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FALCONBRIDGE, C. J. JULY 13TH, 1903.

TRIAL.

ANTHONY v. CUMMINGS.

Gift—Deposit in Bank—Parent and Child—Improvidence.

Action by a mother against her son to recover $1,000 which was left to the mother by her deceased husband, and deposited by herself and her son in a bank to the joint credit of both.

L. F. Heyd, K.C., for plaintiff.

J. Harley, K.C., for defendant.

FALCONBRIDGE, C.J.—Plaintiff did not intend to make and never did in fact make a gift inter vivos of the fund in question. She did not understand the full consequence and effect of the mode in which the deposit was made. Her capacity to grasp the situation was and is limited, and she did not grasp it, and the transaction was improvident and ill-advised. . . . Judgment for plaintiff as prayed, but without costs, defendant's conduct not having been fraudulent.

OSLER, J.A. JULY 15TH, 1903.

TRIAL.

CLERGUE v. MCKAY.

Specific Performance—Contract for Sale of Land—Authority to Agent to Sell—Refusal to Carry out Agent's Bargain—Offer to Sell to Agent for Undisclosed Principal—Oral Acceptance by Agent—Completed Contract—Statute of Frauds—Conveyance of Land by Vendor before Action—Bona Fide Purchaser for Value without Notice—Registration of Conveyance—Intervening Registration of Certificate of Lis Pendens—Action—Parties—Damages.

Action for specific performance of an agreement to sell defendant Preston's undivided two-thirds interest in certain property in the town of Sault Ste. Marie for $1,200.

The action came on for trial at Sault Ste. Marie in November, 1902. The only persons then defendants were Annie McKay and Thaddeus D. Preston. The action was dismissed as against the former, and in the course of the trial it appeared that, after the making of the contract sought to be enforced, and before action, defendant had conveyed the land in question to one W. B. Heath. The plaintiff had registered a certificate of lis pendens two or three days before the registration of Heath's deed. Leave was given to add Heath as a party: see ante 50; he was added, and the pleadings were amended.

The trial was resumed at Toronto on the 10th July, 1903, on the amended record.

J. M. Clark, K.C., and N. Simpson, Sault Ste. Marie, for plaintiff.

G. H. Watson, K.C., and W. H. Hearst, Sault Ste. Marie, for defendants.

OSLER, J.A.— . . . The title of defendant Preston to the property at the date of the alleged agreement was not in dispute, and both defendants were then and still are residents of the city of Iona, in the State of Michigan.

Plaintiff proved (1) an instrument in writing dated 1st November, 1899, signed by defendant Preston, authorizing Mr. John McKay to sell and dispose of his undivided two-thirds share or interest in the lots in question for $750 or such greater price and on such terms as he might think proper, and to execute such agreements for sale as might be requisite. (2) A formal power of attorney under seal, dated 21st November, 1899, from defendant Preston to McKay, authorizing the latter to sell the land at such price and on such terms as he might think proper, and to execute such deeds and conveyances thereof as might be necessary.

Soon after becoming possessed of those powers, interviews and discussions took place between McKay and one W. H. Plummer as to the sale of the lots. According to the evidence of the latter, McKay asked him if he could make a sale. Plummer said he thought he could make one for $1,200, but wished to know whether there was any commission in it for him. McKay said there might be $50, which would come out of the purchase money, and McKay, who was a member of the firm of Hearst & McKay, defendant Preston's solicitors, then wrote and handed to Plummer a letter addressed to Plummer, dated 13th December, 1899, as follows: "A client of ours who owns an undivided two-thirds interest in water lots 21 and 22, South Bay street, is willing to sell such interest for $1,200 cash, which is slightly

above the rate of $8 per foot frontage. Kindly advise us if you wish to purchase at that price. Yours truly, Hearst & McKay."

Plummer was not at this time agent for anyone to purchase, but he took the letter to a Mr. Rowland, the plaintiff's general solicitor and man of business, to be submitted to plaintiff to see if he would take up the offer. . . .

About 23rd December McKay asked Plummer if there was any chance of making a sale "to him or his associates." Plummer thought the parties were not disposed to buy, and McKay on that day advised his principal that there seemed no immediate prospect of a sale. On the 31st December, however, Clergue told Rowland to authorize Plummer to accept the offer, and Plummer accordingly did so within the next two or three days, orally and, as it would seem, in his own name, or at all events without disclosing that plaintiff was the purchaser. It was, however, quite understood between McKay and Plummer and Rowland, with the latter of whom plaintiff got into communication immediately after the acceptance of the offer, that the deed was to be made to Plummer, and McKay was evidently satisfied to accept him as the purchaser, whether he was acting in the interest of other persons or not.

Several interviews took place between McKay and Rowland as to carrying out the sale, in one of which McKay told him he would prepare the deed and send it to defendant Preston for execution. On the 12th January, 1900, McKay accordingly did so, Plummer being named in the deed as the purchaser, with the following letter written by him in the name of his firm:—"T. B. Preston, Esq., Iona, Mich.—Dear Sir: We have arranged to sell the two-thirds interest in the water lots to W. H. Plummer for $1,200. This, we consider, is an extra good sale. We will, of course, have to allow him $50 on account of commission, and, in addition to the $50, we will have to charge you our commission of $60 on the sale. Kindly have deed executed and return to us at once, and oblige, yours truly, Hearst & McKay."

Shortly afterwards defendant Preston wrote McKay refusing to carry out agreement. . . .

By deed of 18th May defendant Preston, without further communication with McKay, conveyed his interest in the property to defendant Heath, for the expressed consideration of $3,000, of which $900 was paid on the 19th May, and a promissory note given for the balance, which was paid in full. . . The affidavit of execution of this deed purports to be sworn on the 29th May, 1900, on which day, and in ignorance of its execution, the writ of summons in this action was issued and

a certificate of lis pendens registered at 3 o'clock p.m. The deed to Heath was duly registered on the 1st June at 3 p.m. Nearly twelve months elapsed before the writ and statement of claim were served on defendant Preston and the action proceeded with. Plaintiff had long before this become aware of the conveyance to Heath, but the action was brought down to trial in November, 1902, without his having been made a party.

