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MORSON, JUN.Co.J. FEBRUARY 17TH, 1902.

FIRST DIVISION COURT, YORK.

McCANN v. SLATER.

Parent and Child—Liability of Parent for Tort of Child Eight Years Old—Master and Servant—Isolated Act — Habitual Mischievousness — Knowledge of Parent — Division Courts Act, sec. 73.

Moon v. Towers, 8 C. B. N. S. 611, referred to.

Action for $60 damages to a plate-glass window in the store No. 208 Dundas Street, Toronto, owned by the plaintiff, and caused by the defendant's son, eight years old, throwing a stone.

W. Howard Shaver, for plaintiff.

A. Fasken, for defendant.

MORSON, JUN.Co.J.:—There is no dispute as to the facts, and it did not appear why the child was on the street at the time or on what business (if any), for had he been on the defendant's business the result might have been different. The law seems to be well settled that, speaking generally, an infant, no matter how young, is liable for its own wrongful acts, and not the parent. It is also well settled law that in order to make one person, whether parent or not, liable for the wrongful act of another, whether child or not, the relationship of master and servant must exist between them, and the servant guilty of the wrongful or negligent act must at the time be acting in the employment of or on the master's business. The plaintiff in this case would therefore have to prove that the defendant's child was his servant. This, of course, would be a manifest absurdity in view of the child's tender years and its relationship to the defendant, and in the absence of any evidence of employment. There might be cases, however, under different circumstances as to age and otherwise, where this relationship of master and servant might be presumed to exist. In File v. Unger, 27 A. R. at p. 471, Mr. Justice Osler

says that in the case of a minor child living at home and old enough to perform work, this relationship might be presumed, but does not expressly so decide. Even if I could find it did exist, which I cannot, it would still have to be shewn that at the time of doing the damage, the child was on the defendant's business, as to which there was no evidence, and I would, therefore, have to find it was not. As to this relationship of parent and child I might appropriately quote the following from the judgment of Mr. Justice Willes in Moon v. Towers, 8 C. B. N. S. 615:—"I am not aware of any such relationship between a father and a son, though the son be living with his father as a member of his family, as will make the acts of the son more binding upon the father than the acts of anybody else. I apprehend that when it is established that a father is not liable upon contracts made by his son within age, except they be for necessaries, it would be going against the whole tenor of the law to hold him to be liable for his son's trespasses. The tendency of juries, where persons under age have incurred debts or committed wrongs, to make their relatives pay, should, in my opinion, be checked by the Courts."

The defendant in the present case is clearly then not liable, but the child alone is, notwithstanding the fact that it is only eight years old. In an American case, Hutchinson v. Engel, 17 Wis. 231, an infant of seven years old was held liable in trespass for breaking down shrubbery and flowers in a neighbour's garden. If the plaintiff had been able to shew that the defendant's child, of such tender years, had been in the habit of breaking glass or doing other damage, to the knowledge of its parent, who did not choose then to take ordinary care to see that it did not exercise its damaging propensities to the detriment of others, either by not allowing it out unattended or by keeping it in altogether,* I think I should have in such case held him liable, on the broad principle of equity and good conscience referred to in sec. 73 of the Division Courts Act, and so often invoked by me where administering strict law would work a hardship. In the absence of this knowledge, I do not think the law imposes any duty on a parent to see that his child of tender years is attended, when on the streets, in order to prevent it doing damage, but I think that when the parent knows of its mischievous or destructive habits he should be held responsible for all the damage it does, unless he takes reasonable steps to avoid it. For the reasons, then, that I have stated, I must give judgment for the defendant, but without costs.

* See interesting article in 35 L. J. 238, entitled "Children's Mischief."

OSLER, J. A. FEBRUARY 17th, 1902.

C. A. CHAMBERS.

Re WATTS.

Criminal Law—Extradition—Habeas Corpus—Appeal—Single Judge of Court of Appeal—Jurisdiction as to Bail—Discretion—R. S. O. ch. 83—Judicature Act, sec. 54.

Motion on behalf of prisoner to admit him to bail pending an appeal from order of Street, J., (ante p. 129), upon return of a writ of habeas corpus, remanding him to custody for extradition. Pending the proceedings below, Britton, J., admitted, on consent, the prisoner to bail, on condition that in the event of his being remanded for extradition he would forthwith surrender himself to the keeper of the gaol at Windsor.

F. A. Anglin, for Watts.

G. F. Shepley, K.C., for complainant.

OSLER, J.A.:—An order should not be made, for it does not appear that the prisoner is in actual custody, and it is doubtful whether a Judge of the Court of Appeal has power, on an appeal to the Court of Appeal under R. S. O. ch. 83, to admit to bail, such a matter not being incidented to the appeal, and so capable of being dealt with by a single Judge under sec. 54 of the Judicature Act. Moreover, if it rested in discretion to grant bail, one would be slow to admit to bail a person who has been committed for extradition, but upon the power of the full Court to do so, I do not for a moment reflect.*

FEBRUARY 17th, 1902.

DIVISIONAL COURT.

WILLIAMS v. COOK.

