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CARTWRIGHT, MASTER. MAY 18TH, 1903.

CHAMBERS.

THIBADEAU v. LINDSAY.

Action—Dismissal for Default of Delivery of Statement of Claim—Practice—Time—Costs—Terms of Allowing Action to Proceed—Amendment.

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

W. J. Tremeear, for defendant.

J. A. MacIntosh, for plaintiff.

THE MASTER.—The writ of summons was issued on the 5th January, and appearance was entered on the 9th. No statement of claim having been filed, this motion was launched on the 14th April. This was about 5 days after the expiration of the three months. The affidavit of defendant's solicitor filed in support of the motion is dated the 11th April. This would seem to shew that he was on the watch to take advantage of any slip of the plaintiff's solicitor. . . . In the latter part of February negotiations were had with a view to a settlement, which did not result successfully. . . . The plaintiff asks leave to amend the writ of summons by adding a claim in respect of a certain note for $500 dated 18th March, 1901, and interest thereon. The plaintiff's solicitor states that he was not aware of the existence of this note at the commencement of the present action.

It certainly is a commendable practice that the solicitor for a defendant should call attention to the fact of plaintiff being in any default before moving to dismiss as in the present case. The omission so to do cannot fail to affect the disposition of the costs.

Under all the facts of the case, plaintiff's solicitor might not unreasonably have supposed that defendant would certainly not do anything to speed the cause. . . .

Plaintiff is to have leave to amend his writ as desired, and is to file and serve his statement of claim within seven days. . . . The costs of the motion will be to defendant in the cause, and fixed at $4. If the parties, or either of them, really desire a speedy trial of the action, I will consider on the settling of the order what arrangement can be made for that purpose.

CARTWRIGHT, MASTER. MAY 18TH, 1903.

CHAMBERS.

BAKER v. WELDON.

Venue—Motion to Change—County Court—Preponderance of Convenience—Expense—Fair Trial—Prejudice in County—Undertaking to Dispense with Jury—Affidavit—Solicitor—Scandal—Irrelevancy—Costs.

Motion by defendants in this and four other actions in the County Court of Huron to change the venue from Goderich to Toronto.

George Ross, for defendants.

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

THE MASTER.—These actions all arise out of a matter which has been frequently before the Courts during the last 6 or 7 years. This was the plan devised by one Daly. He induced farmers throughout the county to sign agreements whereby, in consideration of his advertising their farms in a certain way, they gave him a lien on such farms to the amount of 2 per cent. of their stated value. Many, or perhaps all, of these agreements, have been assigned, and, as in the present cases, are now held by the assignees. . . . The plaintiffs in these five actions have taken proceedings to have the agreements set aside on the ground of fraud and misrepresentation.

The present motion, therefore, presents for consideration some points of difference from the ordinary case. In all these present cases the defendants counterclaim for the 2 per cent. and for interest thereon, and also to have their alleged liens enforced by sale or foreclosure. It will, therefore, be convenient to consider the motion as if the position of the parties was exactly reversed, and then see if sufficient grounds

were shewn for an order to change the venue from Toronto (where, no doubt, the assignees would have laid it) to Goderich, where Baker and his four fellow complainants reside. Weldon and Brussels (defendants) cannot object to this, as it gives them the advantage of being prima facie entitled to have these actions tried at Toronto. On such a motion the assignees would urge two objections: (1) that no preponderance of convenience was shewn such as is necessary under the cases. I do not refer to them, as they are to be found in Mr. MacGregor's valuable and exhaustive article in 38 C. L. J., pp. 433-460. (2) That a fair trial cannot be had in the county of Huron.

The question of convenience, as was said in one of the cases, is really one of expense. . . . I see that the return fare from Goderich to Toronto is $6.75. Now, in these 5 cases taken together, I gather . . . that there are in all between 15 and 20 witnesses whom the various plaintiffs will call at the trials of their respective actions. Putting these at 16 in all, their fares would amount to $108. Then each of the witnesses must be allowed on the average 3 days each at $1.25, which would be $60 more, making in all $168. The defendants' witnesses in these actions would be practically the same. . . . It is manifest on the question of expense that there is a sufficient preponderance to decide the question of the venue in favour of Goderich.

