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MACMAHON, J. OCTOBER 12TH, 1903.

CHAMBERS.

CALDWELL v. BUCHANAN.

Libel — Pleading — Defence — Privilege — Scandalous and Irrelevant Statements.

Appeal by defendant from order of local Judge at Perth striking out certain parts of the 4th paragraph of the statement of defence in an action for libel as being scandalous and embarrassing. The plaintiff was a miller and manufacturer residing at the village of Lanark, and was for many years a member of the congregation of St. Andrew's Presbyterian Church in that village, of which the defendant was minister in charge. In the year 1900 the presbytery of Lanark and Renfrew authorized certain members of that congregation, among whom was the plaintiff, to hold services in the town hall in the village of Lanark, and such members were in August, 1901, organized as a mission congregation. The alleged libels were as follows: "But here they are in the hall, the followers of W. C. Caldwell, who has backed up drunkenness all his life, and whose theory is that it is no harm for a man to get on the spree occasionally. Their congregation in the hall is the most drunken rabble ever congregated together, I believe, for such a purpose." "I only know of five men that are members that are with Caldwell that don't get drunk, and most of these are men of weak mind that can be twisted any way." "Even Mr. Caldwell has admitted my influence and told a party that I had too much influence in the community. Yes, I have, I suppose, too much to suit him, but he should have reckoned that influence before he turned his attacks on me." "Is it a sufficient reason for a minister to abandon his post of duty when a man whom we know as a scoffer of God's word, together with a few drunken characters, rises up first against the leading men

in the congregation and then against myself?" The defendant pleaded privilege in that the statements complained of were contained in a private and confidential correspondence with two other ministers, who had an interest in the matter, and were so made bona fide and without malice and solely with a view of promoting the interests of the church and of the congregation, and set out at length the circumstances under which the statements were written. In stating these circumstances, the following words were used, which were those struck out by the local Judge: "For some time prior to the year 1900 a considerable amount of drunkenness had prevailed amongst certain of the members of the defendant's said church, to the manifest injury of the welfare of the congregation and to the detriment of the cause of religion in the locality, and efforts had been made by the session of the said congregation to correct or lessen this evil, with the result that one J. M. (naming him), an offender, was dealt with and subsequently suspended from the membership of the congregation on the charge of drunkenness. The plaintiff espoused the cause of the said M. and sought to obstruct the session in the discharge of what it conceived to be its duty, amongst other things publishing an abusive and scurrilous circular bitterly attacking the members of the session. The plaintiff was thereupon summoned before the session on the charge of having circulated among the members and adherents of the church a circular containing libellous and derogatory matter against the said session, and after trial upon such charge was suspended from the membership of the church. The plaintiff thereupon appealed to the presbytery of Lanark and Renfrew against the sentence of suspension pronounced by the session, and pending said appeal, at the instance of the said presbytery, and for the sake of peace and in order to avoid as far as possible the scandal to the church attaching to such proceedings, an agreement was entered into by the said session to restore the plaintiff to membership of the church on his agreement to voluntarily withdraw from membership of the said congregation and to apply for a certificate of withdrawal within three months' time."

J. H. Moss, for defendant.

Grayson Smith, for plaintiff.

MacMahon, J., held that under the practice prior to the Judicature Act it was unnecessary to specially plead privilege. But since that Act privilege must be specially pleaded, and facts and circumstances must also be stated shewing why and how the occasion is privileged: Rule 298; Odgers, 3rd ed., p. 563. The parts of the paragraph directed to be struck out

must be regarded as scandalous, i.e., offensive and irrelevant, and as tendering to embarrass the trial of action. They were also open to the objection that they attempted to set up what virtually amounted to a justification, without actually justifying the alleged libellous statements. Appeal dismissed with costs to plaintiff in any event.

MacMahon, J. October 12th, 1903.

CHAMBERS.

Re KARN.

Will — Construction — "My own Right Heirs" — Period of Ascertainment — "Then" — Division of Residue — Specific Devisee Entitled to Share.

Motion by the surviving executors of the will of the late Jacob Karn, the elder, for an order declaring the construction of his will, which was executed on the 2nd July, 1867. The testator died on the 20th July, 1874. Part of clause 6 of the will was: "And I also give and bequeath to my said daughter Marilla the north-west quarter of said lot No. 27 in the 12th concession of East Zorra, to hold the same to her free from any interruptions, curtesy, claim, right, or demand, by her present or any future husband, or for liabilities or debts by him contracted, for her natural life; and after her death I give, devise, and bequeath the same to my granddaughter Louisa, the daughter of the said Marilla, but if my said granddaughter Louisa be not then alive, the same I give and bequeath to her children lawfully begotten, in fee, but failing such children then alive, to my own right heirs absolutely forever." Marilla Cummings died on the 30th December, 1902, testate. Her daughter Louisa had predeceased her, unmarried.

