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JANUARY 10TH, 1905.

DIVISIONAL COURT.

FORSYTHE v. CANADIAN PACIFIC R. W. CO.

Master and Servant—Injury to Third Person by Negligence of Servant—Acts outside of Employment—Railway—Section-men—Piling Ties on Highway near Crossing.

Motion by plaintiff to set aside nonsuit entered by ANGLIN, J., at the trial, and to enter judgment for plaintiff upon the findings of the jury or for a new trial.

Action to recover damages for bodily injuries sustained by plaintiff by reason of the alleged negligence of defendants.

C. Millar, for plaintiff.

I. F. Hellmuth, K.C., and W. H. Curle, Ottawa, for defendants.

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

MEREDITH, C.J.—We are of opinion that the nonsuit was right and that the motion should be dismissed.

The action was brought to recover damages for personal injuries sustained by plaintiff owing to his horse having taken fright at a pile of ties lying at the side of the highway which was crossed by the line of the Canadian Pacific Railway, and which were piled, as it appears from the plan, just outside of the line of the travelled way.

The horse appears to have run away, and plaintiff to have suffered severe injuries.

Defendants are sought to be made liable because, as was undoubtedly the fact, the ties were placed where they were by a man named Dunlop, who was section-foreman of the defendant railway, and two men working under him upon the section,—a man by the name of Torrance, who was called as a witness at the trial, and a man named Murphy.

The question turns upon the circumstances in which the ties were placed there, and whether the sectionmen in putting them there were acting in the course of their employment so as to render defendants liable for their negligent or unlawful act.

The evidence upon this point is in a narrow compass and to be found in the testimony of Torrance, which occupies three pages of the shorthand notes.

Torrance, as I have said, was a sectionman working under Dunlop. According to the testimony of Torrance, when ties that were worn out were removed from the track, the duty of the sectionmen, acting under the foreman, Dunlop, in this particular section, was to burn the ties beside the track. There is evidence from which the jury would probably be justified in inferring that defendants had permitted the sectionmen, or any of their employees who desired to have the ties for firewood, to take them instead of burning them beside the track.

Dunlop had, upon other occasions, according to the testimony, availed himself of that permission.

The ties in question were brought from where they had been collected upon the side of the track by the two men and Dunlop—the two men acting under the directions of Dunlop—not for the defendants' purposes (I think it is clear that no other inference could be drawn), but for the purpose of Dunlop appropriating them to his own use, according to the permission which had been given to him by his employers.

The ties were brought and placed upon the highway, so that they would be in a convenient position to be ultimately removed by Dunlop to his residence. The evidence does not shew, and perhaps it is not important to know, how far from the track Dunlop lived.

It seems to me that plaintiff is upon the horns of this dilemma: If there is no evidence that the sectionmen had authority to take and remove these ties for their own use, then what was done was an unlawful act, and it could not be said, if the act of removing them was a wrongful act and a misappropriation of the property of defendants, to be an act done by the sectionmen in the course of their employment. If, on the other hand, and that seems to be the more likely and probable view of the matter, there was the permission to Dunlop to take them, I think upon this evidence Dunlop must be taken to have availed himself of that permission, and that from the moment he made any disposition of the ties it must have been a disposition for his own purposes and not for those of his employers, and therefore that what was done

by the men, although in the employment of the defendants, was not done in the course of their employment, but was done for Dunlop.

This is somewhat similar to the case put by my brother Magee during the argument:—A farmer, who has some cordwood upon his farm, is willing that one of his hired men shall have the benefit of a quantity of it, and says to him, "John, you may take my team and waggon, and the other man, Robert, may assist you in taking that cordwood away for your own use." The man, either through negligent driving, or, as in this case, by improperly piling the wood upon the highway, does something which causes injury to another; it seems to me it would be clear in such a case, that the farmer would not be answerable, for what was being done by the man was being done for himself; and so also in regard to the assistance given by the man who, upon this suggestion, was permitted to assist him.

In the case of Story v. Ashton, L. R. 4 Q. B. 476, there is a discussion as to the circumstances in which it may properly be found that a servant is not acting in the course of his employment, and in which it may be found that he is so acting.

Again, in a case of Sanderson v. Collins, a decision of the Court of Appeal, [1904] 1 K. B. 628, the language of the Master of the Rolls seems to me particularly apposite to this case. He says: "If the servant in doing any act breaks the connection of service between himself and his master, the act done in those circumstances is not that of the master."

