THE CANADIAN BAR REVIEW

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☞ Articles and notes of cases must be typed before being sent to the Editor, Cecil A. Wright, Osgoode Hall Law School, Osgoode Hall, Toronto 2, Ontario.

CASE AND COMMENT

CONSTITUTION LAW — PROVICIAL LEGISLATION ADMITTING APPEAL TO PRIVY COUNCIL. — Appeals to the Privy Council as of right are regulated in Ontario by the Privy Council Appeals Act.[1] The power of the province to make regulations in that connection derives, of course, from British authorization. The Royal Proclamation of 1763[2] declared that the governors of the newly-acquired colonies[3] should have power "to erect and constitute. . . courts of judicature and public justice—for hearing and determining all causes, as well criminal as civil, according to law and equity, and as near as may be agreeable to the laws of England, with liberty to all persons who may think themselves aggrieved by the sentences of such courts, in all civil cases, to appeal, under the usual limitations and restrictions, to us in our Privy Council." In pursuance of this Proclamation and of the Instructions to Governor Murray,[4] an ordinance was promulgated in 1764, establishing civil courts[5] and providing for an appeal "to the King and Council where the matter in contest is of the value of

[1] R.S.O. 1937, c. 98. The appeal as of grace, with which this note is not concerned involves the obtaining of special leave to appeal from the Privy Council itself.

[2] See KENNEDY, STATUTES, TREATIES AND DOCUMENTS OF THE CANADIAN CONSTITUTION, 2nd ed. 1930, p. 35.

[3] See Treaty of Paris, February 10, 1763. The relevant provisions are reproduced in KENNEDY, *supra*, p. 31.

[4] KENNEDY, *op. cit.*, p. 43. The instructions were dated December 7, 1763.

[5] KENNEDY, *op. cit.*, p. 52.

five hundred pounds sterling or upwards." The ordinance was, in 1766, declared to be temporary only.[6]

In the Instructions to Governor Carleton, issued in 1775,[7] a direction was given that in cases exceeding the value of £500 sterling, "an appeal is to be admitted to us in our Privy Council." In addition it was stated:

> It is however our will and pleasure that no appeal be allowed unless security be first duly given by the appellant, that he will effectually prosecute the same, and answer the condemantion, as also pay such costs and damages, as shall be awarded by us, in case the sentence be affirmed: provided nevertheless, where the matter in question relates to the taking, or demanding any duty payable to us, or to any fee of office or annual rents, or other such like matter or thing, where the rights in future may be bound, in all such cases appeal to us, in our Privy Council is to be admitted, though the immediate sum or value appealed for be of less value.

By an ordinance of February 25, 1777,[8] civil courts were established and appeals to the Privy Council were provided for in the terms of the Instructions.

The Constitutional Act, 1791,[9] by which the provinces of Upper Canada and Lower Canada were created, declared in s. 33 that all laws, statutes and ordinances should continue in force, except in so far as they were repealed or varied by the Act and except in so far as they might be repealed or varied under the authority of the Act. Section 34 constituted the Governor and Executive Council of each province a court of civil jurisdiction to hear appeals

> in the like cases and in the like manner and form, and subject to such appeal therefrom, as such appeals might, before the passing of this Act have been heard and determined by the Governor and Council of the Province of Quebec; but subject nevertheless to such further or other provisions as may be made in this behalf by an Act of the Lesislative Council and Assembly of either of the said provinces respectively, assented to by His Majesty, his heirs or successors.

A statute of Upper Canada passed in 1794[10] constituted courts of civil and criminal jurisdiction and established a Court of Appeal, the judgment of which was desired to be final save that where the matter in controversy exceeded the sum or value of $4000

[6] Ordinance of 1766, at p. 68 of KENNEDY, *op. cit.*
[7] KENNEDY, *op. cit.*, p. 153.
[8] *Ibid.*, p. 161.
[9] 31 Geo. III, c. 31 (Imp.)
[10] 34 Geo. III, c. 2.

an appeal lay to the Privy Council. In effect, the provisions of the Ordinance of 1777 were re-enacted.

