THE

Eastern Law Reporter.

VOL. VII. TORONTO, JANUARY 1, 1910. No. 10

NOVA SCOTIA.

SUPREME COURT. JULY 5TH, 1909.

LANGLEY v. MARSHALL ET AL.

Fraudulent Conveyance — Agreement by Grantee to Pay Grantor's Debts—Grantee a Creditor.

Action to set aside two deeds upon the ground that they were made with intent to hinder, delay and postpone the creditors of the grantor. The grantor was indebted to a number of persons, and his indebtedness aggregated upwards of one thousand dollars. He owned several lots of land, all of which were heavily mortgaged. He conveyed a part of his lands to his son by a conveyance expressed to be made in consideration of one dollar, and a few months later he conveyed the remainder to the same son by a conveyance expressed to be made in consideration of six hundred dollars. It was proved at the trial that the son did not pay his father any money whatever for the lands, but on the other hand the son claimed that his father was indebted to him, and the agreement between them was that the son would pay his father's creditors and throw in his own claim in exchange for the lands. The agreement to pay the father's creditors was verbal only, and the father gave a list of the creditors to his son, but the plaintiff's name was not included in the list. The son paid all the other creditors before plaintiff brought this action. Ten years had elapsed between the making of the deeds and the trial of the action.

It was contended by counsel for the plaintiff that it is only necessary that the conveyance attacked delay, hinder or

postpone creditors' rights in order that it be void under 13 Eliz. or sec. 2 (1) of chap. 11, Acts of N. S. 1898 (Ex parte Chaplin, 26 Chan. Div. at page 336, per Fry, L.J. McDonald v. Cummings, 24 S. C. R. 326); that when the result is to hinder or delay creditors the court will attribute intent on the principle that a man is always presumed to intend the consequences of his act (Freeman v. Pope, L. R. 5 Ch. App. 541, Smith v. Shirrell, 16 L. T. Rep. 518, In re Maddever, 27 Chan. Div. 526); that when the consideration consists of an unenforceable promise to pay debts of the debtor the conveyance ipso facto is voluntary and void as against creditors (Holmes v. Bonnett, 24 N. S. R. 284, Ex parte Chaplin, 26 Ch. Div. 330, 331, 334 and 335; McDonald v. Cummings, supra); that when the conveyance is in part on account of the debt of a creditor the conveyance is invalid, under ch. 11, sec. 2 (2) of the Acts of 1898 (McCurdy v. Grant, 32 N. S. R. 528), that the smallness of the amount available by creditors is no reason why the deed should not be set aside (Bott v. Smith, 21 Beav. 517); that delay in enforcing a right to set aside a deed is wholly immaterial, as is also the fact of improvements made on the property (In re Maddever, 26 Ch. Div. (argument), at page 525, and Baggallay, L.J., and Collins, L.J., pages 531-2).

It was contended by counsel for the defendants that the grantee was innocent of any fraud and was a bona fide purchaser for value without notice, and as such was protected (May, Fraud. Conv., 78-9: Golden v. Gillam, 20 Ch. Div. 394); that the making of the deeds was an honestly intended family arrangement for the payment by the son of the father's debts founded on a good consideration (Golden v. Gillam, supra; Ex parte Eyre, 44 L. T. Rep. 922); that the son was not a creditor and that the deeds were not given him as a creditor to secure a debt, and that there was a clear novation.

F. L. Milner (Roscoe, K.C., with him), for plaintiff.

O. S. Miller (J. J. Ritchie, K.C., with him), for defendants.

LONGLEY, J.:—The facts of this case as I derive them from the witnesses and all the surrounding circumstances are as follows:—

The defendant Robinson Marshall is an elderly man who for twenty years has had a farm near Bridgetown and failed

to make a living. The only thing that can fairly be placed to his credit is that he has reared some sons who are more industriously inclined than himself. One of them is the other defendant Edward. This young fellow seems to have been a hard worker and a wage earner since he was fifteen years old, and for years he contributed most of his earnings to his father and this enabled him to keep going. A few years ago he found that his father's farm was under mortgage, nearly up to its value, and that the father himself was head over heels in debt, far beyond what the property was worth "above" the mortgage. He thereupon got a list of the debts from his father amounting to about $950, and he undertook if his father would give him a deed of the place to pay these debts, though it is doubtful if the place was worth $200 above the mortgages against it. It had become run down and unproductive. The deed was given and at once recorded, and the creditors of the father began to press the young man for their debts and Edward assumed them all, giving notes or undertaking to pay them as soon as he could. In due course he had paid off every one of the list of debts which his father had given him; taken possession of the place and begun to make large improvements.

The father did not include the plaintiff's claim in his list of debts, claiming that it was not justly due and the son knew nothing about it when the transaction took place. But as the plaintiff has since got judgment against the father it must be assumed that the debt was really owed. The son having declined to pay this debt, Langley now brings suit to set aside the deed as fraudulent and against the provisions of 13 Elizabeth, as intended to hinder, delay or defeat creditors, and also as contrary to the provisions of chapter 145 R. S., sec. 4.

I must deal with both these grounds. I have little difficulty in reaching the conclusion that this case is not one which would be governed by 13 Eliz. Vice-Chan. Kindersley, in Thomas v. Webster, 28 L. J. Ch. 702 n. (1), says: "The language of the Act being that any conveyance of property is void against creditors if it is made with the intent to defeat, hinder or delay creditors, the Court is to decide in each particular case whether on all the circumstances taken together, whether the conclusion could be reasonably come to that there was such intent."

In this case, so far as I have power to decide upon the facts as a jury, I have no difficulty in finding that there is no evidence to justify any reasonable suspicion that even the father had any such thought when he gave the deed, much less the son. He owed a large amount and if the creditors had taken this place and forced a sale of the equity or redemption, my best opinion is they would have got nothing. By the arrangement actually made all the creditors known to the son got paid in full. The transfer of the place was made not only for good consideration, but for a consideration which no stranger would have dreamed of giving, many times the value of what he was getting. I see no "fraud" or "covin" of which 13 Eliz. speaks in the transaction whatever. I also note that in the strongest case cited by the plaintiff's counsel, Re Chaplin, 26 Chan. Div. 319, the majority of the Court in setting aside a conveyance made under circumstances somewhat analogous to the present, but differing, as I shall seek to show—based their decision upon the Bankruptcy Act and not upon 13 Eliz.

