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APPELLATE DIVISION.

SEPTEMBER 21ST, 1914.

*CAMPBELL v. IRWIN.

Landlord and Tenant — Temination of Lease — Buildings of Lessee—Payment for, by Lessor—Submission to three Persons to Fix Amount to be Paid—Arbitration or Valuation—Conduct of Valuator—Bias—Disqualification—Functions of Valuators—Method of Valuation—Entire Building—Estoppel—Sufficiency of Valuation—Joint Act of Valuators—Evidence—Enforcement of Valuation.

Appeal by the defendant from the judgment of LENNOX, J., 5 O.W.N. 957.

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

W. N. Tilley, for the appellant.

N. W. Rowell, K.C., and George Kerr, for the plaintiff, the respondent.

The judgment of the Court was delivered by HODGINS, J.A.: —The evidence leaves the same impression on my mind as it did upon the learned trial Judge. While the efforts of Garland to help on the sale to Campbell follow rather too closely on the award, indeed before its actual signature, they are capable of the explanation given in the evidence, and this is accepted by the trial Judge as affecting both the inception and subsequent ramifications of the transaction. I cannot say that he is wrong in treating

*To be reported in the Ontario Law Reports.

this whole matter as he did; and, consequently, the finding stands.

This Court has decided that the proceedings under the leases are by way of valuation, not arbitration.* It is, therefore, unnecessary to follow the learned trial Judge in his examination of the effect of Mr. Tilley's argument before him.

Upon the question of statements not under oath being received by the valuators and the respondent's interview with them in the absence of the appellant, I think the course taken by the parties prevents any difficulty arising on this particular score. If it be conceded that the valuators are to seek information as best they can, then it seems necessarily to follow that ex parte statements may be accepted and individual inquiries made. That this was the position is made clear by the evidence. . . .

However improper an interview with one of the parties in the absence of the other might be in the case of an arbitration, I am unable to understand why it was wrong in case of a valuation conducted upon the above basis to obtain from a party interested the information which is admitted . . . to be necessary. . . .

Mr. Hudson in his work on Building Contracts, 3rd ed., p. 713, expresses the opinion that there is no restriction as to what a valuator may do for the purpose of making his valuation—a view that I think must be taken with some limitation.

I am reluctant to say anything that would in any way weaken the salutary rule on the subject that obtains in cases of an arbitration, and do not intend to indicate that the principle may not be equally applicable in the ordinary case of valuation. But I think that the doors were left so wide open as not to justify the present objection in this particular case, which must be decided upon its peculiar and unusual circumstances.

It is not necessary to ascertain the exact difference between an arbitration and a valuation. Generally speaking, a valuation is committed to a person who has skill and knowledge on the subject, so that he may apply both to the subject-matter in hand without hearing witnesses. But this definition is not exhaustive, for the exercising of skill and knowledge may constitute the person acting a quasi-arbitrator. See Pappa v. Rose (1871-2), L.R. 7 C.P. 32, 525; Tharsis Sulphur and Copper Co. v. Loftus (1872), L.R. 8 C.P. 1. Nor is an arbitration always to settle a disputed question. But a valuation is generally for the purpose of completing the contract engagement between two parties by

*See Re Irwin and Campbell (1913), 5 O.W.N. 229.

fixing an amount or arriving at a like result by calculation or by examination of work done or of definite articles.

This much may be said here, that two persons without special skill and knowledge, according to Mr. Millar, were appointed to fix the amount proper to be paid to a tenant when the landlord was taking his buildings, so as to complete the contract engagement embodied in the leases and enable the tenant to recover that amount from the landlord. And if in doing this they could not inquire into the matters necessary to enable them to ascertain the proper amount, then they would be helpless, unable to take evidence, and yet debarred from obtaining as best they could the required information. The statement of the matter carries, as it seems to me, its own answer. The respondent's account of his statement to the valuators shews that he told them the amount he had originally paid, the amount of the repairs, the interest on the capital cost, his expenses in running up and down from Toronto, hotel bills, and general expenses connected therewith. The principal items in this were proper to be known to the valuators, and this is admitted by Mr. Millar.

In view, therefore, of the large latitude given to them, necessarily so under the circumstances, I am unable to find in the incident anything improper, and this applies as well to the statements made by the builders. I can see no difference between acquiring facts from a party himself, as in the case of the respondent, and getting it from an agent, as was done in the case of Smith when the appellant's agent sent him to Garland. And this indicates that Mr. Millar's view was the same as that of the valuators as to the sources from which information might be got.

It is hardly necessary to say that this experiment in valuation has resulted, as experiments generally do, in promoting rather than preventing litigation, and in illustrating how easy it is to cause trouble by departing from well-known methods.

A point very strongly urged was that the valuators had proceeded upon a wrong principle or had acted upon an erroneous impression of the facts in dealing with the valuation of number 134 King street west. It was taken in and treated as an entire building. It seems that the dividing line between the Ross estate's property and that of the Baldwin estate runs through this building; but it was contended that it could not be valued as one building, but must be considered as disjointed portions of a building, and each part estimated separately.

Two answers were made to this: first, that the method adopted is in itself correct; and, second, that the parties agreed that the valuers should proceed as they did.

To understand the importance of this point to the appellant, the situation at the time of the valuation should be stated. The Baldwin estate were ground landlords of the western lots, which included the westerly 14 feet of number 134 King street. A right of renewal existed in the appellant, who was in possession of some of the houses on the lots, and had leased others, including number 134, demised to the respondent. The Ross estate were ground landlords of the eastern lots, which included the rest of number 134, and the appellant had by oversight lost her right of renewal and so had to give up the buildings on the lots to the then ground landlords on payment of their value. The appellant sold the right of renewal and the buildings on the Baldwin lots to the then ground landlords. To do this they had to acquire the buildings on it which were under lease. The result was, that the value of the respondent's holdings, namely, 124 to 134 King street west, had to be ascertained; and this valuation was, therefore, begun. When they had settled with the respondent (and others), they could deliver possession of all of these lots to the then ground landlords respectively. They received $35,000 for their interest in all the houses, etc., on the Baldwin lots, and had yet to be paid for the houses, etc., on the Ross lots. And, as the present ground landlords of these lots were different people, those who represented the Ross lots would, it was feared, only have to pay for the disjointed half of number 134. Hence a depreciated valuation of the two halves of that building would be of advantage to the appellant in both cases; in the one it would make the profit larger, and in the other it would enable her to submit, possibly without loss, to a like valuation. While I have set out the facts, I do not think that they affect the respondent's legal rights.

