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HODGINS, LOC. J. IN ADMIRALTY. FEBRUARY 12TH, 1906.

EXCHEQUER COURT OF CANADA.

TUCKER v. THE "TECUMSEH."

Costs—Interlocutory Motion—Reservation to Trial Judge—No Disposition Made at Trial—Application for Costs after Appeal.

After this case had been appealed to the Exchequer Court and decided in favour of plaintiff, plaintiff applied to be allowed the costs of an interlocutory Chambers motion heard on 15th October, 1905, the costs of which were reserved to be disposed of at the trial of the cause, but which costs were not then brought up for consideration or disposed of.

J. H. Rodd, Windsor, for plaintiff.

J. W. Hanna, Windsor, for defendant.

THE LOCAL JUDGE:—In the Encyclopædia of Pleading and Practice, vol. 2, p. 327, it is stated: "Where an appeal has been perfected, the jurisdiction of the appellate court over the subject matter and the parties attaches; and the trial court has no power to render any further decision affecting the rights of the parties in the cause, until it is remanded." The appellate court has affirmed the judgment of the trial court, and there is therefore no remand back.

And in British Natural Premium Provident Association v. Bywater, [1897] 2 Ch. 531, Byrne, J., while he allowed certain reserved costs of interlocutory motions—there having

been no appeal—said: "Where interlocutory applications have been disposed of, but the costs have been reserved, such costs are not to be mentioned in the judgment or order, or allowed on taxation, without the special directions of the Judge. So far as I am personally concerned, I shall in future deal with great jealousy with such applications; and shall not after judgment has been passed and entered allow costs reserved, and not mentioned at the trial—except under very special circumstances."

On either of the above grounds I think there should be no order on this application.

BRITTON, J. MARCH 5TH, 1906.

CHAMBERS.

DOMINION CANISTER CO. v. LAMOUREUX.

Writ of Summons—Service out of Jurisdiction—Contract—Sale of Goods—Action for Price—Place of Payment—Conditional Appearance.

Appeal by defendant from order of Master in Chambers, ante 272, dismissing motion by defendant to set aside order for service of writ of summons out of the jurisdiction, and service made in pursuance thereof, in an action for the price of goods sold and delivered, but allowing defendant to enter a conditional appearance.

W. J. Boland, for defendant.

J. L. Counsell, Hamilton, for plaintiffs.

BRITTON, J.:—It cannot be satisfactorily determined by me whether there was or was not a new contract in 1904 which is the foundation of the present action. The case, as it stands, is, in my opinion, governed by Blackley v. Elite Costume Co., 9 O. L. R. 382, 5 O. W. R. 57. Defendant is amply protected by the order allowing a conditional appearance. Plaintiffs must at the trial establish a cause of action upon which they are entitled to sue in Ontario, and they are apparently good for costs if they do not succeed.

Appeal dismissed with costs in cause to plaintiffs.

CLUTE, J. MARCH 6TH, 1906.

CHAMBERS.

PLAYFAIR v. TURNER.

Discovery—Production of Documents—Breach of Contract—Damages—Loss of Profits in Business—Books and Documents Pertaining to Business—Postponement of Trial.

Appeal by plaintiff from order of Master in Chambers requiring plaintiff to file a further affidavit on production, and postponing the trial.

F. E. Hodgins, K.C., for plaintiff.

R. McKay, for defendants.

CLUTE, J., dismissed the appeal, but expressed some doubt as to whether the books of plaintiff referred to in the Master's opinion were relevant and the subject of production. Costs of appeal to be costs in the cause.

BRITTON, J. MARCH 12TH, 1906.

CHAMBERS.

CAMPBELL v. CROIL.

Mortgage—Sale—Purchase Money — Default—Deficiency — Money in Court—Payment out.

Appeal by defendant Croil from order of Master in Chambers directing payment of money out of Court.

G. A. Stiles, Cornwall, for defendant Croil.

E. C. Cattanach, for defendant McCullough.

W. E. Middleton, for plaintiff.

BRITTON, J., dismissed the appeal with costs, stating reasons in writing for agreeing with the Master's opinion.

MARCH 12TH, 1906.

DIVISIONAL COURT.

STURGEON v. PORT BURWELL FISH CO.

Venue—Change of—Fair Trial — Convenience — Expense—Witnesses.

Appeal by defendants from order of BRITTON, J., ante 359, dismissing appeal by defendants from order of Master in Chambers refusing to change place of trial from Goderich to Simcoe.

W. E. Middleton, for defendants.

W. A. Skeans, for plaintiff.

THE COURT (MEREDITH, C.J., MACLAREN, J.A., TEETZEL, J.), dismissed the appeal with costs to plaintiff in any event.

MARCH 12TH, 1906.

C.A.

REX v. BLAIS.

Criminal Law—Rape—Judge's Charge—Comment on Failure to Testify of Person Jointly Indicted—"Person Charged"—Canada Evidence Act — Competent Witness—Separate Trials of Accused.

Motion by prisoner for leave to appeal from conviction.

At the autumn assizes, 1905, for the county of Carleton, the prisoner was jointly indicted with one James Finnessey for a rape upon one Lucy Carroll. A true bill was found against them. They were arraigned thereon and pleaded not guilty. The indictment was then traversed to the following sittings in January, 1906. At that sittings it was

ordered that the trial of the prisoner Blais should be proceeded with separately and apart from that of the other prisoner, as to whom the indictment was again traversed to a future sittings.

Blais was accordingly tried and was convicted. In his charge to the jury the trial Judge commented upon the fact that Finnessey, who was shewn by the evidence to have been an associate of Blais, and to have taken part in aiding the latter to commit the outrage for which he was tried, had not been called either for the prosecution or the defence. "Finnessey," he said, "the associate, acting all along with this prisoner, presumably his friend, is not called at all. Finnessey might have thrown some light possibly one way or the other, if called either by the Crown or by his friend the prisoner, upon this transaction. He was not called. We are in the dark as to what Finnessey might have said. We have not any contradiction by Finnessey. We have the girl's positive statement as to what Finnessey did and said in association with the prisoner."

E. Mahon, for the prisoner, contended that Finnessey was "a person charged" within the meaning of sec. 4 of the Canada Evidence Act, 1893, which enacts that every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness, whether the person so charged is charged solely or jointly with any other person; and that the trial Judge, in the comments referred to, had infringed the provision of sub-sec. 2 of sec. 4, which enacts that the failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the Judge or counsel for the prosecution in addressing the jury.

J. R. Cartwright, K.C., for the Crown.

The judgment of the Court (MOSS, C.J.O., OSLER and GARROW, JJ.A., MULOCK, C.J., and BRITTON, J.), was delivered by

OSLER, J.A.:—We are of opinion that the trial Judge committed no error in referring to the failure of the Crown or the prisoner to call Finnessey as a witness, and that leave to appeal should not be granted.

The case is one to which the section does not apply. Finnessey was not a "person charged" within the meaning of sec. 4. The person who is by that section made a competent witness, and comment upon whose failure to testify is prohibited, is the person on trial, the person given in charge to the jury—"the prisoner at the bar whom they have in charge." The prohibition probably extends to the case of one of two or more prisoners who are thus charged, i.e., tried, jointly.

"It was a distinguishing characteristic of our criminal system that a prisoner on his trial could neither be examined nor cross-examined." Nor was one of several prisoners indicted and tried together a competent witness for the other: Regina v. Payne, L. R. 1 C. C. R. 349.

The object of the Act of 1893 was to alter the law in this respect, and, as I understand it, to render a person or persons on trial and the husbands or wives of such persons *competent* witnesses on their own behalf and on behalf of either of them. The Act may have gone even further than this: Rex v. Gosselin, 33 S. C. R. 255: but it is unnecessary at present to consider that case or to invoke its application, because, as I have said, the right of the Crown or of the prisoner at the trial of this case to call Finnessey does not depend upon the Act, but upon the general law, for which it is sufficient to refer to Regina v. Payne, supra, and Winsor v. The Queen, L. R. 1 Q. B. 390, 6 B. & S. 143, 7 B. & S. 491, where it was held that where two prisoners are jointly indicted for a felony and plead not guilty, but only one is given in charge to the jury—that is to say, where he is tried separately—the other is an admissible witness, although his plea of not guilty remains on the record undisposed of. Here, therefore, Finnessey, who was not on trial, was an admissible witness for the prosecution or the defence, and could not have refused to testify, although under sec. 5 of the Evidence Act, as amended by 61 Vict. ch. 53, he might have protected himself against anything he said being used as evidence against him on his own trial. . . .

Leave refused.

MARCH 12TH, 1906.

C.A.

REX v. FINNESSEY.

Criminal Law—Rape—Indictment for Aiding and Assisting —Evidence—Character of Prosecutrix for Chastity—Question as to Connection with a Particular Man—Witness—Question as to Relations with Prosecutrix—Examination to Credit—Refusal to Answer—Finding of no Substantial Wrong or Miscarriage.

The prisoner was indicted for the offence of aiding and assisting one Blais to commit a rape upon one Lucy Carroll, and was tried before a Judge of the High Court and a jury, at Ottawa.

Part of the evidence for the prosecution was to the effect that the prosecutrix, Lucy Carroll, met one Brennan on the evening of 24th April, in the city of Ottawa, and that, after being at other places, they went to the Balmoral hotel about 2 o'clock in the morning of the 25th; that they were allowed by the clerk to remain in the smoking room, and that later on he found out that Brennan and the prosecutrix had gone into a small side room, the door of which was shut and the light turned out. The evidence further shewed that about 4 a.m. the prosecutrix and Brennan left the Balmoral hotel, and while they were walking together, one Eugene Blais came along and started a fight with Brennan, which resulted in Brennan finally retiring, leaving the prosecutrix with Blais.

The prosecutrix stated that Blais and Finnessey (the prisoner), after Brennan had left, carried her into a vacant house, and that there Blais criminally assaulted her, Finnessey at the time holding her by the feet.

In cross-examination the prosecutrix was asked by counsel for the prisoner whether Brennan had any connection with her at the Balmoral hotel, and refused to answer.

The trial Judge ruled that she might refuse to answer if she liked.

