THE

# ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING NOVEMBER 15TH, 1902.)

VOL. I. TORONTO, NOVEMBER 20, 1902. NO. 39

NOVEMBER 7TH, 1902.

DIVISIONAL COURT.

## TURNER v. TOWNSHIP OF YORK.

*Municipal Corporations—Highway—Raising Level of—Injury to Adjoining Land — Backing Water on—Culvert — Inappreciable Injury.*

Appeal by plaintiff from judgment of MACMAHON, J. (6th March, 1901) dismissing action brought by plaintiff, a farmer, against the township corporation for an injunction restraining them from casting upon his land, by means of a culvert across one of their roads, a large quantity of surface water, and for casting it upon him in a more condensed form than it would naturally have come.

J. R. Roaf, for plaintiff.

A. B. Aylesworth, K.C., for defendants.

THE COURT (FALCONBRIDGE, C.J., STREET, J.), after a careful examination of the evidence and the plans shewing the levels and profile of the land in question, saw no reason for differing from the conclusion at which the Judge who heard the case arrived, viz., that plaintiff has not been injured to any appreciable extent, or in any appreciable manner, by the culvert through the road of which he complained. Appeal dismissed with costs.

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CHAMBERS.

## REILLY v. McDONALD.

*Attachment of Debts—Rent—To Whom Due—Heirs of Deceased Landlord—Executors—Devolution of Estates Act.*

The order of the Master in Chambers (ante 721) was reversed on appeal.

W. Norris, for judgment debtors.

W. A. Skeans, for judgment creditors.

MACMAHON, J. NOVEMBER 10TH, 1902.

CHAMBERS.

## STANDARD TRADING CO. v. SEYBOLD.

*Security for Costs—Præcipe Order for—Application for Increased Amount—Election.*

Appeal by defendants from order of local Master at Ottawa dismissing their application for an order requiring plaintiffs to give increased security for costs.

The plaintiffs are a trading company carrying on business in the State of New York. A præcipe order for security for costs was obtained by defendants under Rule 1199, and, instead of giving a bond for $400, the plaintiffs paid $200 into Court under Rule 1207.

The application for increased security was made after examinations for discovery, interlocutory applications and appeals, attendance of counsel at New York to take evidence under a foreign commission, etc., by which a large amount of costs was incurred.

The local Master considered that the defendants' taxable costs would by the time the case was tried amount to at least $500, but he held them bound by their election to take the security obtainable under a præcipe order, relying on Trevelyan v. Myers, 15 C. L. T. Occ. N. 135, and D'Ivry v. World Newspaper Co., 17 C. L. T. Occ. N. 82.

The Rule in force when these cases were decided was Rule 1250 of the Consolidated Rules of 1888: "The amount of security may be increased or diminished from time to time by the Court or a Judge."

The present Rule, 1208, is: "The amount of security, whether directed to be given by an order issued on præcipe or otherwise, may be increased or diminished from time to time by the Court or a Judge."

The Master thought the cases cited applied, notwithstanding the change in the Rule.

C. J. R. Bethune, for appellants.

G. E. Kidd, for plaintiffs.

MACMAHON, J.—By the terms of Rule 1208, the fact of the defendants having obtained a præcipe order by which a definite amount of security was provided for, bound them to no greater extent than if they had in the first instance made a special application for security. In either case the defendants must shew facts disclosing a proper case for increased security. . . . The Master having stated that defendants' costs will probably amount to $500, and that the increase is largely due to plaintiffs' interlocutory motions and appeals,

the simple question is: have the defendants made out a case for increased security? I think they have. The estimated costs of defendants amount to two and a half times the sum for which security has been given. And, although defendants might have foreseen that a commission to take the evidence of witnesses in New York would issue, and that an examination for discovery would probably be necessary, they could not have anticipated at the time the order for security was obtained that an appeal would be made to a Judge in Chambers and then to a Divisional Court, the costs in connection with which would amount to one-half the sum deposited in Court as security.

