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SNIDER, CO. J. APRIL 28TH, 1902.

C. C. WENTWORTH.

LEADER v. SIDDALL.

Pleading—Statement of Claim—Alternative Claim—Sale or Conversion—Concise Statement of Doubtful Facts—Rule 268.

Motion by defendant to strike out of or direct an amendment of the following paragraph of the statement of claim:

On or about the 12th day of October, 1895, the plaintiff *sold and delivered to the defendant*, or *the defendant wrongfully converted to his own use*, one organ at the price, or of the value of, $100.

D'Arcy Tate, Hamilton, for defendant.

S. F. Washington, K.C., for plaintiff.

SNIDER, CO. J.—By Rule 268 pleadings are to be as concise as they can be, consistently with giving a fair statement of the facts relied upon. It seems quite reasonable that, if a sale of the organ in question were alone claimed, the usual form is quite sufficient, that stating the bare fact that it was sold and delivered; or, if a conversion only were claimed, then the form for conversion would be enough. In this case the plaintiff comes to the Court and says, as he may now do under the Rules: "The defendant owes me or I am entitled to recover from him $100, for an organ, but whether the facts are such as to establish a sale or a conversion I cannot quite say, but they amount to one or the other." Here, I think the Court and the defendant are both entitled to have under Rule 268 a concise statement of these doubtful facts, as under the circumstances in this alternative claim I think they are the material facts, and should be concisely stated, and a claim of the alternative legal right made upon them. See notes to Bullen & Leake, 4th ed., p. 12, and cases there cited; Holmested & Langton, p. 453 et seq.

Order granted accordingly with costs to the defendant in any event of the cause.

Washington & Beasley, Hamilton, solicitors for plaintiff.

Carscallen & Cahill, Hamilton, solicitors for defendant.

OCTOBER 21ST, 1901.

DIVISIONAL COURT.

HOLMAN v. TIMES PRINTING CO.

Master and Servant — Injury to Servant—Infant—Negligence of Foreman in Requiring Machine to Run at High Speed.

Motion by plaintiff to set aside judgment of nonsuit of MACMAHON, J., and for a new trial, in action for damages for injuries sustained by infant plaintiff, a boy 16 years old, while employed by defendants working at a Colt's Universal or Armory printing press, printing coupon railway tickets. The infant plaintiff's right hand was caught between the moving plate and stationary frame, crushed, and had to be amputated. In giving his evidence the infant plaintiff stated that "it may be that while my right hand was holding one of these coupons flat against the plate, I was working my left to throw off the impression, and owing to the difficulty I found in doing this, my whole attention may have been taken up with my left hand, and I forgot where my right was." The trial Judge held that the infant plaintiff was thus the author of his own wrong, and that the accident was not, therefore, as alleged, due to the action of the defendants' foreman, who insisted on having the boy run the machine at second instead of first speed, and nonsuited, following Roberts v. Taylor, 31 O. R. 10.

D'Arcy Tate, Hamilton, for plaintiff.

John Crerar, K.C., for defendants.

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

BOYD, C.—The learned Judge who tried this case says that he would have let it go before the jury upon the evidence given for the plaintiff, had it not been for an expression used by the plaintiff at p. 9 of book, that the accident happened because he must have forgotten that his hand was on the press as it moved.

In my opinion, this is putting too much emphasis upon the words of the boy, as if there was some negligence admitted by him in not withdrawing his hand. There must have been some inadvertence, owing to the rapid action of the press, and the overworked condition of the lad, which detracted from his normal state of alertness, but I think it would be deciding contrary to the views expressed in Scriver v. Low, 32 O. R. 290 (not cited at the trial), to hold that the case is thereby to be concluded by the Judge against the plaintiff.

See also Robinson v. Toronto Railway Co., 2 O. L. R. 18.

The nonsuit should be set aside and the case allowed to proceed to trial: cost in the cause to the plaintiff.

Carscallen & Cahill, Hamilton, solicitors for plaintiff.

Crerar & Crerar, Hamilton, solicitors for defendants.

MACLENNAN, J.A. MAY 5TH, 1902.

C. A.—CHAMBERS.

FRANKEL v. G. T. R. CO.

Appeal—To Supreme Court of Canada—Subject Matter in Controversy $1,000—Counterclaim for $1,223.

Motion by defendants for the allowance of the bond on their appeal from the judgment of the Court, *ante* p. 254.