Now, it seems to me that when Dunlop determined to avail himself of the privilege given to him by defendants to take the ties for his own use, and commenced to remove them for that purpose, as plainly he did upon the testimony, that moment there was a breaking of the connection of service between himself and his master, and after that time he and the men under him cannot be said to have done the act which they did in the course of their employment, but that the more proper view of it is that they did it for Dunlop.

There are two other (American) cases which may be referred to. In Baxter v. Chicago, Rock Island, and Pacific R. W. Co., 87 Iowa, it appeared that cattle had been run down upon the railway track, and one of them had been injured and had been left upon the highway, upon the cattle-guard. The company was made liable because it was the duty of the sectionman, by whose negligent act in removing the cattle the injury complained of was occasioned, although he was not employed for that particular section, if he found such an obstruction, to remove it.

There is an interesting discussion of the question before us, which I shall not stop to read, in Tinker v. New York, Ontario, and Western R. R. Co., 71 Hun 431.

There may have been some reason for it, but in the questions put to the jury, a most material one, which lay at the root of the question of the liability of defendants, was not included. I refer to the question whether the pile of ties was calculated to frighten horses and so constituted a nuisance in the public highway.

Without a finding of that kind, there might have been some difficulty, if we had been of a different opinion, in giving effect to plaintiff's motion.

The motion is dismissed with costs.

WINCHESTER, Co.J. JANUARY 11TH, 1905.

COUNTY COURT OF YORK.

IERZINO v. TORONTO GENERAL HOSPITAL TRUSTEES.

Master and Servant—Liability of Master for Theft of Servant —Scope of Employment — Bailment — Hospital—Charity Patient.

Action to recover $160, which the plaintiff alleged had been taken from him while an inmate of defendants' hospital by defendants, their servants or agents, to the use, benefit, and advantage of defendants, their servants or agents.

R. W. Eyre, for plaintiff.

H. D. Gamble, for defendants, contended that they could not be made liable as bailees, for, if this was a bailment, defendants were gratuitous bailees, and to make them liable gross negligence must be shewn, whereas upon the evidence no negligence whatever had been proved. In answer to the charge that the money had been stolen by one of the servants of defendants, he contended that defendants could only be made liable where the tort of the servant was within the scope of the employment, and referred to Cheshire v. Bailey, 21 Times L. R. 130. He further submitted that defendants could not be made liable by any analogy to inn-keepers, inn-keepers being one of the exceptions to the rule that bailees are not insurers of the goods in their custody. Among other cases he referred to Cayle's Case, 1 Sm. L. C., 11th ed., p. 119. He also submitted that boarding-house keepers not being responsible for the loss of their lodgers' property, defendants were in a very much stronger position, inasmuch as the institution was a charitable one, making no profit

whatever from the inmate. He also referred to Holder v. Soulby, 8 C. B. N. S. 254.

WINCHESTER, Co.J.—The evidence on behalf of plaintiff is to the effect that plaintiff, being seriously injured in the head and body, was taken to the emergency hospital belonging to defendants, and while there $160, wrapped up in a handkerchief and tied around his leg below the knee, was taken from plaintiff by a ward-tender named Venning or Hillington in defendants' service, and that he has not received any part of the money since. The ward-tender was arrested on a charge of the theft of this money, and a handkerchief was found in his possession, which plaintiff stated was the one in which the money was wrapped. On the hearing of the charge of theft the ward-tender was acquitted.

The evidence on behalf of defendants contradicted that given by plaintiff as to the place and manner of his undressing, and would indicate that there was no money taken from him either by the ward-tender or any one else. Had the ward-tender been called, and explained how he came into possession of the handkerchief claimed by plaintiff, and shewed that he did not receive any money in it, there would have been no necessity for reserving judgment in the case; but this was not done, although it was shewn that the man was available.

In considering the evidence, one cannot overlook the fact that plaintiff, during the whole time he was in the emergency hospital, a period of 7 days, never once referred to this money; and, although $4, in a purse, handed by him to one of the nurses when he entered the emergency hospital, was returned to him when leaving it, he did not refer to or ask for the $160 which he now alleges was taken from him.

