THE

Eastern Law Reporter.

VOL. VII. TORONTO, SEPTEMBER 15, 1909. No. 5

NOVA SCOTIA.

COUNTY COURT FOR DISTRICT No. 7. AUGUST 17TH, 1909.

DOMINION COAL COMPANY v. McLEOD.

Landlord and Tenant — Overholding — Notice to Quit— Waiver by Subsequent Acceptance of Rent—Evidence— Procedure.

L. A. Lovett, for landlord.

G. S. Harrington, for tenant.

FINLAYSON, CO. C.J.:—This is an action under Chapter 174 R. S. N. S. 1900, "The Overholding Tenant's Act."

The form of lease in question reads as follows:—

"Dom., No. 8, Glace Bay, N.S.,

October 20th, 1908.

"I, the undersigned, do hereby agree to become a tenant of number 86 house belonging to The Dominion Coal Company, Limited, and situated at....., on the following terms and conditions:—

"(1) That I will pay for the said house the fixed rental of $4 per month and pay such rent monthly.

"(2) That I will keep the house clean and tidy, and will not in any way, cause or allow it to be damaged, beyond fair and reasonable wear and tear.

"(3) That I will allow the company's inspector, agent or representative at all reasonable times free access to the

house and premises for the purpose of inspection, and that I will act upon and comply with his instructions in reference to keeping the same in good condition and free from any nuisance.

"(4) That I will vacate and peaceably deliver up the said number 86 house to the company at any time, on receiving from the company one month's notice requiring me to do so.

"(5) That should I cease to be in the company's employ, or cease, abandon or discontinue for any cause or reason to work for or on the company's works, then in either such case that I will on the verbal or written demand of the said company, immediately vacate and deliver up the possession, occupation and use of said house and premises to said company."

The landlord claims that the tenancy has expired by notice to quit given pursuant to a clause in the agreement or lease. The landlord further claims a breach of said clause or condition in the lease under which he claims a forfeiture, and re-entry, and has given the notice required by said clause. The tenant defends, (1) on the ground that the breach complained of took place on the 6th of July, when the men ceased working, and that the landlord waived forfeiture by accepting rent of the said 6th of July on the 17th. (2) That the landlord gave no evidence that the tenant was wrongfully holding or refused to give up possession on demand. (3) There were also objections taken to the form of the papers and irregularities in the service.

These objections were general and apply to all the cases, being taken either by Mr. Tobin or Mr. Harrington for all the tenants. I will deal with them all in this case, and apply the ruling to the other cases, except such special objections as only apply to a particular case. (4) There was an objection that the notice to quit and affidavit of service were not entitled in the cause. This, in my opinion, is not well founded. The notice to quit is not a proceeding in the cause, and does not require to be entitled. (5) That the seal of the Court was not on the appointment. I do not consider this necessary. All the other objections are likewise of a highly technical character, and I do not think it was ever intended to give weight to purely technical objections in summary matters, such as proceedings under this Act. All that is required is a substantial compliance with the requirements of the Act. That the tenant has been made

fully aware of the proceedings taken against him, that he has not been misled or taken by surprise by the papers served on him; to hold otherwise would be in many cases to render the Act nugatory, or in any event defeat the object in view, a speedy determination of the matter in dispute. The papers in all these cases are free from any defects which would warrant holding them bad. Counsel for the tenants objected to the reception of the evidence given by Mr. Duggan, general manager of the coal company, as well as that of the superintendents, on the ground that this was a proceeding between landlord and tenant, and that any evidence of employment was irrelevant. While it is doubtless true that the principles which determine the rights of landlord and tenant must be strictly applied in determining the question at issue in these enquiries, I, however, think it both proper and pertinent to discuss the relationship of employer and employee in order to determine what both parties understood when they entered into the contracts for leasing the tenements in question. These tenants are tenants because they are employees of the Coal Company, and any evidence which shews the terms of employment is in my opinion, relevant and admissible in order to interpret clause or condition 5 or F. in these leases, and on this ground I admitted the evidence of Mr. Duggan, and of the superintendents, as well as the special rules issued by the Coal Company to their employees under the Coal Mines Regulation Act. An objection was taken that the notice to quit was not sufficiently specific. The requirement of a notice to quit as given in Woodfall on Landlord and Tenant, p. 369, is, that it must be clear and certain so as to bind the party who gives it and to enable the party to whom given to act upon it at the time he ought to receive it. The notices in these cases fully meet such requirement. The defendants claim there is no evidence of wrongful holding, that the tenants never refused to give up possession, and consequently the landlord is not entitled to succeed. I take it that any holding after the end of the term, whether determined by notice to quit or otherwise, must be a wrongful holding under the Act. It is the duty of the tenant on the expiry of the term to deliver up possession to the landlord. See Ibbs v. Richardson, 9 A. & E. 849. The main questions now arise. There is no question about the breach of condition, creating a forfeiture. When did the forfeiture take place? Was the forfeiture waived by the landlord, by ac-

ceptance of rent or by delay or otherwise? What was the nature of the tenancy? The greater number of the leases are for an indefinite term, and in olden time would be considered tenancies at will. The old authorities say the only estates known to law are fee simple, fee tail for life, for a term of years, and at will. However, with the monthly reservations of rent, one of the conditions require a month's notice to terminate the tenancy in certain cases. They must be held to be tenancies from month to month, but they are not for a monthly term. They are continuing tenancies and their conditions are continuing conditions; see 24 Cyc. 1034. When there is a continuing condition or covenant an act which implies a waiver of breach of the covenant, does not operate as a license to commit subsequent breaches: Doe & Muston v. Gladwin, 6 Q. B. 953. Clause or condition 5 or F in the lease reads: "Should I cease to be in the Company's employ, or cease, abandon, or discontinue for any cause or reason to work for or on the Company's works, then in either such case, I will on written or verbal demand immediately vacate and deliver up possession," etc. This condition is in the alternative.

By the rules of the Company a man ceased to be in the employ, when he was absent a full day. Thus a man who did not work any day in July would be taken off the employment register and cease to be in the employ on the 17th, the pay day, but if he worked till the 6th he would not be taken off till the 31st, the last pay day. On the other hand if a man were to leave the employ he is supposed to give 14 days' notice of his intention to do so. (See Rule 81 of regulations). I take it that this would mean the discontinuing or abandoning work, under clause 5. I take it also that absence for 14 days, though it might not take a man off the employment register, was sufficient notice that the man ceased, abandoned or discontinued to work for, or on, the Company's works. The man who ceased work on the 6th would therefore be within this rule on the 20th, and I consider this construction fair to both parties. The Company says it would be impossible for them to tell who ceased work within these rules on the 6th, that many who did not work on the 6th came back to their work, some after a shorter and some after a longer term; and that it was only after the lapse of fourteen days that they were satisfied that these people had discontinued working for them, or that they declared the forfeiture and gave them notice to quit.

In this they are sustained by the authorities even had they accepted rent up to the 17th, and after the men ceased working. In order to render acceptance of rent or any other act a waiver of forfeiture, the lessor must have knowledge of the forfeiture at the time of the supposed waiver, unless the forfeiture was of such a nature as to be equally within the knowledge of both parties: Doe & Nash v. Birch, 1 M. & W. 402. In this case, the men in absenting themselves from work on the 6th, cannot be said to have given the Company such notice that they ceased or discontinued work as would enable the landlord to declare a forfeiture on that date. In 15 Campbell's Ruling Cases, 790, after citing a number of English and American cases, the editor says that all these cases concur in holding acceptance of rent to waive forfeiture, if with knowledge on the part of the landlord. Counsel for defendants says that a technical meaning should be given the word "employee," as is given it by the Courts in cases of employment. However, the proper construction to be put on words in a covenant and the covenant itself, is that which is most consistent with the reason and sense of the matter, and what was likely in the contemplation of both parties when they executed the lease, and I think the interpretation above fairly meets this view. Many if not most of the early cases have been those turning upon the construction of clauses in leases, and in each case so far as the examination I have been able to give enables me to say, the Court construed the clauses as the circumstances and the facts of the particular case seemed to demand.

Doe & Bryan v. Bancks, 4 B. & Ald. 409, is in point as regards payment of rent as waiver, and also as to ceasing to work. In that case a lease of coal mines for 99 years contained a proviso that the lease should be void if the tenant ceased working at any time for two years. The lease was dated in 1802, the lessor ceased working in 1813, in 1817 the lessee or his assignee paid rent. The lessor entered for a breach of this proviso. In an action of ejectment waiver by the acceptance of rent in 1817 was pleaded as a defence. It was held that acceptance of rent in 1817 was not a waiver, and that the landlord might avoid the lease upon cesser to work commencing two years before the day of the demise in the ejectment. It was said by Best, J.: "In construing this clause of the lease we must look to the object which the parties had in view. The rent

was to depend upon the number of tons of coal raised. In order to derive any benefit from the mine, it was the object of the landlord, by introducing this clause, to compel the tenant to work it. The clause was introduced solely for the benefit of the landlord to enable him in case of a cesser to work, to take possession of the mines and either work them himself, or let them to some other tenant." The same is equally true in these cases; these houses were for the employees of the company; clause 5 was inserted for the benefit of the landlord (the Company), in order to enable him to re-enter when the tenant ceased working for him, and give the hause to one who would work. Best, J., in the above cited case, also said: "I take it as a universal principle of law and justice that no man can take advantage of his own wrong. Now it would be most inconsistent with that principle to permit the tenant to protect himself against the consequences of this action by afterwards setting up his own wrongful action at a former period. It appears to me that this was a continued forfeiture, and that the landlord had a right to take advantage of it whenever he thought proper to do so."

