CASE AND COMMENT.

CONSTITUTIONAL LAW — LIABILITY OF CROWN IN QUEBEC FOR DELICTS AND QUASI - DELICTS.—The decision of the Supreme Court of Canada in *The King* v. *Joseph Cliche*[1] is of the greatest importance. It declares that the procedure of petition of right is available to make the Crown in right of the Province of Quebec answerable for damages resulting from an offence or quasi-offence.

The suppliant was injured by running at night into a steam roller which was standing without lights on a highway under the control of the province. He instituted proceedings against the Crown by petition of right. The Superior Court and Court of Appeal awarded damages, but without raising the question of immunity of the Crown. Cannon J., delivering the opinion of the Supreme Court of Canada, held on three grounds that the Crown was liable. First, section 106 of the Quebec Roads Act,[2] at least implicitly, decreed the responsibility of the Government for damages. Next, Article 1011 of the Code of Procedure, dealing with petition of right, imposes a wider liability upon the provincial Crown than does the Exchequer Court Act[3] upon the Dominion Crown. The Article reads :

> Any person having a claim to exercise against the Government of this Province, whether it be a revendication of moveable or immoveable property, or a claim for the payment of money on an alleged contract, or for damages, or otherwise, may address a petition of right to His Majesty.

It was probable, he suggested, that the Quebec legislature in enacting the Article was inspired by the Imperial Crown Suits Ordinance XV, 1876, sec. 18, subsec. 2, and this has been interpreted by the Privy Council[4] as including claims based on tort. In the third place, he added that he felt obliged to follow the custom, accepted for many years in Quebec, of interpreting Art. 1011 of the Code of Procedure as covering delict and quasi-delict, and referred to the Report of the Codifiers of 1896 in support of the proposition.[5]

That the result of the decision is socially desirable no reasonable person will question. In these days of increasing

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[1] [1935] S.C.R. 561.
[2] R.S.Q. 1925, c. 91; 17 Geo. V, c. 31, s. 22.
[3] R.S.C. 1927, c. 34, s. 19.
[4] *Attorney-General of The Straits Settlement* v. *Wemyss* (1888), 13 App. Cas. 192.
[5] Cited in SURVEYER, CODE OF CIVIL PROCEDURE, p. 93.

governmental activity, the immunity of the Crown from suit for tort works great injustice. The present holding will mean, not only that the Crown may be sued for damage caused by its ordinary employees in the performance of their civil duties, but also that it will be liable for damage caused by the numerous governmental commissions and regulatory bodies, such as the Liquor Commission, Electricity Commission, etc., except in so far as these may be exempted by special statute. The Crown, indeed, will be placed on a footing of equality with the ordinary employer as regards liability.

While approving the result, however, it is to be regretted that reasons more cogent were not advanced for the conclusion arrived at.

The Crown in Quebec, possessing the ordinary prerogatives of the Crown in other provinces, is free from liability for offences or quasi-offences committed by itself or its servants, except in so far as special liability is imposed by statute. The proposition is too clear to need enlargement. The only special statute in Quebec purporting to destroy this exemption from liability in a general way is the above Art. 1011 of the Code of Procedure. This Article therefore needs careful examination. It can hardly be said to have received the attention it deserves in the present case.

The origin of most, if not all, Canadian statutes dealing with petition of right is to be found in the English Act of 1860.[6] This Act regularised the procedure on petitions. It defined the word "relief" as comprehending

> Every species of relief claimed or prayed for in any such petition of right, whether a restitution of any incorporeal right, or a return of lands or chattels, or a payment of money or damages, or otherwise.[7]

It was expressly provided[8] that nothing in the Act should give the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of the Act. Despite the wide language of the definition of "relief", it was subsequently held that the Act did not confer a right of action based on tort, and that the prerogative exemption of the Crown was not interfered with.[9]

The limited effect of this Act must therefore have been known to Canadian legislatures when they began to adopt it.

[6] 23 and 24 Vict., c. 34.
[7] Sec. 16.
[8] Sec. 14.
[9] *Tobin* v. *Rex* (1863), 16 C.B.N.S. 310, followed in numerous cases thereafter.