For defendants it was contended that if the letter of 13th December, 1899, was an offer to sell, which they denied, it was an offer to sell to Plummer, and not to plaintiff, inasmuch as Plummer was not then plaintiff's agent; that, if it was an offer, it was not followed up by a binding acceptance within a reasonable time; that any bargain made with Plummer after he had become plaintiff's agent was oral only, and that the agent's letter of 12th January, 1900, was not evidence of a binding contract: that Plummer was not a purchaser, but was only an agent of the owner to sell, as evidenced by the promise to pay him a commission; that defendant Heath being a bona fide purchaser and having obtained a conveyance before the commencement of the action, specific performance could not be enforced against him; and lastly that the delay in carrying on the proceedings against defendant Preston and in commencing them against Heath was, in any case, such as to disentitle plaintiff to relief. . . .

I am, in the first place, of opinion that the letter of 13th December is in terms an offer to sell, on the acceptance of which by Plummer a valid contract of sale would have been constituted between Plummer and plaintiff. It is more than a mere statement that the writer is willing to receive an offer. . . . Harvey v. Facey, [1893] A. C. 552, and Johnston v. Rogers, 30 O. R. 150, distinguished. . . . Here defendant says (in effect): "I am willing to sell at such a price. Will you, W. H. Plummer, buy?" And the person to whom the letter is addressed says, "I will." If the requisites of the statute are complied with, there is a valid contract.

Then is there such a contract between plaintiff and defendant Preston? I think there is. McKay was the latter's agent to sell, armed with very comprehensive powers. Plummer may not have been plaintiff's agent to buy when he received the offer from McKay, but in the evidence I find that the latter's belief or expectation (so far as that may be material) was that either he would find some person other than himself who would buy, or that he, or he and others to be associated with him, would do so at the price named, less a

commission or deduction of a specified sum. McKay was quite willing that Plummer should become the purchaser, even though he stipulated for this allowance, and the case would be distinguishable on this ground from Livingstone v. Ross, [1901] A.C. 327, if Plummer were himself the plaintiff seeking specific performance. . . . When Plummer on the 1st or 2nd January, 1900, accepted the offer orally, it was treated by McKay as an existing offer, and Plummer was then undoubtedly Clergue's agent to accept it, though he did so in his own name.

It may be held, too, upon the evidence, leaving the written offer, as such, out of consideration, that there was then an oral offer and acceptance on the same terms as those mentioned in the writing, and the letter of the 12th January, 1900, is a note of it in writing amply sufficient to satisfy the statute, shewing, as it does, the land, the price, and the name of the purchaser—whether stated in terms to be the agent of plaintiff or not, is immaterial, because he was so in fact—and it is signed by the agent of the owner, whose authority was still in full force and effect. Mundy v. Osprey, 13 Ch. D. 855, Smith v. Webster, 3 Ch. D. 49, and McClung v. McCracken, 3 O. R. 596, distinguished. . . .

The next question is, whether plaintiff is entitled to specific performance of this contract as against defendant Heath, and this depends upon whether the latter was a bona fide purchaser without notice of the contract and the effect to be attributed to the registration of the certificate of lis pendens prior to the registration of the conveyance. . . . Upon the evidence, I have no hesitation in finding as a fact that Heath was a bona fide purchaser without notice of plaintiff's contract, for the full consideration expressed in his deed. The deed was executed and a considerable part of the purchase money paid (though this seems not material—R. S. O. ch. 119, sec. 36) at least ten days before the action was brought. Heath's title as a purchaser ante litem was then complete, and although he had not registered his deed, there is no room for the application of sec. 97 of the Judicature Act, which provides that the instituting of an action in which any title or interest in land is brought in question shall not be deemed notice of the action to any person not being a party thereto until a certificate in the form prescribed . . . has been registered. The object of this provision is to limit or control the application of the former doctrine as to the effect of lis pendens, which, as stated in Bellamy v. Sabine, 1 DeG. & J. 566, cited in Price v. Price, 35 Ch. D. 297, broadly was, that pendente lite no one could alienate the property in

dispute so as to effect his opponent, the foundation on which the doctrine rested being the impossibility of bringing an action or suit to a successful termination if alienation pendente lite was permitted to prevail. The mere existence of the action is no longer notice of the lis. That is to be given by the registration of the prescribed certificate. But the object and effect of the notice so given are the same as before, namely, to prevent alienation pendente lite. Heath was a purchaser ante litem, and as such was clearly a necessary party to the action when it was brought or as soon as plaintiff became aware of his deed. If he had been a party, he would have had all the notice that the registration of a certificate of lis pendens could have given him, but no one could have successfully contended that he was not still entiled to register his deed, or that, if he omitted to do so, his defence of a bona fide purchase for value without notice would have been affected thereby. . . . Sanderson v. Burdett, 16 Gr. 119, 127, followed. Millar v. Smith, 23 C. P. 47, distinguished. . . .

Even if, however, I had taken a different view of the effect of the registration of the lis pendens, I should have been of opinion that the great and unexplained delay in proceeding with the action against Heath would have disentitled plaintiff to relief. He was aware of Heath's deed some time . . . before the 23rd May, 1901, when the writ and statement of claim against defendant Preston were served . . . nearly a year after the registration of the lis pendens. Before this, defendant Heath had paid the whole of his purchase money without notice, in fact; but the case was brought to trial in his absence, and no proceedings were taken against him until 31st March, 1903, when he was made a party and the pleadings amended. . . . The property was of a speculative nature, the registration of the lis pendens prevented its further alienation, and plaintiff was doubly bound to prosecute the action with diligence and bring it to a speedy result: Smith v. Hughes, 5 O. L. R. 238, 244, and cases there referred to; Fry on Specific Performance, 4th ed., pp. 475, 478; Finnegan v. Keenan, 7 P. R. 386; Somerville v. Kerr, 2 Ch. Ch. 154.

