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## NEW BRUNSWICK.

SUPREME COURT EN BANC. SEPTEMBER 23RD, 1910.

### REX v. PECK, EX PARTE BEAL.

*Canada Temperance Act—Violation—Conviction—Proceedings Commenced Two Years after Offence—R. S. C. 1906, ch. 152, sec. 134—Construction.*

Application by certiorari to quash conviction made by Peck against Beal under the Canada Temperance Act. Argued June 15th, 1910.

W. B. Jonah, in support of conviction, shewed cause against the order nisi to quash.

L. A. Currey, K.C., contra, in support of the order nisi to quash.

BARKER, C.J.:—An information for a violation of the provisions of the Canada Temperance Act was made against Beal before Peck, police magistrate, for Albert, on the 31st of December, 1908. No summons was issued and no proceeding of any kind was taken until January 14th, 1910, when a summons was issued. The charge was heard and Beal was convicted on the 10th March, 1910. There was nothing to prevent the defendant from being served with a summons at any time during the year and some days which elapsed. On the other hand, the delay does not seem to have in any way prejudiced the defendant as to his defence. The objections to having a charge of this kind hanging over a defendant for an indefinite time, without affording him any opportunity of having it disposed of by a dismissal or

conviction, are so obvious that one might almost infer that there is no such practice. On the other hand, it must be remembered that although this offence is not an indictable one, and is punishable under summary conviction, it is quasi criminal, and the maxim, "nullum tempus occurrit regi" applies unless the legislature has fixed some limitation as to the commencement and continuance of the proceeding. The only limitation applicable to the present case arises from sec. 134 of the Canada Temperance Act (R. S. C. 1906, ch. 152), which is as follows: "Every such prosecution shall be commenced within three months after the alleged offence, and shall be heard and determined in a summary manner, either upon the confession of the defendant or upon the evidence of a witness or witnesses." The information in this case was duly laid before the magistrate within the three months and he thereby acquired jurisdiction over the offence and person to proceed and hear the charge. The question with which we have to deal is whether by reason of no further proceeding being taken until the summons issued over a year later, the magistrate had thereby lost his jurisdiction, for the right to a certiorari to remove the proceedings has been taken away except in such cases. If the jurisdiction was lost, when was it lost? Was it lost merely by delay, or by a delay not justified by circumstances?

In Potts v. Cumbridge, 8 E. & B. 847, cited in the argument, it appeared that according to the forms the summons recited that the application had been made "this day" and the statute directed the summons to issue "thereupon," that is, on the application being made. Notwithstanding this, the Court held that a summons issued over twelve months after this application was good. It is true that they say that there was nothing gained by issuing a summons, which by reason of the defendant's absence could not be served on him; but that is not the ground on which the case is decided. Wightman, J. (at p. 855), says: "The only regulation as to the time is that the application must be made in twelve months, unless it can be said that it is necessary "thereupon" to issue the summons, that is, immediately on the application. I think it is not." And Crompton, J. (at p. 855), says: "The only question here is whether this proceeding can be said to be founded on the original application. I will not say that it could, if the summons had been refused in the first application; but here I

cannot say it is not so founded. The first application is bona fide acted upon after the lapse of a certain time. I find nothing requiring that the summons should be issued at the time of the application."

In Reg. v. Lennox, 34 U. C. Q B. 28, it appeared that the defendant had been convicted for selling liquor without license, contrary to the provisions of the License Act then in force in Ontario. Among other things this Act provided that all prosecutions under the section in question should be commenced within twenty days after the commission of the offence. The information was made December 30th, 1872, charging an offence on December 16th. A summons issued on January 15th, 1873, and on the 30th the defendant was convicted. The question was whether the prosecution had been commenced within the twenty days as no summons had issued until after the expiration of that period. Richards, C.J., in delivering the opinion of the full Court, proceeds to give reasons why the issuing of the summons rather than the making of the information should be held to be the commencement of the prosecution. He says (p. 32): "The issuing of the writ in a civil suit is the commencement of the action, and the proviso would be of little practical use to defendants if an informer could lay an information and allow it to remain a year without issuing a summons and then proceed with the prosecution. There is an obvious distinction in the case when a prosecutor has lodged his complaint and a summons has been issued on it and served on a defendant, and when a complaint has been made and the summons not issued." He then gives certain supposed cases by way of illustrating his argument, and among others the following: "Or, suppose he swore to a complaint before a magistrate, and kept it in his own possession for a month, and then asked the magistrate to issue a summons on it, would that be sufficient under the statute? I do not think in these cases the spirit of the Act would be complied with. It appears to me, that what is meant is, that it is to be commenced and proceeded with, with reasonable expedition in such a way as to bind some one to the proceeding, and by the issue of a summons or warrant against the defendant, to shew that it is really a proceeding intended to be taken against the party within the twenty days, and not something which the prosecutor may proceed with or not, as he thinks proper. On considering the decided cases on the subject, which have been referred to, and

many others, we think it is the safest course to hold that lodging the information is the commencement of the action. Perhaps the correct view to take is, that the magistrate acting as a Judge, and on behalf of the public, in issuing a summons on an information laid before him, will not delay proceedings to the prejudice of a defendant, and inasmuch as any delay which takes place must necessarily be the act of the magistrate, that the prosecutor cannot be responsible for the delay if the justice of the peace neglects or refuses to proceed. Suppose the prosecutor does all in his power to commence the prosecution within the twenty days, the delays of the magistrate ought not to prejudice him, and the magistrate being a public officer, intrusted with the duty of issuing the summons or warrant, we must not assume unreasonable delay on his part in proceeding. When such delay takes place, and a party is being proceeded against after such a length of time that he is prejudiced in his defence by absence of witnesses, or other such causes, he may, perhaps obtain relief by application to the Court." We find here that notwithstanding the results which they thought might follow from a decision that the lodging of the information was a commencement of the prosecution so as to satisfy the statute, the Court felt bound to decide in favour of that view. After pointing out that the proviso for requiring the prosecution to be commenced within a limited time was of little practical use to the defendant if the informer could allow the information to remain a year without issuing a summons and then proceed, they nevertheless held that this could be done, subject possibly to some relief which the Court might grant in case the delay had prejudiced the defendant in any way. Neither in this nor in any other cases referred to by Richards, C.J., is it suggested that any such delay goes to the jurisdiction.

In Vaughton v. Bradshaw, 9 C B. N. S., Erle, C.J., speaking of Tunnicliffe v. Tedd, 5 C. B. 553, says: "that the Court in that case lay down as principles that the information is the commencement of a criminal proceeding, analogous to an indictment; that the summons is an act of the magistrate on behalf of the public; that the party who begins a criminal proceeding cannot withdraw from it leaving it pending." In none of the cases referred to, so far as I have been able to refer to the statutes out of which they came, was there anything in them similar to that part of section 134 of the Canada Temperance Act which

declares that the prosecution "shall be heard and determined in a summary manner either upon the confession of the defendant or upon the evidence of a witness or witnesses." This, however, can in no way affect the justice's jurisdiction to proceed. At most it amounts to statutory declaration of the justice's duty to hear and determine the charge in a summary manner and convict only on confession or evidence. If a magistrate refuses or neglects to discharge his duty by proceeding when he ought, this Court would compel him to do so, but no such order would be made unless he had jurisdiction to proceed. If, on the other hand, his mere failure to proceed when he ought, deprive him of jurisdiction, no application to compel him to proceed based on that default could possibly succeed. If the magistrate's delay in proceeding is explained by circumstances which he bona fide believed to be a sufficient justification for it, as was the case in Potts v. Cumbridge, the delay would not, in my opinion, go to the jurisdiction. It would simply be the exercise of a discretion by the magistrate to go on or not, a discretion which this Court would review if necessary in an application where the point could properly arise. The explanation of the delay here is not very satisfactory. In fact there is strong evidence to shew that the prosecutor had in fact abandoned further proceeding. No special application was made to the justice to proceed until the issue of the summons, and as the jurisdiction continued, and the defendant does not seem to have been in any way prejudiced, I think the order nisi to quash should be discharged.

Order nisi to quash discharged.

BARRY, J.:—Charles N. Beal was on the 10th of March, 1910, at the parish of Hopewell in the county of Albert convicted before Edson E. Peck, Esquire, police magistrate in and for the county of Albert for that he the said Charles N. Beal at the city of Saint John between the second day of October, 1908, and the 31st day of December, 1908, unlawfully did send and ship and cause to be sent, shipped, and carried into the said county of Albert a quantity of intoxicating liquor, contrary to and in violation of the provisions of Part 2 of the Canada Temperance Act then in force in the said county of Albert, Robert A. Smith being the informant, and was adjudged for his said offence to pay a fine of $50 with $33.75 costs, and in default of payment distress and imprisonment.

Mr. Justice McKeown, on the 31st of March, 1910, granted an order absolute for a certiorari to bring up the conviction, with an order nisi calling upon the convicting magistrate and the informant to shew cause why the conviction should not be quashed, upon the following grounds:

1st. The information having been laid on the 31st of December, 1908, and no summons issued until January 14th, 1910,—a period of one year and fourteen days,—the police magistrate had no jurisdiction to convict.

2nd. The Act under which the conviction was made, ch. 71, 7-8 Edw. VII. Can., is an amendment to the Canada Temperance Act, (which is a local option Act), and this amending Act, never having been voted on by the electors of Albert county, is not in force.

3rd. The exception mentioned in sub-sec. 2 of sec. 117 of the Canada Temperance Act (R. S. C. 1906, ch. 152), as amended by ch. 71, 7-8 Edw. VII., excludes the defendant from the operation of the Act.

As to the first ground: Every prosecution under the Canada Temperance Act has to be commenced within three months after the alleged offence (sec. 134). Laying the information is the initiation of the proceedings by the prosecutor, and the commencement of the prosecution. That has been held time and time again. It is contended here that the magistrate, having delayed for more than a year after the laying of the information before issuing his summons, is ousted of the jurisdiction which he admittedly had when he took the information. No authority has, however, been cited to us, and I can find none to support such a proposition. As I have been able to gather, the law seems to be that if the application for the summons be made within the time limited by statute for that purpose it is sufficient, although the issuing of the summons may be suspended for a time by the magistrate.

It is said by Mr. Tremeear in his work on the Criminal Law, 2nd ed., p. 901, that, "subject to statutory exceptions, an indictment or information may be preferred at any time. The general rule is expressed in the maxim, nullum tempus occurrit regi, which means that the Crown is not barred by lapse of time from instituting criminal proceedings against an offender, and it follows that having commenced a prosecution within the time limited by statute, the Crown is not barred by lapse of time from continuing the prosecution to the end." Frequently in criminal Courts where there are

two or more indictments found against an accused, he is only tried and sentenced upon one. On his release from prison after serving his sentence, theoretically he may be tried upon the indictments remaining, but practically such a course is seldom followed.

There is no limitation by statute as to the time within which after receiving the information, the justice is to issue his summons or warrant. In Potts v. Cumbridge, 8 E. & B. 847, a single woman having been delivered of a bastard child, applied on the 30th of April, 1856, within twelve months after the birth, to a justice for a summons upon the putative father. She (not being on oath) stated that she had learned the putative father was in America; upon which the justice without directly refusing the application, declined to issue the summons then. Nineteen months from the date of the application, namely on the 30th November, 1857, she discovered that the putative father was in England, upon which she obtained and served a summons from the same justice; and the justice upon the application made an order of maintenance upon him. It was held by the Court of Queen's Bench that the order was good, the whole proceeding being in effect founded on the original application and it not being necessary that the summons should issue at the time when the application is made.