Ontario introduced it in 1872 by 35 Vict., c. 13, and adopted also verbatim the definition of "relief", but the statute omitted any clause safeguarding the royal prerogative. Nevertheless, in the *Muskoka Mill Company* v. *The Queen*,[10] an Ontario court held that the omission of these words did not suffice to take away the prerogative immunity, and that there was no new liability created by the Act.

The Dominion first introduced the Act for suits against the Dominion Crown in 1875.[11] The Dominion Act contained the same wide definition of "relief" that is to be found in the English Act and included also the express exclusion of new liability. The Supreme Court twice held that no claim against the Dominion Crown based on tort could be proceeded with by petition of right.[12] Doubtless because of that fact the Exchequer Court was given its present jurisdiction over torts connected with public works.[13]

The Province of Quebec adopted the statute in 1883.[14] Substantially the Quebec statute is the same as its English prototype, with necessary changes to fit the procedure to the terminology and practice of the Quebec civil courts. Section 2 of the Quebec statute, which later became Art. 886a of the former Code of Procedure and is now Art. 1011 of the present Code, is so like the English, Ontario and the Dominion definitions of the "relief" for which a petition lies as to make it impossible not to conclude that it was derived from them. If this is so, then Cannon J.'s suggestion in the present case that the legislature of Quebec was inspired by an Imperial Ordinance of 1876 is most improbable; and indeed is somewhat reminiscent of the statement made in *Parson's Case*, that the Fathers of Confederation when drafting the Trade and Commerce clauses of the B.N.A. Act were doubtless thinking of a statute of Queen Anne.[15] It is highly improbable that any one in Canada knew anything about the Crown Suits Ordinance, which attained no general publicity until the Privy Council interpreted it in *Attorney-General of The Straits Settlements* v. *Wemyss*[16] in 1888—six years after the Quebec statute was enacted.

[10] (1881), 28 Grant 563. There is still no general liability on the Crown in Ontario : see note in (1935), 13 Can. Bar Rev., 45.

[11] 38 Vict., c. 12, now R.S.C. 1927, c. 158.

[12] *The Queen* v. *McFarlane* (1882), 7 Can. S.C.R. 216; *The Queen* v. *McLeod* (1882), 8 Can. S.C.R. 1.

[13] By 50 and 51 Vict., c. 16 (1887).

[14] 46 Vict., c. 27.

[15] *Citizen's Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96 at p. 112.

[16] *Supra.*

It is true that the Quebec statute omitted the express statement, contained in the English and Dominion Acts, that no new liability was being created. Nevertheless, sec. 17 expressly safeguarded the royal prerogative in these words :

> Nothing in this Act contained shall : —
>
> 1. Prejudice or limit, otherwise than is herein provided, the rights, privileges or prerogatives of Her Majesty or Her Successors; or
>
> 2. Prevent any suppliant from proceeding as before the passing of this Act.

This makes the argument against tort liability even stronger for the Quebec statute than for the Ontario one considered in the *Muskoka Case*.[17] For, since prerogative can in any case only be removed by express words or necessary intendment, it is impossible to believe that it can be removed by the ambiguous wording of sec. 2. when limited by sec. 17.

Additional argument may be drawn from other decisions of the Canadian Supreme Court, nowhere referred to in the present case. In *The Quebec Liquor Commission* v. *Moore*,[18] Duff J. concluded that the Quebec Liquor Commission, being an instrumentality of the Crown in right of the Province of Quebec, was not answerable in an action for a quasi-delict committed by its servants. This conclusion could not have been arrived at if the Code of Procedure imposed a general liability. Idington J., dissenting, took the opposite view, but rather on the ground that the Alcoholic Liquor Act[19] created a liability. In *The King* v. *Zornes*,[20] the Alberta Petition of Right Act,[21] containing a definition of relief identical with the English, Ontario and Dominion statutes, and like the early Ontario statute containing no statement preserving the prerogative or negativing new liability, was considered not to confer a general responsibility for tort; the suppliant in that case, it is true, was accorded damages for injury committed by employees of the provincial telephone system, but that was only because there was a special provision in the Public Utilities Act[22] which was considered to confer a substantive right for which the procedure of the Petition of Right Act was available.