As against defendant Heath, therefore, I dismiss the action with costs.

As against Preston there cannot, of course, be specific performance, but plaintiff contends that damages ought to be awarded to him for the loss of his bargain. . . . Bain v. Fothergill, L. R. 7 H. L. 158, distinguished. . . . The defendant Preston knew, as appears by his letter of 20th Jan-

uary, 1901, that a contract had been closed by his agent McKay with Plummer, but in consequence of the report of one Taylor as to the value of the land, bearing the same date as McKay's letter announcing the contract, he seems to have determined to disregard it and to hold for a higher price, which he obtained by the subsequent dealing with defendant Heath. He has, in bad faith and for his own advantage, broken his contract and prevented himself from carrying it out. Day v. Singleton, [1899] 2 Ch. 320, is . . . clear authority that, under such circumstances, he may be ordered to pay damages for the breach. In assessing such damages, as I do, at $500, I am awarding a much smaller amount than the evidence would warrant me in giving. . . . Judgment for plaintiff with costs for the above amount against defendant Preston. See also Jones v. Gardiner, [1902] 1 Ch. 191; Ont. Jud. Act, sec. 57, sub-sec. 13.

HODGINS, MASTER IN ORDINARY. JULY 16TH, 1903.

CHAMBERS.

HENDERSON v. BUTTON.

Infant—Suing without Next Friend—Leave to Amend—Costs—Plaintiff's Solicitor.

Motion by defendants to set aside the writ of summons and the copy and service thereof, with costs to be paid by plaintiff's solicitor, on the ground that at the date of the issue of the writ plaintiff was an infant, and that it was issued in his name without a next friend. The action was brought to recover damages for injury to plaintiff at defendants' factory from defective and unguarded machinery, and general negligence of defendants. Plaintiff's solicitor admitted the irregularity, and asked leave to amend by naming a next friend.

G. H. Kilmer, for defendants.

E. G. Long, for plaintiff.

THE MASTER held, following Flight v. Bolland, 4 Russ. 298, that the amendment should be allowed. See also Macpherson on Infants, p. 364; Anon v. Brocklebank, 6 Ch. D. 358. Order made allowing plaintiff to amend, on payment of all costs incurred by defendants up to and inclusive of the order. The amendment to be made within ten days from the date of the order, and in default of its being so made, action to be dismissed with costs to be paid by plaintiff's solicitor. See Gislinger v. Gibbs, [1897] 1 Ch. 474.

JULY 16TH, 1903.

DIVISIONAL COURT.

RUSHTON v. GRAND TRUNK R. W. CO.

Evidence—Depositions of Witnesses—Use on Motion for New Trial—Contradicting Evidence Given at Trial—Appointment for Examination—Setting aside—Divisional Court—Jurisdiction—Reference of Motion by Master in Chambers—Agreement of Parties.

Motion by defendants (referred by Master in Chambers to a Divisional Court) to set aside an appointment and subpœna issued by plaintiff for the examination of three men who had given evidence at the trial, with the intention of using their depositions upon a motion made by plaintiff for a new trial upon the ground of surprise. The plaintiff's solicitor had made an affidavit stating that certain witnesses called for plaintiff had withheld evidence which they could have given in support of plaintiff's case at the trial, and that they were willing to give such evidence upon a new trial.

W. R. Riddell, K.C., for defendants.

Shirley Denison, for plaintiff.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) held that no power is given by the Rules to the Master in Chambers to refer questions before him to a Divisional Court for determination, but that the Court might properly hear a motion if both parties agreed that it should do so, and in this case no objection was made. In a proper case the depositions of witnesses whose evidence is required for the purpose of applications pending before a Divisional Court may be taken under Rule 491, where such evidence is properly receivable and cannot be obtained upon affidavit. In the present case, however, the avowed and only object of the proposed examinations was to obtain from certain persons who were examined as witnesses for plaintiff at the trial statements that the evidence they gave at the trial was not in fact true, and that certain statements made by them before the trial to plaintiff's solicitor were true. It would be dangerous to permit evidence of this nature to be received upon a motion for a new trial; neither affidavits nor depositions should be received for the purpose of establishing that the deponents had willfully concealed or misrepresented the truth when giving their evidence upon oath at a former trial: Phillips v. Hatfield, 8 Dowl. P. C, 882; Harrison v. Harrison, 9 Price 89. Order made as asked by defendants with costs here and below.

FALCONBRIDGE, C.J. JULY 17TH, 1903.

TRIAL.

CONNELL v. JEWELL.

Vendor and Purchaser—Contract for Sale of Land—Delay—Action for Specific Performance—Interest—Costs.

Action by vendor for specific performance of contract, tried without a jury at Goderich.

E. Campion, K.C., for plaintiff.

W. Proudfoot, K.C., for defendant Jewell.

M. O. Johnston, Goderich, for defendant Boyle.

FALCONBRIDGE, C.J.—The parties all admitted that the agreement ought to be specifically performed, and the sole dispute was as to who was responsible for the delay. The only question of fact to be tried was on defendant Jewell's allegation that plaintiff should accept as cash Jewell's note for $200. This I find against Jewell, holding that he has not satisfied the burthen of proof which lies on him to establish that arrangement. Defendants will have to pay the interest on the unpaid balance of purchase money. This litigation might easily have been avoided by the exercise of a little forbearance and discretion. As to this, one party is no more to blame than another. Declaration that the contract ought to be specifically performed. Costs to plaintiff against defendant Jewell only up to and inclusive of filing of statement of claim. No order as to costs or otherwise as between the two defendants. If any inquiry or reference is necessary, the parties may apply in Chambers touching costs of such inquiry, and generally.

