONAL SALE, 625.

IV. MERCANTILE AGENT, 627.

I. IN GENERAL.

1. By sample or by description.]—In an action for the price of coffee the defendant claimed to be entitled to rescind since the goods were not as represented on a sale by description. Prior to the orders in question, the plaintiff had shipped coffee to the defendant accompanied by a sample, which was satisfactory to the defendant. The new contract for more was arrived at by cables and letters in which no mention was made of the sample, but the coffee was described as Demerara Liberian Coffee F.A.Q. This name meant nothing to the defendant who supposed that the first shipment and sample were described by that name. The new shipments were greatly inferior to the first and to the sample. Held, dismissing the action, that the plaintiff knew that the defendant would believe that the Demerara Liberian Coffee F.A.Q. mentioned in the contract was similar to the first shipment and the sample. The plaintiff was estopped from saying that the sample was not the kind contracted for. Hence the plaintiff did not perform its contract by shipping coffee of the description in the contract. As there was no reference to the sample in the contract, and as no evidence to vary it was admissible, the sale was held to be one by description. *Wieting & Richter Ltd.* v. *Braid Tuck & Co. Ltd.*, (1936) 51 B.C.R. 135; (1936) 3 W.W.R. 286.

2. Sale by "description" or by "description and sample".] — The plaintiff bought from the defendant "extra super paddy Siam Rice" of the "new season's crop" guaranteed "fully up to type and grade as shown by sample handed you of last year's crop". The shipment was not equal to the sample. The trial judge held that it was a sale by description as well as by sample and reduced the purchase price. Held, on appeal, reversing the decision below that it was a sale by description and the plaintiff was entitled to the purchase price. The contract was speculative in character since the quality of the new season's crop could only be known after it was harvested. The rice was in accordance with the description although not up to the sample, because while the type (Siamese) and the grade (extra super paddy) are always the same, the quality may differ from year to year. The sample was looked upon as an illustration or guide as to type and grade—not quality. *The East Asiatic Co. Inc.* v. *Canada Rice Mills Ltd.*, (1939) 54 B.C.R. 204; (1939) 3 D.L.R. 695; (1939) 3 W.W.R. 180.

3. Action for price of rejected goods—reasonable compliance with specifications.]—Where the defendant's rejection of certain metal rings was unreasonable, the plaintiff was entitled to recover. The defects alleged by the defendant were based on too literal a reading of the specifications. *Hamilton* v. *Canada Creosoting Co. Ltd.*, (1941) 56 B.C.R. 316.

4. Purported sale of motor car by person entrusted with it.]—The mere fact that the owner has given the possession or use of a chattel to another, not a mercantile agent, who purporting to be the actual owner fraudulently sells it to an innocent purchaser, does not estop the owner from asserting his title against the purchaser. *Bremmer* v. *Johnson*, (1946) 3 W.W.R. 39.

II. WARRANTY.

Poison delivered instead of corn starch—damages for loss of business.]—The plaintiff a manufacturer of baking powder ordered corn starch from the defendant and received sodium silica fluoride, a poison. The plaintiff used the poison to make baking powder and sold it to P. who sold it to G. (a grocer), who sold it to D., whose wife died of eating food containing the poison. When the facts were published the plaintiff's business, as it alleged, was ruined. The plaintiff claimed (a) the amount paid for the alleged corn starch; (b) the value of the other materials used to mix with it; (c)

damage to goodwill. Held, the plaintiff could recover for (a) and (b) under sec. 58 (2) of the Sale of Goods Act. As to (c) damages could not be given for loss of business. This claim based on sec. 21 (a) is restricted 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." The weight of judicial opinion was against giving damages for loss of business in cases of this kind. *Renewo Products Ltd.* v. *Macdonald & Wilson Ltd.*, (1938) 53 B.C.R. 328; (1938) 4 D.L.R. 799; (1938) 3 W.W.R. 418.

III. Conditional Sale.

1. Conditional sale—seizure by vendor but no sale—whether rescission effected.]—The unpaid vendor under a conditional sale agreement seized the defendant's car. It was not redeemed nor was it sold. The agreement largely extended the rights of the vendor beyond those enumerated in the Conditional Sales Act. It was contended that the plaintiff had elected to seize and proceed under the Act, and that the provisions of the agreement were no longer applicable. Held, the taking possession was not an act of cancellation of the agreement but an act in pursuance of the agreement. The purchaser's right of redemption was not lost by the fact that the statutory period had elapsed without the car being sold. *Motor-car Loan Co. Ltd* v. *Adams*, (1933) 1 W.W.R. 60.

2. Status of invalid conditional sale agreement—seizure thereunder.]—While a so-called conditional sale agreement was invalid as such it was held not to be void, as between the parties thereto. The vendor seized the chattels in question at a time when the creditors of the buyer had full notice of the agreement . Held, the seizure was not invalidated by any statute and was a proper proceeding at common law. *Hudson's Bay Co.* v. *Campbell*, (1933) 3 W.W.R. 289.

3. Document conferring right to seize chattel—not conditional sale agreement or bill of sale.]—Where a debtor gave his creditor a document in the form of a lien note as security for the debt and where the creditor seized the chattel under it, the acts of the creditor were justified. The document was not a lien note or conditional sale agreement because there was no sale of the chattel. It was not a chattel mortgage because the debtor did not assign or transfer his property in the chattel. It was simply a contract by which the debtor gave his creditor leave or licence to seize and sell the chattel in default of payment. No third parties or their interests were involved. *Samson* v. *Champion*, (1933) 2 D.L.R. 138.

4. Registration as notice.]—There is nothing in the Conditional Sales Act providing that the fact of registration fastens notice upon anyone except subsequent purchasers or mortgagees claiming from the buyer and those mentioned in the Act. The Courts should not be astute to extend the doctrine of constructive notice to commercial transactions. *Vowles* v. *Island Finances Ltd.*, (1940) 55 B.C.R. 362; (1940) 4 D.L.R. 357; (1940) 3 W.W.R. 177.

5. Purchaser in good faith without notice—effect of registration.]—M. agreed to sell a car to H. under a conditional sale agreement (duly registered) and then assigned all rights thereunder and in the car, to the defendant. H. did not take delivery of the car and some days later M. sold and delivered the vehicle for cash to the plaintiff. Three months later the defendant seized it as assignee of the conditional sale agreement. The plaintiff sued for the return of the car or its value. The judge held that the plaintiff was entitled to succeed as being a purchaser in good faith without notice from a party who continued in possession. (Sec. 32 of the Sale of Goods Act). Held, on appeal, affirming the judgment below but on other grounds, the transaction between M. and H. was not a "sale" but an "agreement to sell" as defined by sec. 8 of the Act because the property had not passed. The transfer of M.'s interest in the agreement and in the car was, however, a "sale" of the car by M. to the defendant who became in law its owner. Possession remained in M. and his sale to the plaintiff was effective under sec. 32 (1) of the Sale of Goods Act. Registration of the conditional sale agreement in H. was not notice to the plaintiff of the previous sale in the absence of any provision to that effect in the Conditional Sales Act. *Vowles* v. *Island Finances Ltd.*, (1940) 55 B.C.R. 362; (1940) 4 D.L.R. 357; (1940) 3 W.W.R. 177.

6. Effect of purported sale without authority by wife of owner of a motor car.]—The plaintiff, going overseas, left his car with his wife. She sold it to B., who knew the plaintiff was the owner and asked no questions. B. sold under conditional sale to M., an innocent purchaser now in possession. Then B. assigned the agreement to U. The plaintiff sued for an order replevying the car and for damages against B. Held, the plaintiff's wife had no interest in the vehicle, nor was she her husband's agent. The sale to B. was illegal and he in turn could pass on no better title than he himself had. The provisions of the Sale of Goods Act did not apply to assist B. or his successors in title. The car was not sold in market overt. The plaintiff was entitled to have the car back with damages against B. *Lexau* v. *Brandes,* (1946) 2 W.W.R. 697.

IV. Mercantile Agent.

Ordinary course of business.]—The appellant, a finance company, having repossessed a car placed it for sale with H., a dealer in new and second-hand cars and took from him a chattel mortgage on the vehicle, which was duly registered. The plaintiff bought the car from H. in good faith without searching for chattel mortgages and paid the purchase price to H. by instalments. Later the appellant seized the car under its mortgage. The trial judge awarded the plaintiff the money he had paid. Held, on appeal, upholding the trial judge, that sec. 60 (1) of the Sale of Goods Act applied, H. being a mercantile agent of the appellant and the sale having been made in the ordinary course of business to the plaintiff who acted in good faith and without notice of any lack of authority. *Jensen* v. *Harrison* and *Vancouver Securities Ltd.,* (1933) 47 B.C.R. 43; (1933) 3 D.L.R. 319; (1933) 3 W.W.R. 369.

SALE OF LAND.

See Vendor and Purchaser.

SALVAGE.

1. Quantum—vessel not abandoned—slight risk.]—The salved vessel caught fire and its crew left to get help; the plaintiffs boarded the burning vessel and got the flames under control in about fifteen minutes after which they towed the salved vessel to Vancouver. The risk was slight, the time taken short and the deviation from course was not appreciable. In awarding $800—half to the owner and half to the crew—the judge took the above factors into account as well as the value of the salved vessel and the fact that she had not been abandoned. *Liddle* v. *M.V. "Gradac",* (1940) 56 B.C.R. 42; (1941) 2 D.L.R. 143.

2. Claim by master and crew—admissibility of light-house keeper's journal.]—The plaintiffs (master and crew) engaged in the pilchard fishery were remunerated on a lay basis calculated upon the season's profits. The salvage services performed were thus unusual in that they were wholly outside the contract and the plaintiffs received no remuneration for these services as would have been the case if they were being paid ordinary wages. Held, that the plaintiffs were entitled to three-fifths of the gross value of the service rendered by the vessel. Held, further, that the journal of a light-house keeper was in the circumstances admissible in evidence as "an official book kept under competent authority" with respect to weather conditions. *Smith* v. *The Race Rock,* (1932) 45 B.C.R. 522.

SCHOOLS AND SCHOOL DISTRICTS.

1. Action for negligence—necessity of one month's notice.]—Sec. 131A of the Public Schools Act bars an action against a school board unless one month's notice thereof is given in writing. A letter was written by the principal of the school, attended by the infant plaintiff, to the Superintendent of Schools in the ordinary performance of his duties and not as agent for the plaintiff. Another letter from the plaintiff's solicitor to the Secretary of the School Board was relied on but it was sent less than a month before the action was commenced. Upon a jury's finding of negligence, the trial judge directed judgment

for the plaintiff. Held, on appeal, varying the judgment below and exonerating the School Board that there was no negligence proven against the School Board but, assuming negligence, there was no proper notice of action under sec. 131A; there was no waiver of the lack of notice; the giving of the notice was a condition precedent to recovery; if the solicitor's letter could be construed as notice, then the action was commenced prematurely because it was instituted within a month of the giving of such notice. *Ritchie* v. *Gale,* (1934) 49 B.C.R. 251; (1935) 1 D.L.R. 362; (1934) 3 W.W.R. 703.

2. No liability for accidents outside of school grounds.]—A pupil leaving the school grounds was run into by a bicycle operated by another pupil. The accident took place on the boulevard off the school grounds. Even if the defendant pupil was negligent there would have been no liability on the part of the School Board. There is not around school grounds a zone over which the school authorities exercise supervision. It does not extend beyond the school premises. *Pearson* v. *The Board of School Trustees of Vancouver,* (1941) 58 B.C.R. 157; (1941) 3 W.W.R. 874.

3. Sufficiency of notice of action.]—Sec. 133 of the Public Schools Act requires that actions for damages shall be brought within six months after the act committed, and "upon four months' previous notice thereof in writing". The solicitors for the plaintiff wrote a letter to the solicitor for the School Board stating that they had been "instructed to take the necessary steps to recover damages". Held, the notice was sufficient; a notice of action is not to be construed with extreme strictness and it will be sufficient, as a general rule, if it fairly and reasonably discloses the ground of complaint relied on. Although it did not give specific notice of the action and was not addressed or sent to the Board, the solicitor received it and it had the immediate attention of the Board. *Pearson* v. *The Board of School Trustees of Vancouver,* (1941) 58 B.C.R. 157; (1941) 3 W.W.R. 874.

4. Extent of supervision over children's games—liability for injuries.]—The plaintiff aged eleven was injured while playing grass-hockey on the school grounds after school hours. He was struck by a hockey stick in the hands of another boy during play. No teacher was supervising at the time of the accident, which took place not at a regular game but in a "pick-up" game. The trial judge held the School Board liable for damages on the basis that to permit the children to engage in the game without supervision was actionable. Held, on appeal, reversing the trial judge, what happened was not a foreseeable risk which required constant supervision. The risk in grass hockey was very slight. A normal parent would not hesitate to permit his son to take part in it. The Board's duty should not be determined from the happening of the extraordinary accident but from the danger that was reasonably foreseeable before the game. *Gordon Peter Gard* v. *The Board of School Trustees of the City of Duncan,* (1945) 62 B.C.R. 323; (1946) 2 D.L.R. 441; (1946) 1 W.W.R. 305; reversing (1945) 3 W.W.R. 485; (1946) 1 D.L.R. 352; (1945) 3 W.W.R. 485.

SECURITIES ACT

See COMPANIES.

SHERIFF.

Attachment for disobedience to order.]—A sheriff had withheld a part of the sum realized although ordered to pay all into Court. After nearly three years an application was made for his committal. Upon appeal from the judge's refusal to make the order, it was held that proceedings of this kind should be taken promptly and in this case too great a delay had occurred. Punitive proceedings will be avoided where other remedies are available. *Ovem* v. *Strand,* (1932) 47 B.C.R. 38; (1933) 4 D.L.R. 541; (1933) 3 W.W.R. 85.

SHIPPING.

1. Deadweight — load displacement — freeboard—ship measurements.] — The method of ascertaining the measurements of ships peculiar to ship construction contracts and the terms used are explained. *Coughlan & Son Ltd.* v. *The King,* (1937) Ex. C. R. 29.

2. Dredge in operation—booms of logs being towed past.]—Both parties were held equally at fault where booms of logs being towed up the Fraser River near its mouth were swept against the dredge by the current. The tug was justified in proceeding with the tow only if she could rely on assistance from the dredge's tender. The tender in assisting, discharged any duty cast upon her. In the circumstances the tug was negligent. The dredge too was negligent in not promptly opening her pipeline on pontoons, which would have let the tug and tow through safely. A dredge engaged in work essential for the safety of navigation involves a necessary curtailment of the facilities of the channel and all concerned must co-operate in a careful and reasonable way. *British Columbia Bridge and Dredging Co. Ltd.* v. *S.S. Gleeful,* (1939) 55 B.C.R. 55; (1940) 3 D.L.R. 89.

3. Damage to gill-nets—management of log-boom—negligence.]—The master of the defendant's tug with a boom of logs left the north arm of the Fraser River for Porlier Pass . Two hours later he turned back on account of bad weather and lost a large part of the tow through the parting of a boom-chain and the splitting of a log. The logs in sections escaped from the boom, and drifted into the plaintiff's gill-nets in the water with the result that they were ruined. The defence was inevitable accident. The negligence alleged was that the master should have stopped at once and searched for the missing sections and given warning of the danger by spotlight or otherwise. It was also urged that he should not have started out with the weather as it was. Held, dismissing the action, that the master was justified in the circumstances in returning to shelter as he did, tying up the remainder of his tow, and then proceeding with the search. The weather at the time and place was not such as to support any finding of negligence on that head. *Gerow* v. *Great West Towing & Salvage Ltd.,* (1943) 58 B.C.R. 481; (1943) 1 W.W.R. 464.

4. Charter-party — frustration — hostilities at port of discharge.]—The defendant chartered a ship to load in British Columbia for Shanghai. Hostilities intervening on the China coast, the defendant notified the plaintiff that on account of war, the charter-party had become impossible of performance and declared it cancelled. The plaintiff claimed damages and the main defence was frustration. Held by the trial judge there was no frustration and the plaintiff was entitled to recover. Held, on appeal reversing the trial judge that all four parties interested in the voyage including the plaintiff, treated it as frustrated with the result that their contractual relations were terminated leaving no right to damages in the plaintiff. The principle of frustration when applied to charter parties extends beyond the destruction or non-existence of the subject-matter; it includes cases in which some supervening event modifies the circumstances affecting a contract so profoundly as to justify it being said there is an implied condition in the contract that it shall be treated as at an end. *Australian Dispatch Line Inc.* v. *Anglo-Canadian Shipping Co. Ltd.,* (1939) 55 B.C.R. 177; (1940) 2 W.W.R. 266; (1940) 4 D.L.R. 104; reversing (1939) 53 B.C.R. 401; (1939) 2 D.L.R. 56; (1939) 1 W.W.R. 421.

5. Operating expenses, including cost of annual overhaul—whether major repairs covered.]—The defendant took over the operation of a wooden ship over thirty years old. The agreement provided that the net profits and the losses were to be borne in equal shares. All operating expenses were to be paid in the first instance by the defendant and charged against the joint venture. Operating expenses were defined to include the cost of annual overhaul. Within nine months of the end of the arrangement the annual inspection showed that dry rot had set in and further investigation showed that some $20,000.00 would have to be spent to repair the vessel. She was worth little more than that. The defendant refused to pay for the repairs and tied up the vessel, leaving her exposed to the elements and the entry of sea water, until the end of the contract when the plaintiff sold her and sued for damages. The trial judge dismissed the action, holding that "annual overhaul" meant only the work necessary to bring the ship back to the condition in which she was after the completion of the previous annual overhaul. Held, on appeal, varying the decision below, neither party could have contemplated that the cost of annual overhaul was to include virtual reconstruction of the ship as an operating expense. The trial judge, however, should have allowed damages for the deterioration to the vessel during the time she was tied up; she was still in the defendant's possession and control. *Galt* v. *Frank Waterhouse & Co. of Canada Ltd.,* (1944) 60 B.C.R. 81; (1944) 2 D.L.R. 158; (1944) 1 W.W.R. 657; varying (1943) 59

B.C.R. 152; (1943) 3 D.L.R. 708; (1944) 1 W.W.R. 6.

6. General average—unseaworthiness—Canadian Water Carriage of Goods Act—limitation of liability.]—The ship with a cargo of lumber from Vancouver to Durban was leaking so badly that she had to abandon the voyage at Valparaiso. The cargo was sold at a heavy loss. The shipowners sued to recover a general average contribution from the owner of the lumber under the rule that a loss caused by a sacrifice in time of peril at sea is to be shared by all the interests involved in the adventure. Here the loss was by way of expenditures made for repairs etc. to the ship. The defendant, owner of the cargo, alleged that the vessel was initially unseaworthy and counterclaimed for the loss it had sustained. The bill of lading of the lumber imported the provisions of The Canadian Water Carriage of Goods Act which removed the shipowners' absolute liability and replaced it by a provision requiring only due diligence to make the ship seaworthy, a change more apparent than real. Held, on the facts, the ship was not seaworthy when she left Vancouver. Further, the owner had not exercised due diligence to make her so at the beginning of the voyage. The plaintiff's claim was therefore dismissed. As to the counterclaim, the plaintiffs claimed to limit their liability under sec. 649 of The Canada Shipping Act under which the loss could be held at so much per ton of the ship's tonnage if the loss was occasioned without the actual fault or privity of the owner. Held, in the circumstances, the owner was entitled to limit its liability and judgment against it on the counterclaim was awarded on that basis. *Canadian Transport Co. Ltd.* v. *Hunt, Leuchars, Hepburn Ltd.*, (1947) 63 B.C.R. 262; (1947) 2 D.L.R. 647; (1947) Ex. C.R 83.

7. Charter party—"expected ready to load" by a certain date.]—A contract of affreightment with respect to a ship contained a term "expected ready to load about Feb. 18, 1939." On Feb. 23rd, the charterer repudiated the contract and an arbitration followed. In proceedings to set the award aside, it was held that the phrase "expected ready to load" by a named date meant that in view of facts known to the carrier, he honestly expected that the vessel would be ready as stated and that the expectation was based on reasonable grounds. The phrase is not a mere representation but a contractual precedent to obligations under the charter. *Re Empire Shipping Co. Ltd.* and *Hall Bryan Ltd.*, (1940) 1 D.L.R. 695; (1940) 1 W.W.R. 97.

8. Canadian Government Vessel — refusal to proceed on voyage — reasonable cause.]—The accused was convicted under the Government Vessels Discipline Act of unlawfully refusing, without reasonable cause, to proceed on a voyage in a Government ship. The Act requires that the ship's master cause every person engaged for service to sign the ship's book after having had the Act read to him. The accused had not had the Act read to him, but had purported to waive its reading having heard it on a previous occasion. Held, quashing the conviction, the Act is a public Act designed to protect seamen on Government vessels and the accused could not waive its effect. The Act states that every person "so signing" shall be subject to the Act. He was not a person "so signing" and hence was not subject to the Act. *Rex* v. *Roma*, (1943) 1 D.L.R. 238; (1942) 3 W.W.R. 525; 78 C.C.C. 340.

See COLLISION AT SEA.

See SALVAGE.

SLANDER.

See DEFAMATION.

SOLICITORS.

I. BENCHERS, POWERS AND DUTIES, 634.

II. LIABILITY, 635.

III. LIEN FOR COSTS, 636.

IV. PRIVILEGED COMMUNICATIONS, 638.

V. COSTS, 638.

I. BENCHERS, POWERS AND DUTIES.

1. Professional misconduct—negligence as constituting.] — It was contended that gross negligence in itself was not a cause

for suspension. Held by the judges of the Supreme Court as visitors that the words "good cause" in the Legal Professions Act are broad enough to justify the Benchers in suspending a member of the Society who has been guilty of a series of acts of gross negligence, which, taken together, would amount to a course of conduct sufficient to bring the profession into disrepute. Quare, whether a Bencher who acts as prosecutor should sit in judgment as well. In *re Legal Professions Act* and in *re a solicitor*, (1945) 62 B.C.R. 38; (1945) 4 D.L.R. 525.

2. Unprofessional conduct — suspension for good cause shown.]—The judgment of the Benchers ought not to be disturbed if it has been reasonably exercised and is fairly founded on the evidence. The solicitor was clearly negligent in not bringing his client's case on for trial; then he deceived her as to what was being done. A client has a right to honest explanations for delay on the part of his solicitor. In *re Legal Professions Act*: in *re a solicitor*, (1945) 62 B.C.R. 34; (1945) 4 D.L.R. 446.

3. Status of Benchers.]—The Benchers of the Law Society are an administrative tribunal performing judicial or semi-judicial functions; they are required to act judicially but are not required to follow court procedure. They may hold their meetings in private. In *re Legal Professions Act* and *the Benchers of the Law Society of British Columbia* and *F, appellant*, (1945) 62 B.C.R. 1; (1945) 4 D.L.R. 702; (1945) 3 W.W.R. 31.

II. Liability.

1. Petition to enforce undertaking.]—On the opening up of a judgment by default the defendant was put on terms to furnish security for the claim. He offered to the plaintiff an undertaking to lodge certain bonds and cash with his own solicitors "to be paid to you in the event of your being successful in the . . . action after final determination thereof." This being unacceptable, the defendant's solicitors added their own undertaking to pay, addressed to the plaintiff's solicitors, "in the event of judgment being obtained" against the defendant. The plaintiff recovered in the action and the defendant filed notice of appeal. At this stage the plaintiff petitioned for an order to enforce the solicitors' undertaking. The judge declined to make the order. Held, on appeal ,affirming the decision below, (a) the two documents should be read together as constituting the undertaking given; (b) so read they refer to the final disposition of the case; (c) even if on a strict interpretation the money was payable as soon as judgment was given, there is a prima facie case for rectification and the judge was justified in exercising his discretion as he did. *Carlton Hotel Co. Ltd.* v. *Gardiner*, (1934) 48 B.C.R. 464; (1934) 4 D.L.R. 421; (1934) 3 W.W.R. 120.

2. Effect of disputed retainer on ex parte order to tax.]—A solicitor obtained an ex parte order to tax his solicitor and client costs. An application to set it aside was made on the ground that the retainer was disputed, as the solicitor well knew, and he should have disclosed that fact to the Court. Held, dismissing the application, the objection is not a valid one, particularly as it is the practice for the taxing officer to decide such issues. In *re Legal Professions Act* and in *re Barker, a solicitor*, (1935) 49 B.C.R. 479; (1935) 1 W.W.R. 751.

3. Disputed retainer.]—On the question of the retainer of a solicitor, where the evidence in his favour has not advanced beyond that of grave doubt, there is no other course open to the Court than to hold that the solicitor has not satisfied the onus which is upon him and to declare that the retainer did not exist. In *re Legal Professions Act* and *Barker* v. *Skrine*, (1935) 50 B.C.R. 298; (1936) 1 D.L.R. 298; (1936) 1 W.W.R. 431.

III. Lien for Costs.

1. Charging order for costs although action unsuccessful.]—The receiver of a company obtained leave to bring an action which failed. His solicitor claimed payment out of a fund paid into Court for the receiver during the progress of the action. Held, directing payment, the fund must be considered as "recovered or preserved" through the services of the solicitor. It was through his efforts that the money came into the receiver's hands. *Westminster Trust Co.* v. *Stave Falls Lumber Co. Ltd. (No. 3)*, (1940) 3 W.W.R. 514.

2. Charge for costs on property recovered or preserved.]—An appeal having been dismissed by the Court of Appeal with costs which remained unpaid, the appellant launched a further appeal to the Supreme

Court of Canada and paid $500 into Court as security for the costs thereof. The appeal to the Supreme Court of Canada was dismissed with costs for want of prosecution and such costs were paid by the appellant. The respondent's solicitor applied for a charging order on the $500 for the costs awarded when the appeal to the Court of Appeal was dismissed. Held, refusing the application, that the money was paid into Court for a special purpose and that purpose had been satisfied in full, whereupon the appellant was entitled to take it out. It was not recovered or preserved within the meaning of sec. 104 of the Legal Professions Act. *Lockett* v. *Solloway Mills & Co. Ltd.* (1932) 46 B.C.R. 211.

3. Charge on property recovered — whether discretionary or absolute—sec. 106 of Legal Professions Act.]—On the contention that a charge under sec. 106, being statutory, it must be absolute, the whole section must be looked at. It is enforceable only by a court's or judge's order, and the section says that "it shall be lawful" to make the order, implying a discretion; and this is confirmed by the power's being a power to make such order as "may appear just and proper." In the result the right to the charge lies in the discretion of the Court. *Henry* v. *Columbia Securities Ltd,* (1942) 58 B.C.R. 193; (1942) 4 D.L.R. 596; (1943) 3 W.W.R. 422.

4. Charge on property recovered — what constitutes recovery.]—The plaintiff sued for the delivery to him of certain motor-cars. The defendant counterclaimed for more than the value of the cars in respect of promissory notes. At the trial the plaintiff was given delivery of the cars but suffered judgment on the counterclaim for $10,000. The defendant handed the cars over but immediately seized them on a fi. fa. for the money judgment. The solicitors for the plaintiff applied for and obtained an order under sec. 106 of the Legal Professions Act charging the cars with their costs of "recovering" them. Held, allowing the appeal without costs, the judgment for delivery of the cars should have been one in detinue with a set-off which would probably have obviated the appeal. The so-called "recovery" was illusory; the client was worse off than if he had been defeated because the sheriff sold at a loss, a result which the solicitor should have foreseen from the start. The judge seemed to be of the opinion that the charge should be ordered under sec. 106 as a matter of course, provided the solicitor had recovered property, whereas he had a discretion. *Henry* v. *Columbia Securities Ltd.,* (1942) 58 B.C.R. 193; (1942) 4 D.L.R. 596.

5. Delivery of bill as preliminary to recovery of costs.] — Notwithstanding the language of secs. 81 and 84 of the Legal Professions Act, the English decisions make it clear that delivery of a bill, and expiration of the month, have no bearing on the right to obtain a charging order. *Henry* v. *Columbia Securities Ltd.,* (1942) 58 B.C.R. 193; (1942) 4 D.L.R. 596.

IV. Privileged Communications.

Solicitor a witness under subpoena duces tecum.]—A solicitor who admitted custody of the documents declined to produce them. It was held that the privilege did not apply to the production of documents. *Blumberger* v. *Solloway Mills & Co. Ltd.,* (1931) 45 B.C.R. 66; affirmed (1932) 46 B.C.R. 241.

V. Costs.

1. Solicitor's assignment of certificate of taxation of costs.]—Solicitors having assigned the moneys covered by a certificate of taxation, including a solicitor's lien on documents, the assignee obtained leave to issue execution pursuant to sec. 96 of the Legal Professions Act invoking Rule 601 of the Supreme Court Rules. Held, on an equal division of the court, that the appeal should be dismissed. In *re Taja Singh* and *Nutta Singh,* (1932) 45 B.C.R. 547; (1932) 4 D.L.R. 303; (1932) 2 W.W.R. 671.

2. Clients application to tax after twelve months.]—The fact that the correspondence between the parties indicated that the bill was treated as one that might be taxed if no settlement was reached, and that some of the charges in the bill seemed unduly large, were elements to be taken into consideration where a client applies to tax a bill after the expiration of twelve months from its delivery. *Cameron* v. *Parsons,* (1936) 51 B.C.R. 70; (1936) 3 W.W.R. 237.

3. Method of referring bill for taxation.] — An application under the Legal Professions Act to refer a solicitor's

account to the registrar for taxation should be made by originating summons and not by petition. The rules for the regulation of procedure and practice are statutory and therefor form 40 in Appendix K should be used. In *re Legal Professions Act* and *Thomas Munroe Miller*, (1935) 49 B.C.R. 403; (1935) 3 W.W.R. 58.