I decide that this deed was not given fraudulently and with intent to hinder, delay or defeat creditors within the meaning of 13 Eliz.

I come now to the question as to whether it contravenes the provisions of our Assignments and Preferences Act.

Section 4 of chapter 145, which is the same as sec. 2, of the original Act of 1898, says:—

"4. (1) Every transfer of property made by an insolvent person (a) with intent to defeat, hinder, delay or prejudice his creditors or any one or more of them; or

(b) To or for a creditor with intent to give such creditor an unjust preference over other creditors of such insolvent person, or over one or more of such creditors, shall as against the creditor or creditors injured, delayed, prejudiced or postponed, be utterly void."

It appeared in the evidence that when this deed was given the old man was somewhat in debt to his son Edward for advances, but looking at the whole circumstances I do not look upon this debt as constituting any element in the transaction. The son had advanced and was advancing money to his father with very little prospect of ever getting anything. Nothing is clearer than that he would never have paid out $950, to get something scarcely worth $200,

for the mere purpose of getting his debt. Neither can I see any intention in taking this piece of worthless property on condition of relieving his father from debt, to do anything which would bring the transaction within the meaning and compass of sec. 4. It was a proposition designed altogether to help creditors who otherwise would have got nothing.

Ex p. Chaplin, 26 Ch. D. 319, is cited in support of the plaintiff's contention, and I must analyze it carefully. A jeweller named Sinclair was largely indebted to a wholesale firm of jewellers to whom he made an assignment in June, 1882, of all his property, including the unexpired lease of his premises, for a consideration much larger than the actual debt due, which was £1,300, whereas the consideration mentioned in the assignment was £3,700. At the same time a secret agreement was made between the parties that the assignee should pay the creditors of Sinclair, but this was not in writing. The assignment was kept secret and Sinclair went on with the business as if no transfer had been made. In March, 1883, Sinclair was adjudged a bankrupt. Chaplins, in the meantime, had not paid the debtors of Sinclair, except three or four comparatively small sums. The trustees in bankruptcy took proceedings against Chaplins to set aside their assignment and compel them to deliver up possession of the goods, and the Court of Appeal decided that this should be done.

I accept the judgment and the reasons for it as sound and unanswerable; but I discern a clear differentiation between the circumstances of that case and the one at bar.

1. Assignor was a trader and subject to Bankruptcy Act. The shade of difference here may not be strong, but I think a farmer conveying his land differs somewhat in character from a transfer made by a trader carrying on a business involving debtor and creditor transactions every day.

2. The document did not truly represent the actual transaction between the parties.

3. The whole transaction was secret, and assignor was allowed to carry on the business and no creditor had any intimation of the conveyance.

4. Assignee never carried out the secret verbal agreement to pay assignor's creditors. Under the transactions the assignee got a transfer of property representing nearly three times his debt, and neither paid the creditors the difference

nor took any obligation in this regard which was enforceable.

5. Assignor soon after was adjudged a bankrupt.

In the case now under consideration:—

(1) There was full consideration, and before assignee knew of plaintiff's claims he had actually paid every creditor on the list given him by his father.

(2) Nothing secret in this transaction, deeds were recorded at once.

(3) Son took the place in good faith, derived no personal advantage from the transaction and made the place his home, and made great improvements.

In my humble judgment these differences constitute an altogether different transaction. It seems to me that there must be present some indication of an intention to hinder or defeat creditors to make the transaction void. In this case the jury find no such intention. If Edward had paid $200 to his father on the transfer no reasonable question could have been raised as to the bona fides of the transaction. Is it to be regarded as fraudulent because instead of paying $200 to the father he actually paid $950 to his creditors, indeed paid every creditor of whom he had knowledge?

I am confirmed in this view by the decision of the Court of Appeal in Golden v. Gillam, 20 Ch. D. 389. Fry, J., says: "I therefore proceed to inquire, looking at the circumstances of the case and at the nature of the instrument itself, whether I can or ought to infer an intent to defraud creditors in the parties to the deed. I say in the parties to the deed because it appears to me to be plain that whatever fraudulent intent there may have been in the mind of Judith Johnson, it would not avoid the deed unless it was shown to have been concurred in by Alice, who became the purchaser under the deed. It has not been contended and it could not be contended that the mere fraudulent intent of the vendor could avoid the deed if the purchaser were free from fraud."

Also Ex parte Eyre, 44 L. T. N. S. 922, the following excerpt from the judgment of the Court seems to me to have a bearing on the point now before us:—

"The Statute of Elizabeth is perfectly familiar to every practitioner. The principle of that statute is that there must be bad faith. There must be an intention on the part not of the settlor, but of the vendor in that character to

cheat his creditors, to delay them in their due demands. Is there any grounds for saying that any such intendment is to be found in this transaction? The correspondence which has been referred to, and usefully for the purpose which I am now considering, shows that the father's anxiety was that his son's debts should be paid. He takes every means in his power to accomplish that object. He gets from him a list of his debts and he ascertains what they all consist of and he provides money to satisfy them all and more too."

Holmes v. Penny, 3 Kay & Johnston, 90, seems to affirm the same view.

McDonald v. Cummins, 24 S. C. R. 321, is cited by plaintiff in support of his contention. I accept the views expressed by Sedgewick, J. He says: "We must however insist that where the preferences are given they should be open, honest and fully disclosed, and that under no circumstances can a debtor as a matter of right secure an advantage to himself by reason of them." Here there is no evidence that either debtor or creditor or assignee secured any advantage for himself apart from his creditors.