It is perhaps arguable that sec. 106 of the Quebec Roads Act created a new substantive right which, when added to the

[17] *Supra.*
[18] [1924] S.C.R. 540.
[19] 11 Geo. V, c. 24, s. 12.
[20] [1923] S.C.R. 257, especially Anglin J. at p. 266 and Mignault J. at p. 268.
[21] 6 Ed. VII, c. 20.
[22] 5 Geo. V, c. 6, s. 31 (1915).

provisions of Art. 1011 of the Code of Procedure, was sufficient to create a delictual liability on the Crown for all damage caused by the construction of highways by the Province. That section reads :

> Whenever, under this Act or any other Act respecting roads, the Minister of Roads maintains, repairs, or improves a road or a highway or performs maintenance, repair or improvement work thereon, such action shall not have the effect of withdrawing such road or highway from the authority of the municipal corporation having control thereof, nor of altering the latter's obligations towards the public. Such corporation shall not, however, be responsible for damage due to the fault of employees of the Minister of Roads, committed in the discharge of their duties, nor to any default in the fulfilment of the obligations undertaken by the Minister of Roads, under sections 51, 61, 64 and 91.

This section, however, is extremely vague, and when interpreted by the rule that the prerogatives of the Crown cannot be taken away except by express enactment or necessary intendment,[23] seems totally inadequate to confer the substantive right in question. Read in connection with sec. 107 of the Roads Act, which provides for a reference to the Quebec Public Service Commission of cases involving damage to property through road construction, sec. 106 seems merely intended to protect municipalities from possible claims based on fault of provincial employees. Even if we concede this point, however, it follows that the judgment in the present case goes no further than to impose a liability for damages caused in this manner on provincial highways. As in *Zornes' Case*,[24] the petition of right procedure is available to enforce a substantive right given elsewhere. Cannon J.'s statement that there is a general delictual liability, even wider than that imposed by the Exchequer Court Act on the Dominion for damage done in relation to public works, becomes then purely *obiter*.

Another line of argument to justify the present holding might have been considered, though it does not appear to have much force. The clause safeguarding the prerogatives of the Crown, contained in the original Quebec statute,[25] was repealed when the other provisions of the statute were incorporated in the Revised Statutes of Quebec 1888, par. 5976. But it is difficult to see how a mere repeal of the safeguarding clause could of itself enlarge the ambit of the section dealing with the substantive right. The present Dominion Petition of Right

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[23] Incorporated in the Quebec Civil Code, Art. 9.
[24] *Supra*.
[25] 46 Viet., c. 27, s. 17.

Act[26] has similarly omitted the safeguarding clause. Are we to conclude therefore that there is a general tort liability imposed on the Dominion Crown, apart from the Exchequer Court Act? Its definition of relief is:

> 2.c. "Relief" includes every species of relief claimed or prayed for in a petition of right, whether a restitution of any incorporeal right or a return of lands or chattels, or payment of money, or damages, or otherwise.

These terms are fully as wide as those in the Quebec Code of Procedure.

It is significant that in no reported case in Quebec has the Provincial Crown ever been held liable in tort. Isolated *dicta* alone support the idea.[27] The statement that long practice in Quebec permits such actions is difficult to understand. The reference in the Codifiers' Reports in no wise supports the contention. The true meaning of the words "or for damages, or otherwise", in the Code of Procedure, Art. 1011, would appear to mean merely claims for unliquidated damages arising out of contract, or other claims of a like contractual nature. These have long been recognized as proper grounds for granting a petition of right.

In conclusion, it seems that *The King* v. *Cliche* is a desirable but somewhat doubtful judgment, at most an authority for the single point decided, namely that the Crown in right of the Province of Quebec is answerable for damages caused by the construction and maintenance of provincial highways.

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[26] R.S.C. 1927, c. 158.

[27] *Corporation de la Paroisse de Berthier* v. *Berger* (1923), Q.R. 35 K.B. 128; *Chaloute* v. *Necker* (1926), Q.R. 64 S.C. 250. Both these cases were connected with damages caused by construction of roads.