Brennan was called as a witness for the Crown, and on cross-examination counsel for the prisoner asked him what

he had done to the prosecutrix while he was in the Balmoral hotel, and he declined to answer.

The trial Judge ruled that the witness was not obliged to answer.

The prisoner was found guilty, but sentence was deferred.

The following question was reserved by the trial Judge for the consideration of the Court of Appeal:—

Was my ruling correct with regard to the questions put to the prosecutrix and Brennan, and, if not, was any such substantial wrong or miscarriage thereby occasioned as to require a new trial?

E. Mahon, for the prisoner.

J. R. Cartwright, K.C., for the Crown.

The judgment of the Court (MOSS, C.J.O., OSLER and GARROW, JJ.A., MULOCK, C.J., and BRITTON, J.), was delivered by

OSLER, J.A.:—On the argument counsel for the prisoner stated that he would not press the objection to the trial Judge's ruling that the prosecutrix was not bound to answer the questions put to her. The authorities shew that such ruling was right. The prosecutrix may be asked questions to shew that her general character for chastity is bad. She is bound to answer such questions, and, if she refuses to do so, the fact may be shewn: Rex v. Clarke, 2 Stark. 244; Rex v. Barker, 3 C. & P. 589; Regina v. Holmes, L. R. 1 C. C. R. 334, 337. So too she may be asked whether she has previously had connection with prisoner, and, if she denies it, that may be shewn: Rex v. Martin, 6 C. & P. 562. Such evidence is relevant to the issue, since in both cases it bears directly upon the question of consent, and the improbability of the connection complained of having taken place against the will of the prosecutrix.

And she may be asked, but, inasmuch as the question is one going strictly to her credit, she is not generally compellable to answer, whether she has had connection with persons other than the prisoner. This seems to rest, to some extent, in the discretion of the trial Judge. Whether, however, she answers it or not, that is an end of the matter; otherwise, as many collateral, and therefore irrelevant, issues might

be raised as there were specific charges of immorality suggested, and the prosecutrix could not be expected to come prepared to meet them, though she might well be prepared to repel an attack upon her general character for chastity: Rex v. Hodgson, Russ. & Ry. 211; Regina v. Laliberté, 6 S. C. R. 117; Regina v. Holmes, L. R. 1 C. C. R. 334; Phipson on Evidence, 3rd ed., pp. 158, 453.

As regards the question put to the witness Brennan, different considerations apply. In one sense, it was a question to credit, and, if it was nothing more, though a proper question to be put, the witness was not bound to answer it, for the reasons already assigned in the case of the prosecutrix.

The question, however, had a wider tendency, which was to ascertain whether from his relations with the prosecutrix the witness was likely to be biassed or unfavourably affected towards the prisoner. . . .

[Reference to Attorney-General v. Hitchcock, 1 Ex. 91; Thomas v. David, 7 C. & P. 350; Ex p. Yewin, 2 Camp. 638 n.]

It appears to me that the relations between the witness Brennan and the prosecutrix on the evening in question were shewn to be such as to justify the prisoner's counsel in insisting upon a full disclosure of all that had taken place between them which might tend to affect his evidence favourably towards the prosecutrix, whose favours he may have enjoyed, or unfavourably towards the prisoner, who had aided Blais in taking his mistress away from him. I think the question was a proper one for this purpose, and that the witness was bound to answer it, and that the Judge should have so ruled.

Whether any substantial wrong or miscarriage has been occasioned by the contrary ruling, is another matter. This, though one of the questions, or part of the question, reserved, is not in strictness the subject of a reservation, but is rather a matter to be dealt with by the Court in considering whether, though they may be of opinion that the evidence was improperly rejected, or that something not according to law was done at the trial, or some misdirection given, the case is not one for the application of clause (f) of sec. 746 of the Code, on the ground that no substantial wrong or miscarriage was thereby occasioned.

As we pointed out in the recent case of Rex v. Drummond, 10 O. L. R. 546, 6 O. W. R. 211, this clause confers upon the Court more extensive powers than those conferred by the New South Wales Act which was considered by the Judicial Committee in Makin v. Attorney-General, [1894] A. C. 57. See also Regina v. Woods, 5 B. C. R. 585, and Manley v. Polache, 11 R. 566 (P. C.)

Though these powers should be very cautiously exercised, and only in cases where it is plain, almost to a demonstration, that no substantial wrong or miscarriage has been caused by the error complained of—and I say this because the Court in applying the cause is, to some extent, assuming the functions of the jury—yet the present case seems to be one in which the Court may properly act upon it and uphold the conviction. The prisoner had what Strong, J., in Regina v. Laliberté, supra, calls the obvious practical advantage which resulted from the refusal of the prosecutrix and Brennan to answer the question, the irresistible inference, in the circumstances, being that connection had taken place between them. If the latter had denied it, it does not appear that there was any evidence available for the purpose of contradicting him other than that of Roy, the hotel clerk, which was given, and from which the inference I have spoken of might have been drawn, while the other facts implicating the prisoner to which Brennan testified were corroborated by independent testimony.

I am therefore of opinion that we should hold that no substantial wrong or miscarriage was occasioned by permitting Brennan to refuse to answer the question, and that the conviction should be affirmed.

The question reserved should be answered by saying that the ruling of the trial Judge in regard to the question put to the prosecutrix was right; that in regard to the question put to the witness Brennan the ruling of the Judge was wrong. But the Court, being of opinion that no substantial wrong or miscarriage had been occasioned by such last mentioned ruling, doth not think fit to reverse the conviction of the prisoner or to grant a new trial.

MARCH 12TH, 1906.

C.A.

REX v. DE MARCO.

Criminal Law — Murder — Evidence — Misdirection—New Trial.

Crown case reserved.

T. C. Robinette, K.C., and J. M. Godfrey, for the prisoner.

J. R. Cartwright, K.C., for the Crown.

The judgment of the Court (MOSS, C.J.O., OSLER and GARROW, JJ.A., MULOCK, C.J., and BRITTON, J.), was delivered by

MOSS, C.J.O.:—The prisoner was tried before MacMahon, J., and a jury of the county of York, upon an indictment charging him with the murder of one John Hoban. He was found guilty, and, at the request of his counsel, the Judge stated a case, reserving 3 questions for the opinion of this Court:—

First, whether there was any proper evidence to be submitted to the jury against the prisoner on the indictment, and whether the case should have been withdrawn from the jury upon the evidence submitted by the Crown.

We are unable to answer this question in prisoner's favour. We cannot say that there was not evidence upon which, if they believed it, the jury might not reasonably come to the conclusion that the prisoner was the man who inflicted the wound which caused Hoban's death.

But, as we are of opinion upon the second question submitted, that there must be a new trial, we refrain from discussing the testimony in detail, and content ourselves with stating the conclusion we have reached upon a perusal and consideration thereof.

The second question relates to the testimony of one Louis Pollikofskey, a witness whose name appeared on the back of the indictment, and who was placed in the witness box by the Crown, at the request of the prisoner's counsel, and the remarks thereon of the Judge in his charge to the jury.

Before Pollikofskey was called, one Chester Manzetto had been called for the Crown. He testified that he was present and saw Hoban stabbed. On examination-in-chief he said that he and the prisoner were the only Italians present, and that he (Manzetto) did not do the stabbing. On cross-examination he was asked: "Did De Marco do the stabbing? A. No, I never saw. I see the other fellow that ran away. Q. The fellow who ran was the fellow who did the stabbing? A. Yes. Q. I will put the question through the interpreter; ask him was De Marco the man who did the stabbing? A. No, he is the other man. Q. Who did the stabbing? A. I do not know. Q. What sort of a looking man, was he a tall man who did the stabbing? A. A short man, a big man? Q. Not a thin man? A. No. Q. You are sure it was not De Marco? A. De Marco never have a knife? Q. This other man who did the stabbing? A. He ran away and De Marco jumped up in a minute or two in the street, he used a little bit of bluff, but De Marco never used a knife." He was then asked by counsel for the Crown: "Do you say De Marco ran away? A. Yes, I never saw him any more. Q. Why did he run away? A. I don't know. Q. There were only two Italians present, you and De Marco? A. Yes."

Mr. Godfrey (counsel for the prisoner) "Q. (through the interpreter): Ask him might this other fellow have been an Italian for all he knows? A. He was an Italian. Q. So then there were three Italians? A. Yes, three Italians."

The learned Judge in his charge to the jury, commenting on Manzetto's testimony, seems to have overlooked this final statement, for he said in part: "Although Manzetto seems to convey the idea that there was a third Italian there, still when he is cross-examined he says there were only "he and Charlie there," and he is asked if he was the person that committed the offence, if he was the man who made the attack upon Hoban, and he says no. Well, if there were only two Italians there and he did not make the attack, who was the other Italian?" Further on he said: "As I have already stated, Manzetto said there was a third man, an Italian, there, but he does not say who he was, if he knew him; but he says in cross-examination that he and the prisoner were the only ones present, and that Manzetto did not do the stabbing."

The tendency of these remarks was towards creating an impression on the minds of the jury that on cross-examination Manzetto withdrew the statement that there were three Italians present when the stabbing occurred, whereas it was in his evidence-in-chief that he first made the statement that there were only himself and the prisoner there, while in cross-examination, and finally in answer to a further question through the interpreter, he averred that there were three Italians present. It can scarcely be doubted that the effect upon the jury of the learned Judge's remarks was to lead them to reject Manzetto's statement that there were three Italians present, and to come to the conclusion that there were only the prisoner and Manzetto there when the stabbing occurred; and, as Manzetto swore positively that he did not do the stabbing, the only person who could have done it was the prisoner. This is important to be borne in mind in considering the manner in which the Judge dealt with Pollikofskey's testimony in respect of which the second question is submitted. He was called at the instance of prisoner's counsel by leave of the Judge, reserving to prisoner's counsel the right to move for what he termed a nonsuit, at the conclusion of Pollikofskey's evidence. The latter was not examined in chief by the Crown counsel, but he was re-examined by him. To the prisoner's counsel he stated that he saw the fight in which Hoban was killed; he was going with another man to Glionna's tavern to have a glass of beer; he saw there was a fight there; two men, and after another man, two Italians, one tall one, big one, and one little one, and one English; he saw the big Italian take a knife—he pulled a knife and said "Come, I want to fight you." The witness then went into the tavern. He said the man who pulled the knife was not the prisoner.