I must not overlook the fact pressed upon me by plaintiff that the chief evidence of this transaction comes from the father and the son and ought therefore to be received with caution, if not suspicion. I have fully considered this phase of the matter, but it is fair that I should add that the son who really need not have gone upon the stand, did so and subjected himself to a severe cross-examination, from which I derived nothing to evoke suspicion or unfavorable impression. He also put upon the stand one after another of his father's creditors, whom he had paid, and only stopped when I suggested that unless contradiction was expected further testimony on this point was superfluous.

Upon the whole I think the plaintiff's case fails. I do not think that a deed honestly given and honestly taken for valuable consideration enuring to the benefit of the agreed creditors can be declared void because long afterwards one creditor says "I was not paid, therefore the deed is fraudulent and void."

I dismiss plaintiff's action with costs.

NOVA SCOTIA.

COUNTY COURT FOR DISTRICT NO 5.

DECEMBER 1ST, 1909.

FRASER v. SINCLAIR.

Damages for Destruction of Dog while at Large—Justification—R. S. N. S. ch. 61, sec. 2, as Amended by Acts of 1908, ch. 63—Costs, where Dog Doing no Injury when Killed.

PATTERSON, Co.C.J.:—This is an action for damages caused to plaintiff through defendant shooting his dog. The shooting is not denied, but defendant justifies under sub-section (b) section 2 of chapter 61 R. S., 1900, as amended by chapter 63 of the Acts of the Province of Nova Scotia for the year 1908. As amended, the section reads:

"2. Any person may kill,—

"(a) Any dog which he sees pursuing, worrying or wounding any sheep or lamb, or,

"(b) Any dog being at large, and without a leather or metal collar on which the name of the owner of the dog is conspicuously marked, or,

"(c) Any dog which any person finds straying on any farm whereon any sheep or lambs are kept.

"But no dog so straying which belongs to, or is kept or harboured by the occupant of any premises next adjoining such farm or next adjoining that part of any highway or lane which abuts on such farm, nor any dog so straying either when securely muzzled or when accompanied by or being within reasonable call or control of any person owning or possessing or having the charge or care of such dog, shall be so killed, unless there is reasonable apprehension that such dog, if not killed, is likely to pursue, worry, wound or terrify sheep or lambs then on said farm."

I have set out the whole section because, though defendant justifies only under a part of it (sub-section b), the plaintiff answers that even if defendant was within his rights under sub-section (b) in killing the dog, which of course plaintiff denies, the dog being shot on the adjoining farm to plaintiff's, the proviso applies, and the defendant is

still liable; and one has to read the whole section to see whether this is so.

I am obliged to accept, and do accept the statement of defendant and his witness, corroborated as it is in part by plaintiff's wife, as to where the dog was, how long he had been there, and what he was doing when shot. From the state of facts that statement discloses, in my judgment, under the authorities, the dog was at large, and while he seems to have had a strap around his neck, it did not have its owner's name on it. In other words, defendant under the strict reading of the sub-section was justified in killing him, unless the proviso applies. But does it apply? I cannot think it does. I think the language of the proviso makes it clear that only sub-section (c) is affected or governed by it. "No dog so straying," it says, and the word "straying" is only found in sub-section (c). "Adjoining such farm,"—the word "farm" is only found in the same sub-section; and the last words of it "said farm," to which every part of the proviso refers, most assuredly can only mean the farm mentioned in sub-section (c).

The defendant will have judgment, but without costs. I refuse him costs because I think his action in shooting the dog was a bit of wanton cruelty, justified under the statute, it is true, but for which certainly there can be no other excuse. He evidently did not think his cow was in any danger—he does not attempt to justify the killing of the dog because the dog was doing, or he apprehended the dog might do, any injury to his cow—he knew the owner of the dog and saw that owner within call—surely, under these circumstances, he should not have resorted to extreme measures.

I have a further reason for refusing defendant costs: He told his story of the killing of the dog in a most disingenuous way, wanting, evidently, to deny it, but afraid to do so.

Should this decision be reversed on appeal and judgment be directed to be entered for plaintiff to avoid necessity for a new trial, I assess his damages at $15.

NOVA SCOTIA.

FULL BENCH. DECEMBER 3RD, 1909.

KENDALL v. THE SYDNEY POST PUBLISHING CO.

Defamation—Newspaper Libel—Innuendo—Verdict for Defendant—New Trial.

Plaintiff brought an action against the defendant company for publishing in their newspaper, the "Sydney Post," a letter containing the following among other words:—

"Why did you at that time withdraw your name from the Liberal convention? The majority of the delegates came there determined to see you nominated. Why did you not accede to their request? Doctor Kendall, what was your price? Did you get it? . . . The proceedings of the convention were held up for no reason that the delegates saw, but for reasons which are very well known to you and three or four others whom I might mention. . . Finally the consideration was fixed and you took off your coat and shouted for Johnston. What was that consideration?"

The innuendo was:—

"Meaning thereby that the plaintiff . . did . . wrongfully, corruptly and unlawfully, and in contravention of the laws of the Dominion of Canada, demand and extort from some two or three persons, money or some other valuable consideration for his agreeing to refrain from being a candidate at the said election, and for his agreeing to vote for and support and use his influence to secure the return of another person at the said election."

Further,

"That by the publication of the words set out . . the defendant meant and intended that the plaintiff was a corrupt person and was guilty of corrupt practices within the meaning of the Dominion Elections Act, &c."

The cause was tried at Sydney, April 13th, 1909, before Longley, J., with a jury. The learned Judge instructed the jury that the publication of the article complained of was proved clearly and conclusively, and therefore that that matter did not come within their consideration. Also that if a man allowed himself to be bought off from contesting an election he brought himself within the Election Act, and

that if they placed that interpretation upon the words used such words were highly defamatory, and they were bound to find for the plaintiff, and the only question for their consideration was that of damages.

The jury having brought in a verdict in favour of defendant a new trial was moved for.

H. Mellish, K.C., in support of appeal.

W. B. A. Ritchie, K.C., and W. F. O'Connor, contra.

The Court delivered judgment upon the conclusion of the argument.