It was argued by counsel for the defendant in the present case that the absence beyond the jurisdiction of the defendant in the case cited, (Potts v. Cumbridge), was an excuse for the delay in serving the summons, but a perusal of the opinions of the Judge who composed the Court does not shew that their judgment proceeded upon any such ground. Coleridge, J. (at p. 854), says: "We came therefore to the question, whether it is necessary that a summons should be issued when it will be merely useless and illusory, in order that there may be an adjournment from time to time, and whether a want of this is matter of substance, so as to affect the validity of the proceedings. I think the magistrates would have been wrong in so holding. As to the suggestion, that a fresh application may be made, that would have been too late in this case." Wightman, J. (at p. 855), says: "I am of the same opinion. The only regulation as to the time is that the application must be made in twelve months, unless it can be said that it is necessary 'thereupon' to issue the summons; that is, immediately upon the application. I think it is not;" and Compton, J. (at

p. 855) says: "The first application is bona fide acted upon, after the lapse of a certain time. I find nothing requiring that the summons should be issued at the time of the application."

In Reg. v. Austin, 1 C. & K. 621, on the trial of an indictment for night poaching, it appeared that the offence was committed on the 12th January, 1844. The indictment was preferred on the first of March, 1845. The warrant of commitment by which the defendant was committed to take his trial was dated the 11th of December, 1844. The statute under which the defendant was indicted enacted that "the prosecution for every offence punishable upon indictment or otherwise than by summary conviction by virtue of this Act, shall be commenced within twelve calendar months after the commission of such offence." And it was held by Pollock, C.B., that the prosecution was shewn to have been commenced within twelve calendar months after the commission of the offence. The lapse of time between the commencement of the proceedings and the preferring of the indictment seems to have made no difference. See also Reg. v. Brooks, 2 C. & K. 402; Reg. v. Parker, 33 L. J. M. C. 135: To Reg. v. Barret, 1 Salk. 383, the head-note is: "If the information be in due time, conviction may be had at any time afterwards." The conviction was one for deer-stealing, and being returned on certiorari, the objection was taken that the conviction appeared to be a year after the day of the information, but it was held sufficient that the information be prosecuted a year after the fact, for that is a good commencement of the suit, and it is from that, that the computation is made in all cases.

Where the proceedings are commenced in due time by the laying of the information, the hearing and subsequent proceedings will be valid though postponed to a term beyond the period mentioned in the Act. Oke's Mag. Synopsis, vol. 1, p. 121. Paley on Summary Convictions, 8th ed., 101.

The information in the present case was laid on the 31st December, 1908. The reasons given by the prosecutor for the delay in issuing the summons until the 14th January, 1910, were that the act was new, and the police magistrate hesitated about making out the summons, as the defendant lived outside the jurisdiction. It was near the time of the session of the municipal council, and objection was raised to the expense of procuring outside counsel. The lawyer whom

the inspector had employed to make out the papers did not do so. The inspector had other work to do on his farm and could not attend to the prosecution. In October, 1909, he saw the magistrate who said he had not received the papers. At the councillors' election a new board had been elected, only four of the old members being returned, and the inspector thought it best to let the matter lie until the session of the new council. At that session he was instructed to proceed and did so. It is not suggested that the defendant was outside the jurisdiction or that there were any difficulties in the way of having him served at any time after the information was laid. The reasons advanced do not at all appeal to me as being sufficient to excuse the long delay of more than a year in issuing the summons, which to say the least is most unusual and a practice not to be commended. Notwithstanding these views, I feel obliged under the authorities to hold that the magistrate had jurisdiction to issue the summons when he did, and that upon the first ground the application to quash must fail.

The second objection is met and answered by sec. 5 of ch.71, 7-8 Edw. VII., which provides that the Act shall have and take effect from the passing thereof in every county and city in which Part 2 of the Canada Temperance Act is then in force, in the same manner and to the same extent as if it had formed a part of the said Act when Part 2 was brought in force in such county or city. Offences against the amendment committed before the passing thereof are not to be considered as violations of the Act. The amendment was assented to and became law on the 20th July, 1908. The offence complained of was committed on the 24th day of October in the same year.

As to the third objection: Sub-sec. 2 of sec. 138 of the Canada Temperance Act provides that it shall not be necessary in any summons, &c., to negative the circumstances, the existence of which would make the act complained of lawful, but upon any such circumstances being proved in evidence, the defendant shall be acquitted, so that whether or not the liquor in question was shipped for family or personal use was a question of fact for the magistrate and does not go to his jurisdiction. The defendant being unable to satisfy the magistrate that the liquor was so shipped we cannot review his decision upon the facts. see Rex v. Nickerson, ex parte Mitchell, 39 N. B. R. 316; Crim. Code secs. 1124 and 1125.

The order nisi to quash must be discharged.

WHITE, J.:—As the statute requires the information, which is the foundation of the magistrate's jurisdiction, to be laid within three months of the date of the offence, the justice has no power to take such information after the lapse of that statutory limit. But the statute does not require the summons to be issued forthwith upon the laying of the information, or within any fixed period thereafter. Hence the only restriction as to the time within which the summons must be issued is that it shall be issued within a reasonable time. What is a reasonable time, is a question of fact dependent upon the circumstances of the particular case; and accordingly, in Potts v. Cumbridge, 8 E. & B. 847, a delay of twelve months in the issue of summons was under the circumstances of that case held not to have been unreasonable. But this question of fact the magistrate is of necessity called upon to determine before issuing summons in every case where the information has not been followed promptly by such issue. By the Canada Temperance Act certiorari is taken away. Hence we cannot entertain a motion to quash the conviction unless the magistrate appears to have acted without jurisdiction. To hold that the magistrate, who has bona fide exercised his judgment in deciding a question which the law imposes upon him the duty of determining, shall be deemed to have acted without jurisdiction merely because this Court may consider he came to an erroneous conclusion upon the facts, would, I think, by importing into the law a dangerous principle which would make so hazardous the exercise by a magistrate of the judicial duties vested in him that no prudent magistrate would be willing to assume the risk, for it is well settled that a conviction obtained before a justice who acts without jurisdiction affords him no protection in an action against him for an arrest made under warrant founded upon such conviction.

A case is easily conceivable when the delay and attendant circumstances would be such as to make it clear that no justice could by any honest exercise of judgment have come to the conclusion that the delay was reasonable; and in such a case the justice might well be held to have acted without jurisdiction. But this is not such a case. Although we may think,—as indeed I am disposed to do,—that the magistrate erred in coming to the conclusion he did, as to the reason-

ableness of the delay, yet it is quite possible that the justice could, and did, honestly and fairly, and in the exercise of his best judgment, reach the conclusion he arrived at, and has acted upon. And when, as I think is the case here, the justice appears to have acted not without jurisdiction but erroneously, in the exercise of it, the statute, taking away certiorari, in my opinion deprives us of power to set aside the jurisdiction.

As to the other two objections urged against this conviction, I agree with the judgment of my brother Barry.

LANDRY, J.:—I agree with the conclusions arrived at by brothers Barry and White. Without committing myself at all as to the reasonableness of the judgment exercised, or the discretion exercised, if it may be so called, on account of the length of time that elapsed, I agree that the magistrate had jurisdiction, and having jurisdiction we cannot disturb the conviction.

MCKEOWN, J.:—On the 31st day of December, 1908, Robert A. Smith, liquor inspector for the county of Albert laid an information under his oath before Edson E. Peck, police magistrate in and for the parish of Hopewell in the county of Albert aforesaid charging that Charles N. Beal at the city of Saint John in the province of New Brunswick between the second day of October, A.D. 1908, and the 31st day of December, A.D. 1908, unlawfully did send and ship or cause to be sent, shipped or carried into the said county of Albert a quantity of intoxicating liquor, contrary to and in violation of the provisions of Part 2 of the Canada Temperance Act then in force in said county of Albert. On the 14th day of January, 1910, (a year and some days afterwards), a summons was issued under the hand and seal of the magistrate before whom the information was laid, commanding the appearance of the accused to answer the said charge on Tuesday, the 25th of January then instant, at the magistrate's office at Albert in the said parish of Hopewell at the hour named in said summons, which was personally served on the defendant at the city of Saint John on the 18th day of January, aforesaid. On return of the summons adjournment was had at the request of counsel retained by the informant and by the accused, and after several intervening adjournments, hearing of the case was commenced on the 22nd day of February, 1910,

and continued on the following day and on the 3rd and 4th days of March ensuing, and the magistrate, having taken time to consider the evidence, convicted the defendant of the offence charged, sentenced him to pay a fine of $50 for the said offence, as well as the sum of $33.75 for costs of the prosecution, and in default of payment adjudged that the accused be imprisoned in the common gaol for the said county of Albert for the term of eighty-five days.

On motion by defendant's counsel, I granted an order absolute for a certiorari with an order nisi to quash the conviction on the following grounds:—

1. The information having been laid on the 31st day of December, 1908, and the summons thereon not having been issued until the 14th day of January, 1910, a period of one year and fourteen days, without grounds for delay, the police magistrate had no jurisdiction to convict.

2. Ch. 71 of 7-8 Edw. VII. (assented to 20th July, 1908), is ultra vires.

3. The defendant brought himself within the exception mentioned in sub-sec. 2 of sec. 1 of said ch. 71 of said 7-8 Edw. VII., and the magistrate had therefore no jurisdiction to convict.

From the return made by the magistrate to the writ of certiorari, it appears that as soon as the information was read over to the accused he was asked if he had any cause to shew why he should not be convicted, or why an order should not be made against him, and the record then reads thus: "The defendant the said Charles N. Beal by his counsel, Doctor L. A. Currey states and objects: 1. To the jurisdiction of the Court; the information laid December, 1908; summons not issued till January 14th, 1910; and the summons being one year and fourteen days after the information, the Court has no jurisdiction to proceed on said information." Other objections to the proceedings were taken before the magistrate, and urged on the application for the writ of certiorari, all of which objections are enumerated above, but I think the substantial ground in support of the order nisi to quash is to be found in the answer to the question whether or not the magistrate who took the information retained jurisdiction to proceed with the case, notwithstanding the lapse of time between the day on which the complaint was laid, and the time when the summons, based on such complaint was issued. Undoubtedly the magistrate was clothed with full jurisdiction in the matter

when the information was laid before him. Has anything transpired to divest him of it? The Canada Temperance Act requires that every prosecution for offences under it, "shall be commenced within three months after the alleged offence and shall be heard and determined in a summary manner, either upon the confession of the defendant or upon the evidence of a witness or witnesses." (R. S. C. 1906, ch. 152, sec. 134)

It is now, I think, settled law that laying the information is the commencement of the prosecution and the question now arising does not, I apprehend, concern that phase of the proceedings; but, assuming the prosecution to have been duly commenced on the 31st day of December, 1908, by laying the information, has the magistrate jurisdiction to issue his summons on the 14th day of January, 1910, for the offence set out in the information, notwithstanding the delay which has taken place as explained by the evidence? On page 35 of the magistrate's return the following evidence is found given by the informant Robert A. Smith, who was called for the prosecution. "Q. State what were the causes, if any, which led to the delay in the issue of summons in this cause." An objection was overruled, and the following answer under objection was given. A. At that time, the Act being new, I saw the magistrate about issuing the summons. The magistrate hesitated about making out the summons as the defendant lived outside the jurisdiction of the Court. It was near council session time, and at the council it was talked over and some objections were raised as to costs of outside counsel. C. A. Peck, K.C., argued that a St. John man charged with the offence could not be prosecuted here in Albert county. I had a counsel during last summer in July who promised to make out the summons and forward them. He did not do so. I had other work, on my farm, and could not then attend to it. In October last I saw the magistrate who said he had not received the papers. At time of election of councillors the new board was elected, only five old members being returned. I thought it best to let it lie till the session. At annual session of the county council I was instructed to proceed and did so"

It may be that the prosecutor considered his reasons for delay were good. I have no doubt he did, but I do not think he acted in accordance with the spirit or wording of the Act in causing or submitting to a delay of over a year in having the summons issued. When it is remembered

that the Act in question sets a limitation of three months to the commencement of prosecutions for penalties inflicted under it, in my opinion it would be unwarrantable to hold that a magistrate who takes an information can for over a year withhold from the accused all knowledge of the charge against him, and at the end of that time summon him to answer the complaint under the circumstances which exist in this case.