Sale of Goods—Contract—Failure to Supply Goods Contracted for—Breach—Guaranty—Remedy—Division Court Action—Bar after Judgment but not after Settlement before Trial.

Appeal by defendant from judgment of MACMAHON, J. Action to recover damages for breach of contract to deliver two dynamos, the breach alleged being that they were second hand and inferior in quality to those contracted for, and for other breaches. Defendant denied the breach, and alleged that plaintiff had bought the dynamos with a guarantee, which had been complied with, and that plaintiff had brought an

* On February 19th, the pending appeal came on for hearing before the full Court, which expressed a doubt as to the jurisdiction to admit to bail in extradition cases, and refused to hear the appeal until the condition of the bail bond had been complied with, and the appellant was shewn to be in close custody.—ED.

action in a Division Court for the same breaches of the contract as set up in this action, and that a settlement of all matters in dispute in that action was had, the action withdrawn, a delivery made of certain fixtures, and payment of moneys made, and a release given of a claim by defendant for $75, in full discharge and satisfaction of all claims under the contract. Defendant also alleged that the dynamos were fit for their intended purpose, and that plaintiff had after a fair trial accepted and paid for them.

J. T. Garrow, K.C., for appellant.

W. Proudfoot, Goderich, for plaintiff.

The Divisional Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.), held, BRITTON, J., dissenting, as follows:—The following are the material parts of the contract:—"Henry Cook, please ship to my address two Manchester-type dynamos . . . The dynamos must be manufactured by the United Electric Co. of Toronto, and their latest improved compound two-field type machine must be furnished, and guaranteed against any inherent defects due to bad workmanship or material for one year after starting. The manufacturing company's guarantees to be taken by you. . . ." Plaintiff repeatedly complained about the way the machines were working. On 24th October, 1900, he brought an action in a Division Court against defendant for not supplying him with one volt and other articles, claiming $100. The action should have come on for trial on 5th November, 1900, but before that date plaintiff agreed to withdraw it upon certain terms. Afterwards plaintiff alleges he, for the first time, discovered that the dynamos were second hand, and he then commenced this action. The Judge at the trial found that the bargain made was for new dynamos, and not for second hand ones, and that plaintiff was entitled to $50 for certain articles not supplied to him. We, after several times reviewing the evidence, agree with his findings, but it is necessary to consider the legal objections raised by defendant. He urged that the plaintiff's right to recover was, under the terms of the contract, limited to the guarantee or promise of the defendant contained in the contract to correct "any inherent defect in the machines, due to bad workmanship or materials, for one year from starting." But this is not an action upon any guarantee, either express or implied, but for damages because the thing supplied to plaintiff was not the thing he contracted for, but something different, and of less value, and he can now maintain this action: Chanter v. Hopkins, 4 M. & W. 399, 404; Gosling v. Kingsford, 13 C. B. N. S. 447; Azeman v. Casella, L. R. 2 C. P. 431; Smith v. Hughes, L. R. 6 Q. B. 597; Heilbutt v. Hickson, L. R. 7 C. P. 438; Shepherd v. Kain, 5 B. & Ald. 240; Cowdry v.

Thomas, 36 L. T. N. S. 22; May v. McDougall, 18 S. C. R. 700. The contract, as we construe it, was for new dynamos, and it was not satisfied by the delivery of the old ones repainted. The right to recover damages for a difference of this kind is something entirely distinct from the right of action upon the guarantee, that being accepted upon the fundamental understanding that the thing contracted for should be supplied: Bowes v. Shand, 2 App. Cas., per Lord Blackburn at p. 480. The plaintiff, upon the weight of evidence, is entitled to the $50 assessed at the trial, for, though the articles not supplied were in question in the Division Court action, they were never supplied pursuant to the settlement. That settlement might have been an answer to the whole cause of action, if it had gone to trial or judgment: Wright v. London Omnibus Co., 2 Q. B. D. 271; Brunsden v. Humphrey, 14 Q. B. D. 141; Nelson v. Couch, 15 C. B. N. S. 99; but it did not, and the question as to what was covered by the settlement is one of fact, and we find on the evidence that no right of action for damages for breach of the contract to deliver new dynamos, that breach not being in fact known to plaintiff, or for warranty as to their working, was included in that settlement: Lee v. Lancashire R. W. Co., L. R. 6 Ch. 527.

Appeal dismissed with costs, BRITTON, J., dissenting.

Proudfoot & Hayes, Goderich, solicitors for plaintiff.

Garrow & Garrow, Goderich, solicitors for defendant.

FERGUSON, J. FEBRUARY 18TH, 1902.

TRIAL.

SHARKEY v. WILLIAMS.

Sale of Goods—Conditional Sale—Hire Receipt—Removal for Non-payment.

Action, tried at Ottawa, brought to recover damages for illegal seizure and removal of a piano, which plaintiff had purchased from defendants on the usual hire receipt plan, and which, upon three payments of $5 each becoming in arrear, they removed from her premises, on 7th July, 1901, The contract provided that the purchase money was to become due on default of any payment, and defendants' agent demanded $115 balance due, and, not receiving it, removed the piano. Subsequently the defendants gave back to plaintiff's agent the piano and received the payments in arrear and $5 costs of removal, the latter under protest.