J. S. Mackay, Woodstock, for the executors and some of the next of kin of Jacob Karn.

J. G. Wallace, Woodstock, for the executors of Marilla Cummings and for John Karn and Catharine Adams.

MacMahon, J., held, that the word "then" twice used refers to the same event, the death of Marilla. The right heirs of the testator were those existing at the date of Marilla's death: Theobald on Wills, 5th ed., p. 312; Long v. Blackall, 3 Ves. 486; Wharton v. Barker, 4 K. & J. 483; Re Morley's Trusts, 25 W. R. 825; Sturge v. Great Western R. W. Co., 19 Chy. D. 444; Re Milne, Grant v. Heyshaw, 59 L. T. N. S. 628; Harvey v. Harvey, 3 Jur. 949.

The executors were authorized to sell various portions of the real estate mentioned in the will, but they were not empowered to sell this particular piece of land.

By clause 7 the testator devised all the rest of his estate to his executors in trust to sell and divide the proceeds "amongst all my children who may survive me in equal shares." Marilla, as one of the children of the testator, was held entitled to share in the residue.

Order accordingly. Costs of all parties—those of the executors as between solicitor and client—to be paid as a first charge out of the proceeds of the sale of the north-west quarter of lot 27.

MACMAHON, J. OCTOBER 12TH, 1903.

WEEKLY COURT.

OSTERHOUT v. OSTERHOUT.

Will—Construction—Bequest of Personalty—"Reversion"—Gift over—Absolute Interest.

Motion by plaintiff for an injunction restraining defendant, one of the executors of the will of his son, Wilfred E. Osterhout, deceased, from dealing with the estate. By consent the motion was turned into a motion for judgment declaring the construction of the will.

The will directed that the testator's real estate should be sold, "and one-half of the proceeds thereof I give, devise, and bequeath to my father, Martin Osterhout (the defendant), with reversion to my brother Herbert G. Osterhout (the plaintiff), on the decease of my father, and the remaining one-half of the proceeds of my real estate I give, devise, and bequeath to my brother Herbert G. Osterhout, his heirs and assigns forever. I further give, devise, and bequeath to my father, Martin Osterhout, one-half of my ready money, securities for money, and money deposited . . . and one-half of all other my real and personal estate whatsoever and wheresoever, with reversion to my brother, on the decease of my father." And the other half he gave to his brother, his heirs and assigns forever. The plaintiff and defendant and one Flagler were appointed executors.

At the time of the death of the testator there was $7,000 on deposit to his credit in a bank, and this sum was divided by the three executors equally between plaintiff and defendant.

This was the only part of the estate in question in this action.

George Kerr, for plaintiff, contended that the defendant, the father, was entitled only to a life interest in the moneys bequeathed to him.

W. E. Middleton, for defendant, claimed an absolute interest.

MacMahon, J., referred to and quoted from Percy v. Percy, 24 Ch. D. 616; Richards v. Jones, [1898] 1 Ch. 438; In re Elma Walker, [1898] Ir. R. 1 Ch. 5; Henderson v. Cross, 29 Beav. 216; Walkim v. Wilkins, 3 M. & G. 622; Bowes v. Goslett, 27 L. J. Ch. 249; and proceeded:

The bequest in the will of Wilfred E. Osterhout in favour of defendant is "with reversion to my brother on the decease of my father."

The word "reversion" is meaningless in so far as it attempts to create a gift over in favour of the testator's brother.

I have examined carefully the cases relied upon by counsel for plaintiff—Bibbons v. Potter, 10 Ch. D. 733; Sanford v. Sanford, [1901] 1 Ch. 939; Williams v. Pounder, 56 L. J. Ch. 113; Constable v. Bull, 3 DeG. & Sm. 411. . . .

In my opinion the case in hand is widely distinguishable from the above cases.

There will be judgment declaring that defendants took an absolute interest in the moneys and securities for money, &c.

No costs.

Falconbridge, C.J. October 12th, 1903.

WEEKLY COURT.

CHANDLER v. GIBSON.

Improvements—Allowance for — Mistake — Title—Use and Occupation—Interest—Parties.

Appeal by plaintiffs from report of local Master at Chatham and cross-appeal by defendant Scane from the same report. The Master found that the value of the lands in question in this action, which had been enhanced by the lasting improvements made by defendant Scane under mistake of title since the date of the deed from Moses Chandler to him, was $1,119.60; that the value of the lands at the date of the deed was $1,000; that the present value of the lands is $2,100, and the increase was attributable wholly to the lasting improvements; that the plaintiffs were entitled to $305 for use and occupation from the death of Moses Chandler to 22nd July, 1902, and from that date to the time of delivery of possession to plaintiffs to an annual rent of $100 and taxes; that the sum in excess of occupation rent to which defendant

Scane was entitled for lasting improvements was $814.60, to be further reduced by the amount of the occupation rent since the 22nd July, 1902.