SPECIFIC PERFORMANCE.

I. Of What Agreements, 639.

II. Purchaser, When Entitled To, 640.

III. Vendor, When Entitled To, 641.

1. Of What Agreements.

1. Sale of mining shares where no title in vendor.]—In an action to compel performance of a contract to purchase shares the plaintiffs had succeeded before a judge and jury. As to the defence that the plaintiffs did not have the shares in question the trial judge held that the plaintiffs had prima facie evidence of title and that the defendant must establish fraud to displace it. Held, on appeal, reversing the judgment at the trial, that the plaintiffs had purported to sell specific shares without owning them; that the plea of want of title does not require proof of fraud to support it; that some of the shares were held by the plaintiffs as trustees and the agreement was vitiated by fraud on the part of the plaintiffs and that specific performance will not be decreed when to do so would condone a breach of trust or sanction unconscionable dealings. Reversed by Supreme Court of Canada holding that the claim is not one for specific performance but a common law action for a money demand in which the onus is on the purchaser to show a legal or equitable ground precluding the seller from transferring the shares. *McTavish Brothers Ltd.* v. *Langer*, (1933) 4 D.L.R. 609; reversing (1932) 46 B.C.R. 310; (1933) 1 D.L.R. 151; (1932) 3 W.W.R. 305.

2. Contract with municipality for the supply of electric energy.]—The contract provided that the company would not make any charge for the supply of electric energy to any of the inhabitants of the municipality greater than that paid for similar service by any municipality or the inhabitants thereof other than a city. It was conceded that the company was charging inhabitants of the plaintiff municipality more than the amounts paid by the inhabitants of the municipality of Burnaby. The trial judge decreed specific performance holding that on the plain reading of the contract the agreed service had not been given. On appeal, affirming the trial judge, it was held that "similar service" referred to the use to which the plaintiff municipality and its inhabitants put the electric energy supplied, i.e. lighting, power, heating, etc., and was not restricted to the facilities and supply of energy together with the maintenance and operation thereof. *The Corporation of the District of Matsqui* v. *Western Power Co. of Canada Ltd.*, (1933) 47 B.C.R. 335; (1934) 1 D.L.R. 264; affirmed by Privy Council (1934) 2 D.L.R. 81; (1934) 1 W.W.R. 483; (1934) A.C. 322.

II. Purchaser, When Entitled To.

1. Purchase of shares—consideration—want of mutuality.] — The plaintiff was desirous of acquiring sufficient shares in a company to get control. He could buy half of them from S. and negotiated with the defendant for five held by him. The defendant professing that he wanted to assist the sale by S. agreed to turn over the five shares to the plaintiff. On the strength of this, the plaintiff paid S. $2500 but the defendant refused to transfer the five shares. Held, consideration was afforded by the action of the plaintiff in agreeing to buy S.'s shares. As to lack of mutuality, the plaintiff did an act from which a third party benefitted and which he would not have done but for the promise of the defendant who was therefore bound to perform his part. Damages would not be an adequate remedy. *Westman* v. *Macdonald*, (1941) 57 B.C.R. 11; (1941) 4 D.L.R. 793; (1941) 3 W.W.R. 321.

2. Purchase of motor-car—damages for non-delivery.] — The deceased specifically bequeathed a Cadillac car to his widow who was also an executrix. She and her co-executor arranged a sale of the car to the plaintiff, an undertaker, who proposed to have it remodelled as a hearse. Before actual delivery the executors sought to cancel the sale and return the purchase money. The purchaser sued for specific performance and damages for non-delivery. Held, there was a binding contract of sale. Notwithstanding the bequest to the widow the executors had authority to sell. It was not

a sale by one executor but by both. The widow, qua beneficiary, attempted to repudiate. After a legal sale made by the executors a beneficiary will not be entitled to repudiate. Specific performance was decreed. As to damages the plaintiffs could not buy a similar car hence the usual measure was not available. The rule in *Hadley* v. *Baxendale,* (1854) 9 Ex. 341 could not be applied because although the purpose for which the car was to be used had been communicated to the defendants it could not, in fact, be so used. The only damages allowed were the insurance premium paid and 5% on the purchase money. *Simmons & McBride Ltd.* v. *Kirkpatrick,* (1945) 61 B.C.R. 467; (1945) 4 D.L.R. 134; (1945) 3 W.W.R. 557.

3. Sale of car — mistake as to "ceiling price".]—The Wartime Regulations fixed a "ceiling price" of $600 on the car in question. The defendant advertised it at "not over ceiling price." Both parties thought the "ceiling price" was $750 and the trial judge found that the plaintiff agreed to buy and made a deposit believing it was $750. When the plaintiff found that it was $600 he tendered the balance on that basis and upon its refusal sued for specific performance. The trial judge dismissed the action because of mutual mistake. Held, on appeal affirming the decision below, specific performance should not be decreed. *Smith* v. *Hall,* (1945) 62 B.C.R. 81.

III. Vendor, When Entitled To.

1. Informal agreement to be formalized later—part performance.]—The plaintiff as vendor claimed for specific performance of an agreement to sell timber. The agreement contained a clause that upon completion of a cruise and survey of the timber, a formal contract was to be executed between the parties according to the usual form adopted in such cases in British Columbia and containing such of the provisions of the informal agreement as should be applicable. The parties carried on as if the informal agreement was all that was necessary but later the position was taken that no agreement had ever been concluded. The trial judge found that the informal agreement was binding and should be enforced. Held, on appeal, affirming the decision of the trial judge, that the informal agreement contained all the essentials of a binding agreement and notwithstanding the provision contemplating a formal contract, the plaintiff was entitled to recover. *British American Timber Co.* v. *Elk River Timber Co.,* (1932) 47 B.C.R. 161; (1933) 4 D.L.R. 286; (1934) 2 W.W.R. 658.

2. Vendor entitled on decree to declaration of lien.]—The plaintiff (vendor) was awarded a decree for specific performance. Held, he was entitled to a declaration in the judgment that he held a lien on the property in question until payment, with liberty to apply to enforce it. *Gleneagles* v. *Thomson,* (1933) 3 W.W.R. 159.

See Wills.

STATUTES.

I. Construction, 642.

II. Effect Of One On Another, 645.

III. Taking Away Recourse To The Courts, 647.

IV. Miscellaneous Cases, 649.

V. Particular Words and Phrases, 653.

I. Construction.

1. Injury to unlicensed driver—whether made a trespasser by statute.] — The Motor-vehicle Act forbids a chauffeur to drive a taxicab unless he holds a permit prescribed by the Act. Moreover a by-law of the City of Vancouver forbids him to operate without a civic licence. The plaintiff claimed as administrator on behalf of a taxi driver who, without either the permit or the licence met with an accident while driving a taxicab on a highway in the City in respect of which a jury gave damages. The defendant contended that the deceased was a trespasser and not entitled to recover. The jury's verdict was upheld by the Court of Appeal on an equal division of the Court. Held, on further appeal to the Supreme Court of Canada affirming the verdict, the question depends on the language of the statute. Generally speaking such legislation does not operate to modify the civil rights of the parties or relieve them from the consequences of their negligence. As to the by-law its purpose is to compel persons to take out licences and the sanction is there. The Act is to regulate the user of the

highway for the protection of the public and not to disturb the ordinary rights of individuals as between themselves. The damage, here, was not caused by the absence of a permit or a licence. The deceased was not a trespasser in the sense of being an outlaw. *Burchill* v. *City of Vancouver*, (1932) S.C.R. 620; affirming (1932) 1 W.W.R. 641.

2. Immigration Act: procedure under.]—A strict adherence to statutory requirements may be excused where no injustice is done or the requirements are directory and not imperative. *Rex* v. *Jung Suey Mee*, (1932) 46 B.C.R. 533.

3. Mortgagors' and Purchasers' Relief Act.]—An order was made under the Act authorizing "proceedings by way of foreclosure or sale or otherwise" for the recovery of money under an agreement of sale. The plaintiff claimed personal judgment in the action. At the trial objection was taken that no leave had been granted as to the claim for personal judgment. Held, giving effect to the objection that the whole of sec. 4 must be looked at and some meaning given to each subsection. Subsection 1 (d) deals with personal recovery and is not included in subsection (1) (a) in which the words "or otherwise" should be read, ejusdem generis with "foreclosure or sale," as if the clause were "by way of foreclosure or sale or other action of a like kind." The claim so far as personal judgment was concerned was dismissed since the Act had not been complied with as to it. *Yorkshire and Pacific Securities Ltd.* v. *Fiorenza*, (1937) 52 B.C.R. 509; (1938) 1 D.L.R. 785; (1938) 1 W.W.R. 390.

4. Effect of repealing ultra vires statute.]—The section of the Interpretation Act (13 (1)) preserving accrued rights when a statute is repealed has no effect where the statute was ultra vires and was repealed only to remove it from the statute books. *Re Herbert Beck, deceased* and *the Succession Duty Act*, (1939) 53 B.C.R. 423; (1939) 2 D.L.R. 439; (1939) 1 W.W.R. 208; reversing (1938) 53 B.C.R. 120; (1938) 3 D.L.R. 789.

5. Departure from literal reading.] — Where too close or literal a reading of the text would bring about a result obviously not intended, it may be departed from. Uniformity in all provinces of practice under a Dominion statute is more desirable than a literal or slavish following of the letter of the Act when the intention is clearly shown. In *re Executors of Gordon Drysdale*, (1938) 53 B.C.R. 155; (1938) 3 D.L.R. 791; (1938) 3 W.W.R. 57; C.B.R. 324.

6. Effect of headings.] — The heading are to be regarded as parts of the statute itself and may be read not only as explaining the sections which immediately follow, but as affording an even better key to the general construction than a mere preamble. They are deserving of greater consideration than marginal notes. In *re Vernon Municipal School District* and *Canadian Pacific Railway Co.*, (1939) 54 B.C.R. 98; (1939) 3 W.W.R. 47.

7. Improvement District—Water Act—"Unless otherwise provided" how to be read.]—The Water Act (sec. 53(1)) provides "Unless otherwise provided in the Letters Patent, the powers of every improvement district shall be exercised and its property managed by a Board of Trustees who shall be elected by the owners of land in the improvement district." The Letters Patent here appointed three persons as the first trustees. It was contended that they must be elected. The judge held, dismissing the action, that the opening words "unless otherwise provided" modified the whole of that part of the section and authorized the appointment in place of the election. He also held that sec. 49 (1) authorized the Lieutenant-Governor in Council to make the provision of the Act as to election inapplicable and to import a provision for the appointment of trustees. Held, on appeal, reversing the decision below, the opening phrase, "unless otherwise provided" relates only to "Board of Trustees" and does not affect the plain statutory requirement that the trustees must be elected. The Letters Patent did not purport to make sec. 53 inapplicable and sec. 49 (1) was not effective for the purpose. *Bulman* v. *Anderson*, (1946) 63 B.C.R. 297; (1947) 1 D.L.R. 614; (1947) 1 W.W.R. 248; reversing (1946) 63 B.C.R. 142; (1946) 4 D.L.R. 679.

8. Doctrine of favouring the subject when legislation doubtful in meaning.] — Where there is ambiguity or doubt as to the meaning of a statute which the canons of construction fail to solve, the matter should to resolved in favour of the subject and against the legislature which has failed to explain itself. *Rex* v. *Kerr*, (1947) 63 B.C.R. 554.

9. Failure of Fire Marshal to give reasons—conviction voided.] — Under the Fire Marshal Act the Fire Marshal dismissed an appeal without giving his reasons although the Act states that he "shall" communicate his reasons in writing to the appellant. Upon conviction for disregarding the Fire Marshal's order following the appeal ,the County Court Judge set the conviction aside. The requirement as to giving reasons was imperative. Here interference with private property was authorized by the statute and the Act should be strictly adhered to. *Rex* v. *Castle,* 82 C.C.C. 318.

10. Minister's order forbidding hunting without permit.]—The appellant was convicted of entering a closed Forest District. There was no evidence of the promulgation of the Minister's order or that the appellant knew of its existence. Held, on appeal to the County Court, quashing the conviction, it was not compatible with justice that the appellant could be convicted and penalized for the violation of an order of which he had no knowledge or notice. The Forest Act, under which the order was made, was silent as to any requirement as to promulgation. *Rex* v. *Ross,* (1945) 3 D.L.R. 574; (1945) 1 W.W.R. 590; 84 C.C.C. 107.

11. Whether change in statute from "in all Courts of Justice" to "at law and in equity" changes the meaning.] — The amendment to the Land Registry Act in 1913 whereby the words "at law and in equity" were substituted in sec. 37 for "in all Courts of Justice" did not change the true meaning of the section. *Davidson* v. *Davidson,* (1945) 2 W.W.R. 576.

12. "May" and "shall"—authority given to be exercised.] — Under sec. 23 of the Landlord and Tenant Act a Supreme Court Judge may require the County Court Judge to send up the proceedings. While the word is "may" and not "shall" the rule is that it is imperative on those having authority by statute to do a judicial act, to exercise the authority when the case arises, and its exercise is duly applied for. This notwithstanding that by the "Interpretation Act" "may" is permissive and "shall" imperative. *Walls* v. *Heal,* (1947) 1 W.W.R. 95.

II. Effect of One on Another.

1. Legislation by reference—effect of—ambulatory or otherwise.]—Where under Order LXXA alimony may be recovered by a person who would be entitled to it "by the law of England," the reference is to the law of England as at the date when Order LXXA became law. The effect of such legislation is as though the extrinsic law referred to was written right into the Act. *Mainwaring* v. *Mainwaring (No. 2),* (1942) 57 B.C.R. 390; (1942) 2 D.L.R. 377; (1942) 1 W.W.R. 728; reversing (1941) 56 B.C.R. 448; (1941) 4 D.L.R. 324.

2. Cattle entering another's land within pound district—effect of Trespass Act on Pound District Act.]—The Pound District Act (sec. 7 and 10) provides that no animal shall be permitted to run at large within any pound district and makes the person in charge of such an animal liable for damage as if he were the owner. The Trespass Act (sec. 14(1)) provides that where cattle stray into lands unprotected by a lawful fence no action for trespass shall be maintainable therefor. The Trespass Act is to be read as relating to lands other than those lying within a pound district. The Trespass Act being a general statute must yield to the special act — the Pound District Act. Damages were recoverable, notwithstanding the absence of a lawful fence, where the lands were in a pound district. *Gladysz* v. *Gross,* (1945) 61 B.C.R. 410; (1945) 3 D.L.R. 208; (1946) 2 W.W.R. 266.

3. Whether Milk Act or Vancouver Incorporation Act prevails — pasteurization of milk.]—The Vancouver Incorporation Act enabled the City Council to pass bylaws for regulating and controlling all persons selling or dealing in milk by retail. The Milk Act gave municipalities (including Vancouver), the power to prohibit the sale of unpasteurized milk, except Grade A milk. Held, on a reference under the Constitutional Questions Determination Act, that the City had not the power to prohibit the sale of all unpasteurized milk. The Milk Act constitutes a complete code of standards of fitness of milk for human consumption intended to have general application throughout the Province including Vancouver. Assuming that the City's powers were wide enough to require pasteurization, those powers are repugnant to and inconsistent with the provitions of the Milk Act and must be taken to have been repealed by implication. And this will be so whether the Vancouver Incorporation Act is special or general. Semble, the Milk Act is special as setting up a complete code relating to milk supplied for human

consumption; the City Act is general giving powers of a general nature to the City for the control of a variety of foodstuffs including milk. In *re Constitutional Questions Determination Act* and *in re Vancouver Incorporation Act,* 1921, (1945) 62 B.C.R. 114; (1946) 1 D.L.R. 638; (1946) 1 W.W.R. 177.

4. Whether Commorientes Act or Insurance Act governs in distribution of life insurance.]—The Insurance Act (sec. 123) provides that where an insured and a beneficiary perish in the same disaster the prima facie presumption is that the beneficiary died first. The Commorientes Act provides that in such a case the younger is presumed to have died first but the provision is made subject to that created by sec. 123 of the Insurance Act. It was contended that the Insurance Act governs for the purpose of deciding the immediate destination of the insurance moneys but once that is done the other Act comes into play and governs its ultimate destination. Held, the Insurance Act governs for all purposes connected with the order of death. A presumption should not be regarded as having effect at one moment and a moment later to be set aside by another, when, as here, the first presumption is declared to be the prevailing one. Moreover, the Commorientes Act applies only where there is uncertainty as to which survived; here the matter is made certain by the operation of sec. 123. *In re estate of George Thomas Law, deceased,* (1945) 62 B.C.R. 380; (1946) 2 D.L.R. 378; (1946) 2 W.W.R. 405.

5. Whether the "Hours of Work Act" supersedes the "Vancouver Incorporation Act" as to hours of taxicab operation by owners.]—While the "Hours of Work Act" prescribes maximum working hours for employees, the hours fixed by the Vancouver by-law (under powers given by the "Vancouver Incorporation Act") for employers remains unimpaired. If a subsequent statute merely creates an exemption or exception from the operation of a previous statute, or modifies its operation by the annexation of a condition, the previous statute is not necessarily held to be repealed. *In re "Vancouver Incorporation Act, 1921,"* and *in re Bent,* (1940) 2 W.W.R. 697.

III. Taking Away Recourse to Courts.

1. Taking away recourse to Courts.]—Provisions of a statute depriving a subject of access to the Courts are quite within the competence of the Legislature, but require express words or necessary intendment. When the language of the Legislature, construed literally, will produce such injustice that the minds of reasonable men must revolt from it, the Court will hold that the Legislature could not have intended to produce that result except by express words. *Briscoe* v. *Yorkshire & Canadian Trust Ltd.,* (1936) 51 B.C.R. 222; (1936) 3 W.W.R. 513.

2. Taking away recourse to Courts.]—Where a marketing scheme had been held to be ultra vires, and persons who had paid levies sued to recover them back, the Act was amended to bar any actions against certain officials acting in good faith. Held, the Legislature had authority either to stay a pending action or prohibit the commencement of a new one. The subject matter of the action is not material; it is the civil right to invoke the aid of the Court that is taken away. *Vancouver Growers Ltd.* v. *McLenan,* (1937) 52 B.C.R. 42; (1937) 4 D.L.R. 143; (1937) 3 W.W.R. 119.

3. Effect of stay by statute—status of injunction under stayed action.]—An interim injunction was granted against members of the B.C. Coast Vegetable Marketing Board. Shortly afterwards the Legislature stayed every action pending against such board members. The defendants moved to dissolve the injunction. Held, it was not open to the parties to come to the Court once the Legislature stayed the action. A stay of proceedings by a Court would be on a different footing. *Lowe Chong* v. *Gilmore* (No. 2) (1937) 1 W.W.R. 410.

4. Taking away recourse to Courts.]—The power of the Legislature to pass even what might be considered unjust legislation is unimpeachable provided the language used is open to no other construction than the one which would have such effect. *Murray* v. *District of West Vancouver,* (1937) 52 B.C.R. 237; (1937) 3 W.W.R. 269.

5. Taking away recourse to Courts.]—Sec. 37 of the Chinese Immigration Act does not preclude a judge from hearing an application under the Habeas Corpus Act for the purpose of proving that, notwithstanding the contrary opinion of the Chinese Immigration Controller, the applicant was in fact born in Canada and as a Canadian citizen was entitled to her discharge from that officer's custody. Nothing short of ex-

press language, or language which admits of no other possible construction, can avail to defeat the object of the Habeas Corpus Act. *The King* v. *Shin Shim,* (1938) S.C.R. 378; (1938) 4 D.L.R. 88; 70 C.C.C. 321; reversing (1937) 52 B.C.R. 79.

6. Taking away recourse to Courts.]—Where legislation closing the doors of the Courts is valid constitutionally, the Courts should not question the policy of the Legislature but only pass upon its scope and application. Such statutes are not uncommon in this Province. *Day* v. *Corporation of the City of Victoria,* (1938) 53 B.C.R. 140; (1938) 4 D.L.R. 345; (1938) 3 W.W.R. 161.

7. Amendment barring action — effect on vested rights.]—Unless the language used plainly manifests in express terms or by clear implication a contrary intention, (a) a statute divesting vested rights is to be construed as prospective, (b) one merely procedural is to be construed as retrospective, (c) one which, while procedural in its character, affects vested rights adversely, is to be construed as prospective. *Dixie* v. *Royal Columbian Hospital,* (1940) 56 B.C.R. 74; (1941) 2 D.L.R. 138; (1941) 1 W.W.R. 389.

8. Right of Federal Housing Official to countermand order of Court.]—An Emergency Shelter Administrator purported to suspend a writ of possession duly issued out of the County Court. Held, directing the sheriff to enforce the writ, the power of the Administrator did not go so far as to enable him to interfere with the execution of judicial process. There would have to be language forbidding any other interpretation to support such a power. *In re Landlord and Tenant Act* and *in re Bachand Dupuis,* (1946) 62 B.C.R. 436; (1946) 2 D.L.R. 641; (1946) 1 W.W.R. 545.

See COMPANIES (SECURITIES ACT)

IV. MISCELLANEOUS CASES.

1. Rights of dismissed contributory under Superannuation Act when rehired.] — The plaintiff, a police officer, was employed by the City of Vancouver for some years and was then dismissed. At that time he had a substantial sum to his credit in the superannuation fund administered by the Minister of Finance of the Province. He rejoined the police force for a short period but was treated as a temporary employee not within the Act. During the short period the City did not make the usual deduction although requested so to do by the plaintiff. Having reached 55 he claimed to be entitled to a superannuation allowance. Held, making the declaration prayed for, that the failure of the City to make the deduction did not deprive the plaintiff of his rights and when he was re-employed he was again a contributor under sec. 20D of the Superannuation Act, and was in effect reinstated in the same position, as nearly as might be, to that in which he was at the time of his first dismissal. The Act applies to temporary employees as well as permanent ones. *Knox* v. *Baker,* (1936) 51 B.C.R. 62.

2. Barbers Act—right to examination.] —Where a candidate for admission to the occupation of a barber fails in the examination set by the Board of Examiners, he cannot, as a matter of right, have the matter referred to three barbers for enquiry and report under subsection (d) of sec. 7 of the 1934 Amendment Act. The Court may make such an order when it is "just and equitable". The order would be made if the rules of the association had not been observed, or if the proceedings of the Board were conducted in a manner contrary to natural justice, or if the decision had not been come to bona fide. The appeal was dismissed as the mere fact of failure in the examinations does not call for a review. *Harley* v. *Barbers' Association of British Columbia,* (1936) 50 B.C.R. 327.

3. Revised Statutes—effect of failure to include statute in extenso.]—The Mortgagors' and Purchasers' Relief Act, 1934, being of a temporary character, was not printed in extenso in the Revised Statutes of 1936. The Revised Statutes Act of that year repealed the acts passed since the last revision in 1924 so far as they were incorporated in the new revision, or were repugnant thereto. It was contended that there was repugnancy having regard to sec. 9 of the Supreme Court Act giving a right to the issue of process leading to foreclosure. Held, there is no repugnancy and the Mortgagors' and Purchasers' Relief Act is listed in Volume IV of the new Revised Statutes. An Act is not to be repealed except by express enactment, or by necessary implication and repeal by implication is never to be favoured. *In re intended action*: *Knox* v. *Venning,* (1937) 52 B.C.R. 81; (1937) 3 W.W.R. 112.

4. Barbers' Act—special tribunal of three barbers.]—Where an apprentice failed in the examination set by the Board of Examiners in Barbering and appealed to the County Court and where the special tribunal of three barbers under sec. 11 was not resorted to, a new trial was ordered. *McAllister* v. *Board of Examiners in Barbering,* (1939) 54 B.C.R. 243; (1939) 3 D.L.R. 124; reversing (1939) 3 W.W.R. 250.

5. Old Age Pensions Act (Dominion)—regulations thereunder.] — The regulations under the Act which are questioned here are within the scope of the enabling section. The "income" of an applicant includes those facilities for maintenance, i.e., his own property and assets, that he already possesses. Otherwise a wealthy miser would be able to come upon the country for an old-age pension. *Gartley* v. *Workmen's Compensation Board,* (1932) 57 B.C.R. 217.

6. Optometry Act—power to require retired member to pass examination before resuming practice.] — Sec. 7 (1) of the Optometry Act empowers the Board of Examiners in Optometry to make regulations concerning the examination and admission of applicants to the practice of optometry. The Board made a regulation requiring every holder of a certificate, if he ceased practice for five years, to apply afresh and pass the examinations prescribed. The applicant through illness retired from practice for more than five years and was refused a certificate until he should pass the examinations. Held, allowing the appeal, it was not intended that such a drastic power should be delegated to the Board. There would be nothing to prevent the Board from fixing a much shorter period. Sec. 7 does not authorize the regulation. *In re Optometry Act* and *in re Charles H. Rodgers,* (1945) 61 B.C.R. 323; (1945) 2 D.L.R. 269.

7. Excise Act — lien-holder escaping consequences of seizure—"all reasonable care".]—The Excise Act provides that a person (other than the person accused) who claims an interest in any vehicle seized under the Act, may obtain an order that his interest is not affected if he satisfies the judge that as a lienholder he exercised all reasonable care that the vehicle was not likely to be used contrary to the provisions of the Act. Here the applicant had discounted a conditional sale agreement covering a motor-car afterwards seized. He relied on a long course of fair and honest dealing by the vendor, and to written assurances given by the purchaser and appearing in the agreement. There were also separate assurances as to liquor and narcotics and a statement that the purchaser's name had never been refused by a finance company or a bank. Held, the interest of the applicant should not be affected by the seizure. The burden is satisfied if reasonable precautions depending on the circumstances, have been taken. *In the matter of the Excise Act* and *Hazel Helen Gordon,* (1945) 62 B.C.R. 96.

8. Parents' Maintenance Act—whether liability joint or several.]—Under the Parents' Maintenance Act the obligation of a child to maintain a dependent parent is limited to his share according to his means. If proceeded against a child is entitled to have the other children brought in. A dependent parent is one who is unable to subsist without the aid of someone else. *Rex* v. *Skilling,* (1935) 1 W.W.R. 183.

9. Farmers' Creditors Arrangement Act — whether applicant a "farmer".] — Under the Act a farmer means a person whose principal occupation consists in farming or the tillage of the soil. Here the applicant employed another man who engaged the help, managed the farm and accounted in connection with the farming operations. Held, the applicant was not a farmer although he shared in the profits and did some "fussing around" on the farm. *In re Farmers' Creditors Arrangement Act* and *in re Lantzius,* (1936) 1 W.W.R. 373; 17 C.B.R. 196.

10. Effect of opinion given under Constitutional Questions Determination Act.] —Section 7 of the Constitutional Questions Determination Act makes the opinion given pursuant to a reference a judgment of the Court of Appeal or of a Judge of the Supreme Court, as the case may be. A trial judge disregarded the opinion as certified by the Court of Appeal on such a reference. Held, allowing the appeal, the proper action for the judge to have taken was to follow the opinion of the Court of Appeal as certified under the Act. *Lowe Chong Co.* v. *B.C. Coast Vegetable Marketing Board,* (1937) 3 W.W.R. 406.

11. Farmers' Creditors Arrangement Act—whether applicant a farmer.]—The defendant was a Dominion company owning farm lands which it rented on a special basis to members of a named group. It applied under the above Act, which was designed to give relief to farmers, for a scheme of composition with its creditors. The plaintiff

as mortgagee sued for a declaration that the defendant was not a farmer and was not entitled to take advantage of the Act. Held, making the declaration prayed for, that the defendant was not a farmer but an owner which had leased its lands to persons who did the farming and tillage of the soil. Held, on appeal, reversing the decision below, that jurisdiction to decide whether or not the defendant was a farmer was, by the Act, vested in a county court judge, and the judge below had no right to deal with it. Held on further appeal to the Supreme Court of Canada, restoring the judgment at the trial, that the defendant was not a farmer, and the Supreme Court Judge had jurisdiction to determine the questions raised before him. The County Court orders in question should be treated as directions to receive and file proposals and the permission given and statement made that the defendant was entitled to take advantage of the provisions of the Act, must be regarded simply as introductory, expressing the judge's opinion, quantum valeat with regard to matters upon which he had no authority to make a binding pronouncement. *National Trust Co. Ltd.* v. *Christian Community of Universal Brotherhood Ltd.*, (1941) S.C.R. 601; (1941) 3 D.L.R. 529; 23 C.B.R. 1; reversing (1940) 55 B.C.R. 516; (1941) 1 D.L.R. 268; (1940) 3 W.W.R. 650; 22 C.B.R. 158; reversing (1939) 54 B.C.R. 386; (1940) 4 D.L.R. 767; (1940) 3 W.W.R. 203; 22 C.B.R. 49.

V. Particular Words and Phrases

"Includes".]—In an interpretation clause the phrase "peddler includes all persons", etc. is not equivalent to "peddler means and includes all persons" etc. The word "includes" is used to enlarge the meaning of the word "peddler". *Gower* v. *Campbell*, (1932) 45 B.C.R. 414; see *Rex* v. *B.C. Fir & Cedar Co. Ltd.*, (1932) 2 W.W.R. 153; and *Rex* v. *Beru*, (1936) 50 B.C.R. 444.

See Crown.

See Dentistry.

STOCK-BROKERS.

See Principal and Agent.

SUCCESSION DUTY.

I. In General, 654.

II. Rate, 657.

I. In General.

1. Provincial succession duties; direct or indirect.]—Under the Act the executor who applies for probate becomes personally liable for the duty. He obviously is expected to recoup himself out of the estate and hence the tax is indirect and beyond the competence of the provincial legislature. *Attorney-General for British Columbia* v. *Col*, (1934) 48 B.C.R. 171; (1934) 3 D.L.R. 488; (1934. 2 W.W.R. 481.