CORONERS' INQUESTS — NEW SOUTH WALES — WHAT IS A BODY? — That the viewing of the body was essential even where death and identity were established, was clearly established by the common law rules imported into New South Wales by the old English Act. But as to what was a body, *i.e.*, how much of the body must be viewed, and whether it was sufficient that there was part of the body, and if so how much, appears not to have been the subject of any reported decision until the point arose in New South Wales in 1935 in *Ex parte Brady; re Oram*, 52 Weekly Notes. In that case the legality of an Inquest was challenged on a Writ of Prohibition. The Coroner had commenced an inquest concerning the death of one James Smith. The body was not produced but an arm had been produced to the Coroner identified by tattoo marks as that of James Smith, there was evidence that the arm had been cut from a dead body and the Coroner was satisfied that James Smith whose arm it was, was dead. Upon this evidence the Judge was called upon to decide the matter on the return of the Writ of Prohibition. His Honour held that there was no proper basis for the Inquest and that the whole matter reduces itself to the question — Is an arm a body or corpus? or, How much of a body may be called a body? The Judge was clearly of opinion that no one would speak of an arm as a body and that the limb which had been viewed cannot be called a body. If, as the Judge added, he were to hold otherwise it would follow that each leg was a body, and likewise a severed head, and consequently, if the various parts were found lying within the jurisdiction of different Coroners, there might be so many different inquests. The court was not asked to decide whether a trunk without head or limbs might be defined as a body or corpus but it seems clear that any separate member cannot be so termed.

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MARRIED WOMEN—HUSBAND'S LIABILITY FOR WIFE'S TORTS. —Elsewhere in this number of the REVIEW appears a discussion of the recent English legislation abolishing the anomalies and inconsistencies of the law relating to married women.[1] The unsatisfactory state of affairs existing in many of the Canadian provinces in this connection, is brought to light by the recent decision of the Saskatchewan Court of Appeal in *Davidner* v.

[1] *Supra*, p.

Schuster,[2] in which the vexed question of the husband's liability for his wife's torts was again discussed. Despite the fact that the Saskatchewan statutes differed in some respects from the earlier English acts dealing with married women, and in particular abolished the "proprietary" liability of a married woman, so that it was possible for Gordon J.A. to say that "a married woman in Saskatchewan has far more rights and is under more liabilities that a married woman in England,"[3] the Saskatchewan Court of Appeal felt that the doctrine of a husband's liability for his wife's torts enunciated by the House of Lords in *Edwards* v. *Porter*[4] still applied in Saskatchewan.

In so holding, the Court was compelled to express its dissent from the 1924 decision of the Appellate Division of the Supreme Court of Alberta in *Quinn* v. *Beales*,[5] in which the Alberta Court felt able to avoid the operation of a doctrine which Turgeon J.A. in the present case stated as having been described as " 'illogical', 'unjust', 'anomalous', and 'Gilbertian', owing to what has been termed the 'survival of archaic law' ".[6] As *Quinn* v. *Beales* was decided a few months prior to the decision of the House of Lords in *Edwards* v. *Porter*, the Saskatchewan Court had no difficulty in saying that "the judgments in that case, founded as they are on unanswerable reasons for what the law ought to be, were not founded on the law as it was and is."[7] In importing the doctrine of *Edwards* v. *Porter* into the construction of a Canadian Statute which admittedly was different in wording and effect than its English prototype, the doctrine of *Trimble* v. *Hill*,[8] seems to have been given a new vigour at a time when we had imagined it to have been more honoured by its non-observance than by its application.[9]

In any event, the case should emphasize again that the whole subject matter of the liability of married women (and of their husbands) is badly in need of a thorough overhauling along lines freed of the anomalies of "separate property" and "joining for conformity". With the lead given by the new English Act, it is submitted that the question is one to which the Commissioners on Uniformity of Legislation in Canada might well give their attention.

