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COURT OF APPEAL.

SEPTEMBER 29TH, 1909.

REX v. BLYTHE.

Criminal Law—Conviction for Murder—Nondirection—Intoxication of Prisoner—Inability to Appreciate Nature and Result of Acts—Manslaughter—New Trial.

On the 9th February, 1909, the prisoner was tried before RIDDELL, J., with a jury, upon a charge of murdering his wife by repeated blows with an iron poker, and convicted. He was sentenced to be hanged on the 13th May, 1909, but was reprieved by the Governor-General till the 17th June, 1909.

On the 15th June, 1909, counsel for the prisoner applied to the trial Judge, under 8 & 9 Edw. VII. ch. 9, to reserve a case for the Court of Appeal, upon certain grounds specified. RIDDELL, J., refused the application, and on the 29th June, 1909, stated reasons for his refusal (14 O. W. R. 363.)

On the 22nd September, 1909 (the prisoner having been again reprieved), T. C. Robinette, K.C., for the prisoner, moved before the Court of Appeal (MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.), for leave to appeal or for an order directing the trial Judge to state a case for the opinion of the Court, upon the ground stated before the trial Judge, and upon the further ground that the trial Judge should have specifically instructed the jury that they should consider the prisoner's state of intoxication, and that, if they thought his state of intoxication was such as to prevent him from appreciating the nature and result of his acts, they should not convict of murder, but of manslaughter.

J. R. Cartwright, K.C., and E. Bayly, K.C., for the Crown.

THE COURT, on the 24th September, 1909, gave judgment refusing to direct a stated case upon the grounds urged before the trial Judge; but suggested that an application should be made to the trial Judge to state a case upon the new grounds.

Upon the same day Robinette applied to RIDDELL, J., to state a case, and upon the following day RIDDELL, J., gave judgment refusing the application, saying (in part) :—No one having at the trial made any pretence that the mind of the prisoner was affected by intoxication in the direction indicated, and there being no evidence in that direction, it would have been idle for me to have charged the jury upon what is, of course, undoubted law in the case of a prisoner proved to have been drunk at the time of committing the offence, and told them that the presumption that a man is taken to intend the natural consequences of his act is rebutted in the case of a man who is drunk, by shewing his mind to have been so affected by the drink that he was incapable of knowing that what he was doing was dangerous. No one doubts the law: but the law stated does not apply to the present case. "Where a Judge sums up to a jury, he must not be taken to be inditing a treatise on the law:" Rex v. Meade, [1909] 1 K. B. 895, at p. 898.

On the 28th September, 1909, Robinette, for the prisoner, moved before the Court of Appeal (MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.), for an order directing the trial Judge to submit a question as to the state of intoxication of the defendant to the Court for its opinion and determination.

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

The question raised was fully argued upon the motion, and counsel agreed that the matter should be left to the Court as if argued on a stated case.

MOSS, C.J.O., on the following day, delivered the judgment of the Court:

We have now considered the case with care, and, I think I may say, with due regard to the gravity of the issues involved, and the importance of the matter to the prisoner, and, after deliberation, we have come to the conclusion, though not without some hesitation on the part of some of the members of the Court, that, looking at the whole case, and regarding the evidence as it went to the jury, it is better to say in that qualified way that we think that there should have been a case stated upon this question. That being the conclusion, of course it will follow, from the understanding that was spoken of yesterday at the conclusion of the argument,

that the case being stated the present conviction would be set aside. and a new trial would be granted to the prisoner, and, that being the view the Court has taken of the case, we deem it proper and right, as much in the interest of the prisoner as in other interests, that we should not comment upon the evidence that was before the jury in this case or upon the way in which the case was finally presented to the jury.

Then it may be said that there could be no reason to suppose for a moment, from the case as it presents itself to our view, that if Mr. Justice Riddell, the trial Judge, had been requested to charge the jury in the way in which it is now stated he should have done, he would have refused to do so. It would be as obvious to his mind as it now appears to be obvious to the mind of everybody, that it is desirable, in view of the evidence, that the direction based upon that should be given to the jury, and that Mr. Justice Riddell should be asked to present it to the jury as the law required it to be presented. That view of it seemed at the time to present itself to everybody's mind, but those in charge of the case seemed to be directing their minds to other views of the case, and that view of it was overlooked, or at all events not thought of sufficiently to determine the issues before the jury. The result of that seemed to have been that perhaps the prisoner had not had his case presented to the jury for his advantage as fully as it would have been had the matter been presented on his behalf in that way, stating the view that he had been drinking to some extent, this extent, of course, to be for the jury to say. Without entering upon the case further, with a view to the new trial, we conclude by saying that this result is one that has been reached after full consideration of the case.

