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[MARCH 4TH, 1902.

DIVISIONAL COURT.

BIRKBECK LOAN CO. v. JOHNSTON.

Building Society—Shares—Advance on—Trust—Notice—Mortgages—Consolidation—Evidence—Examination for Discovery.

The plaintiffs are a building society incorporated under R. S. O. 1887 ch. 169. The defendant Mrs. Amelia Johnston was on the 20th July, 1897, the holder of the following stock in the society:—

6 shares permanent stock A., in her own name.

4 shares instalment stock C., "in trust."

1 share instalment stock C., "in trust for Miss Amelia Johnston."

1 share instalment stock C., "in trust for Miss Marjorie Johnston."

Some shares of instalment stock B., of little value.

On the 20th July, 1897, Mrs. Johnston executed a transfer to the plaintiffs' treasurer, as security for an advance of $700 then made to her, of the following: "All my stock in the said company, consisting of shares of classes A., B., and C. stocks held by me in the said company." On the 1st October, 1897, she obtained a further advance of $600 from the company, and transferred to the treasurer as security "six shares of class C. instalment stock." It was admitted that the six shares intended to be transferred were the same six shares as those standing in her name as trustee as above mentioned. As further security for this advance, she executed on the same day a mortgage to the company upon lands in Strathroy and Toronto, in which it was recited that she was the owner of six shares of the capital stock of the company, and that the company had agreed to advance to her $600 upon such shares, with the mortgage as further security.

Afterwards, the defendant Frank K. Johnston bought from his mother, the defendant Mrs. Amelia Johnston, the Strathroy property, assuming the mortgage for $600 and paying some money in upon the six shares of C. stock.

Afterwards, the defendant Anna K. Johnston bought from Frank the Strathroy property, and, from the assignee of her mother, Amelia, the Toronto property, both subject to the mortgage for $600, which she assumed. Finally, in July, 1901, the defendant Anna K. Johnston purchased from her mother, Amelia, her supposed equity in the six shares of C. stock, subject to the $600 mortgage.

This action was brought against Mrs. Amelia Johnston, Frank K. Johnston, and Anna K. Johnston, to recover the amount of both mortgages, and, in default of payment, for foreclosure of the interest of the defendants in the stock.

The defendant Amelia delivered no defence; the defendants Anna and Frank admitted the making of the mortgage of the 1st October, 1897, and the transfer of six shares of C. stock to the plaintiffs, but put the plaintiffs to the proof of the mortgage of July, 1897; they brought into Court the arrears upon the mortgage of October, and the plaintiffs accepted the amount in satisfaction of such arrears.

The defendant Amelia was examined by the plaintiffs for discovery, and parts of her examination were read by the plaintiffs at the trial, the other defendants objecting that the examination was not evidence against them.

The trial Judge gave judgment in favour of the plaintiffs, and the defendant Anna appealed.

P. H. Bartlett, London, for the appellant.

T. H. Luscombe, London, for the plaintiffs.

The judgment of the Court (STREET and BRITTON, JJ.) was delivered by

STREET, J.:—The defendant Amelia Johnston held all the six shares in trust for her children: as to two shares, the trust is declared on the face of the certificates; as to the other four, the words "in trust" are sufficient to put a person dealing with her upon inquiry, and her evidence (put in by the plaintiffs) shews that they were held in trust for her children. . . . The company are affected with notice that she was not the owner of the shares and had no power to mortgage them, just as any other person advancing money upon the shares would have been. . . . There is no evidence of any authority to her to deal with the property, and she had no more right, as far as appears, to mortgage these shares than if they had stood in the names of her children, instead of in her name in trust for them. . . Section 53 of the R. S. O. ch. 205 relieves the company from the duty of seeing to the execution of any trust to which any shares are subject, and enables the company to pay money to a shareholder who holds shares upon any trust, without seeing that the money is properly dealt

with by the shareholder after receiving it; but it does not entitle the company to lend money to A. with express notice that he is a mere trustee for B.: Bank of Montreal v. Sweeny, 12 App. Cas. 617; Simpson v. Molsons Bank, [1895] A. C. 270; London and Canadian L. & H. Co. v. Duggan, [1893] A. C. 506; Great Eastern R. W. Co. v. Turner, L. R. 8 Ch. 149.

The only shares which passed by the mortgage of July, 1897, were the six shares of class A.

The company cannot consolidate their two mortgages against the defendant Anna K. Johnston, in whom the equity of redemption in the land mortgaged is vested; because they have not shewn any notice to her, at the time she acquired the equity, that any other mortgage existed in the hands of the company: Stark v. Reid, 26 O. R. 257.

The examination for discovery of Amelia Johnston is not evidence against Anna K. Johnston.

Appeal allowed.

[MARCH 3RD, 1902.

DIVISIONAL COURT.

HEFFERNAN v. McNAB.

Will—Construction—Bequest of Interest on Payments to be made by Devisees of Land—Sale of Land by Testator after making his will—Failure of Bequest.

Appeal by plaintiff from judgment of MACMAHON, J., in action by a legatee under the will of Michael McNab, deceased, for its construction, and to set aside a release of his claims thereunder. The testator devised a farm to each of his sons John and Albert, charged with the payment $2,000 and $1,000 respectively. Subsequently he sold both the farms to John, and took back a mortgage for $5,000, with interest at 4 per cent. per annum. The 9th clause of the will was as follows: "I hereby authorize my said executors to purchase and erect a fit and proper tombstone over my grave, and I hereby will that my executors do pay over to my beloved nephew, Edward Heffernan, the interest accruing from the payments to be made by John, James, and Albert McNab, yearly, until the last payment is made by them to my executors, and not before then will my executors furnish them with good and sufficient deeds." At the time of the death of the testator, Albert was also indebted to him. The trial Judge held that the plaintiff, the nephew, took nothing, and was bound by the release he gave.

