The
Ontario Weekly Notes

Vol. II. TORONTO, FEBRUARY 22, 1911. No. 22.

COURT OF APPEAL.

FEBRUARY 14TH, 1911.

REX v HOGARTH.

Criminal Law—Conveying Information Relating to Betting upon Horse-races—Criminal Code, sec. 235 (*h*)—"*Wilfully and Knowingly*"—*Local Manager of Telegraph Company—Absence of Evidence to Sustain Conviction—Stated Case—Mistake in Facts—Correction—Criminal Code, sec.* 1017 (3).

Case stated by a Police Magistrate.

The case was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

E. E. A. DuVernet, K.C., for the defendant.

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

MEREDITH, J.A.:—The accused was charged with having wilfully and knowingly sent and transmitted messages, by telegraph, conveying information relating to book-making, betting, and wagering upon a horse-race;* the charge, thus baldly stated, was attempted to be proved in regard to a telegraphic message sent to a Detroit newspaper, over the lines of the Great North-Western Telegraph Company; but the only attempt, in evidence, to connect the accused with that message was proof that he was local manager of the company.

It ought hardly to be needful to say that such evidence was entirely insufficient to prove the charge, which is a criminal one, subjecting the offender to severe punishment: see Rex v. Hayes, 5 O.L.R. 198.

*The charge was laid under sec. 235 (*h*) of the Criminal Code: see 9 & 10 Edw. VII. ch. 10, sec. 3 (D.)

There was no sort of evidence of any authority in any operator to send such a message.

One only of the two operators employed at the place from which the message was sent, was called as a witness; and he testified that he had sent no message except to the Toronto newspapers. He does not seem to have been asked as to his duties, or anything as to the accused or his connection with this office, or knowledge of that which was done there, if any.

The original proceedings, throughout the prosecution, have been sent up with the case stated; and the facts which I have set out are taken from them: the facts are incorrectly set out in the stated case. It should be corrected: Criminal Code, R.S.C. 1906 ch. 146, sec. 1017, sub-sec. 3.

The facts ought to be accurately stated in every case, and the questions submitted should be such only as have actually arisen in the prosecution, and are necessary for its proper determination: there is no power to state merely hypothetical, abstract, or unnecessary questions.

I would direct the discharge of the accused.

MAGEE, J.A.:—The Police Magistrate has submitted four questions.

With reference to the first one, as there are no particulars given either in the statement of the case or in the copy of evidence as to the nature of the "reports of the races" which it is said the defendant gave instructions should be received for transmission to the newspapers, or as to the "reports" "sent accordingly," it would be impossible for the Police Magistrate or this Court to say whether or not they constituted any infraction of sec. 235; and he was right, upon the evidence in this particular case, in not convicting the defendant in respect of information the nature of which was not proved.

As to the second question, the Police Magistrate states "that the instructions given by the defendant to the telegraph operators on the race-course was to receive reports of the races from the reporters of newspapers for transmission to various newspapers, and that reports were sent accordingly to certain newspapers in the city of Toronto."

I do not find any evidence as to any instructions by the defendant. Possibly there was some admission to that effect, but, if so, it should have been noted. The Police Magistrate further states that "there was one telegram received from the Detroit News . . . . and the reply thereto, upon which solely I convicted the defendant."

The only race-course telegraph operator called denied having sent any message to any except Toronto papers. There is no evidence as to the person receiving or replying to the telegram or the place or office from which the reply was sent, and consequently no evidence whatever that the defendant knew anything about or authorised the transmission of the reply. The amended section 235 of the Criminal Code (clause *h*) only makes the transmission of information criminal if done "wilfully and knowingly." In answer to this second question, I would say that the Police Magistrate was not right in holding that the telegram sent to the Detroit newspaper constituted an offence by the defendant, there being no evidence that he knew of or authorised its transmission.

The third question, applying as it does to all the offences mentioned in sec. 235, is too wide; but, even limiting it to the offence charged, it is difficult to understand its bearing, as no question of intention was raised. However, in view of the answer which I think should be given to the first two questions, both the third and fourth become merely abstract ones, and do not require to be answered.

The defendant should, in my opinion, be discharged.

Moss, C.J.O., Garrow and Maclaren, JJ.A., agreed.

February 14th, 1911.

REX v. LUTTRELL.

Criminal Law—Selling Newspapers Containing Racing Information—Intent to Assist in Betting—Crimlnal Code, sec. 235(f) — Conviction — Evidence — Stated Case — Police Magistrate—Pro Forma Finding.

Case stated by a Police Magistrate.

The defendant was convicted on the 4th November, 1910, for selling newspapers containing information that could be made use of by book-makers and others in making bets at the races held in Toronto.

The conviction was under sec. 235 (*f*) of the Criminal Code, as amended by 9 & 10 Edw. VII. ch. 10, sec. 3.

The question stated was, whether the sale of papers containing records of the races two days after they were run, was with the intent to assist in betting, and whether the onus was on the Crown to prove that intent.

The case was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

T. C. Robinette, K.C., for the defendant.

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

MEREDITH, J.A.:—The learned Police Magistrate seems to have been under a misapprehension of the nature of the offence with which the accused was intended to be charged: Criminal Code, sec. 235(*f*), as enacted by 9 & 10 Edw. VII. ch. 10, sec. 3. His statement is, that the charge against the accused was that of "having sold newspapers containing information that could be made use of by book-makers and others in making bets:" but there is, obviously, no criminal offence comprised in that statement; it would be extraordinary if there were. Under the Act, the offence, as applicable to such a case as this, is, selling "information intended to assist in, or intended for use in connection with, book-making," etc.

There was no evidence of any such intention on the part of the accused, in selling the papers in question; he was merely a newsboy, selling the newspapers in question, among many others, at a "news-stand." The purchaser had no intention of using them in any such manner, but bought solely for the purpose of laying an information against the boy. There was no evidence of any such intention, on the part of the printer or publisher of any of the papers. All that was contained in the papers was news such as is commonly published in all newspapers; matters of public interest. Even the betting upon the races was not mentioned. To say that because, in some indirect way, some use might be made, or attempted to be made, of the news, for the purpose of betting, it ought to be found that that was the purpose of the publication or sale, is obviously absurd. If all things out of which evil can be evolved were prohibited, there would be little left; education would be prohibited, because it might be made use of for an evil purpose.

The gist of the offence is the intention: and the intention "to assist" or "for use" must be that of the accused; if the printer or publisher had such an intention, he is not absolved because the boy who sold had not; nor is the seller absolved by the publisher's innocence, if he himself has the criminal intention in selling; each is answerable for his own sin of intention only.

If the detective had asked the boy for papers to assist him, or for use, in book-making or betting, etc., and the boy had then sold the papers, a case would have been made; but, as the case

now stands, the boy may have been absolutely innocent of an offending; and there is no reasonable evidence that he was not.

When the evidence is quite as consistent with innocence as with guilt, there can be no proper conviction.

There was no reasonable evidence of the criminal intention, which the enactment is aimed against, in either publisher or seller; the conviction was wrong; the accused should be discharged.

In another respect the learned Police Magistate erred; it is not within his power to make a pro forma finding, with a view to stating a case; he must perform his duty, just as a jury must, by a real finding upon all questions necessary for the proper determination of the case.

MAGEE, J.A., agreed, for reasons stated in writing.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., also agreed.

FEBRUARY 14TH, 1911.

GOWGANDA MINES LIMITED v. SMITH.

Company—Shares—Subscription—Allotment — Special Agreement—Misrepresentations—Prospectus—Absence of Fraud —Organisation of Company—Constitution of Board of Directors—Regularity of Proceedings.

Appeal by the defendant from the judgment of TEETZEL, J., 1 O.W.N. 1071, in favour of the plaintiffs, for the recovery of $3,250, the balance of the price of 25,000 shares of stock in the plaintiff company subscribed for by the defendant, at 15 cents per share.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

I. F. Hellmuth, K.C., and Z. Gallagher, for the defendant.

W. R. Smyth, K.C., for the plaintiffs.

MOSS, C.J.O. (after stating the facts):—The defendant does not allege that fraud was practised upon him, and at the trial his counsel disclaimed any intention to charge fraud in procuring the subscriptions. But he set up that the subscriptions were induced or obtained by verbal representations prior to his

having received a prospectus. This question of fact was found, and properly found, against him, upon the evidence.

The defendant was not solicited to become a subscriber, but himself invited the communications as the result of which he was accepted as a subscriber for and holder of the 25,000 shares. His interest had apparently been aroused in the first instance by a friend. He was anxious to be admitted as a subscriber and shareholder, as was shewn by his prompt and ready payment of the first call of $500 upon the 10,000 shares for which he first subscribed. Then, as he deposes, he heard again from his friend, and became desirous, because, as he says, "it looked good" to him, of obtaining more shares. He fully understood the situation with regard to the subscription list, and that the further subscription was only open to him because of former subscribers or a former subscriber having withdrawn. He was willing to subscribe on these terms; the plaintiffs were willing to sanction the necessary formalities and to allot the shares to the defendant; and all this was done on the 4th December. Virtually with the consent of all concerned, the defendant was assigned to the position and rights of the former subscribers, together with all the attached benefits and burdens.

The defendant has failed to establish any substantial defect in the constitution of the plaintiffs' board of directors, or any want of regularity in the proceedings having the effect of rendering them inoperative.

The testimony of Robert Greig makes it plain enough that the meeting recorded in the minutes as the meeting of the Underwriting Syndicate held on the 23rd November, 1908, was in reality the organisation meeting of the shareholders to whom shares had been allotted, and it is a proper inference from his testimony that notice thereof was duly given to them. That meeting chose and elected a board of directors. The subsequent proceedings of the provisional board were taken apparently in order to give effect to the will of the shareholders, and whether or not they were strictly regular as a matter of procedure was of no consequence. The final result was that on the 23rd November the board consisted of the seven persons duly chosen and elected by the shareholders. At the meeting of the 4th December, four of these, constituting a quorum, were present and qualified to transact business. So far as the defendant's rights are concerned, what was done at that meeting appears to have been properly done, and it has never been called in question except by the defendant in this collateral proceeding.

But, assuming that it is open to the defendant to inquire into

the regularity of the proceedings, nothing that appears furnishes any sufficient support to the objections put forward.

The appeal should be dismissed with costs.

GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., concurred; MEREDITH, J.A., giving reasons in writing.

---

*GORDON v. ROYAL COLLEGE OF DENTAL SURGEONS.

Dentistry—College of Dental Surgeons—R.S.O. 1897 *ch.* 178, *secs.* 15, 17, 21, 26—*Power to Make By-laws Regulating Conduct of Licensed Dentists—Application of By-laws Passed after Issue of Licenses—Prohibition of Employment of Licensed Dentists as Servants of Unlicensed Person—Penalty—Suspension or Cancellation—Implied Power to Impose—Reasonableness.*

Appeal by the plaintiffs from the judgment of MEREDITH, C.J.C.P., at the trial, dismissing the action, which was brought to obtain a declaration that certain by-laws passed by the defendants were ultra vires, and to restrain the defendants from proceeding against the plaintiffs under the provisions of the by-laws.

