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BRITTON, J. MAY 4TH, 1903.

CHAMBERS.

EMPIRE LOAN CO. v. McRAE.

Specific Performance—Contract for Purchase of Land—Judgment for Payment of Price—Extension of Time—Payment on Account — Forfeiture—Relief against—Final Order of Sale.

Appeal by plaintiff from order of Master in Chambers (ante 325) extending the time for payment of the purchase money of land under a judgment for specific performance, and allowing the defendant credit on the purchase money for $500 paid under an agreement, though under the terms of such agreement the $500 was forfeited.

C. D. Scott, for plaintiffs.

W. E. Middleton, for defendant.

BRITTON, J.—The question for determination is whether this $500 is liquidated damages or a penalty. If liquidated damages, it is doubtful if the Court has power to relieve against it under sec. 57, sub-sec. 3, of the Judicature Act, as amended by 60 Vict. ch. 15.

The learned Master thinks this a forfeiture, and I agree with him. Forfeiture is penalty for breach of duty or breach of contract, and that is precisely, in reality, what this is, although in the agreement no such word as penalty or forfeiture is found. Nor is there anything in the agreement about liquidated damages. If not liquidated damages, what is it, if not a penalty? If there were damages, even to a small amount, which by agreement the parties liquidated at $500, I would not interfere. But here there are no damages.

The agreement is ingeniously so drawn as to enable plaintiffs to retain, without giving credit for it, the $500, if defendant should not be in time with the balance, and so

drawn as to avoid the use of the word "penalty" or "forfeiture," while it leaves default to operate as a forfeiture of this sum. The words are: "If defendant should fail to make payment of the said balance within the time limited therefor, as aforesaid, by the said judgment, then plaintiffs shall not be bound to give credit to defendant for the $500, and that in this respect time shall be of the essence of the contract." To give effect to this would be to regard the form, and ignore the substance. . . . The plaintiffs are seeking relief. I think it would not be equitable to defendant to compel the payment of the additional $500 under the agreement in question, and also compel him to accept the land purchased.

Appeal dismissed with costs.

BRITTON, J. MAY 4TH, 1903.

KINGSTON v. SALVATION ARMY.

Parties—Unincorporated Voluntary Association—Service of Process on—Religious Body Holding Property in Ontario.

Appeal by the defendants "The Salvation Army" from order of Master in Chambers (ante 314) dismissing application by appellants to set aside the service on them of the writ of summons and to strike out their name as defendants.

A. E. Hoskin, for appellants.

D'Arcy Tate, Hamilton, for plaintiff.

BRITTON, J.—While not wholly free from doubt, I agree with the learned Master. It was contended by Mr. Hoskin in his very able argument that this case is on all fours with Metallic Roofing Co. of Canada v. Local Union No. 30, Amalgamated Sheet Metal Workers' International Association, ante 183. The Salvation Army in this case is sued as a quasi-corporate body just as defendants in the Taff Vale Case, [1902] A. C. 429. . . . The Salvation Army is a large and most important association and organization. It has not been defined or created a corporation by any Act of Parliament. . . . This association has the distinctive name given to it by its founder and head, General Booth. The Army is at work in Canada, and in the declaration of trust by General Booth he says "that the name, style, and title by which the said religious community or society hereinbefore described is to be known and recognized is The Salvation Army." . . . Then, this is a "religious community or society," within the meaning of and with the

powers conferred by R. S. O. ch. 307. It seems to me not desirable to extend non-liability to an association such as the Salvation Army, if it so happens that some one acting entirely within the rules of and for the Army, does a wrong for which he himself would be liable. Of course, in determining the question of holding the Army by name as a party to the action, I am expressing no opinion on the merits.....

The general question is an important one; but I cannot think the Salvation Army would care to allow the brunt of the liability to be borne by McQuarrie and Austin alone, if in what they were doing they were merely acting as officers and in the interests of the Army.

Appeal dismissed. Costs in cause to plaintiffs.

BRITTON, J. MAY 4TH, 1903.

CHAMBERS.

CHANDLER AND MASSEY (LIMITED) v. GRAND TRUNK R. W. CO.

Parties—Joinder of—Two Defendants—Different Causes of Action—Sale of Goods—Claim against Vendee for Price—Claim against Carrier for Loss in Transit.

Appeal by plaintiffs from order of Master in Chambers (ante 286) staying proceedings until plaintiffs elect which of the two defendants the plaintiffs will proceed against, and dismissing the action against the other.

