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APRIL 22ND, 1907.

C.A.

OWEN v. MERCIER.

Deed—Conveyance of Land—Breach of Condition—Unauthorized Insertion of Condition after Execution and Delivery of Deed—Deed Operative to Pass Property notwithstanding Defective Description—Invalidity of Condition.

Appeal by defendants from judgment of BOYD, C., 12 O. L. R. 529, 8 O. W. R. 151.

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

W. E. Middleton, for defendants.

C. A. Moss, for plaintiff.

OSLER, J.A.:—The action is brought to recover possession of lot No. 16 in the 4th concession north of the Kaministiquia river, in the township of Neebing. Plaintiff relies upon the breach of a condition in the deed by which he conveyed the land to the defendants, or those under whom they claim.

The material facts are few, and may be very briefly stated.

The plaintiff agreed to sell the property to one Tonkin for $300, subject to a mortgage for $250.

On 19th February, 1904, a conveyance thereof was formally and completely signed, sealed, and delivered by plaintiff, in which, at Tonkin's request, the name of one Martin Booth was inserted as that of the purchaser, and plaintiff sent it to the purchaser's agent for registration. The purchase money had not been paid in full, but plaintiff was making no difficulty about that. The registrar declined to

record the deed, on the ground that the description of the property was defective, there being a range of concessions on each side of the Kaministiquia river, and the description not stating on which side of the river the concession mentioned in it was situate. The deed was, therefore, returned to plaintiff in order that the description might be rectified by writing in the words "north of the Kaministiquia river" after the words "4th concession," and this was done. While, however, the deed was in the plaintiff's possession for this purpose, he became aware, or thought he had reason to suspect, that it was the intention of the purchaser, or of those for whom he held or to whom he was about to convey the property, to build a house upon it which was to be used for the purposes of a house of ill-fame, and he inserted at the end of the deed a condition that in that event the whole of the land should revert to the vendor, his heirs or assigns, with all improvements thereon. Thus altered, he returned the deed to the purchaser, who, seeing that the description had been corrected, but in ignorance that any other alteration had been made, caused it to be registered.

The defendants are in possession under the deed, the purchase money has been paid, the covering mortgage paid off and assigned, and valuable improvements made upon the land.

It is unnecessary to notice at length the subsequent dealings with the property, as they do not affect plaintiff's rights, if he is entitled to rely upon the condition.

We are unable to adopt the view that, so far as the conveyance of and title to the land was concerned, the transaction between the plaintiff and his vendee had not been completed when the deed was sent back to him for correction. Having been regularly signed, sealed, and delivered, the deed had become, as the plaintiff himself admits, the property of the purchaser, and, as he also admits, he had no authority whatever to make any change in it beyond correcting the description for the purposes of registration. He admits, too, that he did not call the attention of the purchaser to the other alteration, and there seems no reason to doubt that the latter was ignorant that it had been made when he sent the deed to the registry office. It is clear also that, whatever difficulty the omission in the description may have given rise to as regards its registration, the conveyance was operative to pass the property, the fault in the description merely rendering

it equivocal and causing a latent ambiguity which might be rebutted and removed by extrinsic evidence: Miller v. Travers, 8 Bing. 244, 247; Kean v. Drope, 35 U. C. R. 415. And as regards the alterations, the first, the correction of the description, would appear to be harmless, inasmuch as it was made with the consent of the parties to the instrument and to carry out their intention at the time of its execution: Norton on Deeds (1906), pp. 33, 34, and cases there cited; 2 Cyc. 156, 157; 2 Am. & Eng. Encyc. of Law, 2nd ed., p. 205. And plaintiff could derive no right under the second, even if in form creating a valid condition, because made without consent after the execution and delivery of the deed: Norton on Deeds, p. 31. And, even if the effect of the alterations, or one of them, was to destroy the covenants in the deed, yet they cannot operate to reconvey or take away the estate which had once passed by it or to prevent it from being used to shew its operation in its unaltered condition: Hagar v. O'Neill, 20 A. R. 198, 216, and cases there cited.

There is no question of the deed having been procured by fraud or fraudulent representations. The defendants are in possession; the plaintiff was bound to prove a better title; and this he has entirely failed to do. The appeal should therefore be allowed and the action dismissed with costs throughout.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

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

MEREDITH, C.J. MAY 13TH, 1907.

WEEKLY COURT.

RE MOYER.

Will—Construction—Pecuniary Legacies—Specific Bequests—Identification of Moneys—Recourse to General Personal Estate.

Motion under Rule 938 for order declaring the construction of the will of Joseph H. Moyer, dated 14th February, 1898.

E. W. Boyd, for executors.

M. J. McCarron, St. Catharines, for James Moyer and the husband and children of Sarah Fellman.

J. A. Keyes, St. Catharines, for Catharine Moyer individually, and as administratrix of Deborah Moyer.

W. Davidson, for Orval Moyer and Rebecca Moyer.

F. W. Harcourt, for Roy Stauffer and Norah Stauffer.

MEREDITH, C.J.:—The testator by his will appointed executors, whom he directed to pay and discharge all his just debts, funeral and testamentary expenses. After this direction the will contains a bequest to the testator's wife, Catharine Moyer, in these words: "Second. I will, devise, and bequeath to my beloved wife, Catharine Moyer, all my personal property of every nature and kind soever, consisting of notes, bank accounts, lumber, wheat, and all other personal effects, to have and to hold the same to her own use and benefit forever."

