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CARTWRIGHT, MASTER. DECEMBER 15TH, 1903.

CHAMBERS.

KELLEY v. MCBRIDE.

Life Insurance—Change of Beneficiary—Surrender of Policy—Issue of Paid-up Policy—Possession of Policy.

Summary trial of interpleader issue under Rule 1110 to determine who is entitled to a sum of money payable under a policy of insurance on the life of Matthew E. Kelly, deceased.

The policy provided that the sum insured should be paid to "Mary Kelly, mother, or, in the event of her prior death, to Mary Ann McBride, sister, or, if the insured shall survive the aforesaid beneficiaries, to his legal representatives or assigns." Mary Kelly died on the 28th September, 1901, and the insured on the 2nd May, 1903. The policy was a paid-up one for $500, issued in 1894, in consideration of the surrender of a policy for $1,000 and a payment of $148.62. Mary Kelly was the sole beneficiary named in the surrender policy. The $500 was claimed by Mary Ann McBride and by the executors of the insured, and the insurance company paid the amount, less their costs, into Court.

J. Bicknell, K.C., for Mary Ann McBride.

J. T. Loftus, for the executors.

THE MASTER.—It was argued by Mr. Loftus that the original policy for $1,000 having named the mother as beneficiary, there was no power to vary this disposition. He cited R. S. O. 1887 ch. 136, sec. 6; 56 Vict. ch. 32, sec. 8 (2); 59 Vict. ch. 45, sec. 1; 60 Vict. ch. 39, secs. 159, 160. I have examined these statutes. They do not seem to me to bear out the argument that in the present case there was no power to change the original policy into one making another beneficiary not of

the preferred class; and that therefore the disposition has failed and the money becomes part of the residuary estate of the insured. It is to be observed that the insured did not assume in any way to exercise control over this policy after his mother's death.

With the first policy, it seems to me, we have nothing to do. If the mother acquiesced in the change, it was clearly for her benefit to get a certainty by means of a paid-up policy. Even if otherwise, it surely cannot be denied that she might either have released her claim to her son or made over her contingent interest to any one else. Either she assented to the change, assuming that her consent was necessary, or she did not. In the first case she had no right to complain. In the second case her rights against the company are not affected. However this may be, it is enough to say that no claim is being made by any one on her behalf.

But I cannot see how the insured was prevented from leaving to his mother, as he did, all the benefits she would have taken under the first policy, and at the same time providing for the case of her decease in his lifetime. See R. S. O. 1897 ch. 203, sec. 151. He has done so, and the evidence of Mrs. McBride makes it very clear why he did so. Her evidence also shews that after the mother's death Mr. Kelly read the policy in question and handed it back to her, saying, "There is $500 for you." He sealed it up again and told me that no person could take it from me, as it was mine and would pay me for the trouble I had with mother." . . . In any case possession of the policy would be sufficient to enable her to hold it: see Rummens v. Hare, 1 Ex. D. 169.

The money must be paid out to Mrs. McBride, and the plaintiffs must pay the costs, including the costs of payment into Court which were deducted from the $500.

BRITTON, J. DECEMBER 15TH, 1903.

WEEKLY COURT.

WENDOVER v. NICHOLSON.

Gift—Parent and Child—Confidential Relationship—Conveyance of Land—Assignment of Mortgage—Action by Administrator of Parent's Estate to Set aside—Improvidence—Lack of Independent Advice—Reference—Account—Inquiries—Statute of Limitations—Costs.

Appeal by plaintiff from report of an official referee to whom the action was referred under R. S. O. 1897, ch. 62, sec. 29.

The action was brought by the daughter and administrator of the estate of Ralph Nicholson, deceased, against her brother Edward Nicholson, to set aside a conveyance to him from his father of land in the district of Muskoka and an assignment from his father to him of a mortgage on land. The conveyance and assignment were both dated 23rd May, 1896, and Ralph Nicholson died on 11th March, 1898, at the age of 82.

The referee found in favour of defendant.

O. M. Arnold, Bracebridge, for plaintiff.

E. E. A. DuVernet, for defendants.

BRITTON, J.—With great respect, I am unable to agree with the learned official referee in his conclusion that the conveyance of the farm and the assignment of the mortgage should stand. If it were merely a question of deciding upon conflicting testimony, I should hesitate before differing from the trial Judge, but it seems to me that upon the undisputed evidence, indeed upon the evidence of defendant himself, he has not satisfied the onus cast upon him of shewing how the transaction can be supported. . . . It appears that as long ago as 1888 defendant stood in a very confidential relation to his father in dealing with his father's money. . . . It was practically conceded on the argument by counsel for defendant that what was done by Ralph was improvident, and if attacked in his lifetime could not have been supported. It gave all he had; there was no power of revocation—no provision for the old man's maintenance in sickness or health, or for his burial. It has been found by the official referee (with which finding I wholly agree) that the conveyance and assignment were prepared and executed without being read over to Ralph and without his having any independent advice.

The defendant in his statement of defence set up that the conveyance and assignment were made for good consideration, viz., labour performed, money and food furnished, and services rendered for 25 or 30 years prior thereto.

I do not think the transaction can be upheld either as a gift or one for adequate consideration.

The only cases I need refer to are: McCaffrey v. McCaffrey, 18 A. R. 599; Waters v. Donnelly, 9 O. R. 391; Fry v. Lane, 40 Ch. D. 312; Beemin v. Knapp, 13 Gr. 398.

