The
# Ontario Weekly Notes

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## COURT OF APPEAL.

JANUARY 17TH, 1910.

## *REX v. MACDONALD.

*Criminal Law—Conviction for Theft—Police Magistrate — Warrant of Commitment—Defect—Habeas Corpus — Substituted Warrant—Powers of Judge — Criminal Code, secs. 1120-1132 —Summary Trial—Election—Right of Re-election—Code, sec. 828—Certiorari in Aid—Right of Crown—Refusal of Postponement of Trial—"With Hard Labour"—Words Stricken out of Conviction—Prison Regulations—Jurisdiction of Magistrate—Code, secs. 778, 782, 783.*

Appeal by the prisoner from an order of CLUTE, J., upon the return of a habeas corpus, refusing to discharge the prisoner from custody under a warrant of commitment issued by a police magistrate upon a conviction for theft.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

J. B. Mackenzie, for the prisoner.

J. R. Cartwright, K.C., and E. Bayly, K.C., for the Crown.

The judgment of the Court was delivered by MEREDITH, J.A.: — . . . It is said that the original warrant of commitment was defective, but another was substituted for it and the learned Judge against whose ruling the appeal is made, without considering the objections to the first warrant, remanded the prisoner to custody under the substituted warrant. That that was quite within his power has long been established. It was indeed a common practice. The case of The Queen v. Richards, 5 Q. B. 926, affords

* This case will be reported in the Ontario Law Reports. The written opinion was not given to the editor until the 27th April, 1910.

an instance. In addition to that, the provisions of the Criminal Code respecting extraordinary remedies, secs. 1120 to 1132, have quite taken the sting out of technical objections based upon defects in warrants of commitment, among other like objections.

It may also be observed that, if the letter of the law prevails and is taken advantage of, there may be no appeal to this Court in this case, the prisoner not having been remanded to custody again upon the original warrant of commitment or by virtue of any warrant, rule, or order of the Court or a Judge; and so it may be that, if great literal strictness prevailed, it might be necessary to make a new application before an appeal would lie. . .

The application for the prisoner's discharge was based upon allegations contained in an affidavit made by him as to what took place upon his trial, as well as upon the formal objections to the warrant and other proceedings . . . Two points are made : (1) that the prisoner did not really elect summary trial, and that, if he did so, he should not have been refused a re-election such as he, through his counsel, afterwards sought; and (2) that the prisoner was denied an opportunity for making his full answer and defence, in being refused a postponement of the trial to procure witnesses.

No affidavits appear to have been filed in answer, the Crown apparently relying upon the record of the proceedings at the trial as a sufficient answer. These papers were brought up with the conviction by means of a writ of certiorari issued at the instance of the Crown.

For the prisoner it was urged that there was no power to bring the papers up in that manner, and that, therefore, they cannot be used as evidence in these proceedings. But why might not the Court direct that the proceedings be so brought up? And what is there in this case limiting the right of the Attorney-General ex officio to the writ? Nothing in the powers conferred by sec. 5 of the provincial Habeas Corpus Act lessens the right to such a writ.

But, whether brought up on habeas corpus or otherwise, I would not have determined the question of the legality of the imprisonment upon the mere affidavit of the prisoner.

Fortunately, in the interests of truth, the prisoner was examined at the trial as a witness in his own behalf, and proved, as the record also shews, that he did elect summary trial; and proved also that he had once before elected and been tried in like manner upon another charge; and, lastly, proved that he had no witnesses, and so did not need any postponement of the trial for that purpose. . . .

These grounds, therefore, fail.

Then, in regard to a re-election, I am not aware of any legal right in the prisoner, such as he now claims in that respect. Under the procedure respecting speedy trials—sec. 828 of the Criminal Code—the right to re-elect is expressly given in cases where a trial by jury has been demanded, but even in such cases the re-elected mode of trial is not allowed if the Judge is of opinion that it would not be in the interests of justice; and under sec. 830 a person who has elected trial by jury may afterwards re-elect speedy trial before a County Court Judge. The prisoner having been denied no legal right in this respect, there is no power here to give him any relief.

The point that the words "with hard labour" are stricken out of the conviction seems to me to have no substantial effect; the sentence is imprisonment in the Central Prison, and that made the prisoner subject to all the rules, regulations, and discipline of that prison during his term of imprisonment: R. S. C. 1906 ch. 148, sec. 46: see also sec. 47; and R. S. O. 1897 ch. 308, sec. 30.

The last point, and that evidently thought the chiefest, is, that the magistrate had jurisdiction to try the prisoner under secs. 782 and 783 only, and that, as he admittedly did not conform to the requirements of those sections in some material respects, the whole proceedings were of no legal effect. It is said that there is a conflict between sec. 778 and those two sections, and that, as the latter apply only to such cases as this, which it is contended is nothing more than larceny, they must prevail: good logic, but based upon an entirely erroneous statement of the facts. . . .