To counsel for the Crown he said he did not see Manzetto there, but could not say whether he was there or not. He saw the small Italian hit the Englishman. Two Italians and one Englishman were all he saw in the row. Seeing a knife, he went into the tavern because he saw there was a fight with a knife, and did not like to see it. The small Italian and the Englishman were close together. The Englishman punched him, the big Italian came back holding the knife, and said, "Come, I will fight." He was then 20 or 25 feet from the Englishman. This was the position when he went into the tavern. He took a glass of beer and when he was

coming out he saw Hoban, who had been stabbed. He had not see Hoban before. The Englishman he had seen was one who was drunk. He could not say how many Italians there were there.

From the evidence of previous witnesses it appeared that the trouble had originated in the actions of a man named Brown, who was intoxicated, and it would seem that he was the Englishman seen by Pollikofskey. He did not see Hoban, but there is no question that Hoban was present. The trial Judge told the jury in substance not to take Pollikofskey's evidence into consideration, but to leave it out of the case.

The following are his observations as set forth in the stated case: "And here, just in parenthesis as it were, I wish to eliminate from the consideration of this case the evidence of Pollikofskey, the last witness called, in regard to what was thought to be the attack upon Hoban. You remember, gentlemen of the jury, that Clark spoke of a man by the name of Brown coming to the door of the hotel in an intoxicated condition, and saying that there were three or four people outside who were about to maltreat him. He says that Brown was very much intoxicated, and they went out. There was no one there apparently but Hoban and the prisoner that he saw just at that time. Hoban told Brown he had better go home, and made some observation not of a complimentary character to Brown, and Brown became angry, and an altercation took place between Brown and an Italian, with which Hoban was not mixed up apparently in any way. But, from Pollikofskey's evidence, the big Italian, who was there while Brown was present, and who had this difficulty with Brown, pulled out a knife, that is, if you believe Pollikofskey's evidence. He says that the Englishman he saw was the man who was drunk, it was not Hoban at all; he did not see Hoban; did not know anything about Hoban; and he says the man he saw, and the man against whom the knife was pulled, was the Englishman who was drunk; so that, as far as his evidence is concerned, it may be eliminated altogether from your consideration, as far as this tragedy is concerned, because he appears to know nothing about it. The man who had this difficulty with Brown left immediately, and apparently was not there when Clark speaks of the occurrence between the Italian or Italians who were standing there and Hoban."

And the question submitted is, was this part of the charge a misdirection?

Upon the evidence of Pollikofskey, taken in connection with the evidence of Manzetto to which reference has been made, it was quite open to the jury, if they credited it, to conclude that the prisoner was not the person by whom the fatal blow was struck. Manzetto had sworn that there were present when the stabbing took place, himself, the prisoner, and another Italian, and that the latter inflicted the wound. And according to Pollikofskey there was in the vicinity of some of the parties present an Italian with a knife displayed, who was neither Manzetto nor the prisoner. It is true that he says the Italian he saw with the knife was 20 or 25 feet away from where the others were standing, and that he did not see Hoban, but there is no question as to Hoban being there at the time, and there was ample time for the Italian to have come over to where the others were and struck the blow and got away before Pollikofskey emerged from the tavern. It must be borne in mind that, when last seen by Pollikofskey, the Italian was advancing towards the group of which Hoban was no doubt one, with the knife in his hand, and using words of hostility towards some one.

There was enough in his attitude, actions, and language, when Pollikofskey last saw him very shortly before he saw the wounded man, to render it of great importance to the prisoner that the testimony with regard to it should not have been withdrawn from their consideration.

It cannot be correctly said that, because Pollikofskey knew nothing about Hoban, and that it appeared to him that the knife was drawn against Brown, it follows that, so far as the prisoner is concerned, the evidence should be eliminated.

He was entitled to have the jury consider whether, in view of the evidence that the prisoner was not one of the persons with whom knives were seen, it might not have been the man whom Pollikofskey saw advancing that Manzetto saw use his knife on Hoban, and to have the benefit of their deliberations on that point, and of any doubt it might have created as to the prisoner's guilt.

The second question should, therefore, be answered in the affirmative.

The third question submitted raises for consideration a point which, in view of the answer to the second question,

does not call for an answer. Whether or not the observations made by counsel for the Crown in his address to the jury were a contravention of the terms of sub-sec. 2 of sec. 4 of the Canada Evidence Act, 1893, or whether, if this question was the only one submitted, the prisoner would be entitled to the benefit of the objection, need not be determined. But it may not be out of place to observe that remarks of the kind, coming as they undoubtedly do very close to, if not infringing upon, the line of prohibition, should be avoided, and that in every case where no evidence is adduced on behalf of the prisoner, the utmost care should be observed to avoid any reference which could by possibility be regarded as a remark by way of comment on the failure of the prisoner to avail himself of his statutory right of testifying in his own behalf.

The first question will be answered in the affirmative as to the first branch and in the negative as to the second branch.

The second question will be answered in the affirmative.

The third question is not answered.

And there will be a new trial.

SCOTT, LOCAL MASTER. MARCH 13TH, 1906.

MASTER'S OFFICE.

MURPHY v. CORRY.

Interest — Solicitor's Bill — Compensation for Services — Quantum Meruit.

Plaintiffs asked to be allowed interest on the amount found to be due to them by the judgment reported ante 363.

C. J. R. Bethune, Ottawa, for plaintiffs.

W. J. Code, Ottawa, for defendants.

THE MASTER:—Defendants contend that Re McClive, 9 P. R. 213, lays down the principle that in the case of a claim for the amount of a solicitor's bill interest will in no case be allowed unless a demand in writing is shewn to have been

made for it, and they say that if this is not strictly a solicitor's bill, it is a bill rendered to a client by a solicitor, and is governed by the same principle. I do not understand Wilson, C. J., in Re McClive to have laid down any rule such as is contended for. It is true he says (p. 214): "If a demand is made in writing on the debtor claiming interest, the jury may allow interest in such a case (i.e., that of a solicitor's bill) as well as in any other." But the judgment as a whole shews, I think, that in his opinion in Ontario the case of a solicitor's bill does not differ as regards the question of the allowance of interest on it, from that of any other liquidated demand. Were it otherwise, I would still feel bound to hold that, this not being a solicitor's bill, the supposed doctrine would have no application. This is a case where payment of a just debt has been improperly withheld, and under the well known decisions, recently confirmed by the Privy Council in Toronto R. W. Co. v. City of Toronto, [1906] A. C. 117, I am bound to allow interest.

HODGINS, LOC. J. IN ADMIRALTY. MARCH 13TH, 1906.

EXCHEQUER COURT OF CANADA.

CADWELL v. THE "BIELMAN."

Ship—Collision—Rules of Navigation—Dangerous Channel—Speed—Suction and Displacement—Look-out.

Action for damages for a collision which occurred on the night of the 30th May, 1905, in that part of the St. Clair river known as the "Great South Bend."

J. H. Rodd, Windsor, and E. S. Wigle, Windsor, for plaintiff.

N. A. Bartlet, Windsor, for defendant.

THE LOCAL JUDGE:—The collision occurred about at the locality which the evidence warrants me in finding is called Joe Beddore's Landing, and where the channel is about 700 feet wide. The collision was between the sand sucker "Burroughs," a steamer of 109 feet in length, 27 feet beam, and

9 feet draft, and the "Bielman," a freight steamer of 305 feet in length or 291 feet keel, 41 feet beam, and 18 feet draft, both heavily laden, the former with sand, and the latter with 3,303 tons of iron ore. The river at this place is very winding and has been designated by witnesses as "dangerous." The captain of the "Borroughs" described it as "Collision Bend," because accidents happen there. And the captain of the "Bielman" said: "You must exercise great care in navigating this bend. The river is dangerous; and so this bend is as dangerous as other places. There are three dangerous places, and this is one of them." And it appears from the evidence given by the defence that there were 7 vessels in the locality about the time of the collision; the plaintiff's steamer "Burroughs;" the defendant steamer "Bielman," towing the barge "McLaughlin;" a passenger side-wheel steamer "Awana;" a steel steamer; and a steam barge towing a lumber barge. Of these the passenger steamer "Awana" was going up the river; and all the others were going down the river; one is said to have passed 4 seconds before the accident, and another 3 seconds after the accident. It appears therefore that this river bend was a dangerous and crowded channel, yet the captain of the defendant ship, after stating that the ordinary speed of his ship was 9 miles an hour, and that he was going down stream, said that he continued at that rate to the time of the collision, and that he did not reduce the speed of the "Bielman" until the accident was about to happen.

In Spencer on Collisions, sec. 72, it is stated: "An overtaking and pursuing vessel is bound not only to avoid colliding with the vessel passed, but is bound to pass at such a distance that no harm will result to the other from the suction produced by her passage through the water, or from her displacement waves; and she is bound to know the effect of her swell, and to pass at a distance sufficient to avoid danger therefrom; or to reduce her speed to such a degree that a displacement wave will be avoided." "In navigating rivers and harbours where small boats are accustomed to ply, and may reasonably be expected, steamers are bound to navigate with the utmost caution, and also at a rate of speed sufficiently slow to avoid damage from her attending swell. It is negligence in a large and powerful steamer to work her wheel in a narrow and crowded slip, whereby a current is produced sufficient to injure other craft lawfully there."

And the governing rule has been thus stated: "It must be presumed that the master of a large steamer must know the effect of the frontal and side waves made by such steamer when going at her ordinary rate of speed in narrow channels; and he should therefore regulate, or moderate, the rate of speed, and keep sufficiently out of the way of an overtaken vessel."

The evidence of the captain of the "Burroughs" is that he was keeping her to the American side of the river—her proper starboard side of the fairway; and that when he found the "Bielman" abreast of him, and the suction caused by her speed beginning to operate and swing his vessel to port, he put his wheel hard-a-port and backed, and gave 3 whistles to the "Bielman" to check her speed, and also gave several short blasts as a danger signal,—none of which were answered by the "Bielman."