McMAHON, J. JULY 18TH, 1903.

WEEKLY COURT.

CRESSWELL v. HYTTENRAUCH.

Trade Union—Exclusion of Member—Interim Injunction—Illegal Organization—Speedy Trial—Terms.

Motion by plaintiff to continue injunction restraining defendants from excluding plaintiff from the union or federation of musicians by the device of surrendering their charter and taking out a new charter, leaving plaintiff and the members of his orchestra out of the new organization.

J. H. Moss, for plaintiff.

J. G. O'Donoghue, for defendants.

McMAHON, J.—It was urged upon the argument that the London Musical Protective Association was an illegal organization, and, plaintiff being a member thereof, the Court would not assist him by enforcing an agreement made by him with the association, and that the injunction should be dissolved. Some of the rules of the association smack of "trades unionism" and may make it an illegal organization: see Rigby v. Connell, 14 Ch. D. 482; Parker v. Toronto Musical Protective Association, 32 O. R. 305; Chamberlain's Wharf v. Smith, [1900] 2 Ch. 605; Old v. Robson, 59 L. J. M. C. 41; Cullen v. Elwin, 19 T. L. R. 426. I express no opinion, however, on this point, it not being desirable to provoke an appeal when all the questions in issue can be disposed of at the trial. Injunction continued till the trial. Pleadings to be delivered during vacation. Statement of claim to be filed and served by 27th instant, and record entered forthwith after close of pleadings so that the trial may take place at the next non-jury sittings at Toronto during the first or second week of the sittings. Any further examinations for discovery to be had during vacation. Costs of motion to be costs in the cause.

McMAHON, J. JULY 18TH, 1903.

WEEKLY COURT.

SMALL v. HYTTENRAUCH.

Trade Union—Interference with Servants of Plaintiff—Interim Injunction—Speedy Trial—Terms.

Motion by plaintiff, the lessee of an opera house at London, Ontario, to continue injunction restraining defendants, who are members of the American Federation of Musicians, from doing any acts to withdraw musicians from the orchestra at the plaintiff's house, and from interfering with the musicians employed in such orchestra.

J. H. Moss, for plaintiff.

J. G. O'Donoghue, for defendants.

MacMAHON, J., followed the decision of the Chancellor in Small v. American Federation of Musicians, 2 O. W. R. 33, and directed that the injunction be continued to the trial. The terms of the order to be the same as in the preceding case.

BRITTON, J. JULY 18TH, 1903.

TRIAL.

FERGUSON v. McNULTY.

Limition of Actions—Agreement to Purchase Land—Purchaser Deliberately Taking Possession of Wrong Lot—Subsequent Conveyance of Right Lot—Acquisition of Title—Ejectment—Nonsuit—No Bar to Future Action—Costs.

An action of ejectment, tried at North Bay.

J. M. MacNamara, North Bay, for plaintiff.

A. G. Browning, North Bay, for defendants.

BRITTON, J.—The plaintiff and the defendant Catharine McNulty on 6th March, 1889, entered into an agreement for the sale by plaintiff to that defendant of a lot of land, in the township of Widdified, on the outskirts of North Bay, about one-eighth of an acre, for $125, payable $20 down and the balance in monthly instalments. The lot is described in the agreement by metes and bounds. A plan was made of this property on the 29th August, 1889, and the land in the agreement is lot 49 on this plan, while the land which defendants are in possession of . . . and for which this action is brought, is what is laid down on this plan as lots 51 and 52. The defendants did not until recently go into possession of or claim lot 49, but they did take possession in 1889 of lots 51 and 52. The defendant Catharine McNulty says she knew, when taking possession of 51 and 52, that it was not the land mentioned in the agreement. She refused to take 49, and she did take 51 and 52 and arranged to build upon it. . . . The house was built there. No change was made in the agreement. Defendants did not go into possession of 49. Payments were irregularly made upon the agreement, and so the matter stood until 1895, when plaintiff called upon defendant Catharine McNulty. She was living in the house. . . . The plaintiff unfortunately did not bring the matter to a point. He says defendants were notified several times to give up possession. He expected that defendants would pay for this property and get a deed of it and abandon lot 49. Plaintiff knew in 1895 that defendants were upon this property which they had not purchased, and he did nothing in reference to their possession of it until the commencement of this action. Meantime defendants, with the intention, as it appears to me, of getting the three lots for the price agreed upon for lot 49, continued to pay until the balance was paid in full, and demanded a conveyance, which plaintiff gave, of lot 49, without taking any steps to correct the mistake, or to

compel defendants to give up possession of or pay for lots 51 and 52. . . .

In short there is nothing before me but the fact that defendants have had actual visible possession of the land since . . . 1889, more than ten years before the commencement of this action, which is, I think, barred by the Statute of Limitations. I have not before me any facts upon which I can give to plaintiff any relief. It is not a case where there have been improvements made under mistake of title. The defendants both knew, when they took possession of these lots 51 and 52, that they had no title to them. . . . The possession was "open, visible, and exclusive of the true owner." The possession has been continuous. . . . The visit of plaintiff in 1895 cannot be said, upon the evidence, to have been an entry by him under assertion of right or in any such way as to stop the running of the statute against him. The statements made by Catharine McNulty were only verbal. There were no such admissions of plaintiff's title or of his position or possession as would create a tenancy of any kind. What took place at that interview does not bring the case within the decision of Smith v. Keown, 46 U. C. R. 163. See McCowan v. Armstrong, 3 O. L. R. 100.