J. R. Roaf and W. T. J. Lee, for plaintiff.

E. F. B. Johnston, K.C., and J. D. Falconbridge, for defendants.

The judgment of the Court (FERGUSON and MEREDITH, JJ.) was delivered by

MEREDITH, J.—From whichever point of view this bequest is looked at, it fails. The gift is of a specific nature—the interest on certain payments. It is not a gift of money charged upon or to be paid out of any particular property. The thing itself is given with particular interest.

Then if the case is to be looked at as matters stood when the will was made, the gift fails. It could then have had reference only to the payments which the testator's sons John and Albert were to have made, under the will in respect of the lands by it devised to them. These devises were revoked by the sale of the lands, and there are no payments to be made by the sons under any provision of the will. This is admitted, but it is contended that the circumstances existing at the time of the making of the will are to be ignored altogether, and the will is to be read as giving the plaintiff the interest upon any indebtedness from John and Albert existing at the time of the testator's death, and, as John then owed the purchase money of the lands, and Albert was indebted to him also for some arrears of rent, these are to be taken to be the specific payments the interest upon which the plaintiff was to have; but that contention fails upon the proper interpretation of the will. How can the words used be applicable to some arrears of rent? How can such arrears be looked upon as the payments to be made by them and in respect of which they are to be furnished with good and sufficient deeds?

Earlier provisions made in the will shew beyond reasonable question what are the payments the interest upon which the plaintiff was to be paid. And, in the face of these provisions, it is not fairly open to argument that the gift to the plaintiff was of anything other than the interest upon these payments. . . . The learned trial Judge seems to have fallen into an error in regard to the annual payments of $150.

The gift to the plaintiff fails because the thing which was given never came into existence. The lands devised to John and Albert were sold and conveyed by the testator to John, and so no payments are, or ever were, to be really made under the will by them.

It is not necessary to consider the question of the validity of the release given by the plaintiff.

Appeal dismissed with costs.

Cameron & Lee, Toronto, solicitors for plaintiff.

Cowan & McNab, Walkerton, solicitors for defendants.

[MARCH 3RD, 1902.

DIVISIONAL COURT.

GILDNER v. BUSSE.

Defamation—Privileged Occasion—Malice.

Somervilie v. Hawkins, 10 C. B. 583, Taylor v. Hawkins, 16 Q. B. 308, and Toogood v. Spyring, 1 C. M. & R. 181, per Parke, B., at p. 193, approved.

Motion by defendant to set aside verdict and judgment for plaintiff in action for slander tried before BOYD, C., and a jury, and for a new trial. The plaintiff was employed by defendant as a sausage maker, and when discharging plaintiff from his employment, defendant in presence of two other employees called plaintiff a thief. Subsequently plaintiff called for his wages, and defendant again called him a thief, and refused to pay him his wages. The jury found a verdict for plaintiff for $100 damages.

W. J. O'Neail, for defendant.

J. M. Godfrey, for plaintiff.

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

MEREDITH, J.:—The jury were told in effect "if you believe the defendant and his witnesses you will measure the damages by the very smallest you can find, but, if you believe the plaintiff and his witnesses you would give him good round damages, not however up to $2,000 nor anything near it."

Nor were the jury warned that they were not to give damages for the slander given in evidence, but not sued for in this action.

They ought to have been so warned, and, if the observations as to the amount of damages were intended as binding upon them, and not merely as suggestions as to what they might or probably would do, they encroached upon the province of the jury.

But the most serious objection to the course of the trial is in the ruling, and charge to the jury, that neither of the occasions of the publication of the alleged slanders was privileged. They were both privileged.

The ground of the ruling as to the first occasion seems to have been that other servants were called in or present; that cannot destroy privilege, especially in such a case as this, where they are more or less distinctly concerned in the matter. This is abundantly clear: see Somerville v. Hawkins, 10 C. B. 583, and Taylor v. Hawkins, 16 Q. B. 308. . . It is said that on the second occasion a stranger, a mere

bystander, was within hearing. That does not necessarily remove the privilege, or prove malice. It depends upon the circumstances of the case: Toogood v. Spyring, 1 C. M. & R. 181, per Parke, B., whose language is very applicable to the facts of this case. See also Hunt v. G. A. R. Co., [1891] 2 Q. B. 189; Pittard v. Oliver, [1891] 1 Q. B. 474; Tincer v. G. W. R. Co., 33 U. C. R. 8; and Milcar v. Johnston, 23 C. P. 580. . . .

The second occasion was privileged; the plaintiff had himself to blame for raising a disputation in the presence of the stranger; and if there was no evidence of actual malice, the plaintiff should have been nonsuited.

But, upon the whole case, there was, I think, enough evidence to entitle the plaintiff to go to the jury upon that question; the onus of proof of which was of course upon him.

It is well to say as little as possible that might in any way affect that question at a future trial; and it is enough for the purposes of this motion to refer to the contradictory character of the testimony at the trial upon almost every material fact, and call for the intervention of a jury to determine where the truth lay, and whether defendant acted in good faith or maliciously in accusing the plaintiff of theft.