[Reference to 20 Vict. ch. 27; 22 Vict. ch. 27; C. S. C. ch. 105; 32 & 33 Vict. ch. 32; R. S. C. 1886 ch. 176; 55 & 56 Vict. ch. 29, secs. 782 to 809; Criminal Code, secs. 778 to 798, 771, 773, 778.]

In one of the earlier enactments, 38 Vict. ch. 47, I think, very much larger powers regarding such summary trials were conferred upon police magistrates in this province only; and that provision has since been contained in all the re-enactments of the Summary Trials Act, and is now sec. 777 of the Code; and that power has since been extended, by 63 & 64 Vict. ch. 46, sec. 3, I think, to police and stipendiary magistrates in cities and incorporated towns in every other part of Canada. These amendments to the Summary Trials enactment confer upon such magistrates the power, with the consent of the accused, to try any offence which may be tried at a Court of General Sessions of the Peace; and so secs. 782 and 783 have no application to a trial by such a magistrate, but do apply to those magistrates who have no power to try the

cases provided for in sec. 782 except under the provisions of that section. . . . .

But, if this were not so, I should be inclined, having regard to secs. 446 and 852 of the Criminal Code, to consider the offence with which the prisoner was charged, and of which he was found guilty, robbery, not merely theft; the evidence was of theft with very considerable violence.

I would dismiss the appeal.

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APRIL 25TH, 1910.

## REX v. JOHNSTON.

## REX v. McSWEENEY.

*Criminal Law—Keeping Common Betting Place — Conviction — Evidence to Sustain—Evasion of Statute.*

Cases stated for the opinion of the Court by one of the police magistrates for the city of Toronto upon the summary trial and conviction of the defendants for keeping common betting places.

The cases were heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

T. J. W. O'Connor, for the defendants.

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

The judgment of the Court was delivered by MEREDITH, J.A.: —In Rex v. Johnston there was some evidence upon which reasonable men might find that the defendant kept a common betting place; whether that evidence was, or was not, such as ought to have led reasonable men to such a finding is not a question for this Court, which has power to deal only with questions of law: it was a question for the trial Court only.

The defendant was a barber; two persons, who were strangers to him, went to his place of business on four occasions in connection with bets made with him, and were, as to some of the incidents, taken out of the shop to the public street, with the obvious purpose of bringing the transaction within such cases as Rex v. Moylett and Bailey, 15 O. L. R. 348. The betting was upon races taking place at the Empire City race-track, in one of the United States of America, in connection with which races common betting prevails.

All the circumstances made the case one for the trial Court. It cannot be said that there was no evidence upon which that Court could rightly convict.

The like considerations apply to the case of Rex v. McSweeney. The question whether there was any evidence upon which the defendant might legally be convicted, should, in my opinion, be answered in the affirmative.

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Moss, C.J.O., IN CHAMBERS. APRIL 25TH, 1910.

## McCARTHY & SONS CO. v. W. C. McCARTHY.

*Appeal—Court of Appeal—Security for Costs—Con. Rule 826—Dispensing with Security—Property of Appellant in Hands of Respondents—Uncertainty.*

Motion by the defendant for an order dispensing with the giving of security for costs of an appeal to the Court of Appeal from the order of a Divisional Court, ante 500, or reducing the amount of the security to be given.

Featherston Aylesworth, for the defendant.

Grayson Smith, for the plaintiffs.

Moss, C.J.O.:—An appellant applying for an order dispensing with the giving of security for costs under Rule 826, or reducing the amount of the security to be given, must make out a case beyond reasonable doubt. The onus is upon him, and the matter should not be left in uncertainty. The ground presented in this case is that the plaintiffs have in their hands or under their control, by means of a receiving order, property or means of the defendant sufficient to answer their costs of the appeal, and which would, in the event of the appeal failing, be available for that purpose.

But I am not satisfied as to this upon the material before me. There is a conflict as to the value of the 63 shares and as to the extent of the charges against them and the policies of life assurance, as well as to the full amount of the claims against the defendant in respect of which they may be made exigible.

The matter is left in too much uncertainty to justify a departure from the general rule: Re Sherlock, 18 P. R. 6; Thuresson v. Thuresson, ib. 414.

The motion must be refused; but, having regard to all the circumstances, the costs may be in the proposed appeal.

## HIGH COURT OF JUSTICE.

BRITTON, J. APRIL 18TH, 1910.