There has been no request by plaintiff for any reformation of the agreement; no admission by defendants that lots 51 and 52 were in substitution for lot 49; no offer to pay for 51 and 52. . . . The payments were all due on the agreement on 6th April, 1891, at latest, and therefore more than ten years before this action was commenced. . . .

I do not know that there is any possible evidence that would assist plaintiff. If any such evidence can be procured, the judgment now pronounced should not bar another action by plaintiff; and so I direct judgment of nonsuit, and that it may not be pleaded in bar to a fresh action for the same cause: Rule 779.

Defendants have got for nothing land that belonged to plaintiff; they should not get the costs.

Nonsuit without costs.

JULY 18TH, 1903.

DIVISIONAL COURT.

SMALL v. HYTTENRAUCH.

Parties—Representation of Classes—Rule 200—*Members of Unincorporated Voluntary Association—Trades Unions—Local Organization—Members of Executive Committee—Ordinary Members Specially Interested—General Federation—Representation by President.*

Appeal by plaintiff from order of FERGUSON, J., in Cham-

bers (ante 447) dismissing application by plaintiff for an order authorizing and directing the seven individual defendants (excluding defendant Weber) to defend the action on behalf of the London Musical Protective Association, and authorizing and directing them and Weber to defend the action on behalf of the American Federation of Musicians, and directing that all the members of the association and federation shall be bound by any judgment that might be pronounced in the action in the same manner and to the same extent as if they were personally made parties to the action, and also amending the writ of summons and proceedings by setting forth that all the eight individual defendants are sued as well on their own behalf as on behalf of all the other members of the American Federation of Musicians.

There are four classes of defendants:—(1) Seven persons who were officers and leading members of the London Musical Protective Association, which was the local branch of the American Federation of Musicians, these seven being sued on behalf of themselves and all other members of the London Musical Protective Association. (2) The American Federation of Musicians. (3) The London Musical Protective Association. (4) Joseph Weber, the president of the federation, a resident of the State of Ohio.

The plaintiff was the lessee of an opera house in London, Ontario. One Evans had a contract with plaintiff during the season of 1901-2 to supply an orchestra for each performance at the opera house, at a fixed price. He and all the members of his orchestra were members of the London Musical Protective Association, and, as such, were also members of the American Federation of Musicians, which was the central organization of all the local musical protective associations in Canada and the United States.

After the season of 1901-2 the local association agreed to raise its rates, and Evans and his orchestra refused to re-engage with plaintiff at the old rate, but offered to re-engage at $13.50 per night, which was the new rate. Thereupon plaintiff entered into an agreement in writing with one Cresswell, also a member of the local association, to engage him and his orchestra for the season of 1902-3, at the rate of $13.50 per night, being the same rate as that at which Evans and his orchestra had offered to contract, and the rate authorized by the local union. Cresswell and his orchestra began to play at plaintiff's house, but some complaint was made in the interest of Evans' orchestra, and defendant Weber, as president of the federation, decided that the local organization should protect Evans by demanding that the members should

not play for plaintiff until the wrong done Evans, for adhering to the price list, should be righted. This decision was made known to Cresswell, who refrained from playing for three or four performances. After some discussion and hesitation, defendant Weber ordered one Carey, the executive officer of the 9th district of the federation, "to call out the Cresswell orchestra and to inform the members that no member of the American Federation of Labour shall play in Mr. Small's London theatre until Mr. Evans is reinstated."

On 5th December, 1902, an ex parte injunction was obtained by plaintiff, in the present action, restraining defendants from persuading or ordering Cresswell and his orchestra not to perform at plaintiff's house, the action being for an injunction restraining defendants from doing any act to induce Cresswell and his orchestra to break their contract with plaintiff, and to restrain them from conspiring together for that purpose, and for damages. After the action was begun, the charter of the local association was, by direction of Weber, returned to the federation, and steps taken to wind up the association and form a new local association, with the object it was said, of excluding Cresswell and the members of his orchestra.

The appeal from the order of FERGUSON, J., refusing to direct representation, etc., was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

J. H. Moss, for plaintiff.

J. G. O'Donoghue, for the individual defendants except Weber.

No one for the other parties.

STREET, J.—Our Rule 200 provides that "in an action where there are numerous parties having the same interest, one or more of such parties may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all parties so interested. . . . The meaning attached to the Rule . . . has been . . . that the word "parties" is equivalent to "persons:" Smith v. Doyle, 4 A. R. 471.

Temperton v. Russell, [1893] 1 Q. B. 435. Duke of Bedford v. Ellis, [1901] A. C. 1, and Taff Vale R. W. Co. v. Amalgamated Society of Railway Servants, ib. 426, referred to. . . . It has been decided by a Divisional Court here in Metallic Roofing Co. v. Local Union No. 30, 5 O. L. R. 424, ante 183, that the difference between the status of a trades union here and in England is such as to render the Taff Vale case inapplicable here, and therefore that organizations such as the London Musical Protective Association cannot be sued under their collective name. It is evident, however,

from the affidavits and examinations before us, that a number of persons, seven of whom are defendants in the present action, are bound together by a set of rules by which they are in the habit of considering themselves governed; that they annually elect officers, who are an executive committee or board to act on behalf of the whole body of members; that they have a treasurer, to whom they pay regular contributions for carrying out the purposes of the association; and that they hold meetings, at which the majority of votes cast by the members present determines the action of the executive committee on behalf of the whole body. . . . The persons made defendants as representing the London Musical Protective Association are the president, Hyttenrauch, and three other members of the executive committee, one of whom is the treasurer and was the acting secretary at the time the charter was returned, and three other members who appear to have taken a specially active part in the matters in question or to be specially interested in it. So far as the local body is concerned, which does not appear to comprise more than 60 persons, I am of opinion that the persons selected to represent it are properly qualified to do so; they form, in fact, as I understand the rules of the association, the majority of the persons elected by the members of the association to represent them as an executive committee, along with other members specially interested. I think it would have been better to have all the members of the executive committee joined as defendants, but there may have been difficulty in ascertaining their names; and the objection made by the defendants upon the argument was not based upon this ground, but upon the broad principle that no representation was premissable in a case of this nature.