That, however, is not the only point for consideration. There is the more important objection urged by defendants, that a fair trial cannot be had in the county of Huron. This is based on two grounds: first, that a good deal of feeling has been aroused among the farmers and other residents of that county; and, second, that certain newspapers have published articles prejudicial to the claims of defendants. . . .

[Roche v. Patrick, 5 P. R. 210, Davis v. Murray, 9 P. R. 229, Walker v. Ridgeway, 11 Moore 486, Pybus v. Scudamore, Arnold 464, and Walker v. Brogden, 17 C. B. N. S. 571, referred to.]

But an examination of the evidence on which this ground is based does not convince me of its existence in the present case. The articles referred to . . . were published nearly three years ago, and are most unexpectedly mild—I might almost say perfectly unobjectionable.

However, whatever effect might perhaps be due to such considerations is entirely counteracted by the offer of the plaintiffs to dispense with a jury. . . . I will therefore follow the order that was made in Davis v. Murray, and direct

that, in the event of the plaintiffs in each of these cases consenting that the trial shall take place before a Judge without a jury, the motions to change the venue be dismissed with costs to plaintiffs in the cause. These costs I fix in each case at $4 only. I do so to mark my disapproval of the affidavit of plaintiffs' solicitor, on two grounds. First, because it was laid down as long ago as Hood v. Cronkrite, 4 P. R. 279, by Draper, C.J., that affidavits on these motions should be made by the party, and not by his solicitor, who can speak only from his client's instructions. This case has been followed within the last year, as will be seen by reference to p. 443 of 38 C. L. J., already referred to. The other ground is the objectionable character of the affidavit. I do not think that a solicitor is warranted before the trial of an action in speaking of "this action as one of five all arising out of the same fraudulent conspiracy between the defendant and others for the purpose of extorting money out of the plaintiff and others by means of an agreement alleged by defendant to have been signed by plaintiff."

MAY 18TH, 1903.

DIVISIONAL COURT.

HEFFERNAN v. TOWN OF WALKERTON.

Municipal Corporations—By-law—Payment to Mayor—Procedure at Meeting of Council—Reference to Committee of Whole—Injunction—Discretion.

Appeal by plaintiff from judgment of BOYD, C., in the Weekly Court (ante 17), upon a motion to continue an interim injunction, turned by consent into a motion for judgment, dismissing the action, which was brought by a ratepayer to restrain defendant corporation from paying to defendant Cryderman, the mayor of the town, $125 as remuneration for his services as mayor during the year 1902.

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

J. E. Jones, for plaintiff.

A. Shaw, K.C., for defendants.

BRITTON, J.—The plaintiff has no merits in this case, and, applying the words of the statute giving jurisdiction as to injunctions, I do not think this a case in which "it is just or convenient" that an order for an injunction should be made.

The by-law which was challenged was as fully considered by the council, and by the same members, as if considered in

committee of the whole. The money was on hand. The majority of the council of 1902 desired that this money should be paid. The action is defended, so it is evident that the council of 1903 does not sympathize with or concur in plaintiff's action. The plaintiff, technically, has a right to bring an action, and he has done so, instead of moving to quash the by-law; but there is no evidence that the ratepayers, the persons mainly interested, are with the plaintiff, or are objecting to the proposed payment of the small sum mentioned to the mayor of 1902. The inference from the material before us is rather the other way. Plaintiff is hostile to the late mayor, and he ought not to be allowed to thwart the will of the council merely because, by a slip, the council did not consider the by-law in committee of the whole council, but considered it as a council. If there can be a case in which it can be said that there is any discretionary power on the part of the Court or a Judge as to granting or refusing an injunction, this is such a case.

No doubt the majority of the council desired to recoup the mayor, to some extent, for his loss in law costs incurred in the action brought against him by plaintiff. This law suit was against the mayor for what he did as mayor in the interest or supposed interest of the town. I see no objection to this course; but, unfortunately, the council did not comply with the by-law they had previously passed, in putting by-law No. 764 through its different stages. The plaintiff's examination as a judgment debtor is in, and it shews him to be a shifty man, not candid or frank, and that he will never, if he can avoid it, pay one penny of the judgment; and it seems to me perfectly clear upon the evidence that this action was not brought by him in the interest of the ratepayers, but purely as a personal matter, to prevent Cryderman recovering anything to reduce his loss.