Bailey, J., in the same case said: "The effect of receipt of rent on September 29th, 1817, cannot amount to more than an acknowledgment on the part of the lessor of the plaintiff that no forfeiture was then complete. He does not thereby admit that a forfeiture may not have been inchoate, but merely that it was not complete, so as to entitle him to bring ejectment. I think the landlord has it in his election to make this lease void or not; that he is not bound to exercise that election in the first instance; and though he may waive it from time to time, he is at liberty afterwards to insist on the forfeiture in respect to subsequent misconduct." This fully meets these cases. If the tenants are right the landlord could insist on the forfeiture on the 6th of July; he did not do so and if the tenants went back to work at any time before he made his election he would have probably waived his right to forfeit. They have done so, and the ceasing and abandoning or discontinuing to work for the Company is as true of the 24th of July as it was the 6th. The breach of the proviso is a continuing one, and I do not think there can be any question, on principle or authority, but that he was within his rights in declaring the forfeiture on the 24th of July and giving notice to quit, and that he must succeed in this action.

I must come to the following conclusions; That nearly all the leases are for indefinite terms, therefore are continuing leases. That the proviso or condition under which re-entry is claimed is a continuing condition. That the breach complained of is a continuing breach, that under the rules of employment the landlord was justified in declaring a forfeiture and giving notice to quit on the 20th of July or any day after. That there was no waiver by payment and acceptance of rent on the 17th for a breach continuing. That waiver is a defence, and must be proved. That there was no evidence to shew that rent received on the 17th was for rent accruing over after the 6th; that any rent received on the 17th, if after the breach, was received without the landlord having knowledge of the breach, and therefore not a waiver even if the contention of defence is correct that the breach was on the 6th.

An order for possession will be granted in this case.

NEW BRUNSWICK.

FULL COURT. APRIL 23RD, 1909.

EX PARTE PECK, IN RE RHODES.

Assault — Proceedings Before Magistrate — Summons—Prohibition—Jurisdiction.

Order nisi for a writ of prohibition argued on April 14th, 1909, before LANDRY, MCLEOD and WHITE, JJ.

A. A. Wilson, K.C., in support of the order nisi.

W. B. Chandler, K.C., contra.

The judgment of the Court was delivered by

LANDRY, J.:—This is an order nisi for a writ of prohibition to prohibit John H. Rhodes, a justice of the peace for the county of Albert, from further proceeding on an information laid before him by Miles B. Dixon against Edson E. Peck, charging him with having on the 5th day of October, A.D. 1908, unlawfully assaulted the said Miles B. Dixon.

The facts are as follows: In the month of October, 1908, M. B. Dixon laid an information agains Edson E. Peck before Daniel W. Stuart, a justice of the peace of Albert county, for the same cause of complaint. Stuart issued a summons and proceeded with the case, but before hearing evidence was served with an order nisi for a writ of prohibition with a stay of proceedings, and thereupon desisted from proceeding further. This order nisi for a writ of prohibition was afterwards discharged by this Court on December 18th, in Michaelmas Term last [See Ex parte Peck In re Stuart, 6 E. L. R. 274], but no further proceedings were had on the complaint before Magistrate Stuart. On the 5th day of January, 1909, Miles B. Dixon laid a similar information for the same cause of complaint before James Blight, a justice of the peace of Albert county, who issued a summons. Previous to his so issuing the summons the said James Blight had been informed by the said Daniel W. Stuart of the proceedings before him and had been requested by the said Stuart to issue a summons and proceed and hear the matter. On the 3rd of February the said Edson E. Peck, with his counsel Allen W. Bray, appeared before the said James Blight. The said Allen W. Bray, as clerk of the peace, then advised the said James Blight that he had no jurisdiction to proceed and hear the matter, and he the said James Blight being so advised dropped the proceedings and no evidence was heard before him. On the 8th day of February, the said Dixon laid a similar information before John H. Rhodes, a justice of the peace for the county of Albert. Previous to this 8th of February, the said Daniel W. Stuart had informed J. H. Rhodes of the proceedings that had theretofore been had before him in this matter, and had requested the said Rhodes to take the information and proceed and hear the matter. At the return of the summons before Rhodes, the said Edson E. Peck did not appear; a warrant was issued against him to compel his attendance, and on the 11th day of February he was taken before the said Rhodes, under such warrant, when he moved for an adjournment, which was granted to the 18th day of February. On the 16th day of February, the said Rhodes was served with an order nisi for a writ of prohibition, which order is now before us.

The only point in the case is whether Magistrate Rhodes in the circumstances stated has jurisdiction. I believe the three magistrates named had in this matter concurrent juris-

diction. It seems to be established that when a magistrate has commenced proceedings and seized himself with the jurisdiction in a case where other tribunals have concurrent authority, such other tribunals are not permitted to interfere with the exercise of his right so long as he is bona fide proceeding in the matter. In this case Magistrate Stuart with the consent of the prosecutor dropped the original proceedings started before him, and so advised in effect Magistrate Rhodes. It seems to me, therefore, that when the proceedings were started in Magistrate Rhodes' court, he had full jurisdiction to proceed.

It might be contended that the defendant had a right to obtain from Magistrate Stuart a final decision of the case and would insist upon the trial proceeding before him. It is not clear that the defendant would strictly have such a right if the prosecutor desired to withdraw the case. In a review in a higher court, however, the good faith of the prosecutor might be open to be questioned, and his further proceeding in the same matter before another justice might in the case of want of good faith be stopped. But that question does not arise here. If magistrates Stuart and Blight did not proceed to finally hear the case, it was because of their being prevented by the action of the defendant, who cannot now complain of their not proceeding.

I believe that J. H. Rhodes has jurisdiction, and that the order nisi for a writ of prohibition should be discharged.

NEW BRUNSWICK.

FULL COURT. APRIL 23RD, 1909.

REX v. KAY, EX PARTE PHILEAS A. LEBLANC.

Sale of Bread—City By-law—Infringement—Ultra Vires—Constitutional Law.

Conviction made by James Kay, police magistrate, Westmorland county, for violation of a by-law of the city of Moncton, coming before this Court on certiorari and order nisi to quash. Argued April 14th, 1909, before LANDRY, MCLEOD and WHITE, JJ.

W. B. Chandler, K.C., supported the conviction.

Jas. C. Sherren, contra.

The judgment of the Court was delivered by

LANDRY, J.:—This was a motion to quash a conviction against Phileas A. Le Blanc, for having, on the 22nd day of January, at the city of Moncton, exposed for sale in his shop or place of business at the city of Moncton, a loaf of bread not having the initials of the name of the baker by whom it was manufactured stamped in plain and legible characters therein, and not having stamped therein the figure or figures denoting its weight, contrary to the provisions of a by-law of the city of Moncton in such case made and provided. The conviction was dated the 23rd day of February, A.D. 1909.

The grounds urged for the setting aside of the conviction were:—

1. The by-law was ultra vires of the city council.

2. The provincial legislature had no authority to authorize such a by-law, being against section 91, sub-section 2 (as to the regulation of trade and commerce) of the British North America Act.

3. The word "bread" as used in the by-law does not apply to the loaf so exposed, such loaf being fancy bread.

Sub-section 5 of section 47 of the Acts of Assembly of 1890, chapter 60 (Consolidating Acts relating to the City of Moncton), gives the city council authority to make by-laws and regulations regulating the size of bread. The council passed a by-law, requiring, among other matters, that bread exposed for sale in the city of Moncton should have stamped therein the initials of the name of the baker by whom the bread was manufactured, and the figure or figures of the weight of the loaf. We have no doubt of the judisdiction of the local legislature to give the authority to the city council to make such a regulation, nor have we the power of the council to act under that authority. The matter was one entirely of local application, regulating the sale of bread within the city of Moncton and quite subject to the power of the provincial legislature.

As to the nature of the loaf, the finding of that was with the magistrate who heard the evidence and who saw the loaf.

The order nisi to quash will be discharged.

PRINCE EDWARD ISLAND.

SUPREME COURT. JUNE 29TH, 1909.

McKINNON v. CLARK.

Action of Trespass to Land—Motion to Set aside Verdict and for Entry of Non-suit — New Trial — Leave to Move for Non-suit not Reserved at Trial—Construction of Agreement—Whether it Amounted to a Grant of the Land or Merely a Right of Way.

McLeod, K.C., and Bentley, for plaintiff.

Stewart, K.C., and D. McKinnon, for defendant.

The judgment of the Court was delivered by SULLIVAN, C.J.

This is a rule nisi for a non-suit or new trial.