New trial directed. Costs of former trial and this motion to be in the action to the defendant only.

R. C. LeVesconte, Toronto, solicitor for plaintiff.

Robinette & Godfrey, Toronto, solicitors for defendant.

[March 3rd, 1902.

DIVISIONAL COURT.

BALL v. FARMERS' CENTRAL MUTUAL FIRE INS. CO.

Fire Insurance — Application — Diagram of Buildings — Drawn by Applicant at Request of Insurers—Omission of Saw-mill from —Effect of—Agent.

Appeal by plaintiff from judgment of junior Judge of County Court of Middlesex in action by plaintiff, a clergyman, to recover $200 under a policy issued to him by defendants on his dwelling-house, which was destroyed by fire, and was situate on Mill street, in the village of Lion's Head. The defendants alleged that in his application and in the diagram of the premises made by him, plaintiff omitted to mention or shew a saw-mill situated 90 feet from his house; that they are prohibited by their by-laws from insuring any building within 150 feet of a saw-mill; and that the application disclosed this fact, and required that plaintiff must

shew, by it and the diagram, all buildings, and their kind, situate within that distance; and that therefore there had been a breach of a statutory condition, and the policy was void.

G. C. Gibbons, K.C., for plaintiff.

George H. Kilmer, for defendants.

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

MEREDITH, J.:—If it were the duty of the plaintiff to have shewn that building upon the diagram, he cannot succeed. There is nothing, however, in any of the questions he was required to answer, directly or indirectly bearing upon the point; nothing to direct his attention to any requirements of the company respecting it. He acted in good faith, and did not know of such requirements, having read only what was printed upon the face of the application. Nor is there anything anywhere upon the application to indicate that it is the applicant's duty to prepare the diagram. It is upon that side of the application reserved for the certification and the answers of the company's officers, and the correctness of the diagram is to be certified to by their surveyor, and he is also to certify, among other things, to some personal examination of the property. So far there is nothing required from the assured in connection with the diagram. But in his application he has signed a declaration that his answers to the questions and the description of the annexed diagram are true and complete in all particulars. The word "annexed" is not an apt one to indicate "upon the other side." And the diagram was drawn by him, but it was drawn upon the written request of the defendants' agent to "please draw a diagram of the premises." There is no objection to the diagram, as one of the premises only. It is objected to for not shewing buildings not on the premises. In other words, it is contended that the applicant should have furnished a diagram giving all the information mentioned in the printed directions on the back of the application under the word "diagram." But that was nowhere required of him, and he had no knowledge of it. On the contrary, he was asked to give a diagram of the premises, and that he did. The only shadow of ground for this contention is the declaration of the truth and completeness of his answers and the description in the diagram. But there is no declaration that the diagram is drawn in accordance with such directions, or that it gives the information therein mentioned. Before the company can justly avoid a policy after loss upon such grounds, in such a case

as this, they must at least have a declaration from the applicant that the diagram supplies the information specified in the printed directions, or otherwise obtain a representation from him respecting the matters there mentioned: see Bauer v. Canada Life Assurance Co., decided by the Court of Appeal, not reported. As it cannot rightly be said that the plaintiff in any manner represented that there were no other buildings within 150 feet of the risk, nor that there was any concealment of the fact that there were, how can the policy be avoided?

It is abundantly clear on the evidence that Miller, who took the application, was the defendants' agent.

Appeal allowed with costs. Judgment below set aside and judgment to be entered for plaintiff for amount of loss with costs of action.

Gibbons & Harper, London, solicitors for plaintiff.

David Robertson, Walkerton, solicitor for defendants.

MARCH 4TH, 1902.

DIVISIONAL COURT.

ROSE v. CRODEN.

Pleading—Statement of Claim — Amendment — Election — Penalty—Writ of Summons—Discovery.

Where the plaintiff indorsed his writ for penalties under the Dominion Elections Act, 1900, and by his statement of claim asked damages at common law, and thereafter examined defendant for discovery:—

Held, that plaintiff could not afterwards amend, and claim the penalty under the statute.

Held, also, that the provisions of sec. 134 of the Elections Act must be taken as substituted, in actions brought under it, for the general provisions of the Canada Evidence Act.

Reg. v. Fox, 18 P. R. 343, distinguished.

Appeal by plaintiff from order of FERGUSON, J., at the trial, dismissing motion by plaintiff for an order to amend the statement of claim by adding to the 5th paragraph the words, "and the defendant acted contrary to the Dominion Elections Act, 1900, and is indebted to the plaintiff in the sum of $1,000." The claim, as indorsed upon the writ of summons, was as follows: "$600 for penalties under the Dominion Elections Act, 1900, from the defendant, being moneys forfeited by the defendant by reason of wilful misfeasance, act, or omission on his part in violation of said Act, and also refusing and neglecting to perform obligations and formalities required of him by said Act. The plaintiff also

claims $600 damages from the defendant for wrongfully depriving plaintiff of the right to vote at the election held on the 7th day of November, 1900, of a member to serve in the House of Commons of Canada for the electoral district of the city of London." The writ was issued on the 30th January, 1901. The statement of claim (delivered 12th March, 1901) set out that the defendant acted as a deputy returning officer at the election mentioned; that the plaintiff was entitled to vote at the polling-place where the defendant was in charge; (5) that the defendant falsely and maliciously refused to allow the plaintiff to vote; and the plaintiff claimed $1,000 and costs of action. The motion for leave to amend was not made until the 31st December, 1901, just a week before the trial, and was referred to the trial Judge, who heard it on the 7th January, and dismissed it, upon the ground that the plaintiff should not be allowed to amend so as to sue for a statutory penalty, after he had elected, by his statement of claim and by examining for discovery, to proceed at common law.