These provisions for an appeal to the Privy Council as of right survived the Union Act of 1840,[11] and continued in force after Confederation by virtue of s. 129 of the British North America Act.[12] But they became subject to alteration or repeal by the competent legislature under the provisions of this latter Act. The Supreme Court of Canada has given its opinion that the competent legislature is the Dominion Parliament,[13] and the question cannot be finally determined until the Privy Council itself passes on it.

The Ontario Privy Council Appeals Act,[14] as it stands provides for an appeal where, *inter alia*, the matter in controversy exceeds the sum or value of $4000, but the appeal cannot be admitted until, upon application, security therefor has been approved. The decided cases hold that the competency of the appeal, i.e. whether it comes within the provision of the statue, is one of the questions to be considered upon an application for approval of the security.[15] In a recent case, *Patton* v. *Yukon Consolidated Gold Corp. Ltd.*,[16] the Ontario Court of Appeal in effect denied the contention that once it is established that a case falls within the terms of the statute the Court must admit the appeal on proper security being furnished. McTague J.A. took the view that the statute was restrictive, limiting the right of appeal rather than creating it and that the Court's duty was to act judicially in exercising its function in admitting an appeal. Apparently this meant that the Court had a discretion to refuse to admit an appeal although the case was within the statute, and in the *Patton Case* such refusal was grounded on the lapse of time and the intervention of new rights.

In so far as such discretion is merely typical of judicial power in connection with the application or interpretation of of statutes it is in the normal course. But the judgment of the Ontario Court of Appeal in *Montreal Trust Co.* v. *Abitibi Pulp and Paper Co.*[17] proceeds on grounds which attach to the dis-

[11] 3 & 4 Vict., c. 35 (Imp.).
[12] 30 & 31 Vict., c. 3 (Imp.).
[13] *Reference re Privy Council Appeals*, [1940] S.C.R. 49.
[14] R.S.O. 1937, c. 98.
[15] *Cf. Gillett & Co. Ltd.*, v. *Lumsden*, [1905] A. C. 601; *McBride* v. *Ontario Jockey Club Ltd.* (1925), 88 O.L.R. 267.
[16] [1942] 2 D.L.R. 301, O.R.92.
[17] [1942] 3 D.L.R. 17, O.R. 321.

cretion in admitting an appeal a constitutional protection with which the legislatures cannot interfere.

The *Abitibi Case* referred to is one of a series of cases litigating the enforceability of a bond mortgage given by the Abitibi Pulp and Paper Co., a Dominion corporation which had been declared bankrupt and against which a winding up order had been made.[18] Following an order of the Court of Appeal affirming an order for sale of the mortgaged property,[19] the Ontario legislature passed the Abitibi Moratorium Constitutional Question Act, 1942,[20] which provided that notwithstanding anything in the Privy Council Appeals Act or any other Act, an appeal by defendant company to the Privy Council from the order for sale should be allowed and admitted without any security being furnished. Upon an application by the liquidator of the company to admit an appeal, the Ontario Court of Appeal declared the statute to be *ultra vires* but went on to admit the appeal under and subject to the terms of the Privy Council Appeals Act.

In considering the Court's reasons, we can put to one side any arguments based on the fact that the company was a Dominion one and was being dealt with under Dominion legislation in relation to bankruptcy and insolvency.[21] Robertson C.J.O., after pointing out that the legislature assumed to grant a right of appeal free from the restrictions of the Privy Council Appeals Act declared:[22]

> Nothing is to be done by any Court in Ontario except to perform the function, which the Act makes in this case a merely clerical one, of transmitting the case to the Judicial Committee for its opinion. This Act does not, in my opinion, come within the description of a law relating to the administration of justice in the Province, and in respect of which the Legislature of the Province has jurisdiction under s. 92 (14) of the B.N.A. Act, and no attempt was made to support it under any other head.