There is a unity of title in the house in question as between the appellant and the respondent, but the covenants are in separate leases. The question is, can the respondent insist on a valuation upon the terms most favourable to him as against the appellant, or can the appellant compel him, when enforcing his covenants, to receive only the value depreciated by severance?

The leases to Ince, now represented by the respondent, were both dated the 20th June, 1892, and were entered into after the buildings in question had been put up. The appellant is taking advantage of the provisions of both of these leases to obtain possession of this one house and is getting it intact. The respondent is bound to give it to the appellant in that way, and has no way in which he can decline to part with one-half. The appellant is

receiving the benefit and is objecting to pay the equivalent. I think the principle underlying the decision in In re Lucas and Chesterfield Gas and Water Board, [1909] 1 K.B. 16, and Re Gibson and City of Toronto (1913), 28 O.L.R. 20, may reasonably be followed here. The appellant is not, it is true, expropriating, but is only enforcing private rights, yet she is asking the Court to say that the valuators are entitled to exclude as an element a most important item of benefit to the respondent, which they admittedly are receiving, and which forms indeed the chief value of this individual property. She seeks to exclude their acquisition of the other half and to secure a valuation upon a basis that is incorrect in fact, and, as I venture to think, in law as well. The words of the leases "the amount proper to be paid" are large enough, in my judgment, to cover an award such as had been made here, and are singularly appropriate to this peculiar situation.

The principle to which I have alluded is, that the party seeking to take property cannot rely on a depreciation caused by his own act, or on the assumption that he can take an attitude which will injure the value to the owner. And in this case I do not think the appellant can, in dealing with the 14 feet, exclude from consideration the fact that she is acquiring the other half of the building, and require the valuators to arrive at a value upon the assumption that she is only receiving part of it.

If the appellant is only to pay for each half as severed, the respondent must have the right to give the property to her in that condition, and I do not think that the judgment of Solomon is what the appellant really wants.

I am not impressed with the idea, only faintly developed in the evidence, that this severance really destroys the usefulness of the building. It is admitted that the store can be reconstructed at a reasonable cost, and an examination of the plans filed shew that 14 feet is sufficient to provide for a store and an independent entrance as well.

I have not dealt with the consent said to have been given. It is explicitly denied by Mr. Millar, solicitor for the appellant, though there is a quantity of testimony opposed to his recollection. . . . A verbal consent, if proved, could not alter the terms of the leases under which the valuations were proceeding. Unless the view I entertain is to prevail, I think that there would be some question as to whether a misapprehension of the facts or a mistake in law by the valuators can be reviewed in an action upon the covenants in the leases, such as this is, as it

might be on an appeal from the award in the case of a regular arbitration; but it is not necessary to express an opinion as to it in this particular case: see Chichester v. McIntire (1830), 4 Bligh N.R. 78.

With regard to the remaining questions dealt with by the learned trial Judge, I think that his conclusions are correct and cannot be successfully attacked.

The appeal should, therefore, be dismissed with costs.

SEPTEMBER 21ST, 1914.

*LEMON v. GRAND TRUNK R.W. CO.

Railway—Carriage of Perishable Goods—Breach of Contract—Wrongful Delivery—Condition of Goods on Delivery—Damages——Cause of Deterioration in Value—Real Loss Caused by Deprivation of Control—Nominal Damages—Reference as to Other Damages—Costs.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., 5 O.W.N. 813.

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

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

C. A. Moss, for the plaintiff, the respondent.

The judgment of the Court was delivered by HODGINS, J.A.:—Action for damages for wrongful delivery of 300 cases of eggs. The eggs in question arrived in Toronto, and the car containing them was put on the Harris Abattoir Company's siding, where it was found by them on Monday the 17th February, 1913. The latter company, having bought eggs from the respondent, and finding these on the track, assumed to be entitled to receive them and unloaded them that morning into their warehouse. No draft or bill of lading had then appeared, and nothing had been said in the bargain about the time of payment. The draft was presented on Tuesday morning the 18th February by the Royal Bank with the bill of lading attached. The draft was left with

*To be reported in the Ontario Law Reports.

the Harris Abattoir Company, but without the bill of lading. On this the eggs were examined, and not coming up to the sample were condemned. Notice of this was given to the appellants but not to the respondent, the Harris Abattoir Company thinking that the respondent was trying to make them take bad eggs, and desiring to protect the appellants, who had delivered them. The appellants, on Thursday the 20th February, applied to the respondent, through their Stratford agent, for permission to inspect, which was granted, and on the same day notice was sent by the Harris Abattoir Company that the eggs were bad.

On Friday the 21st February, McKee, representing the respondent, came down and inspected the eggs in company with the officers of the Harris Abattoir Company. In the result he agrees that the eggs were not up to sample. He, however, refused to reload them or do anything with them, and they remained with the Harris Abattoir Company until the 27th February, when they were reloaded into a car, but at the request of the appellants were re-transferred on the 6th March into the Harris Abattoir establishment, where they remained till the appellants sold them for the unpaid charges. The sale was on the 20th March, and realised $653.99, leaving $615.59 after deducting freight charges. The details are given in the evidence. The appellants say that the respondent would do nothing, preferring to rest on his supposed rights arising out of the premature delivery.

Under the circumstances the appellants contend that, if they are liable at all, there are no damages, because, if they had retained possession and allowed the Harris Abattoir Company to inspect, the eggs would have been rejected, and properly so. Hence they say no damage has resulted to the respondent except what is the natural consequence of shipping eggs which were not up to sample and then refusing to make the best of the position.