Such procedure, it seems to me, practically nullifies the time limit for prosecutions which the act contains, and unless there be sufficient reason for the delay, I think it is fatal to the jurisdiction of the magistrate. I do not think that the reasons for delay given by the witness Robert A. Smith relieved the magistrate from the necessity of promptly issuing his summons to the defendant if he wished to retain jurisdiction over the subject-matter of the complaint. Laying an information before a magistrate gives no notification to a person accused thereby that proceedings are being taken against him. His knowledge comes from the summons or warrant which follows such information. By service of process the accused person is apprised of the offence charged, and can arrange for his defence, if he have any; but knowing nothing of it for a year, it may well be that witnesses available at the time the offence is charged may not be procurable twelve months afterwards; and in my opinion the criminal law should not be administered in such a dilatory manner. I think in this case the magistrate should have issued his summons promptly and proceeded in the best exercise of his judgment in the disposition of the case; or else, that he should have refused to take the information.

In the case of Reg. v. Lennox, 34 U. C. Q. B. 28, Richards, C.J., delivered the judgment of the Court upon a motion to quash a conviction under 32 Vict. ch. 32, sec. 25 (Ont.), for selling liquor without the license therefor by law required. The question at issue depended on whether the laying of the information could be considered the commencement of the prosecution and the Court held that it should be so considered. In dealing with the matter of delay in prosecution the learned Chief Justice (at p. 32), said: "The issuing of the writ in a civil suit is the commencement of the action and the proviso," (for commencing the prosecution in twenty days)—"would be of little practical use to defendants if an informer could lay an information

and allow it to remain a year without issuing a summons; and then proceed with the prosecution. There is an obvious distinction in the case when a prosecutor has lodged his complaint and a summons has been issued on it, and served on a defendant, and when a complaint has been made and a summons not issued. . . . It appears to me, that what is meant is, that it is to be commenced and proceeded with, with reasonable expedition in such a way as to bind some one to the proceeding, and by the issue of a summons or warrant against the defendant, to shew that it is really a proceeding intended to be taken against the party within the twenty days, and not something which the prosecutor may proceed with or not as he thinks proper." I think the reasoning in the case above cited is applicable to the present case, and in my opinion the conviction should be quashed.

McLEOD, J.:—I agree with the judgment delivered by Mr. Justice McKeown. I think the magistrate, after receiving the information, which was the commencement of the proceedings, should have proceeded to issue the summons. There was great delay in doing that, and that delay deprived him of jurisdiction.

Conviction affirmed and order nisi to quash discharged.

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## NEW BRUNSWICK.

SUPREME COURT EN BANC. SEPTEMBER 23RD, 1910.

### EDMONDSON v. ALLEN.

*Assault — Damages — Quantum — Verdict — Misdirection —New Trial.*

Appeal by defendant from the York County Court. Argued June 16th, 1910.

J. D. Phinney, K C., for defendant, appellant.

R. B. Hanson, for plaintiff, respondent.

Judgments were delivered as follows:—

BARKER, C.J.:—This is an appeal from the County Court of York. The case was tried at a sitting presided over by

the Judge of the County Court of Saint John. The action was brought by the present respondent (Allen), for damages which he alleged he had entertained by reason of an assault made upon him by Edmondson, the defendant below and the appellant herein. The case was tried before a jury and a verdict given for $135. An application was made to the County Court Judge who tried the case for a new trial on the grounds of misdirection and excessive damages, but the Judge refused it. From this decision this appeal is taken.

I think the appeal must be allowed. I shall not say anything as to the damages being excessive. In a case like this where there does not appear to have been any expenditure of money for medical attendance or any loss of time, and the damages must be based mainly if not altogether on the physical injury caused by the assault and the circumstances under which it was made, the question of damages is so much in the discretion of a jury that any reasonable amount assessed by them under a proper charge would not be disturbed though it might appear somewhat larger than ought to have been given. It is for this reason necessary that this wide discretion should be exercised by the jury with some knowledge as to its limits and with some definite instructions from the Court as to the elements which can properly be considered in fixing the amount of damages. The Judge in his charge seems to have directed the jury's attention to circumstances which they might consider in fixing their damages, but which had really nothing to do with the question. In Campbell v. Walsh, decided in last June term, a majority of the Court, in a case much weaker than this, sent the case back for a new trial on the question of damages. Bray v. Ford (1896), A. C. 44 is an authority for holding that such a misdirection is a substantial wrong and a miscarriage entitling the party to a new trial, even though the damages were not excessive.

The appeal must be allowed with costs.

LANDRY, McLEOD, WHITE and McKEOWN, JJ., concurred with the Chief Justice.

BARRY, J.:—Appeal from the York County Court. The action is one for trespass to the person for an assault committed by the appellant upon the respondent. The case was tried with a jury before James G. Forbes, Esquire, Judge of

the Saint John County Court, who had been called in and designated by Wm. Wilson, Esquire, Judge of the York County Court, to try the case, the latter Judge being disqualified to act therein by reason of relationship to one of the parties to the suit; and on the jury's findings a verdict was entered in favour of the plaintiff, the respondent herein, for the sum of one hundred and thirty-five dollars.

Motion for a new trial was made before Judge Forbes, and refused, and the appellant now appeals from this decision upon the two grounds taken in the Court below, namely. 1st excessive damages; 2nd. misdirection of the trial Judge.

In view of the fact that this case has to go back for a second trial, I do not consider that it would be proper for me to refer to either the nature of the assault or the character of the parties concerned in it. Suffice it to say that had the jury, upon a fair and proper charge, assessed the damages at the amount found, I do not think they could be said to be excessive, and I should not have felt disposed to interfere with their finding upon the first ground.

Section 164 of "The Supreme Court Act" (ch. 111, C. S. 1903) provided that, "It shall be the duty of the presiding Judge, on the trial of jury causes, to sum up the facts to the jury without unnecessarily expressing his own opinion upon such facts, and it shall be a ground for a new trial if the Supreme Court shall determine that such opinion has been erroneously or too strongly expressed." Section 78 of ch. 116 C. S. 1903, makes this provision applicable to County Courts. A new trial is, however, never granted on the ground of misdirection unless in the opinion of the Court some substantial wrong or miscarriage has been thereby occasioned in the trial of the action.

A perusal of the learned Judge's charge convinces me that his opinion upon the facts was not only too strongly expressed, but that he introduced into his charge as facts, matters which do not appear in the evidence at all; indeed he goes further than that, for he attributes to the appellant language which according to the stenographer's return, had been used by the respondent himself. It is difficult to say that these observations of the learned Judge did not have their weight with a jury. Without them, who can say what their verdict would have been?

Where the Judge has misdirected the jury, it is for the party shewing cause against the application for a new trial

to shew that no substantial wrong or miscarriage was occasioned by the misdirection—Anthony v. Halstead, 37 L. T. N. S. 433—and the respondent's counsel has failed to satisfy me upon that point. In a case like the present the assessment of damages does not depend upon any definite legal rule, and is the peculiar function of the jury, by whom the party liable is entitled to have the measure of his pecuniary liability determined upon a proper charge. It was held in Bray v. Ford (1896), A. C. 44, reversing the decision of the Court of Appeal that since the assessment of damages is the peculiar province of the jury in an action for libel—and the rule would I apprehend, be the same in an action for an assault—and since the jury had not the defendants' real case submitted to them and might in assessing the damages have been influenced by the misdirection, there had been a substantial wrong or miscarriage within Order 39, Rule 6 (which is practically the same as our own statute), and that there must be a new trial. See also Jenoure v. Delmage (1891), A. C. 73. The same principle was acted on by this Court in Hesse v. St. John Railway Co., 35 N. B. R. 1, where McLeod, J., at p. 25 of the report says: "It was suggested at the argument that the Court might, if the damages were assessed on a wrong principle, enter the verdict for what it should have been, but following the case of Bray v. Ford, I think that cannot be done. It is impossible to say to what extent the minds of the jurors may have been affected by the directions given. I think the direction was improper, the jury having been told to consider matters they should not have considered, and the defendants are entitled to have a verdict of the jury as to the amount of damages sustained under a proper charge by the Judge. . . . I say nothing as to damages being excessive, if the same amount had been given under a proper charge by the Judge." Following the rule laid down in this case, I think the appeal should be allowed and directions given to the Court below to grant a new trial.

Appeal allowed with costs, cause remitted to Court below to grant new trial.

## NEW BRUNSWICK.

SUPREME COURT EN BANC. SEPTEMBER 23RD, 1910.

### REX v. MURRAY, EX PARTE COPP.

*Canada Temperance Act—Violation—Information—Irregularity—Non-appearance of Informant before Magistrate—Effect of—Waiver by Appearance of Counsel—Jurisdiction of Magistrate—Ex p. Sonier (34 N. B. R. 84) distinguished.*

Application by certiorari to quash a conviction made by Murray against Copp under the Canada Temperance Act. Argued June 24th, 1910.

J. D. Phinney, K.C., in support of conviction shewed cause against order nisi to quash.

P. J. Hughes, contra, in support of order nisi to quash.

BARRY, J.:—Albert A. Copp, was on the 24th day of March, 1910, at Sackville, in the county of Westmorland, convicted before Thomas Murray, Esquire, sitting stipendiary magistrate in and for the county of Westmorland, for having between the 24th day of December, 1909, and the 8th day of March, 1910, at Port Elgin in the county of Westmorland unlawfully sold intoxicating liquor contrary to and in violation of the provisions of the second part of the Canada Temperance Act, then in force in the said county of Westmorland, Arthur N. Charters, being the informant, and was fined the sum of $50 with costs, $14.35.

On the 9th day of April, 1910, Mr. Justice Landry granted an order absolute for a certiorari to remove into this Court the said conviction, with an order nisi calling upon Thomas Murray, sitting stipendiary magistrate to shew cause why the said conviction should not be quashed, upon the sole ground that no proper information having been laid before the magistrate he had no jurisdiction, the informant never having personally appeared before the magistrate to lay the information.

The return to the writ of certiorari shews an information in regular and proper form, dated the 18th of March, 1910, signed by Arthur N. Charters, and appearing upon its face to have been "laid and signed before me the day and year

first above mentioned at the town of Sackville, in the aforesaid county of Westmorland, Thos. Murray, sitting police and stipendiary magistrate, in the absence by illness of Daniel Jordan"; but the facts set out in the affidavits, clearly shew that the circumstances under which the information was obtained, did not justify the magistrate in signing his name to the statement at the end of the information; or in other words such statement dose not truly set forth the facts. It was not laid and signed before him.

