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FALCONBRIDGE, C.J. APRIL 17TH, 1905.

CHAMBERS.

MOLSONS BANK v. HALL.

Particulars—Defence—Action on Foreign Judgment—Exclusion of Counterclaim.

Appeal by defendant from order of Master in Chambers in an action upon a foreign judgment striking out the part of the counterclaim relating to a libel, and ordering full particulars of the remainder of the defence and counterclaim.

R. McKay, for defendant.

C. S. MacInnes, for plaintiff.

FALCONBRIDGE, C.J.:—I dismissed the appeal as regards the counterclaim for libel, at the argument.

As regards the particulars, the case is exceptional. The judgment sued on is now nearly 4 years old, and plaintiffs are entitled to the fullest particulars of the grounds on which it is sought to be attacked.

The other matters set up by way of counterclaim go back to the year 1900. Officers of banks die, leave the service, or are shifted about from one branch to another, and as to these matters, too, defendant ought to make the fullest disclosure.

The particulars required are more exhaustive and specific than any that I have hitherto had the privilege of perusing. But the decision in Briton Medical Life Assn. v. Rutania F. Assn., 59 L. T. R. 888, seems to go as near the line of demarcation between particulars and statement of evidence relied on, as this order does.

And Anderson Produce Co. v. Nesbitt, 1 O. W. R. 818, 2 O. W. R. 430, is authority for this order, which will be affirmed, with costs to plaintiffs in any event.

APRIL 17TH, 1905.

DIVISIONAL COURT.

GUELPH PAVING CO. v. TOWN OF BROCKVILLE.

Contract—Paving Work—Measurements—Certificate of Engineer.

Appeal by plaintiffs from judgment of MACMAHON, J., 4 O. W. R. 483, dismissing an action to recover a balance of $1,576.28 alleged to be due to plaintiffs on 13th January, 1899, on a contract dated 15th March, 1898, for the construction of granolithic sidewalks in the town of Brockville.

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

J. A. Hutcheson, K.C., for defendants.

The judgment of the Court (MEREDITH, C.J., TEETZEL, J., CLUTE, J.), was delivered by

CLUTE, J.:—In my opinion the judgment of the trial Judge is right and ought to be affirmed.

In the specification, tender, and contract the sidewalk includes the curbing—the curbing is in fact part of the sidewalk.

Clause 2 of the specification provides that "the price submitted in the tenders must include the providing of all materials, tools, and labour, required in the performance of the work, and for the excavation of all material to the depths required from the line of curbing to the full width of the new sidewalk. . . ."

Plaintiffs in the tender "having carefully read and considered the specifications . . . for the construction of granolithic sidewalks and street crossings" (no mention being made of curbing), agree "to furnish all materials and labour required to complete the sidewalks and street crossings, in strict accordance with the . . . specifications, at the following rates for completed work, viz., sidewalk pavement, any width, including artificial stone curbing with iron fencing at street corners, 16 cents per superficial foot." The specification is made part of the contract.

The contract provides, clause 4: "The corporation agree to pay for such work at the following rates:—Sidewalk pavement, any width, including artificial stone curbing with iron facing at street corners, per superficial foot 16 cents."

It is the "sidewalk pavement," which includes the curbing, that is to be paid for at 16 cents per superficial foot. Unless one reads into the contract something not found there, it is, I think, impossible to give effect to plaintiffs' contention.

It is the pavement—the part to be walked upon—that is to be paid for at the price stated, and this includes the curbing.

It is not disputed that by this measurement plaintiffs have been paid in full, if not overpaid, as stated by the engineer.

It is not alleged in the pleadings that the word "superficial," used in the contract, has any technical meaning in the trade, or that the parties contracted with reference to any conventional use of the word in this particular case.

Evidence was, however, given at the trial by two engineers and two contractors to the effect that in contracts in which they were concerned, the practice was to measure "the whole surface of the work," that is, across the top and the finished face of the curb; but the evidence falls far short of satisfying me that there was anything like a universal custom in the trade, and it was not contended that any such custom prevailed in the town of Brockville, where the work in this case was done, or that the parties contracted with reference to any such custom.