P. H. Bartlett, London, and R. M. C. Toothe, London, for plaintiff.

E. Meredith, K.C., and J. O. Dromgole, London, for defendant.

FERGUSON, J., after a careful perusal of the evidence, held that defendants had not done anything which they were not entitled to do under the contract. Action dismissed with costs.

R. M. C. Toothe, London, solicitor for plaintiff.

Meredith, Judd, Dromgole, & Elliott, London, solicitors for defendants.

FEBRUARY 19TH, 1902.

DIVISIONAL COURT.

Re GLENN.

REX v. MEEHAN.

Justice of the Peace—Refusal to take Information—Order nisi—Forum—Single Judge—Divisional Court—R. S. O. ch. 88, sec. 6—R. S. O. ch. 223, sec. 193 (f).

Orders *nisi* under R. S. O. ch. 88, sec. 6, to compel any justice of the peace to do an act relating to his duties as such justice, are not final, but appealable, and the application for such orders must be made to a Single Judge sitting as the High Court, and not to a Divisional Court.

Motion by A. D. Turner to make absolute an order *nisi* calling upon James Morrison Glenn, K.C., police magistrate for the city of St. Thomas, to shew cause why a mandamus should not issue commanding him to receive the oath of Turner to a certain complaint in writing, preferred by Turner against Patrick Meehan, not couched in the exact wording of sec. 193 (*f*) of the Municipal Act, and charging defendant with, after having voted once at the election of mayor and aldermen for the city of St. Thomas in January, 1902, applying at the same election for a ballot paper in his own name, contrary to the said section.

I. F. Hellmuth, for Turner.

J. R. Cartwright, K.C., for Attorney-General for Ontario.

E. E. A. DuVernet, for magistrate, objected that the motion under R. S. O. ch. 88, sec. 6 should be to a single Judge in Court. The motion was heard subject to the objection.

The judgment of the Court (STREET, J., BRITTON, J.) was delivered by—

STREET, J.:—The order *nisi* and the order absolute provided for by R. S. O. ch. 88, sec. 6, are civil, not criminal, proceedings, although the act which the justice is ordered to do may be, as here, the taking of an information for a criminal offence, and although the proceedings are taken in the name of the King. It is, therefore, to the Judicature Act and Rules of Court, taken along with the section above quoted, that we must look in order to ascertain the tribunal

in which the proceedings are to be taken, that is to say, in order to ascertain what is meant by the High Court in the section. If this application is one of the matters assigned by the Judicature Act, sec. 67, or by any Rule of Court to be heard by a Divisional Court, it is properly before this Court. It could only be so under sec. 65 (*a*), which assigns "proceedings directed by any statute to be taken before the Court, in which the decision of the Court is final," that is, not appealable. Now, though no appeal is given by sec. 6, the order is in fact in the nature of the former writ of prerogative mandamus, and of the present order of mandamus granted upon motion under the Judicature Act and Rules, which is clearly a matter in which an appeal lies. There is, therefore, no apparent reason why an order made under the section in question should not take its place alongside orders of a similar character and fall under sub-sec. 1 of sec. 75 of the Judicature Act. The fact that the order may be made under sec. 6 by a County Court Judge is not of consequence, because, by R. S. O. ch. 55, sec. 52, an appeal from his order is given. Therefore, orders under sec. 6 are not final, but appealable, and should be made before a single Judge sitting as the High Court. The matter, however, has been fully argued, and by consent of parties a further argument may be unnecessary. If consent is forthcoming within one week, judgment upon the merits will be delivered by a single member of this Court; otherwise the rule *nisi* will be discharged without costs, and without prejudice to a further application to a single Judge in Court.

McLean & Cameron, St. Thomas, solicitors for Meehan.

McEvoy & Perrin, London, solicitors for complainant.

FEBRUARY 19TH, 1902.

DIVISIONAL COURT.

SUMMERS v. COUNTY OF YORK.

Municipal Corporation—Highway—Guard at Approach to Bridge—Negligence of Electric Street Railway Company—No excuse for Corporation.

Foley v. East Flamborough, 26 O. R. 43, approved.

Hill v. New River Co., 9 B. & S. 303, referred to.

Atkinson v. Chatham, 31 S. C. R. 61, distinguished.

Appeal by defendants from judgment of County Court of York in action for damages for injuries. The plaintiff was driving a team of horses, attached to a waggon. As he was crossing the bridge on Yonge street at York Mills an electric car approached, and plaintiff jumped out and held the head of the horse nearest the car, and alleges that he

would have been able to control both horses, but they were further terrified by the rumbling sound of the car as it entered on the bridge, and they dragged him in a south-westerly direction across the railway tracks to the top of a bank six feet high, when he had to let go, and the waggon and horses went over into the ditch. The Judge below held that plaintiff was not guilty of negligence; that the neglect of duty, if any, of the railway company would not excuse defendants for not properly guarding the highway: Hill v. New River Co., 9 B. & S. 303; and that the highway was out of repair by reason of there not being a guard rail along the bank, thus bringing this case within Toms v. Whitby, 34 U. C. R. 195.