The plaintiffs were in 1905 licensed by the defendants to practice dentistry. They afterwards entered into an agreement with one James E. Henry, who was not a licensed dentist, whereby they became the employees of Mr. Henry, at stipulated wages, in carrying on the business or profession of dentists at Mr. Henry's premises, called "The Toronto Dental Parlours." Mr. Henry supplied everything required for the purposes of the business, which was his, he taking all the profits and bearing the losses, if any.

The by-laws in question were passed for the purpose of preventing dentists licensed by the defendants from entering into such employments.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

E. F. B. Johnston, K.C., and R. McKay, K.C., for the plaintiffs.

I. F. Hellmuth, K.C., and N. W. Rowell, K.C., for the defendants.

*To be reported in the Ontario Law Reports.

GARROW, J.A.:— . . . It is not, and indeed cannot be, disputed that the plaintiffs' conduct is directly contrary to the provisions of the by-laws in question, which, in the clearest terms, prohibit a licensed dentist from entering into such employments, and prescribe by way of punishment that the licenses to practise may be suspended or cancelled.

The question, therefore, is as to the power of the defendants to pass such by-laws. . . .

[Reference to the defendants' Act of incorporation, 31 Vict. ch. 37, now R.S.O. 1897 ch. 178, secs. 15, 17, 21, 26.]

Under the provisions contained in sec. 17, the board of directors duly passed the by-laws in question, which were afterwards duly published, as the Act requires, and were not cancelled or annulled by the Lieutenant-Governor in council.

The power under that section to pass by-laws of some kind for the "proper and better guidance, government, discipline and regulation of the profession of dentistry and the carrying out of this Act," cannot, of course, be questioned. "Profession of dentistry" means, I assume, those whom the defendants, under the Act, may license to practise that profession. The words in their connection can mean nothing else. And they, therefore, include the plaintiffs, who are licensees. And it is apparently of no moment that the by-laws in question were passed after the plaintiffs were licensed, for the power is "from time to time" to pass such by-laws, etc.

There are two branches to the question to be determined: the first as to the power to pass by-laws prohibiting; and the second as to the power to punish by a suspension or cancellation of the license.

As to the first, it seems to me there is no difficulty at all in supporting the judgment. We are not the judges of the plaintiffs' conduct. All we are required to say is: (1) is the by-law which prohibits such conduct . . . within the powers conferred by the statute; and (2) is it in its terms a reasonable by-law? And to both questions I would, without any hesitation, answer in the affirmative.

As to the other branch, there is room for more doubt, or at least for more argument, because the statute does not expressly confer power to impose penalties or other punishments for breaches of the by-laws which it authorises to be passed.

But the principle seems to be well established that a statutory power to pass by-laws carries with it the implied power to impose reasonable penalties for their infraction; otherwise the by-laws would be largely nugatory: see Hall v. Nixon, L.R. 10

Q.B. 152; . . . Maxwell on Statutes, 4th ed., p. 534; The Queen v. Sankey, 3 Q.B.D. 379; Ex p. Martin, 4 Q.B.D. 212.

Then the next question seems to be: Is the penalty of suspension or cancellation of license a reasonable punishment for offences such as those which the plaintiffs admit? . . .

If the by-law is within the power which the statute confers, and is in its terms otherwise reasonable, the power implied to punish must . . . be effective to accomplish the purpose which the statute had in view.

This statute prohibits unlicensed persons from practising. The plaintiffs are aiding and abetting Mr. Henry in carrying on a practice in defiance of the spirit, if not of the letter, of sec. 26. Their conduct is wilful and defiant, and cannot, unless stopped, but be most demoralising to the profession in general. The imposition of a mere pecuniary penalty would, in the circumstances, be wholly insufficient. That, it is clear, can only be effectually done, in my opinion, in the way which the defendants' by-law now under attack directs, namely, by suspending, or, if need be, cancelling, the plaintiffs' licenses. . . . It is, in my opinion, a very reasonable and indeed necessary punishment for the offences at which it is aimed; and it is also within the powers which ought, in the circumstances, to be implied as having been conferred upon the defendants by the statute.

We were referred to a number of other statutes, such as the Land Surveyors Act, the Solicitors Act, the Medical Act, etc., in which express powers to suspend or expel are contained. . . . The danger of using clauses contained in one of such Acts to limit or control clauses in another, is obvious, and has been before pointed out by eminent Judges. See per Jessel, M.R., in Taylor v. Oldham, 4 Ch. D. at p. 410, and per Lord Cairns in East London R.W. Co. v. Whitechurch, L.R. 7 H.L. at p. 89.

In my opinion, the appeals fails, and should be dismissed with costs.

MOSS, C.J.O., MACLAREN and MAGEE, JJ.A., concurred.

MEREDITH, J.A., dissented, for reasons stated in writing.

FEBRUARY 14TH, 1911.

*RE BREAD SALES ACT.

Weights and Measures—Bread Sales Act, 1910, *sec.* 3, *sub-sec.* 2 *—Construction—Sale of "Small-bread"—Case Stated by Lieutenant-Governor in Council—Constitutional Questions Act*, 1909.

Under sec. 2 of the Constitutional Questions Act, 9 Edw. VII. ch. 52, the Lieutenant-Governor in council referred to the Court of Appeal for hearing and consideration the following question: "Under sub-sec. 2 of sec. 3 of the Bread Sales Act, 10 Edw. VII. ch. 95, is 'small-bread' required to be sold in separate loaves, or can a number of loaves of small bread, so called, be joined together and so sold without being detached by the vendor, when the same exceeds in the aggregate twelve ounces in weight."

Section 3.—(1) Except as provided in sub-section 2, no person shall make bread for sale or sell or offer for sale bread except in loaves weighing twenty-four ounces or forty-eight ounces avoirdupois.

(2) Small-bread may be made for sale, offered for sale and sold in any weight not exceeding twelve ounces avoirdupois.

Argument was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

J. R. Cartwright, K.C., and W. F. Nickle, K.C., for the Attorney-General.

E. E. A. DuVernet, K.C., and J. C. Judd, K.C., for the Bakers' Association.

MOSS, C.J.O.:—The right under the statute to refer the matter is scarcely open to question; but the expediency and utility of submitting questions of the nature of the present one has been strongly questioned by eminent Judges in this country and in England.

For the purpose of illustration, it is sufficient to quote the observations of Osler, J.A., in In re Ontario Medical Act, 13 O.L.R. at p. 502: "The difficulty in the way of answering satisfactorily questions submitted under the Act for 'expediting the decision of constitutional and other provincial questions' has frequently been commented on by the Courts which have been invited—or ordered—to solve them. Generally, they are ab-

*To be reported in the Ontario Law Reports.

stract questions, the answers to which must almost necessarily be of an academic or advisory character, and practically not binding upon the Court in a real litigation. I may refer to what I have said on this subject in Re Lord's Day Act of Ontario, 1 O.W.R. 312, and other like cases, and to the observations of Lord Halsbury in delivering the opinion of the Judicial Committee in the same case, [1903] A.C. 524, and to The Certificate of the Judges respecting a Court-martial (1760), 2 Eden 371 (Appx.)."

It seems almost unnecessary to repeat what has been said by others, that the answer to the question determines nothing, and binds no one, not even ourselves.

As I read the question, an answer is only called for as to the effect of the legislation with regard to the sale of small-bread, and not at all as to the manner of baking, and, so understanding it, I answer that, as I read the enactment, where a number of loaves of small-bread, so-called, joined together, exceed in the aggregate twelve ounces in weight, they are not to be so sold.

GARROW, J.A.:— . . . In my opinion, the plain meaning of sub-sec. 2, properly considered in its relation to sub-sec. 1, is that no small-bread, if made into loaves and so sold or offered for sale, no matter how much less the individual or detachable portions may weigh, shall exceed in weight twelve ounces. And the palpable object is to keep the loaf of small-bread so small that no purchaser need be deceived by having it put off on him for a full loaf of twenty-four or forty-eight ounces. . . .

MACLAREN, J.A.:— . . . I am of the opinion that sub-sec. 2 of sec. 3 . . . only permits the sale of "small-bread," so-called, when the loaf does not, or the loaves thereof joined together do not, in the aggregate, exceed twelve ounces in weight.

MEREDITH, J.A.:— . . . The question is one of fact: if there are really different rolls or loaves, or "small-bread"—an undefined expression—they are none the less rolls, loaves, or "small-bread" because they have run together in the baking, or are attached in the way loaves commonly have been ever since loaves were made, without any one dreaming that they were anything but several loaves, there is no infringement of the provisions of the enactment; but, if in truth and in fact, they are not so attached, but the bread is all in one piece, and it is not of one of the specified weights, there is such an infringement:

and is none the less so for any colourable marks or other pretences of actual division, and whether so sold or offered for sale or even if so made for sale without any offering for sale or sale.

I desire to add an expression of my entire concurrence with Judge Morson in the views of the subject which he expressed in the case, under the Act, recently decided by him—Rex v. Nasmith Co. Limited, ante 116—views which I cannot help thinking, and saying, ought to commend themselves to all reasonable men, from whom only, and not from those too much possessed by the subject, legislation should emanate.

MAGEE, J.A.:— . . . "Small-bread" is not required to be sold in separate loaves when, if joined together, the aggregate weight does not exceed twelve ounces, and a number of loaves of "small-bread" may be joined together and so sold without being detached, where the same do not exceed in the aggregate twelve ounces in weight; but not if they do exceed in the aggregate that weight.

HIGH COURT OF JUSTICE.

TEETZEL, J., IN CHAMBERS. FEBRUARY 9TH, 1911.

RE MONARCH BANK.

Appeal—Leave to Appeal to Court of Appeal from Order of Judge in Winding-up Matter—Jurisdiction—Time—Dominion Winding-up Act, sec. 101, 104—*Con. Rule* 352 (*e*).

Motion by three of the provisional directors, T. H. Graham, D. W. Livingstone, and T. M. Ostrom, for leave to appeal from the order of TEETZEL, J., ante 436, dismissing their appeal from the finding of an Official Referee, in a reference for the winding-up of the company under the Dominion Winding-up Act, that they were liable for breach of trust or misfeasance under sec. 123 of the Winding-up Act.

The order of TEETZEL, J., was pronounced on the 23rd December, 1910, when reasons for the order were given, but the order was not drawn up and entered until the 23rd January, 1911. Notice of appeal was given on that day; and the motion for leave was made within fourteen days from that date, and adjourned till the 9th February, 1911.

By sec. 101 of the Winding-up Act, R.S.C. 1906 ch. 144, there may (in certain cases) be an appeal "by leave of a Judge of the Court."

By sec. 104, all appeals shall be regulated, as far as possible, according to the practice in other cases of the Court appealed to, but no appeal shall be entertained unless the appellant has, within fourteen days from the rendering of the order, or within such further time as the Court or Judge appealed from allows, taken proceedings therein to perfect his appeal, etc.

By Con. Rule 352, the Christmas vacation is not to be reckoned in the time for (*e*) doing an act or taking a proceeding in appealing to the Court of Appeal.