W. A. Sadler, for plaintiffs.

D. L. McCarthy, for defendant company.

C. A. Moss, for defendant Kerr.

BRITTON, J.— . . . I have no doubt that as a matter of convenience and saving of expense to all parties, this is a case where plaintiffs should be at liberty to join defendants.

There is, however, the question of law. It is contended that Rule 186 applies only to cases of joinder of defendants in reference to one cause of action, and that it has no application to any case where there are two distinct and different causes of action, one against one defendant, or, in the alternative, the other cause of action against the other defendant, even if the action arises about the same subject matter. It is argued that Rule 192 is limited to cases where the right to relief is founded strictly and technically upon the same cause of action. A careful perusal of the cases cited will not warrant the conclusion that the Rule is absolutely so limited and restricted. . . . [Quigley v. Waterloo Mfg. Co., 1

O. L. R. 606, distinguished.] Here there are technically two causes of action, but . . . there is practically one thing to determine, and that is the liability of defendant company for the destruction of the goods. Plaintiffs must shew, as part of their case, that they are the owners of the goods, and prima facie they were the owners, as they were the shippers, but the defendant company say they have delivered these goods to the other defendant, who was the consignee. The other defendant denies this, and the proper determination is a matter of law depending upon the facts as between the two defendants. . . . The defendant company deny liability for the loss of the property, and they say further, as part of their defence, that plaintiffs are not entitled to sue, as the property has been actually or constructively delivered to defendant Kerr. All that plaintiffs desire is to get pay for this property, if any one is liable for it under the circumstances. The defendant company, it is contended, are liable; and if, at the time of its destruction, this property had been delivered to Kerr, then Kerr is liable to plaintiffs. This seems to me a singularly proper case for the application of Rule 192. There is doubt—a doubt arising only as to what are the facts as between the defendants. [Reference to Child v. Stenning, 5 Ch. D. 701; Harvey v. Grand Trunk R. W. Co., 9 P. R. 80, 7 A. R. 715; Cox v. Barber, 3 Ch. D. 368; Honduras R. W. Co. v. Tucker, 2 Ex. D. 301; Bennetts v. McIlwraith, [1896] 2 Q. B. 464; Tate v. Natural Gas Co., 18 P. R. 82; Evans v. Jaffray, 1 O. L. R. 614; Langley v. Law Society, 3 O. L. R. 245.]

Appeal allowed. Costs in cause to plaintiffs.

BRITTON, J. MAY 4TH, 1903.

CHAMBERS.

LEMOINE v. MACKAY.

Evidence — Foreign Commission — Postponement of Trial—Delay—Security for Costs—Other Terms.

Appeal by plaintiffs from order of Master in Chambers (ante 390) allowing defendant to issue a commission to take the evidence of witnesses in England and Ireland, and postponing the trial meantime.

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

R. McKay, for defendant.

BRITTON, J.—Upon the material before me, it is impossible to resist an impression that the application for a

commission . . . is not made in good faith. It is difficult to see how persons at present living in Ireland can speak of anything concerning the deceased that will aid in the determination of the issues herein. . . . Deceased left Ireland in 1835, when only 16 years of age. He resided more than 65 years in Canada, conducted a large business, and amassed a very large fortune, which he disposed of by will. Some information should have been furnished to shew what acquaintances of so long ago, if any, now living, and with memory enabling them to speak, can say affecting the deceased or relevant to the issues as to his will. I will, however, give the defendant the benefit of any doubt, and, as is frequently done in such matters, decline to interfere with the discretion which the Master has exercised in directing the commission: Morrow v. McDougal, 16 P. R. 129; Robins v. Empire Printing Co., 14 P. R. 495.

The order must embody the following terms:—

1. As to the commission for examination of Walter MacKay and wife, it is not to issue until after 30th June, and not then if it appears, or if plaintiffs undertake, that these witnesses will be present at the trial.

2. As to the witnesses residing in Ireland, that their names, residences, and occupations shall be furnished to plaintiffs on or before 30th June next.

3. The commission must be returned on or before 1st September next.

No delay beyond 1st September, so that trial may proceed after that date as if order for commission not made.

Costs to be costs in the cause.

BRITTON, J. MAY 4TH, 1903.

CHAMBERS.

RE SOLICITOR.

Solicitor — Bill of Costs—Order for Delivery — Rescinding—Special Circumstances.

Appeal by Nancy A. Wilkinson from order of local Judge at Chatham rescinding order for delivery by solicitor of a bill of costs to the appellant.