The appeal should be allowed, and the conveyance of the land and the assignment of the mortgage should be declared void and be cancelled.

The land must be sold, and the mortgage collected, or mortgage security realized for the estate, and estate wound up by the plaintiff as administrator of Ralph Nicholson. Defendant must account to plaintiff as administratrix for the money of the intestate or of his estate that came to defendant's hands and for the rents and profits of the land since the date of the conveyance. And for the purpose of ascertaining this there should be a reference to the Master at Bracebridge, who upon the inquiry shall ascertain whether defendant is entitled to be paid for any labour performed, money and goods furnished, and services rendered, as set out in paragraph 4 of the statement of defence, and if so, to what amount; and upon such inquiry the defence of the Statute of Limitations, if applicable, shall be available to either party as to any items on either side.

As to costs, as no moral fraud has been proved against defendant, I will follow the course adopted in Fry v. Lane and Whittel v. Bush, 40 Ch. D. 324, and not give costs against him. The defendant is to get no costs, but is to bear his own costs except the costs of the day as ordered by Street, J., 10th May, 1901, for the sittings of the Court in May, 1901, at Bracebridge. The plaintiff as administratrix is to be paid her costs, including the costs paid by her to defendant, out of the estate. Costs of reference reserved.

MACMAHON, J. DECEMBER 15TH, 1903.

WEEKLY COURT.

ORILLIA EXPORT LUMBER CO. v. BURSON.

Bankruptcy and Insolvency—Assignment for Benefit of Creditors—Assignee—Solicitor for Preferred Creditors—Appointment—Approval—Application to Remove—Injunction—Solicitor for Estate Partner of Assignee—Debtor of Estate.

Motion by the plaintiffs, creditors of George Wilson & Co., insolvents, for an order for the removal of the defendant from the office of assignee for the insolvents under an assignment for the general benefit of creditors made pursuant to the Assignments Act, and restraining defendant from entering into any contract with any person for the sale or disposal of the assets of the estate of the insolvents, or from settling or admitting the claim of the Quebec Bank as preferred creditors of the estate, or from acting as assignee, upon the grounds that the defendant is a nominee of the bank, and solicitor for the bank; that the defendant's partner, whom he employs as

solicitor for the estate, is a debtor to the estate; that defendant has not managed the estate properly, and has not kept the accounts and so dealt with the estate as an assignee should do, and has acted improperly in selling or attempting to sell part of the assets to the wife of one of the insolvents; and that he has not called upon the secured creditors to value their security.

A fire occurred on the premises of the insolvents on 26th June, 1903, which destroyed a large quantity of lumber and two of the buildings, and after the fire, at an informal meeting of the creditors, the insolvents were requested by the unsecured creditors to make an assignment to Mr. Osler Wade. The insolvents, however, made an assignment to the defendant, the solicitor for the Quebec Bank.

After the assignment, at a formal meeting of the creditors, a motion was made to have one W. G. Wade appointed assignee in place of defendant, but the creditors, by a vote of 49 to 30, confirmed defendant as assignee.

A. C. McMaster, for plaintiffs.

D. L. McCarthy, for defendant.

MacMahon, J.—. . . . Assignments for the general benefit of creditors are frequently made by insolvents to one of their creditors, or to some person named by the creditor; and the general body of creditors, if they object to the assignee, have the remedy in their own hands, for at the first meeting of creditors the majority in number and value may, under sec. 8 (1) of the Assignments Act, substitute another person . . . for such assignee. So that, if it were the fact that the insolvents, at the instance of the Quebec Bank, made the assignment to the solicitor for the bank, that did not prejudice the general body of creditors, for it was in their power to have removed him at the meeting which was called; but, instead of doing so, the majority of the creditors appeared to have confidence in him, for they continued him in the assigneeship.

The assignment being made to the solicitor of the bank cannot of itself be regarded as objectionable, so long as the assignee appoints an independent solicitor to act as solicitor for the estate. This is necessary in order that the duty of the assignee to the creditors may not conflict with his duty as solicitor to the bank.

I do not think the solicitor appointed by the assignee should longer continue to act as such, as he has been solicitor for the insolvents, and is largely indebted to the estate. His duty as solicitor may conflict with his duty as a debtor to the

estate, and with such an adviser the position of the assignee might be no better than if he himself continued to occupy the dual position of solicitor to the bank and assignee to the estate.

The material before me indicates that the bank are fully secured for the indebtedness of the insolvents to them. If this be so, the bank may deem it unnecessary to file a claim against the estate. See In re Brampton Gas Co., 4 O. L. R. 509, 1 O. W. R. 543.

If the bank should settle the claim against the insurance companies so that the rights of the other creditors of the estate are prejudiced thereby, the creditors are not without remedy. Any surplus in the amount legally payable by the insurance companies would, after satisfying the bank's claim, be held by the bank as trustee for the assignee of the estate.

The defendant undertaking to change the solicitor for the estate as indicated, the motion will be enlarged to the trial. Costs to be in the cause to defendant unless otherwise ordered by the trial Judge.

Reference may be had to Story's Equity, sec. 1289; Cassels on Assignments, 3rd ed., p. 50.

DECEMBER 15TH, 1903.

DIVISIONAL COURT.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. LEADLEY.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. MOORE.