[Reference to the English O. LV. r. 2; Republic of Costa Rica v. Erlanger, 3 Ch. D. 62; Massey v. Allen, 12 Ch. D. 807; Bentsen v. Taylor, [1893] 2 Q. B. 193.]

Both the English Rule and our own contemplate that there may be more than one application for increased security. . . . No reservation is necessary in any order for leave to apply again, as the learned Master seemed to think.

The great increase in the costs . . . could not have been foreseen by defendants when the præcipe order for security was obtained, and the order of the learned Master must, therefore, be reversed, and the plaintiffs ordered to give the defendants additional security by bond in $600 or by payment into Court of $300.

The costs of the appeal and of the motion before the Master will be to the defendants in any event.

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

WEEKLY COURT.

## RE PUBLISHERS' SYNDICATE.

*Company—Winding-up—Claim against Assets—Breach of Contract—Damages.*

Appeal by William J. Greig, David Connery, and Roderick J. Parke, from the certificate or report of an official referee, whereby he allowed Greig and Parke nominal damages of $1 each only, and disallowed the claim of Connery for damages as against the estate of the syndicate, an incorporated company in liquidation.

Damages were sought for the breach on the part of the syndicate of the contracts contained in certificates of registration issued to them respectively by the syndicate, whereby the syndicate agreed, in consideration of $10.50 paid by each of the claimants to the syndicate, to sell to each of them for the period of five years from the dates of their respective cer-

tificates all books, magazines, periodicals, and other printed matter, on the terms mentioned in the certificates.

R. McKay, for the appellants, contended that they were entitled to rank as creditors against the estate of the company for substantial damages as established by the evidence, and that the liquidator should pay the costs.

C. D. Scott, for the liquidator, contra.

FALCONBRIDGE, C.J.—The referee was right in disallowing the claim of Connery, not perhaps because Connery committed a breach of the contract entitling the syndicate to put an end thereto, but because the selling of books at a profit was not contemplated by the contracts, and therefore loss of prospective profits, besides being obnoxious to the general rule, was never in contemplation of the parties. His general statement that he bought a great many books besides, does not afford any reasonable basis for a specific finding of damage.

But as to Greig and Parke, the learned referee has confounded loss of prospective profits or speculative damage with the loss which these two claimants will sustain by reason of not being able for three years to buy a certain quantity of books for their own use at a certain promised discount; i.e., at a price less than they can buy them for in the open market.

Parke's damages assessed at $30; Greig's damages at $20. No costs of appeal as to Connery's claim. Parke and Greig to rank for $30 and $20 respectively, with $20 each costs allowed by the referee, and costs of this appeal fixed at $10 each.

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NOVEMBER 10TH, 1902.

DIVISIONAL COURT.

## BENTLEY v. MURPHY.

*Ship—Contract to Sell — Co-owners — Partnership—Authority of One Co-owner to Bind the Other—Ratification—Specific Performance —Damages.*

Appeal by plaintiffs and cross-appeal by defendant Craig from judgment of BRITTON, J., at the trial (1 O. W. R. 273). The action was to compel specific performance of an alleged agreement by defendants to sell and deliver to plaintiffs a steamer called the "Island Queen," then at Kingston, for $5,000, payable $2,500 on delivery and $2,500 six months from the date of delivery.

The trial Judge found that the contract was made by Murphy on behalf of himself and Craig; that Murphy and Craig were not only part owners of the steamer, each being entitled to 32 shares, but were partners in the venture; that Craig, as between himself and Murphy, insisted on getting

the whole of the cash payment, but, subject to that, he ratified and confirmed the agreement for sale by Murphy. He held, however, that specific performance should not be enforced unless plaintiffs were willing to do equity by giving a mortgage on the vessel for the unpaid purchase money. There was a finding for plaintiffs against both defendants upon the contract, and a reference was ordered as to damages.