C. A. W.

[2] [1936] 1 D.L.R. 560.
[3] *Op. cit.*, at p. 577.
[4] [1925] A.C. 1.
[5] [1924] 4 D.L.R. 635.
[6] [1936] 1 D.L.R. at p. 568.
[7] Turgeon J. A., at p. 568.
[8] (1879), 5 App. Cas. 342.
[9] See an article by Mr. Justice Hodgins, *The Authority of English Decisions* (1923), 1 Can. Bar Rev. 470.

CRIMINAL LAW — RIGHT OF APPEAL FROM CONFISCATION ORDERS.—A strange quirk in the procedural provisions of our Criminal Code was brought to light in the recent case of *Rex* v. *Miles*.[1] Miles had been convicted, under the summary trial provisions of the Code, of unlawfully keeping a common gaming house. Subsequently, proceedings were taken, before the magistrate who had made the conviction, under sec. 641 of the Code. This section provides for searching gaming houses and seizing and destroying certain kinds of property found therein. The magistrate issued a warrant to search the premises occupied by Miles for gambling machines. Under this warrant a slot machine was seized, and the magistrate made an order that it be destroyed and that any money therein be forfeited to the Crown.

Miles appealed against this order to the Supreme Court of Nova Scotia *in banco*, on the ground that the magistrate made no proper inquiry as to the purpose for which the machine was used or intended to be used, and made no adjudication thereon, and that even if he did, it was not disclosed in the record. The appeal was dismissed on the ground that there was no right of appeal from the order of the magistrate.

In a number of cases in other provinces appeals from such orders were entertained, but the question of the right of appeal itself was not raised. In *Rex* v. *Richards*,[2] a majority of the British Columbia Court of Appeal held that, on an appeal from the order of a magistrate for the confiscation of a vending machine, the order should, in the circumstances, be set aside. In *Rex* v. *Glenfield*,[3] the Appellate Division of the Supreme Court of Alberta set aside an order for the forfeiture of a gaming machine. The decision was based on the ground that the magistrate must determine whether instruments of gaming found in a disorderly house have been used or are intended to be used for an illegal purpose, and that the adjudication necessary to give jurisdiction must appear on the face of the proceedings.

In the judgment of the Supreme Court of Nova Scotia in the present case the above decisions were disposed of on the ground that no objection to the right of appeal was taken in those cases. No right of appeal could exist unless given by statute, and no such statutory provision existed. Sec. 1013(1) of the Criminal Code did not confer such a right, for the present

[1] [1936] 1 D.L.R. 186; 9 M.P.R. 554; 65 Can. C.C. 88.
[2] [1932] 1 W.W.R. 177.
[3] [1935] 1 D.L.R. 37; 63 Can. C.C. 334. See also, *Rex* v. *Foo Loy* (1921), 36 Can. C.C. 159; 30 B.C.R. 162, which seems impliedly to recognize the existence of appeals from such orders.

appeal was not one by the prisoner against his *conviction*. The condemnation of the machine was a proceeding *in rem* entirely distinct from the proceedings against the prisoner. Furthermore, the present case could not be treated as an appeal against *sentence* under sec. 1013(2) of the Code. "Sentence", according to sec. 1012(e) meant an order of the trial court made on conviction *with reference to the person convicted or his wife or children*.

The writer is not prepared to suggest that the decision in this case is unsound in law. As a matter of strict law it appears to be quite correct. He does wish, however, to question the justice and desirability of such a state of the law. It is all very well to draw technical distinctions between proceedings *in personam* and *in rem*. Theoretically they are excellent; but from a realistic viewpoint the validity of such distinction is questionable. The real object and effect of forfeiture provisions such as those in sec. 641 of the Code is to punish some *person* having a proprietary interest in the forfeited article. The object is not to punish the machine. Indeed, the existence of such machines, or the possession or ownership of them, is not necessarily illegal. The purpose is to punish some person who has permitted the property to be used for unlawful purposes. An order of forfeiture in such cases may not be technically a "sentence", but it is undoubtedly a punitive sanction similar in its nature to a *fine*. If it is to be treated as essentially different from other punitive proceedings, one may reasonably require that sound reasons of policy, rather than of technicality, should be adduced in support of such a course.[4]

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[4] According to the recent case of *Re Nelson* (1935), 65 Can. C.C. 94 (Ont.) there appears to be a remedy by way of *certiorari* to quash the order for confiscation in such cases.

