The
Ontario Weekly Notes

VOL. XV. TORONTO, NOVEMBER 8, 1918, No. 9

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. OCTOBER 28TH, 1918.

*WILSON v. LONDON FREE PRESS PRINTING CO.

Libel—Question whether Words Used were Defamatory—Question for Jury—Judge's Charge—Words Capable of Defamatory Meaning—General Verdict for Defendants—Libel and Slander Act, sec. 5—Verdict not Perverse.

Appeal by the plaintiff from the judgment of MIDDLETON, J., upon the verdict of a jury, dismissing the plaintiff's action for libel with costs.

At the time of the alleged libel, the plaintiff was an alderman of the City of London. The defendants were the owners and publishers of a newspaper.

The complaint was that the defendants systematically published false and malicious reports to the effect that the plaintiff was not attending to his duties as alderman. The offence consisted in the omission of the plaintiff's name from the report of the proceedings of the council. There was evidence to the effect that the plaintiff had complained that the reports given by the defendants did not do him justice, and thereupon the defendants did not report his presence or refer to him by name in the proceedings of the council. On one occasion it was stated that the persons named, not including the plaintiff, were the only aldermen present, when in fact the plaintiff was present.

The defendants did not dispute that their manager had given instructions not to refer to the plaintiff in the report of the proceedings of the council, but averred that it was a mistake of the reporter in the one instance when the word "only" was used.

The jury found a general verdict for the defendants. No objection was taken to the Judge's charge.

* This case and all others so marked to be reported in the Ontario Law Reports.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

J. M. McEvoy, for the appellant.

W. B. Raymond, for the defendants, respondents.

CLUTE, J., in a written judgment, said that it was argued that the publication complained of was clearly libellous upon its face; and that, while it would have been difficult to sustain a case against the defendants in respect to the publications other than the one in which the word "only" was used, that publication, taken with the others, clearly carried the meaning that the plaintiff was disregarding his duty as alderman in not being present and taking part in the important matters that were brought before the council.

The learned trial Judge said in part in his charge: "It is my duty to tell you as a matter of law whether the words are capable of having a defamatory meaning, and it is your duty to find whether the words have in fact a defamatory meaning. . . . The first article is an article that has been read to you in which it is said that only certain aldermen were present at a certain meeting, meaning thereby, fairly plainly, that Wilson was not there; and I I think I shall come to the conclusion that that is in itself capable of being defamatory. It is a false statement, for Wilson was present at that meeting, and I think saying of an alderman that he was not present is defamatory of him in his office as municipal councillor, because the faithful municipal councillor ought to be present at meetings."

After dealing with the other publications and stating that no evidence was given of special damage, he charged on the question of damages.

The Libel and Slander Act, R.S.O. 1914 ch. 71, sec. 5, provides:—

"On the trial of an action for libel the jury may give a general verdict upon the whole matter in issue in the action, and shall not be required or directed to find for the plaintiff, merely on proof of publication by the defendant of the alleged libel, and of the sense ascribed to it in the action. . . ." This was first enacted by 13 & 14 Vict. (1850) ch. 60, sec. 1, which was taken from Fox's Libel Act, Imp. statute 32 Geo. III. ch. 60, which applied to criminal proceedings by way of indictment or information only. When the Act was introduced into Canada, it was made to apply "to any *action*, indictment, or information."

"Fox's Act laid down no new principle:" Baylis v. Lawrence (1841), 11 A. & E. 920, at p. 925. "Fox's Act was only declaratory of the common law:" per Brett, L.J., in Capital and Counties Bank v. Henty (1880), 5 C.P.D. 514, at p. 539. "Libel or no libel,

since Fox's Act, is all of questions peculiarly one for a jury:" (per Coleridge, C.J., in Saxby v. Easterbrook (1878), 3 C.P.D. 339, at p. 342); Odgers on Libel & Slander, 4th ed., pp. 575, 772, 773, and 680.

It would thus appear that our statute, at all events in so far as it refers to civil actions, was introduced into Canada as part of the common law in 1792, and in this regard the statute of 1850 above referred to was merely declaratory of the common law.