The circumstances under which the information was laid appear by the affidavits to be as follows: Mr. Charters, who is the inspector under the Canada Temperance Act for the county of Westmorland says that he twice went to Sackville for the purpose of laying an information before Daniel Jordan, police and stipendiary magistrate of Sackville, against Copp; and on both occasions found Mr. Jordan too ill to attend to the matter. Subsequently the inspector filled out and signed an information against Copp leaving the date and a place for the magistrate's name in blank, and mailed the paper to Mr. Jordan. A few days later Mr. Murray the convicting magistrate, called the inspector by telephone, and told him that the papers had been handed to him by Mr. Jordan, who was unable to act, and the inspector then by telephone requested magistrate Murray to take the information against Copp, and instructed him to issue a summons thereon. This Magistrate Murray did. It is quite clear that in laying the information the inspector did not appear personally before either Mr. Jordan, the police magistrate, or Mr. Murray, the sitting magistrate.

It was contended by counsel supporting the conviction that the defendant by his appearance at the trial by his counsel, C. Lionel Hanington, waived any irregularity there may have been in the information. It is a well understood principle acted on by the Courts for many years, that faults in procedure may be cured or waived by the appearance of the accused. But did the accused in this case appear in the sense of participating in the trial and defending? The following is the record of the magistrate of Mr. Hanington's participation in the proceedings: "C. L. Hanington appears at this stage of the proceedings (i.e., after the evidence was all in) to take exception to the jurisdiction of the magistrate, and asked the Court whether or not the information was laid by Mr. Charters by personal attendance before the sitting magistrate, or by the use of the mails and telephone." The magistrate in

answer detailed the circumstances under which the information came to his hands, as already mentioned, and Mr. Hanington took no further part in the proceedings.

Ex parte Sonier, 34 N. B. R. 84, is distinguishable from the present case. There it was set up that the information for violation of the Canada Temperance Act was defective in that it was not sworn to by the prosecutor at the time and place stated therein. The defendant however appeared and pleaded not guilty, and it was held that the magistrate had by the appearance of the accused acquired jurisdiction over his person, even though there had been no written information. The case of Reg. v. Hughes, 4 Q. B. D. 614, is cited in support of that proposition. But the present case is entirely different. The magistrate acquired jurisdiction over the accused by his appearance in Court, unless it be that the appearance of Mr. Hanington at the close of the case for the prosecution for the purpose only, as clearly appears by the record, of taking exception to the jurisdiction of the magistrate can be construed into a general appearance, and I think it cannot.

In Dixon v. Wells, 25 Q. B. D. 249, which was a prosecution under "The Sale of Food and Drugs Act," the accused with his solicitor on the day fixed for the hearing of the complaint, duly appeared before the stipendiary magistrate sitting as a Court of summary jurisdiction, in answer to the summons, and objected that the summons was invalid, and that the Court in consequence had no jurisdiction to hear and determine the matter, and notwithstanding the cases of Reg. v. Hughes, 4 Q. B. D. 614, and Reg. v. Shaw, 34 L. J. (M.C.) 169, it was held by the Court of Appeal, consisting of Lord Coleridge, C.J., and Mathews, J., that the defect in the summons was not cured by the appearance of the accused, as he appeared under protest. Lord Coleridge, in distinguishing the case from Reg. v. Hughes, says (p. 255):—"In that case the defendant was indicted for perjury, alleged to have been committed before justices at the hearing of a charge against a person brought up on a warrant illegally issued without a written information on oath, and the contention was that the proceedings were invalid; but the Court held that they were valid. The case establishes the proposition that when a person is before justices who have jurisdiction to try the case they need not inquire how he came there, but may try it. That decision is binding on me, and I have no wish to depart from it. But the present case, I am glad to say, is not within it,

and is distinguishable upon the sound ground taken by the counsel for the appellant. The document called a summons in this case was, in my opinion, no summons at all. But the accused was before the magistrate. Two distinctions, however, separate this case from those cited. First, in all the cases to which our attention had been called there was no protest made by the person who appeared, and the Courts said, applying a well known rule of law expounded centuries ago, that faults of procedure may generally be waived by the person affected by them. They are mere irregularities, and if one who may insist on them waives them, it is afterwards too late for him to question the jurisdiction which he might have questioned at the time. In this case there was a protest, because when the case was called on before the magistrate the appellant took the same objection that he has taken to-day. He objected that there was no summons and no information, that the whole proceeding was irregular, and that the Court had no jurisdiction to try him because he was not properly brought there. Of course it is assumed that if he had made no protest, the cases cited would have been applicable, but his protest makes a marked distinction. See also Blake v. Beech, 1 Ex. D. (1876), 320, and Reg. v. McNutt, 3 Can. Cr. Cas. 184.

Offences against Part 2 of the Canada Temperance Act are to be prosecuted and the punishments and penalties therefor enforced in the manner directed by Part XV. of the Criminal Code, so far as no provision is in Part 3 of the Canada Temperance Act made for any matter or thing which is required to be done with respect to such prosecution. General forms of information, search warrants, summons, convictions and commitments are prescribed by the Canada Temperance Act, and since under the terms of that Act it is only in cases where no provision is made in the Act for any matter or thing which is required to be done with respect to any prosecution, that we must have recourse to the provisions of the Code, we are to be guided as to the essential requisites of informations by the form prescribed by the Canada Temperance Act. The form of information laid down in the latter Act clearly directs, if we are to consider the words used by Parliament, that it shall be laid and signed before the police magistrate or justice receiving the same. Considering these words in their plain and ordinary meaning, I do not see how we can exclude the idea of the actual presence of the information before the magistrate. It might possibly be successfully argued that an in-

formation may be laid by telephone, but I cannot see how it could be signed by the same means.

Sec. 655 of the Criminal Code as enacted by ch. 9, 8-9 Edw. VII. provides that "upon receiving such complaint or information the justice shall hear and consider the allegations of the complainant, and the evidence of his witnesses if any, and if of opinion that a case for so doing is made out he shall issue a summons or warrant, as the case may be in manner hereinafter provided." Under this section it has been decided that before issuing his warrant in the first instance, it is the duty of the justice to examine upon oath the complainant or his witnesses as to the facts upon which his suspicion and belief are founded, and to exercise his own judgment thereon. Ex parte Boyce, 24 N. B. R. 347; Rex v. Mills, Ex parte Coffon, 37 N. B. R. 122; Rex v. Carleton, Ex parte Grundy, 37 N. B. R. 389. Where a warrant is asked for in the first instance the information must be sworn to, but in the case of a summons the oath of the informant is not required; the summons is a citation proceeding upon the information or complaint laid before the magistrate who issued it, and conveying to the person cited the fact that the magistrate is satisfied that there is a prima facie case against him; and he should not issue the summons unless so satisfied. Every complaint or information under the general law is to be laid or made by the complainant or informant in person, or by his counsel or attorney, or other person authorised in that behalf (Crim. Code sub-sec. 4, sec. 710). The issue of a summons for an offence punishable summarily, as well as on an indictment, is a judicial act. The justice is required to hear and consider the allegation in the complaint or information, and the issue of the summons is dependent upon his opinion; he has to judicially consider whether or not the informant is acting bona fide, and whether such a case as will justify the isssue of a summons has been made out. Hope v. Evered, 17 Q. B. D. 338; Lea v. Charrington, 23 Q. B. D. 45.

I am satisfied that the telephonic communication between the inspector and the magistrate in this case was not such a hearing and consideration of the complaint, or such an exercise of the judicial discretion of the magistrate, as the law contemplates. The conversation between the complainant and the magistrate by telephone was a merely perfunctory one, and amounted to nothing anyway. The magistrate had received by mail from Mr. Jordan the written information; he called

up the inspector and so informed him, and the inspector then requests the magistrate to take the information, and instructs him to issue a summons against the accused; and that is all. Where was there any exercise of any judicial discretion here? The magistrate made no inquiry as to the truth of the charge or in regard to the witnesses whom the inspector would require to substantiate it. For my part I do not feel disposed to encourage any such looseness in the administration of the criminal law; I prefer to hold that in administering justice summarily, strict regularity must be observed. My opinion is that the paper called an information and upon which the magistrate acted, gave him no jurisdiction to issue a summons and that the accused did not by his appearance by counsel for the purpose only of taking exception to the jurisdiction waive or cure the irregularity in the proceedings, or give the magistrate jurisdiction over his person. I would therefore make absolute the order nisi to quash the conviction.

McLEOD, J.:—I agree that the conviction should be quashed; but I do not wish at present to say what action the magistrate must take for issuing a summons. I confine myself entirely to this fact, that by the papers there does not appear to have been a proper information laid before the magistrate, and therefore he had no jurisdiction, and that the appearance of Mr. Hanington, who simply objected to the jurisdiction of the Court, did not waive the want of information.

Conviction quashed.

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## NEW BRUNSWICK.

SUPREME COURT EN BANC. SEPTEMBER 23RD, 1910.

### REX v. PECK, EX PARTE O'NEILL.

*Canada Temperance Act—Conviction for Offence—Ex parte Proceedings—Irregularities in Procedure—Misdirection of Magistrate—Sufficiency of Information—Certiorari.*

Application by certiorari to quash conviction made by Peck against O'Neill under the Canada Temperance Act. Argued June 15th, 1910.

W. B. Jonah, in support of conviction, shewed cause against the order nisi to quash.

J. B. M. Baxter, K.C., contra, in support of the order nisi to quash.

BARRY, J.:—Philip M. O'Neill was, on the 8th of February, 1910, convicted before Edson E. Peck, police magistrate in and for the parish of Hopewell, in the county of Albert, for that he at the city of St. John between the 2nd day of October, 1908, and the 31st day of December, 1908, unlawfully did send and ship, and caused to be sent, shipped and carried into the county of Albert a quantity of intoxicating liquor contrary to and in violation of the provisions of Part 2 of the Canada Temperance Act, then in force in the said county of Albert, Robert A. Smith being the informant, and was adjudged for his said offence to pay a fine of $50 with $48.20 costs, and in default of payment, distress and imprisonment.

On the first of April last, Mr. Justice McKeown granted an order absolute for a certiorari to remove the conviction into this Court, together with an order nisi calling upon the police magistrate to shew cause why the said conviction should not be quashed, upon the following grounds:—

1st. That no evidence was taken by the magistrate substantiating the matter of the information before the issue of the summons.

2nd. That no evidence was taken by the magistrate substantiating the matter of the information before the issue of the warrant for compelling the appearance of the defendant.

3rd. That a summons could not legally be issued after the lapse of more than a year from the laying of the information.

4th. That a summons could not be legally issued after the lapse of time aforesaid, and because of all the other circumstances of the case which shew that the magistrate was acting as a party or prosecutor, or had an interest in the prosecution or was guilty of bias, or some or one of such improper motives.

5th. That a warrant compelling the appearance of the accused could not legally be issued for the reasons set forth in the fourth ground.

6th. That the magistrate was disqualified by bias and interest from hearing and determining the matter of the

said information and from making any conviction thereon.

7th. That the magistrate had no jurisdiction to hear and determine the matter of the information at the time he professed to do so.

8th. That the police magistrate had not legally before him any evidence upon which he could convict the defendant.

The information was laid on the 31st of December, 1908, and the summons was issued on the 14th of January, 1910, returnable on the 25th of January and served on the 18th of the same month. The defendant not appearing on the return of the summons the Court was adjourned until the 2nd of February in order to permit of the attendance of counsel for the prosecution who was then otherwise engaged. The defendant did not appear on the day to which the Court was adjourned, and counsel for the prosecution upon due proof of the service of the summons moved for and obtained a warrant for the arrest of the defendant in order to have him personally before the Court to answer to the charge, and the Court then adjourned to the 8th of February. Wilmot G. Asbel, a provincial constable, took the warrant had it backed by the police magistrate of St. John, and on the 7th of February accompanied by officer Gosline of the St. John police force, arrested the defendant on the same day. The defendant made a deposit of $95.55, a sum estimated as sufficient to cover a fine and the probable costs in case of conviction, which sum the constable accepted upon the understanding, as he says, that the amount would be forfeited in case the defendant did not appear and defend, and a conviction was made against him.