The plaintiffs appealed on the grounds that damages were not an adequate remedy, and that the trial Judge erred as to the mortgage for the unpaid purchase money.

The defendant Craig appealed on the ground that he and Murphy were not partners, and Murphy had no authority to dispose of his (Craig's) shares in the vessel.

The appeal was heard by MEREDITH, C.J., MACMAHON, J., LOUNT, J.

L. G. McCarthy, K.C., and A. M. Stewart, for plaintiffs.

T. Mulvey, K.C., for defendant Murphy.

C. H. Ritchie, K.C., and A. E. Knox, for defendant Craig.

MACMAHON, J. (after stating the facts at length) :—One of the findings in the judgment is, that defendants were partners in the venture, i.e., in the ownership of the vessel. That was not the relationship existing between them. The learned trial Judge, entertaining that view, was doubtless influenced to some extent in reaching a conclusion that there was a valid contract binding on both defendants. For, if they were partners in the venture, Craig would be bound by Murphy's offer.

[Reference to Abbott on Shipping, 14th ed., pp. 116, 129, and to Lindley on Partnership, 6th ed., pp. 25, 26, as to the difference between co-ownership and partnership.] . . .

Craig says Murphy was not authorized by him, and had no authority to give an option on his behalf for the sale of the steamer. This direct and positive statement remains uncontradicted. . . .

It was urged that, even if Murphy had no authority from Craig to give the option, what is contained in Craig's letter of the 9th June to Murphy, and his subsequent conduct, shew ratification of Murphy's act. Craig stated in the letter that he would wire Murphy on the Tuesday "if I can get off with the Government, and if so you had better get the Toronto people (the plaintiffs) to promise all cash, and then wire him (Craig) to go to Toronto to close deal." The letter in effect says: "If the plaintiffs pay cash for the vessel, I am willing to sell, and, on being notified that they will do so, I will go to Toronto and close the deal." On the 11th (Tuesday) Craig telegraphed Murphy: "If Toronto parties pay cash for my

interest, I will assign to them." On the same day Murphy replied: "Will pay cash. Come at once."

I fail to see in this the slightest evidence of ratification of Murphy's act in giving the option. Bentley knew that Craig was a co-owner with Murphy, that Craig had repudiated Murphy's authority to sign the option on his behalf, hence Bentley's desire to secure Craig's signature to the option. Craig insisted on being paid $2,500 in cash for his interest in the steamer, and at the meeting in Foy & Kelly's office on the 17th June he expressed his readiness to assign his 32 shares, on being paid that amount. That is not a ratification of the offer made by Murphy to accept $2,500 cash and the balance of the purchase money in six months.

When Craig, on the 9th June, repudiated Murphy's authority, that was a revocation by Craig of the offer, as far at least as he was concerned, although he was prepared to negotiate on different terms, provided the Government did not purchase the steamer.

The judgment directed to be entered against the defendant Craig must be set aside, and judgment directed to be entered for him, dismissing the action as against him with costs.

The judgment directed to be entered against Craig being set aside, the position of the plaintiffs in regard to the defendant Murphy has been materially changed.

It was laid down in Cullen v. Wright, 8 E. & B. at p. 657, that "where a person induces another to contract with him, as agent of a third party, by an unqualified assertion of his being authorized to act as such agent, he is answerable to the person who so contracted for any damages which he may sustain by reason of the assertion of authority being untrue."

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The principle enunciated in Cullen v. Wright has been upheld by a long line of authorities.

But is the present case governed by Cullen v. Wright? Bentley, as I have already stated, prepared the option which Murphy signed, and at that time he knew that Craig was part owner in the steamer, and as a lawyer he knew that, without express authority from Craig, Murphy could not bind him, and acting on that knowledge he immediately on reaching Kingston endeavoured to induce Craig to sign the option so as to ratify Murphy's act. Now, Bentley knew as a fact that Murphy was not the sole owner, and he did not sign the offer as agent for Craig, nor is there in the body of it any statement that he is acting as such. And in Cullen v. Wright, and a large number of authorities in which that case is followed, there was in every case a representation by the defendants in the body of the contract, or by signing, that they are agents of a named

principal. And it is only on such a representation that Murphy would be liable on his implied warranty as agent. [Reference to Beatty v. Lord Ebury, L. R. 7 Ch. 800.]