W. J. Clark, for appellant.

R. C. Clute, K.C., for solicitor.

BRITTON, J.— . . . While it is quite possible that the appellant has been unjustly treated by the solicitor, there is a great element of uncertainty introduced into the case

by the answers given by the appellant, and by her refusal to answer upon cross-examination on her affidavit. From what appears, I think it of advantage to the appellant to put an end to this contest about a bill of costs between her and the solicitor, and so dismiss the appeal. . . . I do so because I realize that, under the special circumstances of this case, if the truth between the parties could be arrived at, it would be impossible, where so small amount of money is involved, to give the applicant adequate redress if she should be entitled to succeed.

Appeal dismissed without costs.

FERGUSON, J. MAY 4TH, 1903.

CHAMBERS.

PREET v. MALANEY.

Pleading—Statement of Defence—Application to Strike out Irrelevant Matter.

Appeal by defendant Annie Malaney from order of Master in Chambers (ante 388) striking out part of statement of defence.

W. J. Clark, for appellant.

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

FERGUSON, J., affirmed the Master's order, and dismissed the appeal with costs.

CARTWRIGHT, MASTER. MAY 5TH, 1903.

CHAMBERS.

MORAN v. McMILLAN.

Judgment Debtor—Examination of—Default of Attendance on Adjourned Appointment—Costs.

Motion by plaintiff for an order requiring defendant to attend at his own expense for the conclusion of his examination as a judgment debtor.

W. N. Ferguson, for plaintiff.

F. C. Cooke, for defendant.

THE MASTER.—On the material I have come to the conclusion that there was a misunderstanding between the counsel. No doubt plaintiff's counsel was anxious to have the examination proceeded with at the somewhat unusual hour of 8.30 a.m., and held out hopes of being able to conclude in half an hour. The defendant was equally pleased at the prospect of escaping from the unpleasant ordeal within a

limited and definite period. I do not think I can find that plaintiff's counsel gave any undertaking such as the defendant and his counsel not unnaturally thought plaintiff's counsel was entering into.

On the whole facts of the present case, I do not think it is distinguishable from McKinnon v. Richardson, to be found at p. 275 of the current volume of that most useful publication, the Ontario Weekly Reporter. Following the decision of Mr. Justice Street in that case, I direct that defendant, on being paid his proper conduct money, do attend for further examination, and that there be no costs of this order.

CARTWRIGHT, MASTER. MAY 5TH, 1903.

CHAMBERS.

BLACKWELL v. BLACKWELL.

Pleading—Statement of Claim—Non-conformity with Writ of Summons—Amendment — Practice.

Motion by defendants to strike out certain paragraphs of the statement of claim and of the prayer for relief, on the grounds "that thereby is set up a new, distinct, and different claim from that expressed in the writ," and "that, if the paragraphs complained of are allowed to remain on the record, it will be a source of inconvenience at the trial."

M. Wilkins, Arthur, for defendants.

J. H. Spence, for plaintiff.

THE MASTER.—The material is commendably simple. Defendants' solicitor files his own affidavit verifying the writ and statement of claim. The plaintiff's solicitor makes an affidavit to the effect that, whatever may be the technical irregularity of his pleading, the whole matters set out in the statement of claim are all parts of a regrettable family dispute, and Mr. Spence asks to have leave to move nunc pro tunc to amend his writ so as to conform to the statement of claim, and to be allowed to add the causes of action set out in the paragraphs objected to by Mr. Wilkins.

I think there is no doubt that Mr. Wilkins's motion was technically right. The present case does not come under the protection of Smythe v. Martin, 18 P. R. 227, nor of Rodger v. Noxon, 19 P. R. 327. What the plaintiff should have done is sufficiently indicated in Hogaboom v. McCulloch, 17 P. R. 377. In that case I allowed the plaintiffs to amend in a way similar to what has been done here. This was affirmed on appeal by Ferguson, J., and the case has been followed ever since. In Holmested and Langton, at

pp. 258, 291, the learned authors speak of the indorsement on the writ being actually amended in such cases. On inquiry at the central office, I was informed that, as a matter of fact, this is not usually done.

The order to be made will be according to the form of that issued in Hogaboom v. McCulloch, and the costs of this motion and any extra costs occasioned to defendants thereby will be to them in any event. . . . I refer also to Patterson v. Central Canada L. and S. Co., 17 P. R. 470, as being a very strong case in favour of amendments.

CARTWRIGHT, MASTER. MAY 5TH, 1903.

CHAMBERS.

BURNSIDE v. EATON.

Security for Costs—Increased Security — Fixing Amount—Possible Settlement—Future Applications.

Motion by defendants for an order for additional security for costs to the amount of $3,000.