This seems to be the first occasion upon which it has been asserted that a legislative direction to a court, depriving it of discretion in the matter, is incompatible with the constitution. There has hitherto been no doubt that a provincial legislature may assign or imposes duties upon or limit the jurisdiction

[18] *Cf.* [1938] O.R. 81 589; [1940] O.W.N. 307; [1942] 2 D. L.R. 349, O.R. 193.
[19] [1942] 2 D.L.R. 349, O.R. 183.
[20] 1942 (Ont.), c. 2.
[21] These points were not relevant to the decision of the case under discussion but they were relevant in previous stages of the litigation.
[22] [1942] 3 D.L.R. 17, at p. 23.

a provincial court,[23] but that these duties must reserve to the courts an area of discretion so that they might decide whether they ought to discharge them is a new doctrine of constitutional law. Surely if the matters assigned to the courts are within provincial legislative power it is of no consequence that the courts are relieved of discretion in connection therewith. To suggest that because the court's function is "clerical" the legislation assigning it is not within the legislative power in pursuance of which it was enacted amounts to an arrogation of power by the judiciary for which the British North America Act does not provide.

The reasoning of the late Mr. Justice Masten proceeds along lines similar to that of the Chief Justice. Thus, he states:[24]

> If the Act of 1942 were to be held valid, the judicial discretion hitherto exercised by this Court would be abolished and it would be usurped by the Legislature, the Court being demoted to the position of a clerical automaton. Such a result appears to me to be contrary to the fundamental basis of the Constitution and therefore *ultra vires* and invalid.

This, with respect, is a startling proposition, for it savours of the introduction into our constitutional law of some doctrine akin to that of separation of powers which, without warrant either in the words of the B.N.A. Act or in the constitutional experience of Canada, would operate as a limitation upon the legislative power of both the Dominion Parliament and the provincial legislatures.

A novel proposition too is Masten J. A.'s statement that the impugned Act does not relate to the "*general* administration of justice."[25] Section 92 (14) of the B.N.A. Act does not use the word "general", and there has hitherto been no judicial authority that legislative powers must be exercised generally only and never particularily; in fact, the reverse has been the case.[26]

The only ground upon which the Court's judgment of invalidity is supportable is that legislative power to deal with appeals to the Privy Council resides in the Dominion exclusively, in virtue of the decision of the Supreme Court of Canada in *Reference re Privy Council Appeals*.[27] On this view, the Ontario Legislature

[23] *Cf. Ottawa Valley Power Co.* v. *Hydro-Electric Power Commission*, [1937] O.R. at p. 309, per Masten J. A.
[24] [1942] 3 D.L.R. 17, at p. 30.
[25] *Ibid.*, at p. 30.
[26] *Cf. Dow* v. *Black* (1875), L.R. 6 P.C. 272; in relation to the provincial taxing power.
[27] [1940] S.C.R. 49.

would have no power to amend the Privy Council Appeals Act, let alone pass additional legislation respecting Privy Council appeals.[28] It is not improbable, however, that allowing for the correctness of the Supreme Court of Canada's decision, it carries no further than to give Dominion legislation respecting appeals a paramountcy over provincial legislation but does not prohibit provincial legislation in the absence of Dominion legislation.[29]

B. L.

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NEGLIGENCE — MALPRACTICE—RES IPSA LOQUITUR. — The continued refusal of Ontario courts to apply the doctrine of *res ipsa loquitur* to cases of malpractice by physicians and surgeons still awaits a satisfactory explanation.[1] One is not called upon to defend the doctrine in protesting against its non-application in such cases, in view of the variety of situations in which it has been successfully invoked.[2] It is easy to understand a refusal to apply the doctrine in cases where all the elements deemed necessary to warrant its employment are not established.[3] Thus, it might properly be urged in some malpractice case that the accident or injury could well happen without negligence, having regard to the state of medical science. The Ontario courts however, assume the existence of all elements deemed necessary to bring *res ipsa loquitur* into operation and refuse to apply it in malpractice cases as a matter of law.[4]

Thus, the application of *res ipsa loquitur* has been denied in Ontario where part of a forceps broke off and remained in the wound;[5] where there was a failure to discover a shoulder dislocation because full x-rays were not taken;[6] where a severe burn was suffered because of a flash of flame following the application of a heated cautery to the body;[7] where the administration of an inter-venous anaesthetic resulted in the leakage of the solution into the surrounding tissue.[8]