The plaintiff's counsel relied on Sydney Post Publishing Co. v. Kendall (1910), 43 S.C.R. 461, and Lumsden v. Spectator Printing Co. (1913), 29 O.L.R. 293, urging that, inasmuch as there was proof of defamatory libel, the verdict was perverse and there ought to be a new trial; that, in short, the verdict found by the jury, for whose consideration it essentially was, was such that no jury could have found as reasonable men; and referred to Australian Newspaper Co. v. Bennett, [1894] A.C. 284, at p. 287.

Quite aside from the question of damages, the jury might have taken the view that the publications in question were not in fact libellous upon the facts proved in the case; it was solely a question for the jury; and their verdict for the defendants ought not to be disturbed.

The appeal should be dismissed with costs.

MULOCK, C.J.Ex., agreed with CLUTE, J.

RIDDELL, J., agreed in the result, for reasons stated in writing.

SUTHERLAND, J., also agreed in the result, for reasons stated in writing.

KELLY, J., agreed in the result, for the reasons stated by SUTHERLAND, J.

Appeal dismissed.

FIRST DIVISIONAL COURT. OCTOBER 29TH, 1918.

CANADIAN H. W. GOSSARD CO. LIMITED v. DOMINION CORSET CO. LIMITED.

Trade-Name—Deception—Use of Similar Name and Label—Sale of Goods—Likelihood of Purchasers being Deceived—Evidence—Suspicious Circumstances—Action to Restrain Use of Name and Label—Dismissal without Costs—Appeal—Dismissal with Costs.

Appeal by the plaintiffs from the judgment of SUTHERLAND, J., 14 O.W.N. 164.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

G. M. Clark, for the appellants.

W. N. Tilley, K.C., and Hammet Hill, for the defendants, respondents.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

ROSE, J. IN CHAMBERS. OCTOBER 29TH, 1918.

*SUPERIOR COPPER CO. LIMITED v. PERRY AND SUTTON.

Writ of Summons—Foreign Defendants—Service of Notice of Writ out of Ontario—Ontario Companies Act, sec. 151, sub-secs. (6) and (7), Added by 8 Geo. V. ch. 20, sec. 30—Action by Mining Company—Call on Shares—"Conditions" of Service—Rules 25-30—Validity of Call—Application of New Sub-sections—Special Act, 7 Edw. VII. ch. 117—Statutory Power to Maintain Action — Determination at Trial — Jurisdiction — Conditional Appearance.

Appeal by the defendant Sutton from an order of the Master in Chambers dismissing a motion to set aside the service of the writ of summons on the appellant out of Ontario.

Peter White, K.C., for the appellant.

A. W. Langmuir, for the plaintiffs.

ROSE, J., in a written judgment, said that, in an action between the same parties, a Divisional Court decided that leave to effect service out of Ontario could not be given in an action in which all that was claimed was a declaration that certain shares of stock were not paid-up but were assessable and subject to call: Superior Copper Co. Limited v. Perry (1918), 42 O.L.R. 45.

By sec. 30 of the Ontario Statute Law Amendment Act, 1918, 8 Geo. V. ch. 20, assented to on the 26th March, 1918, sec. 151 of the Ontario Companies Act was amended by adding sub-secs. (6) and (7), whereby, in the event of any call on shares of the stock of a mining company remaining unpaid for a certain length of time, the company, in lieu of proceeding to sell the shares, might maintain an action in the Supreme Court for the sale of the shares,

and might serve the process in such action upon a shareholder resident out of the jurisdiction; and also that, where any question is raised as to the validity of any call, an action may be brought in the Supreme Court for the purpose of determining the validity of the call and the right to sell, and that process in such action may be served on a shareholder resident out of the jurisdiction.

On the 24th April, 1918, the plaintiffs discontinued the first action, and commenced this action on the 31st May, 1918; in it they alleged that a call was made on the 18th October, 1917, and they claimed: (1) a declaration that the shares standing in the names of the defendants were not fully paid and were assessable and subject to call, that the call made was valid, and that the plaintiffs were entitled to sell the shares; and (2) an order for the sale of the defendants' shares under the direction of the Court.