In Symonds v. Lloyd, 6 C. B. N. S. 691, referred to by plaintiffs' counsel, evidence was admitted to shew that the usage or custom of the place was to measure brick and stone in a particular way. Here there is no such evidence, and I am of opinion that the plain meaning of the contract cannot be altered by shewing what was done in other cases under other contracts where possibly the wording as to measurement was different.

There is a further difficulty in plaintiffs' way, as pointed out by the trial Judge, that plaintiffs are entitled to be paid on the production of the engineer's certificate. They have been paid in full for all that the certificates call for, and, unless there was fraud or misconduct on the part of the engineer, plaintiffs are bound by his certificate. . . .

[Reference to Stevenson v. Watson, 4 C. P. D. 148; Scott v. Corporation of Liverpool, 1 Giff. 216; Botterell v. Ware Board of Guardians, 2 Times L. R. 621; Chambers v. Goldthorpe, [1901] 1 Q. B. at p. 635; Roscoe's Digest of Building Cases, 4th ed., pp. 30, 35.]

Appeal dismissed with costs.

APRIL 17TH, 1905.

DIVISIONAL COURT.

VAN CLEAF v. HAMILTON STREET R. W. CO.

Way—Non-repair—Injury to Person—Portion of Roadway Occupied by Street Railway Tracks—Liability of Railway Company—Misfeasance.

Appeal by plaintiffs from judgment of ANGLIN, J., ante 278, dismissing action brought to recover damages for the death of plaintiff's son, which was caused, as they alleged, and the trial Judge found, by the unsafe condition of the space between the rails of one of the tracks of defendants' railway laid upon one of the streets of the city of Hamilton under the authority of defendants Act of incorporation and a by-law of the city.

A. M. Lewis, Hamilton, for appellants.

E. E. A. DuVernet, for defendants.

The judgment of the Court (MEREDITH, C.J., TEETZEL, J., CLUTE, J.), was delivered by

MEREDITH, C.J.:—. . . The depression in the road which caused it to be out of repair and led to the accident, occurred in consequence of defendants having put in a switch there, and the earth which had been displaced and filled in again having sunk owing to the heavy rain which followed after the work was done. The condition of the road was not, therefore, due to mere wear and tear from the travel upon it, but to the acts of defendants in putting in the switch and either negligently replacing the material which had been removed in doing that work or negligently leaving the depression which had been thus created unfilled. This was an act of misfeasance, and defendants were therefore guilty of causing a nuisance in the highway, and, altogether apart from the question of their liability by reason of the terms of their agreement with the municipality as to keeping the highway in repair are answerable to plaintiffs for the loss they have sustained by the death of their son, which was occasioned by that nuisance: Burough of Batherst v. MacPherson, 4 App. Cas. 256; Bull v. Mayor, etc., of Shoreditch, 19 Times L. R. 64, 20 Times L. R. 254.

Appeal allowed with costs, and judgment to be entered for plaintiffs for $600 with costs.

APRIL 17TH, 1905.

DIVISIONAL COURT.

EARLE v. BURLAND.

Costs—Appeal to Judicial Committee of Privy Council—Costs Incurred in Canada—Taxation—Order for—Rules 818, 1255.

Appeal by plaintiffs from an order of FALCONBRIDGE, C.J., dated 8th February, 1905, upon a petition of defendants, directing that it should be referred to the senior taxing officer to ascertain the amount to which the petitioners were entitled under the terms of the order of the Privy Council of 10th December, 1901, with reference to the costs incurred in Canada in relation to an appeal to the Judicial Committee, and directing plaintiffs to pay to defendants the costs of the petition and reference.