W. E. Middleton, for defendants.

J. R. L. Starr, for plaintiff.

THE MASTER.—The facts of this case, so far as material to the present motion, are set out in the affidavit of one of the defendants' solicitors. He goes fully into the matter and gives his reasons for asking a greater sum than has ever been asked for in this Province in any case that I am aware of. . . . I have read over the bulky material furnished me on this motion. I have carefully considered it in the light of the judgment of a Divisional Court in Standard Trading Co. v. Seybold, 5 O. L. R. 8, especially remarks of Meredith, J., at p. 13. I think it is a fair deduction . . . . that a plaintiff is not to be required in all cases to give security to the utmost limit of his possible and prospective liability, in case of his failure in his action. It may yet be the fact, as all friends of the parties must honestly desire, that this action may never go to trial. In any case no such trial can take place until some time next September or October.

Having all the circumstances of the case under consideration, I think that justice will be done by directing plaintiff to pay into Court a further sum of $1,200, and that all proceedings be stayed in the meantime. This, of course, will not preclude a further application, if the action should really be proceeded with beyond the limit that the amount then in Court would fairly meet, which I estimate will be up to ser-

vice of notice of trial. The costs of this motion will be in the cause.

BRITTON, J. MAY 5TH, 1903.

TRIAL.

DELHI FRUIT AND VEGETABLE CANNING CO. v. POOLE.

Sale of Goods—Damages for Non-delivery—Measure of Damages—Claim and Counterclaim—Payment into Court—Costs.

Action for price of goods sold and delivered. Defendants admitted the claim of plaintiffs, but counterclaimed for damages for non-delivery of 155 cases of canned tomatoes which defendants purchased at $1.80 a case.

R. A. Dickson, Delhi, for plaintiffs.

J. G. Wallace, Woodstock, for defendants.

BRITTON, J.—The weight of evidence is in favour of defendants' contention . . . There was a memorandum in writing sufficient to satisfy the Statute of Frauds; but, apart from this, the goods purchased by defendants were one lot, in one order, including the tomatoes in question, and there was a part delivery of these goods. . . . The measure of damage is the difference in price between what the tomatoes were worth in the market when plaintiff should have delivered, and what defendants agreed to pay. Plaintiffs are entitled to costs of action and defendants to costs of counterclaim. The amount of damages allowed to defendants together with the amount paid into Court by defendants amount exactly to plaintiffs' claim. The money paid into Court to be paid out to plaintiffs.

BRITTON, J. MAY 5TH, 1903.

TRIAL.

ANDERTON v. MONTGOMERY.

Settlement of Action—Consideration—Forbearance—Costs—Enforcement—Judgment.

Action by judgment creditors of defendant Robert Montgomery against him and his wife to have a certain mortgage made by one Labrash to the wife, upon lands in the township of Ferrie, made exigible for the satisfaction of plaintiffs' judgment, and to have it declared that the wife is a trustee for her husband of the mortgage.

The plaintiffs asserted that there had been a settlement of the action and that they were entitled to a judgment in terms of that settlement.

The authority of defendants' solicitor to act in making the settlement was not questioned; but defendants set up that, as there was no consideration for the alleged settlement, and plaintiffs' position was not in any way changed, defendants had the right to change their minds, and have the case fought out.

On the 8th April—the next sittings of the Court being near—defendants' solicitors wrote to plaintiffs' solicitors stating that there was illness in defendants' family, and that a postponement of the trial would probably be necessary, and inviting an offer of settlement.

On the 9th April plaintiffs' solicitors answered: "If your clients will pay the full amount, enough to satisfy the County Court execution at present in the sheriff's hands, together with the costs of the present action, excluding the costs of the motion to continue the injunction, but including all other costs properly taxable against your clients incurred in endeavouring to realize plaintiffs' claim herein, we will accept same."

On 11th April defendants' solicitors wired plaintiffs' solicitors, accepting the offer.

On 14th April defendants' solicitors wired to plaintiffs' solicitors that their clients instructed them to contest the action.

C. E. Hewson, K.C., and A. E. H. Creswicke, Barrie, for plaintiffs.

H. E. Stone, Parry Sound, for defendants.

BRITTON, J.—I find there was a complete settlement. There was consideration: plaintiffs stayed their hands; they agreed to waive the costs of the motion to continue the injunction; there was a certain amount of forbearance. It was the compromise of the suit, with the stay of proceedings—a mutual settlement of a bona fide dispute, where there were mutual promises; and the consideration for one was the promise of the other.