A. B. Morine, K.C., for the applicants.

C. A. Masten, K.C., for the liquidator.

Upon the argument of the motion the following questions, among others, were raised: (1) whether the fourteen days mentioned in sec. 104 ran from the pronouncing or the entry of the order; (2) whether Con. Rule 352 (*e*) applied to an appeal under the Winding-up Act; and (3) whether, if the fourteen days were considered to have expired, the application could be entertained.

The following, among other, cases were referred to: Re Central Bank of Canada, 17 P.R. 370; The Queen v. Woodburn, 29 S.C.R. 112; Robertson v. Wigle, 15 S.C.R. 214.

TEETZEL, J., held that he had jurisdiction to entertain the application, notwithstanding that it had not been made or notice given within fourteen days from the date of the pronouncing of the order, assuming that the time ran from that date; and he, therefore, did not find it necessary to consider the other two questions raised. He granted leave to appeal, with a stay.

SUTHERLAND, J., IN CHAMBERS. FEBRUARY 8TH, 1911.

BOYD, C., IN CHAMBERS. FEBRUARY 10TH, 1911.

*RE BELDING LUMBER CO. LIMITED.

Company—Winding-up—Petition for—Irregularity—Affidavits not Filed before Service—Con. Rule 524—Application to Proceeding under Dominion Winding-up Act—Secs. 5, 13, 135—Winding-up Order Made upon Subsequent Regular Petition—Contest between Solicitors for Carriage of Order—Practice—Discretion—Application for Leave to Appeal.

*To be reported in the Ontario Law Reports.

Two petitions were filed for orders to wind up the company: the first by W. J. Mitchell and George C. Ryerson, creditors, dated the 6th January, 1911; the second, by the Elgie and Jarvis Lumber Co. Limited, also creditors, dated the 24th January, 1911. The first petition was presented on the 24th January, 1911, but was then enlarged, and later further enlarged from time to time.

Finally both petitions came on for hearing together before SUTHERLAND, J.

W. R. Smyth, K.C., for the petitioners Mitchell and Ryerson.

W. J. McWhinney, K.C., for the petitioners the Elgie and Jarvis Lumber Co., objected to the granting of an order under the first petition, upon the ground, among others, that the affidavit in support of that petition was not filed before the service of that petition, as required by Con. Rule 524.

M. P. Vandervoort, for the company.

SUTHERLAND, J., said that he was inclined to think that sec. 135 of the Winding-up Act was wide enough to make Con. Rule 524 applicable: Re Victor Varnish Co., decided by Falconbridge, C.J.K.B., in October, 1907, not reported; and, if this were so, the objection was well taken and must prevail.

As the proceedings upon the second petition appeared to be regular, and no objections to it were pointed out upon the argument, an order for winding-up should be made as asked by the prayer of that petition.

The petitioners Mitchell and Ryerson moved before BOYD, C., for leave to appeal from the decision of SUTHERLAND, J.

The same counsel appeared.

BOYD, C.:—By the Winding-up Act, R.S.C. 1906 ch. 144, sec. 5, "the winding-up . . . shall be deemed to commence at the time of the service of the notice of presentation of the petition for winding-up." The application is to be made by petition . . . and . . . four days' notice shall be given to the company: sec. 13. The general rules of practice are incorporated by reference in sec. 135 into the procedure under the Act. By Con. Rule 524, affidavits upon which a petition is founded shall be filed before the service of the petition. As a general rule the directions of a statute such as this cannot be waived, and the requirements of the Act were not observed by service of the petition on one day and filing the affidavits on the next subsequent day. Had an execution against the company been lodged with the Sheriff before the day the affidavits were

filed, it would have priority over the winding-up proceedings: Re Ideal Furnishing Co., 17 Man. L.R. 576, 578. . . .

It is sought to appeal from the order, and that cannot be done unless leave of a Judge is obtained under sec. 101. Section 104 would seem to indicate that leave should be obtained from the Judge making the order objected to . . .; but, assuming that the matter is properly in my hands, it does not appear to me to be a proper case for appellate interference, having regard to the limitations imposed by the statute (Winding-up Act, sec. 101). . . .

The contest here is simply as to what creditors shall issue the order, or, . . . as put by my brother Riddell in Re Farmers Bank of Canada, ante 624, what solicitor shall secure the casual advantages resulting from the carriage of the order. The contest is substantially between solicitors, not as to any matter affecting the creditors interested, or the assets of the company. The matters in regard to which an appeal is contemplated are as to substantial matters of property or rights arising in the winding-up proceedings. . . .

The Act does not contemplate that such an initiatory contest should be tied up by appeal in order to settle a point of discretionary practice. The manner of liquidation is in no way affected by this order. The learned Judge appears to have followed what is said to have been held by Falconbridge, C.J., in Re Varnish Co., that there was no power to waive compliance with the Rule in the non-filing of affidavits: see Parker and Clark's Company Law, p. 364; but I do not now consider whether that is an absolute rule or not, as it is not necessary, in the view I take of this application. See Re Grundy Stove Co., 7 O.L.R. 252.

I refuse leave to appeal, but it is not a case for costs.

BRITTON, J. FEBRUARY 10TH, 1911.

McKAY v. WAYLAND.

Vendor and Purchaser — Contract for Sale of Land —Option or Offer—Time-limit for Acceptance—Repudiation by Vendor before Expiry of Time for Acceptance—Agent of Purchaser—Name of, Used in Written Offer—Knowledge of Vendor—Assignment by Agent to Principal—Action by Principal—Estoppel—Absence of Valuable Consideration for Offer—Failure to Tender Purchase-money and Conveyance for Execution.

An action by the plaintiff, as purchaser, to compel specific performance of an alleged contract by the defendant, as vendor, to sell and convey to the plaintiff certain land owned by the defendant in what was called the "Wayland Addition" to the city of Fort William.

In February, 1910, G. W. Head, who acted as agent for the sale of the property, went to Hamilton, where the plaintiff lived, taking with him a plan of the property, and had an interview with the plaintiff. As a result, the plaintiff instructed one Metcalfe to go to Port Arthur and secure, if possible, an option on the property. Metcalfe and Head went to Fort William, and Metcalfe, on the 1st March, 1910, obtained from the defendant an agreement or option, in these words: "In consideration of the sum of one dollar herein acknowledged, I agree to give an option to H. D. Metcalfe for the period of thirty days from this date, March 1st, 1910, on the property known as lots E and F, Wayland Addition, shewn on blue print of the estate, giving river frontage of 1,018 feet, more or less, for the sum of sixty-five dollars ($65) per foot; terms cash. This option is given with the understanding that the property will be used for industrial purposes only—the said H. D. Metcalfe agreeing to have this memo. inserted in the deed, with a time-limit for building to commence, providing the sale is made. E. P. Wayland."

On the 2nd March, the plaintiff, styling himself as acting for H. D. Metcalfe, in Montreal, offered to sell this property to one James Playfair for $100 a foot.

On the 15th March Metcalfe formally assigned the option to the plaintiff.

On the 22nd March, the defendant sold the property to another person. It was said that the defendant thought that the plaintiff's option expired on the 21st March; and, in response to telegrams from the plaintiff and Metcalfe, the defendant wired that his copy of the option read "21st."

On the 30th March, the plaintiff notified the defendant of his (the plaintiff's) acceptance of the defendant's offer; Metcalfe also accepted for the plaintiff; and the plaintiff's solicitors wrote to the defendant confirming the plaintiff's acceptance, and the plaintiff was prepared to complete the purchase.

This action was begun on the 1st April, 1910.

H. S. Osler, K.C., for the plaintiff.
F. R. Morris, for the defendant.

BRITTON, J. (after setting out the facts):—Two of the many objections to the plaintiff's right to succeed are formidable: (1) that the option was given to Metcalfe, and is not assignable, and the assignment to the plaintiff by Metcalfe of the 15th March does not give the plaintiff any right of action; and (2) that there was in fact no consideration—that the option is nudum pactum.

If this option was taken to Metcalfe for himself, for his own benefit, the offer, which in itself is not a contract, would not be assignable. . . . See Meynell v. Surtees, 3 Sm. & G. 101; Vanderlip v. Peterson, 16 Man. L.R. 341.

The plaintiff, however, says he does not rely upon the assignment. He claims as principal, and says that Metcalfe was acting only as his agent in securing this option.

The evidence is clear that Metcalfe was acting only as agent for the plaintiff, and warrants the inference that the defendant knew that the plaintiff was the principal for whom Metcalfe was acting in this transaction. That entitled the plaintiff to maintain this action in his own name.

At the trial before me, Metcalfe was present, and he gave his consent in writing to be added, if necessary, as a party plaintiff. I would allow this to be done; but, whether added or not, the matter may be dealt with as if the plaintiff was acting himself in obtaining the option. The plaintiff did profess to be acting under the agreement, and did, in the name of Metcalfe, offer to sell to Playfair, and also did, as Metcalfe's assignee, accept the defendant's offer; but, as the plaintiff was, in fact, principal, he should not be estopped, and is not estopped, from asserting his true position as principal.

If the plaintiff were merely asserting his claim as assignee of Metcalfe, he could not recover; and if, as the fact is, Metcalfe were, in his own name, to attempt to seek redress, he could not, in face of the fact that he was only agent, recover from the defendant; so that, no matter how formal or binding the option, the defendant would escape liability. He would not be liable to Metcalfe, as Metcalfe was merely an agent, and he would not be liable to the plaintiff by reason of the plaintiff's accepting from Metcalfe what Metcalfe did not own. See Smith v. Hughes, 5 O.L.R. 238.

As to the 2nd objection. The consideration named is one dollar "herein acknowledged." I take that to mean, "the receipt whereof is hereby acknowledged"—that being the usual form. One dollar is usually called a nominal consideration. The dollar was not actually paid by either the plaintiff or Metcalfe,

or by any person having authority to do so for either the plaintiff or Metcalfe. . . .

I am forced to the conclusion that there was not, in law or in fact, any consideration for the option sued upon. It was voluntary and not under seal. If there had been any valuable consideration, the adequacy of it would not be for me; but there was none.

The further objection was made that the plaintiff did not pay or tender the amount of his purchase-money, and that he did not tender a conveyance for execution.

This objection cannot prevail in the case. There was, before the expiration of the option, complete repudiation by the defendant. The defendant declined to furnish an abstract of title, and declared, as no doubt was the case, that he had sold the property on the 22nd March. The plaintiff had the money, and was ready and willing to complete. He asked the defendant for an abstract, referred the defendant to his (the plaintiff's) solicitor, and it was clear that there would have been no difficulty about completion of the sale and purchase if the defendant had not, in violation of his promise, disposed of the property before the expiration of the thirty days.

This is not a case where the would-be purchaser was to do some specific act or acts before he could be allowed to buy. Such a case was Bell v. Canada Co., 24 Gr. 281. Here the purchaser must first be allowed to buy; then, as part of the bargain, he must pay—the paying by the purchaser and the conveying by the vendor being practically contemporaneous transactions.

I find that the description of the land was quite sufficient. It was well identified.