D. L. McCarthy, for plaintiffs.

W. E. Middleton, for defendants.

The judgment of the Court (MEREDITH, C.J., TEETZEL, J., CLUTE, J.), was delivered by

CLUTE, J.:—R. S. O. 1897 ch. 48, sec. 7, provides that costs awarded by the Privy Council upon an appeal shall be recoverable by the same process as costs awarded by the Court of Appeal. Rule 818, after providing that the decision of the Court of Appeal shall be certified, etc., enacts that "all subsequent proceedings may be taken thereupon as if the decision had been given in the Court below." The order of the Judicial Committee of the Privy Council has been filed and has become an order of the High Court. Rule 1255 (818a) provides that on filing the Privy Council order with the officer of the High Court with whom the judgment appealed from is entered, he shall cause the same to be entered, etc., "and all subsequent proceedings may be taken thereon as if the decision had been given in the Court below." This Rule is simply giving effect to the above Act and to Rule 818, and does not carry the procedure beyond what is therein provided for. It is a rule of procedure, and applies, I think, to the present case. But, even without Rule 1255, plaintiffs are entitled under the above Act and Rule 818 to have the costs ascertained "as if the decision had been given in the Court below."

I think the appeal should be dismissed with costs.

(See Earle v. Burland, 3 O. W. R. 702.)

CARTWRIGHT, MASTER. APRIL 18TH, 1905.

CHAMBERS.

ARMOUR v. TOWN OF PETERBOROUGH.

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

Action to recover damages for injury alleged to have been caused by improper construction of a sidewalk.

Motion by defendants to strike out jury notice under sec. 104, O. J. A.

Grayson Smith, for defendants.

C. W. Kerr, for plaintiff.

THE MASTER:—The 6th and 7th paragraphs of the statement of claim allege that "the accident to the plaintiff was caused by the negligent construction of the said pavement, which is built on an incline, and is made with an exceedingly smooth granite finish, at all times dangerous to pedestrians, and the said pavement when moist is rendered even more dangerous than when dry through the faulty, improper, and negligent construction thereof. This pavement has been well-known and notorious at the place in question by reason of the negligent, improper, and faulty construction thereof, and the exceeding smoothness of the surface thereof, and by reason of the fact that the said pavement is built upon an incline, which would call for the ordinary rough finish which it is customary and prudent and usual to build under said conditions."

The question is, does not this allege nonfeasance so that the action is for an injury "sustained through non-repair?"

This was considered in the cases of Clemens v. Town of Berlin, 7 O. L. R. 33, 2 O. W. R. 1115, 3 O. W. R. 73, and Kirk v. City of Toronto, 7 O. L. R. 36, 2 O. W. R. 1138, where all the cases are cited.

The present action is based on the alleged "negligent, improper, and defective construction" of the sidewalk itself.

As pointed out by Street, J., in Barber v. Toronto R. W. Co., 17 P. R. 293, the cases upon non-repair and obstruction have run into one another a good deal."

It may not at first sight be easy to reconcile such a case as Dickson v. Township of Haldimand, 3 O. W. R. 969, with Huffman v. Township of Bayham, 26 A. R. 514, as the effect

of the wall in the first case was similar to that of the milk-stand in the other. The distinction, no doubt, is in the person who erected the respective obstructions or nuisances.

The present case, I think, comes within sec. 104, as contended by defendants, and they are entitled to have the case tried without a jury. This would not improbably be the course adopted even if the jury notice was technically regular. If the principle laid down by Lister, J.A., in Huffman v. Township of Bayham, supra, is correct, it would seem clear that this is "non-repair," as the statement of claim alleges negligent construction of the pavement as being on an incline, and made with an exceedingly smooth surface, which is especially dangerous in moist weather, and this was not guarded against by having the ordinary rough finish, which is at once usual and prudent to adopt in such cases.

The allegations here are very similar to those in the case of Ince v. City of Toronto, 27 A. R. 410, 31 S. C. R. 323, which was tried without a jury . . .

Costs to defendants in any event.

"Non-repair" seems to mean any omission of duty on the part of the municipality which makes the highway unsafe. Making a new road or walk defectively and leaving it in such unsafe condition would seem to be "non-repair" within the words of the statute as interpreted by the cases.

CARTWRIGHT, MASTER. APRIL 19TH, 1905.

CHAMBERS.

CLARK v. LEE.

Summary Judgment — Action on Bill of Costs — Defence — Agreement of Solicitor to Conduct Action without Remuneration—Champerty and Maintenance—Cross-action—Consolidation.

Motion by plaintiff to consolidate this action (in the High Court) with an action brought against plaintiff by defendant in a County Court, and for summary judgment in this action, with a reference for taxation of the bill of costs to recover the amount of which this action was brought.