The bargain is not all in writing, but before shipment the Harris Abbatoir Company had bought the eggs and had the right to see if they were up to sample. If the regular course of retaining possession until delivery was demanded by the holder of the bill of lading had been followed, the difficulty would not have arisen. The act of unloading on Monday into the Harris Abattoir Company's establishment was, upon the evidence, no detriment to the eggs. The inspection was made on Tuesday, and the eggs proved not to be according to contract. Had this inspection been made by consent or arrangement with the holder

of the bill of lading, the Royal Bank, communication of the rejection should have reached the respondent earlier. As it was, the Harris Abattoir Company refrained from giving the latter notice otherwise than by telling the bank messenger that they would not pay the draft, and that the eggs were bad, and communicated directly only with the appellants. Apparently in order to cancel their previous delivery and give the respondent the impression that they still held the eggs, the appellants asked for permission for the purchasers to inspect, who, in their turn, on that day, without further inspection, notified the respondent that the eggs were refused.

On McKee's arrival, he must have learned the fact, and, while agreeing that the eggs were not up to sample, declined to deal with them in any way.

I do not agree with the argument that if no real damage was shewn to have resulted from the misdelivery there could be no recovery. The general principle is, that, if a legal right is invaded or a contract broken, the person injured thereby may maintain an action. . . .

[Reference to Sanquer v. London and South Western R.W. Co. (1855), 16 C.B. 163; Hiort v. London and North Western R.W. Co. (1879), 4 Ex. D. 188.]

The contract was partly verbal, partly in writing, but there is no dispute as to its terms. The eggs were to be "same as sample," and the offer and acceptance both say "f.o.b. Owen Sound." The samples candled at 4 to 6 eggs bad to the case [each case containing 30 dozen], according to Cowan, and 6 to 8 eggs according to Fox—i.e., about half a dozen to the case. The shipment, tested by 11 cases, ran 10 dozen bad to the case, or 110 dozen in 330 dozen. This is confirmed by McKee for the respondent, who also says that he candled out of this same room a week previous to the sale, and found 2 dozen bad to the case, and that after he returned from Toronto he tried three more cases, and found a little less than 3 dozen bad to the case.

The respondent says that a fair average for storage run in February would be 3 or 4 dozen bad to the case. Upon McKee's evidence and that of the respondent the learned trial Judge finds that when the eggs were shipped to the Harris Abattoir Company they were in accordance with the sample which had been furnished to that company. This finding would be embarrassing if the case were between vendor and purchaser, for McKee admits that he cannot account for the difference between the eggs as he saw them on the 21st February and those

he tested on the 14th February, a week before the shipment, and that the shipment to Toronto and the removal into the Harris Abattoir establishment would not account for all that difference.

On a shipment f.o.b. Owen Sound, the purchaser would ordinarily have to accept the usual deterioration during transit, yet where there is a sale by sample, and the goods are to be delivered and inspected elsewhere than at the point of shipment, the bulk must correspond at the delivery point with the sample, upon inspection. Both parties apparently agree in this view. But in this case the question is not whether the eggs were really up to sample or not, but what was the situation of the parties, including that of the appellants, when the eggs were inspected and rejected, rightly or wrongly. In any event the learned trial Judge does not specifically find that the eggs when received in Toronto were equal to the sample, nor yet that the deterioration was wholly attributable to the transit. . . .

If it were necessary to determine whether the eggs were up to sample or not, the evidence as a whole satisfies me that on the 18th February the bulk did not correspond with the cases sent down previously. . . .

But I do not think it is essential to determine this question as between the parties to this action. The appellants had a bill of lading in their possession, the explicit provisions of which they departed from. But in point of fact their breach of duty only enabled the Harris Abattoir Company to examine more easily, and that company never claimed to have any right to the eggs after the 18th February. The error of the respondent in attaching the invoice to the bill of lading sent to the Royal Bank contributed to lead the Harris Abattoir Company to think that the eggs were being delivered to them pursuant to their contract, subject to their right to inspect. Immediately on learning the real situation, they examined the eggs, and the respondent admits their right to do so when they did it. He puts his claim upon the neglect of the appellants or the Harris Abattoir Company to notify him until the 20th February, as the market was falling, and he ignores the notice on the 18th February to the bank, his agents, and the persons to whose order the goods were consigned. In so doing he is obliged to insist that the taking on the 17th February of the eggs into the Harris Abattoir establishment was a wrongful delivery, contrary to the bill of lading. This is an extreme position in view of the fact; but, as I have indicated, it was one that he was entitled to assume, and carries with it the right to damages.

But in determining these damages the real circumstances must be taken into account. On the 18th February, the Harris Abattoir Company rejected the eggs, and made no claim to retain them further. On the 20th February, the respondent knew of the rejection; and on the 21st February his representative, McKee, was aware of where the eggs were, and that they were at his disposal. The respondent, if the rejection was wrongful, could have insisted upon his bargain being carried out and could have looked to the Harris Abbatoir Company, thus relieving the appellants from any liability. If it was rightful, he had the eggs then under his control, and might have endeavoured to dispose of them without any let or hindrance from the Harris Abattoir Company, in whose warehouse they were and whose possession of them minimised the danger of further deterioration.

Indeed, on that assumption he was bound to take them away: Heilbutt v. Hickson (1872), L.R. 7 C.P. at p. 452. In either view, the appellants made such reparation as they could by the offer to McKee—for such the interview on the 21st February amounted to—of the eggs free from any claim. . . .

[Reference to Hiort v. London and North Western R.W. Co., 4 Ex. D. 188, per Bramwell, L.J., at p. 195, and per Brett, L.J., at p. 200.]

I think it is clear that the respondent, if entitled to damages, is only so entitled to his real loss caused by the deprivation of his control over the eggs from the time when admittedly the Harris Abattoir Company might inspect and reject, i.e., the 18th February, until the time when his control was re-established, if he chose to exercise it, namely, the 21st February. The respondent in bringing this action elects not to look to the Harris Abattoir Company on their contract, thus admitting that the rejection was proper; and he is only entitled to damages against the appellants on the basis I have indicated, treating as in the nature of a return the offer to McKee on the 21st February to give up the eggs. This is enforced by the consideration that unreasonable conduct on the part of the person whose property has been converted may always be taken into consideration in assessing the damages. See Wilson v. Hicks, 26 L.J. Ex. 242.

Some evidence was given as to damage at the trial, but I think the real point to be decided is, whether the eggs could have been sold on the 18th February for a better price than on the 21st February, when the respondent could have disposed of them if he had chosen so to do. They were actually sold afterwards at a

considerable loss, but that was after they had been exhaustively and critically examined, and their condition known. . . .

