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HIGH COURT DIVISION.

KELLY, J., IN CHAMBERS. JULY 15TH, 1919.

WILSON v. TORONTO R.W. CO.

Jury Notice—Filing and Serving after Time for so Doing Expired—Judicature Act, sec. 56—Solicitor's Error or Omission—Motion to Strike out Jury Notice as Irregular—Failure to Specify Grounds in Notice of Motion—Order Validating Jury Notice—Costs.

Appeal by the plaintiff from an order of the Master in Ordinary, sitting in vacation for the Master in Chambers, striking out the plaintiff's jury notice.

Alexander MacGregor, for the plaintiff.
G. W. Adams, for the defendants.

KELLY, J., in a written judgment, said that prima facie the action was one to be tried by a jury. The plaintiff did not file and serve a jury notice within the time prescribed by the Rules, the omission being due purely to an oversight of his solicitor and not to intent. Later the plaintiff filed and served a jury notice. It was stated on the argument that the action had been set down for trial at the next jury sittings in Toronto.

The defendants moved to strike out this jury notice; and on the return of the motion the plaintiff moved on notice for an order that the jury notice be validated. The defendants' application was granted and the plaintiff's was dismissed; the plaintiff now appealed.

The defendants' notice of motion did not state, either expressly or by reference thereto in any affidavit or other instrument, the grounds upon which the motion was made, and the only documents proposed by the notice to be used on the application were the pleadings.

In Macrae v. News Printing Co. (1895), 16 P.R. 364, where a jury notice was served in due time, but through inadvertence was not filed until the specified time had elapsed, it was held that there was power to make an order allowing it to stand as a good notice, and that such order should be made if the case was one proper to be tried by jury.

The provision relating to the giving of a jury notice had been changed since that decision (see the Judicature Act, R.S.O. 1914 ch. 56, sec. 56); but there was power to make such an order in a proper case; if there was that power, the litigant should not, where the action is prima facie one to be tried by a jury, be deprived at this stage of the proceedings of that right merely because of an inadvertent omission by his solicitor, where the opposing party is not prejudiced by the delay in giving the notice.

Giving the jury notice after the prescribed time was an irregularity; and the notice of motion to set it aside should be specific in setting out or referring to the irregularity complained of; failure to indicate the irregularity is a sufficient ground for a refusal of the order asked. A party moving against an irregularity must himself be regular, and is not entitled to indulgence.

As the matter had been presented, the Master's disposal of the motion was not merely one of discretion; had it been such, the Judge would hesitate to interfere. The proper order on the two motions was to allow the jury notice already filed and served to stand. The appeal should be allowed accordingly. When all was considered it was not a case for costs, either here or below.

KELLY, J. JULY 16TH, 1919.

CORRELL v. CORRELL.

Husband and Wife — Alimony — Evidence — Adultery — Cruelty — Parties Assaulting each other—Quarrel Provoked by Wife.

Action for alimony, tried without a jury at Sault Ste. Marie.

U. McFadden and E. V. McMillan, for the plaintiff.
J. L. O'Flynn, for the defendant.

KELLY, J., in a written judgment, discussed the evidence as to the alleged adultery and cruelty of the husband, the defendant. He found that the charges of adultery were not proved. There had been differences between the parties for almost the whole eriod of their married life—about 9 years. They had several

times quarrelled and separated and come together again. The plaintiff, to support her allegation of cruelty, relied chiefly on what occurred on a certain Saturday night in July, 1918. She was, no doubt, injured on that occasion in a quarrel and bodily encounter. The defendant was a cripple, and he was also injured. The learned Judge was unable to conclude that what happened on that night established sufficient ground to entitle her to alimony. She was the aggressor in a quarrel for which she was responsible, and in which, owing to his deformity and consequent incapacity, the odds were against him. Because of the part she then and in many of their other quarrels and troubles took, her rights were not distinguishable from those of the plaintiff in Warring v. Warring (1813), 2 Phillim. 132, where the Court, being unable to say that either party (husband or wife) was free from blame, refused relief to the wife, believing that her own conduct did not give her a title to complain, and suggested that her own behaviour might have been responsible for the evils of which she complained.

In Payne v. Payne (1905), 10 O.L.R. 742, the judgment was in favour of the defendant in an alimony action where it was found that the defendant's acts were not of such an excessive and intemperate character as to render it unsafe for his wife to live with him, and that the conduct complained of was provoked by the wife herself.

The facts of the present case brought it within the scope of these decisions, and were convincing against the merits of the plaintiff's claim.

