[HIGH COURT OF AUSTRALIA.]

MORTON . . . . . APPELLANT;
INFORMANT,

AND

WALKER . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1916.

MELBOURNE, *Sept.* 11.

Griffith C.J., Barton, Isaacs, Gavan Duffy and Rich JJ.

Building Regulations—Irregularity in building—Certificate of official referees—Sufficiency—Melbourne Building Act 1849 (*N.S.W.*) (13 *Vict. No.* 39), *sec.* 13.

Sec. 13 of the *Melbourne Building Act* 1849 is, so far as is material, as follows:—"Be it enacted with regard to any buildings . . . external walls . . . and every other part of every building . . . which shall be hereafter built rebuilt enlarged or altered within the said city" (of Melbourne) "contrary to the provisions hereof, so far as relates to the removal thereof, That if the same be not built . . . in the manner and of the materials and in every other respect according to and in conformity with the several rules and directions which are in this Act particularly specified, and if any person build or begin to build . . . contrary thereunto, and if in either of such cases it so appear by the certificate of the official referees, then the said building . . . or such part thereof so irregularly built . . . shall be deemed a nuisance; and that thereupon it shall be the duty of the surveyor, and he is hereby directed and required, to summon the builder before any two justices of the peace; . . . and that thereupon it shall be the duty of such builder, and he is hereby required, to enter into a recognizance in such sum as the said justices shall appoint for abating and taking down the same," &c.

Held, that a certificate by the official referees, which, after setting out that they had had submitted to them copies of notices served on the defendant to amend irregularities existing in certain buildings "the said irregularities being that the walls are not built of brick laid in mortar to produce solid

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work," stated that they decided and determined "that the said buildings are nuisances requiring to be abated," was not a good certificate within the meaning of the section as it certified to a matter of law, and not of fact.

Special leave to appeal from the decision of the Supreme Court of Victoria (*Hodges* J.): *Morton* v. *Walker*, (1916) V.L.R., 647; 38 A.L.T., 93, refused.

APPLICATION for special leave to appeal.

At the Court of Petty Sessions at Melbourne an information was heard whereby Henry Edgar Morton, Surveyor of the City of Melbourne, charged that Augustine William Walker being the builder, within the meaning of Act 13 Vict. No. 39, did, at Little Queensberry Street, Melbourne, build portions of a certain building irregularly and in such a manner as to be deemed a nuisance, viz., walls not built of bricks laid in and with mortar, contrary to Schedule C, Part 2, of the said Act. A document was put in evidence purporting to be a "certificate and award of the official referees," which was in the following terms:—"We, the official referees duly appointed under the provisions of the *Melbourne Building Act*, 13 Vict. No. 39, have had submitted to us copies of notices dated 25th November and 14th December 1915 served on the said A. W. Walker to amend irregularities existing on premises Nos. 8 and 14 Little Queensberry Street, City, the said irregularities being that the walls are not built of brick laid in mortar to produce solid work, as required by the provisions of Schedule C, Part 2, By-law No. 92. We, having heard the evidence of Mr. Minns, the Deputy Building Surveyor, and Building Inspector Douglas, decide and determine that the said buildings are nuisances requiring to be abated. The cost of this award, amounting to £2 2s., to be paid by the said A. W. Walker. And this is our certificate and award."

Evidence was given on behalf of the informant to the effect that hand-made bricks were used for the inside of the walls above the first storey and machine-made bricks for the exterior of the walls, and that the use of the two kinds of bricks would not make solid work. Evidence to the contrary was given on behalf of the defendant. The Magistrate held that the certificate of the referees was binding, and ordered the defendant to enter into a recognizance in the sum of £50 for abating the nuisance and taking down the walls.

An order *nisi* to review the order of the Court of Petty Sessions

was made absolute by *Hodges* J., on the grounds that sec. 13 of the Act required proof of the improper building of the walls as well as a certificate of the referees, and that the document alleged to be a certificate was not a certificate within the meaning of the section: *Morton* v. *Walker* (1).

The informant now applied for special leave to appeal to the High Court from that decision.

Starke, for the applicant. The proper construction of sec. 13 of the Act is that the irregularity is to be proved by the certificate, and that no other evidence is necessary. The certificate in this case, although it does not follow the words of the section, necessarily imports a finding that the irregularities existed. The referees are in the same position as any other public officer, and, if possible, their decision should be upheld.

PER CURIAM. The certificate is plainly bad. It certifies to a matter of law and not a matter of fact. Leave to appeal will be refused.

Special leave to appeal refused.

Solicitors for the applicant, *Malleson, Stewart, Stawell & Nankivell.*

B. L.

(1) (1916) V.L.R., 647; 38 A.L.T., 93.