The action was for trespass to land, and a verdict was found by the jury in favour of the plaintiff. Leave to move for a non-suit was not reserved at the trial and consequently no non-suit can be entered. Whether a new trial can be granted depends upon what is the proper construction of the following document:—

"This agreement, made the Tenth Day of November, One Thousand Eight Hundred and Sixty-five, between Richard Egan, of St. Andrews Township, Number Thirty-seven, Prince Edward Island, farmer, of the one part, and John Roche Bourke, also of Township Number Thirty-seven, in said Island, esquire, of the other part; witnesseth that he, the said Richard Egan, doth for himself, his heirs and assigns, hereby agree to sell and dispose to the said John R. Bourke, his heirs and assigns, a piece of land for the use of a road or highway to Hillsborough River, commencing and having a perpendicular front of twenty-two feet, twenty-two inches, on the south side of the road leading from Mount Stewart Bridge to St. Peter's Road and thence running by parallel lines due south to said Hillsborough River, the said piece of land hereby agreed upon being part of a block already held under lease by said Richard Egan from said J. R. Bourke, and this agreement is to exist for and

during the term of said lease, for and in consideration of which the said John R. Bourke agrees to pay to the said Richard Egan the sum of £9, Island currency, the receipt of which is hereby acknowledged; in witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

(Sgd.) Richard Egan (L.S.)
" J. R. Bourke, Jr. (L.S.)

"In presence of John F. Beaton."

This agreement was put in evidence on behalf of the plaintiff, the alleged trespass having been committed on the land described in it, which land at the time of the trial was claimed by the plaintiff.

The first point to be considered is whether the agreement conveyed the land to John R. Bourke, the predecessor in title to the plaintiff, or gave him merely a right of way over it. A full consideration of the document and the circumstances in which it was executed by the grantor lead me to the conclusion that it gives a right of way only. For intangible property, such as a right of way, trespass is not maintainable.

The verdict in favour of the plaintiff consequently cannot stand. The rule will be made absolute for a new trial, the defendant to be allowed to amend his pleadings by pleading a right of way, if he should be so advised, and to be required to pay the costs of such amendment if it be made.*

PRINCE EDWARD ISLAND.

SUPREME COURT. JUNE 29TH, 1909.

IN RE WILLIAM K. ROGERS.

Motor Vehicle—Constitutional Law—Provincial Statute Prohibiting use of—Validity—B. N. A. Act, 1867, secs. 91 and 92—Criminal Law—Local Works and Undertakings.

Writ of certiorari.

McQuarrie, K.C. and McLeod, K.C., for applicant.

Haszard, K.C., Attorney-General, and Johnston, K.C., contra.

*REPORTER'S NOTE.—Reference was made by the learned Chief Justice to the following cases as authorities for the granting of a new trial and for the amendment of the pleadings as stated: Higham v. Rabbett, 7 Dowl. 653; Doe dem. Wyatt v. Stagg, 5 Bing N.C. 564; Williams v. Pratt, 5 B. & A. 896.

The judgment of the Court was delivered by

SULLIVAN, C.J.:—This matter comes before us on a writ of certiorari removing into this Court, in order to quash the same, the record of a conviction of William K. Rogers, made on 22nd June, 1908, by the stipendiary magistrate for Charlottetown on the prosecution of John N. Campbell. The conviction is for having used and operated upon a public highway in the city of Charlottetown a motor vehicle contrary to the provisions of the statute of Prince Edward Island, 8th Edward the 7th, chapter 13, entitled "An Act to prohibit the Use of Motor Vehicles upon the Public Highways of this Province." The ground upon which the certiorari was issued is that the statute referred to by virtue of which the conviction was made is, under the provisions of "the British North America Act, 1867," beyond the power of the Legislature of Prince Edward Island to enact.

The contention at the Bar, on the part of the applicant, was that the Act in question trenches upon the criminal law, legislation in regard to which is, by the British North America Act, assigned exclusively to the federal parliament, and that consequently the Act is ultra vires the provincial legislature. The main argument in favour of this view was based upon the assumption of possible objections to the running of automobiles.

These objections were classified as falling within offences designated nuisances which render their authors liable to punishment under the criminal law. The preamble of the statute was referred to in support of this view. It reads as follows:—

"Whereas it has become necessary in the public interest and for the safety of the travelling public, to prohibit the use and operation of motor vehicles on the highways and public places in this province."

It was argued that as the object of the statute, as stated in the preamble, is to prohibit the use and operation of motor vehicles in the "public interest" and for the "safety of the travelling public," such statement amounts to a declaration that their use upon the highways and public places is a public nuisance, and that as the enforcement of the Act would stop their running, such enforcement would necessarily abate the nuisance, and the Act would thus deal with a subject to which the criminal law applies.

In the construction of statutes, courts will, if necessary, disregard the title and preamble. But it is recognised, as has been said by Lord Halsbury, that "the preamble of a statute affords useful light as to what a statute intends to reach." In the preamble to the statute in question I see nothing which necessarily indicates that the Act trenches upon the criminal law. To legislate "in the public interest" does no do so; if it did there would arise the absurdity that a provincial legislature could not legislate at all as all public statutes are presumed to be enacted in the public interest; to legislate for the "safety of the travelling public" does not do so; if it did to legislate for the construction or repair of a bridge or a road, which would be for the safety of the travelling public, would likewise be ultra vires a provincial legislature.

That the criminal law may be properly invoked to abate public nuisances—or to punish their commission—whether such nuisances be caused by the running of automobiles or otherwise, is a proposition not open to controversy, and the numerous cases cited by the applicant's counsel which tend to establish that doctrine are of unquestionable authority. But as I view this matter no question of trenching upon the criminal law is involved in it. Quite apart from the circumstance of the use of automobiles being, or not being, a nuisance, even supposing them to be of the utmost utility, still there surely is in Canada some legislative authority that has power to enact that they shall be prohibited from running on the highways in Prince Edward Island; and the sole question in this case is whether that authority is vested in the provincial legislature or in the Dominion Parliament. That question, it will readily be perceived, is altogether distinct from anything concerning the application or non-application of the criminal law.

In the distribution of legislative powers under the British North America Act, section 92, No. 10, assigns exclusively to provincial legislatures "local works and undertakings" other than such as are excepted, among which latter, "highways" and "public places" in Prince Edward Island are not included.

But it was argued by the applicant's counsel that assuming the Act in question to fall within some of the Nos. of section 92, still the Provincial Legislature could not enact it by reason of the concluding part of sec. 91, which provides that "any matters coming within any of the classes of sub-

jects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

The highways in Prince Edward Island are "local works and undertakings," and they do not come within any of the classes of subjects enumerated in section 91 as assigned to the Parliament of Canada; they must therefore be deemed to come within the class of matters of a merely local or private nature in the province comprised in the enumeration of the classes of subjects assigned exclusively to the provincial legislature.

In the case of Attorney-General for Ontario v. Attorney-General for the Dominion (1896), A. C. at pp. 359-360, Lord Watson, in reference to this branch of the question, says:—

"It appears to their Lordships that the exception was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen sub-sections, save to the extent of enabling the Parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91." And again in the same case at pp. 360-361, he says:—

"But to those matters which are not specified among the enumerated subjects of legislation (in sec. 91), the exception from section 92, which is enacted by the concluding words of section 91, has no application, and in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by sec. 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada in regard to all matters not enumerated in sec. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in sec. 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by sec. 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces."

The construction and repair, management and control of the highways in Prince Edward Island are matters of a "merely local or private nature" in the province. They are of provincial not of Dominion "interest or importance." They come within the classes of subjects enumerated in sec. 92 as exclusively assigned to provincial legislatures, and are therefore part of that class of subjects upon which Lord Watson, speaking for the Judicial Committee of the Privy Council, says the Dominion Parliament should not trench. That being so it was competent for the Legislature of Prince Edward Island to deal with the provincial highways in the manner in which it has done. The enactment of the Act in question was clearly within its power. The judgment of the stipendiary magistrate will therefore be affirmed, and the writ of certiorari obtained by the applicant will be quashed with costs.

PRINCE EDWARD ISLAND.

SUPREME COURT. JUNE 29TH, 1909.

REX v. PETER CASSIDY.

Rape—Indictment—Admissibility of Evidence—Conversation between the Complainant and her Mother—Reservation of Question of Admissibility—Appeal from Judge's Refusal to Reserve.

McQuarrie, K.C., for the accused.

Haszard, K.C., Attorney-General and Johnston, K.C., for the Crown.

The judgment of the Court was delivered by

SULLIVAN, C.J.:—In this case the prisoner, Cassidy, was tried and convicted before Mr. Justice Hodgson and a jury, last July term of this Court at Georgetown, on an indictment for rape. In the course of the examination of the complainant, who was produced as a witness for the Crown, the Attorney-General asked her whom she saw when she returned home. She replied that she saw her mother, and added, "then she asked me what happened." To which the

complainant answered, "Cassidy did everything to me except cut my throat." Her mother then asked her "what did he do?" And in reply the complainant told her what he had done to her. The mother, on being examined, repeated the question she had put to the complainant as above given and detailed what the complainant said to her in answer to that question. The reception of this evidence of the complainant and her mother was objected to by the prisoner's counsel, but it was admitted by the Judge.