My dismissal of the action is solely upon the ground of want of consideration—an objection one would hardly expect from the defendant, who is well versed in business and familiar with land contracts, especially in regard to an option prepared by himself.

The action will be dismissed without costs.

Since the above was written . . . I saw the report of Canadian Pacific R.W. Co. v. Rosin, ante 610, decided by Mr. Justice Clute. That case is, in one aspect, very like the present; but, as in each case there is a dismissal of the action, I do not delay longer to consider the points wherein there seems to be a difference of opinion between my brother Clute and myself. Upon these points of apparent difference, the cases are to some extent distinguishable, upon the facts.

MIDDLETON, J. FEBRUARY 11TH, 1911.

RE MULGREW.

Will — Construction — Devise — Life Estate — Remainder—Residuary Clause—Costs.

Motion by the executors of the will of Hannah Mulgrew from an order declaring the proper construction of the will.

H. E. Stone, for the executors.

MIDDLETON, J.:—The testatrix seems to have thought that her will had some operation during her life. She gives the lands in question to her husband for life, but, in the event of her surviving her husband, the lands are to go to her son.

The only gift of the remainder expectant upon the husband's life estate is in the residuary clause, by which everything not disposed of is given to the husband "if he shall at the time of my death survive me."

The husband survived the testatrix several years, and took by the combined effect of these clauses the fee in the lands.

The son has been notified of this motion, but does not appear, and, as the husband alone is concerned, and he is an executor, no order need be made as to costs.

MIDDLETON, J. FEBRUARY 11TH, 1911.

RE COTTERILL.

Will—Construction—Devise—Estate in Fee—Contrary Intention Appearing by Will—Life Estate—Vested Interests in Remainder—Bequest of Personalty—Life Interest.

Motion by the executors of the will of John Cotterill for an order declaring the proper construction of the will.

J. W. McCulloch, for the executors.
S. J. Arnott, for Violet Glockling.
S. W. McKeown, for the widow.
J. R. Meredith, for an infant.

MIDDLETON, J.:—The testator left some $4,000 personalty and lands of considerable value.

He devised all his property to his wife, and then provided "that upon the death of my wife my son Samuel Cotterill shall receive 15 per cent., and the balance to be equally divided among my daughters."

The devise to the wife is without words of limitation, and, since the Wills Act, would pass the fee, unless a contrary intention appears.

I think a contrary intention here clearly appears. Upon the wife's death the estate is to go to the children in the shares indicated. The wife has a life estate only, and the shares of the children in the remainder are vested interests.

Grosvenor v. Watkins, L.R. 6 C.P. 500, a case in which there are elements of difficulty not present in this case, is conclusive.

The personal property is given to the wife in the same way. On her death the children are to take. This would not apply to things quae ipso usu consumuntur.

Costs may be allowed out of the estate.

DIVISIONAL COURT. FEBRUARY 11TH, 1911.

*PRATT v. WADDINGTON.

Bailment—Loan of Animal—Transfer by Bailee to Another—Death of Animal—Action for Non-return—Cause of Death not Ascertained—Responsibility—Burden of Proof.

Appeal by the defendant Grundy from the judgment of the County Court of York in favour of the plaintiff in an action by bailor against bailee for non-return of a horse.

The appeal was heard by MULOCK, C.J.Ex.D., TEETZEL and MIDDLETON, JJ.

R. McKay, K.C., for the appellant.

R. G. Hunter, for the plaintiff.

The judgment of the Court was delivered by MIDDLETON, J.:— . . . Pratt owned the horse in question. Grundy borrowed the horse in November, 1909, saying, according to Pratt, "We," that is, the firm of Waddington & Grundy, "want another horse, and do not want to buy one, and we thought, as you would not be doing anything with your horse in the building line during the winter, we might have the horse for his feed, and return him in the spring. Pratt assumed that Grundy had authority from the firm, and assented to this. It turns out

*To be reported in the Ontario Law Reports.

that Grundy was not acting for the firm, and the action has been dismissed as to Waddington. Grundy handed the horse over to a man named Spain, for whom he was really acting, and Spain proceeded to use him in his own business. The horse was used for drawing night-soil and other heavy work, and there is some evidence from which it might be inferred that he was worked hard and not too well treated. At any rate, the horse died some three weeks after it had been lent. The plaintiff only learned of its death some week or ten days after it occurred. When it fell ill, a veterinary examined it and gave medicine without avail. He thinks death was from indigestion—"chronic with a little acute form;" the cause was not ascertained. Various causes are suggested in evidence—a long drive when not used to it—draughts of cold water—change of food—wet bed—feeding oats or giving water when hot.

The learned Judge has found that the exact cause of death is not shewn, and that the onus was upon the defendant Grundy to shew that he was guilty of no negligence.

Spain, in whose custody the horse was, was not called; and no evidence was given shewing how the horse was housed, fed, or cared for. . . .

[Reference to Phipps v. New Claridges Hotel Co., 22 Times L.R. 49; Dollar v. Greenfield, Times, 19th May, 1905; Scott v. London Dock Co., 3 H. & C. 596; Cooper v. Barton, 3 Camp. 5; McKenzie v. Cox, 9 C. & P. 632; Platt v. Hibbard, 7 Cowen (N.Y.) 500, note; Schmidt v. Blood, 9 Wend. 267; Beardsley v. Richardson, 11 Wend. 25; Beekman v. Strouse, 5 Rawle 178; Cass v. Boston, etc., Co., 14 Allen (Mass.) 448; Onderkirk v. Central National Bank, 119 N.Y. 263; McLean v. Warnock, 10 Rettie 1055; Pearce v. Sheppard, 24 O.R. 167.]

Here the defendant Grundy was entirely in the wrong; the loan of the horse was to him, and he had no right to pass it on to Spain. For aught that we know, the death of the horse may have been wholly due to Spain's treatment and lack of care. The horse was subjected to conditions and risks not contemplated by the bailment; the defendant Grundy and Spain, holding the horse under him, have the means of shewing what was done; and in fairness and in law the onus is upon them to excuse the default in making due return.

In discussing the cases I have avoided all reference to cases where the defendant was a carrier, as special considerations place the liability of a carrier upon a higher footing than the defendant's liability here.

Appeal dismissed with costs.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 13TH, 1911.

McDONALD v. GRAND TRUNK R.W. CO.

Costs—Taxation—Counsel Fee—Postponement of Trial—Item 153 of Tariff—Discretion of Taxing Officer—Appeal.

Appeal by the plaintiff from the taxation of the defendants' costs by the Local Master at Barrie.

A. E. H. Creswicke, K.C., for the plaintiff.
Frank McCarthy, for the defendants.

MIDDLETON, J.:—The item in question is a counsel fee of $40 allowed on postponement of the trial. The sittings began on the 24th October; a motion was made to the Master on the 18th to postpone, and on that day refused; but on the 21st an appeal was allowed and the trial postponed. Increased counsel fees upon these Chambers motions and at the trial have been allowed by the Taxing Officer at Toronto. The Local Master now allows $40, the maximum he could allow at a trial, on the postponement.

Outwater v. Mullett, 13 P.R. 509, shews that, when a trial is postponed, a counsel fee, in the discretion of the officer taxing, is allowable. The only item of the tariff under which any fee can be allowed is 153; and that case must be taken as determining that this item applies to postponement. The Local Master, therefore, had a discretion, and it is not the practice to review the discretion of a taxing officer when the law has left the matter to his discretion, and no error in principle or misunderstanding is shewn: Conmee v. North American Railway Contracting Co., 13 P.R. 433; In re Ogilvie, [1910] P. 243.

Appeal dismissed with costs, fixed at $10.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 13TH, 1911.

*REX EX REL. WARNER v. SKELTON AND WOODS.

Municipal Elections—Quo Warranto Application—Joinder of Respondents—Municipal Act, 1903, sec. 225—Grounds of Objection Applying to two Respondents—Election—Costs.

*To be reported in the Ontario Law Reports.

An appeal by the relator from the decision of the Master in Chambers, ante 693.

E. Meek, K.C., for the relator.
J. M. Godfrey, for the respondents.

MIDDLETON, J.:—I have looked at all the authorities cited and many others, and have, in the result, arrived at the conclusion that the matter must be determined upon the construction of our statute. . . .

The statute must be strictly and literally followed. There is no inherent jurisdiction; and considerations of convenience and analogy find no place in the discussion.

Two conflicting cases upon the statute are cited. . . .

[Reference to Regina ex rel. St. Louis v. Reaume, 26 O.R. 460, and Regina ex rel. Burnham v. Hagerman, 31 O.R. 636.]

In this conflict of authority—there being no further appeal—I must form and act upon my own opinion.

Section 225 of the Municipal Act, I think, authorises proceedings against more than one person in the one motion only when "the grounds of objection," that is, all the grounds set out in the notice, "apply equally to two or more persons elected."

Where, as here, there is a common ground of attack, the Judge before whom the different motions are returnable will give proper directions to enable the cases to be tried together, and so avoid all unnecessary expense.

The proceedings under the Municipal Act are civil proceedings, and cannot be regulated by analogy to criminal proceedings; nor do the special provisions found in the Statute of Anne and the English Crown Office Practice Rules afford any guide; in fact, the absence of these provisions indicates the absence of the special powers they confer.

The remedy granted by the Master is not in all respects apt. The relator should be at liberty either to strike out the grounds not common to both respondents, and so proceed with the matter as a joint attack under sec. 225; or he should be at liberty to strike out the name of either respondent and proceed against the other—leaving the respondent whose name is struck out liable to separate attack. This respondent would be entitled to the costs; and, as between the relator and continuing respondent or both respondents, if the proceedings are continued as to both, the costs must be to the respondent or respondents in any event. Election may be made in two days, and should appear on the face of the order issued.

I have not considered the question as to the order being subject to any appeal, as it was argued upon its merits without objection. See Rex ex rel. McFarlane v. Coulter, 4 O.L.R. 520.

RIDDELL, J., IN CHAMBERS. FEBRUARY 13TH, 1911.

RE CLENDENAN.

Land Titles Act—Purchaser at Tax Sale—Certificate of Title Subject to Mechanic's Lien—Powers of Master of Titles under sec. 68—Order of Court—Costs.

Motion by a lien-holder under the Mechanics' Lien Act for an order directing the Master of Titles to issue to the purchaser at a tax sale a certificate of title under the Land Titles Act subject to the lien.

George Wilkie, for the applicant.
A. J. Anderson, for the purchaser.

RIDDELL, J.:—In this case land has been sold; subsequently to such sale a mechanic's lien has been registered against the land. The Master of Titles considers that he cannot stay the issue of the certificate or grant a certificate subject to the mechanic's lien; and I was asked to make an order for the issue subject to the lien registered. The order was made upon the argument, but I have reserved the question of costs. The Master has furnished me with the reasons for his conclusion,* and I cannot see that he is wrong.

Some provision should be made by statute for such a case, and the Registrar will draw the attention of the Attorney-General to the matter. . . .

The owner of the land will pay the costs of this application.

*"The reason is simply this, that sec. 68 of the Land Titles Act expressly states that after the expiration of three months from the mailing of the notice the Master shall register the purchaser at the sale as owner of the land with an absolute title, unless the registration shall be stayed by order of the Court."