TOWNSHEND, C.J.:—We do not think it necessary to delay judgment in this case. To my mind it is quite clear that the letter cannot bear any other interpretation than that of imputing to the plaintiff a criminal charge in view of s. 265, R. S. Can. c. 146.

I consider that there was no question for the jury except the damages to be assessed.

The verdict should be set aside with costs and a new trial granted.

RUSSELL, J.:—The words complained of in the letter are not capable of any other construction than that which amounts to defamation.

DRYSDALE, J.:—No reasonable construction can be placed on the letter to make it an innocent criticism.

LAURENCE, J.:—I am of the same opinion.

NOVA SCOTIA.

FULL COURT. DECEMBER 11TH, 1909.

REX v. FRANEY.

Canada Temperance Act — Conviction for Offence under Second Part—Ex parte Proceedings—Service of Summons on Defendant's Brother Living in his Hotel—"Inmate"—Insufficiency of Service—Practice.

Motion for an order for a writ of certiorari to remove into this Court a certain record of conviction, made by

Barclay Webster, Esq., stipendiary magistrate for the town of Kentville, under the Canada Temperance Act.

W. B. A. Ritchie, K.C., in support of application.

W. E. Roscoe, K.C., contra.

LAURENCE, J., read the judgment of the Court.

An application for a certiorari to remove into this Court a conviction made by the stipendiary magistrate of the town of Kentville on the 28th July, 1909, against the defendant "for an offence under the second part of the Canada Temperance Act."

This application was made to the presiding Judge at Chambers and by him referred to this Court.

The stipendiary magistrate issued the summons in this prosecution on the 26th July, 1909, returnable on the 28th July, 1909, at 10 a.m. Service of the summons may be proved by the oral testimony of the person effecting the same or by the affidavit of such person purporting to be made before a Justice. Cr. Code, sec. 658, sub-sec. 5. Proof of service in this case was made by the oral testimony of John E. Coleman, a constable of the town of Kentville, on the hearing under the summons, which testimony is as follows:—

"The said deponent, John E. Coleman, saith on his oath: I am a constable of the town of Kentville and county of Kings. I knew Albert Franey of the town of Kentville. He is proprietor of the Lyons' Hotel, Kentville. Summons 1/B. W., was served by me on July 26th, 1909, before the hour of ten p.m. It was about 9.30 p.m. I served the summons upon David Franey at the Lyons' Hotel, Kentville, kept by Albert Franey. David Franey is, as far as I know, a brother of Albert Franey. David Franey is between 45 and 50 years old, I should judge. He stays there most of the time. I could not find Albert Franey is the reason I served it on David Franey. I enquired of David Franey for Albert Franey, asked him where he was; he said he was not there, had gone away; I asked him when he would return. He said he had no idea. Could not say when. I then handed him a copy of summons 1/ B.W. and came away. David Franey read the summons in my presence."

Neither the defendant nor anyone on his behalf attended before the magistrate on the hearing of this summons, and

the magistrate proceeded upon the return day of such summons ex parte and made the conviction complained of.

Sec. 658 (sub-sec. 4) of the Code, as to the manner of service, says: "Every such summons shall be served by a constable or other peace officer upon the person to whom it is directed either by delivering it to him personally, or if such person cannot conveniently be met with, by leaving it for him at his last or most usual place of abode with some inmate thereof apparently not under sixteen years of age." And

Sec. 718 of the Code provides in cases where the accused does not attend, "If it appears to the satisfaction of the justice that the summons was duly served a reasonable time before the time appointed for appearance, such justice may proceed ex parte to hear and determine the case in the absence of the defendant."

The grounds upon which this application is made are: "Was the summons served in compliance with sub-sec. (4) of sec. 658 cited above," and "Was the service (if so effected) a reasonable time before the time appointed for appearance?"

The summons was served not on the defendant by delivering it to him personally, but "by leaving it at the hotel kept by defendant, and of which he is proprietor, with David Franey, a brother of defendant, who stays there most of the time." The defendant could not conveniently be met with as he could not be found. David is between 45 and 50 years of age.

It is contended that these facts do not disclose that David Franey was an inmate of this hotel kept by defendant, nor that the service was a reasonable time before the hearing.

As to the reasonableness of service in respect to time the defendant was served in the manner stated on the evening of the 26th July to appear on the 28th at 10 a.m. There are cases in which the defendant was served the afternoon or evening before the return day of the summons and the service was held reasonable. Rex v. Craig, 38 N. S. R. 345; Ex parte Hogan, 32 N. B. R. 247. But in all these cases the defendant was personally served.

In Reg. v. Diblee, 32 N. B. R. 242, there were two cases before the Court. The summons in each case was served in the afternoon of the day preceding the return day at defendant's residence on the servant of the person with whom

defendant resided. In one case the constable told the servant "what the summons was for, and to give it to the defendant." In the other case this was not done and the Court held the service in the former sufficient and in the latter insufficient.

In Reg. v. Mabee, 17 Ont. R. 194, the summons was served on the wife of defendant at his hotel on the 20th March, he being then in the United States as a witness in a suit, to appear on the 22nd, and it was held a reasonable time had not elapsed, but the wife was not informed by the constable of the purport of the summons. The Court followed The Queen v. Smith, L. R. 10 Q. B. 604, in which Cockburn, C.J., said:—

"It does not appear that she (the defendant's mother) was informed what her son was thereby (by the summons) required to do; if she had been informed of its purport she probably would have stated that her son was at sea."

In both these cases the Court took knowledge of the facts disclosed in the affidavits used on the application to have the convictions reviewed, and did not confine itself to the facts in proof of the service before the justice. In the case before us the summons was read by the person to whom it was delivered and the affidavits disclose that the defendant was in Halifax during the next day and could have been communicated with.