I think the respondent should be entitled to shew, if he can, that he could have re-sold these eggs on the 18th, 19th, or 20th February to better advantage than upon the 21st February, and in excess of the prices afterwards realised. But he ought to bear the costs of a reference on that point, if he chooses to take one, in view of the fact that he went into evidence of damage at the trial and should have done so upon the proper basis.

The appeal should be allowed with costs, and judgment should be entered for the respondent for nominal damages, say $1, and for payment to the respondent of the amount in Court, with a reference at the respondent's expense if he seeks further damages upon the principle I have indicated. If a reference is had, the judgment will reserve further directions and costs of action. The reference may be to the Master at Owen Sound or to the Master in Ordinary, as the respondent may elect. If the reference is not had, the judgment will be with costs on the Division Court scale without set-off.

SEPTEMBER 21ST, 1914.

SHAFER v. ROSS.

Vendor and Purchaser—Agreement for Sale of Land—Formation of Contract—Option — Acceptance—Failure to Make Payment—Evidence—Findings of Trial Judge—Appeal.

Appeal by the plaintiff from the judgment of MIDDLETON, J., at the trial, dismissing the action, which was brought to enforce specific performance of an agreement by the defendant Ross to sell to the plaintiff a parcel of land in the outskirts of the city of Windsor, containing about eight acres.

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

F. C. Kerby, for the appellant.

J. H. Rodd, for the defendants, the respondents.

The judgment of the Court was delivered by MAGEE, J.A.:— The agreement bears date the 13th January, 1913, and by it Ross, in consideration of $10 paid, did "give an option to and

agreed to sell to" the plaintiff the therein described property: the price to be $1,475; the option to hold good for two months from date, and to be extended for a further term of two months on payment of $10; both of such payments to be applied on the purchase-money if the sale is carried out on or before the expiration of the option, and to be forfeited if the sale is not carried out. Ross was to retain possession until the purchase was completed. The agreement proceeds: "When sale is made, I agree to accept $500 at time of sale and for the balance of $975 a first mortgage to run for a period of five years with interest at 6 per cent."

The plaintiff did pay another $10, thus extending the option till the 13th May, 1913.

On the 5th May, the plaintiff went to Ross's house, near the land, and wrote out and signed on Ross's duplicate of the agreement a memorandum as follows: "I hereby accept and exercise this option, terms and conditions as mentioned." He did not pay or offer any money, but, according to the defendant Ross, he said, "Now this is a sale, I consider it a sale according to this agreement"—to which it does not appear that Ross made any reply. The plaintiff went away, and did not make any effort to see Ross again until the 17th May. On that date and again on the 21st, he drove to Ross's house, but found it closed —Ross living alone and being frequently in Windsor. On the 19th May, Ross went to the plaintiff's office in Windsor "to close the matter with him," and he says that, if he had found him then, he would have taken the money, though he denies having in any way agreed to postpone the date for its payment. However, the plaintiff was not there, and Ross told a clerk there to tell the plaintiff that the option was off, and he did not want anything more to do with it. In the 19th May, the plaintiff, on his way to Ross's house, passed the latter driving with the husband of the defendant Gauthier, but did not stop him or mention the subject of the sale.

On the 23rd June, the plaintiff registered the agreement of the 13th January, and on the 5th June began this action. On the latter date, Ross conveyed the land to the defendant Gauthier, who subsequently conveyed to the defendants Gundy and Gundy.

Not until after this action was first set down for trial was any tender of documents or offer to pay the $480 made by the plaintiff; but he says that he was at all times on and after the 5th May ready to pay, and he had on the 7th May instructed

Mr. Kerby, his solicitor, to prepare both deed and mortgage, and they had been prepared on the 11th May, and the mortgage executed by him on that date.

He excuses this inaction between the 5th and 17th May because he alleges that on the 5th May Ross had directed him to have Mr. Kerby prepare the papers for Ross, and had agreed to come in and close the sale; but Ross denies this; and, whatever may have been the actual fact as to this, it is impossible to disturb the finding of the learned trial Judge against the existence of such an arrangement.

The case then stands that, instead of making a payment up to $500 at the time of sale, the plaintiff seeks to make out that there was a sale without such a payment, which was of the very essence of the transaction. The two payments of $10 were not made or accepted as deposits on account of purchase-money, but only as consideration for postponing the term for the plaintiff to determine whether there would be a sale at all or not. If it had been a case of an immediate sale, that is, immediate acceptance of the offer, the plaintiff could not have pretended that it was closed without payment of the sum which must accompany the acceptance and form part of the actual making of the agreement itself. The time for acceptance being postponed does not alter the character of the payment which was to accompany it, or turn it into a postponed instalment of the purchase-money.

I do not see any reason to disturb the decision of the trial Judge, more especially in view of the speculative nature of the transaction and the circumstances which gave rise to the increased value of the property over ordinary farming land.

Appeal dismissed.

SEPTEMBER 22ND, 1914.

ELMER v. CROTHERS.

Release—Action for Damages for Personal Injuries—Settlement after Action Brought — Validity — Payment of Money—Receipt.

Appeal by the plaintiff from the judgment of SUTHERLAND, J., 6 O.W.N. 288.

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

G. M. Macdonnell, K.C., for the appellant.

J. L. Whiting, K.C., for the defendant Crothers, the respondent.

THE COURT affirmed the judgment below, on the ground that the release given by the plaintiff was valid, and dismissed the appeal with costs.

SEPTEMBER 23RD, 1914.

*REX v. LOUIE CHONG.

Criminal Law—Indecent Assault—What Constitutes—Criminal Code, sec. 292—Evidence.

Case stated by the Police Magistrate at Sarnia as follows: "The evidence disclosed that the prisoner, a Chinaman, followed the complainant, a respectable girl of fifteen, on her way home, at a late hour of the night, overtook her at a lonely spot, seized hold of her against her will, and offered $5 to go with him for an immoral purpose, there being neither encouragement nor consent on her part. On the contrary, she made an outcry and threatened him with arrest, whereupon he left her. She ran home and immediately made complaint to her father of what taken place. On these facts, so found by me on the evidence, was I right in finding the prisoner guilty of an indecent assault on a female?"