Defendants are sued as being responsible for the actions of their servant, it being alleged that he took the money. The limits of liability of a master for torts of a servant are set out in Clerk and Lindsell on Torts, p. 69, as follows: "Where the relationship of master and servant exists, the employer is liable for all torts committed by the person employed, provided first, they were within what is usually termed the scope of the employment, and secondly, were either unintentional, that is to say, amounted to mere acts of negligence, or if intentional, were intended to be done in the interest and for the benefit of the employer."

It is clear that if the money in question were taken by the ward-tender as alleged, the taking was not done within the scope of his employment as set forth in the above limits. On this point I would refer to Cheshire v. Bailey, 21 Times

L. R. 130, cited by defendants' counsel. In that case defendant had agreed to let on hire to plaintiff, by the week, a brougham, horse, and coachman for the use of plaintiff's commercial traveller in taking round samples of goods to customers. Defendant was not told the character of the samples to be carried. While the carriage was being so used, the traveller went to lunch, leaving the carriage and its contents in charge of the coachman, and while he was away the contents of the carriage were stolen with the connivance of the coachman. The coachman had been in defendant's employment for some time and had borne a good character. The Court of Appeal held that defendant had undertaken by his servant to use due care in safeguarding the samples in the temporary absence of the traveller, and would therefore have been liable for the negligence of his servant, acting within the scope of his employment; but that, as the felony of the servant which caused the loss of the samples was an act done outside the scope of his employment, defendant was not liable. The Master of the Rolls in his judgment said: "There was no special contract in this case altering the ordinary rights of the parties as implied by law upon a bailment of this class. Technically it seems to come under the class described as locatio operis faciendi. The defendant, though not a common carrier, has come under the ordinary obligations of a person who undertakes for consideration to do the work of carrying the plaintiff's traveller and his goods to such destination as he shall direct. He is bound therefore to bring reasonable care to the execution of every part of the duty accepted. He may perform that duty by servants or personally, and if he employs servants he is as much responsible for all acts done by them within the scope of their employment as he is for his own. But he is not an insurer, and is not answerable for acts done by his servants outside the scope of their employment. Hence he is not responsible for the consequences of the crime committed by the driver in this case, which was clearly outside the scope of his employment, unless it can be shewn that the happening of the crime was due to the defendant's negligence. It is a crime committed by a person who in committing it severed his connexion with his master, and became a stranger, and as the circumstances under which it was committed are known it raises no presumption of negligence in the defendant. He took reasonable care to perform his duty in that he sent out a servant whom he reasonably supposed to be trustworthy to drive the brougham and watch its contents in the traveller's absence, and he was not bound to do more. That an ordinary contract of bailment of this class does not

involve a warranty that the servant shall not turn thief, and so cease to exhibit reasonable care, where the master has devolved the duty of custody on the servant, is clear from the fact that no class of bailee except common carriers and innkeepers are now at common law deemed responsible for the theft of their servants unless such theft was attributable to the negligence of the master."

The case of Houlder v. Soulby, 8 C. B. N. S. 254, decided that the law imposes no obligation upon a lodging-house keeper to take care of the goods of his lodger, and therefore the lodging-house keeper was not responsible for the loss where the property of a lodger who was about to quit had been stolen by a stranger who in the lodger's absence was permitted by the occupier of the house to enter the rooms for the purpose of viewing them.

Defendants herein are not brought within the cases applicable to innkeepers, nor are they bailees for hire, as plaintiff paid nothing for the services rendered to him, nor was he charged anything. In the Am. & Eng. Encyc. of Law, 2nd ed., it is stated that a public hospital or asylum is liable for the tort or negligence of an officer or servant only when such corporation has been guilty of negligence in selecting such officer or servant. When the corporation have exercised due and reasonable care in the original selection of the offending officer or servant, they are not liable for his subsequent act, unless, prior to the occurrence of such act, knowledge of the unfitness and incapacity of such officer or servant was communicated to and fully brought home to the corporation. The evidence herein shewed that defendants in hiring the ward-tender were not negligent, and that no complaint was made against him until the present case.

Not only upon the evidence but also upon the law I am of opinion that plaintiff fails to prove his claim against defendants.

The action will be dismissed with costs.

JANUARY 13TH, 1905.

DIVISIONAL COURT.

COLEMAN v. ECONOMICAL MUTUAL FIRE INS. CO.