The effect of putting his wheel hard-a-port is described by several of the witnesses for the defence. The captain of the "Bielman" said that after the side wheeler passed, the "Burroughs" steered away from the "Bielman" to starboard about a point, and towards the American shore; and that she then steered towards the "Bielman," and struck her about midships by her stem at an angle of about 75 degrees. He also stated that after the "Burroughs" started to sheer —just appreciable—he heard her engine bells. The mate of the "Bielman," who had charge of her navigation at the time of the collision, said: "After the passenger boat passed, the 'Burroughs' went over to the American shore;" and adds that he heard the whistles to the engine room to check down the engine. The engineers of the "Bielman" confirm this sheering of the "Burroughs," and the hearing of the bells in her engine room. And the mate of the barge "McLaughlin" said that the "Burroughs" sheered about 50 feet towards the American shore, after passing the side-wheel steamer.

One of the expert witnesses for the defence described the effect of suction and displacement waves caused by a large steamer upon a smaller steamer on the same course. He said that when a large steamer was overlapping a smaller one the water thrown from the bow of the larger steamer would force the stern of the smaller one away from her, and would bring their bows together, or, as he said later, would bring the bow of the smaller one to impinge on the larger. The

evidence for the defence shews that the height of the waves caused by the speed of the "Bielman" was about 1½ feet at 7 miles an hour and 9 miles an hour; that the speed of 9 miles an hour would add about 3 inches more, and he added that about 2 feet 3 inches high might have been reached by her.

The finding on the evidence therefore must be that the suction and displacement waves caused by the "Bielman" in overlapping the "Burroughs"—notwithstanding the effort of the captain of the "Burroughs" to counteract and get away from her displacement waves and suction, by putting his helm hard-a-port and steering towards the American shore, as proved by the witnesses for the defence—forced the stern of the "Burroughs" away from her parallel course, and caused her bow to swing towards the "Bielman" and to strike her amidships at about an angle of 75 degrees; forced the cross beams at her bow to bulge out at the other side and bend one of the iron plates backward towards her stern.

There is in this case the same conflict of evidence as to the estimated distance between the two steamers when the "Bielman" got abreast of the "Burroughs" as there was in the case of The City of Brockton, 37 Fed. R. 897. In that case the witnesses varied in estimating the distance between the two vessels at 75 feet, 100 feet, 250 feet, and 300 feet. The steamers in that case were somewhat smaller than the vessels in this case. But the Court held that it was something other than the wheel of the smaller vessel which caused her to get off her course; and that a force was present —the force of currents created in the water by the powerful action of the propeller of the larger vessel driving her at such speed. In this case the witnesses similarly vary in their estimates of the distances between the vessels at 75 feet, 100 feet, 200 feet, and 250 feet.

The general rule applicable where there is a conflict of evidence in Admiralty cases is that the Court must be governed chiefly by certain undeniable and leading facts; and this especially applies to estimates of distances between vessels. As said in The Great Republic, 23 Wall. p. 29: "Under the most favourable conditions it is impossible to measure distances on the water with accuracy; but in time of excitement there is very little reliance to be placed on the opinion of any one on this subject; and especially is this so when the condemnation of a boat may depend upon it."

There is no evidence to negative Captain Allen's oath that when the displacement waves or suction caused by the "Bielman" began to operate on his vessel he put his wheel hard-a-port, and backed. On the contrary, he is confirmed by several of the witnesses for the defence that, as soon as the side-wheeler passed the "Burroughs," she sheered away from the "Bielman" and towards her starboard side of the narrow channel. And the only thing against the captain's oath is the supposition of Captain Montgomery of the "Bielman," "I attribute the collision to the 'Burroughs' putting her wheel the wrong way, or to her steering gear being disabled." He admitted that he had heard Captain Allen's evidence, and that he had no means of shewing that he did not do as he said. I must therefore find that Captain Allen's evidence has not been impeached, or disproved.

But there is another fact which I must find against the "Bielman," on the evidence of her captain. He says as to the out-look: "At the time of the accident the mate was in charge of the navigation of the ship. There was no look-out on the deck with him, and he had charge of the navigation and the look-out. The look-out was on deck with the pilot, but was on the main deck, and had been sent back to do something about the towing machine, and he was engaged at that up to the time the accident happened. Add to this there is proof by 6 witnesses that when the collision was imminent the captain of the "Burroughs" gave 3 blast signals by whistle, and also several short blasts as danger signals; but 4 of the defendants' witnesses, who were questioned as to these signals, denied, or did not remember, hearing any of these signals from the deck of the "Burroughs."

This brings up the question of a proper look-out on the night of the collision. And the non-observance of the duty to keep a proper look-out was considered in the case of The Twenty-one Friends v. J. H. May, 33 Fed. R. 190, where, in consequence of the mate and look-out man dividing their attention between the look-out and reefing sail, it was held that a proper look-out had not been observed. This was followed in St. Clair Navigation Co. v. The "D. C. Whitney," 6 O. W. R. at p. 312, where it was held that the mate and the look-out man, dividing their attention between the look-out and preparing the ropes for mooring the ship, was not a compliance with the rule as to a proper look-out. And The City of New York, 175 U. S. 87, shews that

the non-hearing by the officers of the "Bielman" of the blast and danger signals given by the "Burroughs" must be held to be "conclusive evidence of a defective look-out."

And the same case decides that "the duty of a steamer to answer a signal given by an approaching vessel is as imperative as the duty to give one;" the Court thus defining the duty: "Ordinary prudence demands that an obligated steamer, proposing by whistles to deviate from the customary course, shall receive an immediate reply, so that her wheel may be put to starboard or port as the exigencies of the case may require. A delay of even a few seconds may seriously embarrass her as to the intention of the preferred vessel."

To these must be added the duty of the "Bielman," as the overtaking steamer, observing Article 18 of the Act of 1886, C. S. C. ch. 79,—now amplified in Articles 23 and 24 of 1905, but which in the former article tersely reads thus: "Every steamship when approaching another ship, so as to avoid risk of collision, shall slacken her speed and stop and reverse, if necessary." See also Articles 20, 21, and 22.

On a review of the law applicable to the facts which I find to be proved in this case, I must hold that plaintiff is entitled to the decree moved for and costs. Reference to the deputy registrar at Windsor to assess the damages and to the district registrar to tax the costs of the action and reference.

BOYD, C. MARCH 13TH, 1906.

CHAMBERS.

RE HARSHA.

Extradition—Warrant of Commitment—Form — Persons to whom Addressed — Forgery — Statement of Offence in Warrant—Intent to Defraud—Proof that Offence Charged is a Crime in Foreign Country—Complaint—Information and Belief.

Fred Harsha, having been committed on a second warrant for detention under the Extradition Act, moved for a writ of habeas corpus on the grounds mentioned in the judgment. See the reports of previous applications, ante 97, 155, 293.

J. B. Mackenzie, for the applicant.

BOYD, C.:—The prisoner moves on the following grounds:

1. That the warrant of committal is void because not properly directed to some particular and named constable. It is addressed generally "to the chief constable or other peace officer of the city of Toronto and to any constable or other peace officer in and for the county of York, and to the keeper of the common gaol," etc.

Reference is made to the difference in forms given in the Extradition Act between form 1, "Warrant of Apprehension," which is addressed to "each and all of the constables," etc., and form 2, "Warrant of Committal," which is addressed "to ———, one of the constables," etc. The forms are not of sacred character for imperative use, a departure from the language of which is fatal. They are supplied for convenience, and by sec. 20 of the Act the forms given, or forms as near thereto as circumstances admit of, may be used, and when used shall be deemed valid. Under the Code various methods of address are used in the different forms—all certain in this, that some officer or class of officers is specified—and I notice in the form I I "Warrant of Commitment of a Person Indicted," the address is "to all or any of the constables or other peace officers in the said county," etc. Underlying Code and Extradition Act is the common law rule that a warrant may be addressed to any number of persons by name or by description of office and be validly executed by any of them within the municipal or other precincts of his office: Rex v. Weir, 1 B. & C. 288. There is no value in the first objection.

2. The next objection urged is, that the charge of forgery on the face of the warrant is insufficient, because it is not stated that the act was done "with intent to defraud."

A warrant for detention is not to be construed with the same nicety as a warrant in execution. Under the Act the warrant may be in very general terms, not with the particularity of an indictment, but with such reasonable certainty as will inform the party with what he is charged: Rex v. Gourlay, 7 B. & C. 669; Ex p. Terraz, 4 Ex. D. 63. This was the rule even before our Code dispensed with all such "technical averments:" sec. 611. The statement in this warrant contains all the ingredients of forgery, as defined in sec. 422 of the Criminal Code. This objection falls with the first.

3. The last objection is, that the evidence does not shew that the matter complained of is a crime in the foreign locality (the State of Illinois). The offence charged is forging tickets in respect of an entertainment of the Policemen's Benevolent Association, at the price of $1 each. The forged ticket has this on its face, "This ticket is exchangeable at box office on and after Sept. 25." The meaning is that the holder of the ticket could apply 8 days ahead to get the admission ticket without further charge, which would entitle him to the choice of seats—which might thus be secured by the earliest applicants. . . . The objection is, that the forged ticket did not give admission direct, but only enabled the holder to get the actual admission ticket upon delivery up and exchange of the forged ticket at the box office. The offence is laid under the Illinois statute, verified by an expert in law from that State.

The section being cited in Court, "Every person who shall falsely make, forge, or counterfeit any ticket for the admission of any person to any entertainment for which a consideration is required, with intent to damage or defraud, . . . shall be guilty of forgery," the expert witness testified that this transaction would, in his opinion and judgment, be an offence against that law. It is not for me to express any opinion on the foreign law, but I see no reason to disagree with the evidence given, for the forged ticket supplied the means whereby admission was gained to the entertainment. The exchange for another ticket, securing a given seat probably, does not seem to be a material circumstance.

Altogether, therefore, this charge failing, the whole application comes to naught.