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

J. H. Moss, K.C., for the prisoner, contended that there cannot be a conviction for an indecent assault unless the act constituting the assault is in itself indecent in its nature.

E. Bayly, K.C., for the Attorney-General.

The judgment of the Court was delivered by MIDDLETON, J.:—. . . Section 292 of the Criminal Code provides for the punishment of every one who "indecently assaults any female." It appears to me that an act in itself ambiguous may be interpreted by the surrounding circumstances and by words spoken at the time the act is committed. . . . It is in each case a question of fact whether the thing which was done, in the cir-

*To be reported in the Ontario Law Reports.

cumstances in which it was done, was done indecently. If it was, an indecent assault has been committed.

The magistrate has found, and I think rightly found, that the man who took hold of the girl and invited her to go with him for an immoral purpose did indecently assault her.

Conviction affirmed.

HIGH COURT DIVISION.

MIDDLETON, J. SEPTEMBER 23RD, 1914.

*REID v. AULL.

Marriage—Action for Judicial Declaration of Nullity—Jurisdiction of Supreme Court of Ontario — Perpetual Stay of Action.

Motion by the Attorney-General for Ontario for an order dismissing this action or staying all proceedings therein, on the ground that the Court had no jurisdiction to entertain the action. See Reid v. Aull (1914), 6 O.W.N. 372.

E. Bayly, K.C., and Eric N. Armour, for the Attorney-General.

G. H. Watson, K.C., for the plaintiff.

MIDDLETON, J.:—The preliminary question as to the status of the Attorney-General to intervene under the statute has already been argued and determined.

For the purpose of this motion the facts alleged by the plaintiff must be taken to be truly stated. The facts are sufficiently set forth in my judgment dealing with the preliminary objection. See 6 O.W.N. 372.

In Lawless v. Chamberlain, 18 O.R. 296, my Lord the Chancellor investigated the jurisdiction of the Court and concluded that the Court had jurisdiction to declare the nullity of a marriage which had been procured by fraud or duress in such wise that it is void *ab initio*, though the Court had no jurisdiction to dissolve a marriage once validly solemnised, this being not of judicial but legislative competence. In that case my Lord found

*To be reported in the Ontario Law Reports.

that the facts proved did not justify the decree sought; hence what was said with reference to the jurisdiction of the Court has sometimes been regarded as dictum only. Other cases (e.g., May v. May, 22 O.L.R. 559) have, it seems to me, determined that our Courts have not the jurisdiction suggested; and I have, therefore, thought it right that I should investigate the matter independently rather than deal with the case solely in reliance upon the cases in our own Courts cited.

It is to be borne in mind that there is a fundamental distinction between the granting of a divorce and the relief here sought. This distinction is very clearly brought out in an article in 26 Harvard Law Review, p. 252. Divorce assumes the previous existence of the marriage status. Its result is to put an end to that status without affecting its existence in the past. The allegaion here is that there never was in truth a marriage, and what is sought is a judicial declaration to that effect. It is not in this action sought in any way to affect the status of the plaintiff. She simply seeks to have her status declared.

The view entertained in Lawless v. Chamberlain, and pressed by Mr. Watson, is that our Court has no jurisdiction to grant such a decree. The distinction was recognised by the Chancellor in the case of T—— v. B——, 15 O.L.R. 224. . . .

The jurisdiction of the High Court is found by reference to the Judicature Act as contained in R.S.O. 1897 ch. 51. By sec. 25, the Court is in the first place given such powers and authorities as by the law of England are incident to a superior court of civil and criminal jurisdiction, and is given specifically the rights and privileges exercised by the Superior Courts of Common Law at Westminster on the 5th December, 1859.

By sec. 26, the Court is also given the like jurisdiction and powers as by the laws of England were on the 4th March, 1837, possessed by the Court of Chancery in respect of certain enumerated matters, including, *inter alia*, all cases of fraud and accident, and all matters relating to . . . dower, infants, idiots, lunatics, and their estates. None of the other enumerated matters have any bearing upon the matter now under consideration.

By sec. 28, the Court is given jurisdiction as a Court of Equity to administer justice where there is no adequate remedy at law; and by sec. 34 jurisdiction is conferred in actions for alimony.

In England the question is free from doubt or difficulty, as by the statute relating to divorce and matrimonial causes, 21 &

22 Vict. ch. 85, assented to on the 28th August, 1857, all jurisdiction then exercisable by an Ecclesiastical Court in England in respect of divorce *a mensa et thoro*, suits of nullity of marriage, suits of jactitation of marriage, suits for restitution of conjugal rights, and all causes, suits, or matters matrimonial, is taken away from the Ecclesiastical Courts and vested in the new "Court for Divorce and Matrimonial Causes" thereby constituted; and it is provided that no other Court shall thereafter exercise any jurisdiction with respect to these matters.

Where a marriage was alleged on the one side and denied on the other, as already pointed out, a suit for declaration of nullity would be inappropriate, as that assumed a valid marriage ceremony at least. The suit for a jactitation of marriage was brought for the purpose of obtaining a judical declaration that a lawful marriage did not subsist between the parties. This action could, prior to the Act of 1857, be brought only in the Ecclesiastical Courts. What is sought here is really to permit such an action to be brought in our High Court. It is sought to have it established that this portion of the jurisdiction of the Ecclesiastical Courts can now be exercised by this Court. As the Acts of 1857 had deprived the Common Law Courts of all possible claim to such jurisdiction before the 5th December, 1859, the jurisdiction, if it exists in a Court, must be derived through the sections conferring equity jurisdiction. In Lawless v. Chamberlain, the Chancellor adopted the view, expressed in certain judgments of the early Chancellors in the State of New York, that the Court of Equity had an inherent jurisdiction over the matters generally entertained by the Ecclesiastical Courts, this jurisdiction remaining latent, the Court of Equity permitting it to be exercised exclusively by the special tribunals which entertained matrimonial causes. Consistently with this, when the "Courts Christian" were abolished during the Protectorate, the ancient jurisdiction of Chancery was revived and exercised: Tothill, 61; Anon., 2 Show. R. 283.

