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FALCONBRIDGE, C.J. MAY 26TH, 1902.

TRIAL.

TOWN v. ARCHER.

Medical Practitioner—Malpractice—Limitation of Actions—Onus of Proof of Want of Care—Carelessness of Patient.

Action by plaintiff against the defendants, who are physicians and surgeons in the village of Port Perry. In May, 1899, the plaintiff fell and sustained injuries in her left ankle and foot, and she alleges that the defendants negligently, improperly, and unskillfully treated her, and her foot has become distorted and twisted, and she has been rendered permanently lame. The plaintiff is 60 years of age. The writ was issued on the 1st December, 1900.

N. F. Paterson, K.C., and S. S. Sharpe, Uxbridge, for plaintiff.

A. B. Aylesworth, K.C., J. H. Moss, and W. H. Harris, Port Perry, for defendants.

FALCONBRIDGE, C.J.—The action fails under R. S. O. ch. 176, sec. 41, not having been brought within a year from the termination of the defendants' services. It is clear that when the plaintiff called at the offices of the defendants on the 21st December, 1899, and on the 11th January, 1900, she did not go in the continued relation of patient, but as a person who had a grievance and was dealing with the defendants more or less at arms' length. She had called in another doctor to look at her foot on the 13th December, 1899, and had consulted a solicitor during the same month, and her conduct was tantamount to a dismissal of the defendants. On the merits, in an action of this kind, the onus of proof is on the plaintiff to shew that there was a want of due care, skill, and diligence on the part of the defendants, and that the injury was the result of such want of care, etc. The general rule is summed up by Erle, C.J., in Rich v. Pierpont, 3 F. & F. at p. 40. See also Lamphier v. Phipos, 8 C. & P., per Tindal, C.J., at p. 479. The dislocation of the astragalus sustained by plaintiff is admittedly infrequent, difficult of diagnosis, especially where there is a swelling of the parts, and one in which perfect restoration

is not, at the plaintiff's time of life, to be expected. Technically speaking the breaking or carrying away of portions of the periosteum constitutes a fracture, and on the evidence such a fracture cannot be expected to be disclosed after a lapse of two years by the aid of the X-ray. The sciograph is not a photograph; it is a shadow, and at present is not an infallible guide in fractures; to this extent at least, that it will not always disclose the line of fracture; and the possibility is that the bony covering being re-united might not shew at all. Assuming the diagnosis to have been correct, the preponderance of evidence shews that the treatment adopted was in accordance with good surgery. If it came down to a question between negligence or malpractice on the part of the defendants on the one hand, and the extreme improbability, even under favourable conditions, of perfect or even approximate restoration of the patient, the doctors in charge ought to have the benefit of the doubt. But there is abundant evidence to shew that the present unfortunate condition of the plaintiff is due to her own conduct in relaxing the bandages. Action dismissed with costs.

Paterson & Sharpe, Uxbridge, solicitors for plaintiff.

W. H. Harris, Port Perry, solicitor for defendants.

FALCONBRIDGE, C.J. MAY 28TH, 1902.

WEEKLY COURT.

RE COVENANT MUTUAL LIFE ASSOCIATION OF ILLINOIS.

Life Insurance—Insolvent Foreign Company—Deposit—Surplus after Payment of Canadian Claims—Interest on Claims.

Appeal by creditors, certain policyholders, from certificate of Neil McLean, an official referee, in a winding-up proceeding. The company was admittedly insolvent when the winding-up order in Canada was made on 25th May, 1900, but the company went into liquidation in the United States in December, 1899. The deposit (required by the Insurance Act and amendments) is sufficient to cover the appellants' claims, and there remains a balance of $1,900. The certificate disallows interest upon the claims.