As to discretion, see Doherty v. Allman, 3 App. Cas. 709.

If, instead of the action and motion for judgment, plaintiff had moved to quash the by-law, the Court might, in the exercise of its discretionary power, refuse to quash. See Re Huson and Township of South Norwich, 19 A. R. 343, 21 S. C. R. 669.

In the exercise of our discretion, in the circumstances of this case, we should not allow the appeal.

FALCONBRIDGE, C.J.—I agree in the result of my brother Britton's judgment. This appeal will, therefore, be dismissed with costs.

STREET, J., dissented, giving reasons in writing.

MAY 18TH, 1903.

C.A.

REX v. BULLOCK.

Criminal Law—Leave to Appeal from Convictions—Two Prisoners Tried together—Burglary.

Motion by defendants for leave to appeal from the verdict and sentence recorded by the Judge of the County Court of Waterloo, who tried defendants, without a jury, upon a charge of breaking and entering a shop in the town of Galt and stealing tobacco, found them guilty, and sentenced them to 23 months' imprisonment. The complaint was that defendants should not have been tried together, but that the evidence against each should have been considered separately.

J. M. Godfrey, for defendants.

J. R. Cartwright, K.C., for the Crown.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.) was delivered by

OSLER, J.A.—Having regard to the cases of Regina v. McBerney, 3 Can. Crim. Cas. 339, and Rex v. Fry, 19 Cox C. C. 135, the Court is of opinion that leave to appeal ought to be granted in order that the propriety of the convictions of the prisoners, under the circumstances, may be discussed.

MAY 18TH, 1903.

C. A.

RE SAULT STE. MARIE PROVINCIAL ELECTION.

SMITH v. MISCAMPBELL.

Parliamentary Elections—Corrupt Practices — Bribery — Proof of Offences—Proof of Agency—Election Avoided for Corrupt Acts of Agent—Saving Clause.

Appeal by respondent from judgment of trial Judges (ante 174) voiding his election for bribery by agents.

W. Cassels, K.C., and E. Bristol, for appellant.

A. B. Aylesworth, K.C., and R. A. Grant, for petitioner.

The judgment of the Court (MOSS, C.J.O., MACLENNAN, GARROW, MACLAREN, JJ.A., MACMAHON, J.) was delivered by

MOSS, C.J.O.—In the result we are of opinion that the judgment of the rota Judges should be affirmed.

The evidence amply sustains their findings in respect of all the charges that have been held proven. We do not deem it necessary nor do we propose to review the evidence at any considerable length. There was, as there generally is in cases of this kind, a good deal of contradictory testimony from the principals concerned in the impeached transactions, and we must draw our own inferences, assisted of course by the opinions formed and conclusions arrived at by the rota Judges during the progress of the trial before them.

With regard to the Roy charges, the rota Judges, in spite of the difficulty they felt in accepting Roy as a truthful witness, came to the conclusion upon the whole testimony that his employment and payment were based upon a request for his vote and an understanding that he would vote for the appellant or abstain from voting altogether. It is urged that this finding is opposed to the direct testimony of Parent, in whose veracity the rota Judges expressed confidence. But Parent was not in a position to know all that transpired, and it is quite apparent that more did transpire than he was aware of. According to M. Morreault, he and Roy had been together and talking for some time before Parent came upon the scene. And Parent says that almost the first words he heard pass between Morreault and Roy were that Morreault asked Roy to work for him and offered him $3 or $4 a day, and that Roy's reply was, "I don't intend to sell my vote." Why should he speak of his vote unless something had been said about it previously? Is it not likely that something had transpired to make him think that his vote was being sought for?

At this time Morreault had been sent up to Sault Ste. Marie from Montreal by the party—as the appellant said—to help in the election. He was aware that Roy was a voter and opposed to the appellant and that he was out of work. What special reason had he for desiring to employ such a person to work as his assistant?

The work to be done did not call for any great amount of knowledge or intelligence. One would have supposed that, if needed, some person could have been found among the appellant's supporters who could speak English and French and was capable of performing the light labour that Roy was given to do.

If money was to be spent for such services, why spend it upon a political opponent? Money was paid by Morreault to Roy under circumstances calling for explanation. The explanation offered is that it was paid for the services, but this

is not satisfactorily made out. On the contrary, the testimony leads to the conviction that there would have been no employment if Roy had not been an unfriendly voter.