This is a fair statement of the views entertained by the New York Chancellors; but it appears to me that it is not conclusive when it is sought to apply it to the state of affairs existing here, as this latent residual jurisdiction of the Court of Chancery has never been vested in our Courts. Our Courts were given all the jurisdiction of the English Common Law Courts, but only part of the jurisdiction of the Court of Chancery, and I think it must be taken that no portion of the latent Ecclesiastical jurisdiction, if in truth it existed, ever became vested in our Courts. The

argument proves too much; for, if any part of the Ecclesiastical jurisdiction was in that way transferred to our Courts, it must all have been transferred, and our Courts would be entitled to entertain suits for divorce and restitution of conjugal rights, as well as for jactitation of marriage. Indeed, the Courts of Chancery in New York and other States on this reasoning claim to have, and have asserted, full Ecclesiastical jurisdiction. That our Legislature did not intend, in this indirect way, to give the Court the full Ecclesiastical jurisdiction, is plain from sec. 34, which expressly gives jurisdiction to award alimony.

It is also suggested in Lawless v. Chamberlain, and is argued by Mr. Watson, that the jurisdiction which our Court undoubtedly has to make a declaratory decree enables the Court to deal with this matter. This is to ignore the principle laid down in Barraclough v. Brown, [1897] A.C. 615, and many other cases, that a declaratory decree should only be made with respect to matters properly falling under the cognizance of the Court. The power to make declaratory decrees conferred by the Legislature is not to be exercised in respect of matters over which the Court has no general jurisdiction or which the Legislature has seen fit to intrust to other tribunals.

Mr. Watson cited a great many cases which I need not deal with in detail, but of which Regina v. Secker, 14 U.C.R. 604, Regina v. Bell, 15 U.C.R. 287, and Hodgins v. McNeil, 9 Gr. 305, may be taken as illustrations. In these cases the Common Law Courts or the Court of Chancery, for the purpose of determining a matter properly before them, were called upon to determine the validity of a marriage. This clearly affords no foundation for the bringing of an action such as this. If a man is indicted for bigamy, the Court must determine the fact of marriage. If a widow sues for dower, her marriage must be ascertained. But nowhere, save in Lawless v. Chamberlain, is there . . . any precedent for the bringing of such an action as this except in the Ecclesiastical Courts or other Court given matrimonial jurisdiction.

For these reasons, I think it is clear that the motion succeeds, and the action must be forever stayed.

It is not a case for costs.

MIDDLETON, J. SEPTEMBER 24TH, 1914.

CITY OF TORONTO v. RYAN.

Municipal Corporation—Regulation of Buildings—Apartment House — Structural Alterations Requiring Municipal Approval—Neglect to Submit Plans to City Architect—Municipal Act, R.S.O. 1914 *ch.* 192, *sec.* 400 (4)—*Building Constructed in Accordance with By-law—Refusal to Order Destruction—Declaratory Judgment—Costs.*

Action by the Corporation of the City of Toronto for an injunction restraining the defendant from altering a certain apartment house, at the corner of Palmerston avenue and Harbord street in the city, without submitting a plan of the alterations to the City Architect and Superintendent of Buildings.

The action was tried by MIDDLETON, J., without a jury at Toronto.

Irving S. Fairty, for the plaintiff corporation.

J. R. Roaf, for the defendant.

MIDDLETON, J.:—This particular apartment house has been the subject of much litigation. The house as originally contemplated violated certain building restrictions, and in the action of Holden v. Ryan (1912), 3 O.W.N. 1585, Mr. Justice Teetzel so declared. Subsequently, amended and modified plans were submitted to the City Architect, who refused to sanction the changes proposed. A motion was then made for a mandatory order compelling the architect to approve of the plans. This was refused (see Ryan v. McCallum (1912), 4 O.W.N. 193); the reasons assigned being that what was then sought was in effect a new permit, and in the meantime the municipality had passed a by-law prohibiting the erection of apartment houses in the locality in question, and also because the building did not comply with the requirements of an amendment to the building by-law which had been made in the meantime, with reference to open space and yard area.

How the difficulties occasioned by this decision were got over I am not informed; but the building was proceeded with. A motion was made in the action of Holden v. Ryan for an order for the destruction of the building upon the ground that, even in its altered form, it violated the building restrictions and was

in breach of the injunction granted in that action. Mr. Justice Britton thought that the building did not contravene the restriction (see Holden v. Ryan (1913), 4 O.W.N. 668); but upon appeal being had the Appellate Division took the contrary view, and finally called in an architect to ascertain whether the structure of the building could be so altered as to make it unobjectionable. The architect consulted recommended certain changes and modifications, which the owner undertook to make; and upon this undertaking no order was made for the destruction of the building (see Holden v. Ryan (1914), 5 O.W.N. 890). The defendant, in proceeding to make these alterations, is not confronted with this litigation, for the plans of the altered work have not been submitted to or approved by the City Architect.

When the matter came before me upon the motion for a mandamus (Re Ryan and McCallum, 4 O.W.N. 193), the case was argued upon the footing of the validity of the then building by-law requiring the architect's approval. In delivering judgment I pointed out that possibly the Municipal Act as it then stood, which authorised the passing of a by-law "for regulating the erection of buildings," might not authorise the requirement of a building permit. This question was, however, not argued, and the case was dealt with upon the matters presented by counsel. Since then, the Municipal Act has been amended, and a new by-law has been passed. It is now argued that the corresponding requirement of the present by-law is *ultra vires* and beyond what is authorised by the Municipal Act.

What the by-law requires is, that the plans shall be submitted to the City Architect before the erection or alteration of the building is undertaken, and "if during the progress of the work it is desired to deviate in any essential manner from the terms of the application, drawings or specifications, notice of intention to alter or deviate shall be given in writing to the Inspector of Buildings, and his written assent must be first obtained." Alterations which do not involve any change in the structural parts, or conflict with the requirements of the by-law, may be made without this permission.

The alterations here proposed are, I think, structural alterations which under the by-law required municipal approval. They consist in the changing of the position of walls upon the ground floor so as to widen a long corridor, and the closing up of the two entrances on Harbord street originally contemplated, and the substitution of an entrance from Palmerston avenue.

This renders it necessary that I should examine with care the Municipal Act as it now stands to ascertain if the requirements of the by-law can be justified under it.