SEPTEMBER 30TH, 1909.

McNEIL v. STEWART.

Will—Construction—Devise—Death of Devisee—Vested Estate—Contingency — Subsequent Divesting — Power of Appointment.

Appeal by the plaintiff from the order of a Divisional Court, 11 O. W. R. 868, reversing the judgment of FALCONBRIDGE, C.J.K.B., ib. 162.

The point for decision turned upon the construction of the 5th paragraph of the will of Mary Gibson, as follows:—

"I give devise and bequeath all the rest and residue of my real and personal estate whatever and wheresoever not hereinbefore dis-

posed of unto my said trustees upon trust after payment of debts and funeral and testamentary expenses to pay the income derived from residue of my real and personal estate to my said husband James Robertson Gibson during his life. And from and after his death upon trust to pay out of the said residue of my real and personal estate to my step-son James Robertson Gibson the younger or any of his issue such sum (not exceeding $1,000) as my said husband shall by any deed or deeds or by his will appoint, but my said husband shall not be bound to make such appointment which shall be in his sole discretion and in default of such appointment and so far as any other appointment shall not extend in trust for the said Janet Gibson when she shall attain the age of 21 years—provided always that if the said Janet Gibson shall die in my lifetime or in the lifetime of my said husband leaving a child or children who shall survive me or my said husband and being a son or sons shall attain the age of 21 years or being a daughter or daughters shall attain that age or marry then and in every such case the last mentioned child or children shall take (and if more than one equally between them) the share which the said Janet Gibson would have taken if she had survived me and my said husband and attained the age of 21 years. And I declare that my said trustees may at their own discretion raise any part of the expected share of the said Janet Gibson or her child or children under this my will and apply the same for her his or their maintenance clothing education advancement preferment or benefit as my trustees shall think fit but I do not impose upon them any legal obligation to do so."

The will was dated the 16th September, 1889; the testatrix died on the 19th January, 1890. Janet Gibson died on the 12th May, 1900, without issue. James Robertson Gibson senior died on the 27th March, 1907.

The appeal was heard by Moss, C.J.O., Osler, Garrow, Maclaren, and Meredith, JJ.A.

W. E. Middleton, K.C., for the plaintiff.

G. Wilkie, for the defendants.

Moss, C.J.O., said that the question was whether, in the events which happened, Janet Gibson (or Stewart) died seised of or entitled to the lands in question in remainder expectant upon the death of James Robertson Gibson. But for the introduction into the proviso in the 5th clause, of the words "or in the lifetime of my said husband," the clause would be perfectly simple. The testatrix gave to her husband an estate for life, and subject thereto she gave the estate in fee to Janet Gibson. If the clause had stopped there,

no difficulty could have arisen. Neither would any have arisen if the proviso had proceeded without the words above set forth. Eliminating them, the remaining words provided clearly and appropriately for the possible case of a lapse by reason of the death of Janet Gibson in the lifetime of the testatrix, and carried the benefit of the devise to children, if any should be left and should survive to fulfil the conditions set forth. This was of course a very proper provision to make. Without it there would have been an intestacy in the event of Janet Gibson's death before the testatrix, even though there were children surviving her. Section 36 of the Wills Act, R. S. O. ch. 128, would not apply, Janet Gibson not being a child or issue of the testatrix. See also Hargraft v. Keegan, 10 O. R. 272. The insertion in the proviso of the words above adverted to does not in any wise depreciate its effect in the event of death before the testatrix, but their presence seems to suggest the presence in the testatrix's mind of some further idea imperfectly conceived or at all events imperfectly expressed. Death without children after the death of the testatrix but before death of her husband would, in itself, work no lapse of the devise. The words were probably used with some other intent, but of themselves they failed to express it, and there was nothing in the other words of the will from which it might be gathered. There was nothing to control the clear effect of the earlier provision by which the estate in remainder was vested in Janet Gibson upon her attaining the age of 21 years. The result is that in the events which happened the earlier provision was left to its operation and the plaintiffs have therefore no estate or property in the lands in question. As to the alleged appointment in favour of the plaintiff James Robertson Gibson, it was virtually conceded that, there was not a valid execution of the power, and that appears to be the correct view, even if it be assumed that it was ever delivered so as to become operative as an executed instrument..