M. Wilson, K.C., for plaintiffs.

D. L. McCarthy, for defendant Scane.

FALCONBRIDGE, C.J.:—The findings of the Master that the value of the lands at the date of the deed from Moses Chandler to defendant Scane was $1,000, and that the present value thereof is $2,100, and that the increase is attributable wholly to the lasting improvements, are entirely borne out by the evidence. The Master also worked up the improvements item by item, and, except for the negligible difference of $19.60, the same result is arrived at. In this view it is not relevant or material to pursue a nice inquiry whether tenant for life or years would have made any of these improvements at all events and for his own immediate benefit. The position that allowance ought not to be made for what defendant Gibson did is not tenable. He is a party to the action; he never completed his purchase or paid anything to Scane. Assuming that the Master allowed the full rent of the improved land, interest on the outlay ought to be allowed. Munsie v. Lindsay, 11 O. R. at p. 53, referred to. Report referred back to be varied by deducting $19.60 from the sum allowed to defendants, and by allowing defendants interest on the money expended on improvements. No costs of appeal.

MACLENNAN, J.A. OCTOBER 12TH, 1903.

CHAMBERS.

METALLIC ROOFING CO. OF CANADA v. LOCAL UNION No. 30, AMALGAMATED SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION.

Appeal — Leave — Extension of Time — Parties—Service of Writ of Summons.

Motion by plaintiffs for an order extending the time for appeal and for leave to appeal from an order of a Divisional Court (2 O. W. R. 183) of the 4th March, 1903, setting aside the service of the writ of summons on one J. H. Kennedy for the defendant association. On the 6th March, 1903, an order was made on consent authorizing representation of members of the association by individual defendants. On the 5th October, 1903, an order was made by MACMAHON, J.,

dismissing an application for an order for representation of the association. An appeal from this order is pending.

W. N. Tilley, for plaintiffs.

J. G. O'Donoghue, for defendants.

MACLENNAN, J., held, having regard to the consent order of 6th March, and to the fact that an appeal is pending from the order of 5th October, that the plaintiffs should have leave to appeal and the time extended for appealing from the order of 4th March.

CARTWRIGHT, MASTER. OCTOBER 13TH, 1903.

CHAMBERS.

THORP v. WALKERTON BINDER TWINE CO.

Venue — Change of — County Court Action — Witnesses — Expense.

Motion by defendants to change venue in a County Court action from Guelph to Walkerton. The action was in respect of certain shares in the defendant company, whose office was at Walkerton. The plaintiff did not require any witnesses except himself. The defendants said they would require 4 or 5 who were at Walkerton.

G. H. Kilmer, for defendants.

J. J. Drew, Guelph, for plaintiff.

THE MASTER held that justice would be done by making the change asked for, upon defendants undertaking to pay all the additional expense properly arising thereupon to plaintiff. Drew v. Fort William, 2 O. W. R. 467, referred to. Order accordingly. Costs in the cause.

STREET, J. OCTOBER 13TH, 1903.

CHAMBERS.

SEXTON v. PEER.

Parties—Mortgage Action—Death of Plaintiff—Assignment of Portion of Interest—Revivor—Executors—Assignee —Reference—Rules 659, 753.

Motion by executors of William Sexton, the original plaintiff in this mortgage action, to set aside an order of the local registrar at Hamilton of 11th September, 1903, allowing one Harold L. Lazier to continue the proceedings in his own name.

J. H. Spence, for applicants.

W. E. Middleton, for Lazier.

STREET, J., held, upon the evidence, that only a part of the interest of William Sexton, the original plaintiff, was transmitted to Lazier, and that a substantial interest was retained by him, although subject to the rights transferred to Lazier. Under these circumstances it was not competent for Lazier to have himself substituted for the executors, because they are still entitled under the judgment to prosecute the proceedings, notwithstanding that since the judgment Sexton had parted with a part of his interest. The matter is still before the Master under Rule 753, and there should be no difficulty under Rule 659 in having Lazier added either upon his own application or upon that of persons parties to the action with whom he is acting, as a party defendant in the Master's office, and in his having the reference continued under Rule 753. Order set aside with costs.

MACLAREN. OCTOBER 13TH, 1903.

WEEKLY COURT.

RE DICKSON AND ST. ANDREW'S COLLEGE.

Vendor and Purchaser—Interest—Possession—Attornment of Tenant—Costs.