H. E. Rose, for defendants.

James Baird, for plaintiffs.

MACLENNAN, J.A.—The plaintiffs have no objection to the bond, but object that no appeal lies by reason of the Act of the Dominion 60 & 61 Vict. ch. 34, sec. 1, which enacts that no appeal shall lie from any judgment of this Court to the Supreme Court of Canada except in certain cases, unless special leave of this Court or of the Supreme Court is obtained, which has not been done.

Mr. Baird contends that the case is not within any of the clauses making an appeal competent; while Mr. Rose says it is within clauses (*c*) and (*f*), inasmuch as the matter in controversy on the appeal exceeds the sum or value of $1,000 as explained in the latter of these two clauses.

The plaintiffs claimed $1,500 damages for delay in delivery of a large quantity of iron carried by them for the plaintiffs, the damages being caused by a fall in the price of the iron between the time when it ought to have been delivered and the time of its actual delivery.

The defendants, besides denying the charge of non-delivery in due time, counterclaimed for demurrage for the use of their cars on which the iron was loaded for several months, and for this they claimed $1,223.

The trial Judge gave judgment for the plaintiffs for $1,000, estimating the damage upon the fall of price between the time when delivery should have been made and the time of actual delivery, and he dismissed the counterclaim.

The defendants appeal to this Court, which allowed the appeal by limiting the damages to the fall in price during

a considerably shorter time than that fixed by the trial Judge, to be ascertained upon a reference. The defendants contended in this Court that the judgment dismissing their counterclaim was erroneous, and their appeal was dismissed.

The plaintiffs' counsel on the argument before me said the plaintiffs' claim in the reference would be less than $1,000, but I think I cannot act upon that statement. Their claim in their pleading was $1,500, and, although the judgment which they recovered was only $1,000, I am unable to see that they would be limited to that sum upon the reference under the present judgment.

I therefore think that the matter in controversy in this appeal, on the plaintiffs' claim, exceeds the sum or value of $1,000 within clause (*e*) of the Act.

But, however that may be, I think it is a sufficient answer to the plaintiffs' objection, that the defendants' claim upon their counterclaim is the same in their proposed appeal to the Supreme Court as it was at the trial and in the appeal to this Court, namely, the sum of $1,223, and that being so, they are entitled to appeal without leave.

I overrule the objection and allow the bond.

MACLENNAN, J.A. MAY 6TH, 1902.

C. A.—CHAMBERS.

HAYNES v. EDMONDS.

Appeal—To Court of Appeal — Surrogate Court Case — Divisional Court—Further Appeal.

An appeal by a party to the Court of Appeal from an order of a Divisional Court dismissing his appeal from a judgment of a Surrogate Court does not lie. McVeain v. Ridler, 17 P. R. 353, applied.

Motion by plaintiff to quash an appeal by defendant from order of a Divisional Court dismissing his appeal from judgment of a Surrogate Court admitting to probate a paper propounded as a will.

J. E. Jones, for plaintiff.

W. J. Tremeear, for defendant.

MACLENNAN, J.A.—I am of opinion that there is no right to bring this appeal, and that it should be quashed.

Section 36 of the Surrogate Courts Act gives an appeal from judgments of a Surrogate Court to a Divisional Court of the High Court, instead of to the Court of Appeal, as the law was prior to 58 Vict. ch. 13, sec. 45. And this right of appeal is also embodied in the Judicature Act, R. S. O.

ch. 51, sec. 75, sub-sec. 4. The immediately preceding section of the Judicature Act, namely, sec. 74, declares that "there shall not be more than one appeal in this Province from any judgment or order made in any action or matter, save only at the instance of the Crown, in a case in which the Crown is concerned, and save in certain other cases hereinafter specified."