I am of opinion the service was in respect to the time which elapsed between the delivery of the summons to David Franey and the return day, under all the circumstances of this case reasonable, and that the magistrate had before him sufficient evidence so to find, if David Franey was shown to him to be an "inmate" of the defendant's last or most usual place of abode; that is, an inmate of defendant's hotel. In ex parte Wallace, 19 Can. L. T. 406, the service was made by leaving it with a clerk in the hotel of which the defendant was reputed proprietor and in which he resided. It was held the evidence did not show that the clerk was an inmate of the last or most usual place of abode of accused: Bouv. Law Dict., p. 1045. "Inmate. One who dwells in a part of another's house, the latter dwelling at the same time in said house." In a note to Buxton v. Jones, 1 M. & G. 86, it is said that lodgers are inmates.

The jurisdiction of the magistrate only attaches on proof that the summons was duly served and the Court has power

to inquire into the validity of the service, and will grant a certiorari if it be shown that the service was invalid: Reg. v. Farmer et al. (1892), 1 Q. B. 637.

I am of opinion the proof of service before the magistrate in this case does not show that the summons was delivered to an "inmate" of the defendant's last or most usual place of abode, and that the conviction in this case should be quashed.

NOVA SCOTIA.

FULL COURT. DECEMBER 11TH, 1909.

HUTCHINS v. McDONALD.

Negligence—Injury to Person—Verdict—Irregularity of Conduct of Jury—New Trial—Costs.

In an action claiming damages for negligence of the defendant in running an automobile as the result of which negligence plaintiff's husband was run over and sustained injuries resulting in his death, the jury found a verdict in favour of plaintiff and on their findings judgment was entered in plaintiff's favour for the sum of $3,511.75, and costs to be taxed.

A new trial was applied for on the ground, among others, of misconduct during the trial of certain members of the jury in viewing the locus of the accident and in making experiments with an automobile for the purpose of obtaining evidence and so obtaining evidence to govern them and other jurymen in coming to conclusions, without the consent of the parties or the order of the Court or a Judge.

H. Mellish, K.C., and J. C. O'Mullin, in support of appeal.

W. B. A. Ritchie, K.C., contra.

RUSSELL, J.:—The evidence as to the rate at which the automobile was moving immediately before the accident is in conflict, and the verdict of the jury would greatly depend upon their opinion as to the rate of speed. The defendant had a right to have the judgment of the jurors upon this question uninfluenced by any misleading evidence,

and, further than that, uninfluenced by any evidence other than that legally placed before them. The experiment made by the two jurors with an automobile would necessarily tend to influence them and the other jurors to whom the results were liable to be communicated, in arriving at their conclusion as to the rate of speed. The light derived from the experiment may have been a misleading light. The machine may have been of different weight or differing gear from that which caused the accident. It may have been operated by a chauffeur of greater skill than the defendant was bound to exercise. The questions involved in the case were, under the evidence, delicate and difficult, and without expressing any opinion whatever as to the merits of the question, apart from the effect that the experiment may have had upon the result, I think that there will have to be a new trial because of the possible effect of the irregularity, the costs of the appeal to abide the event.

MEAGHER, J., read an opinion reaching the same conclusion except as to costs, which, as defendant had succeeded on a substantial part of his motion, he thought should be defendant's costs in any event.

TOWNSHEND, C. J., and GRAHAM, E.J., concurred in awarding a new trial for the reasons stated.

TOWNSHEND, C.J.:—The result is that the verdict will be set aside and, as to costs, the majority of the Court think they should be the defendant's costs in the cause.

NOVA SCOTIA.

FULL COURT. DECEMBER 11TH, 1909.

THE ATTORNEY-GENERAL OF CANADA v. SAM CHAK.

Chinese Immigration Act—Action to Recover Head Tax—Judgment—Application to Quash—Validity of Federal Act—Practice.

Application to quash a judgment of a stipendiary magistrate removed into the Court by certiorari.

W. F. O'Connor, and F. McDonald, in support of application.

R. T. MacIlreith, contra.

GRAHAM, E.J.:—This is an application by Sam Chak to quash a judgment of a stipendiary magistrate removed into this Court by a writ of certiorari.

The judgment was given in an action brought before the magistrate to recover the head tax of $500 payable by a Chinaman on entering Canada under the Chinese Immigration Act, R. S. C., c. 95, s. 7.

By s. 31 it is provided that "All suits or actions for the recovery of taxes or penalties under this Act and all prosecutions for contraventions of the Act (not indictable offences), shall be tried before one or more justices of the peace or before the . . . stipendiary magistrate having jurisdiction where the cause of action arose or where the offence was committed."

First, the provision is attacked on the ground that it is ultra vires the parliament of Canada to pass such a provision in respect to a Court.

There are reasons in Rex v. Wipper, 34 N. S. R. 202, which show why such a provision is within the power of that Parliament. The expression "having jurisdiction where the cause of action arose," plainly, I think, refers to the territorial jurisdiction, and means "in the locality." Attorney- General v. Flint, 16 S. C. R. 707.

It happens, in Nova Scotia at least, that stipendiary magistrates have jurisdiction in respect to debts not exceeding the sum of $80. R. S. N. S. c. 160. It is quite competent for the parliament of Canada to confer upon those tribunals jurisdiction in respect to amounts above that sum. The reasoning in Attorney-General v. Flint, 16 S. C. C. 707, and Valin v. Langlois, 5 App. Cas. 115, conclusively shews that. Parliament having conferred this jurisdiction upon a stipendiary magistrate it is well established that in such a case it is to be exercised according to the procedure and forms, mutatis mutandis, which are already used by the tribunal upon which the new jurisdiction has been conferred.

This applies to the mode of procedure used here, and I think that mode more nearly resembles procedure ordinarily adopted for the collection of a statutory debt, and

therefore it is better adapted for the purpose than a summons or a warrant generally used by stipendiary magistrates for the enforcement of penalties or for the punishment of offences would be.

In this connection the use of a jury by the stipendiary magistrate was criticised. The magistrate may direct a jury by sections 23-27 of this statute, under which he has jurisdiction to try actions for debt. It was this defendant who demanded the jury. The use of a jury was not inappropriate in such an action. Everything seems to have been done with the utmost regularity.