As to the first objection: It was decided in the recent case of Rex v. Dibblee, ex parte O'Regan, 39 N. B. R. 378, that, under the law as it stood at the time this information was laid, which was some six months prior to the passing of the amendment to sec. 655 of the Criminal Code, it is not necessary for the justice before issuing his summons, to take evidence substantiating the matter of the information and that where the defendant is properly served with a summons founded upon a proper information, the magistrate can proceed ex parte and convict the defendant in his absence.

Second objection: Although, as has just been intimated, it was not at all necessary that the magistrate should issue his warrant for the arrest of the defendant in order to give him jurisdiction, for some reason or other, which is not to

me apparent, he saw fit to pursue that course. In Ex parte Boyce, 24 N. B. R. 347, it was decided that a sworn information stating that the complainant has just cause to suspect and believe and does suspect and believe that the party charged has committed a specified offence triable under the Summary Convictions Act, will not authorise a justice to issue his warrant to arrest in the first instance; and that it is the duty of a justice before issuing a warrant to examine upon oath the complainant or his witnesses as to the facts upon which such suspicion and belief are founded and to exercise his own judgment thereon. That case has been followed in Rex v. Mills, ex parte Coffon, 37 N. B. R. 122, and in Rex v. Carleton, ex parte Grundy, 37 N. B. R. 389. The principle laid down in these cases has, however, been to some extent modified by the decision in Rex v. Hornbrook, ex parte Madden, 38 N. B. R. 358, where it was held that a sworn information, containing a positive statement that the party charged has committed an offence triable under the Summary Convictions Act is sufficient to authorise the issue of a warrant in the first instance without an examination of the informant or his witnesses. The information in the present case although sworn to does not contain a positive statement by the complainant of the infraction of the law complained of, but is based upon the information and belief of the complainant only, and is according to the form prescribed by the Canada Temperance Act. This case also differs from the cases mentioned in another respect. Here there was a summons in the first instance, which was duly served upon the defendant, and which he disobeyed. The magistrate then, upon proof both by affidavit and viva voce evidence of the due service of the summons issued his warrant upon which the defendant was arrested; but instead of his being taken before the magistrate the constable accepted as a deposit the amount of a fine and a sum to cover the probable costs, and allowed the defendant to go at large. The question is, whether, in these circumstances, without anything before him but the information,—sworn to, it is true, but only upon the "information and belief" of the informant,—and the proof of the service of the summons, the magistrate had jurisdiction to issue the warrant; or, in other words, whether, after disobedience of the summons, in the absence of any positive statement in the information of a violation of the Act, the duty of examining upon oath the complainant or his wit-

nesses as to his information and the facts upon which his belief was founded and exercising his own judgment thereon before issuing the warrant was still incumbent upon the magistrate; and I think it was. There is nothing in the proceedings returned to us to shew whether he did or not, but it is asserted and not denied that he did not do so. The fact that a summons has been issued does not prevent the justice from issuing his warrant at any time before or after the time mentioned in the summons for the appearance of the accused, and in case the service of the summons has been proved, and the accused does not appear, or when it appears that the summons cannot be served, a warrant may issue, (sec. 660, sub-secs. 4 & 5 Crim. Code). It seems to me to be just as essential in a case where a summons is asked for in the first instance, that the justice should, before invoking the aid of a warrant, examine the complainant or his witnesses as to his information and the facts upon which his belief is based, as it is that he should do so where the warrant is asked for in the first instance. Otherwise a wide door might be opened to the improper exercise of the power of arrest. Here there is no absolute and positive statement in the information of a violation of the Canada Temperance Act so as to bring the case within the decision in Rex v. Hornbrook, ex parte Madden, 38 N. B. R. 358. The complainant only states that he is informed and believes that the defendant has violated the law. Informed by whom? Upon what facts or circumstances is his belief based? The answers to these questions would be matters upon which the magistrate should have exercised his judicial discretion and satisfied himself before depriving the defendant of his liberty. I think, therefore, the case comes within the three cases already mentioned, and that the magistrate had no jurisdiction to issue the warrant, and that consequently the arrest thereunder was illegal. But, while in my opinion the magistrate acted erroneously in issuing the warrant, it by no means follows that the conviction on that account is bad. The information is according to the form prescribed by the statute; the summons issued thereon was regular, was personally served and the service properly proved. On the authority of Rex v Dibblee, ex parte O'Regan the conviction is good although the defendant did not appear; and the error of the magistrate in issuing a warrant without first obtaining the proper foundation for it does not deprive him

of the jurisdiction which he already had. The warrant was at most but a collateral proceeding, and does not, in my opinion, affect the other proceedings which seem to have been commenced and continued to their conclusion with regularity in every way. By discarding the warrant and the arrest altogether, which I think we may properly do, we have a conviction and the proceedings upon which it is founded correct in every particular.

The questions raised by the third, seventh and part of the fourth objections have been considered and disposed of in the judgment in Rex v. Peck, ex parte Beal (ante p. 501), so that it is unnecessary that they should be again discussed here.

I can see nothing in the affidavits read before us to lead me to conclude that the magistrate was disqualified on the ground of either bias or interest from hearing and determining the case. There remains the eighth objection. While this has never been regarded as a ground for interference with a conviction, for the Court will not upon certiorari consider the evidence or re-try the case, I may say that if it were a ground, I think there was ample evidence to justify the conviction in this case. Herbert Doherty contributed $3; Asael G. Forsyth, $2; and Chas. E. Brewster contributed something,—he does not say how much,—and formed a pool. Brewster sent to St. John and purchased from the defendant eight quarts of Irish whisky. When the liquor came by express to Albert county, it was received by Brewster and divided amongst the three. Brewster who was the real purchaser swears it was not for his personal use; neither was it for family use within the meaning of the amendment to the Canada Temperance Act.

The order nisi to quash must be discharged.

WHITE, J.:—I agree with the conclusions arrived at by my brother Barry, but I am unable to assent to the view that after a summons has been lawfully issued and duly served upon the defendant, and the defendant fails to appear the magistrate must, before issuing a warrant, have the information sworn to. I can find nothing in the Summary Convictions Act (Part XV. Crim. Code), which, in my judgment, requires that. It is quite true that in England, under the Jervis' Acts, it is necessary in like circumstances to have the information attested by the oath of the informant, but that is because the second section of the

Jervis' Act (Summary Conviction, ch. 43, 11 & 12 Vict. Imp.), expressly so requires. We have no such provision in our Act. On the contrary, it appears to me that section 718, which deals with the circumstances under which the warrant may be issued in case of disobedience of summons requires only that there shall be proof of summons duly issued and served a reasonable time before the hearing, and failure to attend in obedience thereto, to authorise the justice to issue his warrant. This view is borne out upon comparison of Form 6, which is that of a warrant issued in the first instance,—with Form 7,—that of the warrant where summons has been disobeyed. Form 6 recites that the defendant "has this day been charged upon oath before the undersigned," &c., while in Form 7 the corresponding recital is merely that the defendant "was charged before the undersigned," &c; and this is followed by recital of the issue of the summons, the defendant's neglect to appear, and "that it has been proved upon oath that the said summons has been duly served."

LANDRY, J.:—I agree with the reasons and conclusions as contained in the judgment of my brother Barry; and while I have an opinion as to the jurisdiction of the magistrate to issue a warrant when the party has been served with a summons and has not responded, without an affidavit, as it is not necessary to give a decision on that in this case, I will not do so. As at present advised, however, I do not think the affidavit is necessary. The party being served and not appearing, and that being shewn to the magistrate, I think he is authorised in issuing the warrant.

MCKEOWN, J. (dissenting):—In this case the conviction is for an offence against Part 2 of the Canada Temperance Act, and for the reasons submitted in the case of Rex v. Peck, ex parte Beal, I think the rule to quash should be made absolute. The magistrate's return shews that an information was laid before him on the 31st day of December, 1908, against the accused O'Neill charging that he did between the 2nd day of October, 1908, and the 31st day of December, 1908, unlawfully send and ship and cause to be sent and shipped into the county of Albert a quantity of intoxicating liquor contrary to and in violation of the provisions of Part 2 of the Canada Temperance Act then in force in the said county of Albert. On the 14th day of January, 1910, ( a

year and some days afterwards) a summons was issued directed to the defendant, who resided in the city of St. John, commanding him to appear before the magistrate who took the complaint at the office of the said magistrate on Tuesday the 25th day of January then instant, at Albert in the parish of Hopewell in the said county of Albert to answer the said charge. On the return of the summons the defendant did not appear, and on notice by counsel for the prosecution a warrant was issued to compel the attendance of the accused. This warrant was backed by Robert J. Ritchie, police magistrate of the city of St. John, and the defendant was arrested thereunder on the seventh day of February, 1910. On his arrest the defendant made a deposit of $95.55, taking a receipt therefor, and was allowed his liberty. At the hearing of the case no appearance was entered for the accused, and on proof of the offence charged he was fined the sum of fifty dollars and costs which amounted to forty-eight dollars and twenty cents. No evidence was given at the hearing which would in any way account for the delay which occurred between the laying of the complaint and the issue of the summons to the defendant. In my opinion and for the reasons set out at length in my judgment in R. v. Peck, ex parte Beal, the delay is fatal to the jurisdiction of the magistrate, and the order to quash should be made absolute.

BARKER, C.J :—I concur in the judgment of the majority of the Court that the order nisi to quash should be discharged. With reference to what has been said as to issuing a warrant, I concur in the remarks of my brother White.

MCLEOD, J. (dissenting) :—I agree with MCKEOWN, J.

Conviction confirmed, and order nisi to quash discharged.

## NOVA SCOTIA.

SUPREME COURT.

FULL COURT. APRIL 29TH, 1911.

### CORBETT v. PIPES.

*Cumberland Sewers Act — Acts N. S. 1893, ch. 30 — The Marsh Act—Construction of Dyke and Aboiteau—Prescription—Lost Grant.*

An appeal by defendant from the decision of DRYSDALE, J., reported in 9 E. L. R. 127.

W. E. Roscoe, K.C., and J. L. Ralston, for the appellant.

T. S. Rogers, K.C., for the respondent.

The judgment of the Court (SIR CHARLES J. TOWNSHEND, C.J., GRAHAM, E.J., MEAGHER and RUSSELL, JJ.), was read by

GRAHAM, E.J.:—This action is brought by a Commissioner of Sewers to have a declaration that the defendant, a proprietor of marsh lands at Amherst Point, is liable to contribute for expense in respect to the construction of an aboiteau which protects his lands as well as those of others against the incursions of the tide. The rate is $181.70, less an allowance for land damages, $45.

An aboiteau is the watergate in the protecting sea-wall or dyke, rendered necessary by a creek or stream at that point which it must cross, and this gate lets the fresh water of the stream escape to the sea, but automatically prevents the salt water of the recurring tides from entering by the same gateway to flood the marsh within.

The creek is at this part called the Forrest creek.

There have been (not exactly on the same site as the present one, constructed in 1907, but performing a similar service crossing this creek), the old French aboiteau further in, the Gordon aboiteau, said to be about 100 years old, the 1850 aboiteau further seaward than any, the Forrest aboiteau (1870), further in than the latter one, and the present one within fifty feet of the Forrest aboiteau.

As each aboiteau was placed nearer the sea the dykes along each side of the creek became more or less unnecessary.