Then follows sec. 76, which enacts that, subject to the exceptions and provisions contained in this Act, an appeal shall lie to the Court of Appeal from every judgment, order, or decision of the High Court, whether the judgment, order, or decision was that of a Divisional Court or of a Judge in Court. Mr. Tremeear very properly relied on this section as in express terms giving an appeal in the present case, unless it could be shewn that it is excepted somewhere in the Act. I think it is clearly excepted, and that that exception is to be found in the following sec., 77, as amended by 62 Vict. (2) ch. 11, sec. 27. That section as amended enacts that: "(1) An appeal shall not lie from any judgment or order of a Divisional Court except as hereinafter provided. (2) In case a party appeals to a Divisional Court of the High Court in a case in which an appeal lies to the Court of Appeal, the party having so appealed shall be entitled afterwards to appeal from the Divisional Court to the Court of Appeal upon obtaining leave so to do as hereinafter provided, but any other party to the action or matter may appeal to the Court of Appeal from the judgment or order of the Divisional Court without obtaining such leave." The right of appeal to this Court from a Divisional Court, given by this sub-sec. 2, is expressly confined to cases in which an appeal would have lain on the first instance to this Court, which this is not. And the right given to apply for leave to appeal to this Court given by sub-sec. 3 in like manner is confined to judgments or orders of a Divisional Court pronounced on an appeal in a cause or matter in the High Court.

It is therefore clear that an appeal from a judgment of a Divisional Court given upon an appeal from a Surrogate Court, under the Surrogate Courts Act, sec. 36, is not within the exception to sec. 77, sub-sec. 1, and that such an appeal does not lie.

In the case of McVeain v. Ridler, 17 P. R. 353, cited by Mr. Jones, this Court in 1897 quashed an appeal in a County Court action from a judgment of a Divisional Court on the ground that no appeal lay either with or without leave. No distinction can be suggested between an appeal in a County

Court case and a case in the Surrogate Court with reference to the question now before me.

The motion to quash must therefore be granted.

Maxwell & Maxwell, St. Thomas, solicitors for plaintiff.

J. A. Robinson, St. Thomas, solicitor for defendant.

MAY 6TH, 1902.

DIVISIONAL COURT.

CLEMENS v. BARTLETT, FRAZIER, & CO.

Execution—Agreement to Work Farm and Share Profits—Partnership — Right of Sheriff to Seize Interest of one Partner in Grain, but not to Take it out of Possession of Other Partner.

Ovens v. Bull, 1 A. R. 62, followed.

Appeal by defendants from judgment of ROBERTSON, J., in favour of plaintiff in an interpleader issue as to the right to the proceeds of certain grain and chattels seized by the sheriff of the county of Waterloo. The defendants are execution creditors of John H. Thamer, who absconded from the country in May, 1901. The trial Judge found as facts that in 1894 the plaintiff owned two farms and had an auction sale of about $2,500 worth of chattels, etc. Of these Thamer, then 21 years of age, plaintiff's nephew and adopted son, and who was living with him, bought $900 worth, but did not pay for them, and during the subsequent years worked one of the farms on shares with the plaintiff, who remained in possession; that at the time Thamer left he owed plaintiff $3,400; that certain grain had been held over and not sold, but the balance had been sold and proceeds appropriated by Thamer; and that at the time of the seizure the plaintiff, being a partner and in possession, was entitled to the grain, and that the goods had always been the property of plaintiff under his agreement with Thamer, who pursuant to it had from time to time replaced worn out articles.

F. Arnoldi, K.C., for defendants.

E. P. Clement, Berlin, for plaintiff.

THE COURT (MEREDITH, C.J., MACMAHON, J., LOUNT, J.) held that the judgment below was right and should be affirmed. The chattels never became the property of Thamer. The agreement constituted the plaintiff and Thamer partners, for, though nothing was said about losses, profits only having been provided for, there being no contrary intention shewn, it amounted to an agreement to share losses: Lindley on Partnership, 5th ed., p. 12 et seq. The

sheriff had, no doubt, the right under the attaching order to seize the grain, but no right to take it out of the possession of the plaintiff, and nothing but Thamer's interest in it could be sold: Lindley, p. 356 et seq. The issue is not to try the right of Thamer to a share of the property seized, but to the property itself, and plaintiff is therefore entitled to succeed, because it is partnership property. Ovens v. Bull, 1 A. R. 62, is, on the facts, a conclusive authority in support of the judgment below on the issue as to the grain. Appeal dismissed with costs.

Bowlby & Clement, Berlin, solicitors for plaintiff.

Arnoldi & Johnston, Toronto, solicitors for defendants.

MAY 5TH, 1902.

DIVISIONAL COURT.

McCAULEY v. BUTLER.

Solicitor—Costs—Collusive Settlement of Action—Notice of Lien.

Appeal by defendant from order of FERGUSON, J., ante p. 72.