He next devised to his son James the homestead farm, "upon the condition that he pays therefor the sum of $6,000," which sum he directed to be paid as follows: $1,500 in one year after his death, $1,000 a year for the next two years thereafter, and the residue of $2,500 at the death of his wife, with interest on the $2,500 at the rate of 4 per cent. per annum, payable annually, the interest to be paid to his executors for the benefit and use of his widow, and if the interest, with the interest which he by a subsequent provision of his will directed to be paid by his daughter Sarah Fellman, should prove insufficient for the support and maintenance of his widow, he directed that his son James should pay so much of the principal as with the interest would be sufficient to support and maintain her. He also provided that his son James should allow and permit his widow to use, occupy, and enjoy the house then occupied by her, with the grapery and garden attached to it, and that his son James should also furnish his widow with certain necessaries and conveniences for her use.

He then devised to his daughter Sarah Fellman the farm he had purchased from Delos W. Spence, provided she or her assigns should pay to his executors therefor $4,000, as follows: $1,000 within one year after his decease, $750 annually for the next two years, and the residue with interest at the rate of 4 per cent. per annum on or before the death of his wife, and he directed that in the event of the interest not

being sufficient to support his wife, his wife was "to ask" his executors to collect a portion of the principal to support and maintain her from his daughter Sarah as well as from his son James.

Then follow bequests of 4 pecuniary legacies, one of $950 to his grandson Orval Moyer, one of $600 to his grandson Roy Stauffer, one of $600 to his granddaughter Norah Stauffer, and one of $50 to Rebecca, widow of Noah Moyer; the first 3 to be paid to the respective legatees, if then of age, upon the death of the testator's widow.

He then bequeathed to his daughter Sarah Fellman, James Moyer, and Deborah Moyer, the proceeds of the sale of his two farms devised to James and Sarah, "whether purchased by Sarah Fellman and James Moyer or other parties, share and share alike," after deducting out of the shares of each of them certain specified sums.

Then follow a provision that, in the event of either his son James or his daughter Sarah, or both of them, refusing to accept the farms "at the prices specified by" the testator, the executors should dispose of them and divide the proceeds as he had directed with regard to the moneys to be paid by James and Sarah, and a declaration that the bequest to his widow did not include "the proceeds of the sales" of the farms.

James Moyer accepted the devise of the homestead, but Sarah Fellman refused to accept the devise to her of the Spence farm, which has been sold under the direction of the will.

The testator was not possessed of any real estate other than the homestead and the Spence farm.

The question raised by the motion is as to the source, if any, from which the pecuniary legacies are to be paid.

It is argued upon the one side that the bequest of the personal property to the widow is specific, and that the bequest of the moneys payable by James Moyer and of the proceeds of the sale of the Spence farm is also specific, and that there is, therefore, no fund to which the pecuniary legatees are entitled to resort for payment of their legacies, and on the other side it is contended the the legacies referred to are not specific, and that the pecuniary legacies are payable out of the general personal estate, which it is contended consists of the personalty bequeathed to the widow and the money

payable by James and the proceeds of the sale of the Spence farm.

The contention that the bequests of the moneys payable by James Moyer and of the proceeds of the sale of the Spence farm are specific, is, in my opinion, well founded.

The rule applicable is thus stated in Roper on Legacies, p. 200: "If a testator direct his freehold or leasehold estates to be sold, and disposes of the proceeds in such a form as to evince an intention to bequeath them specifically, the testamentary dispositions will be specific, the money is sufficiently identified and severed from his other property, and, since he has sufficiently marked his intent to distribute the identical proceeds, the bequests are accompanied with all the requisites of specific legacies."

An instance of the recognition and application of this rule is to be found in Page v. Leapingwell, 18 Ves. 463. . . .

The gift of the $600 payable by James Moyer and the proceeds of the sale of the Spence farm is a specific legacy within the meaning of this rule, the moneys are bequeathed specifically, they are identified and severed from the other property of the testator, and the intent to distribute the identical moneys is clear.

In In re Ovey, Broadbent v. Barrow, 20 Ch. D. 676, the Court of Appeal had to consider what is necessary to constitute a specific legacy. Without attempting to give an exhaustive definition of a specific legacy, the Master of the Rolls (Jessel) indicated that, speaking generally, it is necessary to make a legacy specific, that the subject of it be a part of the testator's property, a part emphatically as distinguished from the whole, a severed or distinguished part, and not the whole in the meaning of being the totality of the testator's property, or the totality of the general residue of his property after having given legacies out of it, and Lindley, L.J., adopted as a working though not an exhaustive definition, of a specific legacy, that it is "a bequest of a specified part of the testator's personal estate which is so distinguished:" p. 684. The case was taken to the House of Lords, and is reported, sub nom. Robertson v. Broadbent, 8 App. Cas. 812, and there the Lord Chancellor (Selborne) said that the principle of the exemption of personal estate specifically bequeathed from being applied in payment of pecuniary legacies is that it is necessary to give effect to the intention apparent by the gift, and, referring to the power of

a testator, as against all persons taking benefit under his will, to release a particular chattel forming part of his personal property from liability for his debts, said: "The same principle applies to everything which a testator identifying it by a sufficient description and manifesting an intention that it should be enjoyed or taken in the state and condition indicated by that description, separates in favour of a particular legatee from the general mass of his personal estate the fund out of which pecuniary legacies are in the ordinary course payable:" p. 815.