Fire Insurance—Interim Receipt—Immaterial Variation in Policy—Prior Insurance not Assented to—Insurance in Plaintiff's Name—Mortgagee—Agent—Ratification.

Appeal by plaintiff from judgment of IDINGTON, J., 4 O. W. R. 466.

A. J. Russell Snow, for plaintiff.

William Davidson, for defendants.

THE COURT (MEREDITH, C.J., MACMAHON, J., MAGEE, J.), dismissed the appeal without costs.

BRITTON, J. JANUARY 16TH, 1905.

TRIAL.

GREIG v. MACDONALD.

Partnership—Dissolution—Claims against Partner—Partner Engaging in other Business—Acquiescence—Counterclaim —Questions of Fact.

Prior to 12th February, 1902, plaintiff Greig and defendant were partners carrying on business as merchants under the name of Greig and Macdonald at Seaforth. On that day defendant sold his interest in the business and the assets and goodwill thereof to plaintiff Stewart, and plaintiffs continued the business as partners.

Plaintiffs' claim was to recover: (1) an alleged debt owing by defendant on and before 12th February, 1902, to the old firm, called an asset of the business; (2) a debt owing by defendant to plaintiffs for money and goods supplied to defendant since 12th February, 1902; (3) compensation from defendant for time consumed and remuneration received by him, during the 5 years of his partnership with plaintiff Greig, in acting as the ticket agent of the Canadian Pacific Railway Company, and as the agent at Seaforth of the Dominion Express Company.

Defendant asserted a counterclaim for services rendered to plaintiffs after 12th February, 1902.

W. Proudfoot, K.C., for plaintiffs.

George Kerr, for defendant.

BRITTON, J., reviewed the evidence and found all the facts in favour of defendant as regards plaintiffs' claim, and against defendant on his counterclaim.

Action dismissed with costs, and counterclaim dismissed with costs.

JANUARY 16TH, 1905.

DIVISIONAL COURT.

DELAPLANTE v. TENNANT.

Contract—Sale of Goods to be Manufactured—Breach—Construction of Contract—Implied Condition—Expectancy—Consideration—Property Passing—Destruction by Fire—Appropriation of Goods to Contract.

Appeal by defendant from judgment of MACMAHON, J., 4 O. W. R. 76, in favour of plaintiff on his claim for the recovery of $904.50 with costs, and dismissing defendant's counterclaim with costs. The action was for damages for breach of a contract by defendant for the getting out and delivery to plaintiff of a quantity of hemlock at a price agreed upon. The counterclaim was for the price of certain lumber.

The appeal was heard by BOYD, C., MEREDITH, J., MAGEE, J.

R. U. McPherson, for defendant.

W. E. Middleton, for plaintiff.

BOYD, C.—The surrounding facts in the evidence shew this condition of affairs as to the matter in dispute: defendant had a quantity of logs at a switch 6 miles north of Huntsville and 20 miles from Bracebridge, where plaintiff had his saw-mill. The logs were estimated to yield from 400,000 to 600,000 feet; the actual yield was a little over 400,000. It was known to plaintiff that defendant had no saw-mill at the switch, and that his intention was to make arrangements to have the lumber cut at the switch by getting a man to move in with a portable mill and do the work. Arrangements had been made in part for the purpose, but the man relied upon to come from Whitney refused. . . . and so it became practically impossible for defendant to have the cut made during the sawing season. He then sold the logs at the switch for some $1,800, an amount which was about $1,000 less than would have been derived from the sale as lumber to plaintiff. . . .

Plaintiff's right to recover . . . rests upon the proper construction of the two letters dated 11th and 15th April, 1902 (set out in 4 O. W. R. at p. 76.)

The broad general principle to be extracted from the decisions, according to Collins, M.R., is, that "when the con-

sideration which one of the parties is to receive depends on the other party continuing in the same condition, there is an implied obligation on the part of the latter to keep in existence the condition out of which his ability to make a return for the benefit received by him arises:" Ogdens v. Nelson, [1904] 2 K. B. 418. Much depends on whether the contract has been executed on one side and the whole consideration given by the party seeking to enforce the implied obligation, as was pointed out by Kennedy, J., in Bovine, Limited, v. Dent, 21 Times L. R. 82 (November, 1904). The earlier cases were under consideration by this Court in Morris v. Dinnick, 25 O. R. 291; and in this particular transaction I think the words are those of expectancy and promise as to the sale of what was to be cut at the switch, and not an actual contract to cut so much or any quantity at the switch.