A. B. Cox, London, for appellant.

G. C. Gibbons, K.C., for respondent.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., LOUNT, J.) was delivered by

MEREDITH, C.J.—I am of opinion that my learned brother's judgment is right, and that for the reasons given by him the notice was sufficient in point of form, and that it operated as notice to the appellant from the time it was communicated to his solicitor.

With regard to the latter point, it was strongly urged by Mr. Cox that it would be unreasonable to treat a notice given to a solicitor as a notice to the client from the time it was given to the solicitor, when, as in this case, it could not have been communicated to the client by post before the payment over of the money, or it might be in another case that it could not be communicated in time even by telegraph or any other means, but it appears to me that such a rule is not unreasonable and works no hardship upon the client, for he need not enter into or complete the compromise until he has communicated with his solicitor and has ascertained from him whether there is anything to prevent his safely doing so.

There is in the evidence, however, much to indicate that the money was not paid over by the appellant to the plaintiff until at all events the last day of September. It may

be that the money had passed out of the hands of the appellant into the hands of Hodgins and Fox before then, but there is much to lead to the conclusion that it was held by them not for the plaintiff but for the appellant. The receipt that was given by the plaintiff for the $500 and is dated 31 (sic) September, 1901, is more consistent with this than with the opposite view, and it is significant that in the affidavit of the appellant the statement is not that $200 was paid to the plaintiff but to Fox on the 14th September, and not that $300 was paid to the plaintiff but to Hodgins on the 16th September, and it is reasonably clear, I think, that Hodgins and Fox were acting for the appellant in the transaction, rather than for the plaintiff.

I should also upon the evidence come to the conclusion that Fox was the agent of the appellant to do what he did in London on the 14th September, and that on that day he received notice of the respondent's claim to a lien for his costs, which in that case would of course be notice to the respondent, and I am very much inclined to think that Fox communicated to the appellant what the respondent said to him about the costs, on his return to Lucan, and before the last $300 was paid to Hodgins. There is also, I think, much to justify the suspicion, and perhaps the finding, that the course which was adopted by the parties with regard to the compromise and the carrying of it out was designed to place matters in such a position that the respondent would be compelled to accept what Fox thought to be a reasonable sum for his costs.

The appeal, in my opinion, fails and should be dismissed with costs.

MAY 8TH, 1902.

C. A.

REX v. DAOUST.

Criminal Law—Evidence—Prisoner as Witness—Cross-examination —Contradiction.

In Canada, a prisoner who is examined on his own behalf may properly be cross-examined as to whether he has been previously convicted. If he refuses to answer or denies any conviction, it may be proved against him.

Case stated by the Judge of the County Court of Carleton. The defendant was charged and tried summarily by the Judge for the robbery of a sum of money from one Gravelle. The accusation or indictment of the prisoner

did not charge him with any previous conviction. Witnesses were examined on both sides, and the prisoner, on being examined on his own behalf, denied that he was guilty, and upon being asked, and the questions objected to, whether he had several times previously been convicted of indictable offences, admitted five previous convictions. No evidence of good conduct of defendant was adduced, and the Judge convicted, certifying that the evidence of the previous convictions had effect upon his mind in arriving at a decision. The question submitted to the Court was whether the evidence of the previous convictions was properly admitted.

E. Mahon, Ottawa, for defendant.

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

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) held as follows:—When the Canada Evidence Act, 1893, was introduced, it had long been the law, as now found in sec. 695 of the Criminal Code, 1892, that a witness might be questioned as to whether he had been convicted of any offence, and if, upon being so questioned, he either denied the conviction or refused to answer, "the opposite party" might prove such conviction by a certificate of the proper officer in manner and form prescribed by sec. 694 and by proving the identity of the witness as such convict. The right and, if such it can be called, the privilege of the accused now is to tender himself as a witness. When he does so he puts himself forward as a credible person, and, except in so far as he may be sheltered by some statutory protection, he is in the same situation as any other witness as regards liability to and extent of cross-examination. The Imperial Criminal Evidence Act, 1898, carefully provides that a person charged and called as a witness on his own behalf shall not, except under certain specific circumstances, be asked, and if asked shall not be required to answer, questions tending to shew that he has committed or been convicted of or charged with any offence other than that wherewith he is then charged, or is of bad character. This may have been done out of tenderness for the accused, who may feel himself, as he no doubt in most cases is, under a sort of moral compulsion to give evidence for himself, the Act having removed his previous disability in that respect, or it may have been in order to avoid any even apparent inconsistency with the provision corresponding to that of sec. 676 of the Criminal Code which deals with the proceedings upon an indictment for committing an offence after a previous conviction or

convictions. There the prisoner is to be arraigned in the first instance upon so much only of the indictment as charges the subsequent offence, the trial of the question as to previous convictions being deferred until he shall have been found guilty of that offence. Our Criminal Evidence Act contains no section corresponding to this of the Imperial Act, the only exception it makes to the competence of the accused to testify being in respect of communications made by husband to wife or by wife to husband during their marriage.