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[28] *Cf. Dobie* v. *Temporalities Board* (1882), 7 App. Cas. 136.
[29] *Cf. British Coal Corp.* v. *The King*, [1935] A.C. 500, 3 D.L.R. 401.
[1] *Cf. Clark* v. *Wansbrough*, [1940] O.W.N. 67; *Hutchison* v. *Robert*, [1935] O.W.N. 314.
[2] *Cf.* PROSSER ON TORTS, p. 293, for a list of such situations.
[3] *E.g Cox* v. *Saskatoon*, [1942] 2 D.L.R. 412, reversing [1942] 1 D.L.R. 74 (Sask. C. A.).
[4] *Cf. McFadyen* v. *Harvie*, [1941] 2 D.L.R. 663, affirmed [1942] 4 D.L.R. 647.
[5] *Hutchinson* v. *Robert*, [1935] O.W.N. 314.
[6] *Clark* v. *Wansbrough*, [1940] O.W.N. 67.
[7] *McFadyen* v. *Harvie*, *supra*. note 4.
[8] *Hughston* v. *Jost*, [1943] 1 D.L.R. 402.

On the other hand, the doctrine of *res ipsa loquitur* has been applied in New Brunswick,[9] has been accepted in England[10] and has been utilized in various types of malpractice cases in the United States.[11] If Ontario courts support the application of the doctrine in aeroplane crash cases,[12] it is difficult to support their position in the matter with respect to physicians and surgeons.

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PRACTICE — VENDORS AND PURCHASERS APPLICATION — WHETHER PROPERLY BROUGHT IN COURT OR IN CHAMBERS— *Re Fisher* v. *Coldoff*[1] was a motion before Mr. Justice Urquhart in Chambers under The Vendors and Purchasers Act, R.S.O. 1937, chapter 168, sec. 3. In dealing with costs, the learned Judge said: "This application has been brought in Chambers. I have always been of the opinion that Vendor and Purchaser applications are matters to be heard in Court but a large percentage of these cases are now launched in Chambers. Rule 205 applies and the matter does not appear to be within those provided for by Rule 207 to be heard in Chambers. Rule 602 confirms my opinion that these matters are to be heard in Court."

Under the relevant section of The Vendors and Purchasers Act, "A vendor or purchaser may, at any time. . . . apply. . . . to the Supreme Court or a judge thereof in respect of any requisition . . . . . and the Court or Judge may make such order upon the application as appears just." In considering the question whether or not such a motion is properly brought in Chambers or in Court, it is interesting to note what Mr. Justice Middleton said with respect to the interpretation of the Rules as to whether or not a motion was to be in Court or Chambers etc. In *Oliver* v. *Frankford*[2] he stated:

> Under the present Rules, jurisdiction is throughout conferred upon the Court, and Rules 205 *et seq.* must be consulted to ascertain whether the motion should be made before a Judge sitting in Court or in Chambers or before the Master in Chambers. All the old learning upon the use of the phrase "the Court or a Judge" and "the Court" is now happily obsolete.

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[9] *Taylor* v. *Gray* [1937] 4 D.L.R. 123 (N.B.C.A.).
[10] *Mahon* v. *Osborne*, [1939] 2 K.B. 14. In *Hughston* v. *Jost*, *supra*, note 8, Hope J. stated incorrectly that the Court of Appeal in the *Mahon Case* had denied the applicability of *res ipsa loquitur*. The learned Justice quoted from a dissenting judgment on the point.
[11] PROSSER ON TORTS, p. 294.
[12] *Malone* v. *Trans-Canada Airlines*, [1942] 3 D.L.R. 369.
[1] [1942] O.W.N. 490.
[2] 47 C.L.R. 43 at p. 44.

In the case at bar it is said that there does not appear to be any provision in Rule 207 enabling the motion therein to be made in Chambers. It is respectfully submitted that Rule 207 (15) seems to be in point. This reads: "[the following applications shall be disposed of in Chambers:] Motions under any statute which authorizes an application to a Judge". Since the Vendors and Purchasers Act authorizes the alternative procedure before the Court or a judge, it would appear to be quite in order for the application to be made in Chambers. Rule 205 deals with any statute (expressly) providing for the matter to be be heard in Court. In such cases it must be before a Judge sitting in Court.