N. W. Rowell, for plaintiff.

G. C. Gibbons, K.C., for defendant.

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

STREET, J.:—The plaintiff having two remedies open to him, one his common law action for damages, and the other his statutory action under the 19th, 131st, and 133rd sections of the Dominion Elections Act, 1900, appears to have issued his writ claiming the penalties, but to have altered the frame of his action when he came to deliver his statement of claim, and to have then claimed only at common law; for the distinguishing characteristics of the action for penalties pointed out by the 131st section of the Act are not to be found in his pleading. It appears to be necessary to preserve in some way a clear line between the two classes of action, because of the plaintiff's right in the statutory action to have the defendant committed to prison in case of nonpayment of the amount of the penalties for which judgment is given, as well as on account of the limit of time allowed for bringing that action, and for other reasons.

The defendant, treating this as a common law action, submitted to discovery in it without objection. The question whether the defendant might have successfully resisted discovery in case the action had been brought for the penalties given by sec. 19 does not seem to me to be covered by the decision in Reg. v. Fox, 18 P. R. 343, by reason of the special provisions of sec. 134, which must, I think, be taken to be substituted in actions brought under the Elections Act for

the general provisions of the Canada Evidence Act upon which that case turned.

This section 134 seems to introduce into actions for penalties under the Act the same exceptions to the general rules regarding discovery as exist in ordinary civil actions, under the laws of the Province. One of those rules undoubtedly is that discovery will not be compelled from a defendant in an action to recover penalties: Martin v. Treacher, 16 Q. B. D. 507; Saunders v. Wiel, [1892] 2 Q. B. 321; Mexborough v. Whitwood, [1897] 2 Q. B. 111.

The decision of Reg. v. Fox, 18 P. R. 343, turned upon a provision in the Canada Evidence Act which was held to govern the case, and not upon the general provincial law of evidence; it does not therefore establish a rule generally applicable to civil suits in this Province.

I think, therefore, that the defendant in an action for penalties might have successfully resisted an attempt to compel him to submit to an examination for discovery; in an ordinary common law action he was of course bound to submit to examination, and he did so.

Having by proceeding at common law obtained from the defendant the discovery which he could not have had in an action for penalties, he then applied to amend his statement of claim by turning his action into one for penalties. At the time he made the application, more than a year had expired since the act complained of was committed, and he could not have brought a new action for the penalties: see sec. 142 of the Act.

I think, under these circumstances, that, notwithstanding the indorsement upon his writ, the plaintiff must be taken to have conclusively elected to pursue his common law remedy, and that the appeal should be dismissed with costs.

H. B. Elliott, London, solicitor for plaintiff.

Gibbons & Harper, London, solicitors for defendant.

FERGUSON, J. MARCH 4TH, 1902.

WEEKLY COURT.

FOX v. KLEIN.

Mortgage—To Two Different Mortgagees—Action for Sale by One Claiming Relief for Himself Only, Improper.

Davenport v. James, 7 Hare 252 *n.*, followed.

Motion for leave to amend the pleadings in a mortgage action by striking out the name of one of the mortgagors, defendant James J. Mallon, deceased, who joined in the mortgage as administrator of John J. Shea, who died seized

of the property in question; and for judgment for sale. The defendant Klein became entitled as one of the heirs of Shea to a one-half interest, and on 30th May, 1892, made the mortgage in question for $1,500; the plaintiff advancing, as stated in it, $1,000, and one Ferry, the other $500. Ferry assigned his interest to defendant Stock.

W. A. Skeans, for plaintiff.

A. E. Knox, for defendant Klein.

W. J. Tremeear, for defendant Stock, objected that the plaintiff should not have asked for relief as to his own claim of $1,000 and interest and costs only, but have included the claim of defendant Stock; citing Davenport v. James, 7 Hare 252 *n.*

FERGUSON, J., allowed the name of James J. Mallon to be struck out, and directed the judgment to conform, as far as practicable, to the form of decree given in Davenport v. James, *supra.*

MARCH 5TH, 1902.

DIVISIONAL COURT.

MACNEE v. ROSE.

Infant—Liability to Indemnity—Next Friend—Improvident Litigation —$400 Incurred to Enforce Doubtful Claim of Infant to $200 Worth of Goods—Ratification after Majority must be in Writing—R. S. O. ch. 146, sec. 6.

Appeals by defendant Strawbridge, and plaintiff, from judgment of BOYD, C., dismissing claim of appellant Strawbridge against his co-defendant, J. H. Rose, for contribution and indemnity for and in respect of all costs, liabilities, and obligations incurred by the appellant in an action of Rose v. Winters, in which the appellant Strawbridge was the next friend of Rose, and co-plaintiff with him; and refusing to hold Rose liable to plaintiff for the costs incurred.

A. B. Aylesworth, K.C., for defendant Strawbridge.

J. B. Clarke, K.C., for plaintiff.

C. H. Widdifield, Picton, for defendant Rose.

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

STREET, J.:—By the will Rose's father left his farm to his widow (now Winters), during the minority of his son, the defendant Rose, and to Rose absolutely when he became of age, and also gave her all the chattels on the farm, directing her to leave on it chattels to the value of those she received.