Speaking of this statement, Lord Blackburn said: "I do not know if it were necessary to give a definition of a specific legacy that any would come nearer to my idea than what has just been said by the Lord Chancellor in this case:" p. 820.

The legacy in question in this case, in my opinion, comes clearly within this definition, and is therefore a specific legacy.

The same case determines that such a bequest as that to the testator's widow of his personal estate is not specific.

It follows, therefore, that the pecuniary legatees are entitled to have recourse to the general personal estate bequeathed to the widow, but not to the fund bequeathed to Sarah Fellman, James Moyer, and Deborah Moyer, for the payment of their legacies.

I have no doubt that the meaning I am compelled to give to the language which the testator has used to express his testamentary intentions will defeat his real intention, and I should have been glad, therefore, to have found in the will something which would enable me to hold that that intention had been expressed, but I have found nothing.

There must, therefore, be judgment declaring the true construction of the will to be in accordance with the opinion I have expressed, and the costs of all parties must be paid out of the general personal estate bequeathed to the widow.

BOYD, C. MAY 13TH, 1907.

TRIAL.

BICKELL v. WOODLEY.

Way—Private Way—Trespass—Boundary—User — Evidence —Costs.

Action to recover possession of a strip of land in the town of Dundas and to restrain defendant from trespassing

thereon and for damages. Counterclaim to establish a right of way, etc.

J. W. Lawrason, Dundas, for plaintiffs.

A. R. Wardell, Dundas, for defendant.

BOYD, C.:—There appears to be but little accurate evidence of details . . . . I think it is well proved that double gates were placed on the 12 or 14 feet in question, upon Matilda street, towards the end of 1894. This was the first time that any opening for entrance upon the property was made at that point. Before that time there had been gates for the use of the brick cottage on the piece of land sold (out of the larger block) to Sutherland in August, 1894. That appears to be the obvious reason of the change, not to afford means of access to the small wooden cottage now owned by defendant, but for convenient or necessary access to the main building, the brick cottage, now owned by plaintiffs. Up to the end of 1894 there had been a fence where the double gates now are, and the occupants of the wooden cottage made use of a small wicket gate to get to the street from the back porch door, while they get in coal or wood either by throwing it over the fence or by using a "chute" (or spout) which Mrs. Graham says was on the street at the front of the wooden cottage. . . .

The only access to the site of the alleged lane from the street began in 1894, and the critical question is, what use was made of this 12 or 14 feet down to the time the wooden cottage was conveyed in April, 1899, to the person under whom defendant claims. . . .

I take it that the place was used as a yard, and that wood and coal were taken into it through the gates intermittently with horse and rig. But there is no evidence of any defined driveway or lane, no beaten road, nothing of a visible or continuous nature to indicate any apparent right.

It is not clear whether Armes's occupation ended in 1893 or 1899, but, even if extending to the later date, it falls short of shewing a right of way enjoyed with or appurtenant to the wooden cottage. There is other evidence . . . to shew that at the time of the purchase by his son (through whom defendant claims) it was supposed that the line bounding the purchase would come some inches into the porch, and the son said he would move the porch, but was prevented from doing so by illness, and he was told at that time that

the 12 or 14 feet were reserved for the use of the brick cottage. This explanation of the situation appears to me to accord better with all the other circumstances than the claim to have the land open to joint user by both tenants.

I find that the true boundary will give two feet more land to defendant than was supposed at the date of purchase, and thereby access will be afforded from the back porch to the wicket gate attached to the wooden cottage, and as for wood and coal, that can be delivered in the same way as was done before the erection of these double gates in 1894.

Success is divided; the claim as to right of way fails, but defendant is entitled to a larger strip of land along the porch than was conceded by plaintiff. The boundary should be defined as according to the line laid down in Mr. Fairchild's plan, and neither party should get costs.

The question of law I do not consider at length, but I have grave doubts whether any right of user over the strip of land would, in the circumstances found, pass to the owner of the wooden cottage either by implication or under the Conveyancing Act, R. S. O. 1897 ch. 119, sec. 12; Roe v. Siddons, 22 Q. B. D. 237; Watts v. Kelson, L. R. 6 Ch. 173.

MAY 13TH, 1907.

DIVISIONAL COURT.

MARKLE v. SIMPSON BRICK CO.

Negligence—Master and Servant—Injury to and Death of Servant—Action by Widow for Damages—Findings of Jury—Accident—Cause of.

Appeal by plaintiff from judgment of RIDDELL, J., 9 O. W. R. 436.

M. J. O'Reilly, Hamilton, for plaintiff.

G. Lynch-Staunton, K.C., and N. Somerville, for defendants.

THE COURT (MEREDITH, C.J., CLUTE, J., MABEE, J.), dismissed the appeal with costs.

MAY 13TH, 1907.

C.A.

RE KAY AND WHITE SILVER CO.

Land Titles Act—Registration of Cautions—Claims for Compensation—Bona Fides—Terminating Cautions.