In sub-sec. (6) added to sec. 151, it is provided that process in such an action as is declared maintainable may be served upon a shareholder resident out of the jurisdiction "in the same manner and subject to the same conditions as process is permitted to be served out of the jurisdiction in cases provided for by the Consolidated Rules." The learned Judge was of opinion that the "conditions" referred to were not the cases set out in Rule 25 in which service might be allowed, but the regulations as to application, evidence, and procedure for effecting service stated in Rules 26 to 30.

It was argued that the sub-sections added to sec. 151 were not applicable to the plaintiff company; that the call in question in this action depended for its validity upon an Act passed in 1907, upon the petition of the company—7 Edw. VII. ch. 117; that the payment of the call must, therefore, be enforced, if at all, in the manner laid down by that Act, and not otherwise; and that the plaintiff company had not been given statutory power to maintain the action or to serve notice of the writ out of Ontario. It was not necessary to decide that point upon the present motion, because, whichever way it was decided, there was another point which could not be decided upon the material before the Judge upon this motion, and which, if decided in favour of the plaintiffs, seemed to authorise the institution of the action and the making of the order for service out of Ontario.

Neither in the statement of claim nor in the affidavit upon which the order giving leave to issue the writ was based was there any reference to the special Act of 1907; and the plaintiffs contended that the call did not depend for its validity upon the special Act. The question whether the call sought to be enforced was one which could be supported apart from the special Act was, obviously, a question which could not be determined until all the facts were brought out at the trial of the action.

The case, therefore, must go to trial, and the appeal should be dismissed; but the appellant should have leave to enter a conditional appearance.

Costs of the appeal to be costs to the plaintiffs in the cause, unless the trial Judge should otherwise order.

MASTEN, J. NOVEMBER 1ST, 1918.

CONWAY v. CONWAY.

Husband and Wife—Alimony—Permanent Allowance—How Payable—Lump Sum—Annual Payments.

An action for alimony.

Trial without a jury at Chatham.
O. L. Lewis, K.C., for the plaintiff.
The defendant was not represented.

MASTEN, J., in a written judgment, said that the plaintiff had established her case, and was entitled to alimony. The only question reserved for consideration was the prayer of the plaintiff that she might be awarded a lump sum in lieu of monthly instalments of alimony.

The practice was settled by Spragge, V.-C., in Hagarty v. Hagarty (1865), 11 Gr. 562, where it was determined that the Court will not, on grounds of public policy, award a lump sum for alimony in lieu of periodical instalments.

The learned Judge said that he was bound by this case; and the reasoning upon which it was founded seemed to be as forcible now as it was when it was decided. It was there said that the ordinary rule of the Court was to decree alimony to be paid quarterly, and reference was made to the fact that alimony may be allotted for the maintenance of a wife from year to year. While the more ordinary practice in our Courts had been to award a monthly allowance, the learned Judge said that he knew of nothing binding in that regard; and, considering all the circumstances of this case, the fact that the parties had been living apart for two years, the exceedingly meagre allowance which the husband had made the plaintiff during that time, and the evidence establishing the probability that the defendant had now absconded from Ontario, it might properly be directed that the alimony be paid yearly at the rate of $360 per annum, and be computed from the date of the issue of the writ of summons; the first payment to be payable forthwith.

Judgment accordingly, with costs.

MEREDITH, C.J.C.P. NOVEMBER 1ST, 1918.

*RE SPELLMAN AND LITOVITZ.

Vendor and Purchaser—Agreement for Sale of Land—Objections to Title—Power of Appointment—Validity of Execution—Conveyancing and Law of Property Act, sec. 24—Discharge of Mortgage Made to Executors—Necessity for Execution by All—Provisions of Will.

Motion by the vendor for an order, under the Vendors and Purchasers Act, declaring the objections made by the purchaser to the title to land forming the subject of an agreement of sale and purchase, to be invalid.

The motion was heard in the Weekly Court, Toronto.

G. R. Forneret, for the vendor.

E. F. Singer, for the purchaser.

MEREDITH, C.J.C.P., in a written judgment, said that the first question was, whether the exercise of a power of appointment in respect of land was invalid if not made in the manner provided for in sec. 24 of the Conveyancing and Law of Property Act, R.S.O. 1914 ch. 109, in a case in which the instrument creating the power does not provide for the manner in which it is to be executed.