2. Liability on bond where Provincial Act held ultra vires.]—The executor furnished a bond to cover succession duty and from time to time secured extensions of time and the release of specific properties from the statutory lien. After some six years and the payment of about $10,000 the executors brought action against the Attorney-General for a declaration that the Succession Duty Act was ultra vires and that there was no further liability on the bond. The Attorney-General counterclaimed for the balance of the succession duty. The trial judge found for the executors and dismissed the counterclaim. Held, on appeal, affirming the decision below, that the Act being ultra vires, the duty was not payable because the bond creating the liability rested upon it; there was no estoppel by reason of acquiescence during the protracted negotiations that were had; the bond was conditional for the payment of any duty to which property coming into the hands of the executors "may be found liable", that is, found liable under the Act. *Godson and Ray* v. *Attorney-General of British Columbia*, (1934) 49 B.C.R. 131; (1935) 1 D.L.R. 92; (1934) 3 W.W.R. 475.

3. Direction to executors to pay—effect of.]—Where a testator directs his executors to pay succession and probate duties which may be chargeable against any devise or bequest, the devises and bequests are not free of the duties. Such directions are merely administrative provisions telling the executors to do what it would be their duty to do without such a provision. *In re Estate of Katherine Dixon, deceased*, (1935) 50 B.C.R. 285; (1935) 3 W.W.R. 118; (1936) 1 D.L.R. 593.

4. Extension of time for payment.]—Executors obtained an order under sec. 38 (1) of the "Succession Duty Act" extending the time for payment of the duty on the ground that payment by them was impossible, due to a cause beyond their control. Although the order was sought by the executors it included a like extension to the beneficiaries. Held, allowing the appeal as to the beneficiaries, that the persons liable to pay the duty are those to whom property passes and such property is not restricted to property finally vesting in a beneficiary upon distribution of the estate. The order below was made without any evidence that the beneficiaries were unable to pay and should not be extended to include them. *In re Estate of Helen F. M. Drummond deceased,* (1936) 50 B.C.R. 485; (1936) 4 D.L.R. 264; (1936) 2 W.W.R. 635.

5. Fair market value.]—In determining the fair market value the question is what prices could probably have been obtained for the properties in the open market at the date of the death of the deceased. Where there is no market value based upon actual sales in the market, other means must be resorted to to determine the market value. Applying the rule in *Pearce* v. *City of Calgary,* (1915) 9 W.W.R. 668, that there are prudent persons who will attempt to measure the forces at work making for a shrinkage in value for a time and again likely to arise making for an increase of value, such persons would not pay more than the values fixed by the executors. *Re Max Leiser, deceased, and the Succession Duty Act,* (1936) 51 B.C.R. 368; (1937) 2 D.L.R. 341; (1937) 2 W.W.R. 428; affirming (1936) 50 B.C.R. 452; (1936) 2 W.W.R. 467.

6. Reciprocal arrangement for allowance where duty paid elsewhere.]—The deceased was domiciled in British Columbia and left property both here and in Ontario. The beneficiaries paid succession duty in Ontario and claimed to be entitled here under a reciprocal arrangement between the Provinces to an allowance for the amount paid in Ontario. The judge below held that they were entitled to such an allowance. Held, on appeal reversing the decision below, that (a) any right resting on the Succession Duty Act which was declared ultra vires in 1934 disappeared; (b) no order in council implementing the power to make such an allowance was ever passed under the new 1934 Act; (c) the saving clause dealing with "exemptions from duty" in secs. 50 and 52 of the new Act do not refer to the allowances in question here; (d) the section of the Interpretation Act preserving accrued rights when a statute is repealed, cannot avail where, as here, the statute was ultra vires and was repealed only to remove it from the statute books; (e) even if the reciprocal arrangement was in effect at any time it was cancelled before the date of payment in Ontario. *Re Herbert Beck, deceased, and the Succession Duty Act,* (1939) 53 B.C.R. 423; (1939) 2 D.L.R. 439; (1939) 1 W.W.R. 208; reversing (1938) 53 B.C.R. 120; (1938) 3 D.L.R. 789; (1938) 3 W.W.R. 24.

7. Whether legacies free of duty.]—There must be a clear direction in the will before executors will be found authorized to charge upon the estate generally, the liability imposed by sec. 10 of the Succession Duty Act upon a legatee or other person entitled under a will. *In re estate of C. H. Hitchen, deceased,* (1944) 60 B.C.R. 312.

8. Whether payable out of residue—direction to pay out of "capital".]—The testator directed his executors to pay probate and succession duties out of the "capital" of his estate. Held, the legacies did not escape payment of the duties. The will contained no provision that the legacies should be free of succession duties or that the executors should be absolved from the statutory duty of deducting the duties from the legacies. If by "capital" the testator meant "residue" unfortunately he did not say so. An affidavit by the person who drew the will reciting the expressed intention of the testator was not received as evidence; apart from ambiguity or obscurity the intention as expressed will govern. *Cave* v. *Day,* (1945) 62 B.C.R. 177; (1946) 1 D.L.R. 30; (1945) 3 W.W.R. 481.

9. Act held ultra vires—voluntary payment by executors—recovery from legatee.]—The executors voluntarily paid the Succession Duty with respect to a legacy. Then the Succession Duty Act was held to be ultra vires. Held, the legatee was under an equitable obligation to reimburse the executors; otherwise the burden would fall on the executors personally or on the residuary beneficiaries. As the payment was made voluntarily to the Crown under a mistake of law the duties could not be recovered from that quarter. *Re Morton,* (1940) 4 D.L.R. 737; (1940) 3 W.W.R. 1.

10. Whether agreement reached between Department and estate.] — An

agreement as to the value of the estate and the duty payable may be reached between the Department of Finance and the estate, but here such an agreement could not be made out. *In re Succession Duty Act: in re Ryall Estate,* (1934) 2 W.W.R. 288.

11. Petition to determine value of legacy—considerations to be applied.]—The executor placed a value of $75,000.00 on a legacy of $150,000.00. The Assessor refused to accept that valuation and the executor petitioned under sec. 40 of the Succession Duty Act to have the duty determined. The legacy was a first charge on the estate and the trustees were empowered to postpone the conversion of the property in the estate for so long as they should see fit. The surviving executor refused to sell the properties hoping that by holding on he could save something for the residuary legatees. The Crown contended that the value of properties, less executors' remuneration, etc., represented the value of the legacy. Held, it was not the value of the property so much as the value of the legacy qua legacy at the date of death that was to be determined. The executor's refusal to sell would be a depressing factor in disposing of it. Litigation might be necessary to compel a sale. Held, the $75,000.00 value estimated by the petitioner should be accepted. *In re Succession Duty Act and in re Steed Estate,* (1942) 2 W.W.R. 7.

II. RATE.

1. Method of calculation.]—The Act taxes property within the Province without reference to the residence of the deceased and sec. 10 applies to a non-resident. The prescribed method of ascertaining the tax is as follows: Take the net value of the whole estate; place such net value in its proper place in the first column of schedule "D"; then locate in the appropriate column the percentage set opposite to the net value; then multiply this percentage by the value of the estate within the Province. *In re Succession Duty Act and Estate of Isaac Untermyer, deceased,* (1933) 46 B.C.R. 547; (1933) 1 W.W.R. 705.

2. Interest on amount of duty—invalid statute.]—The provincial Succession Duty Act having been held ultra vires, a new one was passed. The new Act, which was retroactive in its effect, provided that if the duties were paid within six months, no interest would be charged, but if not so paid, interest would be charged from the death of the deceased. The date of death was April 11, 1933, and the new Act came into force March 29, 1934. An application was made by the executors under sec. 38 (1) to fix a later date from which the interest should be chargeable, on the ground that payment as prescribed was impossible. Held, granting the application, that the old Act must be treated as if it had never existed, and as the new one was not passed until more than six months after the death of the testator, payment was impossible. *In re Mercer Estate,* (1934) 49 B.C.R. 294; (1934) 3 W.W.R. 382.

TAXATION.

I. POWERS OF TAXATION; WHAT TAXABLE.

A. In general (Federal), 658.
B. Provincial taxation, 662.
C. Sales tax, 665.
D. Deductions, 666.

I. POWERS OF TAXATION; WHAT TAXABLE.

A. In general (Federal).

1. Stock-broker failing to affix revenue stamps.]—Invoking sec. 58 of the Special War Revenue Act, the Crown sued a stock-broker for the amount of certain revenue stamps which, it was alleged, he should have affixed to securities sold by him. The trial judge dismissed the action. Held, on appeal, affirming the decision below, that the broker as agent was not the seller or transferor in the legal sense. The language of the statute fell short of fastening liability on the defendant. Held on further appeal to the Supreme Court of Canada, that the action should be dismissed. *The King* v. *Crabbs,* (1934) S.C.R. 523; (1934) 4 D.L.R. 324; affirming (1933) 47 B.C.R. 293; (1933) 4 D.L.R. 112; (1933) 3 W.W.R. 379.

2. Income War Tax Act—Exchequer Court alone has jurisdiction.]—Sec. 66 of the Income War Tax Act gives jurisdiction to the Exchequer Court to hear and determine all questions that may arise in connection with any assessment under the Act. "In connection with" means "having to do with" and not "consequent upon". The Supreme Court of British Columbia is without

jurisdiction to deal on certiorari with a decision on which an assessment is subsequently made. Held on appeal, affirming the decision below, that the intention was to give to the Exchequer Court the same jurisdiction as the English Court of Exchequer and to oust the jurisdiction of all other Courts where exclusive jurisdiction is conferred; and that to carry out this purpose sec. 66 is clear and express. *Nanaimo Community Hotel Ltd.* v. *Board of Referees under Excess Profits Tax Act,* (1944) 61 B.C.R. 354; (1945) 3 D.L.R. 225; (1945) 2 W.W.R. 145; affirming (1944) 60 B.C.R. 558; (1944) 4 D.L.R. 638.

3. Partnership set up as selling agency —whether carrying on business for the company—basis of taxation.]—The company set up a partnership whose members were shareholders of the company. The profits of the partnership were distributed in proportion to their share holdings in the company. The same offices, warehouses and staff were used by both. The company sold its product to the partnership below the usual wholesale price. The judge found that the partnership was a part of the company so far as sales tax under the Special War Revenue Act was concerned and that the tax should be payable on the basis of the price obtained by the partnership. The Supreme Court of Canada, affirmed the finding below, viz. that the partnership was carrying on business for and as agent of the company. On further appeal to the Privy Council the appeal was dismissed. *The King* v. *Canada Rice Mills Ltd.,* (1939) 3 D.L.R. 577; (1940) 1 W.W.R. 302; affirming (1939) 2 D.L.R. 544; (1939) S.C.R. 84; affirming (1939) 2 D.L.R. 45; (1938) Ex C.R. 257.

4. "Emolument" — "beneficiary" — income of trust.]—The income of a trust is not to be taxed under sec. 11 of the Income War Tax Act, as income of the settlor of the trust when the beneficiaries are ascertained. A settlor of a trust who is permitted by the beneficiaries to occupy, rent free, property which had been transferred to the trustee, is not a "beneficiary' 'of the trust under sec. 3 (e) of the Act and is not the recipient of an "emolument" under sec. 11. *Malkin* v. *Minister of National Revenue,* (1938) Ex. C.R. 225; (1939) 1 D.L.R. 200; see also *Malkin* v. *Minister of National Revenue,* (1942) 3 D.L.R. 272; (1942) Ex. C.R. 113.

5. "Income derived from mining"—premium on exchange.]—The premium upon dividends paid in United States funds by a mining company is "income derived from mining" and entitled to deduction for depreciation under sec. 5 (1) (a) of the Income War Tax Act. A company carrying on only the business of coal mining is not carrying on the same class of business as a mining and investment company of which it was a subsidiary so as to entitle both to file a consolidated return under sec. 35 (3) of the Act. Expenses incurred in prospecting etc. were not for the purpose of earning the income of the mining and investment company and not deductible for taxation purposes. *Wilson* v. *Minister of National Revenue,* (1939) 1 D.L.R. 678; (1938) Ex. C.R. 246.

6. Income tax—how Minister's discretionary powers to be exercised—function of Court.]—The discretion vested in the Minister under sec. 6 (2) of the Income War Tax Act must be exercised on proper legal principles. The appeal to the Exchequer Court is one from the Minister's assessment and not one from any determination based on the Minister's discretion. The Court will supervise the manner in which the Minister exercises his discretionary powers; the quantum is for the Minister alone. *Nicholson Ltd.* v. *The Minister of National Revenue,* (1945) Ex. C.R. 191.

7. Annuity to employees—extra tax also paid by employer—whether living expenses.]—The taxpayer was provided an annuity policy by his employer who kept up the premiums. The employer having planned to pay all the cost of the pension scheme met any additional income tax of the taxpayer occasioned by the payment of the premiums. It was contended that the taxpayer did not receive the premiums although he might eventually benefit from them; that the additional tax paid by the employer was never received by the taxpayer and that neither was taxable income. Held, by the Exchequer Court both items fell within sec. 2 (1) (r) of the Income War Tax Act as personal and living expenses and having been paid by the employer constituted part of the gain, benefit or advantage accruing to the taxpayer. Moreover, the premiums were a gratuity under sec. 3 (1) (e) of the Act received by the taxpayer from his employer, as additional compensation for his services. *Salter* v. *Minister of National Revenue,* (1947) 2 D.L.R. 388; (1946) Ex. C.R. 634.

8. Excess Profits Tax—Whether one company has a controlling interest in another.]—By sec. 15A of the Excess Profits Tax Act in certain cases where one company has a controlling interest in others, the standard profits of all such controlled companies taken together shall not exceed $5,000.00 in the aggregate. Here J. controlled the board of directors of the taxpayer under special powers given him as managing director, and he held the majority of the issued shares of company V. which in turn held the majority of the issued shares of the taxpayer. It was contended that J. held the controlling interest in the taxpayer and not company V. Held by the Exchequer Court, the taxpayer was a controlled company. One whose shareholding is such that he is more powerful than all the other shareholders put together, in general meeting, has a controlling interest. Here, although J. enjoyed control of company V., which held the majority of the shares of the taxpayer, company V. at a meeting of the shareholders of the taxpayer was more powerful than all others taken together. J. had the ultimate but indirect control but by the taxpayer's share register company V. had a controlling interest. *Vancouver Towing Co. Ltd.* v. *Minister of National Revenue,* (1947) 2 D.L.R. 93; (1946) Ex. C.R. 623.

9. Whether English company "residing in Canada" is a "Canadian debtor" with respect to dividends to non-residents.]—The Crown claimed in the Exchequer Court against the defendant alleging that, in paying dividends to non-residents of Canada, it should have withheld 5% thereof and paid it to the Receiver-General. The Income War Tax Act (sec. 9B(2)) imposes a tax on such dividends received from Canadian debtors and requires the debtors to collect and remit it. The defendant company was incorporated in England and carried on all the business in British Columbia. The President of the Court held that the company was not a "Canadian debtor" under sec. 9B of the Act. Held, on appeal to the Privy Council affirming the decision of the Supreme Court of Canada, reversing the decision below, the Company was such a "Canadian debtor". Since by sec. 3 of the Statute of Westminster, 1931, Parliament's power to tax is no longer restricted by any consideration not applicable to the legislation of a fully sovereign state, the section (9B of the Income War Tax Act) is intra vires notwithstanding its extraterritorial effect and the consequent inability to enforce it directly. *The King* v. *British Columbia Electric Co.,* (1946) A.C. 527; (1946) 4 D.L.R. 81; (1946) 3 W.W.R. 737; affirming (1946) 2 D.L.R. 161; (1946) S.C.R. 235; reversing (1945) 3 D.L.R. 613; (1945) Ex.C.R. 82.

10. Whether accrual basis may be used to determine taxability.]—The Income War Tax Act does not give a taxpayer the option to have his taxability decided on an accrual basis. Sec. 3 fixes income received as the basis no matter when it accrued. Sec. 6 (a) similarly deals with deductions on the basis of actual payments; not on the footing of outlays incurred but not actually paid. *Trapp* v. *Minister of National Revenue,* (1946) 3 D.L.R. 654; (1946) Ex. C.R. 245.

11. Matter remitted where Board adjourns hearing for further evidence and makes decision without hearing it—Exchequer Court.]—A Board of Referees under the Excess Profits Tax Act adjourned a hearing to allow an appellant to file certain statistics. Without waiting for the figures the Board made its decision and the Minister approved it. Held, on appeal to the Deputy Judge of the Exchequer Court, setting the decision aside, a mistake or misapprehension occurred and the Board should make a new assessment with an opportunity to the taxpayer to be heard. *Nanaimo Community Hotel Ltd.* v. *Minister of National Revenue,* (1946) 1 D.L.R. 685.

12. Whether taxable income or capital—sums received for release from contract.]—The Judge of the Exchequer Court after hearing evidence varying and explaining the terms of a written agreement between the taxpayer and the company which had employed him, held that the payments thereunder were received for the surrender of the taxpayer's five-year contract and were not taxable income. *Salter* v. *Minister of National Revenue,* (1947) 2 D.L.R. 388; (1946) Ex. C.R. 634.

B. Provincial Taxation.

1. Gross amount earned—not ascertained till later.]—Where a taxpayer was entitled to a bonus, the amount of which could not be ascertained until after the time for making the return in 1927 and he included it in the return for 1928, it was held that the bonus was not "earned" until 1928. *In re London and Brown,* (1931) 45 B.C.R. 92.

2. Whether insurance money received for loss of profits is income.]—It was held on appeal to the Privy Council that money received under a use and occupancy policy covering the loss of net profits occasioned by a fire, constituted income within sec. 2 of the Taxation Act. *The King* v. *B.C. Fir & Cedar Lumber Co. Ltd.* (1932) 2 W.W.R. 153; (1932) A.C. 441; (1932) 2 D.L.R. 241; reversing (1931) S.C.R. 435; (1931) 3 D.L.R. 354; reversing (1931) 1 W.W.R. 40; (1930) 43 B.C.R. 227; (1931) 1 D.L.R. 674; affirming (1931) 1 W.W.R. 22; (1930) 42 B.C.R. 401; (1930) 3 D.L.R. 609.

3. Accretions to capital or income from real estate business.]—The appellant, a private company, acquired real estate in consideration of the issue of shares and thereafter sold and bought from time to time at a profit. The company claimed that the profits were accretions to capital and the assessor contended that they were subject to assessment as income. Held, the test to be applied is whether the sum in dispute is "a gain made in an operation of business in carrying out a scheme for profit-making". Here the properties in which the company dealt were acquired for the purpose of turning them to account to the profit of the company, by sale, if necessary. The profits were income. *Merritt Realty Co.* v. *Brown,* (1932) 2 D.L.R. 465; (1932) 1 W.W.R. 234; (1932) S.C.R. 187; affirming (1932) 1 D.L.R. 795.

4. "Coal land" under Provincial Taxation Act.]—Where an owner sold land reserving all mines and minerals including coal, it was held that the interest so reserved was subject to taxation under the Act irrespective of whether coal had been found on the land or not. *In re T. D. Jones, deceased; Rudd* v. *Aitken,* (1933) 47 B.C.R. 439; (1933) 4 D.L.R. 399; (1933) 3 W.W.R. 453.

5. Taxable income or profit on sale of real estate.]—A Court of Revision under the Taxation Act (Provincial) held that a company which was incorporated inter alia to buy and sell property and which had acquired two Vancouver lots and sold them at a substantial profit, was carrying on the business of dealing in real estate and that the profit made was income within the meaning of the Act. Held, on appeal affirming the decision below, that the arrangement by which the company was established and the property dealt with was an attempt to evade the provisions of the statute. *In re M. D. Donald Ltd.,* (1932) 46 B.C.R. 406; reversed (1933) S.C.R. 41; (1933) 4 D.L.R. 145 .

6. Local distributor for Ontario manufacturer—whether agent or purchaser.]—The Provincial Commissioner of Income Tax ruled that income earned by local distributors was taxable under the Taxation Act, on the footing that they were agents for the Ontario manufacturers. The manufacturers contended that the distributors were not agents but purchasers in Ontario of the goods sold in British Columbia. On appeal from the Commissioner the Judge held that they were not agents and not taxable. He applied *John Deere Plow Co.* v. *Agnew,* (1913) 48 S.C.R. 208. Under the contract between the manufacturers and the distributors the goods shipped were not to be paid for until after removal from the distributor's inventory. The distributors sold as they pleased in their own name and generally dealt with the goods as owners. The manufacturers had no control over local sales and employed no salesmen. The distributors ran their own business of which this was only a small part. The Court of Appeal held that the distributors were agents and that the tax was payable. Held, on further appeal to the Supreme Court of Canada, they were not agents but purchasers in Ontario. What the distributors paid was not the proceeds of the sales but the purchase price stipulated by the terms of the contract. In tax cases the substance rather than the form of a commercial contract is to be regarded and the methods of the parties in carrying it out are helpful in construing it. *In re Taxation Act and in re Assessments of Firestone Tire and Rubber Co. of Canada Ltd.,* (1942) S.C.R. 476; (1942) 4 D.L.R. 433; reversing (1941) 56 B.C.R. 328; (1941) 3 D.L.R. 256; (1941) 3 W.W.R. 635; reversing (1941) 56 B.C.R. 45; (1941) 1 W.W.R. 257.

7. Crown (Provincial) as lienholder.]—The Farmers' Creditors Arrangement Act (Dominion) is binding on the Crown (Provincial) and the latter's lien for taxes, and for the balance due it on a pre-emption, was modified and reduced by a proposal confirmed by a Board of Review under the Dominion Act. *Lindsay* v. *Attorney-General for the Province of British Columbia,* (1939) 54 B.C.R. 185; (1939) 2 W.W.R. 145; (1939) 4 D.L.R. 762.

8. Insurance against loss of profits—whether income.]—Where a company in-

sures against loss or damage which might be sustained in the event of its plant being shut down and business suspended in consequence of fire and damage, and its premises are destroyed by fire, the moneys received as insurance are income within the meaning of the Provincial Taxation Act. *The King* v. *B.C. Fir and Cedar Lumber Co. Ltd.*, (1932) 2 W.W.R. 153; (1932) A.C. 441; (1932) 2 D.L.R. 241; reversing (1931) S.C.R. 435; (1931) 3 D.L.R. 354; reversing (1931) 1 W.W.R. 40; (1930) 43 B.C.R. 227; (1931) 1 D.L.R. 674; affirming (1931) 1 W.W.R. 22; (1930) 42 B.C.R. 401; (1930) 3 D.L.R. 609.

C. Sales Tax.

1. Sales tax—one company selling to another—whether one agent of the other.]—The defendant company manufactured building bricks and sold them all to the V. company. Both companies were controlled by the same parties. The Crown contended that the V. company was merely the agent of the defendant in the sale of its bricks and that the defendant should pay sales tax on the sales prices of the V. company. Held, dismissing the information, the facts did not disclose agency. Merely because the officers and shareholders of the two companies were the same, and the companies had business relations the one with the other, did not make one the agent of the other. *The King* v. *B.C. Brick and Tile Co. Ltd.*, (1936) 3 D.L.R. 23; (1936) Ex. C.R. 71.

2. Sales tax—sales to consumers or users—hirers-out of goods.]—The defendant manufactured uniforms for nurses, barbers, waitresses, etc. Its practice was to sell them to laundries, who in turn rented them to customers. The Department issued circulars providing for a discount on the amount to which the sales tax applied on sales to consumers or users only on the transfer of the goods to their retail stores. Held, the discount did not apply here; the laundries were not consumers or users. The mistaken attitude of the Department in making concessions to the taxpayer will not bind the Government. *Rex* v. *Weir Manufacturing Co. Ltd.*, (1941) 3 W.W.R. 801.

3. Sales tax—retreading tires—whether manufacturer of tires and vendor thereof.]—With respect to tires merely retreaded and returned in each case to the owner, there is no sale and hence no tax. Nor can it be said to be a manufacture by contract for labour only, within sec. 87 (c) of the Special War Revenue Act. But where the dealer sells retreaded tires from stock, having added the cost of retreading to the price, or where he trades retreaded tires for old tires needing retreading, a sale is constituted. And in those cases a manufacture takes place and the tax is properly imposed. *The King* v. *Boultbee*, (1938) 3 D.L.R. 664; (1938) Ex. C.R. 187.

4. Sales tax—isolated act—yacht built for personal use and sold.]—The defendant who was not a manufacturer or trader, had a yacht built for his personal use. He sold it after about two years. He had paid sales tax on the materials that went into the building of the vessel. Held, he was not liable for consumption or sales tax. *The King* v. *Shelly*, (1936) 1 D.L.R. 415; (1935) Ex. C.R. 179.

5. Renovating used mattresses—whether manufactured and sold.]—The "rebuilding" of the customers' own mattresses by disinfecting, recovering and refluffing the filling, held not to be manufacturing within sec. 86 of the Special War Revenue Act. *The King* v. *Guarantee Household Sterilizers*, (1942) 2 D.L.R. 663.

6. Sales tax on manufactured gas — dwelling as defined by Special War Revenue Act.]—Under the Act a sales tax is payable on gas "when used in dwellings." Dwelling includes "business premises where the supply of gas or electricity for both the business and living quarters is metered through a single meter." The defendant operated a cafe downstairs, and in his living quarters, or at least in a corridor upstairs, there was a connected gas stove which was never used. The one meter measured the gas for the whole premises. Held, the premises as a whole were a "dwelling" as defined by the Act. It would be impossible with a single meter to ascertain what portion of the gas supplied to the premises went to the business premises and what portion went to the living quarters. *B.C. Electric Power & Gas Co.* v. *Louie Jhong*, (1942) 58 B.C.R. 407; (1943) 1 D.L.R. 693; (1943) 1 W.W.R. 748; reversing (1942) 3 D.L.R. 684; (1942) 2 W.W.R. 366.

D. Deductions.

1. Depreciation allowance—discretion of Minister.]—A taxpayer has a statutory

right to an allowance for depreciation under the Income War Tax Act and the Minister's discretion under sec. 5 must be exercised on sound and fundamental principles. He is not to disregard the separate legal existence of a corporation or that the corporation, not its shareholders, is the taxpayer. Accordingly the rejection of a depreciation allowance on a company's equipment, on the ground that 100% allowance had been made for such equipment when owned by a liquidated company whose shareholders were the same as those of the taxed company, will be set aside. *Pioneer Laundry & Dry Cleaners Ltd.* v. *Minister of National Revenue,* (1939) 4 D.L.R. 481; (1939) 3 W.W.R. 567; (1940) A.C. 127; reversing (1939) S.C.R. 1; (1939) 1 D.L.R. 246; affirming (1938) Ex. C.R. 18.

2. Depreciation on machinery — too great an allowance to previous owner — Minister's discretion exercised unreasonably.]—The Privy Council (1940 A.C. 127, (1939) 4 D.L.R. 481) had directed the Minister of National Revenue to reconsider his treatment of depreciation of machinery acquired by the taxpayer from another company having the same shareholding ownership. The Minister had disallowed depreciation because of excessive depreciation allowed to the previous owner. In reconsidering, the Minister allowed only one dollar. Held, allowing the appeal from the Minister, the allowance of this nominal sum was not based on a consideration of a reasonable amount for depreciation within the intention of the Act. *Pioneer Laundry* v. *Minister of National Revenue,* (1942) 4 D.L.R. 11; (1942) Ex. C.R. 179.

3. Disallowance of deductions—salaries of executive officers—whether reviewable by Exchequer Court.] — The Minister (through the Commissioner of Income Tax) disallowed certain salary payments as being in excess of what was reasonable. The taxpayer appealed to the Exchequer Court. The discretion of the Minister under sec. 6 (2) of the Income War Tax Act is of a quasi-judicial character; the Court will not itself assume the exercise of his discretionary powers. It will inquire whether or not the discretion has been exercised in a proper manner but the Court's power is limited by way of correction to sending the matter back to the Minister for the application of proper legal principles. Here the appeal was dismissed as the Minister's conclusion exercised as it was on proper legal principles was not open to review by the Court. *Nicholson* v. *Minister of National Revenue,* (1945) 4 D.L.R. 683.

4. Expenses subject to disallowance by Minister—payment made under contract.] —The "expenses" under sec. 6 (2) of The Income War Tax Act are general in character and are wide enough to cover any expenditure by the taxpayer whether made under or as a condition of obtaining a contract or otherwise. There is no justification for drawing a distinction between different kinds of contractual payment. *Wrights' Canadian Ropes Ltd.* v. *Minister of National Revenue,* (1947) A.C. 109; (1947) 1 D.L.R. 721; (1947) 1 W.W.R. 214; affirming (1946) S.C.R. 139; (1946) 2 D.L.R. 225; reversing (1945) 4 D.L.R. 94; (1945) Ex. C.R. 174.

5. Pulpwood operation—discretion exercised by the Minister.]—Under the Income War Tax Act the Minister of National Revenue is empowered to make an allowance for the exhaustion of timber limits. He adopted a recommendation made to him with the order that the special allowance to be made should not apply to pulpwood and fuel operations and so notified the industry. The appellant was engaged in general logging operations but a portion of its product went for pulpwood purposes and the Minister disallowed that portion. Held, by the Deputy Judge of the Exchequer Court, dismissing the appeal, that the Minister had exercised his discretion when he by letter signified that he adopted the recommendation. It was not necessary for him to wait and deal with the actual result of the logging operation as to what part went into pulpwood and what part went into saw-logs. *Burns & Jackson Logging Co. Ltd* v. *Minister of National Revenue,* (1946) 1 D.L.R. 369; (1945) Ex. C.R. 246.