C. C. Robinson, for defendants.

J. H. Moss for third parties, the Metropolitan Railway Company.

W. Cook, for plaintiff.

The judgment of the Court (STREET, J., BRITTON, J.) was delivered by—

BRITTON, J.:— . . . It is true the horses were uncontrollable, but from a cause which the corporation might expect, and so should reasonably guard the highway at such a spot. I think the plaintiff acted carefully and prudently. Had he remained in his waggon, it would have been said he should have got out, and gone to the horses' heads. In Atkinson v. Chatham, 31 S. C. R. 61, the horses were uncontrollable and ran against a telephone pole, but the pole did not occasion any damage; it rather, as suggested by the Court, by separating the horses from the vehicle, saved further damage: Foley v. East Flamborough, 26 O. R. 43, covers this case. Appeal dismissed with costs.

LOUNT, J. FEBRUARY 19TH, 1902.

WEEKLY COURT.

GRAHAM v. BOURQUE.

Contract—Breach by Non-payment of Note—Absolute Refusal to Perform—Necessity of, before Other Party can Rescind in Such Case.

Furth v. Barr, 9 C. P. at pp. 213, 214, referred to.

Appeal by defendants from report of the County Judge of Carleton, to whom the matters in dispute were referred under R. S. O. ch. 62, sec. 29, in action for price of goods sold and delivered. The contract was for delivery of a quantity of bricks subject to approval of engineer of city of Ottawa, and to requirements of defendants. The Judge below found that defendants had made default in payment of a promissory note for $1,750, which fell due on July 17th, 1900, and which had been given by defendants for bricks delivered under the

contract, and that this default was conclusive evidence that defendants were unable or unwilling to make payment, and in either case that plaintiff was justified in assuming that defendants did not intend plaintiff or themselves to be bound by the contract.

J. A. Ritchie, Ottawa, for defendants.

W. A. D. Lees, Ottawa, for plaintiff.

LOUNT, J.:—The question raised is whether, if one party breaks a contract, the other is bound to perform his part of it. See Furth v. Barr, 9 C. P. at p. 213 per Lord Coleridge, and Keating, J., at p. 214. With all respect, I think the learned Judge erred in law as well as in his finding on the facts. It is not sufficient that the defendants were unable to pay or wished to delay payment. It must be found that there was an intention to abandon by defendants and a refusal to perform, or, as Keating, J., put it, there must be "an absolute refusal to perform their part of the contract." In my opinion the evidence falls short of this. . . . Refer to Mersey Steel and Iron Co. v. Naylor, 9 Q. B. D. 648, and 9 App. Cas. 434.

Judgment for plaintiff for $100.10, with costs of action, except costs of counterclaim, and for defendants for costs of counterclaim. Costs of appeal to defendants.

Lees & Kehoe, Ottawa, solicitors for plaintiff.

Belcourt & Ritchie, Ottawa, solicitors for defendants.

FEBRUARY 20TH, 1902.

WEEKLY COURT.

Re CAMPBELL AND HORWOOD.

Will—Construction—Power to Sell—Executors—Real Estate Undisposed of—Intestacy—Vendor and Purchaser—Doubtful Title.

Alexander v. Mills, L. R. 6 Ch. at p. 131, followed.

Motion under Vendors and Purchasers' Act for an order declaring that the title of the vendor to lot No. 6 on the north side of McLeod street in the city of Ottawa is one which the purchaser is bound to accept. The vendor derives title by conveyance from the sole acting executor of Colin Campbell, deceased.

M. J. Gorman, Ottawa, for vendor.

D. L. McLean, Ottawa, for purchaser.

LOUNT, J.:—By a deed of the 9th April, 1900, G. D. Campbell, sole acting executor of estate of Colin Campbell, deceased, conveyed to the vendor the lot. Paragraph 3 of the will of the testator dated 28th December, 1875, provides that all his book debts are to be collected and the moneys arising therefrom to be invested as follows:—"All moneys are to be invested in bank stocks or city corporation bonds. All

mortgages and judgments that the interest is not paid on are to be foreclosed and closed in earnest; if the real estate will not sell for its worth, it can stand until the executors see a chance to dispose of it to advantage: moneys from the sale to be invested as before mentioned." And by paragraph 4, after providing for certain bequests and legacies, he devises certain of his real estate absolutely to his son Douglas, and a life estate to his wife in the dwelling house, subject to conditions, and then says, "and the residue of the estate or the interest arising from all invested moneys after the debts are paid is to be equally divided among my six daughters . . . for their sole use and benefit, and by them not to be conveyed during their natural lives, the interest only as the principal must be kept invested as before mentioned and used as I have instructed."

There is no other provision in the will giving the executors power to sell or dispose of the real estate.

The words "if the real estate will not sell for its worth it can stand until the executors see a chance to . . . dispose of it to advantage," do not empower and authorize the surviving executor to execute a deed to the vendor so as to give her a good title. The rule as to the construction of wills requires that I should give to the words their full and natural meaning, and that I should endeavour to arrive at the meaning and intention of the testator as expressed. On its face it is apparent that it was not drawn by a person having any knowledge or experience in the drawing of wills, but as it was drawn by the testator one presumes the words used are intended to express his mind and wishes . . .