Justice Urquhart referred to Rule 602 which reads: "When upon an originating notice under The Vendors and Purchasers Act it appears that some third person is or may be interested in the question raised, the Court may require to be given. . . ." It seems that the use of the word 'Court' here was of some effect in leading the learned Judge to decide that such a motion was to be made in Court, but having regard to what has been said by Mr. Justice Middleton, it would appear that the use of the word 'Court' is not to be taken in the exclusive sense as meaning a Judge sitting in Court but rather to either the Court, a Judge or any officer thereof.

As an illustration of the use of the word 'Court' in the Rules, Rule 214 might be looked at and this reads: "If on the hearing of a motion it appears that any person to whom notice has not been given ought to have had notice, the Court may either dismiss the motion or adjourn the hearing. . . ." Rule 216 reads: "If satisfied that the delay. . . . entails serious mischief the Court may make an interim order ex parte". At first glance it might appear that the use of the word Court is also exclusive, but when one reads with this, Rule 217, it is apparent that such an exclusive meaning is not to be attached to the word 'Court'. Rule 217 reads: "A party affected by ex parte order. . . . may move to rescind or vary the order before the Judge or officer who made the same, or any Judge or officer having jurisdiction. . . ." In other words, it is respectfully submitted, that it seems fairly conclusive, that the word 'Court' in Rule 602 should not be given the limited meaning attributed to it by Mr. Justice Urquhart, and in order to decide whether or not it is a motion for Court or Chambers, Rules 205 and 207 are the governing Rules. Rule 602 in effect says that the Court may require notice to be given after an originating notice is launched under the Vendors and Pur-

chasers Act. It is only when the motion has been already launched that the Court may act. Whoever is entitled to have recourse to that Act becomes entitled to take advantage of its privilege of alternative procedure.

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MORTGAGES — RELIEF FROM ACCELERATION CLAUSE IN FORECLOSURE PROCEEDINGS—Prior to 1942, there was a fairly general belief that a practice existed in Ontario, whereby a mortgagor or owner of the equity of redemption was allowed to obtain a stay of foreclosure proceedings after judgment, but prior to final order of foreclosure, upon payment of all arrears of principal, interest and costs then due, less principal money due by virtue of an acceleration clause, pursuant to the provisions of Rule 485.[1] This right is no longer available to a mortgagor by reason of the decision of the Court of Appeal in *Ontario Loan and Debenture Company* v. *Gray et al.*[2] A synopsis of the decision as it appears in the head note to that case is as follows:

> Where an application is made for a stay of proceedings in a mortgage foreclosure action after judgment has been entered, "the amount then due for principal, interest and costs", which, under Rule 485, the mortgagor must pay as a condition of obtaining the stay, is the amount found to be owing by the judgment. The fact that a large part of this amount is owing only by virtue of an acceleration clause in the mortgage is immaterial, and while the extended form of that clause in Schedule B to The Short Forms of Mortgages Act, R.S.O. 1937, c. 160, indicates that there is a practice whereby relief may be granted on paying the amount which would be due apart from the acceleration clause, there is in fact no such practice. The rights of the parties have become merged in the judgment, and "the amount then due" can be ascertained only from judgment, and not from the mortgage.

The same point arose for decision in Manitoba and the same conclusion was reached in *National Trust Co. Ltd.*, v. *Campbell.*[3]

[1] Rule 485 is as follows:
(1) In an action for foreclosure or sale, or for recovery of possession of any mortgaged property for default in the payment of interest, or of an instalment of the principal, the defendant may, before judgment or after judgment, but before sale or final foreclosure or recovery of possession of the mortgaged property, move to stay the action upon payment of the amount then due for principal, interest and costs.
(2) Any action so stayed may upon subsequent default in the payment of a further instalment of the principal, or of the interest, be proceeded with by leave of the court.

[2] [1942] O.R. 471.

[3] (1908), 17 Man. L.R. 587.