Solicitor—Authority to Bring Action in Name of Company —Determination of Question—Dismissal of Action— Adding Shareholders as Parties.

Appeals by the defendants from orders of MEREDITH, C. J., in Chambers, ante 1075, affirming orders of Master in Chambers, ante 944.

W. H. Blake, K.C., and A. J. Russell Snow, for appellants.

A. B. Cunningham, Kingston, for plaintiffs.

THE COURT (FALCONBRIDGE, C.J., STREET, J., MEREDITH, J.) dismissed the appeals with costs.

DECEMBER 15TH, 1903.

C.A.

WEBB v. CANADIAN GENERAL ELECTRIC CO.

Appeal—Court of Appeal—Order Directing New Trial—Second Trial Taking Place Before Appeal Heard—Abandonment of Appeal—Order Quashing.

Appeal by defendants from the order of a Divisional Court (ante 322) setting aside a nonsuit and directing a new trial.

After the appeal had been set down the action came on for a second trial, and judgment was given in favour of plaintiff (ante 865).

Upon the appeal coming on for hearing, W. R. Riddell, K.C., and John Green, Peterborough, for plaintiff, objected to the appeal being heard, the new trial directed by the order appealed against having actually taken place.

E. E. A. DuVernet, for defendants, appellants.

The Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.) treated the objection as a motion to quash the appeal, and made an order quashing it without costs.

BRITTON, J. DECEMBER 16TH, 1903.

CHAMBERS.

JOHNSTON v. RYCKMAN.

Costs—Taxation—Appeal—Items not Objected to before Taxing Officer.

Motion by plaintiff to vary terms of order (ante 1088) upon appeal from certificate of taxing officer.

W. R. Smyth, for plaintiff.

C. W. Kerr, for defendant Ryckman.

BRITTON, J., held that the costs of defendant Ryckman which really pertained to the matter of counsel fees in question on the appeal, should not be paid by plaintiff, but that there was no jurisdiction to interfere as to any items to which objections were not made before the taxing officer, as prescribed by Rules 1182 and 1183 : Snowden v. Huntington, 12 P. R. 248; Quay v. Quay, 11 P. R. 258 ; Platt v. Grand Trunk

R. W. Co., 12 P. R. 273; Cuerrier v. White, 12 P. R. 571. The taxing officer is to make the necessary changes as to counsel fees in accordance with the decision upon the appeal. No costs of this motion. Defendant Ryckman to have two days' time to appeal. Plaintiff to have one day after defendant appeals to cross-appeal.

MACMAHON, J DECEMBER 16TH, 1903.

CHAMBERS.

RE MAGER v. CANADIAN TIN PLATE DECORATING CO.

Division Court—Judgment by Default—"Money Demand"—Claim for Money Obtained by False Representations—Prohibition.

Motion by defendants for prohibition to the 1st Division Court in the county of Waterloo and to the bailiff of that Court against proceeding under an execution against defendants, on the ground that the clerk of the Court wrongfully and without jurisdiction entered judgment for default of a dispute notice by defendants, the claim not being for a debt or money demand and not being specially indorsed as required by sec. 113 of the Division Courts Act. The claim was for "money received by defendants for the use of plaintiff, being money obtained from plaintiff by defendants by false representations, $20, and interest thereon at 5 per cent., 50 cents." Section 113 provides that in actions for recovery of any debt or "money demand," where the particulars of plaintiff's claim with reasonable certainty and detail are indorsed on or attached to the summons, unless defendant leaves a dispute notice with the clerk, final judgment may be entered.

W. E. Middleton, for defendants.

W. Davidson, for plaintiff.

MACMAHON, J., held that the claim of plaintiff was a "money demand," being a demand for money had and received by defendants through an alleged fraudulent representation, and came within sec. 113, and no dispute notice having been left with the clerk, judgment was properly entered after the expiration of the time provided for leaving the same. Addison on Contracts, 10th ed., p. 429, Holt v. Ely, 1 E. & B. 795, Litt v. Martindale, 18 C. B. 314, and Robson v. Eaton, 1 T. R. 62, referred to. Motion dismissed with costs.

ELLIOTT, CO. J. DECEMBER 15TH, 1903.

TRIAL.

REX v. BURNS.

Criminal Law—Watching and Besetting—Criminal Code, sec. 523 (f)—Obtaining or Communicating Information.

The defendants were charged under sec. 523 (*f*) of the Criminal Code with watching and besetting the railway station with a view to compel L. & Sons to pay higher wages.

J. Magee, K.C., for the Crown.

J. C. Judd, J. M. McEvoy, and J. G. O'Donoghue, for the several defendants.

Upon the conclusion of the Crown's case, O'Donoghue asked to have the case withdrawn from the jury, upon the ground that the evidence shewed, at most, a watching and besetting to obtain or communicate information, and contended that the absence from the Code of the proviso that, under the English Act, permits watching and besetting merely to obtain or communicate information, made no difference in the law, as the proviso in the English Act was inserted ex abundanti cautela.

ELLIOTT, CO. J., allowed the case to go to the jury upon other grounds, but ruled that the absence of the proviso from the Code did not make the Canadian law different from that of England.

CARTWRIGHT, MASTER. DECEMBER 15TH, 1903.

CHAMBERS.

CLEMENS v. TOWN OF BERLIN.

Jury Notice—Striking out—Action against Municipal Corporation—"Non-repair of Street"—Obstruction.