The appeal should be dismissed.

The other members of the Court agreed; OSLER and MEREDITH, JJ.A., giving reasons in writing.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. SEPTEMBER 22ND, 1909.

ALEXANDRA OIL AND DEVELOPMENT CO. v. COOK.

Fraudulent Conveyance—Transfer of Property by Husband to Wife —Prosperous Financial Condition of Husband at Time of Transfer—Intention to Enter into Hazardous Business — Fear of Future Creditors—R. S. O. 1897 ch. 334—Fraudulent Intent.

Appeal by the defendants from the judgment of BOYD, C., 13 O. W. R. 405, holding that the conveyances of certain land and the transfer of certain personal property by the defendant John W. Cook to his wife, the defendant Mary Ann Cook, were fraudulent and void as against the plaintiffs and other creditors of the defendant W. Cook.

The appeal was heard by MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ.

W. M. Douglas, K.C., and Wright, for the defendants.

G. H. Watson, K.C., and J. F. Edgar, for the plaintiffs.

MACMAHON, J., delivered the judgment of the Court. After referring to the evidence and the judgment of the Chancellor, he cited and quoted from MacKay v. Douglas, L. R. 14 Eq. 106, and Ex p. Russell, 19 Ch. D. 588, and concluded:—

In the present case Cook, at the time he paid the $5,000 to his wife, had entered upon an undertaking of considerable magnitude, of a highly speculative character, in connection with what were supposed to be oil lands, about which he admitted he knew nothing, and the frauds in the sale of the said lands resulted in the recovery of the judgment against him for over $10,000.

Following the cases to which I have referred, and which, I think, govern the case in hand, the appeal must be dismissed with costs.

MEREDITH, C.J.C.P. SEPTEMBER 22ND, 1909.

RE VIRTUE.

Will—Construction—Division of Residue among Children of Testator — Subsequent Clause Giving Discretion to Executors as to Participation by one Child—Vested Interest—Repugnancy.

Motion under Con. Rule 938 for the determination of certain questions arising upon the will of Matthew Virtue.

Paragraphs 7, 8, and 9 of the will provided:—

"7. It is my wish that if the majority of my executors in their judgment see proper that they give to my son Matthew Virtue the sum of $1,000.

"8. All the rest residue and remainder of my estate both real and personal and wheresoever situate I give devise and bequeath unto my executors hereinafter named for the following purposes: to collect and convert into money any portion or the whole of the remainder of my said estate and to reinvest the same . . . and to give to my beloved wife Mary Virtue the income or proceeds of same half-yearly during the term of her natural life and after her death to divide the same equally share and share alike among my children the child or children of any deceased child of mine to take the share of its or their parent share and share alike.

"9. I hereby leave it to the discretion of the majority of my executors hereinafter named as to whether my said son Matthew Virtue does or does not participate in the division of the residue of my estate referred to in the 8th paragraph of this my will."

A majority of the executors determined not to give to Matthew Virtue the $1,000 mentioned in paragraph 7, and exercised the discretion conferred on them by paragraph 9 by deciding to exclude him from participating in the division of the residue.

The Imperial Bank of Canada, judgment creditors of the son Matthew Virtue, having obtained a receiving order in respect of what, if anything, he was entitled to under the will, contested the right of the executors to exclude him from participation in the residue.

G. F. Mahon, for the executors.

W. M. Douglas, K.C., for adult residuary legatees.

Peter McDonald, for Matthew Virtue.

J. Bicknell, K.C., for the Imperial Bank of Canada, contended that an absolute vested interest in an undivided share was given to

Matthew, and that the provision of paragraph 9 was in effect an attempt to interfere with the incidents of such a gift, and repugnant to the gift and void.