Little would be gained by any attempt to analyse the former Act and the by-law passed under it; though it is important to note that the by-law had been in force for many years without attack.

The old section, which contained the words above quoted, has now been amplified, and by R.S.O. 1914 ch. 192, sec. 400, subsec. 4, the council has power to pass a by-law "for regulating the size, strength, . . . and for requiring the production of the plans of all buildings and for charging fees for the inspection and approval of such plans." The change made by the Legislature in the wording of the section, after attention had been drawn to it by the decision referred to, is most significant, and I think is ample to confer upon the municipality the right to require the plans to be produced and approved, which is what is meant by the granting of the building permit; and this, I think, is wide enough to cover the requirement that, when a change is being made in the work permitted from the plans approved, this change shall also be submitted for sanction.

There is much in the other provisions of the statute which goes to fortify this view; but, as I think that the section itself is ample, these provisions need not be analysed with a view of spelling out the intention of the Legislature.

The changes made were at the time of the trial substantially completed. An interim injunction had, I understand, been applied for, and the defendant had in the meantime been allowed to proceed at her own risk.

Evidence was given by the defendant's architect that the building as now being constructed is in conformity with the requirements of the by-law; and, although I asked those representing the plaintiff corporation to point out any respect in which the building violated the by-law, I was not shewn that the architect's statement was incorrect.

I think I have a discretion, which I ought to exercise in this particular case, to refuse to order the destruction of the building upon the ground that it has been erected in its present form without the plans having been submitted. If the building is in fact in accordance with the by-law, this destruction would serve no good purpose. I think the circumstances of the case are in some aspects very exceptional; and I must not be understood as indicating that this course would be followed in any

other instance where the provisions of the by-law have not been complied with. I think I should be going far enough in vindication of the position taken by the plaintiff corporation by now declaring that the building was improperly altered without plans for the alteration having been submitted to the Building Inspector as required by the by-law in question, and by following this declaration by the statement that—it now appearing upon the evidence that the building is in fact in accordance with the requirements of the by-law—this Court does not see fit to make any order save that the defendant do pay the plaintiff's costs of this action.

FALCONBRIDGE, C.J.K.B. SEPTEMBER 24TH, 1914.

WEDDELL v. DOUGLAS.

Chattel Mortgage—Validity against Execution Creditor of Mortgagors — Intent — Family Partnership — Executor de son Tort—Statement of Consideration—Want of Registration of Earlier Mortgage—Interpleader.

An interpleader issue. The plaintiff claimed, under a chattel mortgage, goods seized by a sheriff under the defendant's execution against the chattel mortgagors.

The issue was tried by FALCONBRIDGE, C.J.K.B., without a jury, at Cobourg.

W. L. Payne, K.C., for the plaintiff.

W. F. Kerr and I. A. Humphries, for the defendant.

FALCONBRIDGE, C.J.K.B.:—. . . The only question of fact is as to the intent with which the mortgage was made, and I find that it was not made with intent on the part of either party to defeat, hinder, or delay creditors or others, but in entire honesty.

And, in view of the fact that the indebtedness was an indebtedness of all the McQuaids, who were working together as a family partnership, the objection as to the capacity of an executor *de son tort* is not of avail.

On this point Mr. Kerr strongly relied on Buckley v. Barber (1850), 6 Ex. 164, which necessarily commands respect, inasmuch as Parke, B., delivered the judgment of the Court. But

Sir Frederick Pollock in the note to the report in 86 R.R. at p. 212, says: "(1) No judicial criticism of this case has been found; but it is disapproved by Lord Lindley (Partnership, 7th ed., p. 380) and is thought to be opposed to the current of authority." With this backing I have the temerity not to follow it.

In the absence of fraud the erroneous statement of the consideration does not avoid the mortgage. Nor does want of registration or expiry of an earlier mortgage destroy the validity of the present one.

There will be judgment for the plaintiff in the issue, with costs, if I have power to award them.

MIDDLETON, J., IN CHAMBERS. SEPTEMBER 26TH, 1914.

RYAN v. COOLEY.

Lunatic—Money in Court—Accumulation of Surplus Income—Allowance for Maintenance of Person Entitled after Death of Lunatic—Discretion of Court—R.S.O. 1914 *ch.* 68, *sec.* 12—*Judgment.*

Motion on behalf of Catherine Carmichael for payment to her of part of a sum in Court for her maintenance.

A. E. Knox, for the applicant.

E. T. Malone, K.C., for the committee of the plaintiff, a lunatic.

MIDDLETON, J.:—Nearly $17,000 is in Court to the credit of the plaintiff in this action, who has for many years been a lunatic. According to the medical statements, she is incurably insane, and she is now well advanced in years. By the judgment in the action it is provided that, upon the death of the lunatic without recovering her reason, the money shall be equally divided between the children of the lunatic, namely, Henry Ryan and Catherine Ryan, now Catherine Carmichael. Catherine Carmichael is apparently in destitute circumstances, and applies for an allowance to her out of the moneys in Court. She needs $500 to meet her present obligations and asks an allowance for the future.

The income from the estate of the lunatic, outside of the money in Court, has heretofore more than met the requirements for maintenance, and the money in Court is an accumulation of surplus income. A trust company has been appointed committee.

Having regard to the fact that it is almost a certainty that Mrs. Carmichael will, upon the death of her mother, be entitled to half the moneys in Court, and to the fact that the mother's recovery appears to be impossible, and to the discretion given to the Court to use the property of a lunatic for the maintenance of the family (R.S.O. 1914 ch. 68, sec. 12), I think I am justified in making the order sought and directing payment out of Court forthwith of $500 and of the further sum of $100 each three months for the ensuing year; this to be a charge upon Catherine Carmichael's share.

Since the above was written, a child of the first marriage of the plaintiff's husband, from whose estate this money was derived, has intervened—intending to move against the judgment. It has now been arranged that this order may stand without prejudice to any right she may have to attack the judgment. This should be stated on the face of the order.

MIDDLETON, J., IN CHAMBERS SEPTEMBER 26TH, 1914.

CLARK v. INTERNATIONAL MAUSOLEUM CO. LIMITED.

Practice—Specially Endorsed Writ of Summons—Affidavit Filed by Defendant with Appearance—Right of Cross-examination without Launching Motion for Judgment—Rule 57.