Motion by defendants to strike out a jury notice filed by plaintiff. The statement of claim alleged that plaintiff, while driving in the town of Berlin, was injured by the upsetting of his vehicle "owing to a steam road roller unlawfully left standing on the public highway by the defendants."

C. A. Moss, for defendants, contended that the action was for injury "sustained through non-repair" of the street in question, within the meaning of sec. 104 of the Judicature Act.

J. E. Jones, for plaintiff, contra.

THE MASTER gave effect to defendants' contention referring to Castor v. Township of Uxbridge, 39 U. C. R. 113; Barber v. Toronto R. W. Co., 17 P. R. 293; Atkinson v. City of Chatham, 26 A. R. 821; Huffman v. Township of Bayham, 26 A. R. 514; holding also that it made no difference that the statement of claim did not shew whether defendants themselves placed the roller in the street.

Order made striking out jury notice. Costs to defendants in the cause.

MACMAHON, J. DECEMBER 17TH, 1903.

TRIAL.

MELLICK v. WATT.

Sale of Goods—Action for Price—Condition as to Test—Non-fulfilment—Dismissal of Action—Costs.

Action to recover $443.63, the price of a gas engine alleged to have been purchased by defendants from plaintiff. The engine was a second-hand one. The defendants were starting a brick yard at Attercliffe station, near Dunnville, and needed an engine to run their brick machine. Plaintiff offered to sell them the machine in question and put it in running order for $400. Afterwards plaintiff ascertained from one Dashwood, a mechanical engineer at Dunnville, that the cylinder of the engine was broken, and it would be necessary to send for a new one to Philadelphia. Plaintiff then offered to take $275 for the engine, the defendants to pay for the cylinder and the duty and freight thereon and Dashwood's account for repairs. Defendants agreed to purchase on these terms if, on being tested, the engine was found to be satisfactory for the purpose for which they desired it. A cylinder was procured and repairs made. After several tests at Dunnville, the engine was removed to Attercliffe, and Dashwood went there four times to make tests. On one occasion he got the engine to run the brick machine light, i.e., without any clay being in the machine. But the engine failed to run the brick making machine and the earth-crusher, which was part of the machinery, although the test was made when both were running light. During the last test, which was on 30th September, 1903, the engine did not run satisfactorily even to Dashwood himself, and after that defendants concluded that the engine would not be sufficient for their purposes, and sent it back to Dunnville. The removal of the engine took place on 23rd July, and plaintiff made no claim against defend-

ants until 7th October, after defendants had written a letter stating that the engine was not suitable for the work.

G. Lynch-Staunton, K.C., and W. D. Swayze, Dunnville, for plaintiff.

L. F. Heyd, K.C., and J. F. Macdonald, Dunnville, for defendants.

MacMahon, J., held upon the evidence that defendants were not liable, and dismissed the action, but, as there was a misunderstanding between Dashwood and defendants as to the arrangement upon which the engine was to be removed and tested, he dismissed it without costs.

December 17th, 1903.

DIVISIONAL COURT.

LINTNER v. LINTNER.

Husband and Wife—Husband Detaining Wife's Property—Action of Detinue—Proof of Demand and Refusal—Evidence of Conversion.

Appeal by defendant from judgment of Falconbridge, C.J., in favour of plaintiff in an action of detinue. The plaintiff was the wife of defendant. On 21st October, 1902, she left her husband under circumstances which, according to her contention, entitled her to alimony. When she left, there remained in the dwelling house in which they had lived, and in which the husband continued to live, and on the farm on which the dwelling house was situated, personal property belonging to the wife, consisting of household furniture, etc., and a number of cows and sheep. The claim was for the detention of this property and for pecuniary damages for the detention. At the trial no evidence was given either of a refusal by defendant to deliver the property to plaintiff or of any demand of it by her before action, but plaintiff endeavoured to shew that on 27th November, 1902, after the commencement of the action, there had been a demand and refusal, and contended that this was sufficient to entitle her to recover, upon the authority of Blackley v. Dooley, 18 O. R. 381, Morris v. Pugh, 3 Burr. 1242, Wilson v. Girdlestone, 5 B. & Ald. 847, and Thorogood v. Robinson, 6 Q. B. 769.

R. S. Robertson, Stratford, for defendant.

J. P. Mabee, K.C., for plaintiff.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) held that a demand and refusal on the 27th November, 1902, were not proved. Also that, had the action been for the conversion of plaintiff's property, there was nothing shewn from which the inference that there had been a conversion could properly be drawn, but the proper inference from these facts and circumstances was that there had not been any conversion before action. The action not being for conversion, but for detention, it was open to question whether the rule of evidence referred to was applicable. See Isaac v. Clark, Bulstrode 308; Clements v. Flight, 16 M. & W. at pp. 46,47, 50; Jones v. Dowle, 9 M. & W. 19; Needham v. Rawbone, 6 Q. B. 771 n.; Wilkinson v. Verity, L. R. 6 C. P. 206.

Appeal allowed and action dismissed. No costs of appeal or of action. Issue as to ownership of property to be found in favour of plaintiff.

MEREDITH, J. DECEMBER 18TH, 1903.

CHAMBERS.

WILLIAMS v. HARRISON.

Writ of Summons—Renewal after Expiry—Statute of Limitations—Setting aside ex Parte Order—Material Evidence Withheld.