There was no misrepresentation in point of fact as to agency. The offer was for a sale of the vessel by Murphy when Bentley knew he had only a part interest therein. Murphy assumed that Craig would be satisfied with the proposed sale, but there was no representation that he would get in Craig's interest.

As Murphy would not transfer his shares without a mortgage on the vessel or promissory notes which he could discount, the defendants are entitled to recover such damages as they may be able to shew on a reference.

Before accepting a reference the plaintiffs had better consider what their position would have been if they had became the assignees of Murphy's interest and the owners of a moiety in the vessel.

If Craig was in possession of the vessel, his authority over her would be supreme. Where a vessel is owned in moieties, the owner who is in possession seems for all practical purposes to have the power of the majority, while the right of his co-owner seems to be restricted to those of a minority: Abbott, 14th ed., p. 120. He might refuse to employ the vessel in any venture which the new owners of Murphy's moiety might desire to use her in. He might be unwilling to run the risk of becoming bound as a partner for supplies for the vessel, which he would be if he consented to the vessel going into employment. For the position of the parties is altered when the owners determine to exercise the right of using her—the part owners of a ship becoming partners in respect of the voyage, its expenses and profits: Abbott, 14th ed., p. 132.

The costs of the reference will be at the plaintiffs' risk if in the result they are entitled only to nominal damages.

If a reference is not accepted, there will be judgment for the plaintiffs for nominal damages, fixed at $20, with costs on the Superior Court scale.

LOUNT, J., agreed with the judgment of MACMAHON, J.

MEREDITH, C.J., dissented, holding that the authority of Murphy to act for his co-defendant as well as for himself in selling the vessel and entering into the contract with plaintiffs, and the subsequent ratification and adoption of the contract, had been satisfactorily shewn, and that specific performance should be decreed.

OSLER, J.A. NOVEMBER 10TH, 1902.

C.A.—CHAMBERS.

## RE LENNOX PROVINCIAL ELECTION.

## PERRY v. CARSCALLEN.

*Controverted Election Petition — Affidavit of Bona Fides — Commissioner—Agent for Solicitor.*

Motion to set aside or dismiss the petition and to set aside the service thereof and of the affidavit of bona fides and of notice of presentation upon the respondent.

C. A. Masten, for respondent.

R. A. Grant, for petitioners.

OSLER, J.A.—From the affidavits filed, and the argument, the objection to the proceedings appears to be that the commissioner before whom the petitioners' affidavit of bona fides, etc., was sworn, was disqualified, he being the solicitor by whom the petition and affidavit were prepared or filled up, and by whom as agent for the petitioners' solicitors the petition, as appears by the indorsement thereon, was presented.

The affidavits filed shew that Messrs. Kerr, Davidson, Paterson, & Grant were instructed to present a petition against the election; that they sent one Sutherland, a clerk in their office, to Napanee with the necessary forms of petition and affidavit to be signed and sworn to by the petitioners, whoever these might turn out to be; that he went to the office of Mr. German, a local solicitor, who filled up the forms and as commissioner swore the petitioners to the affidavit; that Sutherland took the papers back with him to his principals, who, after indorsing the petition as follows, "This petition is presented by T. B. German, of the town of Napanee, in the county of Lennox and Addington, agents for Messrs. Kerr, Davidson, Paterson, & Grant, of the city of Toronto, solicitors for the petitioners," returned it to German, who filed it with the local registrar at Napanee on the 2nd August, 1902, together with the affidavit and notice of presentation, which latter appears to be filled up in German's handwriting. Copies of all these proceedings were afterwards served upon the respondent.