This question must be answered in favour of the vendor. Upon the case as stated by counsel, the vendee's objection to the validity of the execution of the power of appointment failed. It would not have been necessary to take time for consideration of the point but for a paragraph in the last edition of Farwell on Powers which seemed to convey an opinion that such a power as that in question, if not exercised by will, must be executed in conformity with the writing creating the power or else in the manner set out in the statute. Whether the execution, if defective, would have been aided in a Court of Equity, cannot be considered in this matter, there being no information as to the facts before the Court.

The next question was, whether less than all of the living executors of a will could give a valid discharge of a mortgage of land so as to revest the land in the mortgagor. See Ex p. Johnson (1875), 6 P.R. 225.

The trend of legislation seems to have been toward empowering any hand entitled by law to receive the debt, and to give a valid discharge of it, also to reconvey, by way of a statutory discharge of mortgage registered, the land pledged for its payment; but whether that trend had reached the case of one of several ex-

ecutors, need not now be considered, for it did not in fact really arise in this case. The mortgage was not made to the testator, but was made to all of the executors and trustees under his will; and the learned Chief Justice knew of no power in any less than all of them, who were living, to give a valid discharge of the mortgage, unless some special power to do so had been conferred upon them. If the will conferred upon a majority of the executors power to discharge mortgages which under the will they were empowered to take, nothing in law prevented a mortgage so taken being so discharged: see Ewart v. Snyder (1867), 13 Gr. 55, at p. 57.

Order declaring accordingly.

LATCHFORD, J., IN CHAMBERS. NOVEMBER 2ND, 1918.

*STONE v. WORLD NEWSPAPER CO. LIMITED.

Libel—Security for Costs—Libel and Slander Act, sec. 12 (1), (2)—Attributing to Plaintiff Intention to Commit Suicide—"Involves a Criminal Charge"—Jurisdiction of Master in Chambers—Rule 208.

Motion by the plaintiff to set aside an order of the Master in Chambers directing the plaintiff to give security for costs in a libel action against the publishers of a newspaper, and staying proceedings in the meantime, on the grounds that the order was made without jurisdiction and that the action was not one in which security should be ordered under the Libel and Slander Act, R.S.O. 1914 ch. 71 sec. 12(1).

H. T. Beck, for the plaintiff.
K. F. Mackenzie, for the defendants.

LATCHFORD, J., in a written judgment, said that an application under sec. 12 (1) might be made to "the Court or a Judge," and would properly be made in Chambers. As the case did not fall under any of the exceptions stated in Rule 208, the Master in Chambers had jurisdiction.

Under sub-sec. (2) of sec. 12, a defendant is not entitled to security for costs where the alleged libel "involves a criminal charge."

The libel charge in this case was: The plaintiff "will kill herself" or "will have to kill herself," meaning thereby, to use

the words of the statement of claim, "the plaintiff . . . . contemplated or intended to put an end to her life."

This statement with the innuendo mentioned was said to involve a criminal charge.

The learned Judge, after referring to authorities, and to secs. 10, 269, and 270 of the Criminal Code, said that the words alleged to be libellous did not involve a criminal charge against the plaintiff under sec. 269 or sec. 270. Assuming the innuendo found as pleaded, the utmost they attributed to her was a contemplation or intention of committing suicide. "The mere intention to commit a misdemeanour is not criminal. Some act is required:" Parke, B., in Eagleton's Case (1855), 1 Dears. 515, at p. 538; Lord Reading in Rex v. Robinson, [1915] 2 K.B. 342, at p. 348. Contemplation is less than intention; and, the distinction between felony and misdemeanour being abolished by sec. 14 of the Code, a statement that the plaintiff intended to commit suicide no more involves a criminal charge than a statement that she intended to commit what in Baron Parke's time was called a misdemeanour.

The alleged libel not involving a criminal charge, the plaintiff was not entitled to the advantages afforded by sub-sec. (2) of sec. 12, and the order appealed from could not be set aside.