The jury returned a verdict of "guilty," and as the Judge was about to pass sentence upon the prisoner his counsel asked him to reserve the question as to the admissibility of the evidence of the complainant and her mother, to which he had objected, which the Judge refused to do, and sentenced the prisoner to four years in the penitentiary.

Last Hilary Term the prisoner's counsel applied to this Court for leave to appeal from the Judge's refusal to reserve the question, which leave was granted, and a case was stated as to the admissibility of the evidence mentioned, the opinion of this Court being asked whether the rulings of the trial Judge already referred to "are or are not according to law."

Apart from the consideration of the fact that although the objection to the reception of the evidence was taken in the course of the trial, it was only after the verdict that the Judge was asked to reserve the question, and viewing the case as stated simply upon its merits, we are of opinion that under the decisions of the Court for Crown cases reserved in the Queen v. Lillyman (1896), 2 Q. B. D. 167 and in the King v. Osborne (1905), 1 K. B. 551, the rulings of the trial Judge as to the admissibility of the evidence of the complainant and her mother were such as are recognised by law.

In the course of the argument of the case stated in this appeal the prisoner's counsel sought to introduce another and different question from that which he raised at the trial, namely, that the Judge in his charge to the jury omitted to point out to them that the evidence of the complainant and her mother, if believed, should not be regarded by them as evidence of the fact complained of, but only of the consistency of the complainant's conduct and as corroborative of her credibility. If this point was available for the prisoner it should have been taken by way of objection to the Judge's charge, and the foundation for an appeal laid during the trial, but it does not appear that it was at any

time ever brought to the Judge's notice; and in any case, after the trial it is too late for either the prosecutor or the accused to apply to the Court to reserve such a question. See sub-section 3 of sec. 1014 of the Criminal Code, and the construction given to the words "during the trial" therein, by the Supreme Court of Canada, in the case of Ead v. The King (40 S. C. R. 272).

The appeal will be dismissed and the rulings appealed from confirmed.

PRINCE EDWARD ISLAND.

COURT OF CHANCERY. JULY 15TH, 1909.

HENDERSON v. HENDERSON AND OTHERS.

Husband and Wife—Purchase of Land with Husband's Money in Wife's Name—Gift or Trust—Circumstances Rebutting Presumption of Gift.

G. Gaudet, for complainant.

J. A. Mathieson, K.C., and W. E. Bentley, for defendants.

FITZGERALD, V.C., Acting M.R.:—Thomas Henderson, the father of the complainant, died about four years ago, leaving him surviving his widow, his second wife (since remarried), and three children by her (infants).

His first wife (Ann Campbell) died about 20 years ago intestate and without issue living at her decease.

Henderson and his first wife lived at Brackley Point up to the year 1876 or thereabouts, on a farm which he owned there, and while there a child was born, which died there.

He sold this farm, and about three or four years afterwards, with the purchase money, bought thirty-three acres of land at Newport, and a little over a year afterwards thirty-three acres adjoining. The deed for his first purchase was from Roderick Campbell, dated 5th February, 1883. The deed for the second purchase was from Peter Campbell to Ann Henderson, his wife, and is dated the 16th November, A.D. 1880.

Peter Campbell and his wife, Henderson and his first wife, are all dead.

This bill is filed seeking to have the heirs at law of the late Ann Henderson (parties hereto) declared trustees for the three infant children of the late Thomas Henderson as to this latter 33 acres, and to have the whole 66 acres sold, and partition and distribution of the proceeds made among such infants.

The law is well settled that "although a purchase in the name of the wife, if altogether unexplained, will be deemed a gift, yet you may take surrounding circumstances into consideration so as to say it is a trust, not a gift," as it is thus expressed by Jessel, M.R., in Marshall v. Crutwell, L.R. 22, Eq., p. 329; and as Mr. Justice Strong, as V.C., in Owen v. Kennedy, 20 Grant, p. 178, states it: "The land having been bought with the money of the husband and the conveyance having been made to his wife, there would, in the absence of proof to the contrary, be a presumption arising from the relationship of husband and wife sufficient to counteract the trust which ordinarily results when property is purchased and paid for with the money of a person other than that one to whom the conveyance is made. It is, however, open to the plaintiff to rebut the presumption of advancement by parol proof, that such was not the intention of the purchaser at the time the conveyance was made.

Later cases admit the correctness of these two definitions of the law in this respect.

In this case, consequently, the whole question turns upon the sufficiency of the parol evidence given in rebuttal.

Taking "into view all the circumstances, as I am bound to do as a juryman"—as Jessel, M.R., suggests—I think the circumstances under which this deed of the 33 acres was executed in the wife's name, shew that it was so taken as a mere matter of convenience and that it was not intended as a provision for the wife.

The principal witness was John Henderson, at present a resident of the United States. He was an adopted child of Thomas and Ann Henderson, lived with them at Brackley Point, and moved with them to Newport. He was 14 years old when the purchase of this 33 acres was made. He saw the money paid by Thomas Henderson, as his own, and was present at the negotiations for the purchase.

According to his account, which I have every reason to believe, the vendor, Peter Campbell, objected to give the

deed to Henderson himself, claiming that under his father, Duncan Campbell's will, he could not do so as that will prohibited a sale out of the family, but offered, however, in order to overcome this difficulty, to have the deed made out to Henderson's wife, who, as a member of his family, was eligible as a purchaser.

Henderson, at first, would not consent to this, but after "lots of talk" over the matter, Henderson finally agreed to have the deed made out to his wife. and it was so made.

This witness further stated that he understood that the whole 66 acres was bought for him in case he remained with his adopted parents, and that Ann Henderson, on her death-bed, expressly said so to him.

Not being able to get along with Henderson he left him, and now makes no claim to this land.

The will of the late Duncan Campbell was admitted in evidence. It showed that such conditions existed in it, but from the evidence of the witness Innocent Campbell, it would appear that this 33 acres was part of the land originally devised to Marshall Campbell and not subject to the condition in the will.

This same witness proved Peter Campbell's sole possession of this 33 acres for over forty years.

No question of title is, however, raised before me on the pleadings or evidence.

There will be a declaration that the heirs at law of the said late Ann Henderson hold the said thirty-three acres conveyed to her by Peter Campbell by deed bearing date the 16th day of November, A.D. 1880, in trust for Grace Lena Henderson, John T. Henderson and Ida Henderson, infant children of the said late Thomas Henderson.

And a finding, that the said three infant children are entitled to the whole sixty-six acres, each having one-third share or interest therein.

And it appearing that a sale thereof will be more beneficial to them than a partition, ordered that the 66 acres be sold by Master Longworth free, clear and discharged, from all incumbrances; and the Court determining that the dower interest therein of Florence Bassett, widow of the late Thomas Henderson, be sold, further ordered that said lands be sold, freed and discharged from her claim of dower therein.

Usual order for sale in other particulars.

It appears to me, however, that letters of administration will have to be taken out in order to insure a good title to the purchaser. That can be done by or for the infant complainant, and the estate administered in this Court, the Master giving the usual notice to creditors.

Leave to apply further.

PRINCE EDWARD ISLAND.

SUPREME COURT. JUNE 29TH, 1909.

MOONEY v. McDONALD.

Husband and Wife—Lease of Husband's Property made by Wife—Action by Wife for Rent—Amendment on Trial by Joining Husband as Plaintiff—Jurisdiction to make Amendment—Practice.

A. J. B. Mellish, for plaintiff.

G. Gaudet, for defendant.

The judgment of the Court was delivered by

FITZGERALD, J.:—This suit was tried before me last Hilary Term. It was brought to recover the rent of a dwelling house and premises under a written agreement to "rent the house" signed by the parties plaintiff and defendant, and for goods sold and delivered.

It appeared from the plaintiff's evidence on the trial, that the property both real and personal belonged solely to her husband, then living.

I refused a nonsuit and allowed the plaintiff to amend (hoping to save expense to the woman plaintiff), and I let the case go to the jury, on the understanding that if the defendant was prejudiced in his defence by such amendment I would postpone the hearing.

A verdict was found for the plaintiff for $56.60, and leave reserved to the defendant to move the Court above for a nonsuit.

The plaintiff elected to amend by adding the name of her husband as plaintiff.

There is no question of the law. The wife cannot sue alone or jointly with her husband for rent due the husband alone, on his own property, in which the wife has no separate interest, or for the price of goods sold, the property of her husband. And though the agreement is signed by the wife as "Mrs. Philip Mooney," there is no estoppel. To be such it must be mutual. If the landlord is not estopped, neither is the tenant: Howe v. Scarrot, 4 H. & N. 723. The plaintiff here is under a disability. She is neither bound nor estopped by the lease.

Counsel for the plaintiff suggested on the argument that the Married Woman's Property Act enabled the wife to sue in her own name. Quite true in relation to her separate property, but certainly not otherwise.