6. Disallowance by Minister of deductions to cover commissions to English company — principles applicable.] — Under sec. 6 of the Income War Tax Act the Minister is authorized to disallow expenses in his discretion determined by him to be in excess of what is reasonable for a business. The Minister acting on a report of the local Inspector of Income Tax disallowed certain sums paid as commissions to an English company under contract. The report was not produced at any stage nor nor was the nature of its contents disclosed. Held, on appeal to the Privy Council, affirming (with a modification) the decision of the Supreme Court of Canada

which allowed the appeal of the taxpayer from the judgment of the Exchequer Court; (a) the discretion given the Minister means no more that that he is the judge of what is reasonable or normal. His power is not arbitrary. His decisions will stand unless some ground for interference is shown; (b) while the law does not compel the Minister to give reasons, that does not mean that by keeping silent he can defeat a taxpayer's appeal. The Court will examine the materials that were before the Minister. Here none were disclosed upon which his decision could properly be made. It must be assumed that apart from the documents before the Court the Minister had no materials before him to support his determination. *Wrights' Canadian Ropes Ltd.* v. *Minister of National Revenue,* (1947) A.C. 109; (1947) 1 D.L.R. 721; (1947) 1 W.W.R. 214; affirming (1946) S.C.R. 139; (1946) 2 D.L.R. 225; reversing (1945) 4 D.L.R. 94; (1945) Ex. C.R. 174.

7. Whether borrowings are capital or expenses incurred in the earning of income.] — The appellant was a construction company. In order to get advances from its bank a director was required to guarantee them. For this guarantee the company each year paid the guaranteeing director a commission equal to the interest paid the bank. By such borrowing the company was able greatly to increase its operations and its income. **The commissions so** paid were disallowed by the Minister as not being a proper deduction under sec. 6 of the Income War Tax Act. Held on appeal affirming the decision of the Minister, the advances were borrowed capital used in the same way as its own capital. The contention was that as the borrowings could not be obtained without the guarantee and the guarantee could only be given if the commissions were paid, therefore the commissions were necessarily laid out in order to earn the increased income. Held, the commissions were paid in order to borrow additional capital. The increase in income resulted from an increase in capital. *Bennett & White Construction Co. Ltd.* v. *Minister of National Revenue,* (1947) Ex. C.R. 474.

8. Whether informally adopted children give rise to exemption—sec. 2 (f) of Income War Tax Act.]—The taxpayer, unmarried, adopted by a verbal agreement two minor children and maintained them in a self-contained domestic establishment as defined by the Act. The Minister ruled that "adoption" under the definition of "householder" in the Act means "legal adoption" and disallowed the exemption. Held, allowing the appeal, the appellant kept, maintained, educated and cared for the children and treated them as if they were her own. That was what the Act meant by adoption. Parliament did not intend that "adoption" must be accomplished with the requirements of the various provincial adoption acts which are concerned with civil status and civil rights. *Anderson* v. *Minister of National Revenue,* (1947) Ex. C.R. 389.

TESTATOR'S FAMILY MAINTENANCE ACT.

See WILL.

TORT.

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D. Trespassers, 682.

I. IN GENERAL.

1. Concurrent criminal prosecution.] — Where the identical facts and the identical persons are involved in a negligence action and also in a pending charge of manslaughter, and the defendant has done nothing to delay or frustrate the criminal proceedings, a stay of the civil action will be ordered. Sec. 13 of the Criminal Code, if it is intra vires, does not purport to take away the right of any civil court to control its own proceedings. *Illingworth* v. *Coyle,* (1933) 48 B.C.R. 81; (1933) 3 W.W.R. 607.

2. Claims against both parent and minor.] — Sec. 18A of the Motor-vehicle Act which makes a parent liable in certain cases for the negligent driving of his child, imposes a new and additional liability on a parent and no question of joint-tortfeasors arises. The plaintiff was given the right to pursue his damage claim against both the parent and the minor. *Vandepitte* v. *Berry,* (1938) 53 B.C.R. 161; (1938) 3 D.L.R. 788; (1938) 3 W.W.R. 11.

3. Damages for refusal to serve negro in beer parlour.]—The plaintiff, a negro, entered the defendant's beer parlour and was refused a glass of beer because of his colour. He sued for damages for the humiliation suffered and was awarded damages. Held on appeal reversing the decision below, that the doctrine of complete freedom of commerce extends to the operator of a beer parlour. He is free to deal as he may choose with any individual member of the public. *Rogers* v. *Clarence Hotel Co. Ltd.,* (1940) 55 B.C.R. 214; (1940) 3 D.L.R. 583; (1940) 2 W.W.R. 545.

4. Contractor's covenant to indemnify against claims by invitees—pile of gravel left on roadway at night—joint tortfeasors.]—The defendant as occupier was found liable to pay damages to an invitee who had fallen over a pile of gravel on a roadway left there by a building contractor (the third party). The defendant claimed to be indemnified under the contractor's covenant in the building contract providing, inter alia, that "the contractor shall use due care that no person is injured in or about the said work." On the trial of the issue between the judgment debtor and the third party the trial judge held that there should be indemnification on the footing that the accident was solely attributable to the negligence of the third party which was in violation of its covenant. Held on appeal, affirming the decision below, the accident was within the scope of the indemnity covenant. The tortious act of the third party was the primary cause of the injury against which it had covenanted to indemnify the occupier. The defence that one joint tortfeasor cannot claim indemnity from another was met by the exception that where both parties' negligence contributes to an accident, but one's negligence consists in commission, the other's merely in omission, the inactive party may claim indemnity from the other. *McFall* v. *Vancouver Exhibition Ass'n; Marble,* third party (*No. 4*), (1943) 59 B.C.R. 1; (1943) 3 D.L.R. 39; affirming (1942) 58 B.C.R. 168; (1942) 4 D.L.R. 336.

II. Assault.

1. Unlicensed bailiff committing assault.] —The defendant company employed a bailiff who, in turn, employed an agent to execute a warrant to seize a piece of furniture in the possession of one of the plaintiffs. Neither the bailiff or the agent was licensed under the Collection Agents' Licensing Act, which forbids any person from acting as a bailiff unless he has a license under the Act. The judge found that the agent had been guilty of assault upon the plaintiffs. Held, awarding damages against the defendant company and the agent, that the agent, being unlicensed, never had the legal right to be on the plaintiff's premises as bailiff; that his entry and subsequent acts were illegal acts, and that he was a trespasser ab initio. The defendant company having employed and authorized an unlicensed bailiff must itself be held to have committed trespass and assault. The intention of the Act is to ensure that persons acting as bailiffs have, as required by the Act, deposited security for the protection of the public. *Shadin* v. *David Spencer Ltd.,* (1935) 50 B.C.R. 55; (1935) 2 D.L.R. 813; (1935) 1 W.W.R. 693.

2. Effect on civil action of hearing before justice—Code sec. 734.]—Where the defendant appeared before a magistrate on an information sworn by the plaintiff, pleaded guilty to a charge of common assault, the plaintiff not appearing, and paid a fine and costs, it was held that the proceeding before the magistrate was a hearing but not "a hearing on the merits" and hence did not afford a defence under sec. 734 of the Criminal Code. *Kyle* v. *Jamieson,* (1938) 53 B.C.R. 309; (1939) 1 D.L.R. 726; (1939) 1 W.W.R. 10; 71 C.C.C. 342.

3. Trespasser—refusal to leave premises — degree of force to be used.] — The plaintiff was peddling socks in the defendant's beer parlor. She was asked to desist and refusing, was ejected. Held, she was a trespasser and it was open to the occupier of the premises, or any person with his authority, to evict her using a reasonable degree of force. Only such force as was necessary to bring about her removal was

justified. The action was dismissed. *Brien* v. *Astoria Hotels Ltd.*, (1939) 54 B.C.R. 3; (1939) 2 D.L.R. 752; (1939) 1 W.W.R. 641.

4. Ejection of passenger from elevator in hotel.]—The plaintiff, a woman, who had been drinking, and was not a guest at the defendant's hotel, was injured when ejected from the elevator. Held, whether or not there were good grounds for refusing the plaintiff access to the elevator there was no justification for the assult which took place. Damages were awarded. *Goodwin* v. *Manitoba Hotel Co. Ltd.*, (1939) 2 W.W.R. 208.

5. Effect of provocation.]—The provocation proved did not justify an assault of the force used by the defendant. It was not established that the plaintiff struck, nor even struck at, the defendant. The defendant's assault had a result which he did not intend or anticipate, but it flowed logically from the assault. There being some provocation the case was not one for exemplary damages. *Nystad* v. *McPhee*, (1941) 1 W.W.R. 118.

III. Conversion.

1. Removal of plants after sale of property.]—The damages should be assessed on the basis of the replacement value of the plants at the date of the sale of the property. *Coates* v. *Paskin*, (1946) 3 W.W.R. 639.

2. Effect of judgment on ownership of chattel.]—The judgment that the defendants had converted the plaintiffs' boat to their use did not of itself change the ownership of the chattel. When the judgment is paid the plaintiffs will be divested of their right to the property. *Sadler* v. *Scott*, (1946) 63 B.C.R. 313; (1947) 1 D.L.R. 712; (1947) 1 W.W.R. 270.

IV. False Arrest and Imprisonment.

1. Notice of action against police officer under sec. 1144 of Criminal Code.] — A chief constable directed that a person suspected of complicity in a serious crime be held, and while he was so held, he was photographed and finger-printed under the Identification of Criminals Act. In an action for wrongful arrest it was contended that sec. 1144 of the Criminal Code was a bar to the action so far as photographing and finger-printing were concerned. Held, that the protection of the section does not avail the defendant as it is only a person who is in lawful custody (sec. 2 of the Act) and charged with an indictable offence who may be photographed and finger-printed. As the accused had not been charged, the defendant could not have purported to act under the Act. *Warnock* v. *Foster*, (1936) 51 B.C.R. 179; (1936) 3 W.W.R. 625.

V. Duties Connected With Occupation of Property.

A. In General.

1. Trap—defective railing.] — Where a porch was used by tenants and the landlord exercised no rights with respect to it, it was held to be included in the demise. Even if the railing of the porch was so weak as to constitute a "trap" there could be no recovery for injuries sustained unless the "trap" existed with respect to a portion of the building not included in the demise and which was under the control of the landlord. *Agnew* v. *Hamilton* (1932) 46 B.C.R. 147; (1932) 3 W.W.R. 57; affirmed (1932) 46 B.C.R. 362.

2. Obligation that of occupier.]—Where the defendant, as lessee, had sublet the building for one day and given up possession and control, it was exonerated from liability to the plaintiff, who was injured by a fall on the stairs. *Bentley* v. *Vancouver Exhibition Association*, (1935) 50 B.C.R. 343; (1936) 1 W.W.R. 480; reversing (1935) 3 W.W.R. 129.

3. Defective railing— trap — landlord's duty to repair.]—The defendant rented the premises to K. The plaintiff called to see K. and while waiting at the door leaned against a railing which gave way injuring him severely. The trial judge in awarding damages against the defendant found that he had agreed with K. to repair and that he knew of the defective condition of the railing. Held, on appeal, affirming the award, that the trial judge was right in finding upon the evidence that the defective condition of the railing constituted a trap to the knowledge of the defendant who was under obligation to the tenant to repair it. *Elgeti* v. *Smith*, (1936) 51 B.C.R. 545; (1937) 4 D.L.R. 199; (1937) 3 W.W.R. 114 affirming (1937) 1 W.W.R. 346.

4. Defective rail on fire escape—defect known to plaintiff but not to defendant.] —The plaintiff, employed in a private hospital was injured by falling while shaking a cloth on the fire escape near her room. She knew the day before that the rail against which she leaned was detached at one end. She had not reported it to her employer. Held, the plaintiff was responsible for her own misfortune. The duty of the employer in the circumstances was to take reasonable care to provide safe premises upon which the employee was required to work and to use reasonable care to keep them safe. The employee need not prove that the employer actually knew of the defective rail, but she must show that the employer ought to have known if he had used reasonable care. Here there was regular inspection and no evidence that the employer knew of the defect. *Bergeron* v. *Reilly* (1945) 62 B.C.R. 208.

5. Defective fence—injury to child — whether owner liable.]—A heavy fence out of repair was propped up against posts. A neighbour's child playing near it was injured when it fell. There was no evidence to show what made it fall. The fence stood on the property (let to B) of a lunatic whose committee had repaired another part of it. The agent for the committee had been notified that the fence needed repairs where it was propped up, but nothing was done. The trial judge gave damages against the owner and exonerated B. Held, on appeal, reversing the trial judge, when an outsider is injured by the dangerous condition of rented premises prima facie his claim is against the occupier. Here there was no evidence to show that the owner (landlord) had any duty to the tenant to repair. The fact that the owner had undertaken some repairs did not put the premises under the owner's control as occupier. *Cavalier* v. *Pope* (1906) A.C. 428, lays it down that a stranger to the contract between landlord and tenant, who is well aware of the danger, has no claim for want of repair. The plaintiff claimed nuisance but liability is limited to a public nuisance and does not apply to a defect of this kind. As to negligence it must be based on a duty not to set a concealed trap. The position of a child is the same as that of an adult. There was no proof here that there was a trap. *Ingle* v. *Hanson* (1947) 63 B.C.R. 481; (1947) 4 D.L.R. 420; (1947) 2 W.W.R. 698.

6. Dangerous condition of steps — not on defendant's property.]—The plaintiff fell and was injured while entering the defendant's premises by means of steps which were in a dangerous condition through ice and snow. The steps were located entirely on a street, the property of the City of Vancouver. Held, the defendant owed no duty to the plaintiff since the defendant was not, in law, in occupation of the steps. *Patterson* v. *Kearney & Co. Ltd.,* (1939) 54 B.C.R. 140; (1939) 4 D.L.R. 144; (1939) 2 W.W.R. 467.

B. Invitees.

1. Invitee — orange peel on stairs in store.]—The defendant, as occupier, owed to the plaintiff, as customer, the duty of taking reasonable care that the premises were in a safe condition. Where the defendant knew of the dangerous possibilities of litter being left on the stairs and allowed orange peel to remain there upwards of an hour, the burden of proving that the particular piece of orange peel which caused the accident was not there though the negligence of the occupier will be upon the defendant. *Edglie* v. *Woodward Stores Ltd.* (1934) 50 B..CR. 403; (1936) 1 W.W.R. 502.

2. Duty to invitee.]—An invitor, (e.g. a shopkeeper who invites the public into his shop) is liable for danger on his premises of which he knew, unless (a) the danger is open and obvious, or (b) though not obvious to all the world, it is well known to the plaintiff; as to dangers of which he has no knowledge, he is only liable if they are discoverable by the exercise of reasonable care. The onus is on the plaintiff who must prove affirmatively that the defect was one of which the occupier ought to have known. *Witt* v. *David Spencer Ltd.,* (1935) 50 B.C.R. 35; (1935) 2 W.W.R. 644.

3. Duty to invitees.] — The defendant, the owner of an apartment block, let a part of it to the plaintiff's employer with a proviso that the latter would keep it clean and in good condition. The defendant retained in his possession and control a stairway and balcony. The plaintiff while engaged in cleaning, leaned against the railing of the balcony; it gave way and she was injured. The trial judge held that she was a bare licensee and dismissed the action on the ground that although there was a concealed danger, there was no evidence that the defendant knew of it. Held, on appeal, reversing the decision below, that the plaintiff was an in-

vitee within the principle of *Indermaur* v. *Dames,* (1866) L.R. 1 C.P. 274, as the plaintiff's employer was bound by his lease to see that the rooms were kept clean and had sent his servant (the plaintiff) to do it. *Dymond* v. *Wilson,* (1936) 51 B.C.R. 301; (1937) 1 D.L.R. 730; (1937) 1 W.W.R. 419; reversing (1936) 50 B.C.R. 458; (1936) 2 W.W.R. 193.

4. Unguarded vehicular ramp to ferry.] —A ramp over which motor cars were driven to board a ferry had no warning or barrier, and at night a would-be passenger, the plaintiff's husband, drove off the end into the water and was drowned, the ferry having departed. There were no witnesses to the accident and there was no evidence of intoxication or other incapability. The car was in good running order. The plaintiff's husband was an invitee and it was open to the jury to find negligence on the part of the defendant occupier. *Whitehead* v. *Corporation of the City of North Vancouver,* (1937) 53 B.C.R. 512; (1939) 3 D.L.R. 83; (1939) 1 W.W.R. 369.

5. Invitee—dangerous condition of entry to store.]—The plaintiff stepped into the entry of the defendant's premises to look more closely at a piece of furniture in the window. The floor gave way resulting in injuries to her. The defendant, who was tenant of the premises, had discontinued the use of the place as a store but furniture was displayed in the window and the word "Furniture" was still on it. Held, awarding damages (a) the display of goods in the window amounted to an invitation to approach and examine them; (b) the plaintiff was an invitee and the defendant was under the duty to take reasonable care that the premises were safe; (c) the defects in the floor had existed so long that the defendant's failure to inspect was a lack of reasonable care in the circumstances. *Clark* v. *Atherton,* (1939) 54 B.C.R. 217; (1939) 3 D.L.R. 801; (1939) 2 W.W.R. 593.

6. Invitees—collapse of park bench.]—The defendant, as owner and occupier of the premises involved, and a steamship company (the same shareholders in each) had a common interest in a resort at Bowen Island near Vancouver. The steamship company carried patrons to and from the Island and the defendant catered to their wants while there. There was an arrangement whereby the steamship company might allocate recreational facilities on the defendant's property. The plaintiffs, part of a large group, applied to the steamship company and transportation was provided and a picnic ground allocated for the group but they had the use of the entire grounds. During an open-air concert the plaintiffs were seated on a bench provided by the defendant when it gave way, by reason of the rotting of the wood of which it was made, injuring them. The trial judge held that they were invitees and awarded damages. The Court of Appeal by a majority affirmed the decision below. On further appeal to the Supreme Court of Canada, it was held, affirming the judgment at the trial; (a) the locus of the mishap was within the area allocated to the plaintiffs and they were invitees; (b) it was not necessary that there should be any contractual relationship between the plaintiffs and the defendant, nor that the defendant should have received any remuneration for the use of the allocated area; (c) the case came within the principles laid down in *Indermauer* v. *Dames,* (1866) L.R. 1 C.P. 274. *Kennedy* v. *Union Estates Ltd.,* (1940) S.C.R. 625; (1940) 3 D.L.R. 404; affirming (1940) 55 B.C.R. 1; (1940) 1 D.L.R. 662; (1940) 1 W.WR. 209.

7. Invitee—department store escalator.] — The heel of the plaintiff's shoe was caught in an opening in the moving escalator as she was about to leave it after ascending from one floor to another. The trial judge found that the plaintiff was an invitee and applied the principles of *Indermaur* v. *Dames,* (1866) L.R. 1 C.P. 274, holding that there was an unusual danger which the defendant knew, or ought to have known. He found that the plaintiff had used reasonable care and gave judgment in her favour. Held, on appeal affirming the decision below, the slit in which the plaintiff's heel caught must be regarded as a concealed danger which in the circumstances she could not avoid. *Cameron* v. *David Spencer Ltd.,* (1940) 55 B.C.R. 167; (1940) 3 D.L.R. 286; (1940) 2 W.W.R. 273.

8. Invitee—pile of gravel left on roadway — accident at night.] — The female plaintiff having completed her duties for the defendant on one part of the area occupied by the defendant was on her way home, late at night, by the normal route, when, while still on the defendant's premises, she fell over an unlighted pile of gravel on the road, put there by contractors employed by the defendant. The lights in the area had been turned off. Held, awarding damages to

the plaintiff, she was an invitee and her failure to carry a flashlight was not contributory negligence. The defendant's duty as occupier was to take reasonable care that the premises were safe and to prevent injury to the invitee from unusual dangers which were more or less hidden, of whose existence the occupier was aware or ought to have been aware. The injury was caused by leaving the pile of gravel on the roadway without any warning light or other protection. *McFall* v. *Vancouver Exhibition Ass'n,* (1942) 58 B.C.R. 161; (1942) 4 D.L.R. 336; (1942) 3 W.W.R. 278.

9. Invitee — patron of moving-picture theatre—piece of wood on floor.] — The plaintiff on entering the theatre was met by an usher who escorted him down the aisle with a flashlight. While the usher was momentarily attending to some other patrons the plaintiff found a seat for himself without the benefit of the flashlight. He stepped on a small piece of wood and sprained his ankle. Held, dismissing the action, the seating and lighting arrangements were in good order and did not contribute to the accident. The defendant had taken reasonable care to see that the premises were safe for its patrons. The number of ushers, the cleaning system, the use of flashlights all indicated proper precautions on the part of the defendant. *Corbeil* v. *Romano,* (1943) 59 B.C.R. 175; (1943) 3 W.W.R. 21.

10. Invitee — occupier unaware that stairway light had failed.]—The plaintiff was an inviteee in the defendant's restaurant premises. She was directed up a stairway to the washroom and while returning fell on the stairs. The light usually burning near the bottom of the stairs was out. There was evidence that it was burning about two hours before the accident, but none as to the exact time it failed. The trial judge found that the stairway was very dark and that the absence of a light created a situation of danger but he dismissed the action holding that the defendant neither knew or should have known of the danger. Held, on appeal, affirming the decision below, the standard of care to be exercised by the occupier was not one of perfection. Here, the light might have failed one minute before the accident. It was not shown that any reasonable supervision would have prevented it. The absence of a handrail did not contribute to the fall. There was no absolute duty to maintain a light; only a duty to exercise reasonable care. *Lusk* v. *Ye Olde English Fish & Chips Ltd.,* (1946) 63 B.C.R. 464; (1947) 3 D.L.R. 210; (1947) 1 W.W.R. 913; affirming (1946) 63 B.C.R. 30; (1946) 3 W.W.R. 56.

C. Licensees.

1. Defective railing.] — The plaintiff, a mere licensee, was injured by a fall from a landing caused by a defective railing. The defendants were the executors of the former owner who had died in Australia. The local agent continued to collect the rents and order repairs and after probate of the will the executors continued him as their agent as before. Held, awarding damages to the plaintiff, that the condition of the railing constituted a trap or concealed danger; that the defective condition had existed for so long that the defendants should have known of it; that the acts of the local agent had been ratified by the executors and there was no hiatus in his agency. *Hauser* v. *McGuinness,* (1934) 49 B.C.R. 289; (1934) 3 W.W.R. 321.

2. Trap — unknown to owner.] — The tenant of a suite in an apartment building, and his wife, while using a balcony in the possession and control of the defendant owner, were injured through a defective railing. The trial judge found that the wife was a bare licensee and that the condition of the railing constituted a concealed danger which was not known, but ought to have been known, to the defendant. The defendant was held liable following *Robert Addie & Sons (Collieries)* v. *Dumbreck,* (1929) A.C. 358. Held, on appeal reversing the decision below that in a case based purely on tort, liability would arise only if there was a danger known to the defendant and not known to the plaintiffs. *Power* v. *Hughes,* (1938) 53 B.C.R. 64; (1938) 4 D.L.R. 136; (1938) 2 W.W.R. 359; reversing (1937) 52 B.C.R. 492; (1938) 2 D.L.R. 534; (1938) 1 W.W.R. 369.

3. Leave and license — duty of driver backing car.]—The defendant company occupied store premises with a vacant area at the back between the building and the lane, used for a loading area not only by the defendant but also without objection, by the adjoining occupier and his customers. The plaintiff had driven into this area to gain access to the adjoining occupier's premises and was coming out when he was backed into and injured by a truck of the defend-

ant company driven by the other defendant. The trial judge held that the plaintiff was there by leave and license of the defendant company and was thus a licensee, and that whether he was a licensee or a trespasser, he was entitled to recover. Held, on appeal affirming the decision below, that there was evidence to support the finding of leave and license and that the servant of the occupier had not exercised that degree of care necessary to absolve his employer from liability. The Court made no finding as to the liability of the defendants had the plaintiff been a trespasser. *Hiatt* v. *Zien,* (1939) 54 B.C.R. 450; (1940) 1 D.L.R. 736; (1940) 1 W.W.R. 283; affirming (1939) 54 B.C.R. 17; (1939) 2 D.L.R. 530; (1939) 1 W.W.R. 314.

4. Duty toward user of automatic elevator in apartment house—whether visitor, licensee or invitee.]—The plaintiff was injured while visiting an occupant, as he opened the door leading to the shaft, thinking the elevator was there, and falling down it as a result of the cage being at another floor. Held, dismissing the action, the plaintiff was a bare licensee and not an invitee. The duty of the owner was not to expose the plaintiff to a hidden peril or trap, i.e. one not apparent to the licensee but the existence of which was known or ought to have been known to the defendant. That duty was met where, as here, the defendant had the elevator regularly checked and inspected, the lighting was not shown to be inadequate and a warning posted against attempting to enter the cage, until it was in place. The defendant did not know, nor should he have known that the door could be opened when the cage was at another floor. *Seider* v. *Ray,* (1937) 1 W.W.R. 440.

5. Railway train — duty to pedestrian walking on track.] — Where with the knowledge of the railway company, it had become the custom for people in the neighborhood to walk along the track to save time, the trial judge held, that the plaintiff's wife killed while so doing, was a licensee and not a trespasser. Held, on appeal, that assuming but not deciding that she was a licensee, the railway company was not liable. She knew the train times, she could have stepped off the track without difficulty, she was quite familiar with the locality and knew of the nearby curve which added to the danger. The train whistle was blown and the bell was kept ringing. *Jacobsen* v. *Vancouver Victoria and Eastern Railway and Navigation Co.,* (1941) 56 B.C.R. 207; (1941) 3 D.L.R. 140.

6. Licensee—taking short-cut—familiar with obstruction.] — The premises were used as a hotel and a log had been placed in the parking area in the front of the building to guide traffic. The plaintiff was going to the hotel to visit the defendant when in the dark she fell over the log and was injured. Held, dismissing the action, the plaintiff was a licensee who left the path to take a short-cut. The log had been there for a long time and the plaintiff should have known of its location. As a licensee the plaintiff must take the premises as she found them apart from some concealed source of danger. The log was not a hidden danger and there was no failure of duty on the part of the defendant. *Baker* v. *Vandepitte,* (1944) 61 B.C.R. 44.

D. Trespassers.

1. Railway cut frequented by children.] —The railway line ran through an artificial cut or ravine which was very attractive to boys as a place for games, etc. The railway officials made every reasonable effort to prevent the boys from frequenting the place. While in the ravine, with other boys, the plaintiff's six-year-old son attempted to board a train and was so injured that he died. Held, dismissing the action, that the boy was a trespasser, and in no sense a licensee or invitee, and as a result the railway company was under no duty except to refrain from doing some act with the deliberate intention of doing harm to the trespasser, or at least some act with reckless disregard of the presence of the trespasser. *Craig* v. *Canadian Northern Pacific Railway Co.,* (1933) 47 B.C.R. 453; (1934) 1 D.L.R. 484.

2. Trespasser, licensee or invitee.]—The plaintiff was employed by a sign company which had contracted to service the sign on the roof of the building occupied (as the judge found) by the appellant which had leased a ground floor office and the use of the roof, for advertising purposes to the defendant N. As the plaintiff was hoisting his equipment to the roof via the fire-escapes a rail on one of them gave way and he was injured. At the trial the judge dismissed the action as against N. and the trial proceeded against the appellant. The jury found for the plaintiff. Held on appeal

setting aside the verdict of the jury, the plaintiff was a trespasser as to the fire-escape and was owed no unperformed duty by the appellant. There were three ways of getting to the roof—the one used was in violation of the City by-law as it obstructed the fire-escape. There was no evidence that either of the defendants knew of the use being made of the fire-escapes. *Crewe* v. *Star Publishing Co. Ltd.*, (1942) 58 B.C.R. 103; (1942) 4 D.L.R. 75; (1942) 3 W.W.R. 193.

See MALICIOUS PROSECUTION AND FALSE IMPRISONMENT.

See NEGLIGENCE.

TRADE MARKS AND TRADE NAMES.

1. Infringement—"Gold Medal Furs"—Damages.] — The plaintiff as holder of a registered trade mark "Gold Medal Furs" claimed an injunction and damages against the defendants as distributors of "Gold Medal Seal" fur coats. Held, awarding damages only for the period after the defendant had notice of the infringement up to its cessation of the use of the name; (a) if the name "Gold Medal" was descriptive and hence not ordinarily apt for registration, it had acquired a secondary meaning so as to distinguish the goods of the plaintiff, and so was registrable; (b) the onus of proving that the trade mark was registered without sufficient cause was upon the defendant and was not discharged; (c) as to the claim that the plaintiff had deviated from the actual trade mark and that non-user had prevented the plaintiff from claiming under it, there was not such deviation or non-user as would disentitle the plaintiff to claim; (d) the defendants were not "adopters" but merely "users" of the trade mark and hence were not deemed to have had notice under sec. 18 (2) of the Unfair Competition Act; (e) no damages should be allowed until after actual notice of the infringement. *J. H. Munro Ltd.* v. *The T. Eaton Co. Western Ltd.*, (1942) 58 B.C.R. 446; (1943) 2 D.L.R. 27; (1943) 2 W.W.R. 195 (but see *J. H. Munro Ltd.* v. *Neaman Fur Co. Ltd.*, infra.

2. Trade name—injunction by licensee of, against wrongful user thereof.]—The plaintiff had acquired a revocable license to the trade name of "False Creek Woodyard." The defendants used the name for their own purposes. In granting an injunction and damages the judge found that the licence had never been revoked, that the name had a value, and that the defendants had not made use of it innocently. The plaintiff suffered damage in his fuel business through the malicious interference of the defendants. *Bakhshi Singh* v. *Hall*, (1944) 3 D.L.R. 396; (1940) 3 W.W.R. 481.