C. A. Masten, for appellants. The referee was in the position of a jury and could have allowed interest: McCullough v. Newlove, 27 O. R. 630; Attorney-General v. Ætna Ins. Co., 13 P. R. 459 : and interest is clearly allowable : secs. 113 and 115 Judicature Act. The rule followed by the referee that interest is not recoverable because of insolvency does not apply, because here there is a surplus: Re Hunter Iron Works, L. R. 4 Ch. 643; Woodcock's Case,

16 Sol. J. 517; Re Commercial Bank of Manitoba, 10 Man. L. R. 187. No technical effect should be given to the mere fact of there being a winding-up order. R. S. C. ch. 124 defines terms upon which deposits are to be made and their application, and deposits are segregated from the general assets of a company and set apart for the purposes defined in sec. 107 of R. S. C. ch. 129.

W. B. Raymond, for foreign liquidator. The company is insolvent. The winding-up order of May, 1900, so expressly declares, and it has not been appealed from. The ordinary rules do not govern this case, but those do which apply to liquidation of companies: Ex p. Furneaux, 2 Cox Eq. Cas. 219; Re Intercolonial Contract Co., L. R. 13 Eq. 623; Rawlins & MacNaghten's Company Law, p. 379. The deposit is an asset of the insolvent company, sent from its head office in Galesburg, Illinois, and the American policy-holders will not be paid in full.

J. McBride, for Canadian liquidator.

FALCONBRIDGE, C.J.—This is a case in which a jury could and should have allowed interest at the legal rate. The rule as to interest in insolvency cases does not apply here, the question being simply one as to the application of the deposit under the terms of sec. 107. The company, being able to pay in full, should do so. Appeal allowed. Costs of all parties out of fund.

MAY 29TH, 1902.

DIVISIONAL COURT.

SHERLOCK v. WALLACE.

Deed—Absolute in Form, but Intended as Collateral Security—Redemption—Waiver—Counsel at Trial—Mistake.

Appeal by plaintiff from judgment of FERGUSON, J., ante p. 54.

T. W. Crothers, St. Thomas, for plaintiff.

J. M. McEvoy, London, and W. A. Wilson, St. Thomas, for defendants.

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

STREET, J., who said that, upon the findings below, the plaintiff was entitled to redeem upon payment of what was due upon the security, and that there must have been a misunderstanding as to the concession of counsel that, if the Judge thought that plaintiff had no right to profits, the action should be dismissed. The evidence shews that the counsel meant that the question of profits was the question to be determined at the trial, and not that he meant to waive the

plaintiff's right to redeem. Judgment directed to be entered for plaintiff for redemption, with a declaration that plaintiff is not entitled to credit for profits upon the stock transactions. No costs to either party up to hearing. Costs of appeal to plaintiff, to be set off. Further directions and subsequent costs reserved.

MAY 29TH, 1902.

C. A.

REX v. RICE.

Criminal Law—Murder—Conspiracy—Charge to Jury—Verdict—Criminal Code, secs 61 (2), 227 (d), 228 (a), (2).

Case reserved by FALCONBRIDGE, C.J., at the Toronto Autumn Assizes, 1901. The prisoner was indicted for the murder of William Boyd on the 4th June, 1901. There was only one count in the indictment. The evidence shewed that the prisoner, Fred Lee Rice, and two other men, Rutledge and Jones, were on the day in question being driven in a cab through the streets of the city of Toronto, all three handcuffed together (they being at the time under trial for burglary), with Boyd and another man, both constables, sitting opposite to them in the cab, when, at the corner of Gerrard and Sumach streets, a parcel containing two revolvers was thrown into the cab. The weapons were seized by Rice and Rutledge, and Boyd was shot dead. The trial Judge in his charge divided the case into two branches, first, whether Rice's hand fired the shot which killed Boyd, and second, if not, whether Rice was guilty of murder, under the circumstances, if the hand of one of the other men fired the shot. The Judge told the jury that up to the time the weapons were thrown into the cab, there was no evidence of a conspiracy or collusion, but that after that there might have been a common resolve to escape from lawful custody, and, if there was such common resolve or design, that Rice might be found guilty of murder. The jury disagreed as to the first branch of the case, and found the prisoner guilty on the second branch. Three questions were reserved for the consideration of the Court: (1) Was there any sufficient evidence to warrant the verdict? (2) Was the Judge's direction to the jury on the question of conspiracy or common design correct? (3) Was the finding of the jury a proper one, or was there a mistrial.