Appeal by plaintiff from order of Master in Chambers (ante 1061) setting aside order of a local Judge for renewal of a writ of summons after the time for service had expired, and the Statute of Limitations had run in defendants' favour.

C. A. Moss, for plaintiff.

T. P. Galt, for defendant Joseph Harrison.

MEREDITH, J., dismissed the appeal with costs.

MEREDITH, J. DECEMBER 18TH, 1903.

CHAMBERS.

RE PEINE v. HAMMOND.

Prohibition—Division Court—Verification of Documents—Affidavit of Defendant—Acknowledgments Given for Liquors Drunk in a Tavern—Discrediting Affidavit—Findings of Judge in Inferior Court.

Motion by defendant for prohibition to the 1st Division Court in the county of Middlesex, on the grounds that there

was no evidence of the signature of defendant to the I.O.U.'s and acceptance sued on and produced by plaintiff at the trial of the action other than the affidavit of defendant filed on an application for speedy judgment, and that the affidavit, if evidence at all, shewed that the I. O. U.'s were given for spirituous and malt liquors drunk in a tavern, over which cause of action a Division Court has no jurisdiction, and that the acceptance was paid.

W. H. Bartram, London, for defendant.

H. B. Elliot, London, for plaintiff.

MEREDITH, J.—There is no good reason why the affidavit should not have been put in by plaintiff in support of her case, and if there were, it would not form a ground for prohibition in any case within the jurisdiction of the Court. If there had been no other evidence at the trial, the Division Court ought not to have exercised jurisdiction as to the I. O. U.'s: Division Courts Act, sec. 71, sub-sec. 21. But a witness was examined who gave material indirect evidence in support of the claim, and upon the whole evidence the Judge discredited the allegation as to the consideration for the I. O. U.'s contained in defendant's affidavit, the defendant not being called as a witness in his own behalf. The Judge exercised his judgment, upon the whole evidence, in a case in which, whichever way decided, there would be a good deal that could be said in support of the judgment. There is nothing having a semblance of a perverse finding in order to retain jurisdiction, and whether he was right or wrong in his conclusions, there was no good ground for prohibition. The defendant's course, if desiring to carry the case further, was to have applied for a new trial, so that he might give evidence in his own behalf; his failing to give his evidence at the trial may have weighed much in the Judge's mind in discrediting, in part, his affidavit.

There is no ground for the motion as to the other part of the claim. It was unquestionably within that Division Court's jurisdiction, and whether rightly or wrongly decided is not a question for consideration upon this motion: see In re Long Point Co. v. Anderson, 18 A. R. 401.

Motion dismissed with costs.

MEREDITH, J. NOVEMBER 18TH, 1903.

CHAMBERS.

CONFEDERATION LIFE ASSOCIATION v. MOORE.

Pleading—Statement of Claim—Irregularity—Delivery after Notification that Defendant Does not Require—Defence and Counterclaim.

Appeal by defendant from order of Master in Chambers (ante 1087) dismissing defendant's motion to set aside the statement of claim for irregularity.

W. E. Middleton, for defendant.

C. P. Smith, for plaintiffs.

MEREDITH, J.—The Rules are to be so construed as to give effect, if possible, to all of them, and to bring all of their provisions into harmony.

That can substantially be done in this case, though there may be an apparent conflict between the provision giving a defendant power to deliver a statement of defence—treating the indorsement upon the writ as the plaintiff's claim—and the provision allowing a plaintiff three months after appearance to deliver a statement of claim. The harmony is made if the indorsement upon the writ becomes and is the plaintiffs' statement of claim. The Rule allowing the three months cannot give a right to deliver a second statement of claim.

That seems to me a fairly satisfactory solution of the main question involved in this motion, and to work out a convenient and satisfactory practice. The plaintiff cannot complain for, when making his indorsement, he does it with a knowledge that the defendant may treat it as the statement of claim, and it can be framed accordingly, and, after the delivery of the statement of defence, a plaintiff has such wide power of amendment that he can then frame his statement of claim, without any order or leave, in the form it would have taken if the defendant had not elected to treat the indorsement upon the writ as a statement of claim.

That the defendant may thus reduce the usual time allowed to a plaintiff to deliver his statement of claim is not an evil—anything that fairly brings the parties the quicker to

trial and out of litigation, ought to be deemed rather the opposite of an evil. And why should a party have three months or three days or three minutes to do that which he is altogether relieved from doing—in this case to deliver a pleading which he is not required and there is no need to deliver? There is no injustice or inconvenience in this solution of the difficulty. On the other hand, if the learned Master were right, the plaintiff could at his option render entirely futile the provisions of the Rule under which the defence was delivered, and bring about the anomaly, and wasted cost, of a defence duly delivered being rendered wholly ineffectual by the plaintiff choosing needlessly to deliver a statement of claim, instead of doing that which would be just as effectual and would harmonize everything—amend.

Which ever view of the question is taken, some difficulty is met. In this view of it, the plaintiff does not get three months' time to bring forth an unnecessary (having regard to the power to amend) pleading. The words of paragraph (b) of Rule 243 give that right, although the defendant may have appeared and stated that he does not require the delivery of a statement of claim, but not although he may, as the Rules permit and require—in Rule 586—have delivered a statement of defence. On the other hand, if the statement of claim may be delivered notwithstanding the delivery of the statement of defence, a plaintiff can, at his will, deprive a defendant of the right, conferred by Rule 247, in fact turn it into a dead letter, and all done under it into wasted energy and expense, without any substantial reason for the waste. And also some violence is done to Rule 256, which requires a plaintiff to reply, if he desires to reply, within three weeks after the defence has been delivered; and again to Rule 300 as to amending.