3. Infringement — invalid registration—first use in others — lack of distinctiveness.]—Registration of a trade mark must be had before an action for infringement can be brought and it is open to the defendant to defeat the action by showing that a registration is invalid. Held by the President of the Exchequer Court dismissing the action, the plaintiff was not the first user of the words "Gold Medal Furs" nor were the words used by the plaintiff as a trade mark at all. Moreover the words did not have the distinctiveness that is one of the essentials necessary to constitute a trade mark. Such words are not apt or appropriate for trade mark use. The onus of establishing a secondary meaning so as to denote only the plaintiff's furs was not met. *J. H. Munro Ltd.* v. *Neaman Fur Co. Ltd.*, (1947) 1 D.L.R. 868; (1947) Ex. C.R. 1.

TRADE UNIONS.

I. CHARTER AND REGULATIONS, 684.

II. PICKETING, 687.

III. I.C.A. ACT, 688.

I. CHARTER AND REGULATIONS.

1. Validity of meeting—whether direction in by-law is imperative or directory only.]—A "governing" by-law imposed by the Canadian Congress of Labour required that the election of officers of the local should take place in December of each year. The election which took place in December 1942 was by a consent judgment declared null and void; hence there were no officers after the expiration of 1942. At a meeting of the local in February, 1943, provision was made for an election and at

that meeting the defendants were elected. The trial judge held that the election was illegal as not being held in December as called for by the governing by-law. Held on appeal, reversing the decision below, the requirement for the meeting in December was merely directory. To hold otherwise would mean that 13,000 members of the local would be without officers for a whole year. *Stephen* v. *Stewart,* (1943) 59 B.C.R. 410; (1944) 1 D.L.R. 305; (1943) 3 W.W.R. 580; reversing (1943) 59 BC.R. 84; (1943) 2 D.L.R. 476; (1943) 2 W.W.R. 35.

2. Validity of meeting—called when no officials to call it.]—The "governing" by-law of a local said that special meetings should be called by the President or by the Secretary-Treasurer on the request of five members. There were no officers, but a regular meeting of the local provided for a special meeting. It was contended that as there was no request and as there were no officers the meeting was invalid. Held, the members at the regular meeting could themselves provide for the special meeting. Like an unincorporated club, there being no officers, the entire management of the local was in the hands of its members. The provision in the by-law with reference to a special meeting was to give the members an additional power—not to take away from the members at a regular meeting the right to provide for the holding of a special meeting at any time. *Stephen* v. *Stewart,* (1943) 59 B.C.R. 410; (1944) 1 D.L.R. 305; (1943) 3 W.W.R. 580; reversing (1943) 59 B.C.R. 84; (1943) 2 D.L.R. 476; (1943) 2 W.W.R. 35.

3. Interim injunction to restrain officials elected at illegal meeting.]—The National Union expelled two business agents of a local union. Those disapproving called a general meeting of the members of the local and reinstated the expelled business agents and elected two of the defendants as President and Secretary-Treasurer of the local in place of two of the plaintiffs. Held, on an application for an interim injunction restraining the defendants from acting, and granting the order, that the general meeting of the local was prima facie invalid and the election disregarded the provisions of the constitution, rules and by-laws of the local. The validity of the action of the National Union was not a matter to be considered here; the action was not taken by the plaintiffs. *Bruce* v. *Baker,* (1944) 60 B.C.R. 246.

4. Damages for wrongful expulsion from union—evidence of mitigation.] — The plaintiff was held to have been wrongfully expelled from his union. By virtue of a closed-shop agreement his employer dismissed him. He was reinstated after some months, but was awarded damages during the period of expulsion. It was contended that he could have obtained other non-union employment and that as a result his damages were merely nominal. Held, he was justified in refusing to seek non-union employment at a time when he was insisting that his status was that of a union man wrongfully expelled. *Kuzych* v. *Stewart,* (1944) 61 B.C.R. 27; (1944) 4 D.L.R. 775.

5. Effect of provision that an officer who through negligence fails to make a report shall be immediately removed from office.] —The constitution of the Federation with which Local No. 2 was affiliated provided for the removal from office of any officer of a local who through negligence failed to send to the Federation certain monthly reports. The defendants as officers of the Local and by direction of the Local did not send in the reports, and the charter of the Local was suspended. In an action by the members of the Local (except the defendants) the plaintiffs sought inter alia a declaration that the defendants were lawfully removed from office. It was contended that upon failure to make the reports they were automatically and ipso facto removed from office without any finding of negligence. Held, dismissing the action, there should have been a charge of negligence before the removal could take place. *Smith v. Cardwell* (1946) 1 W.W.R. 78.

6. Damages against union officials for failing to submit application for reinstatement.]—The plaintiff regularly withdrew from his union following disability. Upon recovery he applied to the Union officials for reinstatement, which by the union's rules was a matter for decision by the executive or by the membership. The secetary wrongly refused to submit the plaintiff's application. Held, the plaintiff was entitled to a declaration that his application be submitted to the executive, or to the membership, to be dealt with by them. *Guelph* v. *White* (1946) 62 B.C.R. 453; (1946) 4 D.L.R. 114.

7. Damages for expulsion from union —none where by-laws observed and good faith applied.]—Damages are not recover-

able for expulsion from a trade union where the action to expel was taken in good faith and according to the constitution and by-laws of the union. Remedies under them were open to the plaintiff of which he should have availed himself before having recourse to the Courts. The right to vote where it is a right incident to a right of property will justify interference by the Courts. *Kuzych v. White* (1947) 2 D.L.R. 496; (1947) 1 W.W.R. 322.

II. Picketing.

1. Picketing.]—Sec. 501 (f) of the Criminal Code makes it an offence wrongfully and without lawful authority to beset or watch the residence or working place of any person with a view to compel him to do or abstain from doing any lawful thing. Two members of a union walked up and down in front of a theatre with signs stating that the theatre did not employ union men. On a hearing before a magistrate evidence was given that the theatre suffered loss of business as a result. They were convicted. Held, on appeal, upon an equal division of the Court, that the appellants had beset and watched the theatre and whether it was done peacefully or not made no difference. The offence falls within the very language of the section and as they did these things without lawful authority, they were guilty of the crime aimed at by the section. The provincial Trade-unions Act is applicable to civil cases only and has no reference whatever to crime. *Rex* v. *Richards,* (1933) 48 B.C.R. 381; (1934) 3 D.L.R. 332; (1934) 2 W.W.R. 390; 61 C.C.C. 321.

2. Watching and besetting theatre—interim injunction.]—Complaining that the plaintiff, a theatre operator, had broken his agreement with the union, the defendants picketed the theatre and distributed hand bills to patrons and others. The plaintiff obtained an interim injunction restraining the defendants. Held, on appeal, affirming the decision below, that the injunction should not be interfered with, since the judge below must have found that there was evidence of acts not protected by the Trade-unions Act. *Hollywood Theatre Ltd.* v. *Tenney,* (1938) 53 B.C.R. 385; (1939) 2 D.L.R. 745.

3. Trade-unions Act—watching and besetting—injunction—damages.]—A dispute between a theatre operator and the Projectionists' Union as to the effect of a contract between them led the Union to picket the theatre with the purpose of inflicting such financial injury on the plaintiff company that it would be compelled to accept the Union's interpretation of the contract or else go out of business. What was done was sought to be justified by sec. 4 (1) of the Trade-unions Act. An interim injunction had been granted which was continued at the trial and $2,000 damages were also awarded. Held, on appeal, affirming the judgment below, the besetting that took place was not excused by such terms in the Act as "warning" and "urging". The immunity given by the Act with respect to warning and urging "workmen, artisans, labourers, employees or other persons" did not extend to patrons of the theatre. The controversy was not a labour dispute but one as to the interpretation of the contract. The trial judge had made an order that the trustees of the Projectionists' Union and the Trades and Labour Council (both unincorporated) should represent those organizations as well as themselves. The Act contemplates that their funds can be made liable for their wrongful acts but as the organizations were not actually made defendants, the judgment was varied by directing that, pursuant to the Act, their funds be made liable for the damages and costs awarded against their respective trustees in their representative capacities. *Hollywood Theatres Ltd.* v. *Tenney* (No. 3) (1939) 54 B.C.R. 247; (1940) 1 D.L.R. 452; (1940) 1 W.W.R. 337; 73 C.C.C. 158 affirming (1938), 53 B.C.R. 389; (1939) 1 D.L.R. 798; (1939) 1 W.W.R. 90; 71 C.C.C. 365.

III. I.C.A. Act.

1. Industrial Conciliation and Arbitration Act—whether dispute exists.]—As it is the privilege and right of the employees to belong to a trade-union, and as it is lawful for an employer to enter into an agreement with such trade-union with respect to the working conditions of such trade-union employees, it follows that the refusal of the employer to enter into such an agreement at the request of the bargaining committee of employees is a matter which affects or relates to the rights and privileges of the employees, and therefore is one falling within the definition of "dispute". The action of the judge below in refusing an injunction, at the instance of the employer, to restrain a Board of Arbitrators, on the ground that there was no dispute, was affirmed. *Bloedel*

Stewart & Welch Ltd. v. *Stuart* (1942) 58 B.C.R. 351; (1943) 1 D.L.R. 183; (1943) 1 W.W.R. 128 affirming (1942) 4 D.L.R. 648; (1942) 3 W.W.R. 506.

2. Trade-Union as legal entity—how to be served.]—For the purposes of the Industrial Conciliation and Arbitration Act, a trade-union acting as a bargaining agent is an entity having a separate legal existence distinct from its members, and while an unincorporated association, not being a partnership or legal entity known to the law, may not be sued in its name, there may be such an entity which is neither a corporation or a partnership. Here the Legislature has set up such an entity under the Act and it may be prosecuted in its union name for an offence against the Act. The question as to how service is to be effected on such a union is one of procedure and not of jurisdiction. The magistrate should deal with that. *Rex v. Nanaimo Dry Cleaning and Laundry Workers Union Local No. 1* (1947) 63 B.C.R. 493; (1947) 4 D.L.R. 159 (sub *nom. re Patterson and Nanaimo Local*) (1947) 2 W.W.R. 510.

3. Collective bargaining agreement — dispute referred to arbitration—scope of arbitration.]—The plaintiff was a member of a union which was the bargaining agency for him and his fellow employees. The collective bargaining agreement contained a clause referring certain matters in dispute to arbitration if not otherwise adjusted. The plaintiff made a claim that he was wrongfully dismissed and the question was referred to arbitration under the terms of the agreement. The arbitrators found that the dismissal was wrongful and recommended the plaintiff's reinstatement which took place. He sued for damages since the time he was dismissed. The defendant contended that having gone to arbitration he should have obtained his remedy before that tribunal instead of coming to Court. Held, the only matter before the arbitrators was whether the dismissal was wrongful or not. The question of damages was not before them and was properly the subject of an action. *Hnatnicky* v. *Pacific Pine Co. Ltd.* (1947) 63 B.C.R. 460; (1947) 4 D.L.R. 468; (1947) 2 W.W.R. 141.

TRESPASS.

1. Wrongful entry on business premises.]—Where the plaintiff had established an insurance business and during an illness the defendant entered the plaintiff's place of business and taking possession, proceeded to carry on the business as his own, there is unwarranted and wrongful trespass. *Foxall* v. *Shobrook* (1935) 50 B.C.R. 430; (1936) 2 D.L.R. 155 affirmed by Supreme Court of Canada, (1936) 4 D.L.R. 464.

2. Seizure by unlicensed bailiff.]—A person acted as bailiff on only one occasion. He held no licence under the Collection Agents' Licensing Act. It is the engaging in, or advertising himself as engaging in the business that is forbidden. Held that in seizing goods under a chattel mortgage on a single occasion, the bailiff was not contravening the Act and was not a trespasser ab initio. *Richards* v. *Hanson* (1935) 50 B.C.R. 245; (1935) 3 W.W.R. 144.

3. Position where plaintiff as lessee relies upon actual possession.]—The plaintiff was lessee for a five-year term of waterfront property adjoining that held by the defendant under lease. The plaintiff's lease not having been registered it could not rely on constructive possession but must show actual possession. That was established by acts of the plaintiff. The plaintiff if its leasehold interest had been injuriously affected by the defendant could recover damages for trespass. Held ,the defendant could not invoke a default clause in the plaintiff's lease, the lessor having taken no steps to terminate. Apart from technical and minor trespasses the defendant excavated and made use of a portion of the plaintiff's premises as a pool for logs. This constituted a continuous trespass entitling the plaintiff to a mandatory injunction. Damages were also allowed. *Excelsior Paper Stock Ltd.* v. *Cartwright Lumber Co. Ltd.* (1941) 1 W.W.R. 607.

TRUSTS.

I. Express Trusts, 691.

II. Resulting Trusts, 693.

III. Rights and Powers of Trustees, 694.

IV. New Trustees, 697.

V. Breach of Trust, 698.

I. Express Trusts.

1. Superannuation—10 years' guarantee —creation of trust.]—The annuitant under the Superannuation Act of the Province died leaving his wife to receive the remaining instalments. She in turn, under the arrangement set out below, named her son, the plaintiff, to take any instalments falling due after her decease. By her will she left her estate to the plaintiff and his two brothers in equal shares; she made no mention of the annuity or of any residuary estate. By sec. 15 (2) of the Act the allowance became the absolute property of the wife. She had made an arrangement with the plaintiff that he should have it in consideration of past and future assistance, and this arrangement was fortified by her correspondence with the Superannuation Commissioner. Held that the allowance became the property of the plaintiff. The objection that it was not assignable was met by holding that the requirement was for the convenience of the administrator of the fund and did not stand in the way here. The contention that the arrangement was testamentary, and must be made by will, was met by holding that a trust was created in favour of the plaintiff which was effective from the time the wife turned the instalments over to him. *Thomson* v. *Thomson* (1943) 59 B.C.R. 100.

2. Son handing earnings to father — promise to repay at death. —A son from the time he was 13 handed his pay cheques to his father. He was to get all back at his father's death, but shortly before his death the father gave his daughter a considerable sum and by his will bequeathed to her the balance of his estate. The trial judge held that some $8,000.00 had been paid under the arrangement; that it became trust funds in the father's hands, and that the son's claim was amply corroborated under Section 11 of the Evidence Act. Judgment was given against the daughter as executrix of her father's estate and against her personally. Held on appeal, affirming the decision below, an express trust had been created. No technical expressions are required for the purpose. The daughter took the gift and the bequest with a trust already impressed upon them. There was evidence that she knew of the arrangement. The contention that at common law a parent is entitled as of right to the earnings of his child, while he lives at home, was met by declarations of the father that he was holding the money for the son's benefit. *Swanson* v. *Smith* (1944) 61 B.C.R. 243; (1945) 3 D.L.R. 431. (1945) 2 W.W.R. 469.

3. Employer buying farm at employee's request—whether relation that of vendor and purchaser or trustee and cestui que trust. —The plaintiff desired to hold the services of the defendant and bought a nearby farm which the defendant occupied. The trial judge found that the arrangement was that the farm was to be the property of the defendant to be paid for partly out of a portion of his wages and partly from the proceeds of the sale of a property in Saskatchewan, and that the plaintiff took title only for security. When prices went up he (as the judge held) decided to keep the place for himself. It was held that the plaintiff was trustee of the farm for the defendant. Held on appeal, affirming the decision below, the plaintiff held the property in trust and as security for the payment of the money laid out by him. No technical expressions are necessary to create an express trust; any language will suffice if it is clear that the party using it considers himself a trustee and adopts that character. It is a fraud on the part of a person to whom land is conveyed as trustee, and who knows it was so conveyed to deny the trust and claim the land himself. Hence the agreement may be proved by parol evidence notwithstanding the Statute of Frauds. The defendant was entitled to a declaration that the plaintiff bought the farm as trustee and that it was so held subject to a charge for the amount due the plaintiff. *Brown* v. *Storoschuk* (1946) 63 B.C.R. 225; (1947) 1 D.L.R. 227; (1946) 3 W.W.R. 641.

4. Notations attached to share certificates—whether declarations of trust.]—The deceased, intestate, attached slips on at least one of which was the plaintiff's name, to a number of share certificates and retained them in his possession. It was shown that the deceased expressed a wish to remember the plaintiff whose name was found by the Official Administrator attached to a share certificate among the deceased's papers. The plaintiff had been employed by the deceased for many years. Held, dismissing the action, the evidence of plans to make a will indicated that he proposed to reward the plaintiff by his will. He did not intend that the allocation of the certificate to the plaintiff should be effective until after his death. Mere benevolent intentions did not suffice to create a trust. *Dong Sing* v. *Bryant* (1946) 3 W.W.R. 106.

5. Whether declaration of trust testamentary or not—effect of later legacy adding to trust property.]—The testator agreed in writing with his divorced wife that if he predeceased her, she was to have one-third of his whole estate and covenanted that he held the one-third share in trust for her. Some months later he made a will leaving her one-third of his residuary estate. His estate was larger at his death than at the date of the agreement. She knew nothing of the will until after his death. Held, in construing instruments as to their testamentary character the substance rather than the form is to be looked at. Here the agreement was not a testamentary document but one by which the testator constituted himself, a trustee for the wife and the trust interest vested when the agreement was made subject to divestment if she predeceased him. The legacy was not given in compliance with any covenant in the agreement. She was unaware of it and was not put to her election as between the trust property and the legacy; they so differed in character that the rule as to satisfaction did not apply. *Re Woodman* (1947) 2 D.L.R. 797.

II. Resulting Trusts.

1. Effect of voluntary conveyance — whether resulting trust arises.]—The question of whether or not a voluntary deed gives rise to a resulting trust is not settled. All the circumstances should be looked at and if the conclusion is that none was intended, then none arises. Here no resulting trust was intended. In *re M. D. Donald Ltd.* (1933) S.C.R. 411; (1933) 4 D.L.R. 145 reversing (1932) 46 B.C.R. 406.

2. Timber licenses purchased in name of wife—presumption of advancement rebutted.]—The husband bought certain timber licences in the name of his wife "for convenience" as he said. He took from her an assignment but left it with her for safekeeping. She obtained the licences registered in her name from their solicitors and disclaimed any knowledge of the assignment. He brought action for divorce and sued her for a declaration that the licences were his property. The defence was that they were a gift from her then husband. The trial judge held that he had never intended to make her a gift, but had merely put the licences in her name as his agent and for convenience, and that he had told her so at the time. The presumption that it was a gift was overborne by the evidence in the light of the circumstances. Held on appeal to the Court of Appeal, affirming the decision below, the heavy onus to rebut the presumption of advancement and to show that the transfer to the wife, although absolute in form, was never intended to operate as a gift, was discharged. There was a resulting trust. The suggestion that her husband had put the property in his wife's name to avoid his creditors was not pleaded, and the trial judge believed his denial of it. On further appeal to the Supreme Court of Canada, it was held, dismissing the appeal, that on the testimony of the husband taken in conjunction with the documentary evidence the judgments below could not be interfered with. *Cole* v. *Cole* (1944) S.C.R. 166; (1944) 2 D.L.R. 798 affirming (1943) 59 B.C.R. 372; (1944) 1 D.L.R. 37; (1943) 3 W.W.R. 532.

3. Invalid marriage—transfer to woman thought to be wife—intention.]—At a time when the plaintiff believed he was married to the defendant he transferred property (land, shares, etc.) to her. When it was discovered that they were not, in fact, married, he sued for a declaration that the property was his. The trial judge held there had been no intention of vesting the immediate beneficial interest in the defendant; a mistake of fact had occurred with respect to a basic and fundamental matter. The plaintiff was entitled to recover. Held on appeal, affirming the decision below, no presumption of advancement or of a gift arose by reason of the defendant going through a form of marriage with the plaintiff. In law the parties were strangers and the rebuttable presumption was that a resulting trust arose in favour of the plaintiff. She was to have no present beneficial interest but was to have all in the event of his death. The gift was not complete and rested in intention only, although the alleged gifts did not remain within the plaintiff's sole control. *Clelland* v. *Clelland,* (1945) 61 B.C.R. 426; (1945) 3 D.L.R. 664; (1945) 2 W.W.R. 399 affirming (1944) 61 B.C.R. 19; (1944) 4 D.L.R. 703; (1944) 3 W.W.R. 234.

III. Rights and Powers of Trustees.

1. Whether salaried employee may as executor continue to be remunerated in both capacities.]—The executor of a per-

son who held half the shares in a hotel company properly continued to carry on the business. He had been paid a salary by the company as joint-manager. The question arose as to whether he could retain the salary paid him while acting as executor or must account to the estate for it. The fact that he received the salary from the company was held not to affect the situation. Held, the executor must account to the estate for the salary received. He was engaged in a transaction by which he acquired an interest adverse to his duty. If an executor is qualified to do the work required, he may in certain circumstances, elect whether he will do it or employ another. If he employs another he may pay him. If he does it himself, it becomes part of the work of administration to be paid for as ordinary remuneration. In *re Trustee Act and Vinnicombe Estate* (1934) 1 W.W.R. 780.

2. No appeal from advice given trustees under Trustee Act.]—There is no appeal from the "opinion, advice or direction" given by a judge on a petition by trustees under sec. 79 of the Trustee Act. In *re Estate of Katherine Dixon* (1936) 1 W.W.R. 383; (1935) 50 B.C.R. 285; (1936) 1 D.L.R. 593.

3. Power to sell.]—R. conveyed a property to his wife who agreed to give a lease and option to S. R. and his wife then entered into a trust agreement with the Royal Trust Company whereby the wife conveyed the property to the Trust Company, subject to the agreement with S. She also assigned to the Trust Company her rights under the agreement with S. upon trust (inter alia) to divide the rentals between R. and his wife, and on the death of either of them to pay to the survivor, and after the death of the survivor to hold the capital and income for their two children. The agreement with S. was terminated and S. and the Trust Company released each other. Four years later, both R. and his wife having died, and the Trust Company having become the executor of each of them, the Trust Company agreed to sell the property. A daughter of R. by his first wife filed a caveat against the property. The question for decision was: had the Royal Trust Company the right to sell the property. For the caveator it was contended that she was entitled to make a claim under the Testator's Family Maintenance Act; that the Trust Company had no power to sell under the trust agreement, and that it could not have sold as executor because the property was not disclosed in the Succession Duty affidavits. Held, the two children mentioned in the trust agreement took nothing under it because the agreement with S. fell through. The trustee under the trust agreement had no power to sell and upon the termination of the agreement to sell to S. the Trust Company became a bare trustee for the two R.s, or one of them. The Trust Company, however, as executor for both R.s, was entitled to sell by virtue of the fact that it was expressly empowered to do so by both wills. In *re Rattenbury Estate and Trustee Act* (1935) 51 B.C.R. 316.

4. Remuneration—misconduct short of breach of trust.]—The plaintiff applied for remuneration as trustee under a trust deed executed by the defendant to secure a bond issue of over a million dollars. The defendant asked for a reduction in the amount recommended by the Registrar, not for any breach of trust, but on the ground that the high standard of conduct required of trustees was not met. It also suggested that too great a sum had been recommended. The judge found that the proceedings complained of, which were taken by the trustee under the trust deed were justified in the very difficult circumstances facing the company in the depression of the early thirties. The trustee's failure to consult the bondholders was understandable at the time and in any event the trustee's responsibility could not be entirely shifted to them. It was not established that there was any conflict between the trustee's interest and its duty. It was held that the heavy responsibilities involved were fully realized by the trustee and that they were faithfully discharged. As to the quantum, the amount recommended was fair and reasonable, but one item should be disallowed as it was already covered in the general remuneration. *National Trust Co. Ltd.* v. *Vancouver Kraft Co. Ltd.* (1938) 52 B.C.R. 552; (1938) 2 D.L.R. 791; (1938) 2 W.W.R. 32.

5. Trustee remiss in failing to acquaint a beneficiary as to the latter's interest and the condition of the estate.]—Where a trustee proved the will and neglected for seven years to notify an infant beneficiary of her rights to benefit from the estate and the beneficiary took proceedings to have her rights ascertained and protected, no costs were allowed the trustee until after the

plaintiff's claim had been settled and paid. In *re Short Estate* (1941) 1 W.W.R. 593.

6. Whether liquidator a trustee.]—In fixing the remuneration of a liquidator in a winding-up subject to the supervision of the Court under sec. 228 of the Companies Act, the restrictions applicable to a trustee under sec. 80 of the Trustee Act do not apply. *Re Intermountain Building & Loan Association of Canada.* (1942) 3 D.L.R. 779.

7. Charge for safekeeping of securities disallowed.]—The Winnipeg office of the trustee charged the estate with an amount for the safe custody of securities of considerable value. Held the items were not expenditures any more than payments of upkeep of the offices of the trustee were. They were part of the operating expenses of the trustee and should be covered by the remuneration allowed. In *re The Trustee Act* and in *re estate of Laura Miller Dunsmuir* (1946) 62 B.C.R. 361; (1946) 3 W.W.R. 557.

IV. New Trustees.

1. Power to name trustee under will—whether oral appointment sufficient—whether revocable.]—The testator declared that his wife should name and appoint the first trustee of a fund set up by him. Held, an oral appointment was valid and it could be revoked and new appointments made. As there was no trustee at the time of the wife's death, it will be for the Court to appoint one. *Re Morton* (1940) 4 D.L.R. 737.

2. Right to appoint new trustee under Trustee Act.]—M. died in 1906 leaving real and personal property to be administered by his wife executrix. At her death her children became her executors and they completed the purely administrative part of their duties with respect to both their parents' estates. Then they renounced and appointed two strangers as trustees, purporting to act under the provisions of the Trustee Act. An attempt by the new trustees to deal with the real estate was challenged and the new trustees and their predecessors applied for the advice and direction of the Court. Held, under the law as it was at the date of M.'s death his executrix took only his personalty. As to his personal estate when it was administered she became a trustee of what remained in her hands. Her executors occupied the same status on her death and became trustees of the residue of M's personalty. They took no interest in his real estate and had no power to appoint anybody as executors — only as trustees of M.'s personal estate and of his widow's real estate, she having died in 1924. *Re Munsie* (1941) 2 D.L.R. 778; (1941) 1 W.W.R. 334.

3. Religious Institutions Act—whether meetings naming new trustee properly held.]—The Act enables a religious society to appoint trustees at any special meeting called by written notice read to the congregation by the officiating minister at the close of public worship on each of the last two preceding Sabbaths. A church had recently been built and a dispute had arisen over money matters with the builder. On the Sabbath when the notice was to be read the members were locked out, but held services and had the notice read in a private house. The same thing happened on the second Sabbath. Held the meetings were "public worship". There was substantial compliance with the Act and the new trustees were properly appointed. *Schmunk* v. *Brook* (1944) 60 B.C.R. 428; (1944) 3 D.L.R. 643; (1944) 2 W.W.R. 437.

V. Breach of Trust.

1. Investments made dehors the trust deed.]—A trust deed outlined with meticulous care the course to be followed by the trustees. One of the trustees, an Oregon corporation, notwithstanding that the trust deed provided in detail for the disposition of every dollar received, made other investments resulting in a loss, the other trustee having in the meantime purported to delegate his powers and duties under the deed to the Oregon corporation. Both trustees were held liable by the trial judge for breach of trust. Held, on appeal, affirming the judgment below (a) the question whether Oregon or British Columbia law is involved is not important where the document gives such complete directions as to the conduct of the trustees; (b) as the trustees had no authority under the deed to invest in outside securities, the general powers of investment enjoyed by the Oregon corporation could not be invoked; (c) the attempt of the other trustee to escape liability on the ground of delegation failed because the delegation permitted by the deed was limited to powers, not duties.

Harris Investments Ltd. v. *Smith* (1933) 48 B.C.R. 274; (1934) 1 D.L.R. 748.

2. Promoters of mining syndicate—duty to disclose interest—effect of release.]—The defendants induced the plaintiff to buy three units in a syndicate to be limited to 1000 unit-holders. When only 63 units had been sold a company was incorporated and the unit-holders agreed to accept 800 shares per unit. One of the defendants made a declaration of trust accordingly and each unit-holder signed a release. By this arrangement, the defendants got about 89% of the shares in the new company. The plaintiff claimed a declaration that the shares retained by the defendants were held in trust for the members of the syndicate. The trial judge dismissed the action holding that the facts were disclosed to the plaintiff and she accepted the shares in satisfaction of her interest as a unit-holder. The Court of Appeal affirmed the decision below. A further appeal to the Supreme Court of Canada was dismissed. The actual bargain was that the plaintiff should receive certain shares in the new company. This she did with knowledge of what the defendants were to receive. *Cameron* v. *Carr* (1940) 4 D.L.R., 216, affirming the Court of Appeal (unreported), affirming (1939) 54 B.C.R. 85; (1939) 1 D.L.R. 801; (1939) 1 W.W.R. 328.

See EXECUTORS AND ADMINISTRARORS.

See WILL.

VENDOR AND PURCHASER.

I. THE CONTRACT, 699.

A. Agreements for Sale, 699.

B. Options, 700.

II. RIGHTS AND DUTIES ARISING OUT OF THE CONTRACT.

I. THE CONTRACT.

A. Agreements for Sale.

1. Recovery of deposit—no concluded agreement on interim receipt.]—Where an intending purchaser was induced to make a deposit by misrepresentation (though innocent) as to the state of the title, he was entitled to refuse to complete, and could recover the deposit. *Jackson* v. *Macaulay Nicolls Maitland & Co.,* (1942) 57 B.C.R. 492; (1942) 2 D.L.R. 609; (1942) 2 W.W.R. 33.