Motion dismissed without costs.

LATCHFORD, J. NOVEMBER 2ND, 1918.

HESS v. GREENWAY.

Negligence—Lease of Part of Building—Injury to Goods of Lessee from Bursting of Steam-pipes—Cause of Bursting—Duty of Landlord——Duty of Tenant Undertaking Heating of Building —Findings of Fact of Trial Judge.

Action for damages for injury to the plaintiff's linotype machines contained in part of a building sublet to the plaintiff by the defendant Greenway, who had a lease from the owner of the building, the defendant Elliott. The plaintiff alleged that the damage was caused by the negligence of the defendants or some or one of them.

The action was tried without a jury at Toronto.

T. N. Phelan, for the plaintiff.

G. H. Gilday, for the defendant Greenway.

William Proudfoot, K.C., for the defendant Elliott.

H. J. Scott, K.C., for the defendants the Sinclair & Valentine Company.

LATCHFORD, J., in a written judgment, said that the plaintiff's lease contained a clause by which the lessor agreed to heat the demised premises "during all lawful working days to a reasonable extent." The lessor was not to be responsible for damages "during necessary repairs to the heating plant, nor if the parties under contract with the lessor to heat said building fail to do so until he shall have received reasonable notice from time to time of the conditions, and shall have taken over the heating of the said building himself and shall also have had a reasonable opportunity of remedying such conditions."

The "parties" who were under contract to heat the building were the Sinclair & Valentine Company, to whom Elliott had demised another part of the building, by a lease which contained an agreement by the company to furnish fuel and a competent man so as to provide heat in the several sections of the building "to the reasonable satisfaction of the tenants therein."

The lessor agreed to change the boilers from low to high pressure, and to put on a reducing-valve "to step the steam pressure down to the necessary pressure to heat the building."

The only means of heating the linotype room and office of the plaintiff consisted of one end of a radiator or set of 10 or 12 one-inch steam-pipes, suspended from hangers along the east wall of the building under the windows. From the south end of the lowest pipe a half-inch pipe led to a valve in the distant basement near the boiler. This small pipe was not a necessary part of the system after high pressure boilers had been installed by Elliott, but it was allowed to remain.

On the 28th December, 1917, during a period of extreme cold, water accumulated in this small pipe, and there froze, bursting the pipe and causing leaks. On the next day, the engineer of the Sinclair & Valentine Company cut off the small pipe where it had burst, and placed a plug in the end connected with the radiator. The 29th was a Saturday, and on Monday the 31st Hess found his linotype machines badly rusted and damaged owing to a series of bursts in the steam-pipes. The weather had continued extremely cold, the steam was off, the water froze, and expanding burst the pipes. The damage to the machines was what the plaintiff complained of.

The learned Judge, after setting out the facts, made certain findings upon the evidence, one of which was that the work done on the small pipe on Saturday had nothing to do with the accident; he also found that no liability attached to the defendant Greenway; and that there was, in the circumstances, no breach of any duty which the defendant Elliott owed to his tenants, or, for a greater reason, to the plaintiff: Halsbury's Laws of England, vol. 18, p. 504; Lane v. Cox, [1897] 1 Q.B. 415.

Action dismissed with costs.

THEDE v. HESSENAUER—LENNOX, J., IN CHAMBERS—OCT. 29.

Stay of Proceedings—Motion for—Mental Capacity of Plaintiff—Authority for Continuance of Action—Costs.]—Appeal by the defendant from an order of the Local Judge at Walkerton dismissing an application by the defendant for dismissal of the action or a stay of proceedings. LENNOX, J., in a written judgment, said that it was impossible, upon the material before him, to determine whether the plaintiff did or did not now desire to continue the action, or whether he was mentally capable of deciding for himself; and, in that state of things, it was not right that proceedings should be stayed or the action dismissed. The case should go to trial; and, if the attention of the trial Judge should be called to the question raised by this motion, he might ascertain the attitude of the plaintiff and determine his capacity. The order of the Local Judge should be modified as to costs. The appeal should be dismissed, but the costs here and below should be costs in the cause to the successful party. G. H. Kilmer, K.C., for the defendant. J. H. Spence, for the plaintiff.