Many American cases were cited, which do not help very much upon matters of practice, but there is one American case of highest authority which was not cited, but from which I quote with great acceptance words that may help to minimize applications like the present under the Extradition Act:

"In the construction and carrying out of such treaties (of Extradition) the ordinary technicalities of criminal proceedings are applicable only to a limited extent. Foreign powers are not expected to be versed in the niceties of our criminal laws, and proceedings for a surrender are not such as put in issue the life or liberty of the accused. They simply demand of him that he shall do what all good citizens

are required and ought to be willing to do, viz., submit themselves to the laws of their country. Care should doubtless be taken that the treaty be not made a pretext for collecting private debts, wreaking individual malice, or forcing the surrender of political offenders; but where the proceeding is manifestly taken in good faith, a technical non-compliance with some formality of criminal procedure should not be allowed to stand in the way of a faithful discharge of our obligations. Presumably, at least, no injustice is contemplated, and a proceeding which may have the effect of relieving the country from the presence of one who is likely to threaten the peace and good order of the community, is rather to be welcomed than discouraged:" per Mr. Justice Brown in Grin v. Shine, 187 U. S. R. 181.

Mr. Mackenzie pointed out that in a previous application in this matter he had omitted to cite Rice v. Ames, 180 U. S. R. 371, as going to shew that a man should not be arrested on statements of information and belief. Such is not the usual practice in this country. I think the law applicable, besides what was formerly cited, is well manifested in the Encyclopædia of the Laws of England, vol. 2, p. 51 . . . "The informant or complainant need not be a person who is able to give evidence as to the commission of the offence alleged. It is enough for him to lay an information or make a complaint on statements made to him by others. . . . The reason of the rule is that the urgency of the case frequently makes it impossible to obtain other evidence in time to obtain the needful temporary protection of the law."

BOYD, C. MARCH 14TH, 1906.

CHAMBERS.

ASHLAND CO. v. ARMSTRONG.

Security for Costs — Rule 1198 — Foreign Corporation— "Residence"—License to do Business in Ontario—Small Agency—Property in Ontario.

Appeal by plaintiffs from order of local Master at Belleville requiring plaintiffs, a foreign corporation doing busi-

ness under license in Ontario, to give security for defendant's costs of an action brought by them against him.

C. A. Moss, for plaintiffs.

A. G. Slaght, for defendant.

BOYD, C.:—The provincial statute 63 Vict. ch. 24 does not throw any light on the residence of a foreign corporation. By procuring a license thereunder, such a body gets a status in this country for the purpose of carrying on business and being able to enforce its contracts in the provincial courts; but, so far as the Act goes, it remains an extra-provincial corporation.

The cases cited as to the "residence" of foreign corporations are not of pertinence as to what residence is sufficient so as to escape giving security for costs. For instance, in one of the most recent it is said by Romer, L.J., that "carrying on business in a place for a period of time is by the cases considered as residence for that period for the purpose of service of process:" Dunlop Pneumatic Tyre Co. v. Actien Gesellschaft für Motor und Motorfahrzeugbau, [1902] 1 K. B. 349.

A corporation can only reside anywhere in a figurative sense, through its agents, and what may be deemed a sufficient residence for one purpose, such as service of process or taxation of income, might be far inadequate where residence is required in order to avoid giving security for costs.

A very instructive case is Goerz & Co. v. Bell, [1904] 2 K. B. 136, in which Mr. Justice Channell adverts to the variety of meanings attributable to the word "residence."

Without going through all the cases, I would deduce this conclusion, that to satisfy the terms of Con. Rule 1198 a corporation must be incorporated and have its head and controlling office within the jurisdiction, and where its business is carried on by its members and officers.

Where it is a foreign corporation having only a constructive residence through agents acting in its business interests and licensed so to do in a comparatively small and transient way, such a condition of affairs does not imply "residence" as contemplated by the practice as to security for costs.

The present plaintiffs appear to me on the facts to be in that position—the whole bulk of their business is centred at

New Jersey, or it may be elsewhere out of Ontario, and only a small agency acting in mining operations for a term. . . . If the operations prove unsatisfactory—and I have nothing to cast light on this—it is not likely that the license will be again renewed.

That this is the proper test of residence appears to be involved in the Apollinaris Case, [1891] 1 Ch. 1. . . . A foreign company carrying on a large branch concern in England did not urge residence as an exemption, but claimed it on the ground that there was a sufficiency of available goods and chattels owned by the company in England; and that view was adopted by the Court.

So that in this case it comes to the question of how much property is owned of a tolerably permanent nature by the appellants in this province.

I agree with the Master that the land cannot be considered as to the possible value of its equities, and the evidence of plaintiffs' ownership of chattels is not established according to the latest affidavit by the one who knows best—the sheriff. He sold the goods (now said to belong to plaintiffs) under execution to one Wilson Mackie, from whom no transfer has been made to the company. It is said that Mackie bought for the company, and with their money, but he himself does not say so—and makes no affidavit.

Trouble might arise at once on this state of facts as to the ownership of these chattels if they were seized as the company's property: Ebrard v. Gassier, 28 Ch. D. 235.

Considering that this is said to be a wealthy American corporation, and that only $200 is needed to be paid into Court for security, I think it is better simply to affirm the Master's order, than to allow further evidence to be given, or to let any further documents be supplied as to the title to the goods. Costs of appeal in the cause to defendant.

MARCH 14TH, 1906.

DIVISIONAL COURT.

SMITH v. CANADIAN EXPRESS CO.

Carriers—Non-delivery of Goods—Conversion—Termination of Transitus—Conditional Refusal of Consignee to Accept—Place of Refusal—Setting aside Finding of Jury—Dispensing with New Trial—Rule 615—Judgment.

Appeal by defendants from judgment of senior Judge of County Court of Wentworth, upon the findings of a jury, in

favour of plaintiffs, consignors of a parcel of trees, in an action for damages for non-delivery and conversion of the trees.

The appeal was heard by BOYD, C., STREET, J., BRITTON, J.

J. W. Nesbitt, K.C., for defendants.

W. A. Logie, Hamilton, for plaintiffs.

BOYD, C.:—The jury negative the evidence of Conroy (the consignee), which was that he absolutely refused to receive the trees at Ottawa on 28th June. The only other evidence on the point is that of Blair (the agent of defendants at Ottawa), who says that Conroy on that day at Ottawa refused to look at the trees and said he would not accept them till he saw one Farrell, who was the agent of the plaintiff Cavers, who had taken his order for the trees. Blair told him that he had engaged a waggon and was going to deliver the trees at Aylmer, Quebec (where Conroy lived), but the other still refused to take them till he saw Farrell, and, according to the letter of 3rd June (which is verified as to its truth by Blair), Conroy further promised to come back and advise the defendants about the shipment, but had failed to do so; and in fact he never did return, and the trees remained in the hands of defendants. Defendants did not know the shippers, and could take no further action directly, but through their instrumentality information was communicated to plaintiff Smith through Patterson, agent at Winona, that the consignee had refused to accept about 1st June. The other plaintiff Cavers knew, of course, through the agent Farrell, that the goods had not been taken and were refused by Conroy about the same time, 1st June. It would seem that Conroy had it in his mind that if delivery of the goods were not made in May at Aylmer, Quebec, he would be discharged from his contract with Cavers, and that Farrell, the agent of Cavers, had told him the same thing, and this may have been the reason of his conduct at Ottawa and his refusal then to take the goods even if forwarded to Aylmer, Quebec, as Blair was willing and proposed to do. But of course defendants could not read the thoughts or gauge the motives of Conroy—for then he refused to take the trees till he could see Farrell, and that conditional refusal became absolute by his default. Defendants could not thrust the trees upon him, and it was apparently a superfluous thing to team

the goods to Aylmer and then again to offer delivery, when his refusal was to have anything to do with the trees till he could confer with Farrell. Was it necessary for, or even reasonably incumbent upon, defendants to go through the form of making a proffer again of the goods to him at Aylmer? His conduct and words would excuse them from so doing, and give them good reason to believe that he would report again to them if he was minded to take the goods. His refusal was communicated with all reasonable expedition to plaintiffs, and it seems unjust to charge the value of the trees on the express company, when they were ready and willing to deliver to the consignee at the place appointed if he had been willing to accept. His refusal to accept renders him liable for the price of the trees, and it is there I think that plaintiffs should seek indemnity for their trees. This much upon the facts. Then how as to the law?

The defendants forwarded the goods under a message from the Aylmer, Ontario, station, in these words, "Ship by express Conroy's trees to Aylmer, Quebec." The defendants did not know any one else in the transaction than Conroy, as the consignee of the trees, and on the authorities might assume that he was the owner, or in any event that he might give directions as to the place of delivery. The rule in such cases is clearly laid down in London and North Western Railway Co. v. Bartlett, 7 H. & N. 400, and Cork Distilleries Co. v. Great Southern and Western R. W. Co., L. R. 7 H. L. 269, that the consignee may receive the goods at any stage of the journey, and, though the consignor directs the carrier to deliver them at a particular place, there is no contract by the carrier to deliver them at that place and not elsewhere. The contract is to deliver them unless the consignee shall require the goods to be delivered at another place. The right thus to have them delivered elsewhere on the journey involves, of course, the right to deal with the goods either in the way of accepting them or of refusing to accept them. The goods having arrived at Ottawa, the terminus in that direction of the defendants' offices, notice was sent to Aylmer to Conroy that the goods had arrived, and upon that Conroy forthwith came to Ottawa and refused to accept delivery of the goods, though the offer was made to send them by waggon to Aylmer—an hour's journey distant. Granted that this was not an absolute refusal; but it was such a refusal as dispensed with any further action on the part of defendants till they had a message from the consignee that he was

ready and willing to receive. This never came, and defendants acted reasonably in holding the goods in the interim, and giving notice of the situation to the consignors as soon as they found out who they were. This line of conduct is justified by the cases as being the reasonable and proper course: see Hudson v. Baxendale, 2 H. & N. 575.

It is said by Alexander, C. B., in Storr v. Crowley, 1 McClel. & Y. 129, 136, that "a carrier having once tendered a delivery has discharged himself of his obligation: because, otherwise, where is his liability to cease? Where is the line to be drawn, if not there? To construe his undertaking in any other way would be attended with the greatest inconveniences; and I should therefore hold the rule to be as stated, in ordinary cases."