### POWER v. MAGANN.

*Contract—Work and Labour—Independent Contractor—Liability of Employer for Wrong Done in Course of Executing Contract —Taking Soil from Neighbouring Land—Liability as between Contractor and Servant — Acts done in Ignorance — Innocent Trespass—Damages.*

Action for the value of a quantity of black loam taken from the plaintiff's land by workmen of the defendants Stone & Wellington, under the direction of the defendant Chambers, a professional landscape gardener, and used in landscape improvements to land upon which the defendant Magann resided, of which the title was in the defendants the Toronto General Trusts Corporation under the defendant Magann's marriage settlement.

The improvements were made under a contract between the defendant Magann and the defendants Stone & Wellington.

W. J. Elliott, for the plaintiff.

Glyn Osler, for the defendants Magann and the Toronto General Trusts Corporation.

W. W. Vickers, for the defendant Chambers.

C. C. Robinson, for the defendants Stone and Wellington.

BRITTON, J.:— . . . There was no personal interference by Magann or the Toronto General Trusts Corporation with this work. What was done was by the defendant Chambers and other workmen of Stone & Wellington. Stone & Wellington were contractors employed to do a lawful work, and they and these employed by them are alone responsible. There was no power reserved by the owner of the Magann land to interfere with or dismiss the workmen of Stone & Wellington. For damages to the plaintiff's property he must look to the wrong-doer or the first person in the ascending line who is employed and has control over the work: see Murray v. Cronan, L. R. 6 C. P. 24, 27.

What is complained of by the plaintiff did not naturally result from what was contracted to be done. The plaintiff alleges that what was done was for Magann's use and benefit. If Magann, after knowledge of what had been done, assented to it and claimed the benefit of it, he would be liable. Magann was not called upon to be on the watch to see where the soil came from. He trusted

to Stone and Wellington, and had no reason to do otherwise. There was no negligence on the part of Magann in allowing the plaintiff's soil to be placed upon and mixed with his own. In so far as the soil of the plaintiff can be identified, Magann has not been asked for it, and he has not refused to allow the plaintiff to take it. . . .

It was argued most ably and with great force by Mr. Robinson . . . that the defendants Stone & Wellington are not responsible for the acts of . . Chambers or . . of any workman employed by Chambers or even by Stone & Wellington in this matter.

Chambers was not an independent contractor, and even less so was any man under Chambers in this work. . . Chambers took the place of Maxson, working for Stone & Wellington, and was paid by the day's work. This is set up in Chambers's statement of defence, and is established by the evidence . . .

In so far as the question of whether or not the defendants Stone & Wellington are chargeable with the acts of . . Chambers, as done under this authority, is a question of fact, I find that they were so chargeable. Stone & Wellington were generally presiding over the business. If they did not know they ought to have known where their employees were getting material to execute a contract for their benefit and for which they were paid. This is not a case where the servant of Stone & Wellington knowingly did an unlawful act. The act of taking the plaintiff's soil was one done ignorantly by the defendants' servants in the performance of the work. The servants of Stone & Wellington, not finding upon Magann's land the soil necessary for the work, might, even in the exercise of ordinary care, go upon vacant and unenclosed adjoining land, as in this case: see Gregory v. Piper, 9 B. & C. 591.

The case most in the defendants' favour is Bolingbroke v. Local Board of Swindon, L. R. 9 C. P. 575, but the distinction is, that in this case there was no wilful trespass, and . . the firm of Stone & Wellington have got and retain the benefit of the wrongful act of their servant. . . .

The sum of $250 will compensate the plaintiff for his actual loss. . . .

The action will be dismissed as against Magann and the Toronto General Trusts Corporation without costs, and there will be judgment for the plaintiff against the defendants Stone & Wellington and Chambers for $250 with costs according to the proper scale; no set-off of costs to be allowed.

MEREDITH, C.J.C.P., IN CHAMBERS. APRIL 22ND, 1910.

## *RE GREEN v. CRAWFORD.

*Division Courts—Jurisdiction — Promissory Note for more than $100—Item in Larger Account—Merger in Mortgage—Matters of Defence—Division Courts Act, sec. 72 (1) (d)—4 Edw. VII. ch. 12, sec. 1—Mandamus.*

Motion by the plaintiff for a mandamus to the Junior Judge of the County Court of Elgin, commanding him to try this action, which was brought in the 3rd Division Court in the County of Elgin, upon a promissory note made by the defendant for $140, to recover the amount of it with interest, amounting in all to $154.60.

At the trial the plaintiff produced and proved the making of the promissory note. On his cross-examination it appeared that he had other dealings with the defendant and a Mrs. James, that he had an account in his books with them, that the amount of the note formed one of the items of this account, and that he had taken a mortgage from Mrs. James covering the amount of the account.