COUNTY OF ESSEX v. TOWN OF LEAMINGTON.

Contract—Construction—Municipal Corporations—Supply of Natural Gas—Natural Gas System.

Appeal by the defendants from the judgment of the Senior Judge of the County Court of Essex in favour of the plaintiffs, in an action in that Court, brought to enforce an alleged agreement by the defendants to supply the plaintiffs with natural gas for their House of Refuge.

In 1899 the defendants possessed a natural gas system whereby their citizens were furnished with natural gas, consisting of gas-producing wells sunk within the limits of the town and a distribution plant whereby the gas could be supplied.

The plaintiffs were about to erect a House of Refuge, and the defendants desired to have it placed near the town.

On the 25th July, 1899, the town council passed the following resolution: "This council will furnish for the House of Refuge for the Poor of Essex County, if located on the site known as the Wilson Wigle site, or any other site which the committee may select if adjoining or near enough the town limits, free water for fire protection and domestic use, and also natural gas for fuel for the building, so long as the Corporation of Leamington has sufficient to do so."

On the 19th January, 1900, the following agreement was entered into between the plaintiffs and defendants:—

"Whereas the said county is about to erect a House of Refuge on lands lying adjacent to the said town . . . and whereas it is deemed advisable by the municipal council of the said town to assist in the maintenance of the said House of Refuge in the manner hereinafter specified, in consideration of its being erected on said premises: Now, therefore, this agreement witnesseth: In consideration of the premises and of the sum of one dollar . . . the said town hereby agrees to lay and keep in repair a sufficiently large main from its natural gas system to a point in the said Talbot road . . . for the purpose of supplying said House of Refuge with natural gas from its natural gas system, said pipe to be laid when required by the said county and its officers, and the said town agrees that the said county may freely and lawfully and without hindrance or molestation from the said town . . . pipe from the said main on Talbot street whatever natural gas is required for fuel in the said House of Refuge, so long as the said town supplies natural gas to the citizens of said town for domestic use . . . ."

When this agreement was entered into, the defendants were

supplying their citizens with natural gas from their own wells within the town limits, and possessed no other wells; and these facts were well known to both the contracting parties.

The House of Refuge was erected on the lands adjacent to the town as contemplated by the agreement, and for a short time the plaintiffs obtained their supply of natural gas for the House of Refuge from the defendants' system. Soon, however, the wells became exhausted, and for a few years neither the citizens of Leamington nor the House of Refuge got any supply of natural gas.

On the 17th August, 1909, the defendants entered into a contract with the Beaver Oil and Gas Company, whereby the company, who owned a number of gas wells in the townships adjoining the town, agreed to lay a pipe line from these wells to the defendants' distribution plant, and thereby to furnish the town with natural gas to be supplied to the citizens, the defendants agreeing to contract with the citizens individually for their supply of gas and to be entitled to payment therefor by the citizens, the defendants paying to the company a certain proportion of the gross revenue from such sales.

The plaintiffs alleged that this supplying of natural gas to the citizens of the town entitled the plaintiffs to a supply for fuel purposes for the House of Refuge, free of charge; and the County Court Judge gave effect to their claim.

The appeal was heard by MULOCK, C.J.ExD., TEETZEL and CLUTE, JJ.

F. E. Hodgins, K.C., for the defendants.

A. H. Clarke, K.C., for the plaintiffs.

The judgment of the Court was delivered by MULOCK, C.J. (after setting out the facts as above):—The language of the agreement does not, I think, entitle the plaintiffs to free natural gas subject to the one qualification only, namely, "so long as the said town supplies natural gas to the citizens of said town." Effect must be given to what precedes this provision of the agreement, namely, "the said town agrees to lay . . . a sufficiently large main from its natural gas system . . . for the purpose of supplying the House of Refuge with natural gas from its natural gas system."

This provision indicates, I think, the source of the natural gas in question. It does not contemplate natural gas coming from points outside of the limits of the town, but "natural gas from its natural gas system" then actually existing as known and understood by the two contracting parties.

The resolution of the town council clearly shews at least what was at that time in the minds of the members of the council, when it speaks of the supply to continue "so long as the Corporation of Leamington has sufficient to do so." If the defendants were to be liable to supply gas not from their own natural gas system . . . the words "from its natural gas system" would be meaningless.

It seems to me impossible to say that the wells owned by the defendants at the time of this contract and connected with the distribution plant were not part of the defendants' natural gas system. Their distribution plant includes not only the main and service pipes, but pipes extending in the wells down to the source of supply; and the more comprehensive term "natural gas system" includes, I think, more than the distribution plant, namely, whatever is connected with the supply of gas from its source until its final delivery to the consumers.

If this is a correct definition of the term used, "natural gas system," then it is quite clear that what was contemplated, when the defendants agreed to supply the House of Refuge with "natural gas from its natural gas system," was natural gas originating in the wells of the town. The gas at present being supplied to the citizens of the town does not come from the defendants' "natural gas system," but from the natural gas system of the Beaver Oil and Gas Company. It passes "through" a portion of the defendants' system, but not "from" it, in the sense of originating in it, which is, I think, the sense in which both parties used the term.

For these reasons, I think the plaintiffs are not entitled under the agreement to a supply of natural gas as claimed, and that this appeal should be allowed with costs and the action dismissed with costs.

RIDDELL, J. FEBRUARY 13TH, 1911.

*REX v. TORONTO R.W. CO.

Criminal Law—Common Nuisance — Indictment — Motion to Quash—Demurrer—Jurisdiction—Railway and Municipal Board—Street Railway—Endangering Life and Comfort—Fenders, Guards, and Appliances—Overcrowding—Duty to Passengers—Carriers of Passengers—Agreement with City Corporation—Questions of Law Reserved for Court of Appeal.

*To be reported in the Ontario Law Reports.

The defendants were indicted for a common nuisance.

The trial was before RIDDELL, J., and a jury at the Toronto assizes.

The bill of indictment charged a common nuisance in various forms.

The defendants moved that the indictment be quashed, upon the ground that the Court had no jurisdiction to try the matters charged. Judgment was reserved upon this motion; and it was renewed at various stages of the trial, in various forms, raising at every stage the question as to the power of the Court. Judgment upon all these motions was reserved.

Subject to the objection just mentioned, the defendants then demurred. The demurrer was overruled except as to one count. Counsel for the Crown consenting, the 5th count was struck out.

The defendants then pleaded "not guilty."

After many days' trial, the jury found a verdict of "guilty" on count 6A, but were unable to agree upon the other counts, and were discharged.

An application was made for a case to be reserved for the opinion of the Court of Appeal; and RIDDELL, J., decided to reserve a case.

H. L. Drayton, K.C., for the Crown.

W. Nesbitt, K.C., H. H. Dewart, K.C., and D. L. McCarthy, K.C., for the defendants.

RIDDELL, J.:—I now dispose of the questions of law.

(1) The chief objection raised to trial upon this indictment is, that the Court has no jurisdiction. The indictment is a somewhat long document. The first count sets out that the defendants operate an electric railway in Toronto for the purpose of carrying passengers, and that they should use cars equipped with all proper and efficient fenders, guards, and appliances to avoid danger to human life; that the defendants "are under a legal duty to take reasonable precautions against and use reasonable care to avoid such danger . . . in operating their cars . . . and that they . . . without lawful excuse unlawfully neglected and unlawfully omitted to take reasonable precautions and use reasonable care to avoid danger to human life . . . by having . . . and by . . . neglecting and omitting to provide proper and approved fenders, guards, or appliances to be attached to the cars . . . and by improperly, illegally, and negligently operating and running the

said cars, in consequence whereof the lives, safety, and health of the public . . . were endangered, and in consequence whereof the defendants did thereby . . . cause grievous bodily injuries to one David Goldenberg . . . and that the defendants . . . in manner aforesaid, unlawfully did commit a common nuisance, thereby then endangering the lives, safety, and health of the public," etc. . . .

The objection to this count may thus be stated. The defendants are charged with a common nuisance committed by operating cars without "proper and sufficient fenders, guards, and appliances . . . ." It is contended that this Criminal Court has no jurisdiction to try this question, because the legislature has vested another body with exclusive jurisdiction in the premises. . . .

[Reference to 6 Edw. VII. ch. 31, constituting the Ontario Railway and Municipal Board; sec. 16, providing that the Board shall have all the powers vested in it by the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30; sec. 17 (3) of ch. 31, defining jurisdiction; secs. 209, 210, 212, of ch. 30; 8 Edw. VII. ch. 46, sec. 1.]

The argument at the opening of the case before plea was, that the legislature had intrusted the Board with the duty of determining what life-saving appliances should be attached to the cars of the defendants; that this was exclusive jurisdiction; and consequently it could not be left to a jury to decide whether the fenders and other life-saving appliances used by the defendants were sufficient. . . .

[Reference to the Criminal Code, sec. 247; Union Colliery Co. v. The Queen, 3 Can. Crim. Cas. 523, 4 Can. Crim. Cas. 400, 406, 31 S.C.R. 81.]

If it should turn out that the Board had ordered a particular class of fender, and the defendants had failed to adopt and use it, this would make it a fortiori—the defendants would be under a legal express duty to use that class of fender; and the omission so to use that class would be an "omission to discharge a legal duty" under sec. 221 of the Code.

Moreover, it was said and admitted . . . that some of the cars complained of were not motor-cars, but "trailers." The jurisdiction of the Board under the Ontario Railway Act does not seem to extend to "trailers." . . .

[Reference to secs. 209, 210, and 211 of 6 Edw. VII. ch. 30; 10 Edw. VII. ch. 83.]

But the whole objection is unsound in essence. While the constitution of the provincial Courts, including those of criminal

jurisdiction, is within the power of the province (B.N.A. Act, sec. 92(14)), and consequently the legislature might have formed a new Court for the trial of nuisances, and might have thereby excluded the jurisdiction of the High Court, they have not done so or purported to do so. The Ontario Railway and Municipal Board is not a Criminal Court. . . . not only may, but must, these cases be tried according to the provisions of the Code—and the Board has neither jurisdiction in nor machinery for such trial. . . .

(2) As to the demurrer. A demurrer admits the truth of the allegations of fact. The first count . . . sets out as facts: (a) that the defendants are operating cars; (b) that, in the absence of reasonable caution and care, these might endanger human life; (c) that they omit to use proper fenders, etc., to avoid danger to human life; and (d) that they thereby endanger the lives, etc., of the public. . . . The above discloses a case of common nuisance under sec. 221 of the Code. A legal duty is imposed by sec. 247; its omission, endangering the lives, etc., of the public, is a common nuisance. See Rex v. Toronto R.W. Co., 10 Can. Crim. Cas. 106.

Count 2 is a mere repetition in substance of count 1.

Count 3 charges that the defendants, in the manner set out in the first count, did unlawfully and negligently omit to supply the cars . . . with proper fenders, etc., and did operate the same without reasonable precaution or care, causing thereby grievous bodily injury to the said David Goldenberg, against the form, etc. This is a charge under sec. 284 of the Code. . . . This section has been held applicable to such defendants as these in Union Colliery Co. v. The Queen, supra; and the offence is sufficiently set out.