Practically, therefore, although the provisions of sec. 676 must be complied with, whenever it is intended for the purpose of imposing an increased punishment to try the question whether the accused has been convicted of previous offences, he incurs the risk, if he chooses to testify on his own behalf, of having such conviction proved against him for the purpose of affecting his credit and thereby incidentally prejudicing his position with the jury in regard to the charge then on trial, a risk which by the Imperial Act it has been deemed proper to exclude.

In the case before us the questions were proper, and the testimony they were intended to elicit relevant to the issue as going to the credit of the witness and as authorized by sec. 695 of the Code. The accused, instead of refusing to answer, stated without objection what was probably the truth. Had he denied the facts or refused to answer, the only consequence would have been that the Crown might have proved the previous conviction in the manner above stated. It is therefore clear that evidence of this conviction by the accused's own admissions was proper, and it was open to the Judge to draw therefrom any inference favourable or unfavourable to the accused, of which it was justly susceptible.

MAY 8TH, 1902.

C. A.

REX v. HANRAHAN.

Criminal Law—Common Betting House—Incorporated Association's Race Track—House thereon of Joint Stock Company—Criminal Code, secs. 197, 198, 204.

Case stated under the provisions of sec. 744 of the Code, by the police magistrate for the city of Windsor, as to whether he was right in convicting defendant under secs. 197 and 198 of the Code for unlawfully keeping a disorderly house, that is, a common betting house. It was

shewn before the magistrate that a house was used and kept for betting between persons resorting thereto, and the keeper, and that defendant appeared to be the person having the management, and was therefore found to be the keeper; that the house was owned by a joint stock company called "The Essex Racing and Athletic Club," of which defendant is president, and is situate on the race track of the Windsor Driving Park, a duly incorporated association; that on the date stated in the information about 200 people were in the house, and about 30 of them were betting with defendant and his assistants upon races in Morris Park, New York State, and on other races on the local track, the latter races being conducted by the club under agreement with the association.

E. F. B. Johnston, K.C., for the defendant.

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

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) held as follows:—The house was owned by a joint stock company, but the defendant was found to be the keeper of the house, and it was found that the house was kept and used at the time and place charged in the information for the purpose of betting between persons resorting thereto and the keeper thereof, and it was also found that there were there a number of persons betting with the accused and his assistants, some of them upon horse races then in progress in Morris Park in the State of New York, and others upon horse races then in progress upon a local race track, which latter were being conducted by the Essex Racing and Athletic Club.

What is struck at by secs. 197 and 198 is the keeping of a common betting house for any of the purposes mentioned in clauses (*a*), (*b*), (*c*), and (*d*) of sec. 197. The first clause (*a*) deals with the keeping of such a house for the purpose of betting in any manner between the persons resorting thereto and the different classes of persons specified in items (i), (ii), (iii), and (iv) of that clause, as owners, keepers, and managers, etc., thereof. The other clauses define other purposes connected with betting, which, if a house is kept therefor, will constitute it a common betting house, and therefore a disorderly house, but with these, as I have said, we are not now concerned, as the conviction does not proceed upon them. I only note them in order to emphasize the fact that the offence dealt with by the whole section is the keeping of a house, office, room, or other place for the prescribed purposes. This being so, the facts found bring the defendant clearly within its danger, and he was

rightly convicted. It was strongly urged on his behalf that he had done nothing but what is permitted by sub-sec. (2) of sec. 204 of the Act. That section, however, whatever may be its scope, and whether some of the acts forbidden by it might be evidence of an offence under sec. 197 or not, stands by itself. It is enough to say that the exception contained in sub-sec. (2) is expressly limited to the first part of the section, and there is no ground for reading it into sec. 197. There is nothing in sec. 204 of the Code which warrants an implication that a common betting house may be kept on the race-course of an incorporated association during the actual progress of a race meeting. See Walsh v. Trebilcock, 23 S. C. R. 695.