Upon this appearing, the County Court Judge stopped the case, holding that the Division Court had no jurisdiction; and the plaintiff then moved for the mandamus.

J. M. Ferguson, for the plaintiff.

Shirley Denison, for the defendant.

MEREDITH, C.J., said that the plaintiff's claim came within the provisions of clause (d) of sub-sec. 1 of sec. 72 of the Division Courts Act, R. S. O. 1897 ch. 60, as amended by 4 Edw. VII. ch. 12, sec. 1. He sued on the promissory note only, and to make out his case all that was necessary was the production of the note and proof of the signature of the defendant. The question whether the claim on it had become merged in the mortgage, if that question could or did arise, was matter of defence, and the fact that the amount of the note formed one of the items of the account kept by the plaintiff with the defendant and Mrs. James, if of any importance at all, did not affect the question of jurisdiction. These were matters of defence, which the Judge, having jurisdiction to try the action, had jurisdiction to pass upon.

If . . . it was necessary to investigate the account for the purpose of ascertaining whether the promissory note had been

* This case will be reported in the Ontario Law Reports.

paid in whole or in part, that also did not affect the question of jurisdiction; and . . . nothing appeared in the evidence to oust the jurisdiction of the Division Court.

Order as asked; no costs.

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MEREDITH, C.J.C.P. APRIL 22ND, 1910.

## CHRISTIE v. RICHARDSON.

*Master and Servant—Injury to Servant—Workmen's Compensation Act—Negligence of Foreman—Unsafe Condition of Gangway—Neglect of Foreman to See to Safety—Gangway Widened by Stranger and Left in Unsafe Condition—Liability of Person Interfering—No Joint Negligence—Absence of Contributory Negligence.*

Action by a bricklayer in the employment of the defendant Webb, the contractor for the brick work of a school-house, against Richardson, the contractor for the carpenter work, and Webb, to recover damages for injuries sustained by the plaintiff by reason of the alleged negligence of the defendants, or one of them, in regard to the condition of a gangway provided by the defendant Webb for his workmen to enable them to go to and from their work in the building.

The gangway, as constructed by the defendant Webb, was a safe and sufficient way for the purpose for which it was intended; but one day the carpenters working in the building made what was described as an addition to it for the purpose of widening it, and the addition was left there. The plaintiff was walking up the gangway the next day to go to his work, when it gave way, and he was precipitated into the basement.

The plaintiff based his right to recover against Webb on the breach of his duty to provide a safe and sufficient gangway and to see that the gangway in use was at all times in such a condition as to be safe and sufficient for the purpose for which the plaintiff had occasion to use it, and he based his right to recover against Richardson on an alleged interference by him with the gangway which contributed to its unsafe condition.

It did not appear that any request was made by Richardson or his workmen for Webb's permission to add to the gangway, but it did appear that it was customary for the carpenter to make use of the gangway used by the bricklayers.

The action was tried at Toronto, before MEREDITH, C.J.C.P., who dispensed with the jury except as to damages, which they assessed at $800.

A. J. Keeler, for the plaintiff.

W. Proudfoot, K.C., and W. H. Grant, for the defendant Richardson.

G. H. Watson, K.C., for the defendant Webb.

MEREDITH, C.J.:— . . . Frederick Leitch was the foreman of the defendant Webb, by whom he was intrusted with the duty of seeing that the gangway was proper. . . . I find, upon the evidence, that he knew that the carpenters had widened the gangway. . . . It is difficult, upon the conflicting testimony, to determine the real position and condition of the gangway at the time the plaintiff met with the accident, but, upon the whole, I have reached the conclusion that there was nothing in its condition to indicate that the use of any part of it, including the addition, would be attended with any danger, nor was there anything to indicate to the plaintiff that the addition was not intended to form part of the gangway and to be used by the defendant Webb's workmen.

The plaintiff testified that he did not know that any addition had been made to the gangway, and I see no reason for doubting his testimony on this point or as to any of the matters as to which he testified.

It was the duty of the defendant Webb not only to provide a safe and sufficient gangway but to see that the gangway provided was maintained in a safe and sufficient condition, and for negligence in that regard he is answerable.

This duty was delegated by him to his foreman, Leitch, who was working at the building, and knew that the addition had been made. It was, I think, his duty, knowing this, to see that the gangway had not been rendered unsafe by what had been done, and, although he passed over it on the evening of the day before the accident, he did not take the trouble to inspect it.

If, as I have found, there was nothing to indicate to the plaintiff that the addition was not intended to be used as a part of the gangway, it was, I think, Leitch's duty to see that it might be safely used in its altered state. This could have been readily ascertained by an inspection of it, and I have no doubt that, if he had made the inspection, the accident would not have happened.