The application to quash the judgment will be dismissed and with costs; the Attorney-General to have the costs of the motion for the writ; and a writ of procedendo shall issue to carry back to the magistrate the proceedings brought up, and directing the magistrate to proceed with the action and so that the recognizance given by the defendant may be enforced.

This judgment will cover the other cases removed into this Court by certiorari.

RUSSELL, J.:—The question presented for decision in this case is as to the validity of the provision of the Chinese Immigration Act under which suits for the recovery of taxes are brought before two or more justices or a police or stipendiary magistrate having jurisdiction where the cause of action has arisen. To state the question is, in view of the authorities, to answer it. The cases mentioned by the learned Judge who allowed the certiorari, Valin v. Langlois, Attorney-General v. Flint, and The King v. Wipper (supra), have settled beyond controversy that such legislation is not ultra vires of the Dominion Parliament. It is legislation on the subject of immigration, in dealing with which the Dominion Parliament can confer jurisdiction upon existing provincial courts or create new courts. It is unimportant to inquire which of these things has been done in the present case. One or the other of them has certainly been done.

At the close of the argument the learned counsel for defendant mentioned the fact that the case had been tried by a jury. I have no note of the point having been taken in the opening, although the reporter informs me that this point was mentioned. I think there is nothing whatever in the point, as the procedure of the Court provides for a

trial by a jury, and Parliament, in making use of the Court, must be understood to have adopted its procedure, unless the subject be one on which it can enact a procedure and it does enact it.

But I further am of opinion that the point is not open. It is not taken in the grounds for the motion to quash, unless it is included in the general ground that "the judgment is irregular and void." The notice of motion for the certiorari is not printed, but I assume that this ground cannot have been mentioned because the learned Judge, in granting the motion, says that the only real point submitted is whether the Act confers jurisdiction on the stipendiary magistrate to sue for the head tax imposed by the Chinese Immigration Act. The point mentioned cannot be taken unless it has been specified in the notice of motion for the certiorari. (Crown Rule 33.) The same thing could be said if necessary as to the point that there was no proof of the cause of action having arisen within the jurisdiction of the stipendiary magistrate, namely, that it is not open to the appellant under the case as presented.

MEAGHER and DRYSDALE, JJ., concurred.

NOVA SCOTIA.

FULL COURT. DECEMBER 11TH, 1909.

SAM CHAK v. CAMPBELL.

False Imprisonment—Chinese Immigration Act—Alleged Breach—Arrest—Verdict for Defendant—New Trial—Costs.

Appeal from the judgment of LONGLEY, J., in favour of plaintiff entered on findings of the jury.

R. T. McIlreith, in support of appeal.

W. F. O'Connor and F. McDonald, contra.

This case was tried with a jury, but the facts are the same as those stated in the opinion in Cheng Fun v. Camp-

bell, tried without a jury.* The verdict was for the defendant, and there is an application for a new trial. The learned Judge told the jury:—

"You have heard some talk about thirty and forty days, but he was not imprisoned as the result of what Peter Campbell did, but a very short time. I don't think that he, Peter Campbell, is responsible for the period in which the plaintiff was in jail between the 29th August and when the warrant was issued. There is no evidence that Peter Campbell directed the arrest at all. There is evidence that a police officer was called in as a result of Peter Campbell's instructions. If these men were arrested without a written charge or warrant, then the police officer is the man that is responsible, and not the defendant. He is only responsible from the time that he has preferred a charge against this man Chak, and that was on the 6th day of September."

As I have indicated in that opinion, the only matter or incident in respect to which, upon the evidence, the defendant could be held liable, was the detention between the 30th of August, 1907, and the date of the 6th of September, when the facts were laid before the Stipendiary Magistrate for a warrant.

Indeed, I think the only question is whether the plaintiff, Sam Chak, having been arrested, justifiably as I think, without a warrant, was not held an unreasonable length of time before taking him before a magistrate.

That matter was not placed before the jury except in the way I have indicated.

It must be remembered that the charge of malicious prosecution is withdrawn, and only the charge of false imprisonment remains.

The verdict must be set aside with costs, and a new trial granted. The defendant will have the costs of the application already granted to have the entry of the verdict made in accordance with the oral announcement in Court made by the jury, and the entry thereof by the prothonotary.

These costs will be set off against the plaintiff's costs just awarded.

RUSSELL and DRYSDALE, JJ., concurred.

EDITOR'S NOTE.—Reported *post*. See p. 421.

NOVA SCOTIA.

FULL COURT. DECEMBER 11TH, 1909.

CHENG FUN v. CAMPBELL.

False Imprisonment—Action for Damages—Chinese Immigration Act—Arrest of Defendant without Warrant—Information—Trial—Conviction Quashed—Fine Directed to be Returned to Defendant—Jurisdiction—Erroneous Proceedings—Liability of Officers Executing Process.

Appeal from that part of the judgment of LONGLEY, J., in favour of plaintiff awarding plaintiff, as part of the damages for illegal imprisonment, the sum of $100 fine, paid in connection with an alleged violation of the Chinese Immigration Act.

R. T. MacIlreath, in support of appeal.
W. F. O'Connor and F. McDonald, contra.

GRAHAM, E.J., read the judgment of the Court.

This is an action for damages for false imprisonment. The claims for malicious prosecution were withdrawn at the trial. There are eight similar actions in all against the same defendant, brought by eight different Chinamen, out of a company of seventeen Chinamen who had been prosecuted under the Chinese Immigration Act, R. S. C., ch. 95, for not paying the head tax of $500 on each of them at the port at which they entered Canada.

By sec. 7 of that Act, it is provided that: "Every person of Chinese origin . . . shall pay into the oonsolidated revenue fund of Canada on entering Canada, at the port or place of entry, a tax of $500 each, except," etc. (Certain exemptions.)

Section 8 provides for giving a certificate of the payment to each Chinaman who pays the tax.