Paragraph 3, read with the whole context of the will, was not intended to confer or give power to the executors to deal with any other real estate than that on which he held mortgages, for he disposes of his other real estate as provided in the 4th paragraph, and by this paragraph, after certain gifts, legacies, and devises, he gives the residue of his estate to his daughters not to be conveyed during their natural lives. which residue, I think, relates to the residue of his personal estate and not his real estate, for he uses these words:—"The interest only, as the principal must be kept invested as mentioned." Reading the whole of this paragraph, it seems to me he was dealing only with the personal estate. This would leave an intestacy as to the lot in question.

It is also contended that the title of the daughters and all the heirs passed under a deed of release of the 15th February, 1883. I think this is not so. No doubt it was intended that a deed should have been executed by those parties to the vendor's husband in trust for his and her children, but for some reason this was not done, and the only estate the vendor and her children can have is an equitable one.

A doubtful title cannot be forced on an unwilling purchaser: Alexander v. Mills, L. R. 6 Ch. at p. 131. Motion dismissed with costs.

M. J. Gorman, Ottawa, solicitor for vendor.

D. L. McLean, Ottawa, solicitor for purchaser.

Moss, J.A. FEBRUARY 21ST, 1902.

C. A.-CHAMBERS.

KIDD v. HARRIS.

Leave to Appeal—Special Circumstances.

Thuresson v. Thuresson, 18 P. R. 414, referred to.

Application by defendants J. & C. Harris for leave to appeal from the decision of a Divisional Court (22 C. L. T. Occ. N. 25) affirming (for different reasons) the judgment of FERGUSON, J., at the trial in favor of plaintiff in an action to establish the will of Hebron Harris, deceased.

H. M. Mowat, K.C., for the applicants.

G. E. Kidd, Ottawa, for plaintiffs.

A. Mills and J. H. Spence, for the other defendants.

Moss, J.A.:—Although the applicants have the judgment of two tribunals against them, they have the opinion of one Court only in respect of either branch of the case, and as the value of the estate is large, and as the consequences of the decision of the Divisional Court to the applicants in relation to their status and position are most serious, sufficient special circumstances have been shewn to entitle them to obtain the opinion of this Court upon the case. Security should not be dispensed with: see Thuresson v. Thuresson, 18 P. R. 414. Order made for leave to appeal upon the usual terms. Time for giving notice of appeal extended for two weeks. The appeal to be entered for argument at the next sittings. Costs in the appeal.

FEBRUARY 22ND, 1902.

DIVISIONAL COURT.

FRASER v. GRIFFITHS.

Mechanic's Lien—Registered Owner — Contract With — Transfer of Property after Registration of Lien, &c.—But Pursuant to Previous Agreement—Notice—Parties.

Appeal by defendants Griffiths, Davidson, and Ray from a judgment of the Judge of the District Court of Rainy River in a mechanic's lien action, declaring the plaintiff entitled to a mechanic's lien upon certain land for $844 debt and $185 costs, and ordering the lands to be sold in case of default of payment, and that the defendants Griffiths and Davidson should pay the deficiency on such sale, if any, and

ordering the defendant Mamie Ray to pay the costs of her counterclaim.

W. M. Douglas, K.C., for appellants.

C. A. Masten, for plaintiff.

The Court (FALCONBRIDGE, C.J., and STREET, J.):—Held, that the evidence fully justified the judgment appealed from, both as to the original contract and the extras. It was not necessary that Mamie Ray should have been added as a party at all, because there was no evidence that the plaintiff had any notice of the contract under which she claimed title, and she registered her conveyance long after the registration of the *lis pendens* in the present action. Under these circumstances, the interest she took was subject to the proceedings in the action, and no notice at all need have been taken in the action of the fact that she had acquired title from Griffiths and Davidson. Appeal dismissed with costs.

McLennan & Wallbridge, Rat Portage, solicitors for plaintiff.

W. B. Towers, Rat Portage, solicitor for defendants.

STREET, J., FEBRUARY 22ND, 1902.

WEEKLY COURT.

Re PUBLISHERS' SYNDICATE—MALLORY'S CASE.

Company—Winding-up—Subscription for Shares—Condition—Allotment—Notice—Contributory.

Appeal by M. B. Mallory from a judgment of Mr. Winchester, official referee, sitting for the Master in Ordinary, in a winding-up matter, settling the appellant's name upon the list of contributories as the holder of five shares of unpaid stock in the company. One Stark was an agent of the company, and was authorized to obtain subscriptions for its shares, being paid by a commission. Under his solicitation Mallory signed and handed to him an application for five shares, with the understanding that the application was subject to a condition (not appearing on its face) that Mallory was not to be required to accept any allotment that might be made unless and until he should collect a sum of about $700 then due him. This condition was communicated to the president of the company, to whom the application was handed by Stark, either at the time of so handing it or shortly afterwards. The board of directors allotted five shares to Mallory upon the application being laid before them. There was no evidence of any formal notice of allotment being given to Mallory; he never paid any money upon the shares, and never attended a meeting of the shareholders, or in any way

acted as if he were a shareholder. He never collected the $700 upon which he had relied as a means of paying for the shares. He was twice asked by persons sent on behalf of the company whether his money had come in and whether he intended to take or pay for the shares, and on each occasion he gave the messenger to understand that his money had not come in and that he would be unable to take them. Finally he told the prosident that he had failed to collect his money and would not take the shares, and was told that it was all right.