Count 4 is count 1 in another shape, and is directed to the practice, etc., in backing or Y-ing. This is also covered by Rex v. Toronto R.W. Co., 10 Can. Crim. Cas. 106.

Count 6 alleges that the defendants "were under a legal duty to carry those subjects of our Lord the King received by the said company as passengers on the said cars in such a manner as to avoid endangering the lives, safety, and health of such passengers, and that they . . . without lawful excuse, unlawfully neglected and unlawfully omitted to take reasonable precautions to avoid endangering the lives, safety, and health of such passengers, by neglecting and omitting to take any reasonable precautions or care to prevent undue, dangerous, and illegal overcrowding of passengers in such cars, in consequence whereof the lives, safety, and health of the public

and . . . passengers on the said cars . . . were endangered, and the defendants did thereby commit an indictable offence, contrary to the provisions of the Criminal Code and against the peace,'' etc.

This is, of course, a charge under secs. 221 and 222 of the Code.

Count 6A is to the same effect, with the exception that it is ''the property and comfort of the public'' and not ''the lives, safety, and health of the public,'' which is said to be endangered.

Upon a demurrer, the fact that the defendants are under a legal duty to avoid endangering lives, etc., is admitted. This duty is asserted as a fact, and not as a legal consequence flowing from facts alleged—in which case the existence of the duty as a fact might be disputed. Here the admission is of the existence as a fact of the legal duty, and its violation, with the effect of endangering the lives, etc., of the public; and that, by sec. 221, is legally a common nuisance.

The demurrer could not be allowed, but it remained open for the defendants, under the plea of ''not guilty,'' to contend that no such legal duty had been made out, upon the law, by the evidence adduced. The same process is, mutatis mutandis, applicable to count 6A.

(3) For the purpose of convenience in the discussion of the various points raised at the trial, it will be well to treat the complaint as to overcrowding separately. I now proceed to dispose of that matter.

While it has never, so far as I can find, been specifically so decided in England, it may be the law that it is the duty of a carrier of passengers who holds himself out to the public generally without exception to carry passengers who offer themselves to be carried, to receive all persons who offer themselves in a fit and proper state to be carried, provided the carrier has sufficient room in his conveyance, and the passengers are ready and willing to pay the proper and reasonable fare and to conform to reasonable regulations as to carriage: Macnamara's Law of Carriers on Land, 2nd ed., pp. 534 et seq. It has been so decided in the Courts of the United States: Angell on Carriers, 4th ed., secs. 524, 525; Story on Bailments, 9th ed., sec. 591; Jencks v. Coleman, 2 Sumn. Rep. 221.

However that may be, the duty does not extend to permitting a person offering himself as a passenger to enter the conveyance under all circumstances. . . . The limitation must be of necessity to the accommodation available consistent with safety. And the law goes further, I think. As a part of his duty to carry safely, much is implied.

It is the duty of a carrier of passengers not to allow a passenger carriage to be overcrowded: Macnamara, 2nd ed., sec. 346. . . .

[Reference to Great Northern R.W. Co. v. Hawcroft, 21 L.J.Q.B.N.S. 178; Jackson v. Metropolitan R.W. Co., L.R. 10 C.P. 49, 2 C.P.D. 125; Metropolitan R.W. Co. v. Jackson, 3 App. Cas. 193; Hogan v. South Eastern R.W. Co., 28 L.T.N.S. 271.]

As to the right to a seat, the cases cited in Am. & Eng. Encyc. of Law, 2nd ed., vol. 5, p. 590, n. 1, may be looked at—right to protection from third person: ib., pp. 541, 553.

It is the undoubted duty of a carrier of passengers to take all reasonable precautions and use all reasonable means to prevent his passengers from being assaulted or wilfully injured by other passengers: Canadian Pacific R.W. Co. v. Blain, 34 S.C.R. 74, and cases cited. And I am wholly unable to understand why the same duty does not exist to prevent unintentional bringing together of the bodies as intentional and wilful. . . .

The case of Metropolitan R.W. Co. v. Jackson, supra, establishes that, in the English law, knowingly to permit the overcrowding of a carriage in which a passenger has rightfully taken a seat in order to be carried, is an act of negligence of which the passenger may complain. It is, therefore, "an omission to discharge a legal duty" to such passenger, and satisfies the first requisites of a common nuisance under sec. 221 of the Code.

The rule is not, however, peculiar to the law of England. . . .

[Reference to 6 Cyc. p. 534; Macnamara, loc. cit.; Angell, sec. 525; Redfield, vol. 2, p. 217; Wood on Railroads, 2nd ed., p. 1201, sec. 297; Pittsburgh, etc., Co. v. Hinds, 53 Pa. St. 512, at p. 517; Bass v. Chicago, etc., R. Co., 36 Wis. 450, 461.]

During the trial . . . the question arose as to the right and duty of the defendants to use physical force to prevent their cars being overcrowded in such a way as to endanger the health of the passengers' property within and accepted as passengers; and I reserve a case upon these questions, under sec. 1014 of the Code. . . .

Quite irrespective of and unaffected by any statutory provision, all authorities recognise, not only the right but the duty of all carriers of passengers to make and enforce reasonable rules and regulations for the safety and comfort of their passengers: Angell, 4th ed., sec. 530(a); and in that regard some authorities say they are on a par with an innkeeper. . . .

[Reference to Chicago and North Western R.R. Co. v. With-

ams, 55 Ill. 185, 187; Montgomery v. Buffalo R. Co., 165 N.Y. at p. 140, per Gray, J.; Wheeler's Modern Law of Carriers (1890), p. 130; Pennsylvania R.R. Co. v. Langdon, 92 Pa. St. 21, 27; Fetter's Carriers of Passengers, sec. 247; Thompson's Carriers of Passengers, sec. 335; 6 Cyc., p. 545.]

The defendants were bound to prevent overcrowding; but they made no rules or regulations to prevent any such overcrowding, *i.e.*, within the car: the only instructions given their conductors being to keep a way clear from the step to the door of the car. . . .

[Reference to cases on overcrowding in the notes in 24 L.R.A. p. 710; Metropolitan R.W. Co. v. Jackson, 3 App. Cas. 193, 205, 210, 212; S.C., 2 C.P.D. 129, 135, 141,, 143, L.R. 10 C.P. 54, 55, 56; Pittsburgh, etc., Co. v. Hinds, 53 Pa. St. at p. 517.]

The defendants were advised by counsel that they have no power to use physical force to avoid overcrowding, and that every one who is willing to pay his fare has the right to crowd himself into these cars if he can find standing room, no matter what the danger to passengers already in the car. I cannot follow the argument. Under the agreement between the defendants and the city corporation, clause 33, p. 911 of the Ontario statute-book of 1892, it is the payment of a fare which entitles the passenger to a ride. The agreement, while it is confirmed by the legislature, is not indeed thereby made a statute, but remains a private contract and has only the force of such: Davis v. Taff Vale R.W. Co., [1905] A.C. 542, 552, 553, per Lord Watson; City of Kingston v. Kingston, etc., R. Co., 25 A.R. 462, 468, per Moss J.A. But the rights at the common law of a passenger or intending passenger are quite as high as those purporting to be given by clause 33, for he may demand carriage and transportation if he is ready and willing to pay. . . . I am wholly unable to find anything in the statutes, the cases, or the text-books which compels the defendants to accept the fare of an intending passenger when their car is already full. . . . The defendants may protect their cars from intrusion of supernumerary passengers.

Apparently the defendants have persuaded themselves that city corporations have some right to prevent them from excluding intending passengers. . . . It was argued that the city corporation became a partner. . . . What the city corporation were to receive was a share of the profits by way of payment for what the defendants received from the city corporation: In re Randolph, 1 A.R. 315; Rawlinson v. Clarke, 15 M. & W. 292; Wheatcroft v. Hickman, 8 H.L.C. 268; A. N. Kellogg Co.

v. Farrell, 88 Mo. 591. And even had the city corporation been a partner, the partner had no right to call upon his partner to commit a crime or a tort. . . .

It was urged that a jury could not be allowed to say what amount of force, etc., was proper to be used in preventing overcrowding. But the rights of the defendants in that respect are the same as those of any individual in preventing the entry of a wrong-doer upon his property. Juries are trying every day whether an excess of violence has been used: e.g., Toronto R.W. Co. v. Paget, 42 S.C.R. 488. . . .

The proposition that an infringement of the rights in one respect of the public cannot be a common nuisance, if, taking all the circumstances into consideration, the balance of convenience is with the course pursued by the defendants, is apparently adumbrated in an ill-reported case of Lord Hardwicke's, Burns v. Baker (1752), 1 Amb. 158. . . . This case, being but "a decision by Lord Hardwicke that a particular hospital was not a nuisance (per James, L.J., in Vernon v. Vestry of St. James, 16 Ch.D. 449, at p. 466), or, if a nuisance at all, a public nuisance, which must be prosecuted at the instance of the Attorney-General, would probably not have received the attention it has, had it not been for the judgment of Chitty, J., in Attorney-General v. Manchester, [1893] 2 Ch. 81, at pp. 82, 83; . . . Attorney-General v. Nottingham, [1904] 1 Ch. 673, 681.

The cases in the Criminal Courts will repay examination. . . .

[Reference to Rex v. Cross, 3 Camp. 224; Rex v. Grosvenor, 2 Stark, 511; Rex v. Russell, 6 B. & C. 566; Rex v. Morris, 1 B. & Ad. 441; Rex v. Ward, 4 A. & E. 384; Regina v. Tindall, 6 A. & E. 143; Regina v. Randall, 1 C. & M. 496; Regina v. Betts, 16 Q.B. 1022; Regina v. Train, 2 B. & S. 640; Attorney-General v. Terry, L.R. 9 Ch. 423; Russell on Crimes (comparing the 6th and earlier editions with the 7th ed., vol. 2, p. 1837;) Archbold's Crim. Law, 24th ed., p. 1309; Roscoe's Crim. Ev., 13th ed., p. 504; Barber v. Penley, [1893] 2 Ch. 447; Denaby and Cadby v. Anson, [1911] 1 K.B. 171.]

It may well be that, if the Railway and Municipal Board order a company to use a particular kind of fender, it is not open to the jury to say that any other kind of fender should have been used—that is, in substance, what I charged the jury—but where a matter is not brought before the Board at all, I fail to understand how the fact that the Board has not considered the matter can operate to tie the hands of the Court. A "legal duty" may exist, and the legal duty does exist to take

reasonable precautions, whether the Board act or not. It is not an order of the Board alone which imposes legal duties; and, while it may be that in many cases these orders will define and create legal duties, the omission to order a particular device cannot take away the legal duties which exist.

I shall reserve a case for the Court of Appeal upon the many matters I have discussed; and, if there be any matter which I have not reserved, I may be applied to again. It is a matter of importance to have the legal position of companies such as these defendants authoritatively defined.

SUTHERLAND, J. FEBRUARY 14TH, 1911.

RE RAVEN LAKE PORTLAND CEMENT CO.