M. C. Cameron, for an infant.

MEREDITH, C.J., said that the question was, who are the persons entitled to share in the residue? And if, upon the true construction of the will, in the event that had happened, Matthew Virtue was not one of them, there was no room for the application of the general law that a defeasance, either by condition or by conditional limitation or executory devise, cannot be well limited to take effect in derogation not merely of the right of alienation, but of any of the natural incidents of the estate which it is intended to divest.

The case was not distinguishable in principle from Bain v. Mearns, 25 Gr. 450.

If the provisions of paragraph 9 were to be considered repugnant to those of paragraph 8, the case was one for the application of the rule cum duo inter se pugnantia ultimum satum est; but there was no such repugnancy nor any reason for setting up artificial barriers against the carrying out of the plainly expressed intention of the testator.

Declaration that, in the event that had happened, Matthew Virtue was not entitled to take anything under the provisions of the paragraph of the will referred to.

Costs of all parties out of the residue—those of the executors between solicitor and client.

DIVISIONAL COURT. SEPTEMBER 22ND, 1909

KELLY v. GRAND TRUNK R. W. CO.

Railway—Farm Crossing—Overhead Bridge—Destruction by Company without Authority from Board of Railway Commissioners—Neglect to Provide Crossing for Short Period—Construction of Level Crossing—Order of Board for Construction of Overhead Bridge—Damages for Delay—Injury to Land Owner—Inconvenience—Injury Caused by Construction of New Bridge—Remedy—Statute of Limitations—Railway Act, sec. 306.

Appeal by the defendants from the judgment of CLUTE, J., 13 O. W. R. 781, in favour of the plaintiff in an action for damages for injury to his farm, caused by the defendants' railway being built through it, and for delay in furnishing proper means of communica-

tion between the parts of the farm separated by the railway, and for injury by the bridge ultimately erected by the defendants.

The appeal was heard by MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ.

D. L. McCarthy, K.C., for the defendants.

Grayson Smith, for the plaintiff.

MEREDITH, C.J.:—The trial Judge having properly found, as indeed was not disputed by the learned counsel for the appellants, that the bridge in question was erected in pursuance of an agreement between the predecessor in title of the appellants and the predecessors in title of the respondent, that the former would maintain it, it follows that the tearing down of it and thereby depriving the respondent of the means of access it afforded from one part of his land to the other, without lawful authority, was a breach of the agreement for which the appellants are answerable in damages to the respondent, and to an action for these damages the general Statute of Limitations, and not sec. 306 of the Railway Act, is, in my opinion, applicable.

Even if the section were applicable, it would not bar the cause of action, for there was a continuation of the damage, and one year from the ceasing of the damage had not elapsed when the action was begun, for the new means of crossing provided under the order of the Railway Commissioners was not completed until about the 1st May, 1908, and the writ was issued on the 7th of the following August.

Though I prefer to rest my judgment on these grounds, I do not desire to be understood as differing from the view of the learned trial Judge upon which he came to the conclusion that the respondent's cause of action was not barred.

The appeal should, in my opinion, be dismissed with costs.

MACMAHON, J., concurred.

TEETZEL, J.:—It was admitted by Mr. McCarthy on the argument that the defendants were under agreement with the plaintiff's predecessors in title to maintain a bridge over the railway. I think it must be assumed that under such agreement a bridge affording the accommodation provided by the one that was removed should be maintained.

The plaintiff's right to damages, therefore, against the defendants for not maintaining such a bridge would be based upon agreement independently of any common law or statutory right against the defendants.

His right of action would, for the same reason, not be limited as as to time by the special provisions of sec. 306 of the Railway Act, for, while incidentally his damages are suffered by reason of the "construction" of the railway, his right to indemnity therefor is based primarily upon the agreement.

For this and the reasons contained in the judgment of the learned trial Judge, I think the appeal should be dismissed with costs.

BOYD, C., IN CHAMBERS. SEPTEMBER 23RD, 1909.

REX v. PALANGIO.

Criminal Law—Sale of Intoxicating Liquors within Prohibited Area—Royal Proclamation—Criminal Code, sec. 150—6 & 7 Edw. VII. c. 9—Magistrate's Conviction Based on Confession —Admission of Having Cider for Sale—Absence of Proof of Intoxicating Character — Defective Information — Territorial Jurisdiction of Magistrate.