We have not overlooked Roy's statement that he was asked for his vote in Parent's presence, nor the fact that in that respect he was contradicted by Parent. Beyond question there was talk about his vote when Parent was present. And in all the conviviality and talking that went on, Parent may easily have missed some of the conversation, or Roy may have confused something that occurred in Demers's place, before they met Parent, with what took place afterwards.

The rota Judges, while taking a lenient view of Morreault and of his own account of his doings, were yet unable to accept his denial of Roy's statement that Morreault asked him for his vote. And in that we concur.

As to the other charges, the case is even clearer. The payments to Delargey are clearly shewn. One is admitted by Morreault, and one other he scarcely denies. He can only say he doesn't remember it. It is true that he endeavours to explain the admitted payment by saying that it was made in order to get rid of an importunate tramp.

But it is singular that this man should have singled him out and insisted upon him giving him money, even following him to the railway station, repeating his demands. But the real reason for the payment is explained by the other testimony.

Delargey and D'Aigle, both voters, came to Morreault's committee room, and he was told by Roy that they wanted to be kept or supported until the election was over. Morreault directed Roy to take them to the committee room of Mr. Kearns, another supporter and agent of the appellant. Roy accompanied the two men to Kearns, and told him that he had been sent by Morreault with these two men, who wanted to be supported until the election was over. Kearns sent them back to Morreault, saying that whatever the latter did he had authority to do.

They returned to Morreault's, and he then told them to stay and they would be satisfied — he would give Roy the money to pay them. Kearns was present and heard Roy give this testimony, but he was not called to deny or explain his part in the transaction, and the rota Judges accepted Roy's version.

We think the promise and payments to Delargey and the promise to D'Aigle well established, and we concur in the rota Judges' findings.

In doing these acts Morreault was guilty of bribery under sec. 159 (a), as having promised money or valuable consideration to these voters in order to induce them to vote, and as having paid money to one of them, first, in order to induce him to vote, and afterwards, on account of his having voted.

These men intimated in terms not misunderstood by Morreault that unless they were supported or kept until election day they could not and would not remain at Sault Ste. Marie to record their votes. Morreault thereupon promised them that they would be satisfied,—that he would give Roy the money for them—and they said they would vote for the appellant. Afterwards, in pursuance of his promise, Morreault made the payments to Delargey which have been proved. It is clear that but for their promise to vote for the appellant neither the promise nor the payments of money to them would have been made.

These, as well as the bribery of Roy, were corrupt practices, within the meaning of the Election Act, sufficient of themselves to avoid the election.

Several acts of bribery having been established, it lay upon the appellant to discharge the onus of satisfying the tribunal that, notwithstanding such acts, the election should not be avoided.

To effect that it is necessary that the Court should be convinced that these corrupt acts were not only of a trifling nature in themselves, but of such trifling nature and of such trifling extent that the result cannot have been affected, or be reasonably supposed to be affected, by them, either alone or in connection with other illegal practices. There were other illegal practices not of a trifling nature which cannot be overlooked in considering whether the appellant has succeeded in discharging the onus.

It is not possible to say that the acts of bribery were of a trifling nature in themselves. They were committed under circumstances shewing deliberation and intent. In Roy's case the bargain with him was plainly designed not only to secure his vote, but also to gain the advantage to be derived from the apparent fact (which Morreault took good care to proclaim) that here was a known former supporter of the Liberal side come over to the appellant's side and working for him. How is the extent or far reaching nature of this transaction to be estimated?

The importation of Morreault from Montreal, and his participation in this election contest in the manner in which

he has been shewn to have participated in it, are not satisfactorily accounted for. We can perceive no reason consistent only with the proper conduct of the election for the introduction of such outside agencies.

If, as alleged, he was merely engaged as a speaker or orator, he was not retained long in that capacity only. He was soon permitted to depart from that employment and to engage in an entirely different kind of election work. He was openly recognized as an agent in charge of a committee room, opened and carried on by him in the appellant's interest, and in which or in connection with which the corrupt acts were committed. There is evidence upon which the conclusion might well be reached that he was engaged, or at all events was allowed, to assume a position in which he could do acts of the very kind of which he has been found guilty.