"The substance of this transaction was just the same as if the goods had been carried to Aylmer, and there the notification had been given. The evidence is that Conroy was not prepared to receive them till he could see Farrell and try to sell the trees to other persons; if such a sale could be made, he could accept delivery—if it could not, he would not accept delivery. It lay upon Conroy to take the next step after he had declined to receive upon the first tender. Any further tender in any more formal way was, in my opinion, thereby dispensed with. See per Parke, B., in Ripley v. McClure, 4 Ex. 345, at p. 359, approved of in Hochster v. De la Tour, 2 E. & B. 692.

These considerations shew that the answers of the jury do not supply materials for a final disposition of the case. Their attention should have been directed to the nature of the conditional refusal, and they should have been asked if the conduct and statements of Conroy dispensed with the carriage of the goods to Aylmer and a further tender of them there. That, if left to the jury, could only have been answered on the evidence in one way—viz., that the conduct of Conroy and his first refusal required him to take the next step in acceptance, and that his failing to do so amounts to a refusal absolute.

We are not obliged to direct a new trial, but may act under the provisions of Con. Rule 615, as interpreted by Strong, J., in Rogers v. Duncan, Cameron's Supreme Court Cases, 352, 363, and give judgment on the whole case for the defendants.

The appeal will therefore be allowed with costs and the action dismissed with costs.

BRITTON, J., gave reasons in writing for the same conclusion.

STREET, J., also concurred.

MULOCK, C.J. MARCH 15TH, 1906.

TRIAL.

J. L. NICHOLS CO. v. MARKLAND PUBLISHING CO.

Contract—Construction—Modification—Waiver—Work Done under Contract — Damages for Breach—Counterclaim—Detinue—Demand and Refusal—Conversion.

Action to recover $1,720.99, the amount alleged to be due to plaintiffs by defendants for printing and other work, under a written contract entered into between the parties at Toronto on June 29th, 1903.

E. F. B. Johnston, K.C., for plaintiffs.

J. Bicknell, K.C., for defendants.

MULOCK, C.J.:—Defendants are a company doing business in Nova Scotia, and are the owners of the copyright of a book called "Markland on Nova Scotia," and the contract provides for the publication of an edition of 5,000 copies by plaintiffs, who were to supply the paper and other material required; defendants to place at the disposal of plaintiffs for use in printing the letter press and illustrations, and otherwise for completing the work, all necessary electros, plates, original half-tone illustrations, brass stamps, and dies. The contract entitled defendants to select various kinds of binding, and required them to make such selections for the information of plaintiffs, who were to bind the books in accordance with the binding instructions to be furnished them by defendants. The contract was to be completed within one year from the time when the plates were at their disposal, and it was the duty of defendants, within all reasonable time, to give binding instructions to plaintiffs, in order to enable them to carry out their contract. Though the contract is silent upon the subject, it appears to have been the understanding between the parties that plaintiffs were to

ship the books to defendants' agents in different parts of Nova Scotia, in accordance with instructions from defendants.

The plates were supplied to plaintiffs on 13th July, 1903, and, therefore, the year within which the contract was required to be completed expired one year from that date. Plaintiffs, with all reasonable diligence, proceeded to perform their part of the contract, and on 25th September, 1903, notified defendants that the whole edition of 5,000 copies had been printed. Defendants up to this time had given binding instructions for 2,000 copies only, and, though frequently appealed to, omitted to give any further binding instructions as to the remainder of the edition, and, by mistake on their part, plaintiffs also bound up an additional 1,000 copies in cloth. The remaining 2,000 copies are yet unbound, owing to the failure to give binding instructions.

On the first shipment of books reaching defendants' manager, that officer on 3rd October, 1903, wrote to plaintiffs complaining of inferior paper and bad workmanship. Thereupon a correspondence took place between the parties; plaintiffs asserting and defendants denying that the book which was being turned out was in accordance with the requirements of the contract.

In a letter of 28th October, 1903, plaintiffs reminded defendants that the whole of the 5,000 copies had been printed, and in a letter of 29th October intimated a desire, without prejudice, to have an amicable adjustment reached, and offering a discount of 5 per cent. on goods shipped and the balance of the edition.

To this proposition defendants, by letter of 2nd November, 1903, make a counter-proposition, which would have involved a rejection of the unbound copies, and, upon receipt of this letter, plaintiffs telegraphed defendants, on 7th November, stating that their offer of 29th October was their best, and that unless accepted the contract would be placed with their solicitors. To this telegram defendants' manager telegraphed stating that he was remitting the money and writing. After some further correspondence defendants telegraphed plaintiffs as follows: "1 December, 1903, Berwick, N. S. To settle dispute and without prejudice will order books if you deduct 7½ per cent. from price of books whole order correct title page and place illustrations

in accordance with authorized instructions. Answer." To which plaintiffs sent the following telegram in answer: "December 2, 1903, Toronto. Without prejudice will allow 7½ per cent. on books not paid for copyright already corrected illustrations as already printed can be placed according to forthcoming instructions in all unbound books. Wire answer." To this the defendants sent the following telegram: "Berwick, 2 Dec., 1903. Your offer to-day accepted ship immediately Berwick 200 cloth 300 half 100 full leather."

The fair meaning of this correspondence is, I think, that in consideration of the discount defendants waive their objections to the material and workmanship complained of in regard to the whole edition; the contract, however, except as to this waiver, and the reduction in the contract price, remaining in full force.

It was argued that the telegram of 2nd December was not an unqualified acceptance, because of the shipping instructions contained in it, which followed the words "your offer to-day accepted." This is not, however, I think, the correct construction to place upon the telegram. Plaintiffs had been continuously appealing to defendants to give them binding instructions and shipping instructions, and in their letter of 26th November, 1903, which doubtless reached defendants shortly before their telegram of 2nd December, plaintiffs say: "If you still refuse to give any further shipping instructions, or to receive any further shipments, we think it best to bring action in the High Court here under the contract," etc. This letter called for an answer, and the fair reading of their telegram would be: "Your offer accepted and with reference to your various requests for shipping instructions, ship immediately," etc. The modification brought about by these telegrams was wholly to the benefit of defendants. If it was necessary for the determination of this case for me to decide whether or not plaintiffs in respect of the material and workmanship were fully complying with the requirements of their agreement with defendants, I would find that they were supplying a book substantially in accordance with their obligation.

The concession by plaintiffs was not because of any admitted breach on their part, but for the purpose of an amicable adjustment of what had been developing into a very unsatisfactory business transaction.

Plaintiffs in their account included a charge for cloth binding 1,000 more copies than ordered. The cost of this binding, according to their account sworn to in evidence, is 38½ cents per copy; there must, therefore, be deducted the sum of $385, which leaves a sum of $1,335.95 due plaintiffs in respect of their account. . . .

Plaintiffs ask that they be allowed to complete the books and to sell them. They are not, I think, entitled to this relief. Defendants in respect of the copyright and the use of their plates, etc., have an interest in the books. Being copyrighted, they could be disposed of to no one but defendants, and when completed they were to be shipped to defendants' order in Nova Scotia. For these reasons, I am of opinion that it was the understanding between the parties that the property in what was printed from defendants' plates passed to defendants without delivery, subject to plaintiffs' lien thereon: Burnett v. McBean, 16 U. C. R. 467; and that therefore plaintiffs are not entitled to sell them.

It was the duty of defendants under the contract to give to plaintiffs binding instructions at such times throughout the year of the currency of the contract as would have enabled plaintiffs to complete the same within the year. This they omitted to do in respect of 3,000 copies, and I find that plaintiffs are entitled to damages in respect of such breach on the part of defendants, and, if plaintiffs desire it, let it be referred to the Master to ascertain the amount of such damages and to dispose of the costs of the reference.

By the counterclaim, defendants charge plaintiffs with having retained in their possession the plates, etc. . . . On 25th September, 1903, when the 5,000 copies were completed, plaintiffs ceased to have any right to retain the plates. As to the other articles, they were required in connection with the binding, which was delayed by defendants' default throughout the year. But when, on 13th July, 1904, the time for completing the contract expired, plaintiffs ceased to have any right to retain these other articles.

There was, however, no obligation on plaintiffs' part to bring the goods to defendants or to do anything looking to their return, except to permit defendants or their representative, on demand, to remove them. Defendants made no such demand. Until they did, there could be no wrongful

detention. Their counterclaim is for detention, not conversion, and the point of the action in detinue is demand and refusal: Clement v. Flight, 16 M. & W. 50.

Plaintiffs were lawfully possessed, and to prove wrongful detention defendants were bound to shew demand and refusal. This they have failed to do. At the trial defendants sought to treat it as a case of conversion. The goods are still in plaintiffs' possession, and being useful for but one purpose—the production of a copyright book—are valueless to any one except defendants. Therefore, it would be unsafe to assume that, if defendants had made a sufficient demand, plaintiffs would have given a refusal, and run the risk of damages to the extent of the value to defendants of an article of no value to plaintiffs. Moreover, defendants, by letter of 20th October, 1904, notified plaintiffs that they would be required to pay $5 a day for all time they "may hold the goods," thus plainly informing them that they would be charged for detention. Having so elected, defendants should not now, after the alleged detention, be allowed to shift their ground and charge conversion. But, even treating the counterclaim as one for conversion, there was no demand on the part of defendants or conduct on the part of plaintiffs that would, in my opinion, sustain such a claim.

The counterclaim is, therefore, dismissed with costs.

MARCH 15TH, 1906.

DIVISIONAL COURT.

FARQUHARSON v. DOWD.

Fraudulent Conveyance—Action to Set aside—Insolvency of Grantor—Intent to Defeat Creditors—Failure to Prove—Husband and Wife—Husband Going into Business—Absence of Hazard.

Appeal by plaintiff from judgment of BRITTON, J., 6 O. W. R. 760, dismissing action to set aside a conveyance of land

to defendant by her husband as fraudulent against his creditors.

G. H. Kilmer, for plaintiff.

C. R. McKeown, Orangeville, and J. M. Kearns, Arthur, for defendant.

The Court (MEREDITH, C.J., MACLAREN, J.A., TEETZEL, J.), dismissed the appeal with costs.