The question of my power to amend was argued, but as the plaintiff cannot succeed in this suit as originally laid, or as amended by her, no decision is necessary. I would say, however, that after a review of the authorities I have come to the conclusion that I had no power to allow the amendment asked.

Blake v. Done, 7 H. & N. 465, is no longer an authority that the Court under sec. 227 of the C. L. Proc. Act can change the name of the parties by amendment. Garrard v. Guiblei, 13 C. B. N. S. 832; Clay v. Oxford L. R. 2 Ex. 54; Boblingbroke v. Kerr, L. R. 1 Ex. 222; Norris v. Beazley, 2 C. P. D. 80, are the later authorities, determining otherwise.

It is now settled that the C. L. P. Act does not authorise the Judge at Nisi Prius to change the names of the parties plaintiff, or defendant, either by substitution, or addition.

The rule will be made absolute with costs and the verdict set aside and a nonsuit entered.

PRINCE EDWARD ISLAND.

SUPREME COURT. JUNE 29TH, 1909.

SINCLAIR AND ANOTHER v. DEACON.

Promissory Note—Payable at Particular Place—Presentation—Bills of Exchange Act, sec. 183—Absent Debtor Act, (P. E. I.), 1873—Non-resident Debtors—Jurisdiction.

McQuarrie, K.C., for plaintiff.
Stewart, K.C., for defendant.

The judgment of the Court was delivered by

FITZGERALD, J.:—The judgment in this suit, obtained against the defendant as an absent or absconding debtor, is sought to be set aside on the following grounds:—

1st. That the affidavit upon which the writ of attachment issued is insufficient.

2nd. That the defendant was not an absent or absconding debtor within the meaning of the Act of 1873, and amending Acts.

The 5th sec. of this Act requires that the party applying for the writ shall make affidavit "in the usual form for holding a party to bail."

The affidavit made in this case discloses the fact that the promissory note sued on was made payable at "Freetown, P. E. Island" (the place where it was drawn), and concludes "and the said note has not been paid;"—without any averment of presentation.

This action is by the holder of the note against the maker.

It is contended that this affidavit discloses no cause of action, as a note payable at a particular place must be presented at the place named, before an action can be maintained on it.

Such a contention cannot be gainsaid unless sec. 183 of the Bills of Exchange Act, R. S. C. c. 119, alters the law in this respect.

It reads as follows:—

1st. Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place.

2nd. In such case the maker is not discharged by the omission to present the note for payment on the day that it matures; but if any suit or action is instituted thereon against him before presentation, the costs thereof shall be in the discretion of the Court.

3rd. If no place of payment is specified in the body of the note, presentment for payment is not necessary in order to make the maker liable.

This section has as yet received no authoritative interpretation, and for the first time is before this Court.

Jones v. England, 5 West. L. R. 83; Warren v. Symon-Kaye, 27 N. S. R. 340, and Merchants' Bank of Canada v.

Henderson, 28 O. R. 360, show a difference of opinion in the provincial Courts.

The first clause of this section, and the first clause of its sub-sec. 2, are but declaratory of the common law, as interpreted in Rhodes v. Gent, 5 B. & Ald. 244, and Anderson v. Cleveland, 13 East, 430, viz., that the presentment at the place named is essential, if a note is made payable at a particular place, but the maker is not discharged by any delay in such presentation short of the period fixed by the Statute of Limitations.

The new matter in this sec. 183 begins: "But if any suit or action is instituted thereon against him before presentation, the costs thereof shall be in the discretion of the Court."

The only question is its correct interpretation.

It recognises suit or action before presentation—a distinct change in the law—and is immediately preceded by words which excuse presentment on the day of payment, but not presentment at the place of payment.

It is suggested that this proviso only refers to non-presentation on the day the note matures. This cannot be, as no question of costs could possibly arise where due presentment was made before action brought. At no time was the holder as against the maker bound to present on the day of maturity; and the statute makes no change in that respect. What is there to suport the idea that the holder might now be punished in costs for non-presentment on the day?

And, it is suggested, that it refers to the defendant's costs, in this way, that when he succeeds, as it is contended he must, if presentation is not made before action, the Court might still deprive him of the costs usually given to a successful suitor. It is difficult to see why, if presentation is necessary before suit brought, the defendant has relied upon his rights, and won his suit through the clear default of the holder to make the necessary presentation.

The better and fuller interpretation of this section appears to me to be, "you must present the note at the particular place it is made payable, not necessarily—as against the maker—on the day of its maturity, nor indeed, before suit; but if presentment is not made before suit, the costs being in the discretion of the Court, the maker will be protected from costs should—for instance—the funds to meet the note have been duly placed by him at the place named.

This view of the section gives it a complete interpretation recognizing that it intended changing the law in one particular only, namely, presentation before suit, but at the same time so protecting the maker that at most he would be required to pay the debt without cost, if there was no default on his part.

If this be the correct interpretation of the statute, the affidavit is sufficient, as presentation not being necessary before suit, that statement that it was made is not essential; the one essential, viz., that the note has not been paid, being sworn to; and no question of costs arises as the defendant does not suggest in the affidavit upon which this rule was granted, that he had the money at the place named in the note to answer it when it fell due and thereafter.

The second ground raises a more difficult question, and again, on the construction of a statute, apparently not drawn with any definite intention.

It resolves itself into one question, does our absent Debtor Act apply to non-resident defendants? I eliminate all questions as to where the contract was entered into, or as to its effect upon persons coming to the province merely for a temporary purpose, and then returning to their residence abroad; as the locality of the debt, and the temporary presence of the defendant in the province, appear to me to be wholly immaterial. The statute covers "any debtor," which means every debt no matter where contracted, the enforcement of which is within the jurisdiction of our Courts; and the temporary presence of the defendant is nowhere suggested in the statute as affecting its application.

The decisions quoted before the Court do not greatly assist in determining this question—our own Court in McKean v. McKenzie, 1 H. & W. 203, having the interpretation of the older statute of 20 Geo. 3rd, cap. 9—which contemplated the "case of non-residents, as well as of resident inhabitants absenting themselves," to quote the language of the judgment of the Court in that case, declined to decide "whether it intended to include persons who have never been here, as well as persons here for only a temporary purpose," basing their judgment solely on an acknowledged abscondency.

And the earlier decision of Cochran v. Duncan, 3 N. S. Rep. 80, though it decided that a debtor might be proceeded against under the Absent Debtor Act of that province, although he might never have been present there, was evi-

dently so decided, because as Haliburton, C.J., says in his judgment, "the language of the Act plainly evinces the intention of the legislature that the operation of the Act should not be confined to those only who had actually been personally present within the province." He referred to those sections in it which provided for service of a copy of the summons and declaration, if the debtor "be an inhabitant or hath for some time been a resident within the province," and to those which dispensed with such service.

In the statute before us, there is absolutely nothing to indicate any such intention as it is at present amended by 37 Vic. cap. 4, sec. 1, which strikes out the latter part of sec. 5 in which these words appear: "where he has been a resident in this island"—contemplating presumably, cases where the defendant has not been such resident.

The form of summons given by the statute now under review, however, apparently contemplates that the absent debtor was a resident here, as it commands the sheriff to summon:—

"Agent, factor or trustees of of the said island, an absent or absconding debtor."

This is a question as to the jurisdiction of the Court. The Act covers every debt, a right to maintain an action for which lies in the courts of this province when the debtor is absent or absconding; but as to the nature of that absence, whether by reason of the debtor's residence abroad, or of his having absented himself from his residence here, it is silent. though when it refers to abscondency it speaks of it "as out of the island."

Forty-eight years ago in construing a similar statute in which some glimmer was visible of an intention to extend its provisions to non-residents as well as those who are "inhabitants or hath for some time had their residence within the island," this Court hesitated to decide that it had jurisdiction over persons who had never been here, or who were only here for a temporary purpose.

We have now to construe an Act in which no reference is made to the residence of the absent debtor, except that given in the form to which I have referred, and which in using the words "of the said island," means, I presume, that the debtor's residence was in this island.

Ordinarily speaking, departure from the country is necessary to constitute a person an absent debtor. It would be

somewhat hazardous, under these circumstances, to pronounce that this Court has now clear and distinct jurisdiction—for no doubt should exist—over absent debtors who are absent only by reason of their residence abroad. When the legislature enacts so, the Courts will give effect to such enactment, but until this is done in clear and unequivocal language no Court should sanction the use of its process to the possible injury and loss of suitors by reason of its want of jurisdiction.

In the case before us the defendant is a resident of Winnipeg, and has been so, as appears by affidavit, for the past ten years, a fact not denied.

The most this Court can say in such a case is that it does not appear by the Absent Debtor Acts now in force in this province that it has jurisdiction where the debtor is absent only by reason of his residence abroad.

The rule will be made absolute and the judgment set aside with costs.

PRINCE EDWARD ISLAND.

SUPREME COURT. JUNE 29TH, 1909.

McEACHERN v. HUGHES.

Senate and House of Commons Act, R. S. C. c. 10, sec. 15—Member of House Selling Goods to the Government of Canada—Action to Recover Penalty under Section 16—Venue—Imperial Act, 31 Eliz., Cap. 5.