The explanations attempted to be given as to the disposition he made of the moneys placed in his hands while engaged in the work of the contest, do not remove the impression that more than is accounted for may have been used in similar ways.

What has been shewn as to the appellant's part in the supply of these moneys increases his difficulties on this part of the case. His account of his dealings in regard to them, as gathered from his depositions, demonstrate an entire disregard for the plain directions of the Act. These moneys were not paid through his financial agent. No account of them was rendered to that gentleman, and they did not appear in his published statement. And, even after an exhaustive preliminary examination of the appellant, the facts with regard to the payment of the draft for $100 of which Morreault received the proceeds, were not disclosed until in course of the trial they were admitted by the appellant's counsel. We do not suggest that the explanation finally given should not be accepted, but the difficulties which the petitioners encountered in tracing these payments emphasize the impropriety of the failure to observe the directions of the Act.

There was so much of illegality and irregularity in and connected with the payment of these funds, and in and connected with the employment and conduct of Morreault, in whose hands they were placed, that we are unable to see how the appellant could hope to convince the rota Judges that the election ought not to be avoided.

We entirely agree with the conclusion they have reached, that the acts of bribery proved and the illegal practices of

which they received such vivid impressions in the course of the trial, made it impossible for them to give the respondent the benefit of the saving clause, sec. 172 of the Act.

The appeal must be dismissed with costs.

MAY 18TH, 1903.

C. A.

UFFNER v. LEWIS.

Will—Legacies—Overpayment of Legatees under Judgment—Mistake—Repayment—Interest—Distribution.

Appeal by plaintiffs the Uffners from an order of MOSS, C.J.O., sitting for a Judge of the High Court, upon an appeal from the report of the Master at Hamilton, in taking the accounts of the judgment directed by this Court, 27 A. R. 242. The main questions were, whether the basis of distribution should be per stirpes, as held by MOSS, C.J.O., or per capita, and whether the overpaid legatees were chargeable with interest on the amount directed to be repaid.

The appeal was heard by OSLER, MACLENNAN, GARROW, JJ.A.

D'Arcy Tate, Hamilton, for appellants.

F. W. Harcourt, for the infant children of Mary Evans.

J. V. Teetzel, K.C., and A. M. Lewis, Hamilton, for the Boys' Home.

G. F. Shepley, K.C., and W. Bell, Hamilton, for the executors.

OSLER, J.A.—I agree with the judgment of the Court below as to the principle of distribution. . . . The appeal was remarkably well argued, if I may say so, on both sides, and I have given the arguments presented by counsel the attention they deserve. I have also read the authorities, or all the important authorities, cited, and am satisfied that the result which has been arrived at as to the intention of the testator, ascertainable from the language he has employed—and it is his will which is to be construed, not those dealt with in other cases—is not in conflict with any rule or principle established by or deducible from those cases.

As to the liability of the executors Lewis and Morgan and the Boys' Home to pay interest on the amounts received or retained by them in excess of what they were entitled to under the will, I can see no just reason why they should not be ordered to pay interest thereon at least from the commencement of the action. (I think 9th November, 1895. Statement of claim bears date 21st April, 1896). The authorities . . . justify, if they do not imperatively require, at least that measure of relief. But I am of opinion that, under the peculiar circumstances of this case, they do not oblige us to penalize these defendants by adopting the severer course of charging them with interest from 1882 or 1883, or the date of the decree, or of the Master's report in the administration action.

To the extent I have mentioned, I would vary the judgment, and dismiss the appeal in other respects.

GARROW, J.A., concurred.

MACLENNAN, J.A., gave reasons in writing for agreeing as to the principle of distribution, and for dissenting as regards interest.

CARTWRIGHT, MASTER. MAY 19TH, 1903.

CHAMBERS.

HARMAN v. WINDSOR WORLD CO.

Security for Costs—Libel—Newspaper—Criminal Charge—"Provincial Crime"—Election Act.

Motion by defendant Dickinson for an order for security for costs of an action for libel.

Ferguson (Denton, Dunn, and Boultbee), for applicant.

F. A. Anglin, K.C., for plaintiff.

THE MASTER.—The action is for an alleged libel appearing in the issues of the 16th and 23rd days of January last of a newspaper called "The Essex County World," of which the Windsor World Company are alleged to be publishers, and of which defendant Dickinson is admittedly the editor. It is admitted that plaintiff is financially irresponsible. . . .