Motion to quash the minute of conviction made in this and six or seven other like cases.

J. B. Mackenzie, for the defendant.

R. McKay, for the Commissioner of Police, the informant.

BOYD, C.:—The offences are, having liquor for sale illegally at Cochrane, alleged to be within twenty miles of the line of the National Transcontinental Railway, the area within which prohibition of intoxicating liquors is declared by Royal Proclamation of June, 1907. The convictions are not formally drawn up, but proceed upon the violation of sec. 150 of the Canada Criminal Code, as amended by 6 & 7 Edw. VII. ch. 9, sec. 2 (1907).

The summary proceedings were of most expeditious character: the parties appeared on the information; no evidence was taken, but upon alleged confessions the fines of $50 and costs were imposed, which were forthwith paid.

Many objections were raised and argued, but, to my mind, the most serious one is disclosed upon an examination of the affidavits. The defendants deny making any confession of guilt; they say they did not plead guilty, but admitted having cider for sale, claiming that it was non-intoxicating. As put by the offenders, when the sale of cider was admitted, the magistrate said that was enough, as it was intoxicating, and they would have to pay the fine and costs

or go to gaol; and the payment was under protest. Now, in juxtaposition with this I place the affidavit of the Commissioner of Police, who says: "The defendant admitted he had in his premises . . . liquor discovered and seized, and was selling the same, and upon the said statement by the defendant and admission of his guilt the conviction herein was made."

I find no evidence here of an admission of guilt, but only that cider was being sold—which may or may not be intoxicating. The whole point of the legislation is as to the use of intoxicants within the proclaimed area, and no proof is made or admission given as to this vital point.

The offence is defectively alleged in the information, which states that "the defendant did have intoxicating liquor called cider for sale, contrary to chapter 9, R. S. C. 1907." This may by implication incorporate the statement of the offence given in the statute 6 & 7 Edw. VII. ch. 9 with the information as being a sale within the limit specified in the Proclamation. Proof would, however, require to be given to shew the jurisdiction of the magistrate territorially over the particular place where the sale was made, and that it was within the area of prohibition. A sufficient and unequivocal confession of guilt might, upon this information, have implied an admission of jurisdiction in the magistrate, but the confesion relied upon in these cases cannot be so used.

It would be better also to follow the words of the Act and allege that the offender had "in his possession," though these words are not essential in my opinion.

Altogether there appears to me an entire lack of evidence to support any of these convictions, and they must be quashed and the moneys returned. I grant the usual protection to the magistrate as to actions.

BOYD, C., IN CHAMBERS. SEPTEMBER 23RD, 1909.

TITCHMARSH v. GRAHAM.

TITCHMARSH v. McCONNELL.

Security for Costs—Actions against Magistrate and Constable — R. S. O. 1897 ch. 89, sec. 1—Defences to Actions—Want of Notice of Action—Trial of Merits on Motion for Security.

Appeal by the plaintiff from order of the Master in Chambers, 14 O. W. R. 277, requiring the plaintiff in each case to give security

for the defendant's costs. The defendant in one action was a magistrate and in the other a constable.

J. B. Mackenzie, for the plaintiff.

W. E. Middleton, K.C., for the defendant McConnell.

W. H. McFadden, K.C., for the defendant Graham.

BOYD, C.:—The magistrate had jurisdiction over the subject matter of the offence complained of, yet he omitted to set down, in writing, and on the face of the conviction and warrant of arrest, statements and allegations which would have made them unimpeachable; his failure caused the conviction to be quashed. The warrant to arrest was left, but it is defective on its face. Still he was throughout acting within his jurisdiction, and is prima facie entitled, by virtue of sec. 9 of R. S. O. 1897 ch. 88, to the benefit and protection of the Act. If so entitled, then he is also entitled, under R. S. O. 1897 ch. 89, to apply for security for costs. He has complied with the requirements of sec. 2 of that Act to the satisfaction of the Master in Chambers, and the whole point of this appeal is that the Master erroneously thought there was a defence upon the merits—whereas, it is contended, the facts disclose no possible defence. It is a defence to shew that the proper notice has not been given alleging that the magistrate acted maliciously and without reasonable and probable cause under secs. 1 and 14, apart from all other matters which may arise upon the evidence. It is not the course of the Court to try the validity of the defence upon contested facts or disputed law prior to the trial. Therefore, I find no good ground for disturbing the order as to security being given. The constable is entitled also to maintain the order.