Stewart, K.C., and Mathieson, K.C., for plaintiff.

Attorney-General Haszard, K.C., and Johnston, K.C., for defendant.

The judgment of the Court was delivered by

FITZGERALD, J.:—The defendant sued for a violation of sec. 15 of the Senate and House of Commons Act, R. S. C. ch. 10, for that he, whilst he was a member of the House of Commons of Canada, knowingly sold goods, wares and merchandise to the Government of Canada, and was interested in a contract with the Government.

The action was begun in this Court on the 18th day of April, 1908, and the declaration filed in the following month laying the venue in King's county in this province.

The defendant demurred to this declaration; to the first count on the ground that it was not alleged therein that any public money was paid, or to be paid for the goods sold; and to that, and all the other nine similar counts setting out a breach of said section 15, by sale, contract, and service, to or with the Government of Canada, on the ground that this was a local action only and must be tried at Ottawa; and on the further ground that the statute referred to should have been set out particularly in the declaration.

The main contention was on the interpretation of subsec. 2 of sec. 16 of the Act, relating to the penalty imposed on a person for a breach of sec. 15. It reads as follows: "Such sum shall be recoverable from him by any person who sues for the same in any court of competent civil jurisdiction in Canada."

It was urged that the Imperial Statute, 31 Eliz., cap. 5, is in force, and under it this action must be tried in the county of Carleton, Ontario, as the alleged offence was committed at Ottawa and not in this province.

I do not think it necessary to review the host of authorities cited before us as to whether this Act of 31 Eliz. was ever in force here or elsewhere in Canada.

It has undoubtedly been held to have been in force in some parts of the Dominion: Mason v. Mossop, 29 U. C. Q. B. 500; Mewburn v. Street, 21 U. C. Q. B. 498.

I will assume that previous to the passage of this section 16 by the Parliament of Canada it was in force, and proceed to the only real question which is in debate, viz.: Is this legislation by the Parliament of Canada, on a matter in which they have undoubted jurisdiction, a direct dealing with the subject-matter of suits brought by common informers for penalties inflicted by statute, in other words legislation upon the same subject-matter as that contained in 31 Eliz. For if it is, it is not contended that it does not repeal, if in force, the Imperial Statute, by substitution and independent dissimilar enactment.

The Statute of Elizabeth undoubtedly makes the venue local, and any action for the penalty must be tried "where the matter alleged to be the offence was in truth done."

The Dominion Statute makes the penalty recoverable in any Court of competent civil jurisdiction in Canada.

Does not the one necessarily supersede the other. One declaring that the venue shall be local in the existing Courts, the other giving jurisdiction to all Courts of competent jurisdiction, the jurisdiction in the one case depending on the locality of the offence, in the other on the competency of the Court.

Two hundred dollars per day is the forfeitable penalty to be recovered in any Court of competent civil jurisdiction in Canada.

The penalty is for sitting and voting in the House of Commons during disqualification under section 15.

That is the offence, and if 31 Elizabeth is in force, suit for such penalty can only be brought in the Court or Courts in the county of Carleton which has or have jurisdiction to the extent of $200.

What effect do you then give to the word "any" as applied to the whole of Canada? None.

If, on the contrary, action for this penalty is a transitory one, not a local one, the word "any" has just the meaning you would ordinarily ascribe to it in the connection you find it, viz., any Court in Canada having jurisdiction over the person and subject-matter can be used to enforce the statutory penalty.

This is the only construction which appears to me consonant with the language used and the intention of the legislature. I think the Parliament of Canada, selecting the tribunal to which it intended to transfer jurisdiction in the matter of this enactment, meant to deal with the whole question of suit for penalties, and limitations of actions therefor (sec. 22), and the Courts in which such penalties should be recoverable, and if so such a dealing necessarily repeals the Statute of Elizabeth.

That is the whole question, and much writing thereon will not make it greatly plainer.

On the other two minor points the offence appears to be sufficiently stated, and the statute sufficiently referred to.

The demurrers will be overruled with costs and judgment entered for the plaintiff thereon.

NOVA SCOTIA.

COUNTY COURT FOR DISTRICT NO. 7. AUGUST 19TH, 1909.

(IN CHAMBERS.)

REX v. EDITH HIATT.

Liquor License Act—Offence—Social Club — Conviction — Reduction of Penalty by Judge on Appeal.

A. D. Gunn, for appellant.

D. A. Cameron, for respondent.

FINLAYSON, Co.C.J.:—This is an appeal from a conviction in the Stipendiary Magistrates' Court at Sydney, by which the defendant was convicted of keeping liquor for sale without the license required by the Nova Scotia Liquor License Act. The main defence was that the liquor was the property of the Morien Club, Limited, a body corporate, and not that of defendant, and consequently the defendant could not be guilty of the offence of keeping for sale. I do not intend to go into the evidence, as the learned magistrate who tried the case went fully into the matter, and with the conclusions of fact material to the question at issue at which he arrived I am in accord. It is true the Morien Club, Limited, is and was incorporated, but this in itself is not sufficient to protect the corporation or its officers from the provisions of the License Act. In this case the defendant was president, secretary and manager of the club. The liquor found on the premises where the club was supposed to be located was ordered by the defendant. Evidence was given that at least two other persons were members of the club; that the shares were of the par value of $1, and that a person might become a member and enjoy the full privileges of the club on the payment of $1.

I think this club comes well within what Daly on Club Law, page 98, points out as the characteristics of illegal clubs. Thus he says, when it has been proved to the satisfaction of the Court, that anyone might be a member of the so-called club at a moment's notice, by merely paying a nominal sum for a card of membership, or being introduced by a friend and thereupon becoming entitled to pur-

chase liquor, etc., the only conclusion is that the place is kept and used for the unlawful sale of excisable articles and should be suppressed.

No one on reading the evidence of the defendant in this case would hesitate for a moment in concluding that the above fully describes this club. There is no question in my mind but that the conviction is right, and it could be sustained not only on the grounds given, but also under section 3, occupancy. I do, however, believe that the defendant in this case believed that her certificate of incorporation was a license to sell. She was only a very short time operating in the Morien Club, and I think that the ends of justice would have been as well attained by exacting the minimum instead of maximum penalty.

The conviction will be amended in this respect and the penalty reduced from $50 to $20, together with costs in the Court below, and an order will be granted accordingly.

NOVA SCOTIA.

COUNTY COURT FOR DIST. NO. 7. AUGUST 19TH, 1909.

(IN CHAMBERS.)

McDONALD v. PRAUGHT AND MUSGRAVE.

Replevin Action—Bond—Defects in Form and Substance—Affidavit—Practice—Amendment.

G. A. R. Rawlings and A. D. Gunn, in support of motion.

D. H. Hearn, K.C., contra.

FINLAYSON, Co.C.J.:—This is an application to set aside a replevin bond in this action, on the grounds of non-compliance with rule 5 of order 45, there being only one surety in the bond; also that the form of bond is bad. And secondly, to set aside the order for replevin on the grounds that the affidavit required by rule 2 of order 45 has not been filed, or if filed, is not regular. The goods replevied in this action were distrained for rent, and by rule 30, order 45, no affidavit is required, and if one has been filed, may be treated as mere surplusage of this part of the

motion and be refused; the other objection as to the bond must prevail.

The bond is defective, first, on account of the form followed; and secondly, on the authority of Horsfall v. Sutherland, 31 N. S. R. 471, for having only one surety. The bond must be set aside. I cannot, however, see that the effect of setting aside the bond, or of any proceedings taken, can have the effect of setting aside the levy. The bond, I take it, is protection for the sheriff, and if he takes an insufficient or irregular bond, he may be liable in damages. There is no doubt that it is also for the convenience of the defendant as he or they can get an assignment of it, and in case they sued in the action, proceed against the sureties for costs and damages, and their convenience as well, as their rights must be safeguarded. The power of amendment under the Judicature Act is wide enough to have almost any defect, slip, or mere non-compliance with the rules, cured, and this particularly in a summary proceeding like an action of replevin (see Smith v. Baker, 2 H. & M. 498) where, if the Court is satisfied that substantial justice requires any of its own regulations should be waived or any slip remedied, it will interfere for that purpose. Cobbey on Replevin, 2nd ed., 367, says that the Court should always permit the bond to be amended, or a new one substituted for a defective one, and cites a number of cases in support of this proposition. The plaintiff in this case filed a second bond before he was served with notice of this application. I doubt, however, if this is sufficient. I, however, consider the interests of both parties will be best conserved by granting an order setting the bond aside, and allowing the defendants to file a second bond as of the date of the one set aside. This motion will prevail to that extent.

NOVA SCOTIA.

SUPREME COURT. JULY 12TH, 1909.

DEAN v. McLEAN.

Promissory Note—Consideration—Illegality—Buying Shares on Margin—Knowledge of Illegality by Payee—Compromise and Forbearance to Sue.

Action on a promissory note.