In the statement of claim plaintiff charges that defendant has by his articles imputed to plaintiff serious offences. The question is, are they criminal?

[Smyth v. Stephenson, 17 P. R. 374, referred to.]

I feel constrained to hold that the articles in question may impute a criminal charge, having regard to R. S. O. ch. 9, secs. 159 and 188, sub-sec. 7. I think the decision in Regina v. Wason, 17 A. R. 221, shews that there is such a thing as Provincial criminal law (if I may be allowed to use a convenient, if not strictly accurate, expression). This view, I think, is supported by the decision of the Supreme Court of Canada in Attorney-General for Canada v. Attorney-General for Ontario, 23 S. C. R. 458, on the question of the pardoning power. . . .

Such enactments of the Legislature of Ontario must, I think, be held to be included in the exception as to a "criminal charge" in R. S. O. ch. 38, sec. 10 (a). But, however that may be, and even if I am wrong in that opinion, it is clear that the words complained of are capable of the interpretation put upon them by the statement of claim, "that the plaintiff, having so corruptly and illegally received said moneys as aforesaid, had wrongfully converted the same to his own use." I am of opinion that this certainly involves a criminal charge.

The motion must, therefore, be dismissed with costs to plaintiff in any event.

MAY 19TH, 1903.

C.A.

PILGRIM v. CUMMER.

Partnership—Offer of Partner to Sell Share to Co-partners—Acceptance—Specific Performance—Covenant—Restraint of Trade—Security.

Appeal by defendants from judgment of ROBERTSON, J. (1 O. W. R. 531) in favour of plaintiff in an action for a partnership account.

The argument of the appeal was begun on the 18th May before MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.

J. P. Mabee, K.C., and G. C. Thomson, Hamilton, for appellants.

G. Lynch-Staunton, K.C., and E. H. Ambrose, Hamilton, for plaintiff.

The argument was to have been concluded on the 19th May, but the parties agreed upon a settlement, and judgment was pronounced in terms thereof, amending the judgment below by requiring plaintiff to give security in the sum of $500 for the due performance of his covenant not to carry on within 200 miles of Hamilton a business similar to that carried on by the partnership.

CARTWRIGHT, MASTER. MAY 20TH, 1903.

CHAMBERS.

MURPHY v. LAKE ERIE AND DETROIT RIVER R. W. CO.

Discovery—Affidavit on Production—Better Affidavit—Second Order.

On 25th February, 1903, an order was made by WINCHESTER, Master, directing defendants to file a further and better affidavit on production, and directing Alexander Leslie, an officer of defendants, to answer certain questions on his adjourned examination for discovery.

The plaintiffs now moved for a yet further and better affidavit on production from the defendants.

F. A. Anglin, K.C., for plaintiffs.

W. H. Blake, K.C., for defendants.

THE MASTER.—From Mr. Murphy's affidavit it appears that on the 1st May he and his solicitor attended at the audit office of defendants, by arrangement with their solicitor, to inspect the documents mentioned in paragraphs 4 and 5 of the further affidavit of Mr. Leslie, he being also present, but not his solicitor. Mr. Leslie and Mr. McKay, another of the officials of the defendants, stated that, under instructions from defendants' solicitors, they declined to produce certain books and other documents called for by plaintiff.

[Reference to Bedell v. Ryckman, ante 280; Evans v. Jaffray, 3 O. L. R. 341; Compagnie Financiere v. Peruvian Guano Co., 11 Q. B. D. 55; Marriott v. Chamberlain, 17 Q.

B. D. 154; Storey v. Lord Lennox, 1 Keen 341; Lyell v. Kennedy, 27 Ch. D. 20; Lavery v. Wolfe, 10 P. R. 488.]

I feel obliged, with great reluctance, to make the order asked for. No costs.

CARTWRIGHT, MASTER. MAY 21ST, 1903.

CHAMBERS.

LEMON v. LEMON.

Jury Notice—Irregularity—Striking out—Mortgage Action—Change of Venue—Speedy Trial—Consolidation of Actions—Conduct of Consolidated Actions.