By sec. 27 it is provided that: "Every person of Chinese origin who wilfully evades or attempts to evade any of the provisions of this Act as respects the payment of this tax, by personating any other individual, or who wilfully makes use of any forged or fraudulent certificate to evade the provisions of this Act, and every person who wilfully aids or

abets any such person of Chinese origin in any evasion or attempt at evasion of any of the provisions of this Act, is guilty of an indictable offence," etc.

By sec. 30 it is provided that: "Every person who violates any provision of this Act, for which no special punishment is herein provided, is guilty of an indictable offence," etc.

By sec. 31, taxes and penalties may be recovered before stipendiary magistrates, among other officials.

By the Criminal Code, sec. 648, "a peace officer may arrest, without warrant, any one whom he finds committing any criminal offence."

By sec. 30, "every peace officer who, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not, and who, on reasonable and probable grounds, believes that any person has committed that offence, is justified in arresting such person without warrant, whether such person is guilty or not."

For the scope of that provision I refer to a judgment of Killam, J., in Queen v. Cloutier, 2 Can. Cr. Cas. 43.

Previously to August, 1907, the Collector of Customs at Sydney was apprised by the Department at Ottawa, that Chinamen were coming in at his port from Newfoundland, ostensibly as being residents of Canada and entitled to re-enter on the strength of certificates which they bore purporting to shew their registration at some Canadian port in the past; that it was not at all probable that the bearers of the certificates were the people referred to in the certificates, but, in any event, the certificates did not allow them to re-enter Canada without payment of the capitation tax.

On the 30th of August, 1907, the defendant, a preventive officer at Sydney, was apprised by the collector that a schooner had landed a lot of Chinamen at a place called Gabarus, on the shore of Cape Breton, in the woods, and he was instructed to see if they had paid their head tax. He at once acted (under the collector), and with the Deputy Chief of Police for Sydney, went to hunt them up. They went to a Chinese resort and by interrogating a "student" Chinaman, Wong Winn Yeen, eventually found these Chinamen, some in one place and some in another, part of them on the road to Sydney, but all had passed the port of entry.

Gabarus. The master of the schooner of five tons had entered his vessel at that port from St. Johns as having no cargo, and not landed any, but clandestinely landed this cargo of Chinamen. It is not material how many provisions of the Chinese Immigration Act he had violated in that connection. He was indicted for more than one offence.

The defendant, in pursuing his enquiries of the student as to the head tax, had produced to him 21 certificates purporting to shew that Chinamen of some name had paid the tax; that one Thomas, a Chinese smuggler, had sent him these certificates from Toronto to be used in connection with these arrivals, who were to land on the shore of Cape Breton and make their way to his house. He had destroyed the letter. These certificates were to be delivered to these Chinamen, and in an envelope there were 21 slips, each with a number and a name, or two names rather, in Chinese characters, indicating to whom each certificate was to be given. It was the theory of the Crown that these were old certificates to be used by these people personating other Chinamen, or were false certificates to assist in evading the tax.

The Chinamen were arrested without warrant by the chief constable and were sent to the lock-up. This was done at the instance of the defendant, I think. Later, there was an information made by this defendant and a warrant issued by a stipendiary magistrate in the following terms:—

"Canada,

"Province of Nova Scotia,

"County of Cape Breton, SS.

"To any of the constables and other peace officers of the said County of Cape Breton:

"Whereas, seventeen persons of Chinese origin, and now of Sydney in the county aforesaid, have, this day, been charged upon oath before the undersigned, Angus G. McLean, a stipendiary magistrate in and for the city of Sydney, in the said county of Cape Breton, for that they, on or about the thirtieth day of August, 1907, at Sydney, in the said county of Cape Breton, did unlawfully and wilfully attempt to evade the provisions of the Chinese Immigration Act, as respects the payment of the tax, contrary to the form of statute in such case made and provided.

"These are, therefore, to command you, in His Majesty's name, forthwith to apprehend the said seventeen persons of Chinese origin and to bring them before me or some other

justice of the peace in and for the said county of Cape Breton, to answer unto the said charge and to be further dealt with according to law.

"Given under my hand and seal this sixth day of September, in the year 1907, at Sydney, in the county aforesaid."

They were brought before the magistrate and remanded.

In consequence of the absence of names, they were discharged upon habeas corpus by a Judge of this Court, or at least, one of them was, resulting in the discharge of all.

They were then severally arrested upon informations made by this defendant and a warrant issued in the following terms:—

"Canada,

"Province of Nova Scotia,

"County of Cape Breton, SS.

"To all or any of the constables and other peace officers in the said county of Cape Breton:

"Whereas Sam Chak, at present of the city of Sydney, in the said county of Cape Breton, has this day been charged before the undersigned, Angus G. McLean, a stipendiary magistrate in and for the county of Cape Breton, in the province of Nova Scotia, in the Dominion of Canada, for that he, the said Sam Chak, then being a person of Chinese origin, on the 27th day of August, in the year of our Lord 1907, at Gabarus, in the said county of Cape Breton, in the Dominion of Canada, did unlawfully violate the provisions of sec. 7 of ch. 95 of the Revised Statutes of Canada, 1906, to wit, he then being a person of Chinese origin, did enter the Dominion of Canada without paying the tax required by the said section.

"These are, therefore, to command you in His Majesty's name forthwith, to apprehend the said Sam Chak and bring him before me to answer unto the said charge, and to be further dealt with according to law.

"Given under my hand and seal this 13th day of September, in the year 1907, at the said city of Sydney, in the county of Cape Breton, aforesaid."

Upon this information, after a preliminary investigation, they were committed for trial. They elected to be tried before the County Court Judge under the provisions of the Code relating to Speedy Trials, and were severally convicted and directed to pay a fine of $100 each, which was

paid. But the Judge reserved a case for the Supreme Court and that Court held, Rex v. Chak, 42 N. S. R. 374, that the conviction must be quashed. That the evasion of the payment of the tax, without the use of fraudulent certificates of others within the terms of sec. 27, was not an indictable offence. In other words, that a breach of sec. 7 is not by reason of sec. 30 constituted an indictable offence.