JURISDICTION — FAILURE TO HEAR EVIDENCE AS AFFECTING. —In the February issue of the REVIEW,[1] following a comment by D. M. Gordon on *McPherson* v. *McPherson*,[2] in which he pointed out the distinction between "scope" of judicial power and the "manner" of exercising such power, we drew attention to the recent Ontario case of *Re Nelson*,[3] in which McTague J. held that, despite the decision of the Privy Council in *Rex* v. *Nat Bell Liquors, Ltd.*,[4] the total absence of any evidence deprived a magistrate of jurisdiction, and therefore an order made by a magistrate under such circumstances should be quashed on a motion by way of certiorari. On that occasion, we regretted that we were unable to obtain Mr. Gordon's views concerning the decision in *Re Nelson*, but we ventured to prophesy that he would condemn it. The following communication from Mr. Gordon indicates his views :

> As you surmised I would, I think the decision in *Re Nelson* altogether wrong and illogical. The distinction taken that there was no evidence given at all, whereas in the *Nat Bell* case there was some, is clearly untenable and against authority. *Cf.* the decisions in *Haggard* v. *Pélicier Frères*, [1892] A.C. 61; *Ex parte Blewitt, re The Justices of Shropshire* (1866), 14 L.T.R. 598; *Ex parte Hopwood* (1850), 15 Q.B. 121 (where on 49 out of 50 charges there was no evidence, yet a conviction no all); *Hooper* v. *Hill*, [1894] 1 Q.B. 659 and *The Queen* v. *The Justices of Cheshire* (1838), 8 Ad. & E. 398, in all of which cases a total absence of evidence was held to leave jurisdiction unaffected. *Ex parte Blewitt*, under the name *Re Shropshire JJ.*, and *Ex parte Hopwood* were approved in the *Nat Bell* case.
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> I do not share your view that there is anything to be said for *Re Nelson;* for, though undoubtedly the defendant did not receive justice, there must have been adequate remedy either by stated case, or by appeal, so that it was altogether unnecessary to bring in the question of jurisdiction at all. Nor does it seem to me possible to say that the magistrate "although presented with the opportunity for an exercise of jurisdiction . . . . . never assumed it." The mere fact that he pronounced and recorded a conviction is conclusive on that point. Jurisdiction is the power to decide legal right or liability, and however wrong his methods, how can it be said that in making a conviction the magistrate did not assume power to make a decision?
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> D. M. GORDON.

Victoria, B.C.

[1] 14 Can. Bar Rev. 159.
[2] [1936] 1 W.W.R. 33.
[3] [1936] O.R. 31.
[4] [1922] 2 A.C. 128.

REAL PROPERTY—BUILDING RESTRICTIONS—PRINCIPLES OF MODIFICATION.—The Court of Appeal for Ontario in the recent case of *Re Beardmore*[1] has restated the principles by which the court is guided in considering an application to modify or discharge restrictive covenants under sec. 57(1) of the Conveyancing and Law of Property Act.[2] Until 1927, sec. 57(1) was as follows:

> Where there is annexed to any land which has not been registered under the Land Titles Act any condition or covenant that such land or any specified portion thereof is not to be built on or is to be or not to be used in a particular manner, or any condition or covenant running with or capable of being legally annexed to the land, any such condition or covenant may be modified or discharged by order of a Judge of the Supreme Court on proof to his satisfaction that the modification will be beneficial to the persons principally concerned.[3]

It has been decided[4] that the concluding words of ss. 1 meant that it was not necessary to show that the modification sought would be beneficial to each individual principally interested but rather that consideration must be given to the general balance of convenience and the interest of all concerned, and that the benefit to the applicant must greatly exceed any possible detriment to those opposing the application before an order should be made.