Shortly before defendant Rose came of age, Mr. and Mrs. Winters, who lived on the farm, advertised a sale of chattels.

They had a considerable quantity of their own, and advertised a sale of all. The defendant Strawbridge, the co-executor with Mrs. Winters under her husband's will, then commenced proceedings against Mr. and Mrs. Winters, to restrain a sale, and the costs in question were incurred. The action was dismissed with costs as against Mr. Winters, and it was held that the infant had no right to restrain the sale, and Mrs. Winters agreed, without admitting liability, to pay $200 into Court, but eventually, instead, left the farm with $200 worth of chattels, the conceded value of those she received, upon it.

The rule is that a next friend of an infant is entitled to indemnity from him if the proceedings taken are proper and undertaken with due care and prudence. I am not able to say that the Chancellor's view that Strawbridge was not entitled to indemnity is incorrect. Strawbridge incurred costs of $400 to try and enforce a doubtful claim to goods worth $200. This might not be conclusive if it were shewn that Strawbridge before doing so had taken obvious steps to avoid litigation. From what appears in evidence it seems highly probable that if he had gone to see Mrs. Winters, who lived in his neighbourhood, the action would have become unnecessary. To hold him entitled to charge these costs against the infant would be to offer a premium to rash and imprudent litigation. It is not shewn that the $200 worth of goods could not have been preserved without incurring any costs at all. As to the claim against the infant, he is clearly protected by R. S. O. ch. 146, sec. 6, his ratification not being in writing. Appeals dismissed with costs.

P. Clark Macnee, Picton, plaintiff in person.

C. H. Widdifield, Picton, solicitor for defendant Rose.

MARCH 5TH, 1902.

DIVISIONAL COURT.

CROWN CORUNDUM AND MICA CO. v. LOGAN.

Action — Order Dismissing — Undertaking — Default in Giving— Effect of.

Decision of MEREDITH, C.J., in Chambers, *ante* 107, affirmed on appeal. (FALCONBRIDGE, C.J., STREET, J.)

W. E. Middleton, for plaintiffs.

G. F. Macdonnell, for defendant.

MARCH 3RD, 1902.

DIVISIONAL COURT.

HEAL v. SPRAMOTOR CO.

Contract—Breach—Subsequent Letter as to Contract—Satisfaction—Waiver—Evidence.

Evans v. Powis, 1 Ex. 601, and Edwards v. Hancher, 1 C. P. D. 111, followed.

Appeal by defendants from judgment of LOUNT, J., in favour of plaintiff for $329.38 (less $150 paid into Court), balance alleged to be due for goods sold by sample and delivered. The defendants counterclaimed for damages for delay in delivering a portion of the goods—certain printed catalogues— and alleged that they were not of the paper, weight, or quality agreed to be furnished, and brought $150 into Court in full of plaintiffs' claim. The trial Judge held that the contract in writing between the parties, dated 25th February, 1901, was cancelled by an agreement embodied in a letter of 9th April, 1901, which he held had not in contemplation any claim for damages, and was a waiver in any event of any claim, and dismissed the counterclaim, rejecting any evidence outside the letter.

P. H. Bartlett, London, for plaintiffs.

George F. Shepley, K.C., for defendants.

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

MEREDITH, J.—The trial was too abruptly closed; the case should have been tried out in the usual way.

It may well be that, if there was no breach of the first agreement before the making of the second one, the defendants can have no claim now for breach of any term of the earlier agreement, unless also a breach of the later one.

But the defendants allege, and claim in respect of, breaches of the earlier agreement before the making of the later one; and the plaintiff denies such breaches, and alleges that, if there were any such, they were caused by the defendants' own default, and in any case were satisfied by the later agreement.

That agreement, however, does not purport to be in satisfaction or release any such claims; nor is it wholly inconsistent with such claims.

After breach there must be a release or accord and satisfaction.

There is no release; and the question of accord and satisfaction is one of fact, which must be determined upon all the relevant evidence which may be adduced at the trial. The latter agreement is evidence, and should have its due weight, but cannot exclude all other evidence.

A substituted promise may, if there be a good consideration, and if so intended by the parties, be a valid satisfaction of the breach of the prior promise. The question whether the parties so agreed is, in such a case as this, one for the jury, or for the trial Judge, if tried without the intervention of a jury; see Evans v. Powis, 1 Ex. 601; and Edwards v. Hancher, 1 C. P. D. 111.

There must be a new trial, unless the parties agree to a reference; and, as neither party sought the ruling in question, all costs should be costs in the action.

P. H. Bartlett, London, solicitor for plaintiffs.

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

[March 3rd, 1902.

DIVISIONAL COURT.

KEESO v. THOMPSON.

Work and Labour—Agent—Joint Liability—Guarantee—Damages for Unskilful Work—Set-off, not Counterclaim—Costs—Rule 1172.

Appeal by defendant Thompson from judgment of County Court of Perth for $105 and costs in favour of plaintiff, and for appellant on his counterclaim for $71.95 and costs, in action in that Court to recover $165.40, balance alleged to be due to plaintiff for sawing, skidding, and piling 128,208 feet of lumber delivered by defendants at plaintiff's mill in the village of Listowel. The action was dismissed as against defendant Marshall on the ground that, to the knowledge of the plaintiff, he acted only as agent for his co-defendant. The appellant brought into Court $90 as the balance due, alleging that the number of feet of lumber was only 103,669, according to log measure as agreed, and claimed $100 damages for the negligent, unskilful, and wasteful way in which the lumber had been sawed and piled.