The principle upon which the Court proceeded in that case was that a provision in a mortgage that upon default in payment of an instalment of principal or interest, the whole amount shall become due, is not a provision in the nature of a penalty against which equity will relieve. As it was considered desirable that a mortgagor should have a right to obtain such a stay of proceedings without having to pay the accelerated principal money, the Rules of Practice in Manitoba were amended accordingly. Subsequently the Rule in question was repealed and in substitution thereof a section was added to the King's Bench Act and now appears in R.S.M. 1940, c. 44, s. 60, as follows:

> (1) Notwithstanding any agreement to the contrary, in case default has occurred in payment of any money due under any mortgage of land, agreement for sale of land with or without chattels or agreement relating thereto, or in the observance of any covenant contained in any such mortgage or agreement, and under the terms of such mortgage or agreement in consequence of such default the payment of money not payable by reason merely of lapse of time is accelerated, the court, in any action for enforcement of the rights of the mortgagee or of the vendor or of any person claiming through or under him, if a defendant has paid into court the full amount of the moneys due under such mortgage or agreement (exclusive of the money not payable by reason merely of lapse of time), together with the costs of the action, and has performed each and every such covenant which is performable and has paid into court a sum which the court deems sufficient to cover the loss or damage suffered by the plaintiff by reason of the breach of any and every such covenant which has become not performable,
>
> (a) if judgment has not been recovered, shall have jurisdiction to grant relief from such acceleration and shall upon application grant such relief and dismiss the action;
>
> (b) after judgment has been recovered, but before sale or recovery of possession of the land or final foreclosure of the equity of redemption or final determination of the agreement, shall have jurisdiction to grant relief from such acceleration and shall upon application grant such relief and stay proceedings in the action.
>
> (2) Where after proceedings have been stayed under the preceding subsection, fresh default occurs under the mortgage or agreement the court shall upon application remove such stay.

It will be noted that the above section covers agreements for sale, probably for the reason that this form of contract is widely used in Western Canada.

The effect of Rule 485 as explained in the 1942 Ontario Case, may not apply to a mortgage which does not contain a provision similar to the one contained in The Short Forms of

Mortgages Act, R.S.O. 1937 c. 160, Item 16, but the Manitoba section above mentioned would appear to cover all mortgages including those where there is a specific provision that no such relief shall be granted.

It was held in *Todd* v. *Linklater*[4] that where the mortgage contract provides for relief from the operation of an acceleration clause at any time prior to judgment, this provision preserves to the mortgagor the right to restrain sale proceedings instituted under a power of sale by paying arrears of interest and costs. The language contained in section 60 of the Manitoba Act appears to limit its operation to cases where there is an action pending in court, and the right to a stay of proceedings after institution of sale proceedings but prior to actual sale appears to be covered by section 11 of The Mortgages Act, R.S.M. 1940, c. 140, which is as follows:

> Where default has occurred in making any payment due under any mortgage or in the observance of any covenant contained therein and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable, the mortgagor may, notwithstanding any provisions to the contrary, and at any time prior to *sale* or foreclosure under a mortgage, perform such covenant or pay such arrears as may be in default under the mortgage, together with costs, and he shall thereupon be relieved from the consequences of non-payment of so much of the mortgage money as may not then have become payable by reason of lapse of time.

It would seem somewhat anomalous to have relief against the effect of an acceleration clause in Ontario depend on a "judgment," thus differentiating between sale proceedings taken under a power of sale and proceedings in court leading to a judgment, and the question of amending Ontario legislation and the Rules of Practice to accord not only with the Manitoba practice but with the wide-spread professional opinion held prior to the decision in *Ontario Loan and Debenture Company* v. *Gray* is worthy of serious consideration. It may be that an enabling statute will be required if a question of substantive right is involved rather than procedure, but eventually an amendment to the extended form of the statutory short form acceleration clause to clear up the difficulty regarding "judgment," as well

[4] (1901), 1 O.L.R. 103.

as an amendment to Rule 485, providing that the "amount due" within the meaning of the Rule shall be only the amount due by lapse of time and shall not include any amount which is due by virtue of an acceleration clause would seem necessary.