NATIONAL TRUST CO. v. TRUSTS AND GUARANTEE CO.

Company—Winding-up—Realisation of Assets—Claim by Mortgagee to Proceeds—Contestation by Liquidators—Leave to Bring Action against Liquidators—Powers of Referee—Dominion Winding-up Act, secs. 22, 110, 133—*Discretion—Appeal—Frame of Action—Liquidators Representing Creditors.*

On the 20th September, 1907, an order was made under the Dominion Winding-up Act for the winding-up of the Raven Lake Portland Cement Company Limited, and a reference was directed to J. A. McAndrew, an Official Referee. The order contained the usual clause delegating the powers of the Court under the Act to the Referee.

The Trusts and Guarantee Company were appointed permanent liquidators.

The liquidation proceeded, and certain assets of the company were realised by the liquidators, and a claim for these was made by the National Trust Company, under a mortgage made to them by the insolvent company for the purpose of securing an issue of $50,000 of second mortgage debentures.

Objections to this claim were filed by the liquidators.

On the 3rd November, 1910, the National Trust Company applied to the Referee and obtained an order for leave to prosecute an action against the liquidators to recover the assets or the proceeds thereof.

The liquidators moved before the Referee to set aside the order of the 3rd November and the writ of summons issued pursuant thereto, and to bar the claim of the National Trust Company, or to proceed with the contestation of that claim.

The Referee dismissed this motion, and the liquidators appealed.

W. Laidlaw, K.C., and A. E. Knox, for the liquidators.

Glyn Osler, for the National Trust Company.

SUTHERLAND, J.:— . . . While it is true that, under sec. 110 of the Winding-up Act, very large powers can be conferred upon the Referee . . . and that, under sec. 133, powers are given to obtain remedies by summary order in place of by action, suit, or otherwise, it is also true that, under sec. 22, there is power, after the winding-up order has been made, with the leave of the Court, to authorise the institution of an action. Under this last section, I assume, the Referee has permitted . . . the action to be brought against the liquidators. . . . I think the Referee had the power under the Act and under the authority delegated to him by the Court . . . to make the order for leave to bring the action, and that he exercised a proper discretion in doing so.

It seems to me, in view of the issues raised in the objections to the claim in question,* that the action is of such a special and important character as to warrant him in authorising an independent action to be instituted: Titterington v. Distributors Co., 8 O.W.R. 328; Harte v. Ontario Express and Transportation Co., 25 O.R. 247.

I was referred to the case of Kent v. La Communauté des Sœurs de Charité de la Providence, [1903] A.C. 220, for the proposition that the action is not properly authorised to be brought against the liquidators. It seems to me that in this case the liquidators are really representing, in their contestation of the National Trust Company's claim in the action, the creditors of the company other than that company, and in that view the action is properly framed. . . .

Appeal dismissed with costs.

*The objections were: (1) that the alleged mortgage to the National Trust Company was null and void: (2) that the assets realised by the liquidators were not covered by the mortgage; (3) that the mortgage was not registered in accordance with the provisions of the Bills of Sale Act, and was void as against the creditors of the insolvent company; (4) that no renewal statement of the mortgage was filed; (5) that no affidavit of bona fides was made or filed, and no resolution, passed by the National Trust Company, authorising any officer or agent to make such affidavit, was filed.

RIDDELL, J. FEBRUARY, 15TH, 1911.

*ROGERS v. NATIONAL DRUG AND CHEMICAL CO.

Landlord and Tenant—Agreement for Lease—"Option" for Further Term—"Option" of Purchase—Assignment by Lessee of Interest under Agreement—Assignment by Lessor of Reversion—Rights of Assignees—Interest in Land—Notice—Legal Estate—Equitable Rights—32 Hen. VIII. ch. 34.

Motion by the plaintiff for judgment on the pleadings and admissions in an action to recover possession of land.

Mitchell, the owner in fee of the property in question, entered into an agreement with one Pearce to let the same to Pearce for five years from September, 1905, to be used as a drug-store and dwelling. The agreement set out certain terms, and finished thus: "And the lessor further agrees with the said lessee that he will at the end of the term of five years give the said lessee the option of a further term of five years, and the lessor further agrees that, in case of sale, he will give the said lessee the first option to purchase." Pearce accepted this and entered into possession.

In July, 1907, Mitchell sold and conveyed the property to the plaintiff. Before doing so, however, he offered the land to Pearce, but Pearce refused to buy. Pearce in August, 1907, assigned all his interest in the agreement to one Smuck, and he in October, 1908, assigned all his interest in the property to the defendants, who entered and paid rent to the plaintiff until the end of August, 1910. On the last day of August, 1910, the defendants wrote the plaintiff: "We hereby give you notice that we accept the lease for a further term of five years, as provided in the said lease."

On the 1st September, 1910, the plaintiff demanded possession, which was refused; and this action was brought on the 18th October, 1910. The defendants counterclaimed for a declaration of their right to a further term of five years.

The motion was heard by RIDDELL, J., in the Weekly Court.

J. Bicknell, K.C., for the plaintiff.

E. D. Armour, K.C., for the defendants.

RIDDELL, J. (after setting out the facts as above):—The interpretation and legal effect of the last clause is the crux of

*To be reported in the Ontario Law Reports.

the case. I think it clear that what is meant is: (1) that, upon sale by Mitchell, the lessee, Pearce, was to have the first chance to buy—this was done, and nothing turns upon that provision; (2) the lessee was, at the end of the period, to have an option of a renewal of the lease for five years longer. "Option" is used here, I think, with a somewhat different connotation from that of its previous use; and I read the clause as though it said, "give the said lessee a renewal of this lease for a further term of five years at his option." It was argued that all that was meant was, that the lessee should have an opportunity of making arrangements with the lessor for a new lease for five years upon terms which would be satisfactory to both; but this, it seems to me, is not what the parties meant. If, then, the clause contained an "option" for a renewal for five years, it is clear that the lessee had a right to a term of five years, beginning at the end of the previous term, and upon the same terms with the exception of the right to renew: Lewis v. Stephenson, 78 L.T. 165, and cases cited.

But it is not Pearce who is endeavouring to enforce the right to a further term; it is his assignee (through mesne assignment.)

Of course, "in the simple case of an offer by A. to sell to B., an acceptance of the offer by C. can establish no contract with A., there being no privity. . . . The assignment of an unaccepted offer made to one individual, with specific views and for a specific purpose, could not easily enable the assignee to give an acceptance which should turn the offer into an agreement as against the person who made it:" Sir John Stuart, V.-C., in Meynell v. Surtees, 3 Sm. & G. 101, at pp. 116, 117. And a mere option to purchase the fee in land is admittedly not assignable, but is personal . . . Canadian Pacific R.W. Co. v. Rosin, ante 610.

This is not, it is argued, a mere personal option, but in law an interest in the land—an advantage, to speak broadly, which the assignee took with his assignment, and which he may enforce against the assignee of the lessor, who took with notice.

At the "common law, covenants ran with the land, but not with the reversion. Therefore, the assignee of the lessee was held to be liable in covenant and to be entitled to bring covenant, but, the assignee of the lessor was not:" per Lefroy, C.J., in Butler v. Archer, 12 Ir. C.L.R. 102, at p. 127.

The statute 32 Hen. VIII. ch. 34 does not apply to leases not under seal: Bickford v. Parson, 5 C.B. 920, and the many other cases cited in 1 Sm. L.C. 59, 60; nor does the principle of

Cornish v. Stubbs, L.R. 5 C.P. 334, based upon Buckworth v. Simpson, 1 C.M. & R. 834, apply. While the plaintiff accepted the rent, he never had an opportunity or the right to give notice to quit; and, therefore, it could not be said, in the words of Willes, J., "a conventional law is thus made equivalent to that of Henry VIII. in the case of leases under seal"—there is nothing from which it can be inferred that the plaintiff considered himself bound by the option for a term after that provided for in the document itself.

Neither are there any letters or negotiations indicating anything in the way of waiver, such as are relied upon by Farwell, J., in Manchester Bridge Co. v. Coombs, [1901] 2 Ch. 608, at p. 615. . . .

[Reference also to Walsh v. Lonsdale, 21 Ch. D. 9; Althusen v. Brooking, 26 Ch. D. 559; Swain v. Ayres, 21 Q.B.D. 289; Foster v. Reeve, [1892] 2 Q.B. 255.]

The principle is, that, the tenant having a right to the legal estate, which right is enforceable in the Court in which the action is brought, Equity looks upon that as done which ought to be done and which the Court can compel to be done; and the Court governs itself accordingly.

The tenant in under an agreement for a lease can be compelled to take on himself the legal estate; and he likewise can compel the landlord to vest him with the legal estate—that is done by an instrument under seal: R.S.O. 1897 ch. 119, sec. 7.

These defendants, then, being before a Court with equitable jurisdiction, must, I think, be considered as though the lease had actually been made—in which case the statute of Hen. VIII. would apply: Manchester Bridge Co. v. Coombs, [1901] 2 Ch. 608.

The plaintiff fails, and the action must be dismissed with costs—the counterclaim must be allowed with costs.

SUTHERLAND, J. FEBRUARY 16TH, 1911.

RE EDWARDS.

Will—Construction—Charitable Devise—"Wesleyan Methodist Foreign Mission"—Identity of Object with Claimant—Evidence.

Application by the executors of the will of Mary Edwards, deceased, for an order determining a question arising under the following clause of the will:—

"I devise and bequeath to my grandson Austin McRorie during the term of his natural life my house and lot situate in the village of Ashton, and after his death I give and devise the said house and lot to Wesleyan Methodist Foreign Mission."

The will was dated the 23rd April, 1903; the testatrix died on the 10th December, 1903; and Austin McRorie died after the testatrix.

The property was claimed by the Methodist Church for the Missionary Society of the Methodist Church, and by the heirs of Austin McRorie, who asserted that, at the time of his death, the "Wesleyan Methodist Foreign Mission" had ceased to exist.

Affidavits were filed shewing the history of the Missionary Society of the Methodist Church.

H. S. White, for the executors.

N. W. Rowell, K.C., for the Methodist Church.

A. C. Heighington, for the heirs of Austin McRorie.

SUTHERLAND, J. (after setting out the facts and referring to the affidavits and statutes bearing on the matter):—It is clear from the clause of the will in question that the intention of the testatrix was, that, after the death of her grandson Austin McRorie, the property in question should be devoted to a charitable object.

The Courts, in their construction of devises to such objects, have shewn a disposition to look favourably upon them, provided there is reasonable clearness as to the identity of the object of the bequest.

It is . . . shewn . . . that the testatrix was for some time before and at the date of her death a member of the Methodist Church and a contributor to the Missionary Society thereof. It is also shewn that the Wesleyan Methodist Foreign Mission has never gone out of existence, but has continually existed from the date of its establishment in 1873 down to the present date; "and the only change has been a slight change in the management thereof, due to the various unions of the Methodist bodies in Canada." . . .

[Reference to Caldwell v. Holme, 97 R.R. 114; Bunting v. Marryat, 19 Beav. 163; Tyrrell v. Senior, 20 A.R. 156.]