The plaintiff cross-appealed on the ground that the amount, $71.95, awarded as damages to defendant Thompson was, upon the evidence, excessive, and that it also shewed that defendant Marshall was jointly liable as a principal.

H. L. Drayton, for defendant Thompson.

J. Idington, K.C., for plaintiff.

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

MEREDITH, J.—The action was rightly dismissed as against the defendant Marshall; though he had been willing to become jointly liable with defendant Thompson, that could not be accomplished without the latter's consent, and there is no evidence of such consent. If the plaintiff sue upon the transaction with Thompson, Marshall was neither directly nor indirectly a party to it: if upon the transaction with Marshall, he must recover against him only in the absence of evidence of his authority to bind Thompson; and if plaintiff sue Marshall as a guarantor of Thompson's debt, the action fails because the guarantee is not in writing. Holding judgment against Thompson, there was no other course but to dismiss the action, as was done, as against Marshall. Nor can the finding as to the balance due to the plaintiff upon his contract with the defendant Thompson be rightly disturbed; it is well supported in the great mass of contradictory evidence adduced at the trial. . . . It is enough to say that the conclusion as to the amounts has not been displaced upon, but is well supported by, the whole evidence in the case. Judgment, however, in such a case as this, ought not to have been given as if upon cross-actions, but the amount allowed in respect of defective work should have been deducted from the amount which would have been payable for the work if properly done, and in accordance with the contract, and judgment entered for the balance only. There is nothing to shew that any other than the usual judgment in such a case should be entered: see Cope v. Hicks, 2 Cr. & M. 214; Lowe v. Holme, 10 Q. B. D. 286; Moore v. Gooderham, 10 O. R. 451; Girardot v. Welton, 19 P. R. 162 and 201; Ryan v. Fraser, 16 L. R. Ir. 283. The defence of tender and payment into Court was not supported by the evidence.

Appeal allowed with costs. Judgment to be entered in the Court below for plaintiff for $33.70 damages with costs as provided in Rule 1132.

Cross-appeal dismissed with costs, if there be any costs of it not taxable as costs of the appeal. The money in Court should be paid out to the defendant Thompson.

Blewett & Bray, Listowel, solicitors for plaintiff.

J. J. Stevens, Teeswater, solicitor for defendant Thompson.

Morphy & Carthew, Listowel, solicitors for defendant Marshall.

FERGUSON, J. MARCH 5TH, 1902.

WEEKLY COURT.

RE ASSELSTINE.

Statutes—Settled Estates Act—Who may not Petition—Partition Act —Who may not Partition.

Petition by executor and devisees of Sarah Asselstine, deceased, for order for sale under Settled Estates Act of certain land, or for leave to petition for partition of it or part of it. Michael Asselstine devised the land in question in 1870 to his two daughters Elizabeth and Sarah as tenants in common. Sarah died in 1885, and by her will devised her half interest to her sister for life, with remainder to certain nephews and nieces, the petitioners. Her will conferred upon the petitioner, the executor, a power to sell her half interest with the consent of the devisee, the life tenant, Elizabeth Asselstine.

J. H. Moss, for petitioners.

E. D. Armour, K.C., and G. F. Ruttan, Napanee, for Elizabeth Asselstine. Without the consent of the tenant for life, there is no jurisdiction under sec. 22 of the Settled Estates Act: Re Taylor, 1 Ch. D. at p. 431, 3 Ch. D. 145, construing sec. 16, the corresponding section in the English Act; see also *Ex p.* Puxley, 2 Ir. Eq. 237; Re Atkinson, 30 Ch. D. at p. 612, per Pearson, J.; Re Merry, 15 W. R. 307; Re Hurd, 2 H. & M. at pp. 201, 202, per Wood, V.-C.; Middleton's Settled Estates Act, pp. 30, 31; Re Dennis, 14 O. R. 267; and as to partition, Murcar v. Boulton, 5 O. R. 164, and Fisken v. Ife, 28 O. R. 595.

Moss, in reply, referred to the Partition Act, sec. 5: Lawlor v. Lawlor, 9 P. R. 455; Martin v. Knowllys, 8 T. R. 145.

FERGUSON, J., gave oral judgment at the opening of the Court the day following the argument, holding that under neither Act could an order be made.

Motion dismissed with costs.

J. Bawden, Kingston, solicitor for petitioners.

Morden & Ruttan, Napanee, solicitors for Elizabeth Asselstine.

STREET, J. MARCH 7TH, 1902.

CHAMBERS.

CLERGUE v. McKAY.

Discovery—Production — Privilege — Letters between Solicitor and Client—Nature of, must be Set Forth in Affidavit

Gardner v. Irvin, 4 Ex. D. 49, O'Shea v. Wood, [1891] P. 286, and Ainsworth v. Wilding, [1900] 2 Ch. 315, followed.

Hoffman v. Crerar, 17 P. R. 405, referred to.