Motion under the Vendors and Purchasers Act. After the motion was made the vendor put herself in a position to make title by procuring the widening of the lane or right of way from Dickson avenue to Summerhill avenue (in the city of Toronto), which was effected on the 22nd July last. The question now was, from what date interest should run on the sum of $7,000 which by the agreement of 29th December, 1902, was to be paid by the purchaser upon receiving a proper conveyance of the lands in question, including the streets known as Clarewood avenue and Dickson avenue, with a good title thereto, and upon the purchaser getting possession of the easterly ten acres occupied by one McKim as tenant, the conveyance and possession to be given on 15th April, 1903, or within a reasonable time thereafter, the agreement being silent as to interest on this sum. The agreement as to possession between the purchaser and Nelson, who was the tenant of the western portion of the land in question, provided that it should not come into effect unless and until a conveyance of the lands was obtained from Mrs. Dickson. In dealing with McKim, the tenant of the eastern portion of the lands, no such reservation or condition was made, but the purchaser accepted an attornment from McKim, who was to remain as tenant at will of the purchaser, paying a rental of $7 a month. It was the possession of the latter portion only that was referred to in the agreement of 29th December,

1902, the agreement as to possession of the western portion having apparently been made before that day.

C. P. Smith, for purchaser.

F. E. Hodgins, K.C., for vendor.

MACLAREN, J.A., held that the unconditional acceptance of McKim as a tenant was a sufficient taking possession to render the purchaser liable to interest from the 15th April, McKim being the purchaser's tenant from that time. The vendor, having put herself in a position to shew title only on the 22nd July, after the motion had been made, must pay the costs of it.

BOYD, C. OCTOBER 13TH, 1903.

TRIAL.

ARCHER v. SOCIETY OF SACRED HEART OF JESUS.

Religious Society—Expulsion of Member — Insanity—False Imprisonment—Compensation for Services—Findings of Jury.

Action by Mary Archer against the society, the Mount Hope Institute, and Elizabeth Sheridan, mother superior of the institute, to recover the value of plaintiff's services to the society, of which she was a member, as cook and servant, and to recover damages for false imprisonment as a lunatic, expulsion from the society, and sending false reports to the head officers of the society.

Defendants pleaded, among other defences, the payment to plaintiff of $300 and a release from her of all causes of action, the Statute of Frauds, and the Statute of Limitations. The jury found a verdict for plaintiff for $3,000 as compensation for services, and $5,000 for dismissal.

F. P. Betts, London, for plaintiff.

J. Magee, K.C., for defendants.

BOYD, C.:—The Court should not uphold the release on the ground that plaintiff retains the $300 and does not offer to repay it. Upon all the circumstances the jury have found the release not binding on plaintiff, and to the charge on this head there was no objection. The signing of that release the jury have in effect found to be improvident, and made at a time when plaintiff was without any advice or protection. It is also to be noted that the money was paid by the lady superior as a gratuity only and not as a settlement of any recognized claim.

It does not appear that plaintiff had any legal or equitable claim in respect of wages or compensation in lieu of wages for the period of her novitiate. She had entered the religious society on the conditions set forth in the constitutions, wherein she had been instructed, and as a lay sister was bound to serve without wage or reward. So long as she remained in the society no pecuniary claim could arise; her services had been compensated from day to day by the enjoyment of the communal life. Nor could she complain when discharged from that life unless that severance was made without good cause.

It is the dismissal which according to the finding of the jury gives ground of complaint, and the damages for that wrongful dismissal (as found by the jury) are what plaintiff may be regarded as having lost for the future, estimated at $5,000. For this sum the verdict has to be maintained, though the amount is excessive. The constitution of the society does not in terms provide for cases of insanity supervening prior to the final vows. No doubt during the unsound period the vow of obedience would not be operative, and had the actual dismissal been during any period of mental unsoundness, there would be more difficulty in plaintiff's way.

The jury must be taken to have affirmed temporary insanity and to have absolved defendants from liability as to the deportation and incarceration of plaintiff at Long Point asylum. But on the undisputed facts she was declared by the authorities at that institution to be completely recovered in the middle of August, 1901, and the release from her vows (which was the order of dismissal) was not given to plaintiff till the 6th September, when she was in full possession of her faculties. The constitution calls for the existence of grave cause before any one can be sent away from the society, and upon this issue, in which the onus lay on defendants, they have failed to satisfy the jury. Though the ultimate control in matters of dismissal rests with the authorities in France, yet there is power of delegation given by the constitution, and the release from vows was in this case forwarded from Paris to be acted on by the lady superior at London, Ontario, according to her discretion. There was a cause of action within this province when that discretion was exercised adversely to plaintiff, and the release transmitted from London to be given to plaintiff at Montreal.

The defendants the Mount Hope Institute are not implicated in this transaction, and as against them the action should be dismissed with costs.

Judgment for plaintiff for $5,000 against the other defendants, with costs of so much of the action as relates to the claim for dismissal.