I must, therefore, find that the accident was caused by his negligence in the performance of the duty with which he was intrusted by the defendant Webb, of seeing that the conditions of

the ways, etc., were proper: R. S. O. 1897 ch. 160, sec. 6, cl. 1. . . . .

Here . . . it was the duty of the defendant Webb to see that the way which he provided for the use of his workmen was kept in a safe condition, and the act of the defendant Richardson's men having, as I have found, rendered it unsafe, it was Webb's duty to have guarded against the consequences of that act when he became aware, or ought to have become aware, of what they had done.

Kelly v. Davidson, 31 O. R. 521, 32 O. R. 8, 27 A. R. 657, may be referred to . . .

My finding is that the plaintiff was not guilty of contributory negligence, and that he is entitled to judgment against the defendant Webb for the damages assessed by the jury, with costs.

The unsafe condition in which the gangway was left was, I think, due to the negligence of the defendant Richardson's workmen, but I am unable to see how the plaintiff can recover against him. There was no joint negligence by him and Webb. His negligent act rendered the gangway unsafe, and it may be that Webb may have a right of action against him; as to that I express no opinion; but the negligence for which I have found Webb answerable is an entirely different negligence, viz., negligence in not seeing that the gangway was kept safe for use by his workmen.

The action will be dismissed as against the defendant Richardson without costs.

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MEREDITH, C.J.C.P., IN CHAMBERS. APRIL 23RD, 1910.

## RE CLARK, TORONTO GENERAL TRUSTS CORPORATION v. BANK OF MONTREAL.

*Administration—Reference—Dispensing with Payment of Money into Court — Distribution by Executors — Arrangement between Testator's Widow and Creditors—Sanction by Court—Administration Order—Exercise of Power to Grant—Order made by Local Master with a Reference to himself.*

Motion to confirm the report of the Local Master at Goderich, dated the 13th April, 1910, made under the reference directed by an administration order made by him on the 17th June, 1907.

W. Proudfoot, K.C., for all parties.

MEREDITH, C.J.:—In the course of the proceedings before the Master, he assumed to sanction an arrangement entered into, while the reference was pending, between the testator's widow and the creditors, by which the widow released her dower in her husband's lands, in consideration of the creditors agreeing not to attack as fraudulent against them the transfers which her husband had made to her of part of his property.

The Master also assumed, although by the order it was provided that all balances which might be found due from the plaintiff or the defendants to the estate of the deceased should be, forthwith after they had been ascertained, paid into Court to the credit of the cause, subject to further order, to dispense with payment into Court.

In both cases the Master acted without authority, and his action, in order to have effect, must be confirmed by the Court.

With regard to the latter of them, it was stated by counsel that the executors, the Toronto General Trusts Corporation, have consented to distribute without charge the moneys in their hands among the creditors; and an order may, therefore, be made dispensing with payment into Court, and providing for distribution in that way.

Since the motion was heard, an affidavit has been filed shewing to my satisfaction that the arrangement with the widow is a proper one to be sanctioned, and the order will provide for its confirmation.

I have had doubt as to whether the administration of the estate in Court is justifiable. With the wide powers now possessed by personal representatives for the disposition of the property of the deceased and the distribution of the proceeds among creditors and persons entitled, it can very seldom happen that an administration in Court is necessary, and the practice of the Court is not to make an order for administration unless a clear case shewing the necessity for it is made out. One of the main objects of the Devolution of Estates Act was to render the administration of an estate in Court, in ordinary cases, unnecessary, an object which would be defeated unless the Court was slow to make administration orders.

Upon the whole, I have come to the conclusion that, in the circumstances of this case, my doubt is not sufficient to warrant my depriving the parties of the commission and disbursements that have been allowed.

The practice of a Local Master making an administration order with a reference to himself is not a satisfactory one, and it would

be much better in such cases that the order were made by a Judge of the High Court.

An order may go containing the provisions I have mentioned, and confirming the report and directing distribution in accordance with its provisions.

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MASTER IN CHAMBERS. APRIL 25TH, 1910.

## CURLETTE v. VERMILYEA.

*Venue—County Court Action—Action against Executor for Specific Legacy—Pleading—County Courts Act, secs. 23 (10), 36—County wherein Will Proved—Convenient Place for Trial—Witnesses.*

Motion by the defendant to transfer the action from the County Court of York to that of Hastings.

Eric N. Armour, for the defendant.

John Jennings, for the plaintiff.

THE MASTER:—The plaintiff claims from the defendant "a rose point fichu," or in default of its delivery $300 damages.

This fichu appears to be a lace ornament of a valuable character much prized by ladies. This, it is alleged, was bequeathed to the plaintiff by a Mrs. Mendell, but is being wrongfully retained by the defendant, who was one of the executors of the testatrix. He is not sued, however, as executor, but as having kept possession of the fichu after the will had been proved and the estate wound up.