Appeal by plaintiff from order of Master in Chambers dismissing plaintiff's application for a better affidavit on production from defendant Preston, who objected to produce certain letters between himself and H. & M., solicitors, "on the ground that they were all communications which passed between myself and my solicitors, H. & M., with reference to matters which are now in question in this action, and that the same are confidential communications between myself and my solicitors, and as such are privileged from production. That when the said communications passed between myself and the said H. & M., the said H. & M. bore to me the relationship of solicitors, and my said communications were written to them in their capacity of solicitors for me, and their communications to me were written by them in their capacity of solicitors for me, in reference to the matters which are now in question in this action." The evidence shewed that the solicitors acted as agents for the defendant Preston, who was the owner of the land in question, in offering to sell it to an agent for the plaintiff on the 13th December, 1899. At that time the legal estate was in the other defendant (the wife of one of the solicitors.) On the 12th January, 1900, she conveyed the legal estate to her co-defendant, Preston, and on that day the first of the letters was written by the solicitors to Preston. The next letter was from Preston to them on the 20th January, 1900. Then there was a letter from the solicitors to Preston on the 6th February, 1900, and one from him to them on the 10th February, 1900. There was then a gap in the correspondence until the 23rd May, 1900. The present action (for specific performance) was begun on the 29th May, 1900.

A. B. Aylesworth, K.C., and R. U. McPherson, for plaintiff.

W. M. Douglas, K.C., for defendant Preston.

STREET, J.—The affidavit on production must not only state that the correspondence is confidential and of a professional character, but the nature of it must be set forth without any ambiguity whatever, in order that there may be no doubt as to its being privileged. The solicitors were acting as agents for the sale of the defendant Preston's land very shortly before the first letter was written; and it seems to be the beginning of the correspondence in question. It is not unreasonable to require that the client should give some more definite description of the correspondence than that it is written "in reference to the matters which are now in question in this action," for that description does not necessarily imply that the client was by his letters consulting the solicitors in their character of solicitors and re-

ceiving legal advice from them by the letters written by them to him: Gardner v. Irvin, 4 Ex. D. 49; O'Shea v. Wood, [1891] P. 286; and Ainsworth v. Wilding, [1900] 2 Ch. 315. This decision goes beyond Hoffman v. Crerar, 17 P. R. 405, but that case did not go as far as the authorities require. Appeal allowed. Defendant Preston to file a better affidavit. Costs in the cause.

Simpson & Rowland, Sault Ste. Marie, solicitors for plaintiff.

Hearst & McKay, Sault Ste. Marie, solicitors for defendant.

STREET, J. MARCH 8TH, 1902.

CHAMBERS.

MORRISON v. GRAND TRUNK R. W. CO

Discovery—Examination of Officer of Corporation—Railway Company—Engine-driver—Rules 439, 461.

An engine-driver is not an officer of a railway company examinable for discovery under Rule 439, especially having regard to the provision of Rule 461 (2) that his examination would be evidence against the company.

Appeal by defendants from order of Master in Chambers for examination by plaintiff of one Spratt, an engine-driver of defendants, for discovery, as an officer of the defendants. The action was brought by the widow of a conductor who was killed while in charge of a passenger train of defendants, to recover damages for his death. Spratt was the driver in charge of the engine of the train in question. One Costello, the defendants' roadmaster at the place of the accident, was present and took charge of the train, in place of deceased, when it proceeded.

D. L. McCarthy, for defendants.

J. G. O'Donoghue, for plaintiff.

STREET, J.—It is important to bear in mind the provisions of Rule 461 (2). . . . Under this Rule the examination of every one who is examined as an officer of the corporation is treated as evidence against the corporation in the same manner and to the same extent as the examination of a party is treated as evidence against himself. The result is, that a plaintiff in an action against a corporation has the advantage in many cases of giving important evidence against the defendants by means of the depositions, taken out of Court, of so called officers of the corporation, who may be unfriendly to it, and who are not seen by the jury unless called by the corporation as its own witnesses. We should not extend the meaning of Rule 439 to any class

of employees without being satisfied that they properly come within it.

In Leitch v. Grand Trunk R. W. Co., 12 P. R. 541, 671, 13 P. R. 369, the grounds upon which it was considered by the Divisional Court and by Osler and Maclennan, JJ.A., in the Court of Appeal, that the conductor was examinable, were that he was intrusted by the company with the charge of their train in its transit, and that he was, therefore, for that particular occasion and purpose, to be treated as an officer.

These reasons do not appear to be applicable to the position of the driver of the engine attached to the train, for he, as well as the brakesmen, is not in charge of the engine or the cars during their journey, but is under the control of the conductor.

[The learned Judge then referred to Knight v. Grand Trunk R. W. Co., 13 P. R. 386; Dawson v. London Street R. W. Co., 18 P. R. 223; and Casselman v. Ottawa, etc., R. W. Co., 18 P. R. 261.]

None of these cases seems to me to extend the principle upon which a conductor was admitted by the Courts to be treated as an officer of the company. The principle would undoubtedly be extended at once to employees of an inferior grade, and the difficulty of drawing a line anywhere would be greatly increased, if we were to hold an engine-driver examinable under the Rule.

Appeal allowed.

Lee & O'Donoghue, Toronto, solicitors for plaintiff.

Bell & Biggar, Belleville, solicitors for defendants.

MacMahon, J. March 7th, 1902.

TRIAL.

BURRELL v. LOTT.

Easement—Right of Way—Repairs—Dominant and Servient Tenements—Water—Right to Flow of—Injunction.

Action (1) for a declaration that the defendant was not entitled to a right of way over the plaintiff's premises, or to maintain on the plaintiff's premises a certain pier, and for an injunction restraining the defendant from trespassing; (2) for a declaration that the plaintiff was entitled, in connection with his foundry business, to take and discharge into the tail race under the defendant's mill one-third of the water of the river Moira; (3) for an injunction restraining the defendant from obstructing the tail race or impeding the free discharge of waste water from the plaintiff's water wheel; (4) for a mandatory order upon the defendant to remove all obstructions from the tail race.