No means in fact existed of cutting at the switch, as both parties knew; it was contemplated on the part of defendant that he would employ or get in a portable mill during the season, by which he might be able to cut logs into timber, but this plan was not carried out by him, for sufficient reasons. There was no continuing condition which was to be preserved in this case; there was no consideration passing, in view of that, from one to the other; but only an executory engagement as to the future, which has not the elements of contract as to an existing thing: Johnson v. McDonald, 9 M. & W. 600. Had any logs been cut into lumber by defendant at the switch during the season of 1902, no doubt liability would have arisen to sell them to plaintiff at the given price, but I see nothing which requires or obliges defendant so to cut any logs: Hamblyn v. Wood, [1891] 2 Q. B. at p. 495.

Judgment as to plaintiff's claim reversed. Judgment as to counterclaim affirmed. No costs of appeal. Defendant to have costs of action, to be set off against the costs he pays on the counterclaim.

MEREDITH and MAGEE, JJ., concurred, each giving reasons in writing.

MEREDITH, J., referred to Hill v. Ingersoll and Port Burwell Gravel Road Co., 32 O. R. 194.

MCANDREW, OFFICIAL REFEREE. JANUARY 17TH, 1905.

CHAMBERS.

LEVI v. EDWARDS.

Evidence—Foreign Commission—Examination of Plaintiff on his own Behalf—Defendant to Counterclaim—Examination for Discovery.

Motion by defendant for an order to examine Morris J. Levi, a member of plaintiff firm, for discovery, upon commission in New York; and motion by plaintiffs for an order to examine the same person upon commission for the purpose of evidence upon the trial of the counterclaim.

The action was upon promissory notes. Defendant admitted the claim, but counterclaimed for damages for malicious prosecution.

R. McKay, for defendant.

G. M. Clark, for plaintiffs.

MR. MCANDREW (sitting for the Master in Chambers): —Defendant is clearly entitled to an order for examination for discovery of Levi, and the order may go.

The counterclaim is to be considered as an independent action, and Levi is in the position of a defendant, and it cannot be said that he has chosen the forum for the trial of the counterclaim. . . . Although, as a general rule, it is inadvisable to have the evidence of any party to an action taken upon commission when he himself applies for the order, in the circumstances of this case I think the order should go.

JANUARY 17TH, 1905.

DIVISIONAL COURT.

KELLY v. JOURNAL PRINTING CO. OF OTTAWA.

Defamation—Verdict for Defendant—Motion to Set aside—Weight of Evidence — Innuendo—Proof—Jury—Reasonable Verdict.

Motion by plaintiff to set aside the verdict and judgment for defendants in an action for libel tried before BRITTON, J., and a jury, and for a new trial.

The motion was heard by BOYD, C., MEREDITH, J., MACMAHON, J.

A. B. Aylesworth, K.C., for plaintiff.

G. F. Henderson, Ottawa, for defendants.

MEREDITH, J.—No objection to the verdict is made on the ground of misdirection or of non-direction, nor of the improper reception or rejection of evidence, nor of misconduct on the part of the jury; nor was it, or is it, contended that there was nothing to go to the jury; the sole ground upon which a new trial is sought is that the verdict is against the weight of evidence, and that is a ground upon which in these days a new trial is seldom granted; the old rule that a verdict once found ought to stand having been very firmly adhered to for the past 20 years at least; and that rule is especially applicable to an action for libel, not only since the legislation which gives to jurors wider power upon the trial of such an action than upon any other (R. S. O. 1897 ch. 65, sec. 2, and ch. 51, secs. 111 and 112), but also long before, it having been said by a very eminent Judge in the year 1696 that "the Court never, or very rarely, grants new trials for words."

Under the enactments referred to, the case had to go to the jury at large, if at all; it could not be controlled by compelling them to answer questions or to find a special verdict; and their verdict cannot rightly be disturbed if it is in any manner supported by the evidence, that is to say, if reasonable men could so find upon any ground of defence pleaded and disclosed in the evidence; just as it also would have been upon any cause of action disclosed in the statement of claim and the evidence, if the verdict had been for plaintiff and defendants were moving against it.