W. E. Raney, for Mallory.

C. D. Scott, for liquidator.

STREET, J.—Held, that the company had never notified Mallory that they accepted his offer to take the shares, and that he withdrew his application when he told the president that he would not take them. The fact that a condition accompanied the application was a sufficient reason for the absence of inquiry on the part of Mallory as to the fate of his application. See Pellatt's Case, L. R. 2 Ch. 527; Shackleford's Case, L. R. 4 Ch. 566; Gunn's Case, L. R. 3 Ch. 40; Rogers's Case, ib. 634; and Ex p. Fox, 11 W. R. 577.

Raney, Mills, Anderson, & Hales, Toronto, solicitors for Mallory.

Scott & Scott, Toronto, solicitors for liquidator.

FEBRUARY 12TH, 1902.

CHAMBERS.

LANGLEY v. LAW SOCIETY OF UPPER CANADA.

Parties—Adding Parties—Joinder of Causes of Action—Relief Over—Third Party—Rules 185, 186, 187, 192.

Evans v. Jaffray, 1 O. L. R. 614, Tate v. Natural Gas Co., 18 P. R. 82, and Confederation Life Association v. Labatt, 18 P. R. 266, followed.

Smurthwaite v. Hannay, [1894] A. C. 494, Thompson v. London County Council, [1899] 1 Q. B. 840, and Quigley v. Waterloo Manufacturing Co., 1 O. L. R. 606, distinguished.

The plaintiff, as liquidator under the Winding-up Act of a company called the Publishers Syndicate, Limited, carried on this action, commenced by that company, to recover the sum of $346 alleged to have been due by the Law Society to the firm of Rowsell & Hutchison, and to have been assigned to the company by E. R. C. Clarkson, as assignee for the benefit of the creditors of Rowsell & Hutchison. The Law Society pleaded that they had not become indebted to the

firm of Rowsell & Hutchison in any sum whatever in respect of the matters in question, and, in the alternative, that if they had become indebted, they had, before the assignment by Clarkson of the company, a right of set-off against Rowsell & Hutchison on other accounts to a much higher sum, and they denied the validity of the alleged assignment by Clarkson to the company. The plaintiff then applied for leave to add Clarkson as a defendant, alleging that he had warranted the existence of the debt, and Clarkson applied at the same time, in the event of his being added, for leave to serve a third party notice on the Bank of Hamilton, alleging that in assigning the debt to the company he had acted as agent for the bank and had paid the proceeds to them. The Master in Chambers granted both applications, and an appeal by the Law Society was argued before MEREDITH, J., on the 10th January, 1902.

Hamilton Cassels, for appellants.

George Bell, for Clarkson.

C. D. Scott, for plaintiff.

MEREDITH, J.—The questions for consideration are, whether the Master had power to make such an order, and, if so, whether he ought to have made it. The first step in the trial will be the determination of the question whether the defendants, the Law Society, are indebted as alleged, and in that all parties are directly concerned. . . . Again, the Law Society are directly concerned with each of the other parties in some of the matters in issue. . . . And lastly, there can be no wrong, nor need there, indeed, be any inconvenience to the alleged debtors in a trial of the action with the added parties. . . . The order ought to be upheld if the practice warrants it. . . . Rules 186, 192, and 187, read together, seem to me broad enough to cover this case.

If the Master's order cannot stand, I am unable to perceive how the law of Tate v. Natural Gas and Oil Co. (1898), 18 P. R. 82, can have been well decided. It is the judgment of a Divisional Court of the High Court, affirmed by the Court of Appeal. It seems to me to give even a broader effect to the Rules than is necessary to sustain that order.

And it is, I think, supported by such cases as Honduras R. W. Co. v. Tucker (1877), 2 Ex. D. 301; Bennetts v. McIlwraith, [1896] 2 Q. B. 464; Child v. Stenning (1877), 5 Ch. D. 695, and Frankenburg v. Great Horseless Carriage Co, [1900] 1 Q. B. 504.

It is not necessary that I should discuss cases of less authority than these, which (if there be any) conflict in principle with these.

And of those of equal or greater authority it is needful to refer to two only.

Of Smurthwaite v. Hannay, [1894] A. C. 494, it may perhaps be enough to say that that was a case of misjoinder of plaintiffs, a case to which Con. Rules 187 and 192 were inapplicable; but it was also a case in which it was held that the claim of each plaintiff was upon a contract separate and distinct from that of each of the others. There was no connecting link between any of the claims, though they were all against the same defendants, and arose out of, mainly, the same circumstances.

The case of Thompson v. London County Council, [1899] 1 Q. B. 840, is the strongest for the appellants, but that was held to be a case of joining two separate and distinct actions for different wrongs against different defendants. And in that case the case of Bennetts v. McIlwraith was not found fault with, but was spoken of with approval.