Plaintiffs are entitled to judgment in terms of settlement, with costs, except costs of motion to continue injunction, and the costs of the trial to be limited to costs of a motion for judgment in terms of settlement.

CARTWRIGHT, MASTER. MAY 6TH, 1903.

CHAMBERS.

DESERONTO IRON CO. v. RATHBUN CO.

Third Parties—Indemnity—Trial of Issues — Discovery—Directions.

Motion by defendants for directions as to the disposition

of the questions raised by a third party notice claiming indemnity against the Standard Chemical Co.

E. D. Armour, K.C., for defendants.

J. Bicknell, K.C., for third parties.

J. H. Moss, for plaintiffs.

THE MASTER.—The third parties dispute their liability, but ask leave to defend either solely or jointly with defendants. This course was strongly resisted by defendants. Their counsel pointed out that serious embarrassment might result to them if the third parties were allowed to be at the trial on an equal footing, as they might be advised to set up a line of defence inconsistent with that taken by defendants.

Failing this, counsel for the third parties asked that the issue between them and defendants should in some way be tried in the other action between the Rathbun Co. as plaintiffs and these third parties as defendants, which is standing for trial at the coming Napanee non-jury sittings. I do not think I have any power to so direct. Even if I had, an examination of the pleadings in that action shews that there are several issues therein raised between the parties. On the other hand, in this action it is only a simple issue between plaintiffs and defendants, viz., whether there has been a breach of the agreement to supply charcoal to plaintiffs. And then the question between defendants and third parties is equally simple, whether or not the third parties are bound to indemnify defendants if they are found liable to plaintiffs. It seems to me that this last question would naturally be best heard after the trial of the issue raised between plaintiffs and defendants. If, for example, plaintiffs should fail then there will be no necessity to follow the question as to the possible liability of the third parties. If, on the other hand, defendants are held liable, then the liability of the third parties properly arises for determination and should be decided as soon as practicable so as to enable either party to consider the question of appeal. In an ordinary case it might perhaps be assumed that a third party disclaiming any liability should be left to assert that position when actively attacked by defendants, but the circumstances of this case are somewhat special. The third parties here may have discovery or have the benefit of the discovery made on the demand of defendants. Otherwise, I think the order made in Coles v. Civil Service, 26 Ch. D. 529, will exactly fit the present case. The Judge at the trial will be in a better position to determine what part (if any) the Standard Chemical Co. should be allowed to take in the contest between plaintiffs and defendants.

MACMAHON, J. MAY 6TH, 1903.

TRIAL.

AMERICAN COTTON YARN EXCHANGE v. HOFFMAN.

Sale of Goods—Part of Consignment not up to Sample—Purchaser Retaining Goods—Claim for Damages—Allowance of Set-off—Costs.

Action to recover $366.34, the price of certain yarn sold and delivered by plaintiffs to defendants.

Defendants counterclaimed for breach of contract in not supplying some of the yarn of the colours ordered, and the consequent loss of profits.

E. Sidney Smith, K.C., and J. Steele, Stratford, for plaintiffs.

G. G. McPherson, K.C., for defendants.

MACMAHON, J. . . . The yarn reached Stratford on 16th September, and on the 17th defendants wrote saying the colours of parcels 2 and 4 were not as ordered. On 20th September plaintiffs directed defendants to return the two parcels to the Indian Orchard Company, by whom they had been dyed. . . . Defendants received and used the rest of the yarn, the value of which amounted to $195.67, so that the value of the yarn required to be redyed was $169.89. Defendants sent to plaintiffs samples of the colours for dyeing of the yarns, of which about one-half was not dyed in accordance with the sample colours. Defendants, having ascertained the insufficiency of the two parcels by inspection at Stratford, could have rejected them, stating that the goods were not according to contract, and remained there at the vendors' risk: Greinoldby v. Wells, L. R. 10 C. P. 91; Heilbut v. Hickson, L. R. 7 C. P. 438.

Instead of doing this, or complying with the plaintiffs' request to ship the yarns to the Indian Orchard Co., defendants refrained from answering plaintiffs' letters, retained the goods, treating them as their own, and sending part of what they retained to be redyed. If defendants had at once sent the yarn to the Hamilton Cotton Co., it could have been redyed in a month. . . . There were 443 pounds to be redyed, and it cost defendants $6 to redye 120 pounds, so that if $25 is allowed by way of set-off to plaintiffs' claim, it will be fair.

Judgment for plaintiffs for $340.36, with interest from 16th December, 1901, and costs on the High Court scale. Counterclaim dismissed without costs.