A solicitor was not, nor was his clerk, partner, or agent, under any disability at common law which disqualified either of them from swearing any one to an affidavit in a cause in which the former was the solicitor on the record. A clear rule or settled practice creating such disqualification in the case before me must be shewn to entitle the applicant to succeed.

If Con. Rule 522 applies to the proceedings in an election petition, it does not help the respondent, as it extends only to affidavits sworn before the solicitor of a party to the cause or his clerk or partner.

The Rules of Court touching controverted elections make no provision on the subject, and s. 113 of the Ontario Controverted Elections Act, R. S. O. 1897 c. 11, provides that so far as these Rules do not extend, the principles, practice, and Rules on which petitions touching the election of members to the House of Commons of England, were on the 15th February, 1871, dealt with, shall be observed.

I am referred to nothing under this head which touches the point.

Then it is said that, in the absence of any Rule or decision, the principle of certain decisions in equity ought to be applied, and the agent of the solicitor in the cause who prepared the papers ought to be held to be within the mischief which is struck at. Foster v. Harvey, 11 W. R. 699, S.C., in appeal, 9 L. T. N. S. 404, Duke of Northumberland v. Todd, 7 Ch. D. 777, and In re Gregg, L. R. 9 Eq. 137, 143, were cited.

It is not suggested that any actual impropriety has occurred or that any wrong or injustice has been done. The objection is, therefore, a strictly technical one, and, if we are to look for analogy or principle, I see not why we should go beyond our own Rule of Court above referred to, which does not include an agent.

Further reason for holding that the objection fails, even had the affidavits been sworn before one of the members of the firm who now appear to be the petitioners' solicitors, is, that when the affidavits were sworn there was no cause or matter in Court, and therefore no solicitor on the record.

In this respect the case is more like Regina ex rel. Blaisdell v. Rochester, 12 U. C. R. 630, than any which has been cited. There, the relator's attorney took the recognizance and affidavit on which the County Judge acted in granting the fiat for a municipal summons. The Court said, per Draper, C.J., that no rule or practice governed the point, and, even if they doubted the strict regularity of the proceeding on the ground of the commissioner being also the attorney, they would be slow to interfere unless a very strong necessity for so doing was made out. The case was compared to that of the suing out of a capias on an affidavit taken before a commissioner who afterwards acted as plaintiff's attorney in suing out the writ.

On every ground the objection fails, and the motion is dismissed, with costs to be taxed and added to the petitioners' general costs of the cause or paid to the petitioners in any event.

MACMAHON, J. NOVEMBER 13TH, 1902.

WEEKLY COURT.

## KELLY v. SMITH.

*Interest—Claim for Price of Goods Sold—Interest not Claimed in Writ of Summons—Report—Appeal—Items—Costs.*

Appeal by plaintiff from report of local Master at Sarnia in an action for the price of fruit and vegetables sold to defendants by plaintiff. The Master found that plaintiff was entitled to $118.83 paid into Court and to a further sum of $74.78.

A. Weir, Sarnia, for appellant, contended that interest should be allowed from the date of the issue of the writ of summons, and that certain items of his account were improperly disallowed or reduced by the Master.

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

MACMAHON, J.—With regard to the claim for interest, which has not been dealt with by the learned Master in his report, and in respect of which he was not asked to make any special report, the appeal fails. Mr. Weir supposed that the indorsement on the writ of summons claimed interest; but a reference to the writ issued shews that no claim for interest is made on the balance, which by the special indorsement appears to have been $368.13. Had the claim been made, I should probably, in view of Irving v. Victoria Harbour Co., referred to in a note in Holmested and Langton's Practice under the Judicature Act, p. 149, have sent the report back for a special finding.

The learned Judge then dealt with the other items in question on the appeal, and allowed the appeal as to one item of $12, dismissing it as to all the others. The defendants having succeeded as to nine-tenths of the amount involved in the appeal, the plaintiff was ordered to pay nine-tenths of the costs.