RE DAVIS AND MOSS—LATCHFORD, J.—OCT. 29.

Vendor and Purchaser—Agreement for Sale of Land—Objections to Title—Buildings Encroaching on other Land—Failure to Shew Easement—Abatement of Purchase-money—Application under Vendors and Purchasers Act—Dismissal—Costs.]—Application by the vendor, under the Vendors and Purchasers Act, for an order determining the validity of the objections to title made on behalf of the purchaser, upon an agreement for the sale and purchase of land, and declaring what further evidence, if any, as to title, the vendor was required to produce. The motion was heard in the Weekly Court, Toronto. LATCHFORD, J., in a written judgment, said that the buildings upon one of the parcels agreed to be conveyed admittedly extended beyond the limits of the vendor's property. Title had not been satisfactorily shewn to the easement claimed to exist for the north eave of the cottage on the land, and the stable on the front of the property encroached on a public highway. It was contended by the vendor that it was the land itself, and not the buildings, which constituted the chief element of value, and that the stable could be moved at small cost. It was entirely clear, the learned Judge said, that the vendor failed to make a good title to the land within the time limited in the agreement between the parties, even as extended by the solicitor for the purchaser. The learned Judge was quite unable to find that

the land itself was the main factor of value, or that the purchaser was bound to accept the property subject to such abatement as the Court might deem proper. Application dismissed with costs. E. F. Raney, for the vendor. D. D. Grierson, for the purchaser.

JACKSON v. MCCOY—LATCHFORD, J.—OCT. 29.

Contract — Services — Remuneration — Percentage — Account — Allowances—Report—Appeal.]—Appeal by the plaintiff from the report of the Judge of the County Court of the County of Frontenac, made pursuant to a judgment of reference, dated the 13th November, 1917. The appeal was heard in the Weekly Court, Toronto. LATCHFORD, J., in a written judgment, said that three findings of the Referee were objected to: (1) that the plaintiff was not entitled to a percentage on certain work done by the defendant known as "the Enterprise contract;" (2) that, in estimating the amount on which the plaintiff was entitled to a percentage, an allowance of $250 a month for the defendant's services was proper to be made; (3) that $125 a month should be allowed to the defendant for his personal expenses. There was manifest contradiction between the parties as to whether the plaintiff was or was not entitled to a percentage on the Enterprise contract. The learned Referee credited the defendant as against the plaintiff on a simple matter of fact; and his conclusion should not lightly be interfered with. He had advantages in hearing the witnesses and observing their demeanour which the appellate tribunal had not. His notes of the evidence, though not very full, warranted his finding in regard to the Enterprise contract. The Referee was right also in regard to the allowance to the defendant for salary and expenses. The defendant's services were valuable—in fact it was not disputed that they were worth $250 a month. Nor was there any substantial contest as to the $125 as monthly expenses. The profits could not be arrived at without taking these factors of salary and expenses into account. Appeal dismissed with costs. A. B. Cunningham, for the plaintiff. W. S. Herrington, K.C., for the defendant.

RE FOSTER AND RUTHERFORD—LENNOX, J.—NOV. 2.

Vendor and Purchaser—Agreement for Sale of Land—Objection to Title—Building Restrictions—Application under Vendors and Purchasers Act—Conflicting Affidavits—Direction for Trial of Questions Arising upon Oral Evidence.]—An application by the purchaser for an order, under the Vendors and Purchasers Act, declaring that the vendor was unable to make a good title to lands the subject of an agreement for sale and purchase, by reason of building restrictions which were an incumbrance. LENNOX, J., in a written judgment, said that the affidavits were conflicting, and one person who was a necessary witness refused to make an affidavit. The issues presented could not be decided by balancing affidavits. The parties must proceed to a trial by an action in the ordinary way, with pleadings defining the issues they wished to raise, or, if they agreed upon the questions to be tried, and desired it, an issue might be directed. In either case the costs of this motion should be costs in the cause to the successful party unless otherwise ordered by the Judge at the trial. R. G. Agnew, for the purchaser. S. H. Bradford, K.C., for the vendor.