2. Interim receipt — lacking essential term—reference to mortgage.]—The plaintiff (intending purchaser) sued for the return of a deposit paid as earnest-money under an interim receipt. One of the terms as to payment was "by assuming first mortgage of $3500 at 6%." Held, there was no completed agreement but only an agreement incomplete in an essential term, in that the only description of the mortgage was that it should be for $3500 at 6%. (There was in fact no mortgage). This leaves complete uncertainty as to, inter alia, the identity of the proposed mortgagee and the duration of the mortgage. On appeal, reversing the trial judge, the plaintiff was entitled to recover back the deposit. *Jackson* v. *Macaulay Nicolls Maitland & Co. Ltd.,* 57 B.C.R. 492; (1942) 2 D.L.R. 609; (1942) 2 W.W.R. 33.

3. Registrar's report including moneys due after date of order nisi.]—Under the order nisi for foreclosure an account was directed of what was due to the plaintiff under an agreement of sale. The registrar included in his certificate moneys which fell due after the date of the order nisi. Held, the registrar's report and all proceedings founded thereon should be set aside. This was not an action for specific performance, but an action for cancellation on default of payment of the amount which was due and payable at the date of the order nisi. *Hayes* v. *MacKinnon,* (1943) 59 B.C.R. 335; (1943) 4 D.L.R. 286.

B. Options.

1. Option—strict construction thereof.]—The conditions imposed on the exercise of an option are always strictly construed. All precedent conditions must be fulfilled by the purchaser before the contract of sale binds the vendor. Moreover, time is of the essence of such contracts; hence if the conditions are not complied with by the day fixed, the option is lost. *Mines Ltd.* v. *Woodworth,* (1942) 1 D.L.R. 135; affirming (on other grounds), (1941) 56 B.C.R. 219; (1941) 4 D.L.R. 101; (1941) 3 W.W.R. 40; varying (1940) 4 D.L.R. 676; (1940) 3 W.W.R. 200.

2. Option—no relief against forfeiture.]—In the matter of the jurisdiction to relieve against forfeiture there is a clear distinction between cases where the relationship is that of vendor and purchaser and that of optioner and optionee. The parties here chose to define the terms on which the right to purchase should arise, and the defendant not having fulfilled them, the Court could not vary the agreement of the parties and say, on entirely different terms, the plaintiff should be compelled to convey the premises to the defendant. It was not a case of penalty or forfeiture. *Jennie Stopforth, administratrix,* v. *Bergwall,* (1944) 60 B.C.R. 48; (1944) 1 D.L.R. 603; (1944) 1 W.W.R. 477.

II. Rights and Duties Arising Out of Contract.

1. Debt not severable from assignor's obligation to convey.]—The purchaser's covenant to pay, i.e., the legal chose in action, cannot be divorced from his right to secure, and the vendor's equitable duty to convey, the lands upon payment of the purchase price. *Canadian Bank of Commerce* v. *Yorkshire & Canadian Trust Ltd.,* (1939) S.C.R. 85; (1939) 1 D.L.R. 401; affirming (1937) 52 B.C.R. 438; (1938) 2 D.L.R. 285; (1938) 1 W.W.R. 530; reversing (1937) 52 B.C.R. 16; (1937) 2 W.W.R. 474

2. Failure of vendor to register his own title.]—The plaintiff sued for instalments due under an agreement of sale of a farm. The defendant had repeatedly demanded that the plaintiff register his own title as required by sec. 27 of the Land Registry Act but the plantiff failed to do so and shortly after the action was commenced, the defendant gave formal notice of rescission. The defendant counterclaimed for rescission of the agreement, and the return of the money paid on the farm. The trial judge set the agreement aside, directed the return of the sums paid with interest and allowed the defendant the cost of moving. A claim by the plaintiff for use and occupation of the farm during the 18 months the defendant was in possession was disallowed. Held, on appeal, reducing the amount of the judgment by the moving costs, that the failure to register entitled the defendant to rescind, but where rescission is ordered damages will not be awarded. As to use and occupation the defendant was not liable, as the plaintiff repeatedly refused that to which the defendant was entitled by law. *Cox* v. *Whieldon,* (1934) 48 B.C.R. 522; (1935) 1 D.L.R. 8; (1934) 3 W.W.R. 145.

See Contract.

WAR LEGISLATION AND REGULATIONS.

I. In General, 702.

II. Defence of Canada Regulations, 703.

III. Housing Regulations, 706.

I. In General.

1. Right to arrest and detain alleged deserter from armed forces of allied state.]—A citizen of the Netherlands was charged with desertion from the Netherlands forces in Canada. He was arrested and detained by military police of the Canadian Army pending his delivery to the Netherlands forces for trial. Held, refusing an order for his release under habeas corpus, (a) he was a member of the Netherlands forces; (b) as a result under Foreign Forces Order, 1941, and the General Order of the Minister of National Defence his arrest and detention were legal. To justify such arrest and detention on Canadian soil authority must be found in the law of this country. In *re de Bruijn,* (1941) 57 B.C.R. 281; (1942) 1 D.L.R. 249; (1942) 1 W.W.R. 105; 77 C.C.C. 105

2. Right to arrest and detain alleged deserter from armed forces of allied state —intervening naturalization.]—Where an alleged deserter from the forces in Canada of an allied state was arrested by the Candian Army under the Foreign Forces Order 1941 for delivery to the forces of the allied state so that he could be tried, and where by the time of his arrest he had obtained a certificate of naturalization, he was nevertheless held, on habeas corpus, to be still a member of the allied state's forces, and not entitled to his discharge. In *re Romeijnsen,* (1941) 57 B.C.R. 295; (1942) 1 D.L.R. 249; (1942) 1 W.W.R. 119, 77 C.C.C. 120.

3. Detention of deserter from Greek ship—Board of Inquiry—making deserter a witness against himself.]—Under the War Measures Act the Merchant Seamen Order was passed. Under it, a Board of Inquiry could inquire into the conduct of a seaman who deserts his ship or who refuses to sail on a ship. The respondent, a deserter from a Greek vessel, was brought before the Board and, having been called as a witness and sworn by the Board, he admitted that he was a deserter. He was detained and kept in Oakalla gaol. On habeas corpus, the judge ordered his release holding that he was not a voluntary witness and could not be made to give evidence against himself. Held, on appeal, reversing the decision below, the Board was an administrative, not a judicial tribunal. It might interrogate a seaman and act on his answers. It was empowered to coerce deserting seamen in the public interest — not because desertion was a crime but solely because it was detrimental to the war effort. The Board was engaged in enforcing a species of conscription. It was exercising a jurisdiction, not criminal, but civil in character. The Board's orders were not convictions. *The Minister of National Defence for Naval Services* v. *Pantelidis,* (1942) 58 B.C.R. 321; (1943) 1 D.L.R. 569 (sub nom. *Rex* v. *Pantelidis*), (1943) 1 W.W.R. 58, 79 C.C.C. 46.

4. Failure to report for military training — whether exempt as "minister".] — The accused was convicted of failing to report for military training under the National Selective Service Mobilization Regulations. His defence was that he was exempt as being a "minister of a religious denomination." Held, assuming that the organization known as Jehovah's Witnesses is a religious denomination, the trial judge was right in holding that the accused was never appointed a regular minister thereof. The letter of appointment produced by the accused was not one from Jehovah's Witnesses but from two other organizations, both of which had been declared illegal. *Rex* v. *Stewart,* (1944) 60 B.C.R. 296; (1944) 3 D.L.R. 331; (1944) 2 W.W.R. 86; affirming (1944) 1 W.W.R. 469; 81 C.C.C. 349.

II. Defence of Canada Regulations.

1. Defence of Canada Regulations — possession of plan of internment camp..]—Regulation 16 forbids any person in any manner likely to prejudice the safety of the state to have in his possession any document containing information with respect to the location of any prisoners of war. The accused whose husband was confined at an internment camp in Alberta had a pencil sketch of the camp, at her home near Vancouver. She was convicted. Held, on appeal affirming the conviction that an offence was committed, it was not necessary to establish that it would affect the safety of the state — likelihood is enough. It could be a serious matter if by the use of the document prisoners of war should escape. *Rex* v. *Bronny,* (1940) 55 B.C.R. 397; (1940) 4 D.L.R. 502; (1940) 3 W.W.R. 423; 74 C.C.C. 154.

2. Defence of Canada Regulations—consent of Attorney-General at what stage necessary.]—Under the Regulations certain prosecutions are not to be instituted except with the consent of the Attorney-General of Canada or the Province. Where the consent was not given until after the laying of the information, it was held to be ineffective and the proceedings were nullities throughout. *Rex* v. *Kluge,* (1940) 3 W.W.R. 57; 74 C.C.C. 261.

3. Defence of Canada Regulations — whether organization illegal although not listed as such.]—Jehovah's Witnesses was in July 1940 declared illegal. In the consolidation of September, 1940, the organization was not listed as such. Held, section 3 of P.C. 4750, by which orders under revoked regulations shall be good and valid unless inconsistent, caused the organization to remain an illegal one. As no specific penalty is provided, the proceedings are by way of summary conviction. *Rex* v. *Sutton,* (1941) 2 W.W.R. 60; 76 C.C.C. 286.

4. Forfeiture of motor-car — member of illegal organization—Jehovah's Witnesses.]—The accused were convicted of being members of an illegal organization. The magistrate made an order for the forfeiture to the Crown of a motor car seized from one of the accused. Held on certiorari quashing the order, that there must be a seizure under subsection (1) of regulation 58 before subsection (4) of regulation 58, which provides for the destruction or forfeiture of seized articles, can be put into force. *Rex* v. *Saparito,* (1941) 56 B.C.R. 277; (1941) 2 W.W.R. 45; 76 C.C.C. 158.

5. Defence of Canada Regulations—sufficiency of consent to prosecution.]—Sec

39B (1) provides that a prosecution for certain offences shall not be instituted except by, or with the consent of counsel representing the Attorney General of Canada or of the Province. A proviso was later added that the above is not to prevent the arrest or remand of a person where the consent is lacking. Held on a stated case from a magistrate, the fact of consent had been fully established. As to the proviso, it derogates from the earlier portion of 39B (1) and provides that in certain cases the want of an in-hand consent at the time of an arrest shall not be fatal. *Rex* v. *Bickert,* (1941) 1 W.W.R. 663; 76 C.C.C. 154.

6. Defence of Canada Regulations — having books "in quantity" prejudicial to the state or prosecution of the war.]—Sec. 39 of the Regulations makes it an offence knowingly to have in possession in quantity any book containing any material likely to be prejudicial to the safety of the state or the efficient prosecution of the war. Held, dismissing the charge, that having a number of different books—each of them subversive—does not amount to having them "in quantity." Here not one of the books was held "in quantity." *Rex* v. *Money,* (1941) 1 W.W.R. 93; 75 C.C.C. 402.

7. Defence of Canada Regulations — Regulation 39A (c)—books prejudicial to the state.]—The magistrate convicted the appellant for having, in quantity, documents containing material likely to be prejudicial to the safety of the state. Held, on appeal to the County Court, affirming the conviction, the scores of pro-communist books and pamphlets found in the appellant's bookshop, of which in some cases there were hundreds of copies and in some cases only a few, supported the conviction. The Regulations (39C) made the Communist Party of Canada an illegal organization and it owned the company which ran the bookshop. The opinions of professors and others who were called for the defence looked to educational standards rather than to the effect of these books during a time of war. *Rex* v. *Ravenor,* (1941) 1 W.W.R. 191; 75 C.C.C. 294.

8. Any offence over which the Parliament of Canada has legislative authority.]—The Defence of Canada Regulations deal with offences over which the Parliament of Canada has legislative authority within the meaning of sec. 706 of the Criminal Code. The regulations are not Acts of Parliament but under the War Measures Act Parliament's powers are delegated to a limited extent to the Executive Government. The jurisdiction conferred by sec. 706 of the Code was effectively exercised by the convicting magistrate. *Rex* v. *Sutton,* (1941) 56 B.C.R. 388; (1941) 3 D.L.R. 719; (1942) 1 W.W.R. 41; 76 C.C.C. 262.

9. Defence of Canada Regulations—no prosecution without consent—proviso to contrary.]—Regulation 39B (1) says a prosecution shall not be instituted under certain regulations except with the consent of the Attorney-General A proviso was added that the absence of the consent shall not prevent the arrest, detention or remanding of a person charged with an offence under the same regulations. Held, reading 39B as a whole and in order to give it an interpretation that will not lead to an obvious absurdity, its effect is to permit all regular procedural steps preliminary to trial to be carried on without the consent, but when the trial stage is reached the consent must be had. *Rex* v. *Paul,* (1943) 59 B.C.R. 475; (1944) 1 D.L.R. 145; (1943) 3 W.W.R. 561; 80 C.C.C. 356.

III Housing Regulations.

1. Application for possession by landlord—Order 108, Secs. 18 (3) and 21 (4)—jurisdiction of Supreme Court—election.]—The spirit of the regulations indicates that the proceedings should be taken in the County Court, but in any event, here the landlord elected to proceed in the County Court and his application came before that court and was adjourned. Believing he would be unsuccessful there, he discontinued with a view to canvassing another court. This he could not do and his election to proceed before the County Court must stand. In *re Order No. 108 of the Wartime Prices and Trade Board respecting maximum rentals and termination of leases and in re Security Storage Ltd.,* (1943) 58 B.C.R. 441; (1943) 2 D.L.R. 47; (1943) 1 W.W.R. 433.

2. Notice to vacate housing acccommodation—procedure.]—The landlord gave the requisite notice to quit for reasons connected with major alterations. Under the regulations the tenants were automatically entitled to a renewal by giving the required notice, subject always to the right of the landlord to apply for possession. Here the

tenants did nothing and remained in possession. The landlord proceeded under the Landlord and Tenant Act (Sections 19 and 22) and obtained an order for possession. Held, dismissing an appeal by the tenants, the parties were left to their ordinary rights at law when the tenants did not claim a renewal. The tenants having done nothing could not now have the merits of the landlord's position inquired into. *Parlby* v. *Dickinson,* (1943) 59 B.C.R. 444; (1944) 1 D.L.R. 454; (1943) 3 W.W.R. 672.

3. Wartime Leasehold Regulations — no compensation for taking agreed upon.] —The real property administrator's power to requisition the use of property to supply a deficiency in housing accommodation, does not include the power to fix the compensation for its use. That must be determined by the Exchequer Court on reference by the Minister of Munitions and Supply. *The Society of the Love of Jesus* v. *Smart,* (1943) 60 B.C.R. 71; (1944) 2 D.L.R. 551; (1944) 1 W.W.R. 534.

4. Orders of Wartime Prices and Trade Board—whether premises "housing accommodation."]—The judge held that a multiple-family building was not "commercial accommodation," but "housing accommodation" notwithstanding that the tenant did not live on the premises although her husband looked after them for her and slept there. The tenant made a profit by subletting to the various occupants and contended that this constitutes the premises a "place of business" within the definition as given. Held, on appeal affirming the decision below, assuming that the tenant was carrying on the business of a lodging-house keeper on the premises she was doing it by operating a "place of dwelling." *Law* v. *Smith,* (1944) 60 B.C.R. 437; (1944) 4 D.L.R. 70; (1944) 2 W.W.R. 385.

5. Whether Court's jurisdiction ousted by statutory order.] — An order passed under the War Measures Act provided that no proceedings by way of injunction should be instituted against any member of the Wartime Prices and Trade Board for any act in the purported exercise of any power conferred by the regulations. Held, the bar refers only to powers conferred—if they are not in fact conferred the Court may grant an injunction. *The Society of Love of Jesus* v. *Smart,* (1943) 60 B.C.R. 71; (1944) 2 D.L.R. 551; (1944) 1 W.W.R. 534.

6. Rentals regulations—"shared accommodation."] — The landlord of a lodging house containing his own and six other suites sought an order for possession of one of them. Under the Rentals Regulations, Order No. 294, the application lies only where the tenant occupies "shared accommodation" which means rooms forming part of the residence of the landlord and of which the entrance and any facility are used in common by the landlord and the occupant. Held the tenant did not occupy "shared accommodation." It could not be said that the suite occupied by the tenant formed part of the landlord's residence merely because the latter occupied one suite in it. Each is a self-contained domestic establishment. On the facts, moreover, this particular tenant had his own private means of entry and egress and hence the entrance to his suite was not used in common. *Chickering* v. *Welton,* (1944) 1 W.W.R. 144.

7. Status of Wartime Housing Ltd. — emanation or servant of the Crown.] — The plaintiff claimed that the defendant had wrongfully entered upon her property and erected a building thereon. Damages for trespass and a declaration of ownership were claimed. For the defence it was contended that (a) the property had been taken by the Crown under the Expropriation Act after which the plaintiff had no title or right to possession; (b) the defendant was an emanation or servant of the Crown and the entry and building were made and done in that capacity. Held, the defendant was an emanation or servant of the Crown and acted in that capacity throughout. The action so far as it was one of tort would not lie against the Crown or its servant. So far as declaration of title was concerned that was a matter between the plaintiff and the Crown and should be brought in the Exchequer Court which alone had jurisdiction. *McClay* v. *Wartime Housing Ltd.,* (1944) 60 B.C.R. 306; (1944) 3 D.L.R. 729.

8. Dominion rental regulations—whether "housing accommodation."] — The trial judge held that the apartment hotel in question was being operated as a business. That being so the premises were not "housing accommodation" within the meaning of regulation 294 and none of the regulations applies. As a result the parties are subject to the provincial law and the notice given was effective to terminate the tenancy. *Maxine Ltd.* v. *Cuillerier,* (1945) 61 B.C.R.

345; (1945) 3 D.L.R. 358; (1945) 2 W.W.R. 221.

9. Rental regulations — effect on proceedings for possession under Landlord and Tenant Act.]—The landlord applied for possession under sec. 19 of the Landlord and Tenant Act on the footing that, the rent being in arrears, the tenancy had been determined by notice to quit. The tenant at the hearing offered to pay all rent but an order for possession was made against him. Held, on appeal by the tenant, affirming the decision below, (a) the objection that the location of the premises was wrongly described in the writ of possession was capable of amendment, (b) an offer to pay all rental accrued was not made prior to the commencement of the proceedings, (c) the landlord, in the circumstances, was entitled to give notice to quit, (d) the objection that the order did not specify which sheriff was to act was over ruled. *Barre* v. *McManus,* (1946) 63 B.C.R. 345; (1947) 1 W.W.R. 263.

10. Whether suite in nursing-home let to a non-patient protected by Housing Order.]—The Federal Housing Regulations (No. 294) provide that they shall not apply to rooms in a nursing home. The tenant here was not a patient and occupied under an ordinary dwelling-house tenancy. Held, setting aside an order giving possession to the landlord, the premises intended to be protected by the regulation are those used as a nursing-home. Here the landlord had by his own act divested this part of the premises of that character and removed the suites from that description. The suite was ordinary housing accommodation and subject to Order 294. *Blaney* v. *Rodda,* (1946) 62 B.C.R. 559; (1946) 2 W.W.R. 511.

11. Landlord's notice to vacate based on desire to occupy personally — housing accommodation — multiple-family building.]—The dwelling was a large one with several entrances and was partly occupied by the tenant but mostly let out to lodgers. There was only one kitchen and there were no private bathrooms, although fifteen persons lived in the house. The landlord having purchased the property gave notice under sec. 15B of Wartime Prices and Trade Board Order 294 that he wanted the premises as a residence for himself. That section was available only as to "housing accommodation, not situated in a multiple-family building," i.e. one containing two or more housing accommodations. The judge held the notice was effective and made an order for possession under sec. 22 of the Landlord and Tenant Act. Held, on appeal, affirming the decision below, the question whether it was a multiple-family building, depended not on how many families lived in it, but whether it was designed for the occupation of a single family. Premises are not a multiple-family building unless they contain two or more separate place of dwelling, i.e., two or more housing accommodations, i.e. self-contained establishments. Here, the premises were a single family dwelling. Hence they comprised "housing accommodation not situate in a multiple-family dwelling" and the landlord was entitled to recover possession under the Provincial Landlord and Tenant Act. *Morrow* v. *Green,* (1946) 63 B.C.R. 210; (1947) 2 D.L.R. 181.

12. Whether store included in demise —action to recover back part of rent paid.] — The plaintiff sought to recover some $30.00 per month on the ground that it had been unlawfully collected as rent being in excess of the rent-freezing requirement. The judge dismissed the action holding that a certain store had not been included in the tenancy. Held, on appeal, the judge reached the proper conclusion. There may have been an attempt to evade the regulations by including the store as an excuse for increasing the rent above that fixed by the regulations. If so the plaintiff was a party to it and cannot now claim a refund of the illegitimate excess. *Mark Wong* v. *Quon Yuen Han,* (1946) 63 B.C.R. 191; (1946) 3 W.W.R. 126; affirming (1946) 1 W.W.R. 340.

13. Effect of Dominion regulation passed under War Measures Act—interference with writ of possession.] — An Emergency Shelter Officer under the powers contained in P.C. 9439 ordered a sheriff not to execute a warrant of possession of rented premises. Assuming that the regulations were validly passed and the officer duly authorized to enforce them, it was held, directing the sheriff to enforce the writ of possession, that to interfere with the administration of justice in this way would require language that forbids any other interpretation. It would amount to an administrative official revoking an order of a Court of competent jurisdiction. If however the intention is clearly expressed and if it is intra vires the Court must give effect to it. Held, further, P.C. 9439 gives no authority to interfere with the execution of

legal process. In *re Landlord and Tenant Act* and in *re Bachand and Dupuis,* (1946) 62 B.C.R. 436; (1946) 2 D.L.R. 641; (1946) 1 W.W.R. 545.

See CONSTITUTIONAL LAW.

See LANDLORD AND TENANT.

WATERS AND WATERCOURSES.

I. FORESHORE, 711.

II. WATER ACTS, 714.

I. FORESHORE.

1. Division of accretion between adjoining owners.]—An area to seaward of two adjoining owners was held to be an accretion which became their property. In an action between them the mode of division was held to be as follows: Take a line representing the line of the shore drawn at such distance seaward as to clear the sinuosities of the coast, and let fall a perpendicular from the end of the land boundary. The line of the shore will not be one representing the whole coast of the bay but one fairly representing the average line of the shore, extending on either side of the land boundary. *Paul* v. *Bates,* (1934) 48 B.C.R. 473.

2. Burrard Inlet — intergovernmental agreement of 1924—indefeasible title.]—The plaintiffs held an indefeasible title stemming from a grant of the Crown Dominion. The defendant had no title but was in occupation. He contended that Burrard Inlet was not a public harbour at Confederation and hence did not become the property of the Crown Dominion. Judgment for possession was awarded the plaintiffs. The settlement made between the the Dominion and the Province in 1924 made it unnecessary to go further back. The plaintiffs had the statutory protection of an indefeasible title. The defendant did not bring himself within the exception of sec. 37 (2) of the Land Registry Act. The plaintiff's title being conclusive it was not necesary to decide whether the area was or was not in a public harbour in 1871. *Kapoor Sawmills Ltd.* v. *DeLiko,* (1941) 56 B.C.R. 433; (1941) 2 W.W.R. 554.

3. Title to foreshore—60 years in possession—title from Crown through Hudson's Bay Company royalties.] — The petitioner applied under the Quieting Titles Act with respect to a strip of land between high and low-water mark adjoining the petitioner's upland property. He claimed by virtue of sixty years uninterrupted possession as well as by various grants and conveyances. Held, the petitioner had established his right to a declaration as to the title, both by prescription and by virtue of the documents of title. (1) As to prescription, the petitioner and his predecessors had continuous, exclusive, uninterrupted and undisturbed possession for over sixty years, and exercised acts of ownership during the whole of that period to the exclusion of all others including the Crown. The area was taxed by the City of Nanaimo as private property. (2) As to title, the original grant from the Crown to the Hudson's Bay Company in 1849 of Vancouver Island included "all royalities of the seas upon these coasts." Each of the subsequent grants and conveyances in turn passed the title of the Hudson's Bay Company under the 1849 grant. "Royalty" is a right held by the Crown and in the circumstances here included the right to the land between high and low water mark and hence the grant of 1849 was effective to pass title to the foreshore. In *re Quieting Titles Act* and in *re application of the Hirst Estate Land Co. Ltd.,* (1943) 59 B.C.R. 321; (1943) 4 D.L.R. 422; (1943) 2 W.W.R. 666.

4. Coal Harbour, Vancouver—foreshore—grant of waterfront lot "with the appurtenances."] — The Crown Dominion sued for a declaration that it was the owner of a strip of land between high and low tide in Coal Harbour in front of an upland lot owned by the defendant. The claim was based (a) on the ground that His Majesty held the title in 1792 and had never parted with it, or alternatively, (b) on an arrangement made in 1924 between the Dominion and the Province of British Columbia vesting it in the Crown Dominion. The defence claimed (a) on a Crown Grant to a predecessor in title of the upland lot "with the appurtenances", (b) title by prescription of sixty years, (c) on the footing that Coal Harbour was not part of a public harbour at Confederation and hence had never ceased to be Provincial property, (d) that the arrangement between the two governments was ineffective without legislation to implement it. The trial judge found for the

plaintiff, holding: Coal Harbour was a part of Burrard Inlet and hence a part of a public harbour and the property of the Dominion; the grant of the upland lot "with the appurtenances" did not include the foreshore in front of it; the arrangement between the two governments made by order-in-council was effective to transfer the administrative control from one to the other. Held, on appeal reversing the trial judge, that Coal Harbour was not, although Burrard Inlet was, a public harbour in 1871; the arrangement was ineffective without legislation. Held on further appeal to the Supreme Court of Canada, restoring the judgment of the trial judge, (a) Coal Harbour was part of a public harbour at the material time; (b) the foreshore did not pass as an appurtenance—land could not be appurtenant to land; (c) the arrangement was valid as being an admission of fact to that effect by the Province; (d) the onus of establishing its acquisition by prescription was not discharged by the defendants; (e) the making of a fill and the erection of buildings thereon could not be justified as an exercise of riparian rights arising out of the title to the upland lot. *Attorney-General of Canada* v. *Higbie*, (1945) S.C.R. 385; (1945) 3 D.L.R. 1; reversing (1944) 2 D.L.R. 425; (1943) 60 B.C.R. 123; reversing (1941) 57 B.C.R. 274; (1942) 3 D.L.R. 66; (1942) 1 W.W.R. 253.

5. Nanaimo Harbour—right to foreshore—effect of certificate of title.]—The plaintiff sued for the recovery of possession of a parcel below high-water mark in Nanaimo Harbour to which he held a certificate of indefeasible title under the Land Registry Act. The defendant claimed, (a) that the foreshore in question passed to the Dominion in 1871 under sec. 108 of the British North America Act and the plaintiff had no title through it, and (b) that he was adversely in actual occupation of and rightly entitled (sec. 37 (2)). The trial judge held that the plaintiff was entitled to possession. Held on appeal, affirming the decision below, the onus on the defendant of strict proof of the necessary possession was not discharged. After the issue of a certificate of title in 1920 no possession subsequent to that time could affect the title. As to the ownership in the Dominion, it was not shown that the Crown Dominion was owner in 1871 at Confederation. Five years earlier an official map showed the property as part of a subdivision. *Nanaimo Ice & Cold Storage Ltd.* v. *Blyth* (1946) 63 B.C.R. 150; (1946) 4 D.L.R. 524; (1946) 3 W.W.R. 719.

II. Water Acts.

1. Invalidity of tax-sale notice.]—The defendant, an improvement district under the Water Act, proposed to sell for delinquent taxes a property of which the plaintiff was mortgagee. The judge granted an injunction holding that under sec. 257 of the Act, the taxes were not delinquent and the requirement as to notice had not been complied with. Held on appeal, affirming the order for an injunction, that the defendant had disregarded the statute both as to the amount demanded by the notice, and the time allowed for payment. *Lowe* v. *Cawston Irrigation District*, (1934) 48 B.C.R. 83; (1934) 2 D.L.R. 464; (1934) 1 W.W.R. 508 affirming (1933) 4 D.L.R. 385; (1933) 3 W.W.R. 151.

2. Effect of Water Acts on riparian rights.]—A stream flowed through the property of the plaintiff, and lower down, of the defendants. The plaintiff had no water record or license under the Act. The defendant held a conditional water license but admittedly had no right to divert the stream. The plaintiff alleged that the defendants had diverted the flow above the plaintiff's lands and asked for an injunction. The defendants counterclaimed for the demolition of a dam erected by the plaintiff on his property. At the trial the defendants contended that the Water Acts had deprived the plaintiff of his riparian right to have the stream flow through his land undiminished. Held, enjoining the defendants from diverting the stream, that the plaintiff as riparian owner still had the right to make use of the water flowing through his property in a way which did not interfere with the recorded rights of other parties; and still had a remedy against a wrongful diversion which deprived him of that right. The legislature did not take away such right and remedy. Unless and until records or licenses have been granted for all the water flowing through his land, the plaintiff has the right to use it, subject to any rights granted. The defendants' license did not cover all the flow if they had not diverted it above. The plaintiffs were ordered to demolish the dam as it interfered with the rights of the defendants under their license. *Johnson* v. *Anderson* (1936) 51 B.C.R. 413; (1937) 1 D.L.R. 762; (1937) 1 W.W.R. 245.

3. Licenses to be appurtenant to land—Sec. 13.]—The plaintiff agreed to sell to the defendant certain placer-mining leases. The documents of title were put in escrow under an agreement whereby on certain defaults the leases and title were to go back to the plaintiff, together with all water rights appurtenant thereto. While the agreement subsisted the defendant had acquired certain water licenses conditioned upon the installation of a dam, flume and other works by the defendant. Default having occurred, the leases were again vested in the plaintiff but the defendant refused to give up the dam, etc., constructed under the licences. The plaintiff sued for a declaration that the works passed to him with the leases and the defendant asked for a rescission of the agreement. Held, giving judgment for the plaintiff that there could be no rescission because of failure of the defendant to repudiate promptly. As to the works they were tied to the licenses and by sec. 13 of the Water Act would pass with them. With the leases went the licenses, the dam, flume and other works constructed by the defendant in connection with the licenses. *Briscoe* v. *Hixon Creek (Cariboo) Gold Ltd.* (1937) 51 B.C.R. 554.