Appeal by J. Wilbur Kay from order of MABEE, J., 9 O. W. R. 712.

W. H. Blake, K.C., for appellant.

J. Shilton, for the White Silver Co.

THE COURT (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A.), dismissed the appeal with costs.

MAY 13TH, 1907.

C.A.

STILL v. HASTINGS.

Malicious Prosecution — Want of Reasonable and Probable Cause—Functions of Judge and Jury—Nonsuit—Setting Aside—New Trial.

Appeal by defendant from order of Divisional Court, 9 O. W. R. 121, 13 O. L. R. 322, setting aside nonsuit and directing a new trial.

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

D. O'Connell, Peterborough, for plaintiff.

THE COURT (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), dismissed the appeal with costs.

MORSON, JUN. CO. C.J. MAY 14TH, 1907.

10TH DIVISION COURT, YORK.

REX v. DEVINS.

Sunday—Lord's Day Act—Restaurant-keeper — Supplying Food—Candies and Oranges not Eaten on Premises—Conviction—Appeal.

Appeal by John Devins from a conviction made by one of the police magistrates for the city of Toronto under the old Lord's Day Act, C. S. U. C. 1859 ch. 104, sec. 1, but which, so far as the point involved in this appeal is concerned, differs in no material way from the new Lord's Day Act, 6 Edw. VII. ch. 27, which came into force on 1st March, 1907. Section 1 enacts as follows: "It is not lawful for any merchant, tradesman, artificer, mechanic, workman, labourer, or any other person whatsoever, on the Lord's day, to sell or publicly shew forth or expose or offer for sale, or to purchase, any goods, chattels, or other personal property or any real estate whatsoever, or to do or exercise any worldly labour, business, or work of his ordinary calling (conveying travellers or His Majesty's mails by land or by water, selling drugs and medicines, and other works of necessity and works of charity only excepted.)"

The appeal was taken under sec. 1 of ch. 10 of 4 & 5 Edw. VII., which amended the Criminal Code, 1892, by directing that the appeal, in cases where a fine and not imprisonment was imposed, should be to the Division Court of the division of the county in which the cause of the information or complaint arose, instead of to the Court of General Sessions of the Peace, as formerly.

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

W. Johnston, for the informant.

MORSON, JUN. CO. C.J.:—The information was laid by Inspector Archibald, of the city morality department, against the appellant as a shop-keeper, and not as a restaurant-keeper, but, at the request of the inspector and on the consent of the appellant, the conviction was made against him as a restaurant-keeper. This was for the purpose of a test case to determine whether the selling of candies and oranges by a

restaurant-keeper on the Lord's day is part of his ordinary calling; if it is, there is no offence under the Lord's Day Act—a restaurant coming within the exception and admittedly a work of necessity.

The conviction is as follows: "That John Devins on the 7th April, 1907, at the city of Toronto, in the county of York, being on the said day a restaurant-keeper, did contrary to law do and exercise worldly labour, business, and work of his ordinary calling as such restaurant-keeper, selling candies and oranges, the said worldly labour, business, and work not being conveying travellers or His Majesty's mail by land or water, selling drugs and medicines, nor other work of necessity or work of charity, contrary to the form of the statute in such case made and provided."

The facts shortly are as follows:—

The appellant is a licensed restaurant-keeper, carrying on business on week days and Sundays at the Sunnyside crossing in the city of Toronto, where he serves, amongst other things, ham and eggs, tea, coffee, sandwiches, and cakes, for light meals, and heavier meals if desired. Some guests eat their meals at the tables, others take them away. The offence for which he was convicted was selling candies and oranges on the Lord's day to several guests who did not eat them in the restaurant.

The appellant now appeals from the conviction, on the ground that the selling was part of his ordinary business of a restaurant-keeper, and therefore no offence under the Act.

It is to be noticed that the appellant in his evidence said he did sell candies and oranges as part of his ordinary business, and was not contradicted. The only question then for my decision is, whether the sale of the candies and oranges by the appellant was in the exercise of his ordinary calling of a restaurant-keeper—and in deciding this, I am deciding the point I was asked to decide as a test case, applicable to all restaurants and eating houses.

It is quite clear, if the appellant kept a candy shop and not a restaurant, the selling of the candies on the Lord's day would be an offence under the Act, a candy shop not being, like a restaurant, a work of necessity, and therefore not exempt.

It appears from the uncontradicted evidence that the appellant was a bona fide restaurant-keeper, and sold, amongst other things, candies and oranges.

In Regina v. Albertie, 3 Can. Crim. Cas. 356, 20 C. L. T. Occ. N. 123, it was decided by the late Judge McDougall that ice cream was a food, and the sale of it on Sunday by a restaurant-keeper was not an offence under the Act.

Judge Morgan also decided in Rex v. Meyers (unreported) that candies were a food, and the sale of them on Sundays by the restaurant-keeper was part of his ordinary calling, and was not an offence. I agree with both these decisions. It has not been proved that the appellant in this case kept a candy shop, as contended by the respondent, and I must therefore treat him as a restaurant-keeper only, who keeps for sale to his customers, amongst other things, candies and oranges with which to supply their various wants, and it must be the customer and not the appellant who decides what those wants are.