C. A. Moss, for plaintiff.

J. E. Cook, for defendant.

THE MASTER:—The bill of costs sued upon was incurred in respect of an action brought by plaintiff as solicitor for defendant. That action was dismissed by the trial Judge. His decision was reversed by the Court of Appeal, and a further appeal to the Supreme Court of Canada was quashed. The taxed costs were paid to the now plaintiff. They amounted to $1,264.73. Defendant had also paid $126 and given a note for $82.50, making in all $1,473.23. At the end of the litigation plaintiff rendered a bill for $1,755.89. He gave credit for the above $1,473.23. This left a balance of $282.66. For this, as well as for the $82.50 note, which was not paid, the present action was brought.

The bill was rendered more than a year ago, and no order for taxation was taken out, because negotiations were pending for settlement, it is said.

On 2nd March defendant commenced an action in a County Court to recover back from plaintiff $173.04, being moneys received by plaintiff to use of defendant. Plaintiff appeared in the County Court action, and then on 13th March commenced this action in the High Court to recover $370.33. In this latter action defendant appeared. . . .

The motion for summary judgment is based on the fact that the bill has been rendered more than a year ago, and is therefore prima facie admitted, as no order has been taken out for taxation.

Defendant has made affidavit that plaintiff, through pressure, and pending the appeal to the Supreme Court, induced him to give a mortgage for $1,000, on the representation that if that appeal were successful there would in some way be something left for him out of the wreck, through the mortgage. Defendant also denies that he ever consciously signed a retainer; and further alleges that plaintiff "took up the case on condition that he was to get his costs out of defendants; that if we failed all I would have to pay was the defendants' costs. It was on this understanding he went into it."

Mr. Moss argued that the agreement set up by defendant could not be heard as a defence to plaintiff's action, because it was champertous and savoured of maintenance. He cited Anson on Contracts, 10th ed., p. 216, . . . With this contention I am unable to agree. The agreement alleged is

certainly not champertous. Nor do I think it in any way comes within the prohibition against maintenance. Anson adopts the definition of maintenance given by Lord Abinger, C.B., in Findon v. Parker, 11 M. & W. at p. 682, viz., "Where a man improperly for the purpose of stirring up litigation and strife encourages others to bring actions or to make defences which they have no right to make."

This received the emphatic approval of Lord Blackburn in Hutley v. Hutley, L. R. 8 Q. B. 112, and of Lord Coleridge, C.J., in Bradlaugh v. Newdigate, 11 Q. B. D. at p. 12.

In Cordery on Solicitors, 2nd ed., p. 232, it is said: "It was never doubted that a solicitor might lay out his own moneys as disbursements on his client's account, and a solicitor can conduct a case gratuitously out of charity or friendship towards his client."

He gives as his authority for the latter part of this proposition what is said in Viner's Abr. "Maintenance," M. 12: "An attorney may present his client's case without fees, and yet it is not maintenance."

This seems decisive of the right of a client to avail himself of such an agreement as is set up in the present case, if he can prove it.

Whether he can do so or not, is a matter to be disposed of elsewhere, and not on a motion under Rule 603.

The client, having been sued by his solicitor, is entitled as of right to have this issue investigated in the usual way by a Judge, who will try it with or without a jury as he may think best.

The proper order to make is to dismiss the motion for judgment, and consolidate the actions.

The defendant is to be at liberty to set up all questions as to the agreement, and also to counterclaim if so advised for a release of the $1,000 mortgage.

In this way all matters in dispute between the client and his former solicitor will be before the Court and be disposed of in one action, as directed by the Judicature Act.

It seems probable that some settlement will yet be arrived at. It is for the parties to consider what is the wisest course for them to adopt.

If no settlement made, costs of these motions will be in the cause.

FALCONBRIDGE, C.J. APRIL 19TH, 1905.

TRIAL.

PARKER v. LAKE ERIE AND DETROIT RIVER R. W. CO.

Master and Servant—Injury to Servant—Negligence—Person to Whose Orders Servant Bound to Conform—Right to Give Order—Servant Voluntarily Incurring Risk—Findings of Jury.