Appeal by the defendant company from an order of the Master in Chambers refusing to set aside as irregular an appointment for the cross-examination of the defendant company's officer on his affidavit filed with the appearance to a specially endorsed writ of summons.

Grayson Smith, for the defendant company.
W. G. Thurston, K.C., for the plaintiff.

MIDDLETON, J.:—The objection taken to the cross-examination is that the plaintiff has not launched any motion for judgment. This objection entirely misconceives the purpose of Rule 57. The

scheme contemplated is the elimination of all idle and useless proceedings. Where the defendant files an affidavit disclosing a defence, the plaintiff cannot successfully move for summary judgment unless he can, on the cross-examination of the defendant, displace the statements sworn to. When the cross-examination has taken place, the plaintiff may, if he sees fit, move for judgment, but he is not obliged to move for judgment before he has by cross-examination ascertained whether he can displace the statements sworn to by the defendant.

No doubt, there is some weight to be attached to the statement made by Mr. Smith that a plaintiff cross-examining upon the affidavit may also examine for discovery; but this is in no way answered by the suggestion that the plaintiff should, as a condition of the cross-examination, in the first place launch the motion for judgment. If the examination is unnecessary and vexatious, or if an examination is afterwards had for discovery, when the cross-examination on the affidavit should have sufficed, the trial Judge has ample jurisdiction to deal with the matter, and the costs of the examination for discovery would probably not be allowed by the taxing officer upon any application made to him. This, however, is quite beside the question. The Rule as it stands gives the right to cross-examination upon an affidavit, quite apart from the making of any motion for judgment.

The appeal fails, and should be dismissed with costs to the plaintiff in any event in the cause.

ANTISEPTIC BEDDING CO. v. LOUIS GUROFSKI—MIDDLETON, J.—SEPT. 22.

Principal and Agent—Insurance Broker—Fire Insurance Obtained for Principal—Payment of Amount of Premiums to Agent—Premiums Paid by Broker by System of Credits—Set-off Assented to by Payee Equivalent to Actual Payment—Validity of Policies.]—The action was brought to recover from the defendant the amount of the loss sustained by the plaintiffs by reason of the destruction of their property by fire on the 22nd June, 1912. The plaintiffs alleged that the defendant was employed by them as an insurance agent or broker to place insurance upon their property, and that, by reason of the breach of his duty, the insurance contracts obtained from several companies were not valid or binding upon the insurance

companies, and the plaintiffs were not compensated for their loss. The defendant placed the insurance with five companies, and the plaintiffs paid the amount of the premiums to the defendants. The policies were sent to the defendant and by him handed over to the plaintiffs, who for some time assumed that everything was in a satisfactory position. The money was not directly paid by the defendant to the insurance companies, but credit was given therefor by the companies in accordance with an understanding between the defendant and them and others through whom they dealt. The case was not one where there was any dishonest attempt to appropriate money; the course of dealing was in accordance with the well-understood relationship of all the parties—not including the plaintiffs. MIDDLETON, J., said that an agent who receives money to be paid for his principal has no authority to set this off against a debt due from the payee to him. His duty is to pay; but, if the payee assents to the set-off, it becomes payment. There is no necessity for the form of handing over the money and then handing it back. The assent to the set-off dispenses with this. Here the set-off was assented to by the agent of the insurance companies, and the amount of each premium was carried into the running accounts between the parties. The insurance companies parted with the policies, being content to carry the premiums into the running account between the different agents and sub-agents. The plaintiffs having paid the premiums and the policies having been delivered, they were, in the circumstances, valid policies, and the defendant had been guilty of no default. Action dismissed with costs. F. Arnoldi, K.C., for the plaintiffs. C. A. Moss, for the defendant.

MOORE v. CANADIAN ORDER OF FORESTERS—MIDDLETON, J., IN CHAMBERS—SEPT. 26.

Jury Notice—Striking out—Judge in Chambers.]—Motion by the defendant to strike out the jury notice. The learned Judge said that if he were presiding at the trial, he would not hesitate to strike out this jury notice; and KELLY, J., who was to be the trial Judge, agreed with this view. Order made striking out the jury notice. Costs in the cause. Grayson Smith, for the defendants. E. F. Raney, for the plaintiff.

RE MCFARLANE AND ORDER OF CANADIAN HOME CIRCLES—MIDDLETON, J., IN CHAMBERS—SEPT. 26.

Life Insurance — Payment of Insurance Money into Court — Order for Payment out to Widow—Application to Vacate Order —Necessity for Personal Consent of Widow.]—By a beneficiary certificate of the above-named benevolent society, insurance money was payable to the wife of the assured. After its date the then wife died, and the assured married again. After the second marriage, he directed the money to be paid to his son William Henry McFarlane. William Henry McFarlane was not the son of the assured; he claimed to be an adopted son. Although an adopted son is not within the the preferred class, McFarlane claimed the money. The society paid the money into Court, and the widow moved for payment out to her. LATCHFORD, J., regarding the widow's claim as clear, made an order for payment out to her. Counsel representing the society and the widow now said that the society was mistaken in paying the money into Court, the policy being a New Brunswick policy, and both claimants residing in New Brunswick; it was also said that McFarlane intended to take proceedings in New Brunswick against the society; and an order was asked for vacating the former order and directing re-payment of the money to the society, so that it might pay the money into the New Brunswick Court. MIDDLETON, J., said that it appeared to him that the money, having been paid into Court and having been adjudged here to be the property of the widow, ought not to be repaid to the society without the personal consent of the widow, with an affidavit of execution shewing that the consent was read over and explained to her, and that she understood its nature and effect. J. E. Jones, for the society and the widow.

CORRECTION.

In BASSI v. SULLIVAN, ante 38, in a quotation from the judgment of Sir William Scott, The Hoop (1799), 1 C. Rob. 196, the last word (p. 40, line 15) should be "*exlex*" not "*ex lex*" as printed. "*Exlex*" is an adjective, "beyond the law, bound by no law, lawless (rare, but quite classical)." See Andrews' Latin-English Lexicon, sub verb. (Courtesy of Sir Glenholme Falconbridge, Chief Justice of the King's Bench.)