Jonathan Lemon died 17th December, 1902. By his will he devised to his son Philip certain land for life, charged with legacies of $1,200 to the testator's son Joseph and $400 to his sister; both legacies to be paid within one year after testator's decease. Testator appointed his two sons Philip and Joseph executors and trustees of his will. Letters probate issued to them on the 27th February, 1903.

On the 18th February, 1903, Joseph began an action against Philip to compel the latter to execute and deliver to the former a discharge of a certain mortgage for $1,500 made by Joseph and another on 21st December, 1888, which had been assigned to Philip. This action was not proceeded with until the 19th May, when a statement of claim was delivered.

On the 17th April, 1903, Philip began an action against Joseph to enforce the mortgage by sale.

A jury notice having been filed by Joseph in Philip's action, Philip moved to strike it out, and to change the venue from Toronto to Lindsay so as to have a speedy trial.

Joseph made a motion for the consolidation of the two actions.

W. E. Middleton, for Philip.

J. W. McCullough, for Joseph.

THE MASTER.—On the question of striking out the jury notice I have no doubt. Pawson v. Merchants Bank, 11 P. R. 72, decided that point, and by the Rules as they now stand the principle of that decision has even a wider application than it had at that time.

The next point for consideration is the propriety of changing the venue. This was in the statement of claim laid at Toronto, as was necessary under Rule 529 (b). The application is now made under sub-sec. (d). In the first case decided on this Rule, Pollard v. Wright, 16 P. R. 505, it was laid down by a Divisional Court that a "very strong case" must be made out to obtain a change. Has this been done in the present case?

I am of opinion that the motion should prevail, on the ground that Philip is entitled to have it decided promptly whether he is to get the money from his brother to pay off the legacies charged on the farm of which he is a life tenant, or whether he must make other arrangements. Had Joseph proceeded promptly with his action, the case could easily have been tried here before this time. In Servos v. Servos, 11 P. R. 135, the Chancellor held that speeding the trial was an important consideration. The motion here is to change the venue to Lindsay. This is opposed by Mr. McCullough on the ground that he has to be at Woodstock with one of the witnesses necessary in this case at the very time fixed for the Lindsay sittings. . . . Mr. Middleton declared his willingness to go to Woodstock, and to allow any extra expense thereby imposed on Mr. McCullough's client to be costs to him in any event.

The actions must undoubtedly be consolidated, and I think that Philip must have the conduct of the consolidated actions, or that Joseph's action must be stayed. I consider that Joseph has, so to say, lost his priority by laches and delay, and it is also to be borne in mind that Philip is more interested in prosecuting the action with diligence than his brother can be. . . .

[Girvin v. Burke, 13 P. R. 216, distinguished.]

The order, therefore, will provide that Joseph's action be stayed or consolidated with Philip's; that Philip is to have the conduct of such action; that the jury notice be struck out, and the case set down for the non-jury sittings at Lindsay or Woodstock, as Mr. McCullough may elect. . . . The order will embody Mr. Middleton's undertaking. The costs of these motions will be in the cause.

FERGUSON, J. APRIL 16TH, 1903.

WEEKLY COURT.

SMALL v. HYTTENRAUCH.

Parties—Representation—Members of Trade Union—Rule 200.

Motion by plaintiff for an order under Rule 200 authorizing and directing several defendants who were members of the London Musical Protective Association to defend the action on behalf of all the other members of the association, who were not parties; also for an order authorizing and directing certain other individual defendants, members of the American Federation of Musicians, to defend the action on behalf of all other members of that association who were not parties; and directing that, in each case, those so represented should be bound by any judgment rendered, in the same manner and to the same extent as if they were personally made parties to the action.

The action was for an injunction to restrain the doing of any act or pursuing any course of conduct with a view to inducing one Creswell and the members of his orchestra, employed by plaintiff, to refuse to continue in plaintiff's employ and to break their contracts with plaintiff; and to restrain defendants from conspiring together for the said purpose or for the purpose of forcing plaintiff to break his contract with the said Creswell and his orchestra; and for damages for illegal and malicious conspiracy.

J. H. Moss, for plaintiff.

J. G. O'Donoghue, for certain defendants.

FERGUSON, J., refused the motion with costs, following Temperton v. Russell, [1893] 1 Q. B. 435.