I am of opinion, therefore, that the case is brought within Rule 200 by the fact that the members of the London Musical Protective Association are a numerous body of persons who, with the exception of Cresswell and his orchestra, are acting in the same interest, through their executive committee, viz., to compel Cresswell to break his contract with plaintiff, in order that what they understand to be the principles of their organization may be sustained.

It is further asked, however, that these same defendants and the defendant Weber may be directed to defend on behalf of the American Federation of Musicians, which is the whole body in Canada and the United States, made up of the numerous local organizations, and comprising, it is said, many thousands of members both here and all over the United States. It is essentially a foreign body, having its head-

quarters at Cincinnati, Ohio, where its executive committee meet, although the members of its branches in Canada are ipso facto members of the federation. The persons who form the executive committee are few in number, and are the only persons whose acts effect local organizations in Canada, and in a proper case they might be made parties, if it should become necessary. But I do not think that a case has been made out justifying us in treating defendant Weber, who is the president, as sufficiently representing the whole of the local organizations, wherever situate, nor do I see the necessity for our making all the members of these associations parties to this action, which is what is asked for. In my opinion, therefore, this part of the order asked for should be refused, and only that part of it should be granted which directs that the individual defendants other than Weber may be sued and authorized to defend on behalf of all the members of the London Musical Protective Association other than Cresswell and the members of his orchestra (naming them).

The order of my brother Ferguson should, therefore, in my opinion, be varied to the extent necessary to carry these views into effect; and, as the success has been divided, there should be no costs of the motion to him or of the present appeal.

FALCONBRIDGE, C.J., and BRITTON J., concurred.

JULY 18TH, 1903.

CRESSWELL v. HYTTENRAUCH.

Parties—Representation of Classes—Rule 200—Members of Unincorporated Voluntary Associations—Trades Unions—Local Organization—Members of Executive Committee—Ordinary Members Specially Interested—General Federation—Representation by President—Domestic Tribunal.

Appeal by plaintiff from order of MACLAREN, J.A., in Chambers (ante 447) dismissing application by plaintiff for an order for representation of parties similar to that applied for in Small v. Hyttenrauch, supra.

This action was brought to restrain defendants from taking any further steps to dissolve or wind up the London Musical Protective Association, and from proceeding or conspiring together, in fraud of plaintiff's rights, to unlawfully exclude him from membership in that association and in the American Federation of Musicians. Plaintiff was a member of the local association, and by reason of such membership he was also a member of the American Federation of Musicians. He refused to break a contract to play for Small at the London opera house for the season of 1902-3, although ordered

to do so by the federation. He alleged that, to exclude him from membership, the local body went through the form of dissolving itself, with the object of forming a new body from which he should be excluded, and so deprived of his membership in the federation.

J. H. Moss, for plaintiff.

J. G. O'Donoghue, for the individual defendants except Joseph Weber.

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

STREET, J.—It was objected by defendants that the question at issue between plaintiff and defendants is one which must be determined by the tribunal appointed by the rules of the association, and that it is not the habit of the Courts to interfere until recourse has been had to them. It may very possibly appear, when the parties are brought before the Court, that this is the case, but to determine that question now would be to try the case, which we should not do upon a mere question of adding parties. . . .

The same order should be made as in Small v. Hyttenrauch, except that defendants in this action should be sued as representing the members of the London Musical Protective Association other than the plaintiff, Cresswell; and there should be no costs here or below.

JULY 18TH, 1903.

DIVISIONAL COURT.

McGILLIVRAY v. MUIR.

Justice of the Peace—Penalty—Action for—Wilfully Receiving Larger Fee than Authorized—Amendment—Notice of Action—Fee Received in Case where none Authorized—Jurisdiction—Recovery—of Fee—Costs.

Appeal by defendant from judgment of junior Judge of County Court of Bruce in favour of plaintiff in a qui tam action for a penalty.

T. Dixon, Walkerton, for defendant.

J. Idington, K.C., for plaintiffs.

The judgment of the Court (FERGUSON, J., MACMAHON, J.) was delivered by

MACMAHON, J.—Action under sec. 3 of R. S. O. ch. 95, to recover from the defendant the penalty of $80 provided by the Act for receiving a larger amount of fees as a justice of the peace than he was entitled to, and for the amount of fees so received, being $1.80. The $1.80 had been paid into Court and not accepted by the plaintiffs.

An information had been laid by the plaintiff Vair, on behalf of his co-plaintiff, Mrs. McGillivray, before the defendant, for an indictable offence under secs. 210 (2) and 215 of the Criminal Code, over which the magistrate had not summary jurisdiction, and, therefore, was not entitled to any fees whatever.

There is a schedule and table of fees to ch. 95, R. S. O., the first section of which provides that "The fees mentioned in the schedule of this Act, and no others, shall be and constitute the fees to be taken by justices of the peace, or by their clerks, for the duties and services therein mentioned; and shall be the costs to be charged in summary proceedings or convictions before the justice, where no other fees are expressly prescribed."

The Criminal Code gives a schedule of fees to be taken by justices in proceedings under the Summary Convictions part (LVIII.), containing items of fees exactly similar to those in the schedule to the Ontario Act. And sec. 871 of the Code provides that "The fees mentioned in the following tariff, and no others, shall be and constitute the fees to be taken on proceedings before justices on proceedings under this part."

The third section of the Ontario Act provides that "Every justice wilfully receiving a larger amount of fees than by law authorized to be received shall forfeit and pay the sum of $80, together with full costs of suit, to be recovered by any person suing for the same . . . one moiety of which shall be paid to the party suing, and the other moiety . . . for the uses of the Province."