R. G. McKay, for plaintiff.

G. A. R. Rawlings, for defendant.

GRAHAM, E.J.:—This is an action on a promissory note, dated April 10th, 1906, payable one year after date, for $812.40. It was a renewal of a former note made in 1904, payable 2 years after date. The original note was given to the defendant as the result of a compromise of a claim which the plaintiff had placed in the hands of his solicitor for collection from the defendant, some $1,300 claimed to have been loaned to the defendant by the plaintiff.

There have been small sums paid from time to time on the note in action, but that fact is not material.

The defence now raised to the action is that the money loaned was lent to the defendant with knowledge that the defendant was about to use it for an illegal purpose. The illegal purpose was an alleged violation of a statutory provision, now section 231 of the Criminal Code. That is aimed at making a contract purporting to buy or sell shares without the bona fide intention of acquiring or delivering the shares, with intent to make gain by the rise or fall of the shares.

The transaction was in respect to 40 shares of the Dominion Coal Company in respect to which the defendant had made a deposit by way of margin, with Ross Cameron & Co., correspondents of Curtis & Sederquist, of New York, of the sum of $200, which the defendant had to his credit in connection with a transaction in Union Pacific shares.

These loans, consisting of three sums, were paid in as follows: August 3rd, 1903, $500; August 7th, $300; August 22nd, $500; and were required by Ross Cameron & Co. as further deposits by way of margin to avoid being closed out.

The plaintiff himself paid in the last sum of $500 to Ross Cameron & Co. But the transaction was afterwards closed as the shares continued to decline.

It is quite clear upon the evidence that the defendant was engaging in an illegal transaction with Ross Cameron & Co., and that no receipt or delivery of the shares was intended. This is constituted a crime under the provision of the Code already mentioned. It was, therefore, an illegal transaction, as distinguished from a void transaction, as a betting transaction would be in England under English

statutes. That distinction has to do with this matter of lending money to be used for the purpose indicated.

The only question is whether the plaintiff at the time knew of the purpose to which the money was to be applied when he made the loans. If he did, he cannot recover; the consideration of the note is an illegal one.

I have come to the conclusion, from the evidence and under the circumstances, that the plaintiff did know of the purpose to which the money was to be applied and that there was no real transaction in shares nor the contemplation of the receipt of shares. The plaintiff, therefore, cannot recover. I refer to the cases of Cannan v. Bryce, 3 B. & Ald., 179; McKinnell v. Robinson, 3 M. & W. 434; Pearson v. Carpenter, 35 S. C. R. 380; B. C. Stock Exchange v. Irving, 8 B. C. R. 186.

It is contended by the plaintiff that this was a past matter, i.e., that the money was already lost and that he was borrowing money to pay it back. I think that was not the transaction. It appears to me it was to be applied in the hope that the price of Dominion shares, then falling, would go up and enable the defendant to win.

Then it is contended that the compromise and the forbearance constitute a consideration for the note.

My conclusion, as already stated, is that the plaintiff knew of the illegal purpose to which the money was to be applied, hence that his loan was illegal and not recoverable in law.

A person knowing that his claim is illegal cannot by compromising or giving time for its payment, supply a valid consideration.

The action will be dismissed, but without costs as the defendant is setting up his own criminal conduct.

NOVA SCOTIA.

COUNTY COURT FOR DIST. NO. 7. JULY 29TH, 1909.

McKENZIE v. CURRY.

Debtor and Creditor—Judgment—Refusal by Commissioner to Commit Debtor—Circumstances showing Debtor's Ability to Pay—Lack of Income—Debt Due for Board.

A. D. Gunn, for plaintiff.

John A. McKinnon, for defendant.

FINLAYSON, Co.C.J.:—This was an appeal from a decision of a commissioner refusing to commit the judgment debtor under sub-section (c) of section 27 of the Collection Act, "where the debtor at the time he contracted the debt had no reasonable expectation of being able to pay the same." (R. S. N. S. c. 182).

The debt is for a board bill extending over a period of forty-nine weeks, from July 31st, 1907.

The debtor boarded at the same house previously to that date and had paid all claims for board up to that time. For forty-nine weeks from that date he paid nothing.

I agree with the contention of Mr. Gunn in support of the appeal that the circumstances of the debtor at the time he contracted the debt is evidence whether or no he had reasonable expectation of being able to pay the same, and I apprehend that in the majority of cases such evidence would be the only kind available in proceedings under this sub-section. The debtor in this case was a bankrupt. He was working with his son without any stated salary or wages. He was in receipt of no income nor had he a source of any income. Had nothing to pay his board except what his son saw fit to give him, and if all these circumstances stood alone the inference might well be drawn that he was within sub-section (c). In this case, however, the debtor boarded at this house before, when his circumstances were the same, and the son advanced him the money for his board; in fact he swears in this case that his son would have given him the money to pay this bill had he asked for it.

If the whole amount of the debt was contracted at one time I would not have much difficulty in committing the debtor, but as there is a continuing and increasing debt from week to week, I would not as a matter of fact say that when he contracted the first week's liability, or for that matter any week, that he had no reasonable expectation to pay. While I fully agree that this is a case which deserves very little sympathy, still the liberty of the subject must be safeguarded and the debtor is entitled to any doubt which I may have as to his being within the statute. For this reason only I must refuse to make the order asked for and dismiss the appeal.

NOVA SCOTIA.

SUPREME COURT. JULY 20TH, 1909.

PRATT v. BALCOM.

Land — Deed — Testamentary Instrument—Conditions and Trusts—Breach by Grantee—Action by Cestui que Trust for Declaration of Trust or Charge.

Action claiming a declaration that lands held by defendant were charged with payment of a sum of money in favour of plaintiff.

J. J. Ritchie, K.C., for plaintiff.

W. E. Roscoe, K.C. and O. S. Miller, for defendant.

LONGLEY, J.:—The facts of this case are as follows: W. D. Balcom, a well-to-do farmer at Paradise, for some reason which in no wise appears, in 1884 made a deed—I will call it that for the purpose of convenience—to two of his sons, Charles and Edgar, of all his real estate and personal property of every kind, which deed was immediately after recorded. He was not an old man nor in poor health and lived more than eighteen years afterwards. This deed had certain limitations and conditions or trusts. The limitation was that he, the grantor, and his wife, should have the management and control of all the property herein conveyed during their lifetime or the life of either of them. The

conditions (or trusts or charges) embraced in the deed are that after the death of both grantors the grantees are to pay the following legacies—these are the words of the instrument—to the other children of W. D. Balcom and wife as follows:—

1. To Jessie Lavinia, $1,000 and organ one year from his decease.
2. To Maria, $1,000 two years after his decease.
3. To Bertha Sophia, $1,000 three years after his decease.
4. To Rupert D., $1,000 four years after his decease.
5. To Annie E., $1,000 five years after his decease.

In 1887, Edgar Balcom, one of the grantees, died, leaving his wife and one son, then a minor, his heirs. Mrs. W. D. Balcom died in 1888 and W. D. himself died in 1902. Charles Balcom, who had been living with his father up to his death, took possession of all the property and has been in the enjoyment of it ever since. He has paid none of the legacies or amounts provided in the trusts to any of the brothers and sisters therein mentioned. On the 31st day of August, 1907, the widow and only son of Edgar Balcom, then being of age, at the request of Charles gave a deed to Charles of all the interest of Edgar in the deed of W. D. Balcom and wife to Charles and Edgar, subject to the carrying out of the conditions, and Charles accepted and recorded this deed before action was brought.

Jessie Lavinia Balcom, who, since the deed of 1884 was given, has married one Pratt, now brings action against Charles Balcom claiming a declaration that the lands conveyed to said Charles Balcom and Edgar, now vested entirely in Charles, are chargeable with the payment to her of the said sum of $1,000 or payment of said $1,000 by Charles Balcom.

The chief defence is that the deed of W. D. Balcom and wife to defendant and brothers was not a deed but a testamentary instrument having no effect until after W. D. Balcom's death, conveying nothing in his lifetime and only operating as a disposition of his property by will. Of course, if I held that, as the document was not attested in accordance with the Act respecting wills, it would be equivalent to declaring the estate intestate.

I have given careful consideration to the point raised by Mr. Roscoe that the instrument in this case is a testamentary instrument and not a deed. There are many authorities bearing on this point, and on the face of them they seem to be slightly conflicting, but carefully read they are not really so, since the distinction between an instrument made inter vivos and purporting to be a deed, and a testamentary instrument, depends so much upon the surrounding circumstances that sometimes Courts have held instruments to be testamentary when given under one set of conditions and to be deeds when given under other circumstances.

If I should attempt to epitomize the decisions on this point it would be that the character of the instrument is to be deduced by the Court from a variety of circumstances; its intrinsic character; the nearness to death when made; the incident of irrevocability; the effect upon execution; the recording; the relation of the parties; whether anything immediately passes, &c., &c. No one of these things is conclusive, but all the circumstances taken together have a determining effect.

In Habergham v. Vincent, 2 Ves. Jr. 230, Buller, J., says: "It was argued for the plaintiff that testator did not intend to make a will when he executed this deed; and therefore it cannot operate as a will. Whether the testator would have called this a deed or a will is one question; whether it shall operate as a deed or a will is a distinct question, and is that now to be considered. That is to be governed by the provisions of the instrument. A deed must take place upon its execution or not at all. It is not necessary for a deed to convey an immediate interest in possession, but it must take place as passing that interest to be conveyed at the execution; but a will is quite the reverse. It can only operate after death."