T. C. Robinette, for prisoner.

J. R. Cartwright, K.C., and Frank Ford, for Crown.

ARMOUR, C.J.O.—I am of the opinion that there was sufficient evidence to warrant the verdict as found by the

jury, that the direction of the learned Chief Justice to the jury on the question of conspiracy or common design was not one of which the prisoner could complain, that the verdict of the jury was a proper one, and that there was no mistrial.

The law is that "if several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was or ought to have been known to be a probable consequence of the prosecution of such common purpose:" Criminal Code, sec. 61 (2).

And culpable homicide is murder in the following case: "If the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one:" Criminal Code, sec. 227 (d).

Culpable homicide is also murder in the following case, whether the offender means or not death to ensue, or knows or not that death is likely to ensue: If he means to inflict grievous bodily injury for the purpose of facilitating his escape from lawful custody, and death ensues from such injury: Criminal Code, sec. 228 (a), and sub-sec. 2.

The evidence shewed that immediately upon the parcel containing the revolvers being thrown into the cab, the prisoner and Rutledge, at all events, and perhaps Jones, armed themselves with these revolvers and formed the common intention of, by the use thereof, prosecuting the unlawful purpose of escaping from lawful custody and of assisting each other therein, and that the shooting by one of them of Boyd was an offence committed by one of them in the prosecution of such common purpose, and that the commission thereof was or ought to have been known to be a probable consequence of the prosecution of such common purpose; each of them was therefore a party to such offence, and the offence, being murder in the actual perpetrator thereof, was murder in the prisoner, even if he were not the actual perpetrator thereof, and he was properly found guilty by the jury of the offence, the evidence, in my opinion, fully warranting their verdict.

There was nothing, in my opinion, in the charge of the learned Chief Justice, nor in his subsequent instructions to the jury, both of which must be read together, of which the prisoner could properly complain.

The jury in coming into Court and their foreman saying, "On the first count we disagree," and on being asked by

the clerk, "How do you find on the second count?" saying, "On the second count we find the prisoner guilty," were obviously referring to the two propositions or branches of the case submitted to them by the learned Chief Justice.

Their verdict must, however, be taken to be the verdict recorded by the learned Chief Justice on the back of the indictment, and acknowledged by the jury to be their verdict in these words: "The jury find the prisoner guilty. They are unable to agree as to whether the prisoner fired the shot which killed William Boyd."

The finding of the jury was, therefore, a proper one, and there was no mistrial.

The conviction will therefore be affirmed.

OSLER, J.A., delivered a written opinion concurring. MACLENNAN, MOSS, GARROW, JJ.A., verbally concurred.

MAY 21ST, 1902.

C. A.

FRANKEL v. G. T. R. CO.

Appeal to Supreme Court of Canada—Leave.

Motion, *ex cautela*, by defendants for leave to appeal to the Supreme Court of Canada from the judgment of this Court, ante p. 254.

H. E. Rose, for defendants.

G. F. Shepley, K.C., for plaintiffs.

The Court (OSLER, MACLENNAN, GARROW, JJ.A.) was of opinion that both on claim and counterclaim the defendants had the right to appeal without leave; but that, if leave were necessary, it was not a case in which it would be granted. Motion dismissed with costs, without prejudice, so far as this Court can say so, to the defendants' right to apply direct to the Supreme Court for the leave desired.

Decision of MACLENNAN, J.A., in Chambers, ante p. 339, approved.

MAY 30TH, 1902.

DIVISIONAL COURT.

RE CAMPBELL AND HORWOOD.

Will—Construction—Power to Sell—Executors—Trust.

Appeal by vendor from order of LOUNT, J., ante p. 139.