The appeal is dismissed with costs to the defendants in the cause.

MEREDITH, C.J.C.P. SEPTEMBER 23RD, 1909.

WARREN v. BANK OF MONTREAL.

Contract—Pledge of Shares of Company Stock—Right of Pledgee to Transfer of Shares and Issue of Certificate—Form of Transfer and Certificate—Reference to Terms of Contract.

The only question upon which judgment was reserved at the trial was as to 1,100,000 shares in the Otisse Mining Co., which, under the terms of the agreement set out in the pleadings, were to be a security to the defendant Currie for the payment of the unpaid

purchase money of the company's mine, which was sold by him to the plaintiffs.

F. Arnoldi, K.C., and D. D. Grierson, for the plaintiffs, contended that the proper mode of carrying out the agreement as to these shares was to transfer them to the defendant Currie "in trust only in escrow as collateral security for $190,000, under the terms of the written agreement dated September 18th, 1908, between W. F. Currie and E. D. Warren & Co., not transferable free from this trust except for delivery to E. D. Warren & Co., until remedies are exercisable for default on their part in payment of said money under said agreement," and they insisted that this should appear on the face of the certificate to be issued for the shares to the defendant Currie.

G. F. Shepley, K.C., and R. F. Segsworth, for the defendant Currie, contended that he was entitled to have the shares transferred to him absolutely without anything appearing to shew that he held them as security for the payment of the purchase money and subject to the terms of the agreement.

Eric N. Armour, for the defendants the Otisse Mining Co.

MEREDITH, C.J.:—The effect of the agreement is, I think, to constitute the plaintiffs pledgors and the defendant Currie pledgee of the shares, and to entitle the latter to have them stand in his name on the books of the company, and to have the certificate issued to him; but he is not, in my opinion, entitled to have the shares stand in his name as if the absolute owner of them.

That a pledgee of shares is entitled to have them transferred to him on the books of the company is stated by the text-writers on the subject, and there is an ample authority in the American cases for that statement. I have not, however, found any case in which it has been held that he is entitled to have the transfer made without it being shewn that it is made to him as pledgee and not as absolute owner of the shares.

Upon principle, it appears to me that the pledgee's right is to have the shares so transferred to him as to prevent the pledgor dealing with them to his prejudice; otherwise his security would be subject to destruction by a sale and transfer by the pledgor to a purchaser without notice; and that, on the other hand, he has not the right to have them so transferred as to put him in a position to deal with them in fraud of his pledgor's right and so as to defeat it, as would happen if he should sell and transfer them to a purchaser without notice.

I am of opinion, therefore, that the proper mode of dealing with the shares is to transfer them to the defendant Currie "in pur-

suance and subject to the terms of an agreement bearing date the 18th September, 1908, between W. F. Currie and E. D. Warren & Co.;" and that the share certificate should issue in the same form.

This mode of dealing with the shares will enable the defendant Currie, in the event of default happening in payment of the purchase money, to exercise fully every right to which he is entitled as pledgee of the shares, and will at the same time protect the plaintiffs against any improper use of or dealing with the shares by him.

There will therefore be judgment declaring the rights of the parties to be what I have found them to be, and there will be no costs of the action or counterclaim to any of the parties. Both of them were in the wrong, and the litigation would have been avoided had less temper and more judgment been shewn in the discussion as to the carrying out of the terms of the agreement.

BOYD, C., IN CHAMBERS. SEPTEMBER 24TH, 1909.

REX v. MONTGOMERY.

Liquor License Act—Conviction for Offence against—Importation of Ale into Local Option District—Sale—Agent—Ale Shipped by Brewers from outside the District.

Motion to quash a conviction under the Liquor License Act.