The provisions of the Rules in plaintiff's favour are not rendered wholly ineffectual; he may deliver a statement of claim within the three months if no statement of defence is delivered within the eight days, notwithstanding that the appearance may have stated that a statement of claim was not required.

For some purposes the indorsement upon the writ must be considered a pleading; that is made plain by the recent amendment of Rule 300. I would have thought it must always have been so where no other statement of claim was delivered and the defendant had pleaded to it as the plaintiff's statement of claim.

But in truth no very alarming wrong is done whether the one or the other mode of practice is adopted. It is more important to have it settled one way or other. The more convenient and more correct way to settle it is as I have indicated, and, therefore, the appeal will be allowed, and the statement of claim set aside; but all costs of the motion and appeal will be costs in the action, and if required, the plaintiff's time for replying or amending will be enlarged for three weeks from to-day.

OSLER, J.A. DECEMBER 18TH, 1903.

CHAMBERS.

GIBSON v. LE TEMPS PUBLISHING CO.

Partnership—Judgment against—Application for Leave to Issue Execution against Partners—Issue—Foreign Judgment—Corporation—Service—Manager of Business.

Appeal by Sara Moffet from an order of MACTAVISH, local Judge at Ottawa, made on the 10th November, 1903, on the application of the plaintiff for leave to issue execution against Flavien Moffet and Sara Moffet as members of the defendant partnership, on the judgment recovered against the partnership, directing an issue to be tried between Gibson as plaintiff and the Moffets as defendants, the questions to be tried being whether the Moffets were members of the partnership, and whether they were liable to have execution issued against them, or either of them, on the judgment.

The appeal was heard by OSLER, J.A., sitting in Chambers for a Judge of the High Court.

W. H. Barry, Ottawa, for appellant.

D. J. McDougal, Ottawa, for plaintiff.

OSLER, J.A.—The grounds of the appeal shortly stated are: (1) that the judgment sought to be enforced is null and void by reason of there never having been any service of the writ upon the defendants in the action, or upon the Moffets, or the alleged partnership; (2) that the judgment was recovered upon an affidavit which alleges no ground of action against the defendants in the action as a partnership, or

against the Moffets or either of them; (3) that the judgment having been granted improvidently and improperly, and being erroneous, the order applied for should be refused and the judgment vacated, etc.

The proceedings in this action have had a somewhat peculiar course. The action was commenced in the early part of 1902, by writ issued out of the County Court of the county of Carleton. It was removed by order of a local Judge (affirmed on appeal) into the High Court. The writ was specially indorsed with a claim for "$248.47, the amount due on and under a judgment recovered by the plaintiff against the defendant in the Superior Court in and for the district of Ottawa, in the Province of Quebec, on the 4th day of November, 1901," and was served on Flavien V. Moffet, manager of Le Temps Publishing Company, but without the notice in writing required by Rule 224 informing him in what capacity he was served. Le Temps Publishing Company appeared by the name mentioned in the writ as if sued as a corporation.

A motion for summary judgment was granted on the 4th June, 1902, for the sum claimed in the writ, upon an affidavit of one J. C. Brooke, verifying an exemplification of judgment recovered in Quebec against La Compagnie de Publication Le Temps. Against this order and judgment an appeal was taken before Britton, J., which was dismissed on the 7th June, 1902. From his judgment a further appeal was taken to a Divisional Court. Some of the grounds of both appeals were that personal service of process was in Ontario and not in Quebec; and the appearance thereto was involuntary (sic) and defendants should have leave to defend on the merits; (2) that the Court in Quebec had no jurisdiction; (3) the judgment was against public policy, and shews on its face that it treats as a wrong what is not such by our law, etc.; (4) that if the action in the Quebec Court is one for libel, defendants were entitled to notice of action, and the right of action is now barred.

This appeal was dismissed on the 9th September, 1902.

The plaintiff rested until March, 1903, when he obtained an order from Britton, J., to examine one Flavien Moffet as a judgment debtor. An appeal to a Divisional Court from this order was also taken, and dismissed on the 7th April, 1903, with an explanatory variation shewing that Moffet was to be examined as "one of the registered partners of the defendants, otherwise called La Compagnie de Publication Le Temps, under Rule 910."

Some of the grounds of objection to the order of Britton, J., were that the defendants were sued as a corporation on a judgment in the Province of Quebec against them as such, and they had appeared in and defended this action as a corporation, and the plaintiff was estopped from denying that they were a corporation and from taking proceedings against them as a partnership, or otherwise than as a corporation.

The next proceeding was that now in question, by which an issue has been directed to try whether the persons appealing are members of the partnership firm of Le Temps Publishing Co.

Several of the objections are similar to those taken on former appeals, and in addition it is contended that service of the writ in the present action having been made upon the manager of the partnership (if defendants are sued as a partnership) and no notice in writing having been then given to him pursuant to Rule 224, informing Flavien V. Moffet whether he was served as a partner or as a person having the control or management of the partnership business, or in both characters, the judgment in the action was irregular or void, etc., and the order in question was made without jurisdiction.