The action was tried without a jury at Belleville on the 19th, 20th, and 21st November, and at Toronto on the 24th December, 1901.

A. B. Aylesworth, K.C., and W. N. Ferguson, for plaintiff.

E. D. Armour, K.C., and E. G. Porter, for defendant.

MacMahon, J.—The properties now owned by the plaintiff and defendant respectively were on the 5th January, 1867, conveyed in one parcel to the late Ellis Burrell and William Bleecker. . . . In July, 1870, Bleecker conveyed to Burrell his interest as a tenant in common. In the conveyance Bleecker covenanted to keep in repair the north part of the mill dam across the Moira, and Burrell to keep the south part in repair. Burrell died in 1882, and by his will devised to his son, the plaintiff, a portion of the property, called "the foundry property," and described as lying to the east of the lane leading from Mill street in the direction of the mill dam, and situate on the north side of Mill street, extending to the centre of the river, with the right to use the lane in common with the owners of the property to the west thereof; also the right to use the waters of the river to the extent of one-third thereof, flowing to the south of the river, and to discharge the waste water into the river at the most convenient place therefor, and subject to the charge of keeping the south half of the mill dam in repair to the extent of one-third of the expense thereof, etc. The testator also directed that, if his son-in-law Campion desired to purchase the property to the west of that devised to plaintiff, it was to be conveyed to him by the executors at the price of $20,000. The executors, on the 11th April, 1882, conveyed the same to Campion. The description in this conveyance covered the whole lot, but there was excepted thereout the land devised to plaintiff. The conveyance was subject to the covenants in the deed from Bleecker to Burrell. In 1876 defendant Lott became the tenant from Ellis Burrell of the foundry building and water power, and continued as such till the latter's death in 1882; after which (the plaintiff then being 12 years old), his guardian leased the foundry proper to Lott, who remained tenant thereof till 1893, when he surrendered possession to plaintiff. Burrell's executors, under the power of sale in a mortgage made by Campion of the property conveyed to him, sold and conveyed to W. H. Potter and the defendant Lott in 1885, and Potter conveyed his interest to Lott in 1888.

Dealing first with what is called the "north pier." . . . James F. Serrex, who was in Ellis Burrell's employment prior to 1867, said that in the spring of that year the dam across the river, and a pier above the south end of the dam, were swept away by freshets. He said that, prior to the destruction of the dam, some cribbing was placed out from the bank of the river, as a retaining wall, to prevent the earth from being carried away from the bank into the river, during high water. This crib-work, built out 14 or 16 feet into the river, was known as "the fire-stand," or north pier. . . . Mr. Baker stated that the fire-stand had been altered a great many times by pieces being carried off from the end by the spring freshets, and if injured by the freshets of 1878 and repaired in that year, no appreciable extension was made to it. . . . I am, however, satisfied, and I so find, that it was not until 1887, after the fire-stand was injured by the freshet, and upon its being rebuilt, that it was extended to its present length into the river. . . . In 1885 the defendant became the owner in fee of the premises he now occupies, and in 1887 he was tenant of that portion owned by the plaintiff, so that, when the fire-stand was extended to its present position in the latter year, the defendant was in occupation of the whole property. . . . Even had I found that the extension to the north pier was made in 1878, and therefore existed in practically its present condition when the defendant became the purchaser of his present premises, he could not claim a right of way over the plaintiff's land to make repairs to the dam and pier, unless it was a right of way occupied and enjoyed at that time as appurtenant to the premises. The 12-foot lane was designed as the way by which repairs could be made to the dam. The dam is west of the line of the plaintiff's foundry, which forms the eastern boundary of the lane, and the plaintiff, under the devise to him, is charged with one-third of the cost of keeping the dam in repair, with right of entry to repair. . . . As the pier did not exist in its present condition when the defendant purchased in 1885, nor did the pier then existing produce the beneficent effects which it is claimed are produced by the existing pier, the defendant cannot claim a right to repair it so as to keep it extended to its present position in the river. . . . The channel through which the water flows which propels the wheels under the plaintiff's foundry and the defendant's factory is an artificial one, and where that is the case "any right to the flow of the water rests on some grant or arrangement, either proved or presumed, from or with the owners of the

lands from which the water is artificially brought, or on some other legal origin:" Rameshur v. Koonj, 4 App. Cas. 121.

The first devise under the will of Ellis Burrell is of the foundry property to the east of the lane with "the right to use the waters of the said river to the extent of one-third thereof flowing to the south of the said river and to discharge the water into the said river at the most convenient place therefor." The most convenient place is that provided by the channel created therefor by the devisor, Ellis Burrell. And the down stream tenement was, as to the right to the flow of one-third of the water of the river, the servient tenement, and when the defendant became the purchaser thereof he was the servient owner, and as such must suffer the water to flow uninterruptedly over the servient tenement: Goddard on Easements, p. 21. . . .

There is a very large diminution of the power to which the plaintiff is entitled, caused by the platform and wheel of the defendant obstructing the flow of the water through the flume and backing it up on the plaintiff's wheel.

Judgment for the plaintiff as prayed.

Millar, Ferguson, & Hughes, Toronto, solicitors for plaintiff.

E. G. Porter, Belleville, solicitor for defendant.