4. Improvement District—Water Act—"Unless otherwise provided" how to be read.]—The Water Act (sec. 53(1)) provides "Unless otherwise provided in the Letters Patent, the powers of every improvement district shall be exercised and its property managed by a Board of Trustees who shall be elected by the owners of land in the improvement district." The Letters Patent here appointed three persons as the first trustees. It was contended that they must be elected. The judge held, dismissing the action, that the opening words "unless otherwise provided" modified the whole of that part of the section and authorized the appointment in place of the election. He also held that sec. 49 (1) authorized the Lieutenant-Governor in Council to make the provision of the Act as to election inapplicable and to import a provision for the appointment of trustees. Held on appeal, reversing the decision below, the opening phrase, "unless otherwise provided" relates only to "Board of Trustees" and does not affect the plain statutory requirement that the trustees must be elected. The Letters Patent did not purport to make sec. 53 inapplicable and sec. 49 (1) was not effective for the purpose. *Bulman* v. *Anderson* (1946) 63 B.C.R. 297; (1947) 1 D.L.R. 614; (1947) 1 W.W.R. 248; reversing (1946) 63 B.C.R. 142; (1946) 4 D.L.R. 679.

See CONSTITUTIONAL LAW.

WILLS

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I. TESTAMENTARY CAPACITY.

1. Competency to make second will.]—The plaintiffs sued to prove a will in solemn form. The defendant counterclaimed that the deceased had made a second will and revoked the one sought to be proved. The second will was never found and the defendant contended that the deceased must have destroyed it animo revocandi with the result that she died intestate. The fact that the second will was made, was proved, but none of its contents, except that it contained a clause revoking all former wills. The medical and other evidence showed that the deceased had deteriorated mentally and was suffering from senile dementia soon after the date when the second will was made.

Held, the will sought to be proved in solemn form should be admitted to probate. The second one having been challenged, the onus is on the defendant to establish it and it has not been proved affirmatively that the deceased was of sound mind when she made the second will. In *re Estate of Bertha P. Fowler; The Royal Trust Co.* v. *Edith Allen* (1936) 51 B.C.R. 128.

2. Soldier's will—under 21 years of age.]—A will made by a soldier on actual military service at a time when he was under 21 years of age was not admitted to probate. Letters of administration were directed. *Re Bird,* (1940) 1 D.L.R. 785; (1940) 1 W.W.R. 63.

3. Undue influence and lack of testamentary capacity—duty of executors to prove in solemn form.]—The plaintiffs sought a declaration that the will was invalid for undue influence and lack of testamentary capacity. The defendants (executors) in addition to their defence counterclaimed for a decree that the will was valid and that it should be proved in solemn form. In dismissing the action the judge said that in cases where the validity of a will has once been called in question it is the duty of the executors to prove it in solemn form of law, and the practice is that they ask for this in the action by way of counterclaim. *Trites* v. *Johnson* (1945) 61 B.C.R. 397; (1946) 4 D.L.R. 412; (*sub nom. MacDougall* v. *Johnson*); (1945) 3 W.W.R. 100.

4. Whether mental delusions, hallucinations and illusions amount to lack of testamentary capacity.]—The trial judge dismissed an action to prove the will in solemn form holding that the onus on the plaintiff of proving testamentary capacity had not been discharged. As no question of credibility was involved the Court of Appeal could draw its own inferences from the evidence. Held, allowing the appeal, that the degree of unsoundness of mind of the testatrix was not such as would influence her decision as to the disposal of her property. Held, on further appeal to the Supreme Court of Canada, affirming the decision below, the fact that the testatrix was shortly after making the will held to be incapable of managing her affairs through mental infirmity did not per se mean that she lacked testamentary capacity. The Court should consider whether the testatrix was in such a state of mind that she could rationally take into consideration not merely the amount and nature of her property, but the claims of those who, by personal relationship or otherwise, had claims upon her. The testimony at the trial did not provide evidence that her hallucinations and delusions were influencing or directing her thinking as she gave instructions and executed the will. The onus was on those propounding the will, but if the Court was, on a balance of probabilities, satisfied that at the relevant time the testatrix was not impelled or directed by hallucinations or delusions and was in possession of testamentary capacity, the will will be valid. *McClure* v. *O'Neil,* (1946) 4 D.L.R. 545; (1946) S.C.R. 622 (sub nom. *O'Neil* v. *Royal Trust*); affirming (1945) 61 B.C.R. 544; (1945) 4 D.L.R. 373; (1945) 3 W.W.R. 641.

II. Execution.

1. Execution—signature on back.]—The testator signed on the back of a form under the words "will of", printed thereon. The witnesses signed in the usual place near the testimonium. Held, the will was entitled to probate under sec. 7 of the Wills Act. In *re William C. R. DeGruchy, deceased* (1941) 56 B.C.R. 271.

2. Alterations not initialled by witnesses—whether made before or after execution.]—In the absence of evidence changes in a will are presumed to have been made after it was executed. It is a rebuttable presumption. The onus is upon those who propound the will as altered to prove that the alterations were made before execution. *Carlson* v. *Hawkins* (*No. 2*), (1941) 56 B.C.R. 406; (1941) 2 W.W.R. 469 (*sub nom.*. In *re Hawkins Estate*).

3. Made in triplicate—two copies lost.] The will of the deceased was made in triplicate. Two copies were lost and the third carbon copy was presented for probate. Each copy had been duly signed and witnessed. Held, the document submitted should be accepted as the last will of the deceased. In *re Long Estate* (1942) 3 W.W.R. 696.

III. Revocation.

1. Whether will revoked by later will—intention of testator.] — The testator made his will leaving everything to his wife and providing that if she predeceased him

his estate should go to his wife's sister and daughter. His wife did predecease him by a few days leaving a substantial estate to her husband. When he died a later will was found simply leaving everything to the wife unconditionally and revoking former wills. If the revocation was effective it rendered the husband intestate (his wife having predeceased him) and his relatives, with whom he was not friendly, would share his estate, nearly all of which came from his wife. It was held, giving effect to the last will, that it was the expressed intention and not the actual intention that governed. The heavy burden of establishing that the revocatory clause in the last will, complete on its face, was not intended to be operative, was not discharged. The contention was that in all the circumstance, as the two wills were found together and that as an intestacy would otherwise result, the testator intended that the later will was only conditional upon his wife being alive at his death, and that otherwise the earlier one should take effect. Held, further, there was no evidence to support such a contention. Held on appeal, affirming the decision below, the language of the later will was too precise and unequivocal to permit any doubt as to its finality. The doctrine of independent relative revocation did not apply. *McCarthy* v. *Fawcett* (1944) 61 B.C.R. 59; (1945) 1 D.L.R. 545; (1945) 1 W.W.R. 70, affirming (1943) 60 B.C.R. 51; (1944) 1 D.L.R. 648; (1944) 1 W.W.R. 228.

2. Evidence of conditional revocation—subsequent to making of instrument.]—Evidence to establish that a testator intended his revocation of a former will to be conditional only did not deal with the situation at the date of the revocation but long afterwards. It was held inadmissible. *McCarthy* v. *Fawcett* (1944) 61 B.C.R. 59; (1945) 1 D.L.R. 545; (1945) 1 W.W.R. 70 affirming (1943) 60 B.C.R. 51; (1944) 1 D.L.R. 648; (1944) 1 W.W.R. 228.

3. Torn into pieces when found—intention—periods of recurring delusions.]—The last will of a former barrister properly executed, and with testamentary capacity, was found after his death with each page torn into five or six pieces They had been gathered up and placed in an envelope (slit open) and put in a box with other personal effects of the testator. The signature was not torn and the parts could be readily put together. The executor sought to prove the will, so mutilated, in solemn form. Over thirty years before, the testator had left his wife and family in England and come to Canada with the chief beneficiary; she had lived with him for all that time and passed as his wife. She cared for him and nursed him during his protracted illness. He had put his home in her name and a short time before his death told her of the will and showed her where it was, telling her what to do about it in case of his death. During his last years he became subject to hallucinations and delusions with intervals of lucidity. Held, admitting the will to probate, the testator gave her the will a few weeks before his death believing that it was a valid will. If it was torn by the testator he did it either unintentionally or in a moment of mental confusion with no intention of revoking it. The surrounding circumstances proved, together with the fact that the torn parts were carefully preserved, showed that there was no intention to revoke the will. In *re Estate of George Goodwin Norris, deceased,* (1946) 63 B.C.R. 62; (1946) 4 D.L.R. 441. *(Sub nom. Eaton* v. *Heyman);* (1946) 3 W.W.R. 98.

IV. Construction.

A. In General.

1. Codicil operating as revival of will.]—The rule that a codicil operates as a revival of the will, as if the testator had made a new will at the time, is subject to the limitation that the intention of the testator is not to be defeated thereby. *The Royal Trust Co.* v. *Shimmin* (1932) 46 B.C.R. 273; (1932) 3 W.W.R. 447, affirmed (1933) 47 B.C.R. 138; (1933) 3 D.L.R. 718.

2. Income and capital—Life tenant and remainderman.]—The testator apart from an annuity to his sister, gave the income of his entire estate to his wife and children for their lives with remainder to his grandchildren. He directed his trustees to convert and invest in Dominion securities with absolute discretion to postpone conversion. At the time of his death he held Dominion securities which appreciated in value and the trustees sold some of them. Held that the increment, both as a matter of law, and by reason of a direction in the will that no part of the proceeds of converting should be applied as past income, is capital. Where there is a loss arising from an authorized investment purchased at a premium the loss

falls on the reversion and not on the life tenant. Similarly the reversion suffers any loss there may be in the case of a sale of authorized investments purchased at a premium. In *re Estate of Walter Cameron Nichol, deceased* (1936) 51 B.C.R. 213.

3. Tenant for life and remainderman.] The plaintiff, as tenant for life, was entitled to receive the rents and profits of a settled estate but not to the powers of management or leasing, which should be left to the trustees. Neither was she entitled to be let into possession of the property. As life tenant, she was entitled to a first charge for moneys advanced by her to reconstruct a hotel on the property, which had been destroyed by fire. On the question of the right of the trustees to pay insurance premiums out of income, the amount already paid was sanctioned but for the future the trustees ought not to pay the premiums out of rents and profits. *Homfray* v. *Homfray* (1936) 51 B.C.R. 287.

4. Statement made by testator to person drawing will.]—An affidavit by a legatee and executor who drew the will, as to the testator's expressed wish and direction was held inadmissible where the will was not ambiguous or obscure. *Cave* v. *Day* (1945) 62 B.C.R. 177; (1945) 3 W.W.R. 481.

5. Rule in Shelley's Case—whether applicable.]—The testator left his estate to trustees and directed that out of the income from his Vancouver real estate there should for three years be paid a specific sum to each of his two daughters and a granddaughter. After three years the whole income from the real estate was to be distributed annually for a certain time after which it was to be sold and the proceeds divided between the descendants of so many of his daughters as should have descendants them then surviving. It was claimed that the rule in Shelley's case applied to the gift to the two daughters and that by virtue of Section 24 (2) of the Land Registry Act they each took an undivided one-third interest in fee simple in the testator's Vancouver real estate. Held the rule did not apply because (a) an estate of freehold was not given to the daughters, but only a legacy; (b) even if the freehold was given the gift over was not to their "heirs" but to the descendants of another class; (c) in any event "descendants" does not mean "heirs" as the word was used by the testator; (d) a time for distribution had been fixed by the testator; (e) the real estate at equity had become personalty and was thus free from the application of the rule. In *re The Trustee Act* and in *re Woodward Estate* (1944) 61 B.C. R. 298; (1945) 2 D.L.R. 497; (1945) 1 W.W.R. 722.

6. Direction as to death duties.]—A will directed the trustee to pay debts, funeral and testamentary expenses and "all probate, legacy and succession duties". Then followed three legacies and then the will proceeded "all above legacies to be free of probate legacy and succession duties". The residue of the estate was apportioned among the testator's children. Held that the direction to the trustee to pay the duties is merely telling them to do what it would be their duty to do without such a provision, and the statement "all above legacies to be free of probate, legacy and succession duties" applies only to the three legacies mentioned. In *re Blowey Estate* (1935) 50 B.C.R. 222; (1935) 3 W.W.R. 95.

7. Direction to pay monthly sum — death of beneficiary.]—At the time of her death M.C.D. was entitled to $200 per month out of the income of her father's estate during the life of her mother who still survived. Under M.C.D.'s will, her trustees, after making certain payments to others, were to pay the balance of the income to her daughter C.L. and after her and her sister's death to the grandchildren of the testatrix. Held, all that C.L. takes is the income from M.C.D.'s residuary estate and the $200 per month is part of that estate. It should be invested and the income paid to C.L. In *re Dockrill Estate*, (1938) 53 B.C.R. 319; (1938) 4 D.L.R. 803; (1938) 3 W.W.R. 367.

8. Capital or income—if income, when distributable.]—The testator was the owner of an undivided three-fourths interest in a petroleum and gas lease in Alberta. A sale was made since his death for $15,000 and an overriding royalty. The property proved productive. The judge held that of the $15,000, $5,000 was capital and $10,000 income distributable forthwith, and that the three-fourths share of the overriding royalty was income distributable forthwith. In *re Barker Estate*, (1938) 54 B.C.R. 176; (1939) 4 D.L.R. 773; (1939) 2 W.W.R. 379.

9. Bequest of moneys held in trust by testator—claimed by cestui que trust.]—

It was proved that the testatrix, president, manager and attorney in fact for the plaintiff company, had deposited in a bank in her own name certain sums received from the company for the payment of its income tax. Upon her death, the company claimed the money but was opposed by the defendant, as legatee under her will of all moneys on deposit in the bank in question. On an interpleader issue it was held that the deposited moneys were the property of the company, held in trust by the testatrix. They were not hers to deal with by her will as she presumed to do. In *re Estate of Evaline A. C. Richards, deceased,* (1943) 59 B.C.R. 76.

10. Meaning of "any residue" — presumption against intestacy.]—The testatrix left an estate of about $40,000. In her will she made various bequests amounting to a little more than half of it. At the end she provided that the furniture in certain boxes in storage should be sold "to defray expenses incidental to settling the estate. Any residue to go to Mrs. Edna Madigan who should examine the contents of the boxes in store". If the "residue" was limited to the furniture, the testatrix was intestate as to nearly half her estate. Held, the testatrix intended by the use of the words "Any residue" to refer not to the infinitesimal amount left from the disposal of the furniture, but applied to the residue of the whole estate. In *re estate of Hilda Clarice Stokes* (1944) 60 B.C.R. 161.

11. "All the proceeds of my estate" — later residuary disposition.] — The will after directing trustees to sell certain chattels and shares, went on to divide "all the proceeds of my estate" to various beneficiaries. Immediately thereafter it gave "all the rest and residue of my estate" to a son. If the earlier gift embraced the whole estate no effect could be given to the gift to the son. Held, reading the whole will and giving effect to every word, the phrase "proceeds of my estate" was intended to have reference to the earlier directions for sale and should be interpreted as a disposition only of the total sum realized from the sale of assets so directed earlier in the will. Otherwise the last residuary clause would have been useless since it would have nothing to operate on, the whole estate having been disposed of, including any lapsed gifts. In *re estate of C. H. Hitchen, deceased* (1944) 60 B.C.R. 312.

12. Ademption—legacies given jointly or in common.]—Where a testator bequeathed a sum at his credit in a certain bank to a hospital, and before he died, transferred the sum to another bank, the money in which he bequeathed to named persons, the legacy to the hospital was adeemed and it took nothing under the will. He directed that certain cash in the bank was to be divided into seven equal parts and divided among seven legatees. Two of them predeceased him; the lapsed legacies (being to tenants-in-common) fell into the residue. The residuary clause simply making a bequest to the seven legatees (being to joint tenants) resulted in the surviving five taking the shares of those whose shares had lapsed. In *re estate of Clement Holden, deceased* (1945) 61 B.C.R. 493; (1945) 4 D.L.R. 198; (1945) 3 W.W.R. 564.

13. Effect of mutual wills on property held jointly.]—When mutual wills, whether contained in a joint will or separate documents, relate to a joint property, the agreement to make the mutual wills, and the making of the dispositions in pursuance of the agreement, sever the joint tenancy, and convert it into a tenancy in common. In *re Estate of Noah C. Skippen, deceased* (1946) 63 B.C.R. 75.

14. How extrinsic evidence of testator's circumstances is to be considered.]—Where there is a latent ambiguity, it must often be the case that its very existence can only be made apparent by the reception of parol evidence. The question was whether a brother's widow was included in the testator's bequest to "my brothers and their families". The judge admitted evidence of the number, age and status of the brothers, and the condition of the brother's wife. Held, the facts shown to have been known to the testator were such as to indicate that he meant the word "family" to bear the ordinary and primary meaning and that he intended to benefit persons of his own blood. *Matheson v. Norman* (1947) 1 D.L.R. 71.

B. Charitable Bequests.

1. Such charitable institutions as my trustees select.]—A bequest to trustees directing distribution among such charitable institutions and schemes as the trustees shall in their absolute discretion select is a good charitable trust and not void for uncertainty. In *re estate of James Cunningham*

(1932) 45 B.C.R. 543; (1932) 3 D.L.R. 665; (1932) 2 W.W.R. 638.

2. Gift "for religious and or charitable work" to missionary society — whether valid.]—The rule against perpetuity does not apply to charitable gifts nor will they fail for uncertainty or want of a trustee. Such a gift must be of a public nature and be capable of administration by the Court. The Court in construing the gift may refer to the evidence as to the surrounding circumstances. Held, the testatrix used words of definition to define the purposes for which the gift was to be used. The contention that the expression "religious and/or charitable work" was so wide and indefinite as to make the gift void for uncertainty was not given effect to. Here the testatrix was using the terms "religious" and "charitable" in their ordinary and popular sense. She meant by religious work only such work as was charitable in the legal sense of that word. The object was to benefit the community or some part of it and so was of a public nature. It was capable of administration by the Court. In *re Morton Estate, Summerfield* v. *Phillips* (1941) 1 W.W.R. 310.

3. Whether charitable bequest—educational and religious objects.]—The testator made his will directing payment of $100,000 to trustees to be held upon the trusts declared by the trustees in favour of educational and religious objects in connection with the Baptist Denomination in the Province of British Columbia. The judge was asked whether the bequest was a valid one or whether it was void for uncertainty. Held, upholding the validity of the bequest, that a will which would otherwise be too uncertain to be valid may be upheld where a charitable purpose is declared and it is left to trustees to select the particular charities to be benefitted. The words in the will, "educational and religious objects" must be read conjunctively, i.e., in such a way that the fund can be applied only to such objects as are both educational and religious. Educational objects are prima facie charitable. A gift for religious purposes will be treated as a gift for a charitable purpose unless the contrary can be shown. It must, however, be of a public nature and must be capable of administration by the Court. Here the gift was to benefit the community or some part of it and not merely private individuals, and hence was of a public nature. While the testator did not specify any particular institution to be benefitted, he did specify the purpose and the Court could, if the trustees failed in their duty, compel them to reform the maladministration or direct a due administration. The objects of the testator's bounty were sufficiently specified to enable the Court to correct a deviation by the trustees. In *re Estate of John Morton, deceased,* (1941) 56 B.C.R. 536; (1941) 4 D.L.R. 763; (1941) 3 W.W.R. 513.

4. Gift to church "to be added to the endowment fund"—no such fund—whether charitable..]—The testatrix directed her trustee after the payment of legacies to transfer the balance to a named church "to be added to the endowment fund". The church had no endowment fund. The trial judge held that the gift was a charitable one and applied the cy pres doctrine. Held, by the Court of Appeal reversing the decision below, the gift was void for uncertainty since it was applicable to purposes not necessarily charitable. The added words as to the endowment fund so enlarged the possible objects to be benefitted that they could embrace purposes not charitable within the legal meaning. On further appeal to the Supreme Court of Canada it was held, restoring the judgment of the trial judge, the bequest was not conditional on the existence of an endowment fund and the words referring to it implied the application of the income for church purposes. Church purposes are prima facie religious purposes and, in the absence of evidence to the contrary, the gift was valid as a charitable bequest, and did not fail for uncertainty. *The Toronto General Trusts Corp'n* v. *St. Andrews-Wesley Church* (1948) 4 D.L.R. 241; (1948) S.C.R. 500 reversing (1947) 1 D.L.R. 477; (1947) 1 W.W.R. 97 reversing (1945) 62 B.C.R. 463; (1946) 3 D.L.R. 571; (1946) 2 W.W.R. 657. *(Sub. nom.* In *re MacKay Estate.)*

C. Vested and Contingent Interests.

1. Time of vesting.]—The testator left one-half of the income of his estate to his wife for life and the balance of the income to such of his children as appeared to the executors to be most in need. Should it at any time appear to the executors that none of the children are in need of assistance but are all unembarrassed financially then after the death of the widow, the trustees may divide the estate among the children then living in such proportions as the executors

think fit. The executors acted on the view that all the income (except the widow's share) should be available for distribution among needy children, without disposal of the corpus, until the time arrived, if at all, when none of the children needed assistance and all were unembarrassed financially. On an application to construe the will, the judge held that the children living at the wife's death took immediately vested interests in the corpus. Held, on appeal, reversing the decision below, that the estate did not vest until the time for distribution should arrive, and that such time might never arrive, in which case a partial intestacy would result. On further appeal to the Privy Council it was held, affirming the judgment of the Court of Appeal, that although a court may, of two possible constructions, prefer that one which avoids an intestacy, there is here no room for such a consideration in view of the clear language used. In *re Estate of Hugh Magee, deceased* (1936) 3 W.W.R. 355; (1936) 4 D.L.R. 81 affirming (1935) 49 B.C.R. 481; (1935) 2 D.L.R. 377; (1935) 1 W.W.R. 487.

2. Life interest, or vested interest subject to divestment.]—The testator directed that his trustee pay life annuities to his grandsons. He provided subject to the other provisions of the will that all the residue of his estate should go to his daughter Susan, with a direction that she was not to have more than the income until the annuitants died and she was thirty years of age. A later clause provided that if Susan should die leaving issue, such issue would take as if she were alive, and she might distribute the benefits among her issue by her will. If she died without issue, the General Hospital at Kelowna was to receive all the benefits she would have received if alive. The judge held that the will did not vest the residue, but gave Susan the life estate subject to the annuities, and gave her a special power of appointment by will among her issue. Held on appeal, reversing the decision below, Susan took a vested interest in the residue subject to divestment by her death before the death of the last annuitant, but which becomes indefeasible if she outlives the annuitants. If she dies first leaving issue they take equally if she makes no appointment; otherwise as appointed. If she dies without issue the hospital takes. In *re Rembler Paul,* (1942) 57 B.C.R. 500; (1942) 2 D.L.R. 743; (1942) 3 W.W.R. 251; reversing (1941) 56 B.C.R. 469; (1941) 4 D.L.R. 342; (1941) 3 W.W.R. 178.

3. Vested or contingent gift.]—The testator set aside a fund the income from which was to go to M for life. After her death the fund was divisible equally between her children on their reaching 25 with a gift to them of the income until each attained that age or married. As between the children the survivor was to take, and if none reached 25 or married, the fund was to fall into residue. M. left two children, 20 and 18. The older one married. Held, the older child was entitled to his share on marrying notwithstanding that he was then under 25. The children took not vested but contingent interests notwithstanding the gift of intermediate income. *Montreal Trust Co.* v. *Maltby* (1944) 3 D.L.R. 304.

4. Whether estate in remainder vested on death of testator.]—The testator after providing certain legacies divided the residue into two parts one "to go" to his son and the income from the other part to be paid to his widow until her death when the corpus was "to go to the son or to his family upon the conditions herein contained." Then followed provisions in case the son should predecease the testator. The son survived the testator and the widow survived the son. Held, the second part vested in the son and with it the income, less the payments to the widow, immediately on the death of the testator. The presumptions in favour of early vesting and against an intestacy applied. It follows that any surplus income belonged to the son. The estate in remainder having vested at the death of the testator it was not subject to divestiture on the death of the widow. In *re Hetherington Estate* (1945) 3 W.W.R. 270.

5. Whether vested interest became divested.]—A daughter of the testator took a gift of an estate in the income from his real estate for her life if she survived the other members of her class; pur autre vie if she did not survive (as she did not). He directed that if she died before the date of distribution, her share should go to her children. She had none. Held, hers was a vested interest for an estate pur autre vie subject to divesting on all of three events (1) her death, (2) her death before the last survivor of her class, (3) her leaving children. There was no divesting because the last event did not take place. The testator clearly directed payment to her until the death of the survivor of the class, but subject to this, that if she left a child the payment would be made to the child following

her death within the period. Held, further, the daughter's share of the income should be paid to her personal representative until the death of the last survivor. In *re Trustee Act* and in *re Woodward Estate* (1944) 61 B.C.R. 298; (1945) 2 D.L.R. 497; (1945) 1 W.W.R. 722.

6. Contingent residuary gift — disposition of income in meantime.]—The testator directed payment of one-third of the income each to his widow, son and daughter. Upon the widow's death, the son and daughter were to get half the income each. None was to take any of the capital, the residue of which was to be divided amongst the testator's grandchildren. The widow and daughter still lived but the son died leaving a son now 21. The question was what becomes of the one-third of the income to which the son was entitled, from the time of his death. The trial judge held that the son's son was entitled to one-half of the income left free by reason of the son's death, i.e., one-sixth of the income. The Court of Appeal varied that decision by giving the son's son one-third of such income. Held, on further appeal to the Supreme Court of Canada restoring the decision of the trial judge, clause 3 of the will (whereby the trustees hold one-half the residuary estate for the son's son subject to the trusts as to income), charges the total income with all the life interests. In *re Estate of Walter C. Nichol, deceased* (1948) 3 D.L.R. 577; (*sub nom. Royal Trust Co.* v. *Nichol),* reversing (1947) 4 D.L.R. 305; (1947 2 W.W.R. 180; varying (1946) 63 B.C.R. 205.

D. Absolute Gift Followed by Inconsistent Direction.

1. Absolute gift—subsequent direction inconsistent therewith.]—Where a testator makes an absolute gift of all his property to his wife and then goes on to dispose of what remains in her hands at her death or re-marriage, the subsequent disposition is ineffective to cut down the absolute gift. In *re Scott Estate* (1937) 52 B.C.R. 278; (1937) 3 W.W.R. 272.

2. Absolute gift or life estate.]—A testator left all his property of whatever kind to his wife. This was followed in his will by a direction that in certain circumstances the property remaining unused by her was to be treated as held by her upon certain trusts. It was held that the property passed to his wife absolutely. *Wood* v. *Johnson* (1939) 54 B.C.R. 426; (1939) 4 D.L.R. 767; (1939) 3 W.W.R. 349.

3. Absolute gift followed by direction to distribute residue on donee's death.]—A testator left everything to his wife "for her sole use and benefit forever". He, in a later paragraph, directed that upon her decease the "residue" should be divided among his sons. He went on to provide that on the death of his wife (who was an executrix) certain other persons were to be executors. It was contended that "residue" meant what was left after the debts were paid and that the testator intended that upon the death of his wife the whole estate (less the debts) was to go to his sons. Held, the testator anticipated that there would be some part remaining after his wife's death—that would be the "residue". He either overlooked, or did not know, that he could not in law direct how she should dispose of any part that might remain at her death. The widow took the whole estate. *Wilson* v. *Wilson* (1944) 60 B.C.R. 287; (1944) 2 D.L.R. 729; (1944) 2 W.W.R. 412 reversing (1943) 60 B.C.R. 31; (1944) 1 W.W.R. 223.

E. Devisees and Legatees.

1. Gift to "my three infant children"—posthumous child.]—A testator left all his property to his wife and his three infant children. After his death another child was born. Held that as the beneficiaries are described, not as a class, but as personae designatae, the posthumous child is not entitled to share in the estate. *Bull* v. *Sloan* (1938) 53 B.C.R. 81; (1938) 4 D.L.R. 79 reversing (1937) 3 W.W.R. 455.

2. Bequest to "my brothers and their families" — whether brother's widow included.]—The ordinary rule is that "family" used in a will means children and does not include a spouse. *Matheson* v *Norman* (1947) 1 D.L.R. 71; (1946) 3 W.W.R. 63.

V. LEGACIES.

1. Misdescription of subject matter of legacy—general or specific.]—The testator bequeathed "87 shares of common stock of the British Columbia Telephone Company Limited." The only company in existence

with a like name was "British Columbia Telephone Company", without the "Limited". At the time of his death the testator owned no common shares in British Columbia Telephone Company. Held that the legatee was entitled to benefit by the bequest, applying the rule that if there is in any part of a description, a sufficient description of the subject matter, with convenient certainty of what was intended, any erroneous addition will not vitiate the gift. The legacy was a general one, not being of a particular thing, but of something which was to be provided out of the general estate. The executors were entitled to expend the amount at which the shares were valued at the date of the testator's death, in the purchase of the shares, or if the shares could not be purchased, to pay the legatee the amount. In *re estate of Sir Frank Stillman Barnard, deceased* (1936) 51 B.C.R. 230; (1937) 1 W.W.R. 340.

2. Whether bequest void for uncertainty—legatee incorrectly described.]—A bequest to the "Royal Protestant Orphanage for Children, New Westminster, B.C." was not void for uncertainty, although there was no such institution. It was a good gift to the "Loyal Protestant Home for Children, New Westminster, B.C." In *re Estate of Mary Ann Humfrey, deceased* (1943) 60 B.C.R. 146; (1944) 2 D.L.R. 476.