And, in my opinion, the verdict can be so sustained without going very deeply, if at all, into many, if any, of the subjects so much discussed here as well as at the trial.

That in respect of which plaintiff sought damages, and in respect of which only he sought them, was that the words published by defendants charged him with having procured by misrepresentation letters of introduction for the purpose of enabling him to float schemes which were dishonest, and fraudulently to obtain subscriptions for stock or companies promoted by him, and that he did fraudulently, by misrepresentation and unlawfully, obtain from a named person and others large sums of money. This in substance covers his whole claim.

Whether the words published are capable of the meaning which he thus ascribes to them or not, is a question of law

for the Court; and, if capable of such meaning, it then becomes a question of fact for the jury whether they did bear that meaning. It may be that they are capable of such a wide meaning, but it seems to me that they must needs be very elastic if they can be stretched sufficiently to cover it all; and it is clearer, in my opinion, that they are also capable of a very much narrower meaning, that they can be so contracted, without doing any greater violence to them, so that they may contain nothing libellous, in the sense attributed to them.

There is no direct and positive charge, in the words published, of falsehood in obtaining either letter; it would not be difficult to find that the meaning conveyed by them was that deception and falsehood had been employed; but, on the other hand, it would be difficult to say that reasonable men could not find that such a meaning was not conveyed, and much more than that must needs be found to support the claim, namely, that the letters were obtained to be used for dishonest purposes; and in regard to the other innuendoes it would be by no means difficult to agree with the jury if they found that the words used conveyed no such meaning, indeed it might be difficult to agree with them if they found otherwise in all respects.

Whatever other cause of action, if any, plaintiff may have had, it is impossible, I think, for these reasons, without considering any others, to say that no reasonable men could in this case have honestly found for defendants on any ground disclosed in the pleadings and evidence.

Motion dismissed with costs.

MACMAHON, J., gave reasons in writing for the same conclusion.

BOYD, C., concurred.

JANUARY 17TH, 1905.

DIVISIONAL COURT.

HILL v. TAYLOR.

Negligence—Collapse of Municipal Building—Injury to Workman — Liability of Employers — Contractors for Work—Liability of Municipal Corporation—Employment of Architect—Independent Contractors.

Appeal by plaintiff from judgment of BRITTON, J., 4 O. W. R. 284, dismissing action without costs.

Glyn Osler, Ottawa, for plaintiff.

T. McVeity, Ottawa, for defendants the corporation of the City of Ottawa.

THE COURT (BOYD, C., MACMAHON, J., MEREDITH, J.), dismissed the appeal without costs.

MOSS, C.J.O. JANUARY 18TH, 1905.

C.A.—CHAMBERS.

CANADA CARRIAGE CO. v. LEA.

Appeal—Court of Appeal—Leave to Appeal from Judgment at Trial—Grounds.

Motion by defendants for leave to appeal directly to the Court of Appeal from the judgment given at the trial.

MOSS, C.J.O.—The defendants desiring to appeal from the judgment of the trial Judge have made application under sec. 76 (a) of the Judicature Act, as enacted by 4 Edw. VII. ch. 11, sec. 2, for leave to appeal directly to this Court.

The nature of the case and the amount involved render it one in which an appeal would lie from this Court to the Supreme Court of Canada. But this alone is not a sufficient ground for granting the leave sought. The applicants must shew some reasonable ground for depriving the respondents of the right which the statute has given them of requiring the applicants to first carry their case to a Divisional Court. If the respondents give their consent, no further question arises. But, if they withhold their consent, as they have a right to do, it is for the applicants to present some substantial reasons why the usual course should not be pursued. It is not expedient to attempt to lay down rules or suggest special instances. Every case must be governed by its own circumstances.

In the present case the amount involved exceeds $3,000. There are questions of some nicety and importance under the Assignments and Preferences Act, which are fairly debatable, and as to which the opinion of this Court is sought. Looking at the whole case, I think it is a proper one in which

to give the leave. The applicants must do all in their power to expedite the appeal. Costs of the application in the appeal.

CARTWRIGHT, MASTER. JANUARY 19TH, 1905.

CHAMBERS.

MELDRUM v. LAIDLAW.

Dismissal of Action—Delay in going to Trial—Excuse—Leave to Proceed—Terms—Costs.