The defendant submits that he and his co-executor should be jointly sued as such. He also invokes on this motion the provisions of the County Courts Act, R. S. O. 1897 ch. 55, sec. 23, clause 10, and sec. 36, as requiring the action to be tried in Hastings.

The defendant swears to a good many witnesses. He gives their names and some indication of what they will prove. Of these at least seven or eight would appear to be material, and perhaps even ten.

The plaintiff in answer states that she will require four witnesses, but gives neither the names nor any information as to what they will be called to testify. Under Arpin v. Guinane, 12 P. R. 364, this may be allowable. The practice, however, is usually that adopted by the defendant. And, if a plaintiff can de-

feat such a motion by swearing to a sufficient number of witnesses to displace the preponderance alleged by the defendant, it would be idle to move at all, unless the Court can deal with the case on what appears to be reasonable and likely from the pleadings and the examinations for discovery.

Here it appears from the defendant's depositions that the personal articles of the testatrix were to be divided, by three ladies named by her for that purpose, among certain beneficiaries, and that they set aside "some rose point lace for Miss Curlette." Another article called fichu or bertha was given to the defendant's wife and produced by him at the examination. Apparently this is what the plaintiff now seeks to recover as being left to her by the testatrix specifically.

It is suggested that many of the articles belonging to Mrs. Mendell were lost in a fire before her death, and it is argued that, if there was any such fichu as the plaintiff claims, it must have been destroyed at that time.

There would seem then to be only two substantial questions in this action. The first, was there a specific chattel known to experts as "a rose point fichu" bequeathed to the plaintiff, and which came into the hands of the executors of the testatrix? Secondly, if not, did what was tendered to the plaintiff answer that description, or was it the only article among the assets of the testatrix which could be said to be a "rose point fichu"?

The evidence on both these points must be at or near Belleville, where the testatrix resided, except that of such experts as may be called on either side. But they can be got as easily at that place as here or elsewhere.

The present would thus seem to be a case within the principle laid down by Osler, J.A., in Macdonald v. Park, 2 O. W. R. 972, and which was apparently approved by a Divisional Court in the subsequent case of Saskatchewan Land and Investment Co. v. Leadlay, 9 O. L. R. 556.

If I am right on this point, it will be unnecessary to consider the question raised under the County Courts Act. But, in case I am wrong, it will be well to deal with that point also, as it was apparently relied on by the defendant on the argument, and seems to be indicated also in the statement of defence, which alleges that the action should have been brought against the executors, and not against the defendant personally.

Section 23 provides that the County Court shall have jurisdiction . . . (10) "in actions by a legatee under the will of any deceased person, such legatee seeking payment or delivery of his legacy . . . ." And sec. 36 (1) provides that actions under

clause 10 of sec. 23 shall be brought and tried in the county where letters probate have issued or where the deceased resided. This certainly seems to meet the present case, notwithstanding the form of the pleadings. In all cases it is the substantial ground of the action that is to be considered. A plain statutory provision is not to be nullified by the dexterity of the pleader.

Whether intentionally or not, the plaintiff has framed her action so as to try and evade this difficulty. But the statement of claim recites the will of Mrs. Mendell and the grant of probate to Vermilyea and Farley, and that the "fichu" came into the possession of Vermilyea, "who has never treated it as part of the assets of the estate" of the deceased, but continues to retain it.

The statement of defence alleges that the estate has been wound up and the distribution of the specific legacies allowed as correct by the Surrogate Court Judge.

This, therefore, seems to come within the scope of sec. 23 (10). The plaintiff alleges that this article came into the possession of the defendant, he being an executor. The action arises really out of a will to which letters probate have issued in the county of Hastings; for under that will the plaintiff claims the fichu as a legacy. It is not as if a stranger to the whole proceeding had obtained possession after the executors had been discharged and the estate wound up. Until this had been done the legatee could only have taken action through the executors.

It, therefore, seems that on this ground also the motion is entitled to succeed. The statute is a legislative indorsement of the principle on which Osler, J.A., went in Macdonald v. Park, supra, and to which effect was given by Falconbridge, C.J. (on the 29th March last, not reported) in General Construction Co. v. Noffke.

Costs, as usual, in the cause.

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RIDDELL, J. APRIL 26TH, 1910.

## KUNTZ v. SILVER SPRING CREAMERY CO.

*Company — Resolutions of Shareholders — Sale of Plant to President—Payment to Directors for Services—Rights of Minority Shareholders—Absence of Fraud — Legality of Transactions—Injunction.*

Motion by the plaintiffs for an interim injunction.