MACLAREN, J.A. MAY 14TH, 1903.

WEEKLY COURT.

CRESWELL v. HYTTENRAUCH.

Parties—Representation—Members of Trade Union—Rule 200.

Motion by plaintiff under Rule 200 for an order as in Small v. Hyttenrauch, ante.

The action was brought by a member of a trade union for an injunction to restrain the pretended dissolution of the

union, and the taking of any steps or proceedings to substitute a pretended new charter and association for the charter and association of the said union, in fraud of the plaintiff's rights as a member of such union, and from conspiring in any other way to exclude plaintiff from membership in the union.

J. H. Moss, for plaintiff.

J. G. O'Donoghue, for certain defendants.

MACLAREN, J.A. (sitting as a Judge of the High Court), dismissed the motion with costs, following the decision of Ferguson, J., in Small v. Hyttenrauch, ante.

MARCH 4TH, 1903.

DIVISIONAL COURT.

HUNSBERRY v. KRATZ.

Attachment of Debts—Interest of Debtor in Estate—Residuary Legatee under Will.

Appeal by the garnishees, the executors of the will of Anna Wismer, from an order of the Judge of the County Court of Lincoln in a garnishing plaint in the 2nd Division Court in that county, dismissing an application by the garnishees for a new trial after a judgment for the plaintiff as against the garnishees.

H. H. Collier, K.C., for appellants.

J. A. Keyes, St. Catharines, for primary creditor.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) held that the interest of the primary debtor as residuary legatee under the will of a testator who died within a year before the attachment, was not such a debt as could be attached.

Appeal allowed with costs, and garnishees discharged.

CARTWRIGHT, MASTER. MAY 23RD, 1903.

CHAMBERS.

FULLER v. APPLETON.

Security for Costs — Increased Security — Premature Application — Leave to Renew.

Motion by defendant Higbee for an order to compel plaintiff to give further security for costs.

A. C. Macdonell, for applicant.

Casey Wood, for the other defendants.

J. B. O'Brian, for plaintiff.

THE MASTER.—Considering that plaintiff has already paid into Court $200, which on motion was allowed (on the 13th inst.) to stand as a compliance with the two præcipe orders for security issued by the applicant and the other defendants (see ante 424), I think this motion is entirely premature and unwarranted. I have had occasion to consider this matter fully in Burnside v. Eaton, ante 417. The conclusion there reached was, that the party applying must not be too anxious to secure himself. It will be time enough to consider the question of witness fees and commissions and engaging eminent counsel, when the action is at issue. Mr. Macdonell asked me to retain the motion if I thought I could not grant it. But I do not see any ground for so doing. The motion must be dismissed with costs to plaintiff and the other defendants in any event. If it really becomes necessary, the motion may be renewed on proper material and at a suitable stage of the action.

MAY 23RD, 1903.

DIVISIONAL COURT.

CRAIG v. SHAW.

Sale of Goods — Action for Price — Contract — Place of Delivery — Inspection—Defect in Quality—Allowance for.

Appeal by defendants from judgment of HARDING, Co.J. of Victoria, sitting at the trial for a Judge of the High Court, in favour of plaintiffs in an action to recover $487, the price of 97½ cords of bark sold by plaintiffs to defendants. The Judge gave judgment for the full amount claimed.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J.

F. E. Hodgins, K.C., for defendants, contended that there never was a complete contract of bargain and sale, or, if any, that it extended only to a part of the whole amount claimed; that defendants acted only as agents for plaintiffs in selling the bark; and that the bark delivered was not merchantable.

R. J. McLaughlin, K.C., for plaintiffs, contra.

FALCONBRIDGE, C.J.—I agree in the conclusion that there was a binding contract for all the bark, the validity of which contract did not depend on the execution of a more formal document.

The plaintiffs' contract was, therefore, to deliver the bark at Graham's siding, and the inspection ought prima facie to have taken place there, and nothing happened to change the place of inspection to London.

It follows that the defect in quality forms no ground of defence in this action (Towers v. Dominion Iron and Metal Co., 11 A. R. 315), and the only redress of defendants would be by cross-action.

But the learned Judge has, although there is no pleading by way of counterclaim, made an allowance or deduction which seems to be justified by the evidence, as are his other findings in the case. . . .

The appeal will be dismissed with costs.

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