Motion by defendants to dismiss the action for want of prosecution.

C. A. Moss, for defendants.

J. H. Spence, for plaintiff.

THE MASTER.—. . . The case was set down for trial first at the winter assizes in 1903, and again at the spring and autumn assizes of the same year. At each of these it was postponed on account of plaintiff's serious illness. It was in the list for January, 1904, but was struck off with leave to plaintiff to apply for re-instatement. Nothing further was done . . . until the present motion was made.

Affidavits in answer are filed by plaintiff and his physician. These state that plaintiff was taken dangerously ill in December, 1902, and has not yet sufficiently recovered to go through the "anxiety and worry of a trial in court which would call upon him to go into the witness box for any length of time." The doctor thinks, however, that within the next 6 months it will be possible for plaintiff to go to trial without "the risk to his health that he would now incur."

Plaintiff is apparently the main, if not the sole, witness on his own behalf. He makes a claim of $13,000 against defendants, brokers in New York, who obtained leave to enter a conditional appearance. It is not right that such a heavy claim should be allowed to hang over them any longer than is necessary, without prejudicing plaintiff by undue haste.

Plaintiff was in default in not taking any steps for a whole year, and in not filing a better affidavit on production,

as ordered in December, 1902; so that defendants were perfectly justified in assuming that the action was abandoned and making the present motion. This opinion was made more probable by the admission on the argument that plaintiff is not in such a position that the costs could be recovered against him by defendants if they were finally successful in the action.

In these circumstances, I think that justice will be done to both parties by the following order. The motion is dismissed on these terms: that the costs thereof (fixed at $30) be paid within 4 weeks from this date; that plaintiff do within the same time file his further affidavit on production; and, if defendants so desire, that plaintiff set the case down first on the list for trial at the non-jury sittings at Hamilton commencing on 12th June next. . . . This will be without prejudice to an application for a postponement if plaintiff is still really unable to stand the strain of a trial in June.

In default of any compliance with the terms of this order, the action will be dismissed with costs.

CARTWRIGHT, MASTER. JANUARY 20TH, 1905.

CHAMBERS.

PRINCE v. TORONTO R. W. CO.

Pleading — Allegation of Immaterial Fact — Striking out — Rule 268—Evidence.

Motion by defendants to strike out paragraph 5 of the statement of claim.

The statement of claim alleged: (1) that plaintiff was a conductor in the service of defendants; (2) that he was injured because the car on which he was started forward suddenly and jerked him off; (3) that to save himself from falling plaintiff grasped one of the rods of the window guard, but, on account of the rod being improperly fastened, it broke away and allowed plaintiff to fall off the car; (4) that plaintiff's injury was caused by the improper construction or defective condition of the motor propelling the car, by reason of which the car was started suddenly; (5) that the car was one of a number which had theretofore been condemned by the city engineer, and which defendants had been ordered to remove from their line of railway and discontinue

using; (6) that defendants had knowledge of these facts; (7) that, if the injury was not caused by the defects of the motor, it was caused by the want of skill of the motorman.

J. W. Bain, for defendants.

D. Urquhart, for plaintiff.

THE MASTER.—I think . . . paragraph 5 should be struck out. Rule 268 says: "Pleadings shall contain a concise statement of the material facts upon which the party pleading relies, but not the evidence by which they are to be proved."

By the material facts I understand those to be meant which the party must prove in order to be fully and completely successful. There may be others which can be proved at the trial, but which are only evidence, and failure to prove which would not be fatal to the case of the party pleading.

As I have had occasion to remark before, this distinction is well illustrated by Blake v. Albion Life Assurance Society, 35 L. T. N. S. 269, where certain allegations of fact were struck out of the statement of claim, though proof of them was given at the trial and allowed, on motion to the contrary, by the same Court which had given the previous decision: see 4 C. P. D.

The only case which looks the other way is Millington v. Loring, 6 Q. B. D. 190. But there the facts brought into question were material in this respect, that, if proved, they would properly influence plaintiff's damages, and it was therefore not embarrassing, but only proper that defendant should have notice of plaintiff's intention to give them in evidence for that purpose. See on this case remarks in Odgers on Pleading, 5th ed., pp. 101, 102.