Action to recover damages for injuries sustained by plaintiff while in the employment of defendants as a fireman on an engine, owing to the alleged negligence of defendants.

The following were the questions left to the jury and the answers:—

1. Did plaintiff, Parker, suffer the injury complained of by reason of the negligence of any person in the service of the railway company, to whose orders he was bound to conform and did conform? Yes.

2. If so, who was the person and what was the negligence? By Couse and by moving the engine too soon.

3. Did such injury result from Parker having so conformed? Yes.

4. Was such injury the result of Parker's own negligence? No.

5. Could plaintiff by the exercise of reasonable care have avoided the accident? No.

6. Was the injury the result of mere accident, for which neither plaintiff nor defendants are responsible? (Not answered.)

7. If plaintiff should be held entitled to recover, at what sum do you assess the damages? $1,250.

J. A. Robinson, St. Thomas, and C. St. Clair Leitch, Dutton, for plaintiff.

J. H. Coburn, Walkerville, and A. Grant, St. Thomas, for defendants.

FALCONBRIDGE, C.J.:—Defendants contend that judgment ought to be entered for them, principally on the ground that plaintiff was not bound to conform to the order which he says he got from Couse, and that in any event it was a case of volenti non fit injuria.

As to the first question the case of Bunker v. Midland, 31 W. R. 231, was not followed in Marley v. Osborn, 10

Times L. R. 388, where it is said that the legislature did not intend to leave it to the workman to go into the question whether the order given was right, if it was an order he was bound to obey. This is not a case of giving an unlawful order. It was said to be an order to do something contrary to the rules of the company. But it was not shewn that plaintiff knew, as in some of the cases, that it was contrary to a rule.

As to the question of volenti, I was not asked to submit any question to the jury on this subject, and, in the absence of any finding by them that plaintiff undertook the risk of doing what he says he did on the bridge, plaintiff is entitled to judgment on the findings of the jury.

I may say that I was not very well satisfied with the findings of the jury in this case. They were certainly against the preponderance of testimony. As the case stands, however, judgment must be entered for plaintiff for $1,250 and costs.

FALCONBRIDGE, C.J. APRIL 19TH, 1905.

TRIAL.

LINDSAY WATER COMMISSIONERS v. FAUQUIER.

Work and Labour—Action to Recover Value—Protection of Plaintiffs' Works from Injury by Defendants—Value of Reasonably Necessary Work.

Action by plaintiffs to recover moneys expended by them in protecting their water main from injury by reason of certain railway construction work carried on by defendant in its vicinity.

H. O'Leary, K.C., and G. H. Hopkins, Lindsay, for plaintiffs.

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

FALCONBRIDGE, C.J.:—The following is the statement of Mr. Flavelle of the conversation between him and Mr. Fauquier:

Q.—Did you have any conversation with Mr. Fauquier in reference to the railway crossing or water main? A.—Yes.

Q.—More than one conversation? A.—No.

Q.—When was that? A.—To the best of my recollection it was early last spring, in Kent street.

Q.—What was the nature of the conversation? A.—I met Mr. Fauquier and called his attention to the fact that he

would soon have to place the water pipe in as good condition as it now was, that it required attention owing to the fact that he excavated a large quantity of earth from the top and exposed it to the weather and the frost, and I said we would expect him to have the work done; we might call upon him at any time. His reply was: "You have the men, you have the materials, you are accustomed to this work; you do the work, render the bill to me, and I will settle it.

Q.—Any further conversation? A.—I stated then to him that from what the engineer, or superintendent, said, it would probably entail a considerable expenditure, and his reply was: "The law compels me to put you in as good a position as you now occupy, and I will have to pay whatever the work costs."

The following is the statement of Mr. Fauquier as to this conversation:—

Q.—Will you tell us what took place between yourself and Mr. Flavelle? A.—He told me we would have to have that pipe lowered, and I told him I understood we would, and said I would like to have him do it himself, as they had the men there to do the work, and I told him we had an excavation there, about — I have forgotten what it is now — I think it was about 4 feet, and he would require to lower the pipe down underneath our excavation.

Q.—Did you know what probable work would be required to be done? A.—I knew what I should have done and considered necessary.

Q.—What you personally would have considered? A.—Yes.