It will be necessary to refer to some provisions of the County of Cumberland Sewers Act, 1903, ch. 80, taken bodily from Rev. Stat. (5th ser.), ch. 42, there applicable to the whole province, including Cumberland county. It appears that the original Acts, ch. 7. 1760, ch. 9, 1769, contemplated the appointment by the Governor in Council, under commissions, of Commissioners of Sewers, and these commissioners had the power to construct and repair dykes and to call on the proprietors to work and to assess for the expenditure and so on.

The Acts were consolidated in 1823, ch. 13, and 1846, ch. 11, and in the different revisions of the statutes 1st, 2nd, 3rd, 4th and 5th series. But a change had very early taken place in the policy of the legislation. The proprietors affected thought that they ought to be consulted. First, in 1793, ch. 4, it was put in a negative form, that the work in certain contingencies could not be undertaken until a certain proportion of the proprietors affected consented. Then in 1846, it was put in another way, namely, a certain portion of the proprietors could select one or more of the commissioners already appointed for the county, township or place to carry on any proposed work or works, but he was to consult with the other commissioners as to the practicability of any work, and in the case of a new work he had to have the consent of a proportion of the proprietors.

Coming to ch. 80, of the Acts of 1893, applicable to the marshes in Cumberland county, sec. 2, merely provides for the appointment by the Governor in Council of commissioners for the county, township or place where the lands lie. There is a provision for a clerk for the commissioners, which with the whole Act, now repealed, is referred to in the case of Davidson v. Lawrence, 7 N. S. R. 32, sec. 3, is as follows:–

"A majority in interest of the proprietors of any marsh, swamp, or meadow lands, within the jurisdiction of such commissioners (meaning merely the area i.e., county, township, or place mentioned in the commission), may by themselves or their agents select one or more commissioners to carry on any work for reclaiming such lands; and they may add to or diminish the number of commissioners selected, or supersede any or all of them and choose others instead,

and the choice or dismissal of any commissioners for or from the management of any particular land shall be made in writing under the hands of a majority of the proprietors in interest in such land, and shall be entered in the book of record or filed by the clerk, etc."

Section 4: "The commissioners so chosen may require the proprietors of such land to furnish men, teams, tools and materials to build or repair any dykes or weirs necessary to prevent inundation to dam, flow or drain such lands, or to secure the same from brooks, rivers or the sea by aboiteaux or breakwaters, or in any way they may think proper, or for the erection of fences to protect the same, etc."

To abbreviate—In case of neglect he could employ all these at the expense of the proprietors and assess and collect from the proprietors the fair and reasonable charges and expenses.

The commissioner so chosen was to consult such other commissioners within the township, county, or place as a majority in interest of the proprietors of the lands in question should name as to the practicability of the work, or anything relating to the same.

"In case of the commencement of any new work a majority in interest of the proprietors of the land shall first agree thereto, but the commissioners shall have power to build any new dyke or aboiteau which he may consider necessary to stop or repair a break in any dyke, although such new dyke or aboiteau is not built on the line or foundation of the old dyke so broken"

Section 7: "The commissioner so chosen may assess the proprietors of such lands for any expenses incurred by him or his predecessor, whose accounts remain unsettled for dykes, weirs, drains, aboiteaux, breakwaters, or fences, including a sum not less than two nor more than three dollars per day for every commissioner, while actually employed, and a reasonable sum for the payment of the clerk and overseers, having regard to the quantity and quality of land of each proprietor, and the benefit to be by him received. And it shall be lawful to assess and collect interest on any moneys necessarily laid out and expended by the commissioners in repairing dykes or in carrying on any works or undertaking for the benefit of or in connection with any body of marsh under the charge of such commissioner, etc."

Section 8 provided, that in a case in which the rate should exceed $1.50 an acre on the whole quantity of rateable land, the commissioner, instead of assessing it himself, should notify the proprietors of such land to hold a meeting, when a majority in interest might elect assessors to go on the lands and make a valuation of the lands owned by each proprietor to be the basis of the assessments and rates to be thereafter levied and assessed on such lands, and they should assess the proprietors for the expenses incurred.

Coming to what was done in this case, in the year 1907, it is proved abundantly that the aboiteau of 1870 had to be replaced. It was structurally defective, and could not be repaired to advantage. It was undermined and was liable to go out at any time, and a new one had to be constructed. The defendant, at the adjourned initial meeting "when called upon, stated that he did not wish to advise the meeting in any way, re keeping aboiteau in repair."

Now this is the requisition which was presented to this plaintiff to act as commissioner to carry on the work:—

"The Cumberland County Sewers Act and Amendments.

"Chapter 80 of the Acts of the Assembly of Nova Scotia, 1893.

"We the undersigned, being the majority in interest of the proprietors of the following level of marsh at Amherst Point in the county of Cumberland, that is to say the level of marsh including the bodies of marsh known as letters 'A,' 'B' and 'C' and the Forrest body and the new marsh, so called, do hereby select T. Silas Corbett, of said Amherst Point, farmer, a Commissioner of Sewers in and for the said county, to carry on the work hereinafter referred to in connection with said lands. The said commissioner shall consult the following other commissioners residing at Amherst Point, aforesaid, that is to say, George W. Forrest, Isaac B. Stewart and E. Bright Pipes, as to the practicability of the work or anything relating to the same. The work to be undertaken by the said commissioner is the repair of the old aboiteau across Forrest creek, if practicable in his opinion, and if not, then the construction of a new aboiteau, and also all works incidental to such repair or construction, and the keeping of the said aboiteau so repaired or rebuilt in repair and also to secure the services of a practical man as overseer (whether a proprietor in the level or not), the said work being necessary, to protect the said level of marsh against inundation by the sea, the present aboiteau being

out of repair and unsafe and insufficient for that purpose, and to be commenced at the earliest possible date, when practicable. Witness the hands of the proprietors, April 22nd, 1907."

It will be noticed that it defines the area of marsh as including the bodies (in some of the papers they are called divisions), of marsh known as letters "A," "B" and "C" and the Forrest body and the new marsh, so called.

The majority in interest of the proprietors of that area signed that requisition, and the plaintiff assented to act and did act.

I shall have to speak of this area of marsh described in the requisition as "the area."

This part of the statute does not use the expression "level," and where that expression is used in the papers it means this area. It does not mean the whole physical level, i.e., marsh on the level of the sea, but it is the conventional level. The expression "division" is not used in this statute, and the expression "body" is hardly ever used. Of course, one sees how it crept in in amendments. The words of the statute are "any marsh, swamp or meadow lands, etc." There is not a more particular definition of area than that.

I have intimated that this plaintiff went on with the work. Inasmuch as the expense exceeded the sum of $1.50 an acre, three assessments were appointed at a meeting of the proprietors, under sec. 8, to value and assess it upon this area in lieu of the commissioner.

On the 11th of October, 1909, the assessors made up the valuation and assessment roll. The defendant is included in it for lands he owns in divisions or bodies A, C, the Forrest body and the new marsh.

The defendant is resisting the payment of the amount rated upon him in respect to this expense.

1. He cannot well contend that his land has not been benefited, but what he contends is that the lands beyond this area have been benefited, that they should have been taken into account in requisitioning a commissioner and so on, and that their contributions would have lightened the proportion which his land must bear.

It is very late in the day to be raising any such contention.

This area has for many years, by the acquiescence of the proprietors thereof and of the proprietors of remote areas, been treated as a separate area or level in connection with

this aboiteau. It is comprised within the outer lines of the holdings of the proprietors. It is the area which is substantially benefited by this aboiteau across the creek, and which has borne and was charged with the burden of its construction and upkeep. When the 1870 aboiteau was constructed, it was the proprietors of this area who were taken into account in requisitioning the commissioner, and who bore the burden of its construction. It was the proprietors of this area who bore the cost of repairs to that aboiteau made in the years 1870, 1889, 1894, 1900 and 1902. The former records of this area, previously to 1870, have been apparently lost, but it is quite clear that the proprietors of this area constructed the 1850 aboiteau and kept it up. It may be that the New Marsh, the area between the dykes now unnecessary, which was first reclaimed by the construction of the 1850 aboiteau, bore its share of the burden for the first time, but there is nothing to shew that this area with that exception did not since the first structure bear the burden of an aboiteau across the creek.

The succession of commissioners for this area has been kept up. Previously to the selection of this plaintiff in 1907, the proprietors of this area had selected, as far back as 1889, George W. Forrest and A. B. Pipes, the brother of this defendant. Before them, in 1870, Nelson Forrest and Jonathan Pipes, under whom he holds, had been selected as commissioners. The requisition to them to construct the 1870 aboiteau is in evidence. Before them Isaac L. Forrest, who built the 1850 aboiteau was commissioner.

After the defendant and his predecessors in title have for this long period regarded this area as the area benefited and charged with the construction and upkeep of an aboiteau across the mouth of this stream, he comes in very late to complain. If physical changes had taken place, rendering the remote areas more equitably liable to contribute than formerly there might be a different case. But to attempt to bring them in when they have no doubt their own special burdens to bear (one has a canal to look after), after such a long outstanding acquiscence, would, I think, seriously disturb the respective rights of these people. They could have provided other walls against the sea if the aboiteau was to be allowed to go out. There must be some delimitation, more or less arbitrary, made when it has to be determined in advance what area of lands will be benefited by a particular work, how far the benefit will extend. Of course, it is

easy in the case of mere sea walls. But once, for any other particular work it is settled, there is not the same difficulty in replacing the work or for repairs. The commissioners for the township no doubt (before there was a law requiring consent or for the selection of a particular commissioner for a particular work or area benefited by a work), settled the confines of this area. And, I think, the Court would have been slow to interfere with their judgment. Remote areas may be appreciably benefited by the aboiteau, but the areas near the aboiteau may be appreciably benefited by the dykes of the remote areas upon the same theory, namely, that if either protection was not there the water would possibly overflow the whole. I must say that without scientific witnesses it is difficult to say what area would be inundated in such a case by the tides, and I see no reason to break through the acquiescence during this long period between this area and the remote areas and the commissioner's decision in acting on the requisition. If the defendant had wished to raise such a point he should have done it at the time of the requisition and before the work was constructed, and brought it up too against the proprietors of the remote areas when it could properly be contested in some aggressive action. Inasmuch as they were not brought into this work at the beginning and into the proceedings for assessment they could not now be made liable under this legislation. There is no remedy against them, and this defendant attended meetings of the proprietors of this area and looked on. He had worked under commissioners for this aboiteau, and his predecessors in title had borne the charge of keeping up the aboiteau. He took part in arbitrating his claim under the Act, against these very commissioners for land damages.

2. The defendant raises another point rather inconsistent with the other. He contends that A, B, C and Forrest divisions or bodies are each a separate division under a commissioner with exclusive powers, and that plaintiff, although commissioner for the whole area, cannot come in there.

One asks immediately, in case of this aboiteau going out, which one of these divisions or bodies is charged with replacing it, and if one does replace it, which provision of the Act gives that division or body any recourse against the others for the proportion of expense incurred in creating the undoubted benefit they receive. Never has one of these separate bodies or divisions as such performed any work of

construction or repair upon any of the aboiteaux crossing this creek. But the proprietors of all them collectively have done so under commissioners, and in one way or the other those proprietors have borne the expense. You may rely upon human nature and say confidently that never did one of these units bear the whole expense of this work. Two rate bills of A division for expenditure for aboiteau doors in 1859, and on the lower aboiteau on Forrest creek for the year 1869, are pointed to, but no doubt, those are for its proportion of the whole expenditure and not by any means for the whole expenditure. There is an indication of those lump sum apportionments. I have gone through the books in evidence, going back in the case of some of these bodies to 1846, and the counsel, no doubt, have done so, and these rate bills are the only shadow for such a suggestion, and these are most minute accounts. That a division or body never contemplated bearing the whole charge is seen by the following offer of a bargain recorded in the minutes of a meeting of the proprietors of A division, held February 12th, 1870:—

"Resolved that the letter A division or body authorise the sewer of the said body to expend the sum of $200 to assist in repairing the new aboiteau in the Forrest creek, providing there is a good substantial job of work done as soon as practicable."