It seems to me clear, therefore, that the intention of the testatrix was, that the property in question should, on the death of Austin McRorie, pass to the Methodist Church, to be held by it for the purposes of that branch of its work which

deals with Foreign Missions. I so construe the clause of the will in question, and decide accordingly. . . .

The costs of all parties will be paid out of the property in question.

DIVISIONAL COURT. FEBRUARY 16TH, 1911.

BURNS v ROMBOUGH.

Malicious Prosecution—Absence of Reasonable and Probable Cause—No Finding of Jury as to Malice—Case Left to Court as Arbitrator—Evidence—Facts Shewing Malice.

Appeal by the defendant from the judgment of the County Court of Lanark in favour of the plaintiff for the recovery of $15 damages in an action for malicious prosecution.

The appeal was heard by BOYD, C., RIDDELL and MIDDLETON, JJ.

Featherston Aylesworth, for the defendant.

Alexander MacGregor, for the plaintiff.

The judgment of the Court was delivered by RIDDELL, J.:—The defendant is in the employ of Frost & Wood, and, being on the evening of the 27th May at a cigar store in Smith's Falls, he forgot his bicycle, walked home, and did not think of his bicycle till the next morning; he then asked at the store, and was told that it was not there. He then told Brownlee, a bicycle dealer, of his loss; and asked him to look out for it, thinking some of the boys had hid it for a joke. Brownlee, after two or three days, told the defendant that Burns, the plaintiff, had been in and some one had left the bicycle in his (Burns's) shed—the defendant had in the meantime advertised for the bicycle. The defendant then went to the plaintiff's place and noticed the bicycle in the plaintiff's shed—no one seems to have been at home at the plaintiff's, but the defendant examined the bicycle with care, and had no doubt as to its being his. He did not take it away, because, as he says, "it was on another's man's property."

The plaintiff, who is a cabman, had found the wheel in the street close to his own house, about a hundred yards away, and had told Brownlee's man about it, and asked if he knew of any one who had lost a bicycle—but in the meantime he had left

the wheel in an unlocked drive-shed, where it had been seen by the defendant.

A few days after this, the defendant met the plaintiff, said he had seen the bicycle, and, upon being asked by the plaintiff why he didn't take the bicycle, he answered, "I did not like to take it." The defendant asked the plaintiff to bring down the wheel in his cab; the plaintiff said he did not think he could get it into his cab; and the defendant said, "Try, and, if you can't, I will go after it." The wheel remained in the plaintiff's shed three or four days after this; then it seems to have been stolen, as it disappeared from the plaintiff's shed. The plaintiff supposed the defendant had it, and did not know any thing different till the defendant telephoned asking where it was. The defendant had sent a boy for it, but the boy had not found it, and later he sent another boy, who reported that it had gone that morning at 5 o'clock.

The defendant then went to the magistrate and consulted him; told him the circumstances and all the stories he had heard (as he says) and was advised by the magistrate to do what he did. What he did was to lay an information against the plaintiff for stealing the bicycle on the 27th May—this information was laid on the 29th June.

It is not true that the defendant told the magistrate everything; for he had been told that the bicycle was at one Ferguson's livery stable, where he in fact did afterwards find it.

The magistrate issued a summons against the plaintiff—and upon the hearing dismissed the charge.

This action for malicious prosecution followed. . . . The learned County Court Judge left only the question of damages to the jury; and determined that there was an absence of reasonable and probable cause. The jury found damage $15; and the learned County Court Judge directed judgment to be entered for that sum.

Upon an appeal to this Court, it was at once ruled that the verdict could not stand; as the jury must find on malice—absence of reasonable and probable cause is not in itself malice, however cogent evident it may be: Winfield v. Kean, 1 O.R. 193, and cases cited.

The parties then agreed that this Court should decide the whole case upon the evidence already in.

The learned County Court Judge has found want of reasonable and probable cause; and I agree with him.

The defendant cannot protect himself behind the magistrate's advice—if for no other reason than that he did not make

a full disclosure of the facts: Scougall v. Stapleton, 12 O.R. 206.

The defendant and plaintiff had been friends, good friends, fairly intimate, for a long time. In the examination for discovery the defendant swore he did not think the plaintiff would steal anything. "I did not think the man would steal. I did not know." At the trial, he says, "I did not know," but that he did believe the plaintiff had stolen the bicycle. Both upon his answers to the questions put and from the facts of the case, I am convinced that the defendant had no thought at the time he laid the information that the plaintiff had stolen the wheel on the 27th May or at any other time.

There is ample evidence upon which to find malice—and, sitting as an arbitrator, I find malice; and I do not think any jury properly instructed would find otherwise.

The damages are most moderate, and the plaintiff should have judgment for the amount, with County Court costs of the Court below and here.

CANADIAN BANK OF COMMERCE v. ROGERS—MOSS, C.J.O., IN CHAMBERS—FEB. 11.

Appeal—Leave to Appeal to Court of Appeal—Order of Divisional Court—Absence of Special Circumstances.]—Motion by the defendant for leave to appeal to the Court of Appeal from the order of a Divisional Court, ante 627. The Chief Justice said that he did not think the case presented any special features making it proper to grant leave for a further appeal. Motion refused with costs. R. S. Robertson, for the defendant. Glyn Osler, for the plaintiffs.

BAYER v. CLARKSON—MOSS, C.J.O., IN CHAMBERS—FEB. 11.

Appeal—Leave to Appeal to Court of Appeal—Interest—Amendment of Judgment below.]—Motion by the plaintiff for leave to appeal from a judgment of BOYD, C. The Chief Justice said that the intention of the Chancellor was only to relieve the defendant from payment of interest up to the date of the judgment. The formal judgment might permit of this construction; but, if any doubt existed, there would be no difficulty

in amending it so as to make it conform to the judgment pronounced. If this is accepted and the parties settle, no formal order need be made on this motion. A. O'Heir, for the plaintiff. R. McKay, K.C., for the defendant.

FERRIS v. MCMURRICH—MASTER IN CHAMBERS—FEB. 15.

Discovery—Examination of Plaintiff—Place for—Residence—Indorsement on Writ of Summons—Joint Plaintiffs—Remedy for Default of one—Attachment.]—The action was brought by two plaintiffs, Ferris and Gauthier, to recover the amount of a promissory note payable to them jointly. In the indorsement of the writ of summons it was stated that the plaintiffs resided at the city of Windsor, in the county of Essex, and at the town of Gowganda, in the district of Nipissing, respectively. The action being at issue, the defendant took out and served an appointment for the examination for discovery of the plaintiff Gauthier at Windsor; Gauthier did not attend; and the defendant moved for an order dismissing the action for such default. Held, that, according to the indorsement, the place for examining Gauthier was North Bay, the seat of the District Court for the district of Nipissing; and it appeared that he still lived at Gowganda. Even if his residence had been at Windsor when the action began, there would be nothing to prevent his leaving and going to live elsewhere, in which event the place for his examination would be in the county to which he had moved, if within Ontario: Jeune v. Mersman, ante 418. Where there are joint plaintiffs, the action cannot be dismissed for the default of one; in such case the defendant must proceed by motion for attachment: Badgerow v. Grand Trunk R.W. Co., 13 P.R. 132; Central Press Association v. American Press Association, ib. 353. A plaintiff should not be obliged to have his action stayed indefinitely for the default or contumacy of his co-plaintiff; he could get leave to amend by making his co-plaintiff a defendant. Motion dismissed with costs to the plaintiffs in any event. F. Arnoldi, K.C., for the defendant. Featherston Aylesworth, for the plaintiffs.

GRANT v. KERR—MASTER IN CHAMBERS—FEB. 11.

Writ of Summons—Service out of Jurisdiction without Order under Con. Rule 162—*Nullity.*]—This action was brought

against three defendants, Kerr, Marshall, and Crowe, who, according to the statement in the writ of summons, all resided in Ontario. The writ as issued was for service in Ontario only, but the plaintiff took it away with him to New York, and there assumed to serve the defendants Marshall and Crowe. No appearance being entered, the plaintiff signed judgment and issued execution. The defendant Crowe moved to set aside the service and all proceedings in the action. Held, that the service was a nullity, not being made pursuant to an order, under Con. Rule 162, permitting service out of the jurisdiction: Pennington v. Morley, 3 O.L.R. 514. Since Metcalf v. Davis, 6 P.R. 275, the practice has been changed: Holmested and Langton's Judicature Act, 3rd ed., p. 295, and 2nd ed., p. 277. Order made setting aside the service of the writ and all subsequent proceedings. If the plaintiff wishes to continue the action against the defendant Crowe, he must proceed in the regular way within ten days, and in that event costs of this motion will be to the defendant Crowe in any event. If the action is not proceeded with, the costs will be payable to that defendant forthwith.

BROOKS v. CATHOLIC ORDER OF FORESTERS—SUTHERLAND, J.—FEB. 15.

Life Insurance—Benefit Certificate—Infant Beneficiaries—Payment to Executors of Assured—Powers under Will.]—Motion by the plaintiff for judgment on the pleadings in an action by the executors and trustees under the will of Timothy J. Hayes to recover $1,000, the amount of an insurance upon the testator's life under a benefit certificate issued by the defendants, made payable to the testator's two sons, who were infants. Besides appointing the plaintiffs executors and trustees, the testator provided in his will: "In so far as I have power so to do, I appoint said trustees guardians of my children, with power to demand and receive the moneys payable to them" under the benefit certificate. The question to be decided was, whether the plaintiffs were entitled to receive the insurance moneys, or whether the defendants could insist upon a Surrogate guardian being appointed, to whom the moneys could be paid, and from whom a release to the defendants could be obtained. Held, following Dicks v. Sun Life Assurance Co., 20 O.L.R. 369, 1 O.W.N. 178, 461, that the moneys should be paid to the plaintiffs under the terms of the will. Judgment for the plain-

tiffs for $1,000 and interest from the date of the writ of summons. Costs of all parties out of the fund. J. F. Grierson, for the plaintiffs. H. E. McKittrick, for the defendants.

GIBSON v. HAWES—MIDDLETON, J., IN CHAMBERS—FEB. 16.

Appeal—Leave to Appeal to Divisional Court from Order of Judge in Chambers.]—Motion by the defendant for leave to appeal to a Divisional Court from an order of TEETZEL, J., in Chambers, directing that the defendant be committed unless he attends for examination for discovery and answers certain questions. MIDDLETON, J., said that he had discussed the case with the learned Judge who made the order, and he agreed in thinking the case a proper one for appeal. Leave granted accordingly. E. D. Armour, K.C., for the defendant. F. Arnoldi, K.C., for the plaintiff.

---

*HOUGHTON v. MAY—DIVISIONAL COURT—FEB. 16.

Execution—Seizure of Ship Wrongfully Brought by Execution Creditor into Sheriff's Bailiwick—Public Policy.]—Appeal by the defendant from the judgment of CLUTE, J., ante 376. The Court (BOYD, C., RIDDELL and MIDDLETON, JJ.) dismissed the appeal with costs. J. H. Rodd, for the defendant. A. H. Clarke, K.C., for the plaintiff.

*To be reported in the Ontario Law Reports.