Q.—Was there anything said between yourself and Mr. Flavelle as to the work that was to be done, the extent of the work? A.—No; that was the conversation. I specified the pipes—at least he told me and I agreed with him that the pipes would have to be lowered underneath our excavation there, and that is what I asked him to do.

Q.—Did you have any conversation with Mr. Flavelle on the subject afterwards? A.—I don't think so, I do not remember any.

Q. Were you ever consulted at any time as to the extent of the work that should be done? A.—No, I did not know anything about it till it was pretty nearly done.

It makes no difference which of the above statements is accepted as being an accurate narrative of what took place between the chairman of the board of water commissioners and

the defendant when the work was authorized. For plaintiffs were bound to do the work with reasonable reference to defendant's interests, i.e., they were not entitled to have it done at an expense greater than was reasonable or necessary. This, however, I find that they did, not in bad faith, but by reason of an excess of precautions, involving great and unnecessary expense in lowering the main for a much greater distance than was required. Mr. Rust, the only independent engineer called by plaintiffs, gives amiable and half-hearted testimony in their favour. He says that what was done was "very good engineering," but he admits that it might have been shortened 100 or 150 feet.

I find that the sum paid into Court was sufficient to pay the reasonable cost of properly and sufficiently protecting plaintiffs' water main and to satisfy plaintiffs' claim.

Defendant will be entitled to his costs subsequent to filing his statement of claim. No costs up to that time.

Order for payment out to plaintiffs of the $200 on their paying defendant's costs as above.

TEETZEL, J. APRIL 20TH, 1905.

WEEKLY COURT.

RE WIARTON BEET SUGAR MANUFACTURING CO.

McNEIL'S CASE.

Company—Winding-up — Contributory — Unpaid Shares Issued as Fully Paid—Acceptance—Set-off—Advances Made by Contributory — Ontario Companies Act — Winding-up Act of Dominion.

Appeal by Alexander McNeil from a portion of an order of J. A. McAndrew, official referee, made in proceedings for the winding-up of the company, settling the appellant upon the list of contributories for $1,675, a balance due upon 238 shares; and an appeal by the liquidator of the company from a portion of the same order, which allowed a set-off of $1,500, for advances made by McNeil for the benefit of the company, pro tanto against the $1,675.

G. H. Watson, K.C., for McNeil.

W. H. Blake, K.C., for the liquidator.

TEETZEL, J.:—On 6th August, 1902, a certificate for 238 shares of the par value of $25 each, described therein as fully paid up and non-assessable, was issued to McNeil, but he in fact only paid to the company a sum equal to 171 shares, and the $1,675 represents the par value of the remaining 67 shares.

The records contain no evidence of an application by McNeil for those 67 shares, nor does there appear to have been any formal resolution allotting them to him; but I think the evidence is conclusive that they were issued in the same certificate with the shares that he had paid for, as bonus stock, in pursuance of an understanding between the directors and McNeil and others. In other words, I think, an effort was made to issue stock at a discount.

There is no doubt, I think, that McNeil had actual knowledge that the 67 shares were not paid for, and he received and accepted the certificate with that knowledge, but, I have no doubt, with the innocent belief that there would be no further liability cast upon him in respect of the shares.

After receiving the certificate for the 238 shares he transferred one share, and afterwards became and for several months continued to be a director of the company. When he transferred the one share he surrendered the certificate for 238 shares, and obtained a new certificate for 237 shares.

He appears in the stock ledger and in the stock register as the holder of 237 shares, and, in my opinion, he is a shareholder in the company, with all the rights and liabilities of such a shareholder, and, having chosen to accept the certificate of ownership of these shares, and having acted upon the same with full knowledge of all the facts, he cannot now repudiate his status as a shareholder in respect of them. . .

[McCracken v. McIntyre, 1 S. C. R. 479, and Page v. Austin, 10 S. C. R. 132, distinguished.]

Whether McNeil would be entitled to relief against the company, who issued the stock as fully paid up shares, it is not necessary to consider; but I think he has no defence to the application of the liquidator to put him on the list of contributories for the amount actually unpaid in respect of the shares. . . .