It would hardly be contended that the proprietors of the whole area could not collectively select a commissioner and construct or repair this aboiteau under this legislation and assess for and collect the cost of the same. It is only because of the supposed interference with the authority of the commissioners of the smaller divisions comprised in this area, that it is sought to resist it as if there cannot be an overlap.

I perfectly agree with the judgment of the learned Judge that the word "reclaim" extends to marsh lands that have been already dyked as well as to marsh lands undyked. Many of the provisions in the Act clearly apply to land already dyked. For a century, at least, the principal use of these provisions, passed over and over by the legislature, has been in connection with marsh land already dyked. And it would upset everything to say that "reclaim" meant the original reclaiming, which in some instances in this province was already done by the French people. I have no doubt that the construction of this aboiteau was "reclaim-

ing," and any existing bodies or divisions must admit that they could not select a commissioner if this construction was not adopted. How the smaller areas came into existence is not shewn in the evidence, but it was clearly for convenience. There may have been subdivisions by convention, because for the ordinary repairs of the season to the sea-wall, or for local work not affecting the holdings of remote proprietors, it would be inconvenient to summon all the proprietors, and from long distances. But more frequently, no doubt, the separate divisions arose from subsequent enclosures by walls beyond the existing walls, and they were not taken into the former enclosures for the local purposes. The new wall might be around a peninsula and very long, and the old one very short across the neck. Perhaps each repaired its own walls and so on by convention. I am speaking generally of the working of these Acts. I do not think it could be contended that before the day of representative Government applied to marshes the commissioners appointed by the Government then unattached could not, although they had constructed a wall on one of the shores of a creek improving the area within it, afterwards further improved that area by constructing an aboiteau that would shut out the sea altogether from a much larger area benefiting the land of both areas and assessing the proprietors of both—or there might be a weir or a long drain, which must reach an outlet with different areas of benefit, but benefiting proprietors within both areas concurrently and overlapping each other in part.

The commissioners, I think, could clearly do that. Then when, under later legislation, they first had to obtain consent of the proprietors of one half of the land, that would mean within the area of the proposed benefit. Thenceforth the consent of the proprietors of the old area as well as the new area proposed to be benefited had to be obtained. I think it was owing to a non-compliance with that provision that in another locality suits nearly failed, but did not do so because the doctrine of estoppel was applied to a separate area which was not taken into the calculation in obtaining consent when two areas were improved. Refer to Baker v. McFarlane, 8 N. S. R. 94. Then in 1846, when the proprietors were to select a commissioner or commissioners from amongst the Government appointees for the township to take charge of a "Work or works," a change in procedure was adopted. The selected commissioners were placed on the

active list. But the area had then been determined for this aboiteau. Israel L. Forrest, as commissioner, appears to have built one in 1850. Of course, in the ordinary case of walls, as I have intimated, there would be less difficulty. I do not find that any of the smaller bodies or divisions selected a commissioner for itself for a long time. Of course, the unattached commissioners charged some fees when they attended the work. I think the New Marsh has not one yet nor the Forrest Body. From 1848 to 1856, at least, one clerk was appointed for several divisions, including A, B and C, and he appears to have been appointed by two commissioners not attached to any one body, and I think the statute enabled this to be done. Of course, if a disagreement had arisen a commissioner would have to be chosen and majority rule brought in.

The statute then contemplated his selection to carry on "any work or works."

By the statute of 1846 ch. 11, sec. 1, it was provided as follows:

"From and out of which commissioners so appointed and sworn two-thirds in interest of persons owning any marsh, swamp or meadow lands within the limits of the jurisdiction of such commissioner shall and may . . select and choose one or more as may to them appear proper to act as Commissioner or Commissioners of Sewers to take charge of and carry on from time to time any work or works necessary for reclaiming any such lands in such county . . . and such two-thirds in interest shall have power from time to time to add to, diminish or supersede any such commissioner or commissioners, and to choose another or others in his or their stead and place, and such commissioner or commissioners so chosen shall have power to call upon the proprietors of such lands to furnish men, carts, teams and materials respectively for the purpose of building and repairing such dykes and weirs as may be necessary to prevent inundation, and also for damming, flowing or draining such marsh, swamp, or meadow lands, and for securing such lands from the sea, rivers or brooks by aboiteaux, breakwaters or otherwise as to him or them may seem advisable, to consult with other commissioners, and for a new work he must have the assent of two-thirds in interest in such lands.

Section 2, provides for the appointment of overseers to assist him in carrying on any such work.

Section 3 provides for summoning the proprietors of such lands.

Section 4. "Such commissioner or commissioners so appointed and chosen . . shall from time to time assess and tax the owners or possessors of such lands towards the charges and expenses incurred by them or their predecessors whose accounts may remain unsettled on said lands or any such dykes, weirs, dams, aboiteaux or breakwaters—having regard to the quantity and qaality of land of each owner or possessor and the benefit to be by him received, &c."

Of course a requisition every time a bit of work had to be done, it might be repairs, was burdensome, and the commissioner once selected remained attached, but was liable to be superseded at any moment, and to distinguish this selected commissioner from the commissioners appointed by the Government for the township, but not selected for active work he was spoken of as the "commissioner in charge" or as having the "management of any particular land," and this came into this legislation. His remuneration was a certain sum per day "while actually employed." One would suppose from the defendant's argument that the selection of a commissioner from time to time for these bodies or divisions in consequence of these words of description gave them a continuous term of office, an exclusive sovereignty within the area, with a sort of non-intromittent clause against the commissioner of a larger area, something attached to the soil. I find nothing like that in these Acts. To hold that would be giving to each one of these divisions or bodies in respect to a work like this the powers and limitations of the dog in the manger. The defendant did not in his evidence suggest that he complained that the expense was spread over four divisions. This is a lawyer's contention. Nothing could be more fragile than the tenure after selection. It was at the people's will. These Acts contemplated works outside as well as inside of the mere territorial area of a body or division. It might be a breakwater, canal, dam or weir outside.

The aboiteau in this case was not physically situate within any one of these bodies or divisions. It was an aboiteau for all of them. The area of substantial benefit over the marsh land caused by a particular work as fixed at the time determined the area of the charge and fixed the proprietors. I think that is plain. Take 1823 ch. 13, sec. 9, now repealed, selling land for the rates. "If the rates remain unsatisfied, the commissioner may cause the sheriff to sell at public auction

to the highest bidders so much of delinquent's lands so dyked drained or improved as aforesaid, as may be sufficient, etc."

I think that the provisions of this Act do not give the commissioner of the smaller bodies or divisions or their constituents any non-intromittent clause against the commissioners of this area.

Of course extreme cases may be put off one area of benefit for an aboiteau, another for a drain and so on, and in actual practice these things do not occur, and the proprietors have good sense. The usual work, walls, fixed its own area. Even if the assessment was worked out in kind as of old, majority rule as well, as the despotic commissioners, before that period would not be likely to require them to be summoned on the same day for two different bits of work. Possibly the proprietors of a body or divisions could under section 32 cut out an aboiteau which was only a benefit to and a charge on their own division, but they could not cut out this aboiteau without applying to the commissioner for this area.

We read of no actual conflict or interference taking place between the respective authorities. One who lives in cities at least soon finds that for local improvements there may be different areas overlapping and local rates taken from him in respect to both, and he would not be protected by such a description as a "board having the management of the streets," or "in charge of them" when a long sewer came along on its way to the sea.

The people understood each other. This is in evidence. Charles J. Logan, who acted as clerk for more than one division, is asked in cross-examination: "Q. In point of fact, so far as your experience as a clerk goes, you have been treating the bodies A. B. & C., the one of which you have been clerk, as distinct entities with distinct commissioners and distinct assessments? A. That is for dyke protection. "Q. For some purposes. A. Yes."

There is no evidence to the contrary.

There have been later additions to the Act, and expressions of description are used which might not be clear as to which commissioner is meant. But if the proprietors do not supersede him altogether, probably for local works like draining part of the area (s. 30), or making or repairing fences, private roads or bridges (s. 31), the commissioner already selected for the body or division is no doubt to have the preference in carrying on the work and they would have to approach that commissioner.

But in the case of a general work benefiting the whole area of a number of bodies or divisions such as a dam, an aboiteau, breakwater, weir or long drain, there is nothing as far as I can find in this Act which prevents the selection of a commissioner by the proprietors of the whole area for constructing or repairing such a work and assessing directly, the proprietors within the whole area for the expense of that work. It is a necessity. These bodies or divisions have not internal walls and the tide may, as it has done in this province swept away a much larger outer wall than that belonging to any one of them. If the defendant's contention is correct this Act would have been helpless to enable concerted action of all the proprietors of the whole area to be taken. And any one of these divisions might not wish to replace it. Something like that was suggested in the history of this very case. A small area remote from the sea might prefer for a season or two to have the sea cover it to destroy the weeds. I think that is called drowning, and to flow it for manuring purposes. But the whole area would not, and the defendant would not assent to have the aboiteau left out for any such purpose. Their holdings do not require that inroad of the sea. In this case, as I have pointed out already, there has been acquiescence on the part of the defendant and his ancestors in title for a long period, certainly since 1870, in this aboiteau being built and repaired by the commissioners of the whole area notwithstanding that the internal areas have been carrying on internal work for other purposes, and that has been the area to be summoned to the work and to be charged with its cost. I think this disposes of the question that was mentioned, namely, that there must be a majority of each body in favour of the work. These divisions or bodies do not act as units at all for this work. It is true that the costs of the construction and repairs in respect to this aboiteau have not always been apportioned in the same way. In some cases heretofore the whole has been apportioned by the assessors in lump sums among the bodies or divisions named in this requisition, and there has been a sub-division among the proprietors severally of those bodies or divisions. This was no doubt by consent or was convenient or perhaps it was done by analogy to or under section 25 which did not apply. Now it is sought, rightly as I think, and it has been done before too, to apportion the whole expenditure in the proper way, directly among the proprietors of the whole area. The defendant cannot complain that this mode bears more heavily upon him than the other

would have done. It does not. The evidence shews this. But the fact that each of the separate bodies or divisions collected the sum apportioned to it from its proprietors was a recognition of the power to construct and repair this aboiteau, and of the dominant and concurrent power over the whole benefited area, and of the charge resting thereon regardless of the internal division lines for other purposes.

3. Then it is contended that when this Act 1893, ch. 80, was repealed by Act 1908, c. 51, although the selection of the commissioner had been made, and the work started no more work could be done under it but that the aboiteau, if it could be continued at all, must be continued under the Marsh Act, R. S., 1900, ch. 66, first passed 1900, ch. 12, a different Act. This is doubly insured against. When ch. 80 Acts of 1893, was repealed, and the Marsh Act introduced into Cumberland county by Acts of 1908, ch. 51, the third section of that Act contained the most ample provision to prevent that Act from defeating, or prejudicially affecting the selection of a commissioner or his carrying on any contemplated works or improvements, and so on, or any other matter or thing whatsoever done, completed, existing or pending; and in respect to "any pending matter or thing proceedings may be continued and completed either under the Marsh Act, or under the Act hereby repealed." The word "proceedings" there means, I think the same as the word "proceedings" in the Interpretation Act, R. S., 1900, ch. 1, sec. 15, not the mere procedure of making or collecting an assessment. Therefore I am not considering the provisions of the Marsh Act which, as I said, is a later and a different Act, and I am not drawing any inference therefrom.