As to the other issues judgment is to be entered for defendants, with so much of the costs of the action as are applicable thereto.

Costs of all defendants to be set off against plaintiff's judgment and costs.

CARTWRIGHT, MASTER. OCTOBER 14TH, 1903.

CHAMBERS.

DELAP v. CODD.

Security for Costs — Residence of Plaintiff Corporation — Dominion Incorporation—Head Office.

Motion by defendant Armstrong for an order requiring plaintiffs to give security for costs.

It was admitted that the plaintiff Delap resided in England, and the question was whether the plaintiffs, the Great North West Central Railway Company, resided in Ontario.

C. A. Moss, for applicant.

F. Arnoldi, K.C., for plaintiffs.

THE MASTER.—By 58 & 59 Vict. ch. 48, sec. 2 (D.), the head office of the railway company was changed from Ottawa to Toronto. This Act was assented to on 28th June, 1895. By 1 Edw. VII. ch. 63, sec. 2 (D.), assented to 23rd May, 1901, it was enacted that the head office of the railway company should be at Montreal, but power was given to the directors to change it by by-law to any other place in Canada. On 2nd June, 1903 a by-law was passed fixing the head office at Toronto from 1st June, 1903, to 1st May, 1904.

The present action was commenced, so far as relates to defendant Armstrong, after the passing of the by-law of 2nd June, 1903.

It is laid down in the Am. & Eng. Encyc. of Law, vol. 7, p. 694, that "the residence of a corporation is in the sovereignty by which it was created." It follows from this that the residence of the company is the Dominion of Canada, and that the company is resident in every part of it. If this is so it must be specially true that it is to be deemed resident in Ontario when its head office is in Toronto.

[Kavanaugh v. Cassidy, 5 O. L. R. 614, 2 O. W. R. 27, 143, 303, 391, and McLaughlin v. Rodd, 2 O. W. R. 309, referred to.]

Motion dismissed with costs to plaintiffs in any event.

CARTWRIGHT, MASTER. OCTOBER 14TH, 1903.

CHAMBERS.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. LEADLEY.

Pleading—Defence—Action Brought in Name of Company —Questioning Right to Use Name—Practice—Motion to Stay Proceedings.

Motion by plaintiffs to strike out paragraph 25 of the statement of defence of defendants, the Leadleys, paragraph 9 of the statement of defence of defendant John T. Moore, and paragraph 10 of the statement of defence of defendant Annie A. Moore.

The nature of the action appears from the report of a former motion, ante 745.

J. J. Maclennan, for plaintiffs.

J. W. St. John, for defendants, the Leadleys.

A. J. Russell Snow, for defendants, the Moores.

THE MASTER.—The language of the objectionable paragraphs is varied, but the substance of all is, that the shareholders who are prosecuting the action have no right to use the name of the company; and that, if they have any grievance, they should sue in their own names, framing their action as was ordered in Murphy v. International Wrecking Co., 12 P. R. 423.

To this way of setting up this defence the plaintiffs object. They rely on the case just cited, also on Austin Mining Co. v. Gemmell, 10 O. R. 696, at p. 705. . . . A similar rule was laid down in McDougall v. Gardiner, 1 Ch. D. 13, 22. . . .

These cases seem clear and conclusive of the point at issue. The motion must be allowed with costs to plaintiffs in any event.

The plaintiffs are at liberty to proceed as was done in Murphy v. International Wrecking Co., if so advised. The material used on this motion can be used in that event, and also supplemented by either party.

STREET, J. OCTOBER 14TH, 1903.

CHAMBERS.

POSTLETHWAITE v. McWHINNEY.

Writ of Summons—Service out of Jurisdiction—One Defendant in Jurisdiction—Rule 162 (f), (g)—Claim for Injunction—Necessary Party in Ontario—Service on before Leave to Issue Concurrent Writ.

Appeal by defendant Sarah Ann Postlethwaite from order of Master in Chambers, ante 794, dismissing motion by appellant to set aside order allowing the issue of a concurrent writ of summons for service out of the jurisdiction, to set aside the writ issued pursuant thereto, and the service upon the appellant, and all other proceedings, upon the grounds that the material upon which the order was made was insufficient, and that the plaintiff's claim did not come within any of the clauses of Rule 162 (1).