M. J. Gorman, Ottawa, for vendor.

F. C. Cooke, for purchaser.

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

STREET, J.—I think the effect of the will of Colin Campbell, of Weymouth, dated 28th December, 1875, was to vest all the testator's real estate except the dwelling-house in his six daughters in fee, subject to a power of sale in the executors, and subject also to a restraint on alienation by them of their shares during their lives, as to the effect of which it seems unnecessary to inquire. Colin Campbell, of Ottawa, son of the testator, appears to have made certain claims against his father's estate, which were finally compromised, with the consent of the six daughters, by the payment to him of $2,000 in cash, and by an agreement to convey the lot in question to a trustee for his children. Before this conveyance was made, he also died, and by his will he recited that he had held the land in question as trustee for his children since 1882 or 1883, by virtue of a quit claim deed from his father's estate; and he directed that his widow should hold the lot as trustee for his children; and that it should be sold to the best advantage on his youngest child coming of age, and the proceeds equally divided amongst his children.

Colin Campbell, of Ottawa, died in October, 1896, and on 9th April, 1900, the executor of Colin Campbell, of Weymouth, in pursuance of the agreement of compromise above mentioned, conveyed the land in question to the present vendor, the widow of Colin Campbell, of Ottawa, her heirs and assigns, in trust for the children of Colin Campbell, of Ottawa, in equal shares.

In my opinion, this conveyance passed the estate in the land to the present vendor as trustee for the children of Colin Campbell, of Ottawa. The executor of Colin Campbell, of Weymouth, had a power of sale under the will, and the agreement with Colin Campbell, of Ottawa, for the conveyance to the nominee of the latter, as part of a compromise of the large claim made by him against his father's estate, was a proper exercise of the power of sale, and was confirmed as such by the persons entitled to the land subject to the power. But from the time of the execution of the agreement Colin Campbell, of Ottawa, ceased to have any beneficial interest in or power over the land; it was vested from that time in the executor of Colin Campbell, of Weymouth, as trustee for the children of Colin Campbell, of Ottawa; and therefore the clause in the will of the latter in which he purports to make his widow trustee of it for his children and to give her a power of sale of it were of no effect, excepting merely that of nominating the trustee who was to take the title in trust for his children.

The effect of the conveyance to the vendor, Mrs. Campbell, on 9th April, 1900, from the executor of Colin Campbell, of Weymouth, was, therefore, to vest in her the estate which had been vested in that testator, but to vest it in her as a bare trustee for the children of Colin Campbell, of Ottawa, without any power to sell it. Having no power to sell it, she cannot make title to it to the purchaser, and the appeal must be dismissed with costs.

M. J. Gorman, Ottawa, solicitor for vendor.

D. H. Maclean, Ottawa, solicitor for purchaser.

OSLER, J.A. MAY 29TH, 1902.

C.A.—CHAMBERS.

BROWN v. McGREGOR.

Appeal—Extension of Time—Laches—Security.

Motion by the plaintiff to extend time for setting down appeal.

J. H. Moss, for plaintiff.

D. L. McCarthy, for defendant.

OSLER, J.A.—The course of the case has been as follows :—

Trial—the second trial—before FALCONBRIDGE, C.J., 16th September, 1901, and judgment by him 27th December, 1901, dismissing the action.

Notice of appeal 6th February, 1902. Reasons of appeal 10th February, 1902. Time for delivery of reasons contra, extended on 12th February, 1902, at request of the respondent. Draft appeal case sent by appellant to respondent 25th February, 1902, but without the evidence taken at the second trial, which appellant had up to this time been unable to obtain from the stenographer. 10th March, 1902, draft case returned by respondent's solicitor, with reasons against appeal, but objecting to insertion in the case of any part of the examination for discovery, except what had been read at the trial.

The appellant would not accede to this perfectly proper objection, and the result was a motion before the trial Judge to settle the case. This was disposed of adversely to the appellant on the 26th March, 1902. No further step was taken by him until the 5th April, when new reasons of appeal were served, omitting those which had been rested on the deleted parts of the examination for discovery.

On the 23rd or 24th April the appellant obtained copy of the evidence, and then rested until the 5th May, when amended draft appeal case was sent to the respondent's solicitor, which he returned with the objection that the appellant was out of time and in default, for not having

set down the case for hearing for the session of the Court which began on the 14th April.