[Reference to Mosely v. Koffyfontein, [1904] A. C. 108; Emden, 7th ed., pp. 188, 189.]

The appeal must, therefore, be dismissed with costs.

With reference to the liquidator's appeal, I am of opinion, with much respect, that the referee was in error in allowing

the set-off in question. According to his view, a shareholder in a company incorporated under the Ontario Act can set off, against a claim by a liquidator for the amount unpaid on his shares, any debt due to him by the company, referring to R. S. O. 1897 ch. 191, sec. 37; sub-sec. 2 of which reads as follows: "Any shareholder may plead by way of defence, in whole or in part, any set-off which he could set up against the company except a claim for unpaid dividends, or a salary or allowance as a president or a director of the company."

This has reference to any action against a shareholder in the nature of a sci. fa. by a creditor of the company. . . .

[Reference to Shaver v. Cotton, 23 A. R. 426.]

To allow set-off by a shareholder who is also a creditor, would violate the spirit and intention of the Winding-up Act, the ruling object of which is the distribution of the assets of an insolvent company among its creditors pari passu; and I cannot construe the provisions of sec. 33 of the Ontario Companies Act as extending the right of set-off to proceedings against shareholders under the Winding-up Act.

It is quite clear upon the authorities that, unless sec. 37 gives the right of set-off as against the liquidator, there is no authority for allowing set-off. . . .

[Re Mimico Sewer Pipe Co., 26 O. R. 289, distinguished.]

As regards the law allowing a set-off of one debt against another, as administered by the Courts, whether of law or equity, both in this country and in England, the mutuality between cross-debts or demands has always been the underlying essential. I can find no case where it has been allowed in favour of a contributory shareholder as against a liquidator; but the cases are very numerous against such allowance. . . .

[Reference to Maritime Bank v. Troop, 16 S. C. R. 456; Emden, 7th ed., pp. 236-239; Masten's Company Law, p. 653.]

There was a good deal of discussion upon the argument as to the effect of the winding-up of the company upon rights conferred upon shareholders by the Ontario Act, Mr. Watson contending that the Ontario Legislature had the power to and did define his client's rights in the statute under which the company was organized, among those rights being the right of set-off against the company, and any creditor suing in respect of unpaid stock, and that these rights could not be curtailed by Dominion legislation.

Against this argument Mr. Blake contended that the Winding-up Act is in the nature of insolvency legislation, within the exclusive jurisdiction of the Dominion Parliament, and therefore in passing such legislation it would be competent to modify or alter the status of a shareholder in his capacity of creditor, so as to secure ratable distribution of the company's assets among all creditors: see Cushing v. Dupuy, 5 App. Cas. 409; Tennant v. Union Bank, [1894] A. C. 31.

I do not deem it necessary to decide this point, as I think the right of set-off does not exist, on the broad ground of absence of mutuality between the claim of the liquidator against McNeil and McNeil's claim as a creditor of the company, for the reasons fully discussed in the Troop case above cited.

The liquidator's appeal will, therefore, be allowed with costs.

FALCONBRIDGE, C.J. APRIL 19TH, 1905.

CHAMBERS.

LOVELL v. LOVELL.

Alimony—Interim Order — Right to—Amount—Disbursements.

Appeal by defendant from order of Master in Chambers, ante 401, requiring defendant to pay $12 a week interim alimony and necessary disbursements.

G. H. Watson, K.C., for defendant.

A. H. Sinclair, for plaintiff.

FALCONBRIDGE, C.J.:—To allow this appeal would be, in effect, to declare that plaintiff must fail in the action, and there is no authority for such a course. Keith v. Keith, 7 P. R. 41, Wilson v. Wilson, 6 P. R. 129, and Walker v. Walker, 10 P. R. 633, are direct authorities contra.

The financial circumstances of the parties, and particularly of the husband, seem to be practically the only subjects of consideration, the marriage being proved or admitted. In Smith v. Smith, 6 P. R. 51, Falvey v. Falvey, 2 O. W. R. 476, and Pherrill v. Pherrill, 6 O. L. R. 642, 2 O. W. R. 1096, considerations of this kind did prevail to defeat the claim for interim alimony, but the state of facts here is quite different.

Appeal dismissed with costs.