From the affidavits and papers before me on the present appeal, it appears that on the 4th November, 1901, a judgment was recovered in the Superior Court of the district of Ottawa, in Quebec, against certain defendants, sued and described as "La Compagnie de Publication Le Temps, a body politic and corporate, having its principal office and place of business in the city of Ottawa, in the Province of Ontario." The action was for a libel alleged to have been published in the issue of the then defendants' newspaper of the 3rd June, 1901. It was a defended action, but it does not appear whether the quality of the defendants as a corporation was brought in question. A partnership by the name of La Compagnie de Publication Le Temps was registered in the registry office of the city of Ottawa in August, 1900, the partners in which, according to the subscribed declaration, were Flavien Moffet and Sara Moffet, his wife. The partnership was dissolved about January, 1903.

It must be assumed that there is no incorporated company in Ontario of the name of La Compagnie de Publication Le Temps, or its English equivalent, as no affidavit on the subject has been filed, though leave was given to do so. Mrs. Sara Moffet makes an affidavit in which she states that she signed a declaration of co-partnership with her husband about

August, 1900, by the name of La Compagnie de Publication Le Temps. That she never took any part in and knows nothing about the business. That the writ herein never came to her knowledge, and she never knew that she was in any way liable to be proceeded against until served with notice of motion to issue execution against her. That she never authorized any one to take proceedings or to do anything for her in the name of the company; and that she cannot read or speak English.

The objections to the present order resolve themselves into two, namely: (1) that the judgment in this action against the partnership was recovered upon the judgment of a foreign Court against a corporation and not against the partnership firm now sued, in short, that such judgment disclosed no cause of action against a partnership firm; and (2) that the writ in this action having been served upon the manager of the business, and not upon either of the partners, the service was irregular or void because of the omission to serve the notice in writing on the manager informing him in what capacity he was sued, as required by Rule 224.

I have given this matter more consideration than I at first thought was due to it, because on looking through the papers it seemed not improbable that some miscarriage had occurred at an earlier stage of the proceedings. I am, however, quite clear that neither of the objections I have mentioned is open to the defendants on the present motion. It must now be taken that the judgment in this jurisdiction was recovered against a partnership firm, and not against a corporation. I do not know whether the action was intended to be so brought, but it must have been so assumed and held by the Divisional Court when they varied the order of Britton, J., for the examination of Flavien Moffet. The evidence before me is that when the original cause of action in the Quebec suit arose, and when this action was brought, there was a registered partnership firm, the members of which were Flavien Moffet and Sara Moffet, and it has not been shewn that there ever was in truth a corporation of that name in this Province.

If the judgment in the Quebec action is to be regarded as a judgment against a corporation or body corporate, and therefore not capable of being the foundation of an action thereon against a partnership firm of the same name, that is an objection which should have been taken on the motion to enter summary judgment, and it appears not to have been

then taken. This was the substantial ground of defence to the action, and, so far as I can see, it was not brought to the attention of the Court at the proper stage, and has never been decided. A similar difficulty attends the objection as to the service of the writ on the manager. On the motion for judgment it might have been shewn (unless the defendants had done something to waive the objection) that the requirements of Rule 224 had not been complied with, and therefore that there had never been an effective service of the writ upon the firm, the person served not being, in fact, a partner, and not having been informed by the prescribed notice that he was served as manager: Snow's Annual Practice, 1902, p. 655; Yearly Practice, 1904, p. 504. Or the firm might have moved to set aside the faulty service on the manager: Nelson v. Pastorino, 45 L. T. N. S. 564. Neither of these courses was taken, and there is now a judgment against a partnership firm which stands unimpeached, and which cannot be attacked in a collateral proceeding. While it stands the plaintiff has the right to enforce it by means open to him under Rule 228. He cannot proceed under part (1), clauses (b) or (c), because no one who has been served with the writ has appeared in his own name, or has admitted on the pleadings that he is, or has been adjudged to be, a partner, and because there is no one who has been individually, that is personally, served as a partner with the writ and who has failed to appear. He, therefore, proceeds under part (2), and applies for leave to issue execution against Flavien Moffet and his wife as being persons other than those mentioned in part (1) (b), (c), who are members of the partnership. As they dispute their liability, the question, not of the validity of the judgment against the firm, but of their liability as members of the firm to execution thereon, is to be determined, which will be done by the issue directed by the order appealed from. I refer to Exp. Young, 19 Ch. D. 124; Jackson v. Litchfield, 8 Q. B. D. 474; Adam v. Townend, 14 Q. B. D. 103; Ex. p. Ide, 17 Q. B. D. 753, 758.

The appellants relied upon Standard Bank v. Frind, 15 P. R. 438, and Munster v. Cox, 10 App. Cas. 680, but those cases are of no assistance to her now. They shew what the practice is up to judgment and afterwards in proceedings against a firm and the persons who compose it, but they do not decide that any irregularity in the mode of obtaining a judgment, regular on its face, against the firm, can be taken advantage of on the motion for leave to issue execution. Turcotte v. Dansereau, 27 S. C. R. 583, is a decision on the prac-

tice under the Civil Code, Quebec. While in principle it may be of use to the appellents or one of them on a substantive motion against the judgment, it shews that under the jurisprudence of that Province, as under ours, that is the proper way to attack the judgment.