J. Haverson, K.C., for the defendant.

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

BOYD, C.:—The conviction, dated 4th August, 1909, purports to be under sec. 49 of the Liquor License Act, for that the defendant did sell or dispose of liquor contrary to the provisions of sec. 49 of the Act and amendments thereof and thereto. Section 49 makes it an offence to sell liquor without a license—a disposal of liquor other than a sale would be an offence within that section. The magistrate gives reasons for his adjudication, and proceeds upon an application of statutes relating to breweries and sample and commission license, finding that the defendant acted as an agent in procuring liquor for others than himself, and that he thereby violated sec. 47 of ch. 82 of the statutes of Ontario, 1909, which relates to sales made under provincial licenses by brewers, and by the amendment prohibits such sales in a local option district. Counsel for the Crown disclaims the right to support the conviction on that theory of the evidence, but says it may be supported as a sale by Montgomery—a view which the magistrate did not apparently act upon.

Reading the evidence fairly, the action of the defendant was simply this: he was about to order some ale for himself from brewers in Brockville, and two of his friends asked him also to order some for them at the same time. They gave him the money to pay for the ale at the same price he was paying for himself—and this money was transferred by him through postal order to the Brockville brewers, who forwarded the ale, which was delivered to the two friends and the defendant in due course. The only purchase or sale of ale was with the Brockville dealers, and the importation of ale into the township of Mountain was an innocuous act so far as the infringement of the Liquor License Act is concerned.

The conviction cannot be supported on the evidence, and should be quashed.

RIDDELL, J. SEPTEMBER 28TH, 1909.

RE HODGINS AND CITY OF TORONTO.

Municipal Corporations—Local Improvements — By-law Assessing Rates on Land Fronting on Street for Payment for New Pavement—Notice to Owner—Defect—No Time Mentioned—By-law Quashed pro Tanto.

Application to quash pro tanto by-law No. 5056 of the city of Toronto, so far as it assessed and levied upon certain property in Bloor street rates to be applied in paying off certain debentures issued to pay for asphalting that street.

T. Hodgins, K.C., the applicant, in person.

W. C. Chisholm, K.C., for the city corporation.

RIDDELL, J.:—This is called a local improvement; and it is now the law that a municipality may in certain instances compel owners of property on the side of a public street to pay for the asphalting of the street, upon the theory that they are the persons benefited thereby. While it is notorious that many such owners contend that they are not in the least benefited, or not more than the rest of the community, and that they are therefore made to pay for the advantage of the general public, the Court has no concern with the propriety or advisability of the legislation, but must take the law as the Court finds it.

But, as this is a very special kind of levy, for the benefit of the people indeed, but to the detriment of the private individual, and justified only by statutory authority, care must be taken to see that

all statutory provisions and prerequisities are complied with; if a statute says that money may be taken out of a man's pocket upon observing certain formalities, it will not do to omit any of these formalities.

In Goodison Thresher Co. v. Township of McNab, 19 O. L. R. 188, at p. 214, Garrow, J.A., adopts the following from Maxwell on Statutes, 4th ed., p. 557, as a correct statement of the law: "When a statute confers a right, privilege, or immunity, the regulations, forms, or conditions which it prescribes for its acquisition are imperative, in the sense that non-observance of any of them is fatal."

In Barton v. City of Hamilton, 13 O. W. R. 1118, at p. 1131, the Divisional Court says, speaking of certain rights under a statute: "The rights arise under a statute; the rights are extraordinary rights and must be exercised in precisely the way the statute prescribes."

The statute provides, Municipal Act, sec. 671, that notice shall be given to the owners, etc., and that every such notice shall, inter alia, "contain . . the amount of the proposed assessment on the particular piece of property and the time and manner in which the same is to be payable. . ."

The notice given to the appellant was as follows: "The estimated cost of the improvement is $12,996, of which $2,489 is to be provided out of the general funds of the municipality. The remainder of the cost of the said improvement is proposed to be paid for by a special assessment payable within.....years on the real property immediately benefited as the same appears by the said statement. Your real property which will be assessable consists of 198 feet on the south side of said street at an approximate cost of 37 1/10 cents per foot per annum."

It is obvious that no time is mentioned as required by the statute, and that therefore the notice is fatally defective. It is no answer to say that the applicant could have found out by going to the city hall and making inquiry—that is not what the statute says.

The case seems to be on all fours with Re Gillespie and City of Toronto, 19 A. R. 713, affirmed in the Supreme Court.

Another objection was taken which also seems formidable, but I do not consider it necessary to delay for the purpose of deciding the question there raised.

The application will be granted with such costs as are taxable, if any.