C. L. Dunbar, for the plaintiffs.

G. M. Clark, for the defendants.

RIDDELL, J.:—The plaintiffs, two shareholders of the defendant company, sue on behalf of themselves and all other the shareholders of the company, making the company and the directors parties defendants. The statement of claim alleges that at the annual meeting held on the 27th January, 1910, a resolution was illegally put and carried to sell out the plant of the company (a creamery company) to the defendant Butler, the president, for $650, whereas the property was worth much more—and that at the same meeting a resolution was "illegally and fraudulently" passed for the payment to the defendant directors of $65 each for their services. The relief claimed is an injunction restraining the carrying out of these resolutions. A motion for an interim injunction was enlarged sine die to enable the company to hold a regular general meeting and get rid of all irregularity. This has been done, and the motion is now renewed before me.

It is contended that the proceedings are in fraud of the minority shareholders; but that is just a manner of speaking intended to describe the fact that the majority of the shareholders consider this course to be for their own interests as against the opinion of the minority.

I can see nothing to indicate fraud in any other sense, so far as the material goes. The transactions are such as the company could legally do—there is nothing illegal, criminal, or ultra vires—and in such cases no shareholder suing for himself, or for himself and others, has any locus standi: Buckley, 9th ed., pp. 612, 613; Lindley, 6th ed., pp. 774, 779, 781.

No case has been made out for an interim injunction, and it is admitted that the defendants are men of substance.

The motion will be refused with costs to the defendants in any event.

This is, of course, quite without prejudice to any case that may be made at the trial.

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DIVISIONAL COURT. APRIL 28TH, 1910.

## *McMURRAY v. EAST NISSOURI S.S. No. 3 PUBLIC SCHOOL BOARD.

*Public Schools—Salary of Teacher—Absence of Written Agreement—Public Schools Act, 1 Edw. VII. ch. 39, sec. 81 (1)—Costs.*

Appeal by the defendants from the judgment of the County Court of Oxford in favour of the plaintiff in an action tried with a jury.

* This case will be reported in the Ontario Law Reports.

The plaintiff was a school teacher, and alleged that she was employed by the defendants in that capacity for the year 1908, at a salary of $500, and was during that year wrongfully dismissed, and her claim was for damages for wrongful dismissal.

The jury found a general verdict for the plaintiff, and assessed her damages at $50, for which sum, with costs on the Division Court scale, without set-off, judgment was directed to be entered.

It was not disputed that the plaintiff was engaged as she alleged for 1908, but the agreement was not reduced to writing, and the defendants contended that it was, therefore, not binding on them: sec. 81, sub-sec. 1, of the Public Schools Act, 1 Edw. VII. ch. 39, which provides: "All agreements between trustees and teachers shall be in writing, signed by the parties thereto, and shall be sealed with the seal of the corporation."

The appeal was heard by MEREDITH, C.J.C.P., BRITTON and CLUTE, JJ.

C. A. Moss, for the defendants.

J. L. Ross, for the plaintiff.

The judgment of the Court was delivered by MEREDITH, C.J.: —I have reluctantly come to the conclusion that the contention of the defendants is well-founded. . . .

The question was dealt with by the Court of Common Pleas in Birmingham v. Hungerford, 19 C. P. 411. The Act then in force was 23 Vict. ch. 49, and the section which corresponds with sub-sec. 1 of sec. 81 of ch. 39, 1 Edw. VII., was sec. 12, and it read: "All agreements between trustees and teachers to be valid and binding shall be in writing signed by the parties thereto and sealed with the corporate seal . . ." Referring to it, Hagarty, C.J., said (p. 412): "If we attach any meaning to the clause cited, we think it must be that a person can only become a common school teacher by agreement under seal, and that any other agreement, verbal or written, would not be an agreement for that purpose with the school corporation." And it was accordingly held on demurrer that the provisions of an Act for an arbitration in case of a difference between the trustees and a teacher as to the salary of the teacher could not be invoked by the plaintiff, there being no allegation in her pleading of an agreement such as sec. 12 requires.

Section 12 has been carried down in the same form, with one exception, through all the consolidations which took place from 1860 to and including 1901. The one exception is the omission of the words "to be valid and binding," which were dropped in the

consolidation of 1891, 54 Vict. ch. 55, sec. 132, and have not appeared in any of the subsequent consolidations.

I do not think that the dropping of these words has altered the effect of the provision, as without such words a similar section of the English Public Health Act, 38 & 39 Vict. ch. 55, sec. 174, has been held in Young v. Corporation of Leamington, 8 Q. B. D. 579, 8 App. Cas. 517, to be imperative and not directory. . . .

As the appeal must be allowed upon this ground, it is unnecessary to consider the objection raised to the jurisdiction of the County Court.