J. W. Hanna, Windsor, solicitor for defendant.

MAY 8TH, 1902.

C. A.

FALLIS v. GARTSHORE-THOMPSON PIPE FOUNDRY CO.

Negligence—Injury to Person—Unsafe Condition of Premises—Accident of Unheard of Nature—Findings of Jury.

Motion by defendants to set aside verdict of jury for $400 and judgment of MACMAHON, J., entered thereon in action for $5,000 damages for injuries. The plaintiff was employed as a teamster by A. D. Garrett & Co., coal merchants, Hamilton, and while delivering coal and coke on defendants' premises he was struck in one eye by a chip from an iron pipe, upon which, about 10 feet from plaintiff, an employee of defendants was engaged with a hammer and chisel. The jury (10 of them agreeing) found that the injury was caused by a chip of iron from the pipe resulting from the dangerous condition of the defendants' premises, and that the danger would have been obviated by a movable or stationary screen.

J. Crerar, K.C., for defendants.

J. W. Nesbitt, K.C., for plaintiff.

THE COURT (ARMOUR, C.J.O., MACLENNAN, MOSS, JJ.A.) held as follows:—The defendants owed a duty to the plaintiff and others to be careful and guard them from injury. There was evidence upon which the jury might find as they did, and the result of their finding is that, as regards this plaintiff, the premises were dangerous, and defendants were negligent. No complaint is made of the charge.

The case is governed by the principles of law laid down in Indermaur v. Dame, L. R. 1 C. P. 274, 2 C. P. 311, and other kindred cases.

MAY 8TH, 1902.

C. A.

MONTREAL AND OTTAWA R. W. CO. v. CITY OF OTTAWA.

Railway—Right to Cross Streets—"At or near" City—Expropriation Proceedings or Compensation—Necessity for—Extension of City Limits—Acquisition of Toll Road.

Appeal by defendants from judgment of BOYD, C., 2 O. L. R. 336.

A. B. Aylesworth, K.C., and Taylor McVeity, Ottawa, for appellants.

Wallace Nesbitt, K.C., and W. H. Curle, Ottawa, for plaintiffs.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) were unanimous in dismissing the appeal.

MOSS, J.A.—The plaintiffs are authorized by 47 Vict. ch. 84 (D.) to lay out, construct, and finish a railway from a point on the Grand Trunk Railway of Canada in the parish of Vaudreuil, in the Province of Quebec, to a point at or near the city of Ottawa, in the Province of Ontario. . . . Having regard to the subject-matter, I think the word "at" should be taken inclusively. And it seems to me there is nothing unreasonable in rendering the words "a point at the city of Ottawa" as "a point in the city of Ottawa." It must be conceded that if the language of the Act enables the plaintiffs to construct their line to a point in the city, that carries with it the right to go through or across the city to reach that point, unless that method of reading it would be manifestly unreasonable in view of all the circumstances. Besides, the Act authorizes the plaintiffs to connect their railway with any other railway at or near Ottawa, and if for the purpose of making such connection it was necessary for the plaintiffs to carry their line across the city, why should not this be done?

Next, the defendants say that if plaintiffs are authorized to construct their line through or across the city, what is being done is not in furtherance of that design, but is nothing more than the laying of a short curve or link from the main line of the Canadian Pacific Railway to the line of the St. Lawrence and Ottawa Railway Company, a line

also controlled by the Canadian Pacific Railway Company. There is nothing in the Act of incorporation to prevent the work of connection from being commenced at either end, and the evidence, as well as the plan, profile, and book of reference, shews that the intention is to complete the work within the time limited by the last Act. Other questions may arise in the event of that not being done, but at present there appears to be no objection to the plaintiffs proceeding in the way they have been. . . .

No mention is made in the Act of incorporation of the county of Carleton, but if, for the purpose of reaching their point in the city of Ottawa, or of making connection with another railway at or near the city of Ottawa, it becomes necessary to take the line into the county of Carleton, the plaintiffs' Acts, by implication, give power to do so.