CARTWRIGHT, MASTER: MARCH 16TH, 1906.

CHAMBERS.

IMPERIAL PAPER MILLS OF CANADA v. McDONALD.

Parties—Motion to Add Defendant—Replevin—Counterclaim—Third Party Procedure—Rules of Court.

This was a replevin action. Plaintiffs asked the return of 20 horses and 7 sets of harness, which, as they alleged, were wrongfully sent by one John Gray to defendants on 30th June or 2nd July last. The writ of summons was issued on 28th July. Negotiations for settlement were in progress for some time. These, however, were abortive, and the statement of claim was served on 7th December. After this, negotiations were resumed, which were also fruitless. On 25th January defendants served notice of motion to have Gray added as a defendant, alleging (1) that Gray was the real owner of the horses, and (2) that the rights of the parties and the ownership of the horses could not be determined without having him added as a defendant.

J. W. McCullough, for defendants.

C. Swabey, for Gray, consented to the order.

L. G. McCarthy, K.C., for plaintiffs, objected to Gray being added as a defendant, as it was well understood that he wished to be able to counterclaim against plaintiffs and to embarrass and delay them in the action.

THE MASTER:—It is apparently conceded that plaintiffs are at least entitled to the harness.

Gray was in plaintiffs' service, and was dismissed at the end of June last. When leaving plaintiffs, he took away the horses in question, which he says he had bought and hired to plaintiffs. On cross-examination he admits he cannot identify all of the 20 horses. On being pressed, he limits himself to 4, which he describes. He assumes to give the names of the persons from whom the other 16 were bought. He cannot give the names of any of these horses.

The McDonalds are quite willing to give up the horses, and had agreed to do so on being indemnified by plaintiffs. This settlement was frustrated by its coming to the knowledge of Gray, who persuaded the McDonalds to take the present course instead.

It was strenuously argued . . . that Gray was a person "whose presence is necessary in order to enable the Court effectually and completely to adjudicate upon the questions involved in the action." . . . Montgomery v. Foy, [1895] 2 Q. B. 321. . . . In that case . . . the shippers were added because they were the persons who had to pay the freight, and the question was "what amount (if any) the ship owner is entitled to receive when the disputes between them are adjusted:" p. 328.

On the other hand, Mr. McCarthy relied on McCheane v. Gyles, [1902] 1 Ch. 911, where Buckley, J., with reluctance, refused to add the personal representative of a deceased trustee in an action brought by the cestui que trust against the surviving trustee for a breach of trust. The learned Judge was of opinion that Montgomery v. Foy, supra, was an authority against the application made to him. Applying the test given (at p. 917), it cannot be said that Gray is a person "who ought to have been joined;" so that he can only be brought in under the following part of the clause if at all.

The cases of Kitching v. Hicks, 9 P. R. 518, and Peterson v. Fredericks, 15 P. R. 361, and others between those dates, were also cited. These, however, are of no use now, as the Rules under which they were decided were repealed as of 1st September, 1894, and were replaced by what are now the Rules as to bringing in third parties. Owing to the

frequent changes of the Rules as originally found in the Judicature Act of 1881, first in 1888 and again in 1898, this point must always be carefully considered before a case can be safely relied on.

The presence of Gray is not necessary to decide whether plaintiffs are entitled as against the McDonalds to the possession of the horses. On the other hand, unless Gray is in some way to be bound by the result of the present action, the ownership of these horses, as between him and plaintiffs, will still be at large. In these circumstances, I think the better course will be to follow the procedure in Eden v. Weardale Iron and Coal Co., 28 Ch. D. 333. There defendants were allowed to bring in third parties, who on their application were allowed to defend the action. It was held that they could not counterclaim, but were as to discovery in the same position as the original defendants.

Such a course is allowable under Rule 213 (2).

An order may therefore go as asked by plaintiffs, on giving security to the amount of $10,000, and, if so desired, the defendants can bring in Gray as a third party, and he can have leave to defend the action as in the Weardale case.

The costs of this motion must be in the cause to all parties.

CARTWRIGHT, MASTER. MARCH 16TH, 1906.

CHAMBERS.

MACKENZIE v. FLEMING H. REVELL CO.

Writ of Summons—Defendant Company Resident out of Ontario—Service on Alleged Agent in Ontario—Cesser of Business Formerly Carried on in Ontario.

Motion by defendants to set aside service of the writ of summons on one S. B. Gundy, on the ground that defendants have not since June, 1904, been carrying on business in this province.

C. W. Kerr, for defendants.

George Bell, for plaintiff.

THE MASTER:—The affidavits filed shew that nearly two years ago defendants ceased having any shop or office here, and sold part of their stock in Toronto to Henry Frowde, and left the rest with him to sell on commission. Of Frowde's business here Gundy is the manager. He states positively that he has nothing to do with the defendants, except in respect of the commission business; that he is paid for his services by Frowde, and has never received anything from defendants. . . .

The only undisputed fact that looks the other way is that on defendants' circular for this year they describe themselves as follows:

"Fleming H. Revell Company"
"New York, 158 Fifth Ave. Chicago, 80 Wabash Ave.
"Toronto, 27 Richmond St. W. London and Edinburgh."

This may not mean more than that their works can be got at the Toronto address. It might, however, be important if there was any other evidence which it could be held to corroborate. The only other evidence is the statement of plaintiff's solicitor that he called at 27 Richmond street west and asked Mr. Gundy if he was then the agent of Fleming H. Revell Company, to which inquiry he replied "Yes, I am."

Mr. Gundy in his affidavit in reply does not deny this categorically, but says that he explained to the person by whom the writ was served the relations between Henry Frowde and defendants, and that the writ had nothing to do with Frowde or himself, but that he would forward it to the company at New York if the solicitor so desired, and that the person who served the writ answered "All right."

These affidavits may apparently conflict, but they can be easily reconciled by holding that the solicitor gives the first part of the conversation and Gundy supplies the rest.

I think Gundy's answer is easily understood by his natural supposition that the solicitor was an intending purchaser, who had come to make some inquiries about defendants' publications.

Unless it can be argued that defendants are liable to the penalties of the Companies Act, they cannot be said to be doing business in the province any more than the defendants in Murphy v. Phoenix Bridge Co., 18 P. R. 495. Applying

the test given by Moss, J.A., in that case (p. 522), would a company in Windsor which sent goods to Toronto to be sold on commission be held to be carrying on business here so as to allow service under Rule 159 on the Toronto commission man?

I think the motion must prevail and the service be set aside, but without costs, in view of the circular and Mr. Gundy's answer.

The plaintiff may be able to proceed under Rule 162 (h) or (e).

BRITTON, J. MARCH 16TH, 1906.

WEEKLY COURT.

RE CAMERON.

Will — Construction — Incomplete Bequest — Legatee not Named—Vagueness as to Subject—Extrinsic Evidence, Inadmissibility of—Void Bequest—Bequest to Church—Income—Perpetuity—Charitable Bequest—Validity.

Motion by the Royal Trust Co., as administrators with the will annexed of the estate of Archibald Cameron, for an order declaring the true construction of two clauses of the will.

C. A. Moss, for the administrators.

W. A. Baird, for the Presbyterian Church at Beachburgh.

BRITTON, J.:—Is not clause 1 of the will void for uncertainty?

The words are: "I give, devise, and bequeath all my real and personal estate of which I may die possessed or entitled to, in the following manner, that is to say: six payments on the Wright farm as follows:—April 1st, 1905, $420; April 1st, 1906, $400; April 1st, 1907, $380; April 1st, 1908, $360; April 1st, 1909, $340; April 1st, 1910, $320."

The "Wright farm" is not otherwise mentioned. No purchaser of it, no mortgage upon it, no agreement in reference to it, is anywhere mentioned in the will, nor is there any name associated with the bequest or with the Wright farm.

There is "uncertainty as to the object." The words, in the absence of extrinsic evidence, are "blind words," and are too vague and indefinite to be intelligently acted upon. This is not a case for the application of the rule "id certum est quod certum reddi potest." It is not a case where the payment of the money depends only upon some extrinsic circumstance clearly enough indicated by the will. Neither the subject nor the object of the bequest is mentioned, and the name of the legatee is not given. . . . This is one of the cases where parol evidence is inadmissible to shew that the deceased intended to make a bequest and to a particular person. It is not a case of ambiguity, but of the absence of words to make it a bequest to any one.

Is the bequest by clause 4 void?

This clause is as follows: "Three thousand dollars for an endowment fund to be called the Cameron fund of the Presbyterian church, Beachburgh, to be put into the Bank of Ottawa in Pembroke to the credit of the trustees of the Presbyterian church, Beachburgh, and only the interest to be drawn yearly and distributed as follows: one-third of it to be paid to the agent of the Ottawa Auxiliary Bible Society every year when he holds his meeting in Beachburgh, and to be applied as a free contributory to the Ottawa Auxiliary Bible Society—all money to be drawn from the bank, the cheque must be signed by the resident minister and the chairman of the managing committee of the said church; the balence of the income derived, or say two-thirds, to be distributed to the various schemes of the said church as the minister and the managing committee may see fit."

This bequest, as one "for the increase and improvement of Christian knowledge and promoting religion," is good, and can be upheld. It belongs to the class of "charitable gifts," and such gifts, being for the public good, are not subject to the rule against perpetuity. See Theobald's Law of Wills, 6th ed., pp. 343, 349, 356.

Costs of all parties out of estate.

BOYD, C. MARCH 16TH, 1906.

WEEKLY COURT.

REX v. PHILLIPS.

Prohibition — Police Magistrate — Preliminary Inquiry— Conspiracy — Particulars — Information — Criminal Code—Jurisdiction of Magistrate.

Motion by defendant for prohibition to the police magistrate for the city of Toronto against proceeding with a preliminary inquiry upon a charge against defendant of conspiring with others to defraud the public.