The wording in the Code is the same, and the penalty is the same, the only difference being that under the Dominion Act one moiety is payable for the public uses of Canada.

In the statement of claim (paragraphs 6 and 9) the allegation is that "The defendant . . . wrongfully, illegally, and maliciously and without reasonable or probable cause, demanded from the plaintiff Louisa McGillivray the sum of $1.80," etc.

Counsel for the defendant, at the opening of the trial, urged that the action was improperly brought under the Ontario statute, the offence charged in the information taken before the defendant being for a violation of the Criminal Code, and that sec. 902, sub-sec. 6, of the Criminal Code governed.

Plaintiffs' counsel then applied to amend the 9th paragraph of the statement of claim, by striking out the words "maliciously and without reasonable or probable cause," and substituting the word "wilfully" therefor, which amendment was allowed by the trial Judge. And after the trial he allowed an amendment to the record (asked for at the trial) by permitting the plaintiffs to add a paragraph to the statement of claim setting up in the alternative that the defendant was liable to pay the penalty imposed by sub-sec. 6 of sec. 902 of the Criminal Code.

One ground of the appeal is, "that the notice of action and the pleadings not having set out the defendant 'wilfully' received the fees mentioned, no amendment should have been allowed to the 9th paragraph of the statement of claim, as it was permitting a new case to be made out not covered by the notice."

The notice—if a notice in this case was necessary—is for the purpose of advising the defendant what the alleged cause of action is, viz., that he had demanded and received fees not allowed by law. The plaintiffs in order to recover the penalty must prove that the fees were received not erroneously under a misapprehension of fact, but "wilfully," which means "purposely," "intentionally," knowing he had no right to receive the fees: Hutchinson v. Manchester, etc., R. W. Co., 15 M. & W. 344; Re Young and Harston's Contract, 31 Ch. D. at p. 174; Wilson v. Manes, 28 O. R. at p. 433.

Whether he received it "wilfully" or not is a question of fact to be decided by the tribunal trying the action. If the amendment would substitute a different transaction from that alleged, it ought not to be made: Brashier v. Jackson, 6 M. & W. 549. But, if the transaction is not altered by the amendment, but remains precisely the same, the amendment ought to be allowed: Cooks v. Stratford, 13 M. & W. 379.

The defendant would require the same evidence to meet the unamended record as he would after it had been amended.

The amendments were, I consider, properly made.

The fee received was not paid voluntarily, as it was shewn that the amount was demanded from Vair, who took

a receipt therefor; and the learned County Court Judge found that the defendant, who, according to the evidence, had acted as a justice of the peace for twenty-five years, intentionally took the fee of $1.80, knowing he had no right to do so. There is ample evidence to sustain the finding.

The ground principally relied upon in support of the appeal was, that the Act only applies to cases where a justice acting under the Summary Convictions Act wilfully receives a larger amount of fees than by the tariff he was authorized to receive. And as the fee he charged and received was in connection with an indictable offence for which no fee is authorized either by the tariff of the Province or of the Dominion, no action could be maintained against him for the penalty.

In Bowman v. Blyth, 7 E. & B. 26, the action was brought under 26 Geo. II. ch. 14, sec. 2, which provides that where a clerk to a justice demanded or received any other or greater fee than was authorized by the table of fees to be taken by clerks of justices of the peace, to be settled by the justices at their general quarter sessions of the peace, which table of fees being approved by the next general sessions, etc., he was liable to a penalty of £20. In that case, a table of fees has been prepared by the quarter sessions, but was not approved, as required by the statute, and the Court of Queen's Bench held that, as it had not been approved, no tariff of fees was in force, and therefore no action would lie against a clerk of the justices for the penalty for taking fees contrary to it.

Our Acts already referred to authorize the taking by the justices of the fees mentioned therein solely in cases where the magistrate has jurisdiction under the Acts relating to summary convictions, and it is for an infraction of either of these Acts by wilfully taking a larger fee in such cases that he may be penalized.

There is no Act of Parliament authorizing the taking of a fee on a charge made for an indictable offence, which was claimed and taken by the defendant in this case, and he cannot be sued for a penalty, for none is attached. That is the effect of Bowman v. Blyth, 7 E. & B. 26.

The defendant might have been indicted for extortion under sec. 905 of the Criminal Code. See Regina v. Tisdale, 20 U. C. R. 272.

The appeal must be allowed, and judgment directed to be entered for the defendant with costs, except as to the sum of $1.80, being the amount illegally received by the defendant

and paid into Court, for which there will be judgment for the plaintiffs, with Division Court costs, to be set off against the defendant's costs, who will be entitled to issue execution for the balance.

JULY 18TH, 1903.

DIVISIONAL COURT.

RE LIQUOR LICENSE ACT.

RE COOK AND LAIRD.

Liquor License Act—Resolution of License Commissioners—Prohibition of Games of Chance on Licensed Premises—Intra Vires—Reasonableness—Conviction of Licensee—Absence of Knowledge—Form of Conviction—Fine—Distress—Imprisonment—Costs.

Appeal by the license inspector of the County of Oxford, under sec. 120 of the Liquor License Act, R. S. O. ch. 245, from an order of the Judge of the County Court of Oxford quashing the conviction of one Laird by the police magistrate for the town of Ingersoll for an infringement of a resolution of the license commissioners of the county providing that "no gambling or any game of chance whatever for gain or amusement or for any other purpose whatever shall be played about any licensed tavern or other house of public entertainment . . . or on the premises." The commissioners have power by sec. 4, sub-sec. 4, of the Act, to pass resolutions for regulating the taverns and shops to be licensed. The evidence before the magistrate shewed that four persons were playing euchre for amusement in a room behind the bar of Laird's hotel, the cards used being the property of one of the players, a boarder in the hotel.