The defendants next take the ground that the plaintiffs are not entitled to enter upon the Richmond road, or use it for the purposes of their railway, without first taking steps to acquire by agreement or expropriation a right of way over it, and make compensation to the defendants therefor, because the part of the road in question is the private property of the defendants, and is not held by them as ordinary public highways are. . . . Under 51 Vict. ch. 53, the defendants, in 1888, paid to the Bytown and Nepean Road Company $1,170 as compensation for the portion of the Richmond road embraced within the enlarged limits of the city, but no conveyance or transfer was executed to the defendants, and since that time the road has apparently been used by the defendants in the same way as the other streets of the city. . . . The highest effect that can be given to the transaction of 1888 is that the interest of the road company was extinguished, and the highway was restored to the municipality of the defendants, which had acquired territorial jurisdiction over that part of the municipality of Nepean embracing the portion of the road in question. The highway in question is not the private property of the defendants, nor to be regarded in the sense that property acquired and held for a city hall or a market house, or property like that in question in Re Bronson and Ottawa, 1 O. R. 415, is to be regarded.

Lastly, the defendants contended that, even if the Richmond road is to be considered as an ordinary highway, under the Railway Act a railway company is not entitled to cross it in the line of its railway without the defendants' consent, save on condition of making monetary compensation to defendants and assuming the maintaining of the

highway at the crossing, as well as submitting to such terms and conditions as may be imposed by the Railway Committee. I am unable to find in the Railway Act, or in any other enactment, any warrant for this claim. . . . The municipality may in some cases secure terms from the Railway Committee, but no provision is made for ordering monetary compensation for the user of the highway involved in crossing it at rail level. This privilege of crossing does not appear to fall within any of the classes of interests for which compensation is provided under secs. 132 to 172. In no case that I am aware of has a claim for compensation to a municipality for the user of a highway by a railway, arising from the mere crossing in the line of railway, been presented or countenanced. Sydney v. Young, [1898] A. C. 457, Donnaher v. State of Mississippi, 8 Sm. & M. 649, and Dillon on Municipal Corporations, 4th ed., p. 834 *n.*, referred to.

Scott, Scott, & Curle, Ottawa, solicitors for plaintiffs.

Taylor McVeity, Ottawa, solicitor for defendants.

MAY 9TH, 1902.

DIVISIONAL COURT.

CANADIAN BANK OF COMMERCE v. ROLSTON.

Execution—Equity of Redemption—Dower—Election—Right to Estate in Land—Assign—Tenant in Common—Practice—R. S. O. ch. 77—Rules 1016, 1017, 1018.

Appeal by plaintiffs from judgment of LOUNT, J., dismissing action for the aid of the Court as to certain executions issued by plaintiffs against defendant out of a Division Court, wherein plaintiffs had recovered judgment for $162.65 and $40.20 respectively against defendant, who is a widow, and is entitled to dower in certain land of her late husband, or to an undivided one-third share or interest therein, subject to a mortgage made by him for $175. The defendant on her examination for discovery declined to say whether she would elect to take dower in or one-third absolutely of her husband's estate. The trial Judge held that defendant had an interest in land saleable under secs. 29, 30, and 31 of the Execution Act, R. S. O. ch. 77.

H. J. Scott, K.C., for appellants.

M. H. Ludwig, for defendant.

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

STREET, J.—In whichever way the widow elects, her interest is not saleable by the sheriff under a *fi. fa.* If she,

under the Devolution of Estates Act, elects in favour of an undivided third share in the equity of redemption, she becomes tenant in common of the equity of redemption with her children, and her share cannot be sold under a *fi. fa.*: Heward v. Wolfenden, 14 Gr. 188; Cronn v. Chamberlin, 27 Gr. 551; Samis v. Ireland, 4 A. R. 118. If she elects to retain her dower, there is no authority under the statutes in a sheriff to sell her dower in an equity of redemption.

Prior to the passing of the section now represented by sec. 33 of ch. 77, R. S. O., it had been held that the right of a widow to dower which had not been set apart and ascertained was not saleable under *fi. fa.* by the sheriff, but that the section in question included such a right: Allen v. Edinburgh Life Assce Co., 25 Gr. 306. But sec. 33 is to be read in connection with secs. 29 to 32, under which equities of redemption are dealt with, and an interest in an equity of redemption which comes within sec. 30, as well as within sec. 33, may, under the combined effect of those sections, be sold by the sheriff under *fi. fa.*, unless such a sale would offend against the limitations imposed upon such sales by the principles laid down in Heward v. Wolfenden, Cronn v. Chamberlin, *supra*, and that class of cases. But a widow having a right to dower which has not been assigned, although she is entitled to redeem a mortgage to which her dower is subject, is not possessed of an estate in the land, and is not therefore an "assign" of her husband, nor a "person having the equity of redemption," within the meaning of sec. 29, for it does not follow that a person entitled to redeem a mortgage is necessarily an owner of the equity of redemption in the land mortgaged. The interest of the defendant as dowress in an equity of redemption does not therefore appear to come within sec. 30, and is therefore not saleable under it nor under sec. 33. If, however, the widow is to be treated as one of the owners of the equity of redemption, then still her interest is not saleable by the sheriff because a sale of her interest would offend against the principles of Heward v. Wolfenden, *supra*.