Another authority is found in Marjoribanks v. Hovenden, Drury R. 29. Lord Chancellor Sugden says: "If I could see upon the face of this instrument a testamentary intention I would take advantage of it to sustain it as an execution of a power notwithstanding its form. . . P. 27:—It has all the characteristics of a deed; it has a seal; it is stamped; it is in the form of a deed; it has the attestation clause which is to be found in all deeds; it does not contain one word having a direct bearing on the supposed intention that it

should operate as a will. . . . Not only is it in form a deed but it is followed by an act which I am entitled to treat as part of the transaction. . . . This shews that immediately after its execution it was taken to the registry office, called a deed, and placed upon the registry as such. . . . Having decided that it is in form a deed, I quite agree that I am not bound to deny it operation as a testamentary instrument."

He did, however, finally determine that it was a deed.

After careful consideration, I feel myself compelled to decide that this instrument is a deed and not testamentary in its character. In the words of the Lord Chancellor: "It has all the characteristics of a deed; it has a seal; it is in the form of a deed; it has the attestation clause which is to be found in all deeds; it has no words having a direct bearing on the supposed intention that it should operate as a will;" it is followed by an act which is inconsistent with the disposition of a will; it is taken to the registry office and recorded as a deed.

Applying other tests, I think that when this deed was delivered and recorded the grantees acquired immediate interests which the grantors were powerless to revoke. There is an English case, I think Thomson v. Brown, 3 M. & K. 32, in which Sir C. Pepys, M.R., held that a deed given by a father requiring the trustees to pay to his mistress and two natural daughters begotten to him by her an annuity after his death, was a deed notwithstanding it contained a power of revocation and was not testamentary nor subject to legacy duty.

This instrument now under consideration was not given in contemplation of death. W. D. Balcom was not an old man and lived nearly twenty years after. The seeking of a deed from the heirs of his brother of all their interest in the property conveyed indicates pretty clearly that Charles Balcom did not regard the instrument as testamentary in its character.

Having decided that the instrument before me is a deed the next question is the application of the remedy.

I see no difficulty in granting a declaration that the land now in Charles Balcom stands charged with plaintiff's

legacy or claim of $1,000. The only difficulty I have is the final disposition of the matter. There are four other claimants of $1,000 each, and although Jessie Lavinia's claim is to be paid first, I am not inclined to think she thereby gets any final advantage in case the whole property is not of sufficient value to pay the charges in full. The claims of all the beneficiaries under the trust have now matured, since W. D. Balcom has been dead nearly seven years. It seems to me in every way convenient that the other beneficiaries should be joined in this action, in order that the rights and interests of all should be considered and regarded.

For the present I will grant a decree making the declaration of charge against the property now held by defendant under deed from his father and mother, and direct that the other beneficiaries be joined as plaintiffs if they agree, and if any or all decline to be joined as plaintiffs those so declining shall be joined as defendants. After which an application can be made to the Court for an order for sale.

The costs, which must be the plaintiff's in any case, may stand over awaiting the final disposition of the case.

NOVA SCOTIA.

SUPREME COURT.

A. MacGillivray, Co.C.J., Master. August 3rd, 1909.

REX v. McGILLIVRAY.

Liberty of Subject—Discharge of Person Imprisoned for Offence against Canada Temperance Act—Warrant of Commitment — Irregularity — Amendment—Judicial Notice of Facts Necessary to Valid Conviction—Effect of Recital in Complaint.

Motion on return of papers pursuant to order in the nature of a habeas corpus under the provisions of the Liberty of the Subject Act, R. S. N. S., c. 181.

D. P. Floyd, in support of motion.

J. A. Fulton, contra.

Counsel for the prisoner, in support of the motion, takes the following grounds:—

1st. That no demand was made of the defendant for goods whereon to levy the penalty for the non-payment of which the prisoner is committed. That the constable executing the warrant of distress did not make diligent search for such goods.

2nd. That the warrant of commitment omits the allegation: "And whereas the said John A. McGillivray has not paid the said several sums or any part thereof, although the time of payment thereof has expired," as required by form "W" in the Canada Temperance Act—form of warrant of commitment for first offence where penalty is imposed.

3rd. That it was not shewn at the trial below that the Canada Temperance Act was in force in the county within which the alleged violation of it was committed, and that in order to do so it must be shown that there was no license in force at the date of the proclamation.

The prisoner is in jail on a warrant of commitment for non-payment of a penalty imposed for violation of the second part of the Canada Temperance Act, in respect of which he had been convicted, and ordered to pay a pecuniary penalty and costs, for non-payment of which a warrant of distress was ordered, and for want of sufficient distress, commitment until the penalty and costs were paid.

The Crown produced the constable who had the distress warrant for execution. He admitted that he did not see the prisoner when he went to execute the warrant, that the defendant was not at home. He said that his barns were locked and he could see no goods whereon to levy. The counsel for the prisoner tendered evidence by a witness who was present in defendant's house while the constable was there. This witness deposed that the constable did not go in the direction of the barn on that occasion; that the barn was not locked; that there were two cows and hay in the barn that day. It was about the end of December last.

The magistrate should satisfy himself that no sufficient distress could be found, and the constable should have done

likewise before the warrant of commitment issued. Not having done so, from the evidence before me, I am of the opinion that this ground taken by the prisoner's counsel is sustained.

The second ground is also properly taken. I do not think that the curative provisions of section 147 Canada Temperance Act empowers me to go beyond amending a defective warrant, defective as to not following the adjudication. The defect in the warrant herein is not of this character. It is an omission in not alleging non-payment "of the said several sums or any part thereof." The defendant may, in the meantime, have paid the fine. A fresh warrant might have been issued on discovering the defect, without application.

"If a warrant of commitment is defective or informal it cannot be recalled, withdrawn or altered. It cannot be amended like the information; but if there is any error in it, a fresh commitment may be lodged with the governor of the prison upon which the defendant may be detained:" Paley on Convictions, 7th ed., p. 271, citing ex parte Smith, 27 L. J. M. C. 186; in re Cross, 26 L. J. M. C. 28.

If the conviction had not been attacked on the ground thirdly taken, I would not quash the conviction, upon which the convicting magistrate could issue a fresh warrant, and lodge the same with the jailer who could hold the prisoner under such warrant. But I have no right on this motion to entertain an application to amend the warrant returned as the warrant under which the prisoner is detained in jail.

The ground thirdly taken by the prisoner's counsel must be sustained and the conviction herein quashed. In Rex v. Lorimer, decided last June (see ante, p. 117) Russell, J., holds that, in order to obtain a conviction under the Canada Temperance Act it must be shewn that the Act is in force; and in order to shew this it must be shewn that there were no licenses in force in the county at the date of the proclamation. The learned Judge follows the decision of Lawrence, J., in R. v. Wallace, lately decided on this point. The convicting magistrate has returned the evidence upon which the prisoner was convicted. It appears that there was no proof before him of the second part of the Canada

Temperance Act being in force in the county. This is also admitted. To meet this objection, counsel for the Crown cites sec. 1128 of the Criminal Code to the effect that no conviction should be set aside for want of proof of a proclamation, an order in council, etc., but that such proclamation, order, etc., shall be judicially noticed. The question here arises, what facts of this class are to be judicially noticed? The broad definition of judicial notice by Sir Frederick Pollock, viz., that the judges could not help knowing what the whole world knew, must, in the case under consideration, and in the application of the provisions of the above cited sections, receive a qualified application. The fact that the Canada Temperance Act was in force in the county at the time, was one of the facts upon which the justice at the trial of the complaint herein rested in deciding upon the matter of the complaint. This fact should have been brought to his attention during the trial in some way. The order by the Governor in Council declaring that Part II. of the Canada Temperance Act is in force in the county should have been brought to his notice, even produced, as such orders are published from year to year with the Statutes of Canada passed at each session of Parliament. . The fact might have been privately known to the trial justice but it is a long established principle of the law of procedure in every judicial tribunal that no judge can give judgment on a fact within his own private knowledge. With greater reason should this fact be brought to the notice of the trial justice, as not only this fact should be noticed, but the concomitant fact, that no licenses for the sale of intoxicating liquors were in force at the time of the proclamation of the Order in Council should be proved. It is admitted by the counsel that no evidence was given on this point at the trial of the accused, and the minutes of evidence returned by the magistrate shew that there was no such evidence. It was, however, contended that in the recital of the complaint of the informant the fact that the Canada Temperance Act is in force in the county was sufficient to enable the trial justice to take judicial notice thereof. This recital, however, might be a misstatement of fact; and the salutary maxim that no judge, by a misstatement of fact, whether by himself or, as in this case, by the informant, can give himself jurisdiction, applies in this case under consideration.

The conviction will be quashed and the prisoner be discharged upon entering into the usual undertaking to exempt the sheriff or keeper of the jail from civil action.

Prisoner discharged.