But nothing of that kind appears in the present case. It is not necessary to consider whether proof of the fact alleged in the 5th paragraph could be given at the trial. However that may be decided, it is reasonably clear that, even if true, it does not form any part of the cause of action. That would "still exist in undiminished vigour" if it could be shewn that the car in question had just come from defendants' works and was making its very first run on their railway when plaintiff was injured. On the other hand, if it was allowed to remain in the statement of claim, it would prejudice defendants with the jury. It would also lead to the discussion of what seems to me an entirely immaterial issue.

. . .

I think the motion should be allowed with costs to defendants in any event.

MEREDITH, C.J. JANUARY 20TH, 1905.

CHAMBERS.

READHEAD v. CANADIAN ORDER OF WOODMEN OF THE WORLD.

Discovery—Examination of Officer of Benefit Society—Clerk of Subordinate "Camp."

Appeal by defendants from order of Master in Chambers, ante 55, dismissing defendants' motion to set aside an appointment for the examination for discovery of one Harley Field, clerk of defendants' Woodstock "camp," as an officer of defendants.

C. A. Moss, for defendants.

J. W. Bain, for plaintiffs.

MEREDITH, C.J., dismissed the appeal with costs to plaintiffs in any event.

FALCONBRIDGE, C.J. JANUARY 20TH, 1905.

TRIAL.

BANK OF MONTREAL v. MORRISON.

Foreign Judgment — Action on — Defence — Defendant not Served with Process in Original Action— Finding of Fact —Leave to Amend—Original Cause of Action—Adding Assignors as Plaintiffs.

Action upon a foreign judgment. The defence was that defendant had not been served with process in the action in which judgment was recovered against him in the foreign Court.

J. A. Worrell, K.C., and W. D. Gwynne, for plaintiffs.

G. H. Watson, K.C., and Z. Gallagher, for defendant.

FALCONBRIDGE, C.J.—Not without great doubt and hesitation I have come to the conclusion that if any one (except the garnishees) was served with process of the Superior Court of Cook County in the original action on 8th March, 1901, it was not this defendant. . . .

[Discussion of the evidence.]

On this main issue defendant is entitled to judgment.

A good deal of evidence was given on the merits, defendant having in his statement of defence denied any liability to Langworthy and Clark (plaintiffs' assignors); on that evidence it is very doubtful whether Langworthy and Clark would be entitled to recover.

The assignment of judgment does not profess to transfer the original debt or cause of action, nor is there any reference to it in the statement of claim.

The action on the judgment set up in the statement of claim is dismissed with costs.

Plaintiffs may, however, on payment of costs of the trial, amend their statement of claim by adding, as parties plaintiffs, Langworthy and Clark, and by setting up the original cause of action upon which the foreign judgment was founded.

CARTWRIGHT, MASTER. JANUARY 21ST, 1905.

CHAMBERS.

FELGATE v. HEGLER.

Security for Costs—Increased Security—Payment of $200 into Court.

Motion by defendants for further security for costs. See the report of a previous motion, 4 O. W. R. 439.

H. A. Clark, for defendants.

C. W. Kerr, for plaintiffs.

THE MASTER.—By Rule 1199 (2), security has to be given in the penal sum of $400 (i.e., by bond, as provided by Rule 1205.) By Rule 1207 (1), instead of a bond, a sum not less than half the penalty of the bond may be paid into Court.

This seems a pretty clear intimation that in such cases payment into Court of $200 is as beneficial to the party entitled to security as a bond for $400.

In the present case, if such bond had been given, no further motion could have succeeded. This, I think, is a sufficient ground on which to dispose of the question.

Apart from that, however, the present action seems emphatically one to which the language of Osler, J.A., in Standard Trading Co. v. Seybold, 2 O. W. R. 878, 6 O. L. R. 379, applies, "that a plaintiff is not to be checked at every stage of the action by ordering security, dollar for dollar, for all costs incurred, or which by possibility may be incurred, without regard to the conduct of the party."

Defendants here are to be congratulated on having been so fortunate as to have $200 lying in Court to answer their costs if they succeed. The money was paid in solely by reason of the claim of Stanley Felgate, who has given the best possible proof of his good faith.

To grant an order now for further security would not in any way stay the trial of the son's action; and no good purpose could be served by staying the trial of the father's action.

. . . .

Motion dismissed; costs to plaintiffs in the cause.