The appeal was heard by BOYD, C., FERGUSON, J., MACMAHON, J.

J. R. Cartwright, K.C., for appellant.

T. A. Gibson, Ingersoll, for Laird, the respondent.

BOYD, C.—The 3rd resolution forbids playing games of chance in the licensed premises. The keeper of the house of entertainment took his license on this condition, and is responsible if it is disregarded. That it was disregarded by playing the game of euchre in a little room back of the bar

on the afternoon of 17th January, was found by the magistrate, and beyond doubt rightly so. Euchre is a well-known game at cards, imported from the States, and is a game of chance. The cards are shuffled, cut, and dealt to the players, and the hand held by each depends entirely upon chance. Whatever adroitness may be contributed by the player, the words used by Mr. Justice Hawkins in reference to another game are doubtless aptly applied to this game of euchre: "It is a game of cards. It is a game of chance; and though, as in most other things, experience and judgment may make one player . . . more expert than another, it would be a perversion of words to say it was in any sense a game of skill:" Jenks v. Turpin, 13 Q. B. D. at p. 524.

The conviction was quashed by the County Court Judge on the ground that the police commissioners had no jurisdiction to pass the 3rd resolution in pursuance of sec. 4 of the Act (R. S. O. ch. 245), and also because they exceeded the jurisdiction, having regard to sec. 81 of the said Act.

The power of the commissioners under sec. 4 is not restricted by sec. 81. This last section is operative as a piece of substantive law against "gambling" in places licensed to sell spirituous liquors, which attaches to all such places irrespective of the resolutions of the commissioners. But, by the resolutions they pass, the commissioners may impose further safeguards to restrict gambling in licensed premises and games of chance which savour of gambling, and are so easily merged into gambling as to escape detection under cover of lawful pastime.

That this regulation is of such a character appears to be reasonably manifest. The power to regulate given by the Legislature to the board enables them to interfere with liberty of action to the extent deemed necessary to prevent disorder and the abuse of liquor licenses—in other words, to make such provision as shall ensure the good government and orderly keeping of these licensed houses where liquor is sold. The scope of the resolution as to time and place is in line with sec. 81, but extends it to "games of chance" as well as "gambling." As said in Regina v. Martin, 21 A. R. 145, the defendant accepted his license on these terms, and must see to it that these terms are observed. . . . And the interference of the Court . . . is only to be undertaken when they are clearly unreasonable.

Now, it is competent for the commissioners to prohibit all card playing on the licensed premises, whether of public guests or private friends of the proprietor, for fear lest unlawful gambling should be collusively carried on in any part

of the licensed premises: Paton v. Rhymer, 3 E. & E. 1. . . .

The English cases generally require that the element of betting be attached to the playing of cards before it can be called "gaming" in the legal sense, which is synonymous with gambling. But this putting up of money or money's worth is not aimed at in the resolution in question. I note an early Virginia case of repute in which it was held that playing at cards in a tavern is unlawful gaming, whether the party bets or not: Commonwealth v. Terry (1817), 2 Va. Ca. 77. And in more recent American cases the law is to the same effect. Playing cards, though not for money, in a private bedroom in an inn is within a statutory prohibition against gaming in any inn: McCalman v. The State (1891), 96 Ala. 98; Foster v. The State (1887), 84 Ala. 457.

The prohibition is in a manner attached to the premises, and the landlord's ignorance does not afford an excuse. He gave orders to the bar tender not to allow playing of cards in his absence, but his brother and others violated the well-known printed regulations which are exhibited in the most public part of the premises (see resolution 10), and the agent or servant of the proprietor failed in due oversight. The knowledge of the proprietor has not been make an element of the offence, and, if games of chance are played in the premises, the landlord is responsible, because he has undertaken in getting the license that they shall be protected: Cundy v. Leroy, 13 Q. B. D. 210; Collman v. Mills, [1897] 1 Q. B. 396, per Mr. Justice Wright at p. 400.

There are some minor objections raised, e.g., that the adjudication was varied by the conviction, and that the fine could only be enforced by distress, according to resolution 12 of the commissioners. The magistrate imposed a fine of $10, and the 8th resolution says that the fine and penalty is to be recovered and enforced with costs by summary conviction. . . . and enforced by distress as provided by law. Into this resolution is to be read the provisions found in sec. 100 of the Liquor License Act, R. S. O. ch. 245, that when penalties are imposed for the infraction of a resolution of the board of license commissioners the conviction . . . may be in the form set forth in sec. 707 of the Municipal Act, R. S. O. ch. 223. Upon turning to that form it will be found that for the recovery of the penalty by distress and in default of distress imprisonment, the conviction in hand follows the statutory form sanctioned by law.

There appears to be no valid objection as to the costs allowed, $4.20. If the inspector attends Court as prosecutor, etc., he is to be allowed certain expenses by way of costs, as

provided in sec. 117. There is nothing to shew anything wrong in the amount allowed. If it were wrong, it is clearly severable, and cannot affect the conviction as a whole.

Altogether the conviction should be upheld as valid and the judgment quashing it reversed with costs to be paid by Laird, the respondent.

FERGUSON, J.—I concur.

MACMAHON, J., referred to Jenks v. Turpin, 13 Q. B. D. 505; Regina v. Ashtan, E. B. & E. 286; Paton v. Rhymer, 3 E. & E. 1; Regina v. Rogier, 2 D. & Ry. at page 435; Bacon's Abr. tit. "Gaming" (A); Regina v. Martin, 21 A. R. at p. 148; and concluded:

I think that the resolution which prevents the playing of a game of whist or euchre for amusement in licensed premises is not a reasonable regulation, and it is therefore one which the commissioners were not empowered to make.

In my opinion, the conviction was invalid, and the judgment of the learned County Court Judge quashing it should be affirmed with costs.