The plaintiff was the husband of defendant Sarah Ann Postlethwaite, to whom he was married in England in 1878. On 22nd August, 1883, they entered into a separation agreement under seal, by which he agreed to pay to a trustee for her a weekly sum so long as they should live apart, and she should continue to lead a chaste life. Plaintiff came to Canada, and his wife remained in England. In 1900 a new separation agreement under seal was drawn up and executed by the husband and wife and the former trustee, and by defendant McWhinney, a solicitor in Toronto, who had agreed to act as a trustee for the wife in the place of the former trustee. By this plaintiff agreed to pay to defendant McWhinney, as trustee for the wife, $15 a month. The payments being in arrear, an action was brought in a Division Court in Ontario by McWhinney against plaintiff to recover them. Thereafter plaintiff brought the present action to set aside the agreement, on the ground that it had been obtained by fraud. The writ of summons and a concurrent writ for service out of the jurisdiction were issued on 25th June, 1903, an order for leave to serve defendant Sarah Ann Postlethwaite, as a British subject out of the jurisdiction, having been obtained on 24th June. The writ for service within the jurisdiction was served on McWhinney on 8th July, 1903, and the concurrent writ was served on the other defendant in England in August. The statement of claim served with the latter claimed an injunction to restrain defendants from proceeding with the pending action in the Division Court.

On 29th June, 1903, on the application of plaintiff (defendant in the Division Court action) an order was made by

the Judge in the Division Court staying proceedings in that action until after the trial and final disposition of this action.

S. B. Woods, for appellant.

R. B. Beaumont, for plaintiff.

STREET, J.— . . . Clause (f) of Rule 162 provides that an order for service out of Ontario of a writ may be made when "an injunction is sought as to anything done or to be done within Ontario." The affidavit upon which the order was granted makes no case for an injunction, and does not even mention the fact that McWhinney had brought an action in the Division Court. The writ when issued is indorsed with the usual statement that "plaintiff's claim is to set aside and have cancelled and declared null and void a certain agreement between the parties hereto of 31st March, 1900." The statement of claim, it is true, alleges that McWhinney as trustee for Mrs. Postlethwaite had brought an action in a Division Court to recover certain payments in arrear under the agreement, and prays for an injunction to restrain both defendants from taking any proceedings upon the agreement. . . . It is upon the affidavit that the order must be justified.

Again, I do not think an injunction against McWhinney either a necessary or a proper remedy under the circumstances. The Division Court had jurisdiction to entertain the claim for arrears under the separation agreement: McWhinney had a clear right to bring his action there, and plaintiff might set up as a defence there the facts upon which he relies as a ground for setting aside the whole agreement. The proper remedy seems to be that which he took . . . an application . . . to stay proceedings there pending the present action. . . .

The covenant in the separation agreement by plaintiff is to pay to McWhinney the monthly allowance; it is paid to him, it is true, as trustee for Mrs. Postlethwaite, but the action upon it can be brought by McWhinney only, and not by her, so that the injunction, if it could be properly granted, should be against him only . . . Clause (f) only applies to a case where an injunction can be properly asked against a defendant who is out of the jurisdiction.

Therefore the order . . cannot be justified under (f).

. . .

Clause (g) provides that service out of Ontario may be allowed wherever "a person out of Ontario is a necessary or proper party to an action properly brought against another person duly served within Ontario."

It seems to be well settled in England and to be recognized in Ontario that the proper construction to be placed

upon this clause is that the person within Ontario is to be served before an order can be granted allowing plaintiff to serve the defendant who is out of the jurisdiction. This is easily practicable under Rules 129 and 130. Plaintiff issues a writ of service within the jurisdiction, addressed to both defendants, and serves it upon the defendants within the jurisdiction; he then applies for leave to issue a concurrent writ of service out of the jurisdiction, upon the defendant who is out of the jurisdiction, shewing by affidavits the fact of service upon the other defendant within the jurisdiction, and the other necessary facts. The form No. 2 under Rule 128 shews that the writ for service out is directed only to the defendant out of the jurisdiction.

In the present case plaintiff obtained his order for service upon Mrs. Postlethwaite out of the jurisdiction before issuing his writ at all, being perhaps misled by In re Jones v. Bissonnette, 3 O. L. R. 54, 1 O. W. R. 13.

In England it is held that the service upon the defendant in the jurisdiction is, under the terms of clause (g), a condition which must first be performed to entitle a plaintiff to an order for service upon the defendants out of the jurisdiction, and that a plaintiff who had obtained such an order without first having complied with the condition must begin de novo: Collins v. North British Co., [1894] 3 Ch. 228, 236; Yorkshire, etc., Co. v. Eglington, etc., Co., 54 L. J. Ch. N. S. 581. The question . . does not . . appear to have been raised and adjudicated upon in any of the cases in our own Courts. . . .

[Livingston v. Sibbald, 15 P. R. 15, Mackay v. Colonial Investment and Loan Co., 4 O. L. R. 571, 577, 1 O. W. R. 569, 592, 646, and In re Jones v. Bissonnette, 3 O. L. R. 54, 1 O. W. R. 13, explained.] . . .

The question is for the first time squarely raised, and I think I am at liberty to determine it irrespective of former cases.