The kind of food each customer may want depends largely on his tastes, his appetite, or perhaps the length of his purse. This being so, and in the absence of any statutory Lord's day bill of fare fixing what kinds of food shall be eaten on the Lord's day, it is surely competent for the customer to choose what he may eat. He may prefer every and all kinds of food the restaurant provides if his appetite so prompts, or only some of them. He may prefer ice cream, as in the Albertie case, or candies, as in the Meyers case. I do not think he is bound to sit down at a table and eat what we ordinarily understand by a meal, light or heavy. He may, I think, instead of a meal, be allowed to purchase some light food, such as ice cream, oranges, or candies, and take them away if he pleases. In the Meyers case Judge Morgan held that candies could be eaten on or off the premises. I do not think it makes any difference in principle that the appellant knew he was selling the candies or oranges for the purpose of being taken away; it cannot change his position of a restaurant-keeper so long as the restaurant is a bona fide one. The respondent admitted on the argument that it would not be an offence if it was ham and eggs the appellant sold, if eaten on the premises, but I fail to see any distinction in principle between ham and eggs and candies and oranges. They are all sold as food, and that candies and oranges are food is undoubted. The late Judge McDougall said in the Albertie case, what is applicable here: "Is he (the restaurant-keeper) to be excused from the penalty if he furnishes to one customer a cut from a hot joint, some vegetables, and a

cup of tea and coffee, but is liable to the penalty should he supply to another customer a dish of ice cream and a glass of water or a biscuit and a glass of milk? If it is lawful for an inn-keeper or an eating-house keeper to supply meals on a Sunday, is he bound to catechise his customers and satisfy himself before serving them that they are hungry and need food to refresh them, or must he refuse them any trifling nourishment short of a full-course dinner?"

The case of Rex v. Sabine, decided by Judge Winchester, and relied on by the respondent, is easily distinguishable. The appellant Sabine was fined for selling ice cream soda on Sunday, but contended that in so doing he was within the exemption, being a restaurant-keeper. He had, it is true, a restaurant license, but the learned Judge held, on the evidence, that he was a candy shop-keeper and not a bona fide restaurant-keeper, having obtained the license only as a blind to enable him to sell ice cream and ice cream soda on Sundays, and therefore properly dismissed his appeal. The learned Judge said in his judgment: "In the present case I am satisfied that the defendant was not strictly and exclusively carrying on the business of a victualler, but, on the other hand, he was carrying on the business of a candy and ice cream store; that he obtained the victualling house license in order to enable him to sell ice cream soda and ice cream on Sundays during the summer weather." He has not decided that a bona fide restaurant-keeper cannot sell ice cream soda on Sundays.

It was also contended by the respondent that because the candies and oranges were not eaten on the appellant's premises, this made the premises a shop, and therefore the selling of them was an offence, a candy-shop not being, as I have already said, exempt under the Act. I cannot give effect to this contention. To hold that a restaurant is only a place where, according to the common idea, meals alone are served from a bill of fare to be eaten on the premises at tables or counters, would, in my opinion, be too narrow a definition of the word "restaurant" or "eating house." I prefer to hold, in the light of modern progress and requirements, that it is a place where, in addition to such foods as are ordinarily sold, there is also sold ice cream, ice cream soda, candies, oranges, and other things of a like nature, to be eaten either on or off the premises. What difference does it make if they are eaten off the premises? To contend, as the respondent does, that it is no offence if eaten on the premises, but if

eaten off them, it changes the restaurant into a shop and is an offence, seems to me an unsound contention. The offence against the Act is surely in the sale, and not in the eating. It is the restaurant-keeper who offends in selling contrary to the Act, and not the customer in eating.

I can therefore come to no other conclusion, under all the circumstances, than that candies and oranges may be sold on the Lord's day by a bona fide restaurant-keeper as part of his ordinary business or calling, without any penalty, under either the old or new Lord's Day Act, and that the appellant in this case did not commit any offence. In so concluding, I have not lost sight, I trust, of the necessity for the due and proper observance of the Lord's day, and I do not think my conclusion will in any way interfere with it. I agree with what the late Lord Kenyon, C.J., said in Rex v. Younger, 5 T. R. 449: "I am for the observation of the Sabbath but not for a pharisaical observation of it."

The conviction will therefore be quashed, but, this being a test case, without costs.

CARTWRIGHT, MASTER. MAY 15TH, 1907.

CHAMBERS.

KINGSWELL v. McKNIGHT.

Judgment Debtor—Examination of—Second Examination—Application for—Rule 900.

Motion under Rule 900 by plaintiff (judgment creditor) for a second examination of defendant as a judgment debtor.

Britton Osler, for plaintiff.

W. J. Elliott, for defendant.

THE MASTER:—The application is supported only by an affidavit of plaintiff's solicitor that he has been informed by his client and verily believes that "an agreement exists whereby the said defendant is entitled to an interest in a claim known as the 'Nugget Claim.'" The defendant was examined as to this on 11th March last on plaintiff's motion for a receiver. After judgment in the action he was ex-

amined as a judgment debtor on 1st May instant, when this question was again gone into as fully as could be done. On both occasions defendant positively denied having any interest in this or any other property of any kind in this province.