Judgment has been signed and costs of defence taxed at nearly $700, and an affidavit is filed shewing that the appellant has recently been placing incumbrances on his property and has disposed of the equity of redemption.

If the case had been set down, as it might have been under Rule 812 (2), for the April session, it could have been and probably would have been heard thereat, as the evidence was obtained on the 23rd or 24th April; or the appellant might have moved for a fiat to set down notwithstanding the absence of the evidence, and the Court might have imposed terms. The delay has been very great, and I find nothing which I can lay hold of as an excuse, beyond this, that it has no doubt been the intention of the appellant in good faith to prosecute this appeal, and his solicitor was probably not familiar with the Rule I have referred to. It does seem not to be very generally known, but, on the other hand, the general practice has been to move for a fiat to set down the appeal notwithstanding the absence of the evidence. This precaution was not observed. The respondent has reason to complain of the delay which now throws him over until September, if the appellant's motion is granted, and he is left with the costs of the action unpaid and unsecured, the appellant's property in the meantime having been put out of his hands. While I express no opinion on the merits of the appeal, I cannot but see that it turns very much upon questions and findings of fact, and on the main facts of the case there have been two decisions against the appellant.

On the whole I am of opinion that I should dismiss the motion with costs, unless the appellant, within———days, gives sufficient security for the payment of the costs taxed in the action and interest thereon, and the costs of this motion in case his appeal is unsuccessful.

Ball & Ball, Woodstock, solicitors for plaintiff.

Mabee & Makins, Stratford, solicitors for defendant.

MACLENNAN, J.A. MAY 31ST, 1902.

C. A.—CHAMBERS.

PEOPLE'S BUILDING AND LOAN ASSN. v. STANLEY.

Appeal—Jury Notice—Jurisdiction of Judge in Chambers as to —Judicature Act, sec. 110.

Motion by defendant for leave to appeal from order of a Divisional Court affirming an order of a Judge in Cham-

bers striking out a jury notice filed by defendant in an action of covenant upon two building society mortgages. Defence that the defendant was induced to execute the mortgages without reading them, or understanding their true effect, by false and fraudulent representations.

W. H. Bartram, London, for defendant.

D. W. Saunders, for plaintiffs.

MACLENNAN, J.A.—The ground of the present application expressed in the notice of motion, and argued by Mr. Bartram, is that the decision involves questions of law and practice upon the construction of sec. 110 of the Judicature Act, in which there have been conflicting decisions or opinions by the High Court of Justice and by the Judges thereof. This ground is the only one upon which, under sec. 77 of the Judicature Act, it was open to him to rest his motion, for the case clearly does not fall within any of the sub-sections of sec. 4, unless it falls within (c).

Mr. Bartram cited the following cases: Bristol, &c., Co. v. Taylor, 15 P. R. 310; Hawke v. O'Neill, 18 P. R. 164; Bank of Toronto v. Keystone Fire Ins. Co., 18 P. R. 113; and Sawyer v. Robertson, 19 P. R. 172.

I have examined these cases and also those cited by Mr. Saunders: Lauder v. Didmon, 16 P. R. 74; Regina v. Grant, 17 P. R. 165; Toogood v. Hindmarsh, 17 P. R. 446; Skae v. Moss, 18 P. R. 119.

The only conflict of decisions which I find in these cases is between Bank of Toronto v. Keystone Fire Ins. Co., decided by a Divisional Court on 4th May, 1898, and the earlier case of Skae v. Moss, decided by a Divisional Court in February, 1896, the latter case not having then been reported, and not having been cited in the subsequent case. The point decided in those cases, however, has no bearing upon the present, that point having been whether a Judge at the trial has power to strike out a jury notice, and to transfer the action for trial at the non-jury sittings.

The power of a Judge in Chambers under sec. 110 to strike out the jury notice has never been doubted in any case, although Street, J., in one case expressed the opinion that in general it ought not to be done. But that opinion does not appear to me to be a conflict of decisions or opinions within sub-sec. (c) of sec. 77 (4) of the Act.