I am of opinion that the construction placed upon clause (g) in Collins v. North British Co. is the proper one, and that proof of service upon defendant within the jurisdiction is an essential pre-requisite to the right to obtain an order under that clause for service upon the defendant who is out of the jurisdiction, and is not a mere irregularity which should be condemned.

Appeal allowed and order allowing the service and the service of the writ and statement of claim upon defendant Mrs. Postlethwaite set aside, without prejudice to plaintiff applying for a further order for leave to issue a concurrent writ for service upon her out of the jurisdiction.

As the practice in this Province has been hitherto unsettled, I think the allowance of the appeal should be without costs.

STREET, J. OCTOBER 14TH, 1903.

WEEKLY COURT.

RE FARMERS' LOAN AND SAVINGS CO.

Company—Winding-up—Compromise of Claim by Liquidator — Approval of Referee — Application by Debenture Holders for Leave to Appeal as a Class—Previous Appointment of Solicitors to Represent Class—Special Purpose—Costs.

The company being in liquidation under the provisions of the Winding-up Act of Canada, and the Winding-up Amendment Act, a controversy arose between the debenture holder creditors and the savings bank deposit creditors as to their respective priorities. Meetings were held and representative creditors of each class were appointed by the Master in Ordinary, to whom the powers of the High Court had been delegated under sec. 20 of the amending Act. By the same orders Messrs. Henderson & Small were appointed to act as solicitors for the debenture holders as a class in certain specified appeals, "and to represent the interests of the debenture holders as a class in the winding-up proceedings," and Messrs. Kerr, Davidson, and Paterson were similarly appointed to represent the other creditors. Subsequently Mr. Neil McLean, an official referee, was appointed referee under sec. 20 of the amending Act, with the powers of the Court, in the place of the Master in Ordinary.

In 1898 an action had been brought by the company against the executors of James Scott, deceased, to recover large sums of money alleged to be payable by him to the company. He had been vice-president from 1882 till his death, in 1896, and it was alleged that he had become individually liable for all the debts of the company under sec. 37 of R. S. C. ch. 118, and that he was also liable, apart from that provision, in a large sum of money for neglect and misfeasance as a director and vice-president. The action was not brought until the liquidation proceedings had begun, and it was authorized by an order of the Court. It was never brought to trial, but was still pending when on 31st March, 1903, the liquidator entered into an agreement with the executors of Scott to compromise the claims of the company against them for $11,000 cash, the agreement being declared to be subject to the approval of the Court. The liquidator then applied to the referee under sec. 33 of the Act for his

approval of the compromise. This was opposed by Messrs. Henderson and Small as representing the debenture holders as a class; evidence was taken, and counsel were heard; and on 25th June, 1903, an order was made by the referee approving the compromise and directing it to be carried into effect.

Messrs. Henderson and Small then applied to the referee for leave to the debenture holders as a class to appeal from the order of 25th June, 1903. This leave was refused, and they then appealed from the order refusing leave and from the order of 25th June.

J. T. Small, for the appellants.

W. M. Douglas, K.C., for the liquidator.

W. Davidson, for the other creditors.

W. H. Blake, K.C., for the executors of James Scott.

STREET, J.— . . . The immediate occasion of the appointment of Messrs. Henderson and Small was the dispute between the debenture holders and the other creditors as to their respective priorities in the administration of the assets of the company. . . . There is no special authority under the Winding-up Acts for such an appointment, but the ordinary procedure of the Courts is introduced into liquidation proceedings by sec. 93 of the Winding-up Act, and there is authority under Rule 662 for the appointment of solicitors to represent the different classes upon a reference. Although the immediate object of the appointment was the conduct of the pending appeal, it seems to have been thought proper to appoint the solicitors to represent the class throughout the liquidation proceedings. It is not to be supposed, however, that by such appointment it was intended that an imperium in imperio should be set up. The liquidator is by statute the representative of all classes of creditors, and his power as such was not in the slightest degree impaired or interfered with by the appointment of Messrs. Henderson and Small to represent one class, and of Merrs. Kerr, Davidson & Paterson to represent another. . . . In making the compromise the liquidator acted on behalf of all classes of creditors, the debenture holders included, and there being no contest as to the rights of creditors inter se, there was no occasion for any class representation.

The referee, having decided that the compromise was in the interest of the creditors as well as of the company, was, it seems to me, entirely right in refusing to authorize Messrs. Henderson & Small, on behalf of a class of creditors, to appeal against his decision at the expense of the estate, especially in view of the fact that any individual creditor had the right to appeal at his own expense and risk. . . .

I think, therefore, that the appeal should be dismissed; the appeal against the order approving the compromise cannot be entertained in its present shape because Messrs. Henderson & Small are not authorized, for the reasons I have given, to appeal on behalf of the debenture holders as a class, and must, therefore, also be dismissed.