The words "on proof to his satisfaction that the modification will be beneficial to the persons principally concerned" were dropped by the 1927 revision. Sedgewick J. in *Re Crocker*,[5] decided that the omission of these words did not improve the applicant's position but that he must show that the benefit to him greatly exceeds any possible detriment to those opposing the modification. *Re Beardmore* is the first pronouncement of the Court of Appeal upon the effect of the change of this statute. Upon the application of Beardmore's executors Rose C.J.H.C. made an order modifying a building scheme to permit the applicants to erect four-family or double duplex houses instead of only one-family residences. The neighbouring land owners appealed from this order on the ground that the effect of it would be to depreciate the value of their property and to destroy certain amenities which they possessed.[6] The Court of Appeal allowed

[1] [1935] O.R. 526; [1935] 4 D.L.R. 562.
[2] R.S.O. 1927, c. 137.
[3] 12 Geo. V, c. 53 (Ont.)
[4] *Re George* (1926), 59 O.L.R. 574; *Re Ontario Lime Co. Ltd.* (1926), 59 O.L.R. 646.
[5] (1931), 40 O.W.N. 294.
[6] The appellants had purchased their lands and built upon them relying on the restrictions of which they had notice. If they had not built, then the amenities would not have been considered. Although it is not stated in the report, the appellants apparently had the right to enforce the building restrictions in question: *Re Speer* (1926), 59 O.L.R. 385.

the appeal and refused to sanction the change in the restrictions because the evidence failed to satisfy them that the appellants' lands would not be to some real extent lessened in value and that they would not be deprived of existing amenities by the order of Rose C.J.H.C. Masten J.A., who delivered the judgment of the Court, said :[7]

> . . . . . I think the change in the statute tends to increase the burden resting on the applicants to establish a case warranting the intervention of the Court. In my opinion the applicant must by his evidence completely satisfy the Court that if the proposed modification is allowed the injury to the neighbouring owners who object will be negligible.

The courts, even before 1927, have emphasized the fact that the statute makes no provision for compensating objecting land-owners for any loss they might suffer by reason of an order under sec. 57(1), and that therefore this jurisdiction must be exercised with the greatest caution.[8] Now it is to be exercised with even greater caution. In view of this effect of the change in the statute, is not an amendment to or the repeal of sec. 99(2) of the Land Titles Act[9] now desirable to insure that the same principles will be followed by the court in modifying or discharging restrictions whether the land affected is registered under the Land Titles Act or comes under the Registry Act?

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[7] [1935] O.R. at p. 534; [1935] 4 O.L.R. at p. 569.

[8] *Re Howie* (1922), 53 O.L.R. 65; *Re Western Canada Flour Mills Limited* (1923), 25 O.W.N. 219; *Re McSherry* (1924), 26 O.W.N. 125; *Re George, supra; Re Ontario Lime Co. Ltd., supra.* As for the purpose of the statute, Middleton J.A. said in *Re Ontario Lime Co. Ltd.* at p. 651 : "The true function of the statute is to enable the Court to get rid of a condition or restriction which is spent or so unsuitable as to be of no value and under the circumstances when its assertion would be clearly vexatious." This is the same principle upon which the courts in their equitable jurisdiction apart from the statute refuse to enforce restrictive covenants on the ground of the change in the character of the neighbourhood. *Knight* v. *Simmonds*, [1896] 2 Ch. 294; *Sobey* v. *Sainsbury*, [1913] 2 Ch. 153; *Cowan* v. *Ferguson* (1919), 45 O.L.R. 161; *Re Ryding and Glover* (1920), 19 O.W.N. 235; *Chatsworth Estates* v. *Fewell*, [1931] 1 Ch. 224. Modification has been permitted under sec. 57(1) in the following instances; where the deviation from the restriction is trifling, *Re Graham* (1922), 23 O.W.N. 413; where the restrictions have only a short time to run, *Re Eglinton and Bedford Park Presbyterian Church* (1927), 61 O.L.R. 430; *cf. Re Langley* (1929), 37 O.W.N. 87.

[9] "The first owner and every transferee, and every other person deriving title from him, shall be deemed to be affected with notice of such condition or covenant; but any such condition or covenant may be modified or discharged by order of the Court, on proof to the satisfaction of the Court that the modification will be beneficial to the persons principally interested in the enforcement of the condition or covenant." R.S.O. 1927, c. 158, s. 99(2).