The result is that, in my opinion, there was and is no right to sell this interest under execution in the ordinary manner.

But Rules 1016, 1017, and 1018 offer a summary method of reaching an interest of this nature which should have been adopted, instead of bringing a new action. Order made declaring plaintiffs entitled to a charge upon the

estate or interest of the defendant in the lands in question and that same be sold. Reference to Master at Walkerton. Costs subsequent to judgment to plaintiffs. No costs of appeal. Scale of costs to be that of County Court unless the interest of defendant sells for a larger sum than $400, in which case scale to be that of High Court.

David Robertson, Walkerton, solicitor for plaintiffs.

Frank J. Palmer, Walkerton, solicitor for defendant.

MACLENNAN, J.A. MAY 10TH, 1902.

C. A.—CHAMBERS.

MURRAY v. WURTELE.

Costs—Appeal—Parties—Added Plaintiff.

Motion to settle certificate of judgment noted *ante* p. 298. The facts sufficiently appear in the judgment.

J. E. Jones, for defendants, appellants.

A. B. Aylesworth, K.C., for plaintiff Fraser.

MACLENNAN, J.A.—The question is whether Fraser ought to be ordered to pay the costs of the appeal. I have read and considered all the papers, and I see no ground on which Mr. Fraser can be released. The order of 22nd December recites that it was made upon Mr. Fraser's application to vary a previous order of 13th November, 1900, and for leave to be added as a party plaintiff. His consent to be added reads "to be added as a party plaintiff and to assume responsibility of carrying on the same from 22nd December, 1900." The order of 13th November stayed all proceedings in the action (19 P. R. 293), and, but for Mr. Fraser's application, the action could not have proceeded further, and no appeal by the defendants would have been necessary. By Mr. Fraser's intervention the stay was removed, and it became necessary for the defendants to appeal against the judgment, which they have done successfully. If the judgment had stood, Mr. Fraser would have had the benefit of it, for as purchaser of the note sued on the judgment was his property. The original plaintiff had no interest in resisting the appeal, except as to costs, and the whole substantial interest was in Mr. Fraser. Under these circumstances, notwithstanding that he did not appear by counsel on the argument, I think he cannot be relieved from payment of the costs of the appeal.

FALCONBRIDGE, C.J. MAY 10TH, 1902.

TRIAL.

DECKER v. CLIFF.

Life Insurance—Assignment of Policy—Insurable Interest—Creditor.

Action by the infant son and the administratrix of the estate of Robert J. Decker, deceased, to have it declared that they are entitled, subject to the claim of defendant as a creditor of deceased, to the proceeds of a policy of insurance on his life issued by the Home Life Assurance Company, who have paid the money into Court. The policy was in favour of deceased's wife, who predeceased him, and at her death Decker assigned the policy to defendant, who claims to be the sole beneficiary.

J. R. Roaf, for plaintiff.

G. M. Macdonnell, K.C., and J. M. Farrell, Kingston, for defendant.

FALCONBRIDGE, C.J.—The defendant paid no money to the deceased at the time of the assignment, and the defendant filled in the blank line in the assignment for describing the relationship—"creditor, etc." In this way only could defendant have complied with condition 11 indorsed on the policy, "an insurable interest existing at the time of the assignment must be shewn." The deceased was *inops consilii*, and was parting with his sole asset. The defendant cannot now be heard to set up his present contention, and must be declared to be a trustee for plaintiffs of the policy, and they are entitled to its amount, less the indebtedness, if any, due to defendant and the amounts paid by him for premiums, with simple interest. Reference to Master at Walkerton. Costs up to judgment to plaintiffs. Further directions and subsequent costs reserved.

Roaf & Roaf, Toronto, solicitors for plaintiffs.

Macdonnell & Farrell, Kingston, solicitors for defendant.