J. E. Jones, for defendant.

BOYD, C.:—Defendant was arrested and brought before the police magistrate by virtue of a warrant duly issued upon an information charging defendant with having, in various years specified, conspired with others (names unknown), by deceit and falsehood and other fraudulent means, to defraud the public, etc., contrary to the statute. This charge is laid under, and employs the very words used in, sec. 394 of the Criminal Code, and discloses an indictable offence over which the magistrate has jurisdiction, and in regard to which he may compel the attendance of the accused for the purpose of preliminary inquiry: secs. 534, 558. Defendant, upon appearing, objected to the sufficiency of the charge, and asked for particulars of the deceit, etc., with dates and names. The objection was overruled by the magistrate, and particulars then refused, as appears by the affidavit of Phillips, on the ground that he (the magistrate) was proceeding with an investigation, and when the facts were ascertained from witnesses and other evidence particulars might then be given. This was in January, 1906, and two months afterwards this motion is made for . . . prohibition and other relief.

At the close of the argument (which was ex parte) I declined to interfere, but gave leave to hand in cases and authorities that might induce another conclusion. These,

having been submitted, I have carefully examined, and see no reason to interfere with the process of inquiry now pending before the magistrate.

Prohibition will not lie unless there is a lack of jurisdiction in the judicial officer or Court dealing with the proceedings. In this case the test of magisterial jurisdiction is whether the magistrate rightly and legally undertook to enter upon this inquiry. That again depends upon whether the offence charged is within the scope of his authority to inquire into in order to form an opinion as to whether the evidence is sufficient to put the accused on his trial: Code, secs. 577, 596. Thus tested, the ground-work exists to investigate these charges of conspiracy, and no prohibition should issue to interrupt the course of the proceedings, according to the discretion of the magistrate. Much latitude is contemplated in the course of this preliminary investigation, both in the way of varying and amending and in the reception of evidence, so that the scope of the inquiry may be enlarged and matters touched upon beyond the scope of the original charge. This consideration has been overlooked in regard to many of the cases cited—I mean the wide distinction which exists between the magistrate who has plenary jurisdiction to try the offence in a summary way, and the justice who is dealing with a preliminary inquiry in respect to an indictable offence, which is to be passed on to another tribunal for trial. The distinction is adverted to very clearly by Lord Russell, C.J., in Regina v. Brown, [1895] 1 Q. B. 126, 127.

However, there has been no departure from the charge as laid at the outset. The questions investigated are touching conspiracies under sec. 394 of the Code. An attack was made on the sufficiency of the warrant and information, on the ground of vagueness and uncertainty. I do not think the test to be applied is as if the information were to be treated as an indictment, but, even according to that test, it would not be held invalid. In the leading case Rex v. Gill, 2 B. & Ald. 206, Bayley, J., said the gist of the offence is the conspiracy. It is not necessary to state the means at all in the indictment; it being quite sufficient to charge the defendants with the alleged conspiracy, which is, of itself, an indictable offence. . . .

[Reference to Regina v. Gompertz, 9 Q. B. 838, Regina v. ——, 1 Chit. 698.]

Since the last case (1819) the practice began by which, before the trial, the Court would direct particulars to be given, and this was done in Regina v. Rycroft, 6 Cox C. C., "even though there had been a previous committal by a magistrate." This is a pretty strong intimation that particulars were not sought in the preliminary stage of investigation (1852).

The next stage in development (1868) is marked in Mulcahy v. The Queen, L. R. 3 H. L. 306, in which Willes, J., says (touching the absence of particulars): . . . "An indictment only states the legal character of the offence (conspiracy), and does not profess to furnish the details and particulars. These are supplied by the depositions, and the practice of informing the prisoner or his counsel of any additional evidence not in the depositions which it may be intended to produce at the trial:" p. 321.

The present state of the practice is stated in the latest text-book thus: "Occasion seldom arises for making an order for particulars, because the evidence for the prosecution in almost every indictable case appears either in the depositions or in the notice of further evidence given before the trial:" Archbold's Crown Prac., 23rd ed., p. 71.

These authorities, however, all relate to the furnishing of particulars for the purposes of the trial, and are not relevant to the policy of the law as to the earlier investigation before the committing magistrate. He is not to be fettered in the proceedings before him by having limitations imposed by means of particulars which necessarily restrict the inquiry—but the whole range of relevant facts is left him to be availed of at his discretion: Regina v. Ingham, 14 Q. B. 396; and see Rex v. Kennedy, 20 Cox C. C. 232.

So it comes to this, as put in Re Higgins: In prohibition the only question is whether the justices had jurisdiction. If they had refused to hear legal evidence or decided improperly upon the evidence, that would be misconduct, but it would be different from acting illegally and without jurisdiction: 8 Q. B. at p. 150. In the report in 10 Jur. it is said the remedy for misconduct would be by criminal information.

and if they act maliciously they are liable to an action on the case: p. 839 (1843).

I have not overlooked the reference to the interpretation clause in the Code, whereby "indictment" and "count" are said to include "information." But that does not bring one any closer to particulars before the police magistrate under sec. 613 of the Code. That enables the Court, for the purposes of a fair trial, to order particulars if satisfied that it is necessary to do so. The provision would then be applicable, no doubt, to the case of a magistrate dealing with a matter summarily, which he can hear and determine by way of trial (as, indeed, is in terms provided for in sec. 848), but has no meaning as applied to the preliminary inquiry. Besides, I share in Mr. Justice Wilson's doubt as to the meaning of the word "information" in the interpretation clause, in that it is not applicable to the word as used interchangeably with "complaint:" Regina v. Cavanagh, 27 C. P. 537. Nor is it necessary to decide whether "Court" in sec. 613 is applicable to the functions of the committing magistrate—as to which much might be argued.

It follows that there is no ground for disturbing the recognizance of bail taken for defendant's appearance before the magistrate; for he had jurisdiction over the forum of appearance, which was the essential lacking in Re Currie, 31 U. C. R. . . . I have looked at all the cases cited, but all are distinguishable on the ground that the magistrate had no jurisdiction or was proceeding in a manner contrary to natural justice, such as trying a man who had not been called before the Court, as in Re Story, 12 C. B. 767.

Much of the ground I have traversed has been touched upon in a Quebec case of Regina v. France, 1 Can. Crim. Cas. 34, which appears to agree with our application of the law, except that I think there is a failure to distinguish between an information on which a man may be convicted in a summary way, and one which is merely serviceable for the purpose of starting a preliminary inquiry.

The application is refused on all points.

BOYD, C. MARCH 17TH, 1906.

CHAMBERS.

MOON v. MATHERS.

Particulars—Statement of Claim—Slander—Names of Persons to whom Uttered—Exclusion of Evidence at Trial—Disclosing Names of Witnesses.

Appeal by defendant from order of Master in Chambers in an action for slander dismissing defendant's motion for particulars of the statement of claim.

J. H. Spence, for defendant.

A. G. Slaght, for plaintiff.

BOYD, C.:—It is a proper term in an order for better particulars to direct that wherein there is a want of particularity (as, e.g., in stating the names of persons who heard the slander or to whom it was uttered, because of the plaintiff's lack of precise information on the point) in the details furnished, that plaintiff should be precluded from giving evidence as to such unnamed or unknown persons at the trial, unless information of the names be given a reasonable time before the thial. . . .

[Reference to Noxon v. Patterson, 16 P. R. 42, and Young v. Erie and Huron R. W. Co., 17 P. R. 4.]

This is, perhaps, anticipating what might be done by the Judge at the trial, as said in Citizens Ins. Co. v. Campbell, 10 P. R. 129, but it is better to have the point clearly defined, so that the parties may both know what can and cannot be given in evidence, and so prepare themselves accordingly before the trial comes on.

In cases of slander the practice as to furnishing names of persons who have heard the words complained of has gone very far in modern times, and it is no excuse that names of possible witnesses may be thus disclosed. See Bishop v. Bishop, [1901] P. at p. 328.

The Master's order will be varied as above indicated, and costs below and of the appeal in the cause.

BOYD C. MARCH 17TH, 1906.

CHAMBERS.

RE McGREGOR v. UNION LIFE INS. CO.

Division Courts—Removal of Plaint to High Court—Grounds for—Question Raised by Claim of Set-off—Construction of Contract — Other Litigation Depending on Similar Contracts—Absence of Right of Appeal in Division Court Case.

Motion by defendants to remove an action from a Division Court into the High Court.

Joseph Montgomery, for defendants.

R. D. Hume, for plaintiff.

BOYD, C.:— . . . Plaintiff's cause of action is a very simple one, arising on a contract dated 28th October, 1905, under which he rendered certain services to defendants as their special agent, for which he now makes claim.

The matter of difficulty on account of which defendants seek a certiorari grows out of another claim made by them against plaintiff on a prior instrument of 19th August, 1905, when he was acting as ordinary agent. The company seek to make plaintiff liable for some $75 on account of lapses in policies of insurance by reason of non-collection of the premiums, which it is said has been guaranteed by him to the company under the first agreement, as ordinary agent.

Both agreements are prepared on very elaborate printed forms by the company, and if there is difficulty in the construction of the first in date, it is occasioned by their own drafting. Besides, the company are not obliged to make defence on the ground of set-off; they can reserve it for or use it in an independent action against plaintiff in the High Court, if they wish a decision in the Superior Court, and are not content to have the whole matter disposed of in the Division Court. No matter of law of general interest is involved. The whole difficulty arises from the assumed ambiguous or obscure document prepared by defendants themselves. Why should plaintiff suffer for this by having his action removed from the Court of his choice?

Plaintiff's cause of action is within the competence of the Division Court. That is the proper forum for its trial, and plaintiff, as dominus litis, insists upon that as his right. The burden is cast upon defendants to establish good, substantial reason for involving plaintiff in a much more expensive, complicated, and lengthened controversy in another Court. They have to make out (in words judicially used with reference to the requirements of a statute in England like our R. S. O. ch. 60, sec. 82), that the case is one which "ought" to be tried in a higher Court—one in which it is "more fit" to be tried than in an inferior Court: Bunker v. Hollingsworth, [1893] 1 Q. B. 442.

That there may be other cases arising on these contracts does not seem to be sufficient ground according to the earlier cases: Stepler v. Accidental Ins. Co., 10 W. R. 59.

The legislature has thought fit not to give an appeal from the Division Court when the amount is less than $100, but that should not be ground to raise to a higher Court, as the policy is not to encourage appeals in minor litigation of Division Court competence.

Motion refused with costs.