The effect of the Smurthwaite and Thompson cases is lucidly exemplified by Romer, L.J., in the Frankenburg case.

Neither the Smurthwaite nor the Thompson case is in fact or in principle like this case, but the case of Bennetts v. McIlwraith, in a measure, is.

Of the latest cases in this Court, Quigley v. Waterloo Manufacturing Co., 1 O. L. R. 606, was governed by the Thompson case. . . . But in this case relief over is sought, and, in addition, there is the connection between all the parties which the transfers of the alleged debt made. All claims are upon contract and in respect of the same subject-matter.

And Evans v. Jaffray, 1 O. L. R. 614, is a strong case of allowing a joinder of defendants and causes of action: and one which is more than merely broad enough to support the order here in question.

The contention that the practice as to joinder of defendants stands in the same position as that of joinder of plaintiffs did before the amendment of Con. Rule 185, because Rule 186 was not also amended, seems to me quite fallacious. It leaves out of consideration altogether the important Rules 187 and 192.

It would be a curious anomaly if several plaintiffs might sue one defendant, whilst one plaintiff might not sue several defendants, under the like circumstances.

The reason Rule 186 was not changed to correspond with the change in Rule 185 was, I have no doubt, that the combined effect of Rules 186, 192, and 187, was at least as wide as Rule 185 in its present form is: and in its present form it is quite wide enough to cover this case, which is one arising out of the same series of transactions, and in which there is some common question of law or fact.

Mr. Bell's contention that the assignor ought not to have been made a party, because, as he contends, the assignor was acting merely as agent of the Bank of Hamilton, raises a question of fact proper for consideration at the trial, not upon this motion: see Tate v. Natural Gas and Oil Co., 18 P. R. 82.

The case of Confederation Life Association v. Labatt (1898), 18 P. R. 266, is authority for the third party notice.

The Master's ruling is affirmed; and the appeal will be dismissed; costs in the action to the plaintiff only.

Scott & Scott, Toronto, solicitors for plaintiff.

Cassels, Cassels, & Brock, Toronto, solicitors for defendants.

Thomson, Henderson, & Bell, Toronto, solicitors for added party.

FEBRUARY 19TH, 1902.

DIVISIONAL COURT.

MORPHY v. COLWELL.

Attachment of Debts—Assignment of Debt—Attack within 60 Days—Pressure—Evidence—R. S. O. ch. 147—Division Courts.

Molsons Bank v. Halter, 18 S. C. R. 88, and Stephens v. McArthur, 19 S. C. R. 446, followed.

Appeal by the claimant, J. D. Smith, from a judgment of the Judge presiding in the 1st Division Court of Middlesex, refusing a new trial and thereby affirming his own judgment setting aside, as an unjust preference, a transfer to him from the primary debtor Colwell of a claim against the Northern Life Assurance Co., who were garnishees.

The summons was issued in the Division Court on 22nd January, 1900; the primary creditor, Morphy, claimed from the primary debtor, Colwell, the sum of $200 upon a due bill dated 1st March, 1894, and all debts due from the Northern Life Assurance Co. to Colwell were attached. On the 7th December, 1899, Colwell had recovered a judgment against the garnishees for $450, and on the same day he

assigned that judgment to James D. Smith, the present appellant. There is nothing to shew that any formal notice of the proceedings or of any contest as to his rights was ever served upon Smith, but he appeared in the proceedings by his solicitor on the 6th July, 1900, and consented to an adjournment of them, and upon the hearing of evidence which took place between all the parties and for all the purposes of their contest between themselves on 24th October, 1900. The learned Judge, after hearing the evidence, held that the commencement of the action having been within 60 days after the transfer to the claimant, the proceedings to set aside the assignment must be taken to have then begun, although the claimant was not made a party to them; that in any event there was no evidence that the assignment was tne result of pressure; he gave judgment for the primary creditor against the primary debtor for $200 and costs, and against the garnishees for $200 and the costs. The claimant applied to him for a new trial, and upon his application being refused, he appealed.

The appeal was heard on the 23rd January, 1902, before FALCONBRIDGE, C.J., and STREET and BRITTON, JJ.

W. H. Blake, for the appellant.

J. M. McEvoy, London, for the primary creditor.

The learned Judge in the Court below has held that, because the garnishee summons was issued against the primary debtor and the garnishee within sixty days of the making of the transfer in question, the transfer must be held to have been attacked within the sixty days, and consequently that its validity cannot be supported by proof of pressure in procuring it.

In this view I am unable to concur. The transfer cannot be taken to have been attacked until proceedings against the transferee for the purpose are begun, and there is not the slightest evidence that the transferee here, J. D. Smith, was in any way notified of the proceedings or made a party to them, until he appeared in them by his solicitors on 9th July, 1900, the transfer in question having been made in the previous December. I am of opinion, therefore, that we must hold that no proceedings to impeach or set aside the transfer were made until after the expiration of the statutory period of sixty days. Then the question arises whether there is evidence of pressure by the claimant sufficient to enable us to hold upon the authorities that the preference obtained by the claimant was not a mere voluntary act, and therefore an unjust preference under the Act. . . .