On the authority of Watson's Case, 15 P. R. 427, 16 P. R. 55, I think the motion cannot succeed. There the applicant gave specific reasons for making the motion, but the order of the Master in Chambers for the further examination was reversed by the Chancellor with costs. The present case is not so strong, and there does not appear any reason for supposing that a new examination will be more successful than that taken two weeks ago.

The motion will, therefore, be dismissed with costs to be set off against plaintiff's judgment.

I have not found any case in which a second, not to say a third, examination has been granted under the Rule in question.

RIDDELL, J. MAY 15TH, 1907.

CHAMBERS.

RE REDMAN.

Devolution of Estates Act—Sale of Land by Administrators—Consent of Official Guardian—Sale Free from Dower—Widow a Lunatic—Necessity for Order—Terms—Payment into Court for Benefit of Widow—Costs.

Application by the administrators of the estate of a deceased person for an order enabling them to convey lands of the deceased free from the dower of the widow.

S. H. Bradford, for the applicants.

F. W. Harcourt, for the widow and her child.

RIDDELL, J.:—The decedent died on 16th December, 1906, intestate, leaving him surviving his widow and one child, 16 years of age. The widow has been for several years in the Mimico asylum, and is insane. Letters of administration have been taken out, and the administrators

are desirous of selling the real estate of the deceased. The official guardian and inspector of prisons and public charities agree that such a sale is proper. The order should be made as asked under the provisions of the Devolution of Estates Act, R. S. O. 1897 ch. 127, sec. 11. The widow is unable to elect under sec. 4 (2). The whole of the purchase money will be paid into Court, and the income of one-third applied for the benefit of the widow until her death or recovery or until further order. It was necessary to come to the Court for an order such as is now directed, sec. 16, as amended by 6 Edw. VII. ch. 23, sec. 3, not enabling the administrators to sell free from dower. The costs, therefore, will be paid out of the estate; but the widow's share should not bear any portion of these costs, as the necessity arose from no act or default of hers.

MAY 15TH, 1907.

DIVISIONAL COURT.

VEZINA v. WILL H. NEWSOME CO.

Foreign Judgment—Judgment Recovered in Circuit Court of Quebec against Company Domiciled in Ontario—Want of Jurisdiction—Nullity—22 Vict. ch. 5, sec. 58 (C.)—Repeal by Subsequent Legislation—Rules of International Law.

Appeal by defendants from order of senior Judge of County Court of York, upon a motion by plaintiff for summary judgment under Rule 603, allowing judgment to be entered for the amount sued for.

The action was brought on a judgment recovered by plaintiff against defendants on 4th October, 1906, in the Circuit Court of the district of Quebec, in the province of Quebec.

A. Cohen, for defendants.

W. E. Raney, for plaintiff.

The judgment of the Court (MEREDITH, C.J., MAGEE, J., MABEE, J.), was delivered by

MEREDITH, C.J.:—According to the affidavit of the president of the defendant company, filed upon the motion for judgment, the company, at the time the Quebec action was begun, had no office or agent in the province of Quebec, the company having, as the affidavit states, "sold out its Quebec business on the 1st day of July, 1906."

The defendant company were incorporated under the Ontario Joint Stock Companies Letters Patent Act, and their head office was and is at Toronto.

In the exemplification of the Quebec judgment the company are described as a body corporate and politic having their head office in Toronto, Ontario, and also a business office in Montreal for the province of Quebec, and the judgment is a default judgment for want of appearance.

Granting that the original cause of action arose in the province of Quebec, the question for decision is whether, assuming the statements in the affidavit of the president of the company to be true—as they must be presumed to be for the purpose of the motion or judgment—is the judgment of the Quebec Court one which should be recognized by the Courts of this province as a judgment binding on defendants?

It was conceded by counsel for plaintiff, and there is no doubt, that, unless jurisdiction was conferred upon the Quebec Court by 22 Vict. ch. 5, sec. 58, and the provisions of that section are still in force, the judgment sued on is in this province a nullity.

The general rule of international jurisprudence applicable is stated by Earl Selborne in delivering the judgment of the Judicial Committee of the Privy Council in Sirdar Gurdyal v. Rajah of Faridkote, [1894] A. C. 670, 683, 684, to be that "the plaintiff must sue in the Court to which the defendant is subject at the time of the suit (actor sequitur forum rei.)" . . .

Court v. Scott, 32 C. P. 148, was relied upon by counsel for plaintiff as taking the case at bar out of the general rule, and giving jurisdiction to the Circuit Court to pronounce a judgment against the appellants which they, though domiciled in this province, were bound to obey, and on the other hand it was contended by counsel for the defendants that the effect of subsequent legislation has been to repeal 22 Vict. ch. 5, sec. 58, upon which Court v. Scott was based, as far, at all events, as it affected persons resident in On-

tario, and that Court v. Scott is therefore no longer applicable.

The contention of defendant's counsel that Court v. Scott is no longer applicable is, in my opinion, well founded, if the hypothesis on which that contention is based—that 22 Vict. ch. 5, sec. 58, is no longer in force—is also well founded.

As I understand the judgment in that case, it is determined that the effect of sec. 129 of the British North America Act was to continue in force both as to Ontario and Quebec the provisions of 22 Vict. ch. 5, sec. 58, which were subsequently, with some unimportant verbal changes, incorporated in the Consolidated Statutes of Quebec as sec. 63 of ch. 83, and that therefore persons in Ontario who might under its provisions be served with the writ of summons were under an obligation to submit to the jurisdiction created by these enactments in the Quebec Courts, and were bound to obey judgments obtained against them there in the manner thereby authorized.