4. In the commissioner's accounts is a charge for wages of a man named Carter, and it is contended, although there is no proof of it, that he was an overseer. And it was contended that this man was not a proprietor, and that sec. 5 provides for the appointment of an overseer from among the proprietors. The learned trial Judge held that it was an enabling provision; that he might be employed notwithstanding he was not a proprietor. I see no reason for overruling that. It is not a mandatory provision. But section 40 enables the proprietors to choose an overseer whether a proprietor or not, and the requisition shews that this was done.

5. Then the defendant contends about an item in the plaintiff's account for interest, that it is only a "commissioner in charge" under the legislation, who may have such

an allowance. I think that this plaintiff was a commissioner in charge of the area charged with the work, and I have dealt with that view.

6. The defendant has for the first time before us raised an objection to another matter which appears in the accounts of the commissioner. He goes behind the assessment made in the case by the assessors for this purpose. In an account of $2,386.40 for the expense assessed on $52,466.17, the aggregate valuations, the plaintiff's lands being valued at $3,807.75, there is a sum of $16 to be deducted, he says, from the former sum.

It is necessary to turn to a memo. printed on page 108 of the printed case which looks like an exhibit put in evidence at the trial but it is not. It is a compilation prepared from a book put in evidence for the purpose of proving the proceedings of the commissioner, and those pages were marked. But in it are also the commissioner's or clerk's accounts of the items of the cost. No reference was made at the trial to these pages from which the person collated that exhibit, embracing the accounts of the commissioner, and no explanation was required of the plaintiff when he was on the witness stand and possibly could have explained the matter. It was proved that the expenditure assessed for was paid. Moreover, in a letter written before the trial, p. 116, the solicitor for plaintiff wrote as follows (Jan. 16th, 1910):—

"If your clients object to specific items included in the assessment, and you will let me know what, I will undertake, if they are not assessable, the rate will not be enforced to the extent represented by such items, and Mr. Corbett will, if you require, furnish any reasonable indemnity against the collection of your client's share of any such objectionable items." That would have been a fitting time to use the industry evinced since the trial. I think that these pages of that book were not put in evidence. However, it is contended that an item of $8 paid for work appears twice in the clerk's accounts by a clerical mistake. It is nothing but a clerical mistake if it is one at all. Then there were some materials left over, $5 worth and $3 worth, disposed of to a third person, which the commissioner is debited with in the book kept by this clerk, but the work is not credited with. The cost of these materials was properly included in the expense when they were procured, and in the assessment, but it is contended that the remnants having been left over should have been credited. They could

be credited in the next rate. This whole error of $16 would make a different of $1 21 in the defendant's rate. It would cost the defendant far more to have the mistake corrected by quashing the rate in any possible view of the case, and every other proprietor as well then submitting to it. The case does not come within In re Bishop's Dyke, 20 N. S. R. 263, where it was sought to include in the expense to be assessed a sum of $163.62 land damages, first to be fixed by valuators, but which had never been fixed as provided by the Act, and were therefore not the subject of a mathematical calculation. It required that judicial proceeding before the rate was made. Here the whole alleged error can be distributed over the rate of each one mathematically by the officer of this Court, anyone in fact, and no one would think of quashing a rate in such circumstances. The Court on certiorari, sec. 37, is to examine the proceedings of the commissioner and make such determination as shall be proper; no doubt giving the power to correct clerical errors. It will be necessary, no doubt, for this commissioner under sec. 7 to make a supplementary rate for costs between solicitor and client arising out of this very action, and if there are real errors he may credit the sum involved in the error to the proprietors."

But in the case of the defendant it is better to correct it at once although he is apparently forgetting that he owes a far larger sum for rates never collected from him because one commissioner moved away and one is dead.

It is not necessary for me, taking the view I do of the whole case, to deal with the point that irrespective of the statute the defendant under the circumstances is liable by prescription or otherwise, to bear his proportion of the cost. I merely mention it so that it may appear in any Court of Appeal that the point was taken before this Court.

The appeal will be dismissed and with costs and the decree corrected by reducing the sum mentioned in it by the sum of $1.21.

## NOVA SCOTIA.

SUPREME COURT.

JUNE 6TH, 1911.

### POWER v. McGILLIVRAY.

*Land—Agreement for Sale—Specific Performance—Wages—Landlord and Tenant—Tenancy at Will.*

Action claiming specific performance of contract for deed of land, and alternately for wages.

J. P. McIsaac, for plaintiff.

A. Macneil, for defendant.

RUSSELL, J.:—The plaintiff was living with his mother who was the defendant's sister, on a farm at Springfield, Antigonish, and the defendant's mother, plaintiff's grandmother, was living on a farm at South River. She was very old and growing older, and the defendant, her daughter had been earning her living in the United States, where she had employment that paid her better than it would to remain with her mother on the farm. Besides, she could not work the farm, but she was desirous that her mother should be looked after and the farm kept up, and it was thought it a good arrangement to have the plaintiff and his mother come to South River. She, that is the defendant, therefore made this proposition to plaintiff's mother with whom all the business was transacted. The terms under which plaintiff and his mother came do not seem to have been very clearly settled, and the parties are at variance for want of a definite arrangement in writing. Plaintiff says that he was to stay for three years and afterwards have a deed or money whichever he liked. In a previous interview, according to his evidence defendant had offered to give him a deed of the farm or wages (not saying whose the option should be). The plaintiff's sister reports that defendant said if plaintiff did not get a deed he would get wages. The arrangement, whatever it was, was made in 1895, and defendant went back to the States. Her mother died only seven months afterwards, but plaintiff and his

mother and sister continued to live on the place and work it without accounting to the defendant or her sister, who with her were the owners, of the farm. There were cattle, sheep and a pig on the place when the plaintiff went there, some of which seem to have died in a way most unusual in the case of cattle, "of old age," and the fences and buildings were not kept in very good condition. Plaintiff paid taxes on the place amounting to $76, but defendant says she also paid taxes. She also sent the plaintiff $80 to pay a debt he owed before he left Springfield.

Plaintiff is claiming wages for the time he worked on the farm, but it is, I think, not contradicted that he made no demand for wages until he consulted a lawyer after the place was advertised for sale by the defendant five or six years ago. It would be difficult to determine what wages, if any, he would be entitled to. If he sold his house at Springfield he got the money for it, or whatever value he had on it. Probably there was none as he left Springfield in debt. Whatever came off the South River farm while he was working it went, after his grandmother's death, to his mother, his sister and himself. He never accounted to the defendant or her sister, the owners of the South River farm for any of the proceeds. He either sold the cattle, receiving the money for them or allowed them to die of old age. I do not, in fact, see how I could make any allowance on a quantum meruit for his wages on his own shewing, seeing that he had been paying himself all along from the products (produce) of the farm and the use or sale of the stock.

The defendant of course denies the plaintiff's version of the agreement, and puts the plaintiff in the position of a mere tenant at sufferance after a period of two years from 1896, as to which she says there was an agreement that plaintiff should remain on the place with his mother, having what they could raise on the place and the use of the stock. She was willing at one time to give plaintiff the farm if he would marry a particular lady, but no such marriage took place.

The plaintiff's evidence is too vague to sustain a finding in his favour on any view of his claim which must therefore be dismissed with costs.

## NEW BRUNSWICK.

SUPREME COURT, EN BANC. NOVEMBER 18TH, 1910.

### CYR v. DEROSIER.

*Appeal from County Court—Non-jury Case—Evidence Supporting Judge's Finding—Admissibility of Evidence — Lease — Secondary Evidence where Notice to Produce Given.*

Appeal from the Madawaska County Court. Argued September sittings, 1910.

T. J. Carter, for defendant, appellant.

J. D. Phinney, K C., for plaintiff, respondent.

The judgment of the Court (BARKER, C.J., MCLEOD, WHITE and MCKEOWN, JJ.,—LANDRY and BARRY, JJ., took no part, not being present at argument) was delivered by

BARKER, C.J.:—This is an appeal from the County Court of Madawaska. The case was tried without a jury, and judgment was entered for the plaintiff DeRosier, (the respondent herein) for the full amount of his claim. So far as the facts in the case are concerned, the Judge found them in the plaintiff's favour. As the evidence given on the part of the plaintiff warranted the Judge's conclusion, and as he gave credit to it in preference to that given for the defendant, there is no reason for disturbing the judgment on that ground. The only other point in the case arises over the admission of some evidence, as to which I think the Judge's ruling was quite correct. The action is in form one for use and occupation. The premises were rented by the plaintiff to the defendant under a written agreement executed in duplicate, each party having a copy. It was admitted by counsel on the trial that the plaintiff's copy of the lease had been destroyed in the fire when the Courthouse was burned, and that due notice to produce the defendant's copy had been given. This copy was on the trial called for under the notice, and in reply the defendant's counsel replied, "We are not producing it." The plaintiff then went on and gave secondary evidence of the contents

of the lease. On his cross-examination, after stating that the lease was in writing but that he did not know whether it was under seal or not, Mr. Carter, the defendant's counsel, produced his copy of the lease, which a few moments before he had refused to produce under the notice, and said, "Is that the lease?" A. "Yes." Q. "Is it under seal?" A. "I don't know." Mr. Carter: "I offer it for identification" The Court: "Is this your counterpart of the lease?" Mr. Carter: "Yes." It was then marked, Mr. Carter saying that he intended to offer it in evidence in his own case. What took place subsequently when the defendant was giving evidence for the defence is thus reported in the minutes. Mr. Carter, who was examining the defendant, said: "Tell the Court the terms of the lease" (Objected to and ruled out as being secondary evidence of the contents of a written document). Mr. Carter: "The plaintiff gave secondary evidence of the contents of the lease." The Court: "That was because you refused to produce the duplicate copy in your possession." Mr. Carter: "I have the right and I now tender the evidence of the witness to shew that he took the place with the option of surrendering it at the end of any month." The Court: "You should have produced the lease at the proper time. You are paying the penalty which law imposes on you for your non-production. In any case it would not help you, as you do not rely on a notice to quit. Refused." Mr. Carter: "Then I propose to prove and I offer in evidence a duplicate agreement between the parties as to the rent of the demised premises in question." This was also rejected.

I think the Judge of the County Court was quite right. The counterpart of the lease was better evidence of the lease than any mere copy of the original and certainly better than mere recollection of its contents: Munn v. Godbold, 3 Bing. 292. If the defendant with the duplicate original in his possession refused to produce it and compelled the plaintiff to give secondary evidence of the contents, it would seem to be giving the defendant great advantages if he could afterwards produce the document if it suited his purpose to do so. The rule as I have always understood it is laid down in Doe dem. Thompson v. Hodgson, 12 A. & E 135, where Lord Denman, C J., gave the considered judgment of the Court as follows, (p. 138): "In this case the question was, whether a party, who, at the trial, had refused to produce a writing which he possessed and thereby had drawn the other party

to give secondary evidence of the contents could afterwards produce it. I thought, at the trial, that he could not; considering it to be the rule that, where he had the opportunity, and had declined to produce the writing he could not afterwards bring forward its contents. Our opinion is, that that is the rule of practice; and that, when that refusal has taken place the party who had refused to produce the writing could not afterwards be at liberty to give it in evidence."

That is exactly what Mr. Carter said he intended to do, and what he wished to do. In Collins v. Gashon, 2 F. & F. 47, Byles, J., in a similar case said: "I cannot now permit the letter to be read. You made your election in the first instance when you refused to produce it, and I hold that the time for its production has passed. You have no right to use it for any purpose."

It seems clear that if the original cannot be produced or used after its production has been refused, evidence of its contents could not.

This appeal must be dismissed with costs.