The conduct of the defendants has been unmeritorious. . . . They may be well left to bear their own costs throughout.

Appeal allowed without costs, and action dismissed without costs.

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RE GILES AND TOWN OF ALMONTE—MEREDITH, C.J.C.P.—APRIL 21.

*Municipal Corporations — Local Option By-law — Voting—Form of Ballot—Departure from Statute.*]—Motion by William Giles to quash a by-law of the town prohibiting the sale by retail in the town of spirituous, fermented, and other manufactured liquors, on the ground that the form of ballot used in voting upon the by-laws was not that prescribed by the statute of 1908. Held, that the expressed wish of the voters ought not to be defeated by the clerk's mistake in departing from the words of the statutory form, where it is not shewn that the departure confused any one and so prevented the will of the voters from being manifested; that the circumstances brought the case within the gauge of the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7 (35); and, while it is a matter of great regret that a municipal officer should depart from the plain directions of a statute, the by-law should not be quashed. Motion dismissed without costs. J. Haverson, K.C., for the applicant. W. E. Raney, K.C., and J. Hales, for the respondents.

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WADDINGTON v. HUMBERSTONE—DIVISIONAL COURT—APRIL 22.

*Principal and Agent—Agent's Commission on Sale of Land—Quantum.*]—An appeal by the defendants from the judgment of BOYD, C., in favour of the plaintiffs for the recovery of $1,237.50

as commission on the sale of farm lands of the defendants. That was at the rate of 5 per cent. on the purchase price. The defendant F. C. Humberstone retained the plaintiffs, assuming to do so on behalf of his co-defendants, as well as for himself. The judgment of the Court (MEREDITH, C.J.C.P., BRITTON and CLUTE, JJ.), was delivered by BRITTON, J., who said that there was such knowledge on the part of the other defendants of and acquiescence in what F. C. Humberstone had done as to warrant a finding against all the defendants. But, assuming that the plaintiffs acted in good-faith and expended some time and took some trouble in bringing the property to the notice of the public, they did not find, nor were they instrumental in finding, a purchaser, and were entitled, upon the evidence only to commission at the rate of 2½ per cent. upon the purchase price. Appeal allowed to the extent of reducing the amount to $618.75. Judgment to be entered for the plaintiffs for that sum with costs of action. No costs of appeal. Strachan Johnston, for the defendants. G. Grant, for the plaintiffs.

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ONTARIO SEWER PIPE CO. v. MACDONALD—FALCONBRIDGE, C.J. K.B.—APRIL 25.

*Contract—Supply of Manufactured Articles—Defects — Damages.*]—Action to recover $774.26 for an alleged balance of the price of vitrified salt glazed culvert pipe supplied to the defendants by the plaintiffs to be used in the construction of railway culverts by the defendants on the Walkerton and Lucknow branch of the Canadian Pacific Railway. The defendants alleged that the pipe supplied was defective, that nearly 1,000 feet of pipe broke, whereby they suffered damages, for which they counterclaimed. The Chief Justice found the facts in favour of the defendants. Action dismissed with costs. Judgment for the defendants for $1,141.14 on their counterclaim, with costs. J. A. Macintosh, for the plaintiffs. G. H. Kilmer, K.C., and J. A. McAndrew, for the defendants.

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REID v. CITY OF TORONTO—DIVISIONAL COURT—APRIL 27.

*Highway—Non-repair — Injury to Pedestrian — Liability of Municipal Corporation—Relief over against Contractor.*]—An ap-

peal by W. R. Payne, a third party, from the judgment of CLUTE, J,. ante 450, in favour of the defendants against the appellant, was dismissed with costs by a Divisional Court (MEREDITH, C.J. C.P., TEETZEL and RIDDELL, JJ.). J. Shilton, for the appellant, H. Howitt, for the defendants. T. L. Monahan, for the plaintiff.

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HUTCHINSON v. JAFFRAY & CASSELS—DIVISIONAL COURT—APRIL 28.

*Broker — Purchase of Shares for Customer on Margin — Hypothecation—Conversion.*]—An appeal by the defendants from the judgment of MAGEE, J., ante 481, was allowed with costs, and the action was dismissed with costs, by a Divisional Court (MEREDITH, C.J.C.P., TEETZEL and RIDDELL, JJ.), following the decision of the Court of Appeal in Clark v. Baillie, ante 628. By consent of the defendants, proceedings under this order are stayed for three months, or, should the plaintiff in Clarke v. Baillie appeal to the Supreme Court of Canada, then until the judgment of that Court is pronounced. N. W. Rowell, K.C., for the defendants. R. W. Eyre and W. C. Mackay, for the plaintiff.