It is necessary, and it may be as well at this point, to refer to 23 Vict. ch. 24; by it provision was made that in an action, in either section of the province of Canada, brought on a judgment or decree obtained in the other section, where service of the process was personal, no defence that might have been set up to the original suit could be pleaded (sec. 2), and that where the service was not personal and no defence was made, any defence that might have been set up to the original suit could be made to the action on the judgment or decree (sec. 4), and by sec. 1, a similar provision to that contained in sec. 4 was made applicable to actions upon a foreign judgment or decree described as a judgment or decree not obtained in either section of the province.

The effect of this statute was, as far as it applied to judgments obtained in either of the two provinces when sued on in the other, to take away from the judgment, if service of the summons was not personal, its conclusive character, by enabling the defendant to make any defence to the action on the judgment which might have been set up in the original action.

Before dealing with this branch of the case, and tracing the subsequent legislation in the two provinces, in order to ascertain whether the provisions of 22 Vict. ch. 5, sec.

58, are repealed, it will be well to consider the effect of 23 Vict. ch. 24, sec. 1 of which was repealed by the legislature of Ontario by 39 Vict. ch. 7, sec. 1, schedule B, and secs. 2 and 4 of which now constitute secs. 117 and 118 of ch. 51, R. S. O. 1897, limited, however, in their application to Ontario. Sections 2, 4, and 3 formed secs. 145, 146, and 147 of ch. 50 of R. S. O. 1877 (the Common Law Procedure Act); in R. S. O. 1887, secs. 145 and 146 were re-enacted and constitute secs. 81 and 82 of ch. 44, sec. 147 being dropped, its provisions having been embodied in Con. Rule 270 (1888), which (as sec. 4 of 23 Vict. ch. 24 did) provided for the mode of service on a corporation in an action brought in Ontario on a judgment or decree obtained in Quebec. Sections 81 and 82 were re-enacted by 58 Vict. ch. 12, secs. 122 and 123, and in R. S. O. 1897 these sections appear as secs. 117 and 118. Rule 270 (1888) was abrogated by the Rules of 1897.

Sections 117 and 118 do not, in my opinion, assist plaintiff. They do not expressly, and it is plain, I think, that they do not impliedly, give to a Quebec judgment any greater effect than it is entitled to according to the rules of international law, their purpose being on the contrary to take away from such a judgment sued on in this province, where service of the summons was not personal and no defence was made, its conclusive character.

It may be that the raison d'etre of 23 Vict. ch. 24 was the legislation contained in 22 Vict. ch. 5, sec. 58, and its effect as to Quebec judgments to modify what otherwise would have been under the earlier statute the conclusive character of judgments obtained under the authority conferred on the Quebec Courts by that enactment, but that for the purpose of the present inquiry is immaterial.

I proceed now to trace the legislation of the two provinces since sec. 58 of 22 Vict. ch. 5 became law.

No notice of the section has been taken in Ontario since Confederation, and in the Consolidated Statutes of Upper Canada it does not appear, nor is it mentioned in the schedule of repealed Acts.

In the Consolidated Statutes of Lower Canada, the section appears as 63 of ch. 83.

Under the authority of ch. 2 of the Consolidated Statutes commissioners were appointed to codify the laws in civil matters of Lower Canada, and 29 & 30 Vict. ch. 25 was

passed adopting a Code of Civil Procedure, the work of the Commisioners, which was to be brought into force by proclamation, and which came into force on 28th June, 1867.

Section 63 without any substantial change forms article 69 of this Code.

In 1875, by 38 Vict. ch. 9, article 69 was amended by extending its provisions to the Dominion of Canada, and by making some change in the mode of proving service of the writ of summons.

In 1888 the statutes of Quebec were revised, and by article 5867, article 69 of the Civil Code of Procedure, as amended by 38 Vict. ch. 9, was with some unimportant verbal changes re-enacted.

By 53 Vict. ch. 55, sec. 3, article 69, as contained in article 5867 of the Revised Statutes of Quebec, was amended.

By 57 Vict. ch. 9, provision was made for a revision of the Civil Code of Procedure by commissioners to be appointed, who were to be charged with that work.

By 60 Vict. ch. 48, a draft Code submitted by the commissioners, with certain amendments adopted by the Legislative Assembly, was adopted, and provision was made for bringing this new Code into force by proclamation, and it came into force by proclamation on 1st September, 1897: Quebec Official Gazette, vol. 29, p. 1292.

Article 69 (article 5867, R. S. Q.), as amended by 53 Vict. ch. 55, sec. 3, forms article 137 of the new Code, but there is omitted from it all reference to the cause of action having arisen in the province of Quebec, and the authority to the Judge or prothonotary to grant leave to serve the writ at the domicile or ordinary residence of the defendant in another province of Canada, appears, from the incorporation in article 137 of certain provisions of article 136, to apply to all cases where a defendant who is absent from the province of Quebec has no domicile, ordinary residence, or place of business in that province.