3. Whether free of Succession Duty.]—There must be a clear direction in the will before executors will be found authorized to charge upon the estate generally the liability imposed by sec. 10 of the Succession Duty Act, upon a legatee or other person entitled under a will. In *re estate of C. H. Hitchen, deceased* see 723 (1944) 60 B.C.R., 312.

VI. Agreements to Leave Property By Will.

1. Effect of Statute of Frauds—specific performance.]—The plaintiff made an agreement with the deceased that in consideration of her continuing in his service until his death, he would leave her his house and property and one-half of his mining interests. This is a complete parol agreement and the Statute of Frauds does not stand in the plaintiff's way because of part, or to put it more accurately, complete performance of her of part of the agreement. Having continued until his death, she properly claims fulfilment of the agreement from the administrator, and specific performance should be decreed. *Folsetter* v. *The Yorkshire & Canadian Trust L. & S.* (1932) 45 B.C.R. 315; (1932) 3 D.L.R. 190; (1932) 2 W.W.R. 382.

2. Understanding that will would be made.]—The deceased made her home with the applicant for many years. He alleged that when she came from England she stated that she had made her will leaving half her estate to him and that it was always understood between them that in consideration thereof, she was to be boarded and lodged by him free of charge. Neither the applicant or his wife was able to swear that any actual contract had been made. Held, that a claim for one-half the estate, or alternatively, a monthly payment by way of remuneration, must be denied. In *re Estate of Elizabeth Smith, deceased* (1934) 49 B.C.R. 79; (1934) 3 W.W.R. 351.

3. Services rendered intestate — understanding that will would be made.] — Where the claimant rendered services and loaned money to the intestate over a period of nearly fifty years, relying, as he said, on a promise to leave him everything, and where there was no dispute about these facts the claimant was allowed to recover on a quantum meruit for the six years prior to the intestate's death. In *re McIver Estate* (1941) 57 B.C.R. 139; (1941) 3 W.W.R. 849.

4. Oral agreement—met by plea of the Statute of Frauds—agreement fully performed.]—The plaintiff sued for specific performance of an agreement with the testator whereby he alleged that she had promised to leave him a life interest in her home if he would look after the place and continue as a paying boarder. She made a will giving effect to the arrangement but much later and (as the judge found) having forgotten about the will, made a new one leaving the property to others. The plaintiff up to the time of the testator's death carried out his side of the bargain to the letter. The executor (a son of the testator) pleaded the Statute of Frauds. Held, the plantiff was entitled to specific performance. The evidence was clear that the plaintiff carried out the arrangement on the faith of and in pursuance of the oral agreement and the testator did not assume that he was doing otherwise. His acts were unequivocally referable to the contract and productive of an alteration of circumstances existing as between the plaintiff and the testator. Thus

equities had arisen in favour of the plaintiff resulting from acts done in execution of the contract. *Coyle* v. *McPherson* (1943) 60 B.C.R. 149; (1944) 2 D.L.R. 591; (1944) 1 W.W.R. 552.

5. Oral agreement with parents to work farm.]—The plaintiff, then about 16 years of age, agreed with his father that he would remain at home and help on the farm during the parents' lifetime and that the farm would be his upon their death. Through changes on the farm he did not work there steadily during the five years before their death, but his parents consented to that arrangement. The father died first and the farm passed to the mother. She on several occasions made statements consistent with the arrangement set up by the plaintiff but not referable directly to it. Held, corroboration was afforded by these statements but the Statute of Frauds was pleaded and the part performance proved was not unequivocally referable to the contract. Held, further, the plaintiff was entitled to recover for services but only for the last six years prior to his mother's death, the Statute of Limitations having been pleaded. *Hilbert* v. *Streight* (1944) 60 B.C.R. 219.

6. Mutual wills by husband and wife—effect of new will made by survivor.]—S. and his wife made identical wills except for the interchange of the donees for life. Each provided for a life interest in the survivor with remainder to a daughter. Each contained a recital explaining that the daughter had promised to look after testators until they died. The daughter's affidavit verified the arrangement mentioned in the recital and she resided with and cared for them. The wife died first. The husband then made a new will disposing of his estate in a different manner. Held, on all the evidence there was an agreement between S. and his wife pursuant to which they executed the wills and by which each was bound. The surviving husband was precluded from making any other distribution of his estate and, while the husband's new will must be admitted to probate, his executor takes the property subject to the trust in favour of the daughter. The fact of the making of the mutual wills is not in itself evidence of an agreement not to revoke; it must be shown, as here, that there was an agreement. Strictly speaking a will is always revocable but if the revocation amounts to a breach of a covenant not to revoke, the executor will be held as a trustee to perform the contract. In *re estate of Noah C. Skippen, deceased,* (1946) 63 B.C.R. 75; (1947) 1 D.L.R. 858.

7. Failure to make out a contract — likewise no claim for a quantum meruit.]—The plaintiffs alleged that the deceased, man and wife, as proprietors of a business had agreed with them that if the plaintiffs would continue to work at the business during the lives of the deceased they would have the business when the survivor of the proprietors died. The plantiffs continued to work, but the deceased made no provision in their wills to implement the alleged agreement. Held, dismissing the action, no contract with the clearness and definiteness required by the law was established. The salaries of the plaintiffs were not lessened after the date of the alleged agreement. The evidence disclosed no acceptance of the alleged offer even if an offer was proved. The salaries paid were not generous, but could not be said to be so grossly inadequate as to buttress the plaintiffs' contention. As to a quantum meruit it, too, implied the existence of a binding contract with the remuneration not fixed. *Porter* v. *The Toronto General Trusts Corp'n,* (1946) 62 B.C.R. 468; (1946) 4 D.L.R. 345; (1946) 2 W.W.R. 513.

8. Whether declaration of trust testamentary or not—effect of later legacy adding to trust property.]—The testator agreed in writing with his divorced wife that if he predeceased her, she was to have one-third of his whole estate and covenanted that he held the one-third share in trust for her. Some months later he made a will leaving her one-third of his residuary estate. His estate was larger at his death than at the date of the agreement. She knew nothing of the will until after his death. Held, in construing instruments as to their testamentary character the substance rather than the form is to be looked at. Here the agreement was not a testamentary document but one by which the testator constituted himself a trustee for the wife, and the trust interest vested when the agreement was made subject to divestment if she predeceased him. The legacy was not given in compliance with any covenant in the agreement. She was unaware of it and was not put to her election as between the trust property and the legacy; they so differed in character that the rule as to satisfaction did not apply. *Re Woodman,* (1947) 2 D.L.R. 797.

VII. Conditions.

1. Public policy as affecting codicil.]—The deceased, a wealthy man, made provision for his wife for life and for his five children in equal shares. His second son, having made what the testator called "an ill-advised marriage", the latter added a codicil to his will revoking the bequest to him and providing instead a life annuity of $70 per month with a provision that if at 35 years of age the son should be free of disputes and troubles with his wife and under no liability to pay her any money from the estate, then he was to be reinstated and receive the share originally provided for him at that age. The question to be determined by originating summons was whether the codicil was void as being against public policy. The trial judge held the codicil to be valid. Held, on appeal, affirming the judgment below, that no offence against public policy was disclosed and the codicil would appear to have been designed rather to promote harmony, thrift and industry in the son's family. In *re estate of Stephen Jones, deceased, No. 2,* (1934) 49 B.C.R. 204.

VIII. Testator's Family Maintenance Act.

A. In General.

1. Position of others than legal claimants.]—The judge found that the testator had not made adequate provision for his widow. It was submitted on her behalf that in taking into account the situation of others having claims, only those should be considered who had legal claims on the estate. Held, that consideration should not be limited to those having claims under the Administration Act or of the Testator's Family Maintenance Act. In *re estate of W. S. Pedlar, deceased,* (1933) 46 B.C.R. 481; (1933) 1 W.W.R. 267.

2. Father's bequest subject to conduct of son at age 35.] — The testator, a wealthy man, made provision for his wife for life and for his five children in equal shares. The second son, made what the testator called "an ill-advised marriage" and he added a codicil to his will revoking the bequest to him and providing instead a life annuity of $70 per month. He then provided that if at 35 years of age, the son should be free of disputes and troubles with his wife and under no liability to pay her any money out of the estate, then he was to be reinstated and receive the original share provided for him at that age. The son petitioned under the Testator's Family Maintenance Act. Held, increasing the monthly allowance to $200, that the inquiry should be as of the date of the hearing and not as of the date of the testator's death, that a time when the son was entangled in disputes and troubles with his wife would be the very time when he would require the assistance of his father, that there was a failure of that "parental duty" which a "judicious father" would have exercised. In *re Stephen Jones, deceased (No. 3)*, (1934) 49 B.C.R. 216; (1934) 3 W.W.R. 726,

3. Widow, daughter and adopted son.]—A son, adopted under the provisions of the Adoption of Children Act of Saskatchewan is entitled to the benefits of the Testator's Family Maintenance Act. Since the testator made his will the estate had so shrunk that the wife's share was greatly reduced. The wife suggested that she be given a lump sum of $15,000 and a life interest on the balance of the estate, which balance the children would receive at her death. This would cut out the testator's sisters and would, in effect, be making a new will, a thing the Court is not permitted to do. In view of the circumstances it was ordered (1) that the wife have an additional $120 per month for herself, her daughter and her son; (2) that the capital of the estate be charged to meet any subsequent order that may be made on the application of either the daughter or son; (3) the further consideration of the petition to be reserved to meet future contingencies. In *re Testator's Family Maintenance Act* and *Estate of George Henry Ramsey, deceased.* (1935) 50 B.C.R. 83; (1935) 2 W.W.R. 506.

4. Effect of release given to testator.]—Some time before the testator's death, the wife, petitioner, in consideration of substantial sums, covenanted to accept them as a complete settlement of all claims against his estate and as adequate provision and support after his death. The judge found that adequate provision for her had not been made in the testator's will and directed payment of a monthly sum subject to adjustment in the future. Held, on appeal, affirming the decision below, the release should be considered in deciding the need for maintenance but it was not a bar to the petitioner's application. In *re Estate of Thomas Daniel Lewis,* (1935) 49 B.C.R.

386; (1935) 2 D.L.R. 45; (1935) 1 W.W.R. 747.

5. Applies to land here of testator domiciled abroad.] — The Act applies to land in British Columbia belonging to a testator domiciled abroad but does not apply to his movables. In *re Rattenbury Estate and Testator's Family Maintenance Act,* (1936) 51 B.C.R. 321; (1936) 2 W.W.R. 554.

6. Adultery and desertion as bar to wife's petition.]—The testator having no children divided his $11,000 estate giving $1000 to his wife and the balance to nieces, nephews and a sister-in-law. The wife's petition under the Act was opposed on the ground that the widow's character or conduct was such that an order should not be made. She was charged with adultery and desertion. The judge found that adultery was not proved nor did the evidence show desertion by the wife. Held, no adequate provision was made for her by the will. In *re Gouge Estate,* (1937), 52 B.C.R. 544; (1938) 2 D.L.R. 800; (1938) 1 W.W.R. 832.

7. Insurance payable to preferred beneficiaries.]—The testator died insolvent but left two policies of insurance payable to his children. On application of the widow under the Testator's Family Maintenance Act the judge reallocated the insurance money by giving $10,000 to her. Held, on appeal, reversing the decision below, the insurance money did not form part of the testator's estate and was not subject to disposition under the Act. In *re Testator's Family Maintenance Act* and *the Estate of Donald Alexander Macdonald, deceased,* (1938) 52 B.C.R. 473; (1938) 2 D.L.R. 798; (1938) 1 W.W.R. 758.

8. Matters to be considered.]—The Act is not a statute empowering the Court to make a new will for a testator. It allows the Court to alter the will only so far as it is necessary to provide for the proper maintenance and support of wife, husband or children where no adequate provision has been made for the purpose. The whole circumstances should be considered. The first inquiry in every case is as to the need of maintenance and support; and the second, what property has the testator left. If the Court finds that adequate provision has not been made, it must consider what would be not only adequate but just and reasonable also, and in deciding this, the value of the estate and the situation of others having claims on the testator must be taken into account. In *re Fergie Estate,* (1939) 54 B.C.R. 431; (1939) 4 D.L.R. 821; (1939) 3 W.W.R. 573.

9. Testator domiciled in Alberta—jurisdiction as to shares.] — The testator domiciled in Alberta where his will was proved, left shares in a British Columbia company. A petition under the Testator's Family Maintenance Act was refused. Shares in a company are "mobilia" and although they may be subject to duty in two jurisdictions, nevertheless the "lex domicilii" prevails. The Courts of the jurisdiction of the "register" will not make an order with respect to shares which may conflict with the orders of the Courts of jurisdiction of domicil. The testator being at his death domiciled in Alberta, a British Columbia Court would not make an order against movables and hence there is no power to grant the petition. In *re Testators' Family Maintenance Act* and *in re petition of Laura Elsie Elliott,* (1941) 56 B.C.R. 178; (1941) 2 D.L.R. 71; (1941) 1 W.W.R. 356; affirmed (1941) 56 B.C.R. 465; sub nom. In *re William Stewart Herron, deceased,* (1941) 4 D.L.R. 203; (1941) 3 W.W.R. 877.

10. Allegation of cruelty by petitioner husband.]—Under sec. 4 of the Act, the Court may refuse to make an order in favour of any person whose character or conduct should disentitle him to the benefit of an order. Where the judge took the allegations into consideration and made an order approximating the division that would have resulted if an intestacy had taken place, the appeal was dismissed. In *re Testator's Family Maintenance Act* and *Estate of Adrianne DuPaul, deceased,* (1941) 56 B.C.R. 532; (1941) 4 D.L.R. 246.

11. Principles upon which relief granted.] —Although the judge properly held that the petitioner (husband) was not precluded by a separation agreement, nor by sec. 4 of the Act, by reason of his character or conduct, he dismissed the petition almost wholly on the ground that the deceased (wife) had never done anything for the petitioner. Held, on appeal, making an allowance of $1,000 out of her $4,000 estate, that the judge had failed to apply the rules laid down in *Walker* v. *McDermott,* (1931) S.C.R. 94. In *re Testator's Family Maintenance Act* and in *re Estate of Margaret Ellen McNamara,* (1943) 59 B.C.R. 70; (1943) 3 D.L.R. 396; (1943) 2 W.W.R. 344.

12. Petition by widow — separation agreement.]—The testator left an estate of about $70,000 to his four sisters, with nothing for his widow. They had lived apart for many years under a separation agreement. Held, the separation agreement was not a bar to her petition. She was not, on the evidence, disentitled by reason of her character or conduct under sec. 4 of the Act. The separation was not shown to be of her choosing or due to her misconduct. An adequate, just and reasonable allowance was $20,000. In *re Testator's Family Maintenance Act* and in *re Estate of Samuel George Foxe, deceased,* (1944) 60 B.C.R. 77; (1944) 2 D.L.R. 392.

13. One son taking entire estate—the other (the petitioner) one dollar.]—When it is disclosed to the Court that the testatrix has failed to make proper and equitable provision for a child, the Court should step in and do what the testatrix as a parent should have done. The fact that one son took the entire estate while the petitioner took nothing does not of itself show that no adequate provision had been made for the proper maintenance and support of the petitioner as required by the Act. Here, the testatrix's disapproval of the petitioner's marriage and her antipathy to the petitioner's wife was so great as to prevent her from exercising normal judgment as a just parent toward a son whose condition of health and inability to earn merited better treatment. In *re Testator's Family Maintenance Act* and in *re Isabella Caroline Dickinson, deceased,* (1944) 60 B.C.R. 214; (1944) 2 D.L.R. 537; (1944) 2 W.W.R. 1.

14. Applicant's physical disability sole ground for relief.]—The applicant was the ne'er-do-well of the family and was so regarded by his parents. He was, however, through physical disability, partially prevented from earning his living. As he had not communicated with his mother (the testatrix) for some time she may not have been aware of his incapacity. His condition of health was the only factor bringing his claim within the terms of the Act. The testatrix's bequest to the applicant of $300 was varied by awarding him $2000 in instalments of $35 per month. In *re Testator's Family Maintenance Act* and in *re Estate of Polly Dunn,* deceased, (1944) 60 B.C.R. 457; (1944) 3 W.W.R. 289.

15. Petition dismissed where claimants not in need of "proper maintenance and support."]—The testator left one dollar to each of the daughters (the petitioners) and the remainder to his son and grandson with a life estate to his widow. The petitioners had left home many years before and were in comfortable circumstances. The son and grandson had worked the farm with the testator under a family arrangement whereby the property would come to them eventually. The Testator's Family Maintenance Act was not intended to operate automatically where members of a family, adults or minors, are passed over in a parent's will. If there is no need the Act does not apply. The testator's right to prefer one child to another, or a grandchild to a child, should not be lightly interfered with. In *re Testator's Family Maintenance Act* and in *re Estate of Sidney Stewart Dawson, deceased,* (1945) 61 B.C.R. 481; (1945) 3 D.L.R. 532.

16. Claim by estranged son — estate given niece.] — The claimant had for twenty years been estranged from his father, the testator. The testator's niece had made him a home and the evidence showed that while he was alive he treated some of his property as if she were the beneficial owner of it. The son's application was dismissed. A man, having a small estate, who had been so long separated from his son, and who in his last years found comfort and affection with his niece, should be permitted to leave his property to her as a mark of his appreciation for her services to him. The fact that a child has been ignored by a testator is not in itself any reason for invoking the Act. In *re Testator's Family Maintenance Act* and in *re Estate of Frederick Saunders, deceased,* (1945) 62 B.C.R. 204.

17. Status as claimant of informally adopted child.]—A person claiming to have been adopted by the testator under an informal arrangement acquires no legal status to petition as a child of the testator under the Testator's Family Maintenance Act. *Re Esplin,* (1946) 2 D.L.R. 404; (1946) 1 W.W.R. 679.

B. Adequacy of Provision.

1. Adequate, just and equitable provision by testator.]—The testator left an estate of about $1500, together with $2600 of life insurance. Under his will the widow was to take one-third and the balance was divided equally among five children by a former wife. Upon a petition by the

widow who was 62 years of age and unable to work, it was held that proper provision had not been made under the will for the widow or for one daughter who was in necessitous circumstances. The trustees were directed to apportion a larger share to the widow and to the destitute daughter. In *re Testator's Family Maintenance Act;* in *re Clegg Estate,* (1933) 47 B.C.R. 447; (1933) 3 W.W.R. 407.

2. Adequacy of provision—matters to be taken into account.]—In exercising its discretion as to what is adequate provision for the wife of a testator under the Act, the Court should enquire into four things, viz. (1) the station in life of the parties; (2) the age, health and general circumstances of the wife; (3) the means possessed by the testator at the time of his death; (4) the property or means which the wife possesses in her own right. Further the claims of others upon the testator must be taken into account. It was ordered that there be paid to the wife out of the capital of the estate an amount sufficient to bring her income from the estate to $600 per year and, so that the Court might be able to protect the wife in the future, the further consideration of the matter was adjourned. In *re Estate of Frederick William Morton, deceased,* (1934) 49 B.C.R. 172; (1934) 3 W.W.R. 719.

3. Inadequate provision for wife.]—The widow, 70, was left the income of an estate of about $4800 for life and thereafter the property was to be divided among five children of a previous marriage all of age and in good circumstances. She was unable to work and had few or no assets of her own. The executors were directed to make her a monthly payment and in order to deal with future contingencies the further consideration of the petition was reserved. In *re Testator's Family Maintenance Act* and *Estate of William Pridmore, deceased,* (1935) 50 B.C.R. 300; (1936) 1 W.W.R. 390.

4. Principles to be applied in altering testator's disposition.]—The testatrix left her only child, a daughter, about $1,000 of a $9,000 estate and divided the balance among 21 nieces and nephews of her deceased husband. The daughter, 45, and in poor health, petitioned under the Act. To give relief, the Court must find that the testatrix had not made adequate provision for the proper maintenance and support of the petitioner. Having made that finding the size of the estate and the situation of others having claims on the testatrix must be considered. The Court should repair the breach of the moral duty of the testratrix. The petitioner had supported herself for most of her adult life. Here the bequest of $1,000 to the petitioner was increased to $5,000. In *re Gill Estate,* (1941) 3 W.W.R. 888.

5. Provision made for mistress—effect on claims of widow and adopted child.]—The moral aspect of the relationship existing between the testator and the mother of his illegitimate child is not an element to be considered if adequate provision is made for those in whose favour the Act is intended to operate. A basic condition for the exercise of jurisdiction under the Act requires that the Court be of the opinion that reasonable provision has not been made for the dependant to whom the application relates; if the condition fails, the provisions for relief do not come into operation. Here, it was held that adequate provision had been made for the petitioners and the petition was dismissed. In *re Testator's Family Maintenance Act* and in *re Estate of Hubert Shadforth, deceased,* (1943) 58 B.C.R. 317; (1943) 2 D.L.R. 123; (1943) 1 W.W.R. 793.

C. Procedure.

1. Time within which application may be made.]—Where under sec. 11 of the Act, application must be made within six months from the date of the grant or resealing in the Province of probate, the time begins to run from the sealing of the grant. In *re Estate of W. S. Pedlar, deceased,* (1933) 46 B.C.R. 481; (1933) 1 W.W.R. 267.

2. When application to be made.]—Sec. 11 of the Act says no application shall be heard unless it is made within six months from the date of the issuance of probate. Held, sec. 3 confers a right in general to make application without reference to any temporal limitation, which right is not taken away by sec. 11, one purely of limitation as to when the application may be brought. The ruling of the judge below that the applicant could not present her application until probate had been granted was set aside. *Murgatroyd* v. *Stewart,* (1938) 54 B.C.R. 172; (1939) 3 D.L.R. 680; (1939) 3 W.W.R. 106.

3. Petition without specific claim for relief.]—Where a petition under the Testator's Family Maintenance Act made no specific claim for relief the omission was fatal and was not saved by the style of cause which concluded "and in the matter of a claim by Laura Elsie Elliott for maintenance." In *re Testator's Family Maintenance Act* and in *re petition of Laura Elsie Elliott,* (1941) 56 B.C.R. 178; (1941) 2 D.L.R. 71; (1941) 1 W.W.R. 356; affirmed (1941) 56 B.C.R. 465 sub nom. In *re William Stewart Herron, deceased,* (1941) 4 D.L.R. 203; (1941) 3 W.W.R. 877.

4. Parties—notice of hearing—rule 130 not applicable.]—The testator left his estate to his widow, two sons and a grandson. A daughter applied under the Testator's Family Maintenance Act. There were four executors, the wife, the two sons and one W. An order was made under rule 130 that service of the petition on two of the executors would be good service on the personal representatives of the testator. No other service was made. Held, that the rule was not intended to cover a case where the rights of the beneficiaries inter se are in question. The two sons and a grandson had no notice whatever. In *re William Stewart Herron, deceased,* (1941) 56 B.C.R. 465; (1941) 4 D.L.R. 203; (1941) 3 W.W.R. 877; affirming (1941) 56 B.C.R. 178; (1941) 2 D.L.R. 71; (1941) 1 W.W.R. 356 (sub nom. *Elliott*).

5. Petitioner dying while judgment reserved—effect on petitioner's claims.]—The surviving husband petitioned for a variation of his wife's will under the Act. His petition was dismissed on the judge's finding that she has just cause for disinheriting him. After his appeal had been heard and judgment reserved, he died before judgment was rendered. Application was made to add the husband's executors. Held, adding the executors and allowing the appeal, that the appellant be given the house property and the real estate unencumbered. Per Sloan J. A. It is unnecessary to decide whether the action survived or not. Judgment should be entered nunc pro tunc as of the date when judgment was reserved. Per O'Halloran, J. A. The appellant's equitable right under the Act passed to his executors. He should be treated as if there were an intestacy and given the entire estate. Per McDonald, J. A. What the petitioner would get was in the nature of a bounty. He had the right to ask for a bounty but none had been awarded him at the time of his death. He alone had the right to ask for it and that right died with him. *Barker* v. *Westminster Trust Co.*, (1941), 57 B.C.R. 21; (1941) 4 D.L.R. 514; (1941) 3 W.W.R. 473 and 614; reversing (1940) 3 W.W.R. 239.

6. Whether examination for discovery may be had—necessity of pleadings if examination to be available.]—Examination for discovery is obtainable only from parties between whom and the applicant there is an issue defined by the pleadings. As there are no pleadings no discovery can be had. In *re Testator's Family Maintenance Act* and *Estate of Charles Henry Hitchen, deceased,* (1943) 60 B.C.R. 117; (1944) 1 W.W.R. 245.

7. Petition premature where provision in will might give relief.]—The testator directed his trustee in his absolute discretion to make additional payments to the widow in the case of sickness or other emergency. The petitioner had not invoked this provision. Held, the matter should be adjourned until application is made pursuant to the will. In *re Testator's Family Maintenance Act* and in *re Harper Estate,* (1946) 3 W.W.R. 59.

See EXECUTORS AND ADMINISTRATORS.

See TRUSTS.

WOODMEN'S LIENS.

I. IN GENERAL, 744.

II. PROCEDURE, 746.

I. IN GENERAL.

1. Whether lien attached to actual logs worked on.]—Work done on logs under one logging operation cannot be said to be work performed in connection with logs cut in an entirely distinct operation in another locality, when the only connection between the two is that the same employer and employees are concerned and the employment is continuous in the sense that there is no discharge and rehiring intervening between the two. *Lucas* v. *Moore Timber Co.*, (1938) 2 D.L.R. 793; (1938) 1 W.W.R. 556.

2. Default judgment for lien — claim by judgment creditor against persons who seize and remove the liened logs.]—The plaintiff as the assignee of several lien claims against the logs of N. sued for enforcement and signed judgment against N. in default of defence. Some time later the plaintiff brought action against the defendant claiming that it had seized and taken away the liened logs in respect of which judgment had been obtained and claiming possession and damages. The defendant in its statement of defence said the judgment was a nullity and that the statement of claim disclosed no cause of action. It was ordered that the two points of law be disposed of before the trial. The judge dealt only with the first and held that the judgment was a nullity because the registrar had no jurisdiction to sign judgment in a lien action of this kind. He then dismissed the action. Held, on appeal, remitting the action for trial with leave to amend by both parties, that, whether or not the judgment was properly entered, the liens remained in existence and by appropriate amendments the plaintiff could set up a triable claim for wrongful dealing with the liened logs. *Warehouse Security Finance Co. Ltd.* v. *Niemi Logging Co. Ltd.*, (1942) 57 B.C.R. 346; (1942) 2 D.L.R. 213; (1942) 1 W.W.R. 785.

3. Status of default judgment for lien —whether it is a judgment in rem.]—The plaintiff as assignee of certain loggers, who had filed liens under the Woodmen's Lien for Wages Act, had sued to enforce them and had obtained a judgment by default against the employers of the loggers. The defendants took and removed the liened logs whereby the liens were lost. The plaintiff claimed damages and on the trial proved the liens by putting in the default judgment against the employers of the loggers. It was contended by the defendant, (a) that the judgment was res inter alios acta and not admissible here, (b) the judgment was a nullity as the registrar was without power to make a declaration that a lient existed. Damages were awarded. Held, on appeal, affirming the judgment below, the default judgment was one in rem and good against all the world and hence was admissible to prove the lien. The registrar had the power to enter the default judgment. *Warehouse Security Finance Co. Ltd.* v. *Oscar Niemi Ltd.*, (1944) 60 B.C.R. 321; (1944) 3 D.L.R. 568; (1944) 3 W.W.R. 567.

II. PROCEDURE.

1. Joinder of claims resulting in suit for more than $1000.]—Forty lienholders duly filed their claims under the Woodmen's Lien for Wages Act. A single action was brought in the County Court by two lienholders acting for themselves and as assignees of two groups of the others. The total claim exceeded $1000. The defendant moved for a writ of prohibition on the ground that the County Court's jurisdiction was exceeded. The judge refused the order. Held, on appeal, reversing the decision below, that sec. 32 of the Act, permitting lienholders to join in taking proceedings, is procedural only and is controlled by sec. 7 which is jurisdictional and provides for enforcement in the Supreme Court where the amount exceeds the jurisdiction of the County Court. *McGilvray* v. *Queensboro Sawmills Ltd.*, (1935) 50 B.C.R. 63; (1935) 2 D.L.R. 784.

2. New trial ordered where judge proceeded on wrong ground.]—In an action to enforce Woodmen's Liens the question was whether the plaintiffs could have a lien on logs cut on one license for logs cut on another. The trial judge found for the plantiffs on the ground that the defendant had no status to contest the liens. Held, ordering a new trial, that the trial judge had proceeded on a wrong ground. *Lucas* v. *Gulf Logging Co. Ltd.*, (1937) 52 B.C.R. 416.

3. Failure of buyer of logs to retain unpaid wages—effect on money attached and paid into Court.]—The lien-claimants were entitled to be paid by N. for labour and services on logs. N. who was a judgment debtor sold the logs to H. and before payment was made N.'s judgment creditor garnisheed the purchase money. H. paid it into Court without any suggestion that the lien-claimants were interested. In a contest for the money between the judgment creditor and the lien-claimants the County Court judge held that the lien-claimants had a prior charge or lien on the money in Court. Held, on appeal, reversing the decision below, there was no lien on the fund. Under the Woodmen's Lien for Wages Act a buyer of logs is required to call for a payroll and must hold back enough to cover unpaid wages. Here the buyer did not do so. By virtue of sec. 38 if a buyer neglects this duty he becomes personally liable for the wages. Hence the remedy of the lien-claimants was against H. *Powell* v. *Norgren*, (1938) 54 B.C.R. 476; (1940) 2 D.L.R. 188; (1940) 1 W.W.R. 272.