As to costs, I think I should not give costs against Messrs. Henderson & Small, because the practice under such an appointment as that upon which they have relied does not appear to have been considered in this Province, and the comprehensive form in which it was made no doubt led to their erroneous belief that a trust to act for the debenture holders was cast upon them without reference to the action of the liquidator. On the other hand, I cannot charge the estate in liquidation, or any part of it, with the payment of their costs, in the view I have taken. The costs of the liquidator should come out of the estate.

FALCONBRIDGE, C.J. OCTOBER 14TH, 1903.

TRIAL.

MORDEN v. TOWN OF DUNDAS.

Municipal Corporations—Contract—Supply of Water—Evidence.

Action for damages for breach of contract as to supply of water and for injury to plaintiff's land.

A. Bell, Hamilton, for plaintiff.

G. Lynch-Staunton, K.C., and H. C. Gwyn, Dundas, for defendants.

FALCONBRIDGE, C.J., gave a written opinion reviewing the evidence and holding that the action was not sustained by it.

Action dismissed with costs.

BRITTON, J. OCTOBER 16TH, 1903.

CHAMBERS.

RE ATCHESON, ATCHESON v. HUNTER.

Administration Order—Application for—Status of Applicant—Creditor—Judgment.

Application by Thomas Atcheson for an order for administration of the estate of John Atcheson.

D. L. McCarthy, for applicant.

C. A. Moss, for W. J. Atcheson, residuary devisee.

H. F. Hunter, Bowmanville, executor, in person.

BRITTON, J.—As this matter now stands Thomas Atcheson is not a creditor of the deceased. Campbell v. Bell, 16 Gr. 115, and the other cases cited in Holmested and Langton, are against applicant. If Thomas Atcheson sues and recovers judgment against the executor, he will bring himself within Glass v. Munson, 12 Gr. 77.

I refuse the motion. Thomas Atcheson can, if necessary, sue the executor. This application is notice to the executor and to W. J. Atcheson of the claim; and my decision is without prejudice to any future application, if Thomas Atcheson deems it necessary to make one. No costs.

BRITTON, J. OCTOBER 16TH, 1903.

CHAMBERS.

MENDELL v. GIBSON.

Summary Judgment — Motion for — Defence—Conditional Leave to Defend—Terms—Payment into Court—Costs.

Appeal by defendant from summary judgment granted by local Judge at Perth.

T. D. Delamere, K.C., for defendant.

Grayson Smith, for plaintiff.

BRITTON, J.—The action is brought upon the covenant of defendant contained in a chattel mortgage dated 20th April, 1899, upon the plant contained in a cheese factory, the chattel mortgage being collateral to a mortgage to plaintiff upon the factory land and building. The writ of summons was specially indorsed for the full amount of mortgage and interest. . . .

On behalf of defendant, George M. Gibson, a brother of defendant, states that in 1900 the plaintiff took proceedings to sell the factory and its contents; that no sale was then effected, but plaintiff took possession; that on or about 7th August, 1902, plaintiff made an agreement for sale of factory and contents to one Alvin W. Mitchell for $750; that Mitchell in March or April, 1903, removed the machinery from the factory and removed a portion of the factory itself; and that no portion of the chattels are at present on the premises or anywhere in the vicinity. The plaintiff replied to this affidavit by saying that he was only in possession of the property "to preserve the same." He

says that Mitchell said nothing, and that if Mitchell removed any of the machinery or part of the factory he did so contrary to his agreement, and to plaintiff's express direction.

That is not a full answer, and it leaves the matter in an unsatisfactory state. No affidavit of Mitchell is put in. By the agreement Mitchell was entitled to possession until default, and even if he paid nothing, there was no default until 1st May, 1903.

It is not at all clear that there is no defence to this action. . . . It would have been much more satisfactory if plaintiff had given the time necessary to procure an affidavit from defendant himself.

On the other hand the address of defendant is not given. He is "in the North-west," and his brother is speaking for him, and there are circumstances which point to the possibility of defendant not desiring personally to resist plaintiff's claim. It is a case in which I think the defendant, if let in to defend generally, should be put upon terms, such terms as will to some extent protect plaintiff if he is in the right and will not be oppressive to defendant.

If defendant pays into Court within one month $150, as security in part to plaintiff, in case plaintiff succeeds, this appeal will be allowed and the order of the local Judge set aside; costs to be costs in the cause to defendant.

If the defendant does not pay the $150 into Court, then the order is to be varied to the extent of giving the defendant until 1st December next to proceed with the reference under the order of the local Judge, and in other respects appeal to be dismissed without costs.

See Stephenson v. Dallas, 13 P. R. 450; Dunnet v. Harris, 14 P. R. 437; Merchants National Bank v. Ontario Coal Co., 16 P. R. 87.