The motion will be refused with costs.

W. H. Bartram, London, solicitor for defendant.

Hellmuth & Ivey, London, solicitors for plaintiffs.

MAY 30TH, 1902.

C. A.

CENTAUR CYCLE CO. v. HILL.

Appeal—Order of Judge of Court of Appeal in Chambers—Appeal to Court—Execution—Leave to Issue Notwithstanding Appeal—Discretion of Judge—Special Circumstances—"Court Appealed to or Judge thereof"—Rule 827 (1).

Appeal by defendants from order of MACLENNAN, J.A., ante p. 377.

The same counsel appeared.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

OSLER, J.A.—First, as to the competency of the appeal. The order of my learned brother is one made in relation to a pending appeal—a matter in Court—and in that respect is not like an order made in a matter external to its ordinary jurisdiction in pursuance of some authority conferred by a statute upon the Court or a Judge of the Court *pro hac vice*, e.g., under the Dominion Railway Act: Re Toronto, Hamilton, and Buffalo R. W. Co. and Hendrie, 17 P. R. 199. In the latter case it may well be that, when a Judge makes an order, he does so as *persona designata*—as one of the two jurisdictions upon whom an alternative authority is conferred to do the act. Here the order is made in the cause to remove the stay of execution under the authority of the Rule of Court, 827 (1), "unless otherwise ordered by the Court appealed to, or a Judge thereof," &c. I see no tangible distinction between these words as here used, and the words "the Court or a Judge," and the meaning of the latter, when used in a statute or rule of Court in relation to jurisdiction over proceedings in a cause or matter, is well recognized. "The Court" means a Judge or Judges in open Court; a "Judge" means a Judge sitting in Chambers: In re B., [1892] 1 Ch. 459, 463; or, as Brett, J., said in Baker v. Vokes, 2 Q. B. D. 171, 175, using the old terminology, "a Court or Judge" means the Court sitting in banc or a Judge at Chambers representing the Court in banc. See also per the same Judge in Dallow v. Garrold, 54 L. J. Q. B. 78: "The statute gives the power to the Court or a Judge, and it is well recognized that that phrase always includes a Judge at Chambers, unless there is some express enactment limiting the meaning of the phrase."

And see Re Housing of the Working Classes Act, 1890, Ex p. Slieman, [1892] 1 Q. B. 394. From the order of a

Judge thus sitting in Chambers, unless it is one made purely in the exercise of his discretion, an appeal, in my opinion, lies to the full Court: Arch. Prac., vol. 2, p. 1,609.

Then, secondly, I do not think that the order in question is a purely discretionary order. The general rule and the right of the appellant is that, save in the excepted cases, proceedings below are stayed upon the appeal being perfected. Nevertheless, if "the Court or a Judge thereof" otherwise orders, the stay of execution may be removed. A proper case must be made out for allowing the respondent to enforce what has not yet become a final judgment, the appeal being a step in the cause.

Upon the whole, after having given the matter a good deal of consideration, we are all of opinion that, under the circumstances, an order for leave to issue execution ought not to go. The appeal appears to be prosecuted in good faith, and on substantial grounds. The defendant is carrying on his business in the usual way, and the effect of an execution will practically be to close it up, and possibly to place the defendant in a situation from which he will find it difficult, if not impossible, to recover if his appeal should be successful. The plaintiffs do not make a prima facie case against the bona fides of the instruments which they propose to attack. They desire to proceed by way of seizure and interpleader, but they can proceed quite as effectively by way of action, and, while the rights of the parties are in suspense, the method likely to be least injurious to the defendant ought to be followed. Apart from the property which it is desired to reach by impeaching the chattel mortgages there seems to be nothing to be secured or laid hold of by the execution, and therefore as to neither of the defendants does it appear that there is any special advantage gained in the nature of security, etc., by removing the stay. The order will therefore be discharged, and the costs of appeal, and of the motion it deals with, will be costs in the appeal.