What then is the effect of the legislation in the two provinces since Confederation? In considering this question, it must be borne in mind that sec. 58 of 22 Vict. ch. 5, forms part of an Act intituled "An Act to amend the Judicature Act of Lower Canada," and that the recital of the Act is "that it is desirable further to amend the laws in force in Lower Canada relative to the administration of justice;" from which it follows that, as after Confederation it was

competent for the legislature of Quebec to make such changes in the laws relating to the administration of justice, which is by the British North America Act subject to the legislative authority of the provinces, as to that legislature might seem proper, it was open to the legislature of Quebec to repeal the provisions of sec. 58, including so much of them as, according to the view of the Court in Court v. Scott, imposed upon persons domiciled in Ontario the obligation to submit to the jurisdiction created in the Courts of Quebec, and to obey judgments obtained against them there in the manner authorized by the section.

The result of the legislation in Quebec since Confederation, and especially of that giving effect to the present Code of Civil Procedure (60 Vict. ch. 48, by sec. 10 of which all provisions of law inconsistent with that Act were repealed), is, in my opinion, to repeal the provisions of sec. 58, to the extent, at all events, of putting an end to the obligation to which I have referred, where, apart from the provisions of that section, and according to the rules of international law, the Courts of Quebec would not have had jurisdiction to pronounce a judgment binding on the defendant, when sought to be enforced by action in this province.

The repeal is of laws inconsistent with the provisions of the Act, and by article 1 of the new Code the laws concerning procedure and the rules of practice in force at the time of its coming into force were abrogated in all cases in which the new Code contains any provision having expressly or impliedly that effect, and in all cases in which the former laws or rules are contrary to or inconsistent with any provision of the new Code, or in which express provision is made by the new Code upon the particular matter to which the former laws or rules related.

By the new Code, express provision is made upon the particular matter to which article 69 of the former Code related, viz., the granting of leave to serve the writ of summons, where the defendant has his domicile or ordinary residence in another province of Canada, and it appears to me that the effect of 60 Vict. ch. 48, sec. 10, and article 1 of the new Code, is, therefore, to abrogate article 69 of the former Code.

The binding effect of the judgment sued on must therefore depend upon the rules of international law, and the defendants not having been domiciled or resident in Quebec when

served with the writ of summons, the judgment must be treated in the Courts of this province as a nullity.

I need hardly add that for the purpose of the application of the rules of international law, it is well settled that the province of Quebec is to be treated by the Courts of this province as a foreign country.

In coming to this conclusion it is satisfactory to feel that I am not denying to the Courts of Quebec a jurisdiction which they assert, for, according to the exemplification of the judgment, it contains on the face of it a statement which, if true, would have given to the Circuit Court jurisdiction, viz., that the defendants had at the time the action was begun in that Court a place of business at Montreal, in the province of Quebec.

I do not regret the conclusion to which I have come, for, if the decision in Court v. Scott were to be applied, it would lead to the anomalous and unsatisfactory result that residents of Ontario are bound by judgments of the Quebec Courts, when, under like circumstances, the judgments of the Court of this province would in Quebec be treated as nullities.

In my opinion, plaintiff's motion for judgment should have been refused, and the appeal should therefore be allowed with costs, and, in lieu of the judgment directed to be entered in the Court below, an order should be made dismissing the motion for judgment with costs. Were it not that plaintiff may desire to amend by suing on his original cause of action, I would direct judgment to be entered dismissing the action with costs.

CARTWRIGHT, MASTER. MAY 16TH, 1907.

CHAMBERS.

JOHNSTON v. TAPP.

Notice of Trial—Late Service of—Motion to Set aside—Failure of Applicant to Negative Service of Proper Notice.

Motion by defendant to set aside notice of trial as served too late.

Featherston Aylesworth, for defendant.

J. M. McEvoy, London, for plaintiff.

THE MASTER:—The 10th May was the last day for service of notice of trial for the non-jury sittings at London commencing on 20th May. The notice in question was served after 4 p.m. on the 10th, though defendant's solicitor had been told earlier in the day that such notice would be given . . . . There was no admission of service given. The defendant at once served a jury notice, and moved to set aside the notice of trial for the non-jury sittings.

It is admitted that under Rules 344 and 538 (b) this notice was too late; but the affidavits in support of the motion do not negative the service upon defendant's solicitor of a regular and proper notice, which was said by Spragge, C., in Scott v. Burnham, 3 Ch. Ch. at p. 403, to be necessary. The present case is very similar in its facts to Wright v. Way, 8 P. R. 328, where Scott v. Burnham was followed and approved by Blake, V.-C. Unless these cases can be distinguished or have been overruled, they are binding on me. So far as I can see, they are binding. They are cited in Holmested & Langton, 3rd ed., pp. 569, 747, as existing authorities. Bodine v. Howe, 1 O. L. R. 208, and McLaughlin v. Mayhew, 5 O. L. R. 114, 2 O. W. R. 10, shew how similar cases are dealt with.

Plaintiff's jury notice will probably have the effect of preventing a trial at the non-jury sittings in any case. It would seem, however, that plaintiff can avoid any delay by availing himself of sec. 92 (1) of the Judicature Act, as the County Court sittings with jury will commence on 11th June.

The motion is therefore dismissed without costs. . . .

[Reversed by TEETZEL, J., 17th May, 1907.]