In short it appears from the evidence both of Smith and Colwell, that Smith had asked Colwell for security shortly before the security was given, and that the security given was that which was promised. This, I think, is sufficient upon the authorities to constitute pressure inducing the giving of the security: Molsons Bank v. Halter, 18 S. C. R. 88; Stephens v. McArthur, 19 S. C. R. 446.

The result will be that the claimant should be held entitled to be paid his debt first out of the moneys realized from the judgment which has been assigned to him. He has paid, it appears, $263.61, and he will be entitled to interest upon this sum and to his costs here and below.

The primary creditor will be entitled to judgment against the garnishees for the surplus over Smith's claim.

BRITTON, J.—I concur.

FALCONBRIDGE, C.J.—I agree with my brother Street, in this conclusion as to the application of the 60 days' rule and its result on the burthen of proof.

But, conceding this point to the appellants, I do not agree in holding the learned Judge in the Court below to have been wrong in his findings of fact. He had ample ground for saying that he did not believe the evidence put forward to support the pressure, and his judgment ought not to be reversed, because he has not said so in express terms.

In my opinion the appeal ought to be dismissed.

Appeal allowed with costs.

McEvoy & Perrin, London, solicitors for primary creditor.

Gibbons & Harper, London, solicitors for claimant and primary debtor.

WEEKLY COURT.

FEBRUARY, 22ND, 1902.

MARKS v. WATEROUS ENGINE WORKS CO.

Sale of Goods — Property not Passing — Breach of Warranty — Counterclaim for Balance of Purchase Money—Effect—Foreclosure of Property—Pleading.

McIntyre v. Crossley, [1895] A. C. 463, followed.

Motion by the defendants to vary the minutes of judgment pronounced on April 15th, 1901, by limiting a time for the payment of the amount found due the defendants by

the plaintiff, and in default a foreclosure of the plaintiff's right to the machine in question.

The action was brought for the cancellation of certain notes given by plaintiff to defendants upon the purchase by him of a 14 horse-power re-built Champion engine, for which plaintiff gave in addition to the notes an old 12 horse-power engine, or in the alternative for damages for breach of warranty as to the power of the engine, and for the price of the old engine. The defendants counterclaimed for the unpaid purchase money represented by the notes, alleging a conditional sale of the engine, and that the property had not passed, and therefore the action for breach of warranty would not lie. The learned Judge (STREET, J.) held that the plaintiff having kept the engine for two seasons must be deemed to have accepted it, and that the counterclaim removed any difficulty as to the claim for breach of warranty, for in answer to such a counterclaim the plaintiff was entitled to plead a breach of warranty.

J. H. Moss, for defendants.

W. E. Middleton, for plaintiff, relied on McIntyre v. Crossley, [1895] A. C. 463, as shewing that the title to the machine had become vested in him.

STREET, J.—Held, that the judgment as settled by the registrar was the only judgment which should be entered in the present action, and the expression of opinion as to the ownership contained in the written reasons for judgment should not be embodied in it, as the question of ownership was not properly before the Judge.

Motion dismissed with costs.

Blewett & Bray, Listowel, solicitors for plaintiff.

Wilkes & Henderson, Brantford, solicitors for defendants.

WINCHESTER, Master. FEBRUARY 18TH, 1902.

CHAMBERS.

CUMMINGS & CO. v. RYAN.

Parties—Action by Person Using his own Name with the Addition of the Words "& Co."—Should Sue in his own Name only—Rules 143, 144, and 222.

An application by the defendants for an order staying proceedings herein upon the ground that the plaintiffs have failed to comply with the demand made by the defendants for a declaration in writing of the names and places of residence of all persons constituting the plaintiff firm.

Frank Denton, K.C., for defendants.

R. S. Neville, for plaintiff.

THE MASTER IN CHAMBERS:—The demand was served under and by virtue of Rule 144, on the 10th February inst. No answer was made to that demand until the 14th inst., when the plaintiff's solicitor gave the information to defendants' solicitor in the office of a special examiner; at the same hour the plaintiff's solicitor was served with notice of motion for the order herein, such service being made at his office.

Counsel for defendants asked on the return that no order other than that the costs of the application be costs in the clause, be made.

Counsel for plaintiff objected and asked that the costs of the application be paid by the defendants to the plaintiff, on the ground that Rule 144 does not apply where there is only one party plaintiff.

It is quite true that if the style of the cause only shewed one party as plaintiff, then not only the motion, but the demand, would not have been served under Rule 144; the procedure would have been in that case under Rule 143.

The difficulty has arisen through the plaintiffs using a firm name in bringing the action, while he is sole member of the firm. This is opposed to the provisions of Rule 222—see the able article written upon this point by Mr. Alexander MacGregor, and published in 37 C. L. J. at p. 763. The plaintiff, having been the cause of the difficulty, might very well have been asked to pay the costs occasioned by his improperly using the name of the firm instead of his own name.

The order will go as asked by defendants' counsel. No costs of plaintiff's affidavits.

R. S. Neville, Toronto, solicitor for plaintiff.

Denton, Dunn, & Boultbee, Toronto, solicitors for defendants.