By referring to the information, at least the last one, it will be seen that this was the charge preferred, and hence, that the magistrate and the Judge of the County Court had made a mistake from the information onward.

It was directed that the fines should be returned to the Chinamen, but, apparently, the fines had then reached the Crown, and were held against the tax. At any rate, they never reached the Chinamen.

The learned trial Judge, in assessing the damages payable by the defendant, has included the sum of $100 to cover that sum paid by way of fine. And the argument was principally confined to that point.

In my opinion, whatever may be said about the detention on the arrest first made without any warrant, the defendant is not liable in damages in respect to that fine imposed by the learned Judge of the County Court.

First, the magistrate and then the Judge had jurisdiction in respect to an effence within the provisions of sec. 27 of the Chinese Immigration Act. But, according to the decision of the Supreme Court, they could not deal with them as they did under secs 7 and 30. In other words, they, in error, dealt with the Chinamen as if the violation of sec. 7 constituted an indictable offence. The defendant, while he may be responsible for the detention up to the time of the first warrant, is not responsible after that, unless it can be shewn that he interfered in some way to assist in that arrest, prosecution and imprisonment under this warrant. There is, it is claimed, testimony tending to shew that he stood by in a crowd which was present when they were re-arrested after the release under the first warrant. The defendant himself says:—

"Q. Where did the arrest on the second warrant take place on the 13th? A. In the jail yard.

"Q. You heard Mr. Finlay McDonald's evidence as to the arrest in the yard? A. Yes.

"Q. Did you lock the gate? A. I did not.

"Q. Are you sure of that? A. I am positive, certain of it.

"Q. You don't know whether the gate was locked or not? A. I don't know.

"Q. You didn't assist the sheriff? A. No, I did not.

"Q. Were you near the gate? A. The nearest I was to the gate was when I was going through it. I didn't give any instructions at all."

The plaintiff's counsel relies upon other testimony, but it does not shew that any overt act was done by the defendant. This is it. Edwards, the constable making the arrest, says:—

"Q. How many constables and other officers were there? A. There were Mr. McCormack and another policeman.

"Q. Did you see the defendant, Campbell, there? A. Yes.

"Q. Have any conversation with him? A. I was talking to him. He said if I wanted any assistance to call for it. I said could I call for him. He said he thought so, if I needed to call for him.

"Q. That is, if you found it necessary? A. Yes, of course there was officers.

"Q. When did you first see Campbell that day? A. I am not sure. I think at the jail yard. I may have seen him at the police station. The warrants were handed to me at the city police station. I didn't receive them from the magistrate. I think it was from Mr. Charles Smith.

"Q. He was the acting lawyer at the time? A. Yes.

"Q. I understand that you consulted with Mr. Campbell from time to time to get directions about this thing? A. Well, I don't know that I took any particular directions. Of course there was a couple of other warrants issued besides the Chinamen's, and I met Mr. Campbell and we spoke about them. I had a warrant for the arrest of Dan McDonald, Klondyke Dan, so called."

Prosecutions before the County Court Judge's Criminal Court are not, usually, carried on by private parties, and in this case, this prosecution could not be said, in any sense, to be carried on by the defendant. He may have been a witness, but there is no other connection between him and that prosecution, other than the information made before the magistrate below.

In Carratt v. Morley, 1 Q. B. 18, Lord Denman said: "We have heard the rules argued and are, in the first place, clearly of opinion with the Chief Baron, that the original plaintiff was not liable, for the reason before stated. Cohen v. Morgan, 6 D. & R. 8, was cited, at the bar, and it is clear, from that and other cases, and upon principle, that a party, who merely originates a suit by stating his case to a Court of Justice, is not guilty of trespass, though the proceedings should be erroneous or without jurisdiction."

In West v. Smallwood, 3 M. & W. 419, Lord Abinger said: "Where a magistrate has a general jurisdiction over the subject-matter, and a party comes before him and prefers a complaint upon which the magistrate makes a mistake in thinking it a case within his authority, and grants a warrant which is not justifiable in point of law, the party complaining is not liable as a trespasser, but the only remedy against him is, by an action upon the case, if he has acted maliciously."

Bolland, B., said: "With regard to the case of the sheriff, that is clearly distinguishable from the present, because the party puts the plaintiff in motion, and the latter acts in obedience to him. In the case of an act done by a magistrate, the complainant does no more than lay before a Court of competent jurisdiction the grounds on which he seeks redress, and the magistrate erroneously thinking that he has authority, grants a warrant. As to the subsequent conduct of the defendant, all he does is to point the plaintiff out to the constable as the person named in the warrant, but this does not amount to any active interference."

I refer also to Brown v. Chapman, 6 C. B. 365; Bullen & Leake on Pleading, 926, note r.

In Austin v. Dowling, L. R. 5 C. P. 540, Willes, J., said: "The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment. There is, therefore, at once a line drawn between the end of the imprisonment by the

ministerial officer and the commencement of the proceedings before the judicial officer. . . . It may very well happen in the Superior Courts which have jurisdiction over both descriptions of actions, when the plaintiff, at once having been taken before a magistrate, may be content to bring his action for false imprisonment only. In such a case—which must be within the memory of all of us—the Judge would tell the jury to give damages for the false imprisonment only, and not for what came under the cognizance of the magistrate."

Under the principles which are established in these cases, I think that the defendant is not liable in damages in respect to that fine which never reached him. It cannot be said in law or in fact that he directly "set in motion" the County Court Judge to impose the fine.

The appeal to that extent must be allowed with costs of the appeal.

The learned Judge, over and above this, has allowed for damages the sum of $16, and I think, whatever view may be taken of the case, this allowance is not excessive or unjustifiable in law, even if the excessive detention after arrest without warrant is the only cause of action against him.

The plaintiff will have judgment for $16 with costs to be set off.

This judgment governs the seven cases argued before us on notice of appeal.