Whether it may not be still open to Mrs. Sara Moffet, under the circumstances, to obtain relief by a direct motion against the judgment on her own behalf, I cannot say. Flavien Moffet has had and lost more than one opportunity of shewing the facts, and on his second appeal to the Divisional Court the judgment was, as against him, treated as a judgment against the registered partnership firm.

The appeal must be dismissed, and I suppose with costs.

CARTWRIGHT, MASTER. DECEMBER 19TH, 1903.

CHAMBERS.

BANK OF HAMILTON v. ANDERSON.

Venue—Recovery of Possession of Land—Violation of Rule 529 (c)—Motion to Change—Onus—Fair Trial.

Motion by defendant to change the venue from Hamilton to Milton. The action was to recover possession of land in the county of Halton, and plaintiffs laid the venue at Hamilton, contrary to Rule 529 (c).

G. H. Gilmer, for defendant.

A. L. Drayton, for plaintiffs, contended that the affidavits shewed that a fair trial could not be had in Halton because there were not a dozen persons in the whole county who were not either creditors or friends of creditors of the Anderson estate, and because the public mind had been prejudiced against plaintiffs by the newspapers published or circulated in the county.

THE MASTER held that the onus was on plaintiffs to shew that they were justified in their violation of the Rule, and they had not satisfied it, the affidavits being in direct conflict.

Town of Oakville v. Andrews, 2 O. W. R. 608, Hisey v. Hallman, ib. 403, Baker v. Weldon, ib. 432, Brown v. Hazell, ib. 734, and Unger v. Brennan, 14 P. R. 294, referred to. It is open to plaintiffs to apply to the trial Judge to dispense with the jury.

Order made changing venue to Milton. Costs to defendant in the cause.

CARTWRIGHT, MASTER. DECEMBER 19TH, 1903.

CHAMBERS.

WALL v. McNAB & CO.

Pleading—Statement of Defence—Denial—Justification—Embarrassment—Master and Servant—Wrongful Dismissal.

Motion by plaintiff to strike out the 2nd and 3rd paragraphs of the statement of defence in an action for wrongful dismissal of plaintiff from the employment of defendants as manager of their dressmaking and mantle departments. The 1st paragraph of the defence denied the allegations of the statement of claim. The 2nd paragraph stated that the plaintiff was employed by the week and paid a salary of $20 per week and was not entitled to any notice of dismissal. The 3rd paragraph stated that plaintiff was not qualified for the position she undertook to fill and was incompetent to reasonably discharge the duties of such position, and by reason of such incompetency and want of qualification and of misconduct on her part was dismissed.

W. J. O'Neail, for plaintiff, contended that paragraph 1 precluded any reference to the statement of claim so as to interpret paragraphs 2 and 3.

W. A. Lamport, for defendants.

THE MASTER held that there was no possible embarrassment to plaintiff; there was no difficulty in understanding what defendants set up. The only possible ground of objection was the use of the word "misconduct" in paragraph 3. That, however, must be referable to plaintiff's employment;

Smith on Master and Servant, Bl. ed., p. 134. Knowles v. Roberts, 38 Ch. D. at p. 270, Dryden v. Smith, 17 P. R. 512, and Smith v. Boyd, ib. 463, referred to.

Motion dismissed with costs to defendants in the cause.

STREET, J. DECEMBER 19TH, 1903.

TRIAL.

CROWDER v. SULLIVAN.

Promissory Note—Illegal Consideration—Unreasonable Restraint on Marriage—Mental Incompetency of Maker.

Action upon a promissory note for $1,500 dated 19th September, 1900, made by Albert Rose, payable three years after date to plaintiff or bearer, with interest at 5 per cent. per annum. Plaintiff was an unmarried woman, and defendant was the administrator of the estate of the maker. The defences were that there was no consideration or an illegal consideration, and that at the time of the making of the note the maker was of unsound mind. Plaintiff was in the service of the deceased as his cook and housekeeper. In 1893 a farmer named Levere paid his addresses to her, and they became engaged to be married, but in the spring of 1897 she broke off the engagement, telling Levere that Rose could not do without her. Rose then told her that if she would not marry and would remain with him as long as he lived he would give her $1,000 in cash or a note for $1,500, or would provide for her in his will. She said that it was in consequence of this promise that she broke off her engagement, and he fulfilled it in September, 1900, by giving her the note. In December, 1900, he became suddenly insane, and died in November, 1901. Plaintiff had been hired by the deceased originally at $8 a month, and her wages were never increased, but were paid to her regularly at that rate. The only consideration for the giving of the note was the agreement made in 1897, viz., that if plaintiff would not marry Levere or any other man so long as Rose lived, but would remain with him during his life, he would do one or other of the three things mentioned. The

deceased at this time was about 60 years of age and apparently in excellent health. Plaintiff was about 28 or 30.

D. B. Maclennan, K.C., and C. H. Cline, Cornwall, for plaintiff.

J. Leitch, K.C., and W. B. Lawson, Chesterville, for defendant.

STREET, J., held that the contract set up was one for an unreasonable period, and the consideration for the note was therefore an illegal one, and no recovery could be had upon it; Lowe v. Peers, 4 Burr. 2225; Hartley v. Rice, 10 East 22. The issue raised as to the capacity of the deceased at the time the note was made he found in favour of plaintiff.

Action dismissed. Plaintiff to pay general costs of action. Defendant to pay costs of issue found in plaintiff's favour. These costs to be set off pro tanto.