The action should be dismissed; the defendant should pay such costs as are provided for by Rule 388.

SUTHERLAND, J. JULY 16TH, 1919.

SYLVESTRE v. SCHWARTZ.

Vendor and Purchaser—Agreement for Sale of Land—Possession Taken by Purchaser—Default in Payment of Instalments of Purchase-money—Action for Rescission, Damages, Forfeiture, and Possession—Tender of Overdue Instalments after Action Brought—Payment into Court—Judgment for Vendor for Amount Paid in—Failure of Action in other Respects—Costs—Rules 313, 314.

Action by the vendor for a declaration that an agreement for the sale and purchase of land was rescinded, for damages, a declara-

tion that the money paid by the defendant was forfeited, and for possession of the land.

The action was tried without a jury at Sandwich.

J. D. Grandpré, for the plaintiff.

F. D. Davis, for the defendant.

SUTHERLAND, J., in a written judgment, set out the terms of the agreement, which was in writing, and provided for a cash payment of $200, and for payment of the balance, $1,600, by monthly instalments, with interest.

The contract contained a clause providing that time was to be considered of the essence, and, unless the payments were punctually made, the agreement should be null and void, and the vendor should be at liberty to resell.

The defendant made the cash payment and nine monthly payments of $20 each, the last being for the one due on the 24th July, 1917.

Between the date of the contract, soon after which the defendant went into possession, and the 8th January, 1919, the defendant made improvements which had substantially enhanced the value of the property.

The defendant failing to make the further monthly payments for which the plaintiff was pressing, the latter, on the 8th January, commenced this action.

On the day the writ was issued, and before she was served therewith, the defendant went to the plaintiff with $100 in cash, admittedly the amount of the then overdue monthly instalments, and tendered that sum to him. The defendant said that the plaintiff told her that he would not accept the arrears unless she paid $50 for expenses. The costs were at that time less than $50.

The defendant entered an appearance; and the plaintiff moved for summary judgment; the motion was dismissed.

Some time later, the defendant's husband went to the plaintiff and offered to pay him $120 in settlement. By this time a further instalment of $20 had, no doubt, come due under the agreement. The husband testified that the plaintiff refused to accept the money, and said he wanted $50 more and that he (the husband) replied to this demand by saying he would not give a cent more than the $120. The defendant thereupon paid the sum of $120 into Court with her defence, "in full settlement of the plaintiff's alleged claim for arrears of purchase-money under covenants . . . without admitting that the said amount is payable under the provisions thereof," and asking that in any event she be relieved from any alleged forfeiture under the agreement. The plaintiff did nothing towards accepting the said sum, and the matter came on to trial in due course.

At no stage did the plaintiff intimate that he was prepared to accept $100 or later $120 and his taxable costs. On the other hand, at no time did the defendant offer to pay such costs, though she was plainly in default under the agreement at the time the writ was issued.

The plaintiff took an unreasonable course in insisting upon the payment of $50, a sum much in excess of taxable costs. Had he agreed, as he should, to have accepted taxable costs, further litigation might have been avoided.

Had the defendant offered to pay taxable costs, when she tendered the $100, her position might have been different on the question of costs.

The defendant relied upon Rules 313 and 314.

There was no plea of tender before action, and the plaintiff might have taken the $120 in satisfaction of all causes of action.

There was in fact no depreciation of the land, but an appreciation in value by what the plaintiff had done upon the land, and the claim for damages on this score was a fictitious and disingenuous one.

The defendant was in possession and had made substantial imporvements; and the plaintiff could not hope, after the offer to pay the arrears of $100, and much less after this was increased by the tender of $120 and its payment into Court, to obtain a decree for a rescission of the contract and possession. In these circumstances, Rules 313 and 314 were applicable. The plaintiff should therefore have accepted the $120 after it was paid into Court, and could then have proceeded to tax his costs of the action and on the Supreme Court scale notwithstanding the amount: Babcock v. Standish (1900), 19 P.R. 195; Stephens v. Toronto R.W. Co. (1907), 13 O.L.R. 363.

The plaintiff should now have judgment for the $120, with such costs as he could have taxed up to the time of the service of the statement of defence upon him. The defendant should have her costs from that time onward, as against the plaintiff, which might be set off as against the $120 and costs of the plaintiff mentioned. The action otherwise should be dismissed.

SUTHERLAND, J. JULY 16TH, 1919.

*KATZMAN v. MANNIE.

Bailment—Motor-car Left at Garage for Repair—Lien for Value of Work Done—Delivery of Car to Owner without Payment in Full—Return of Car to Garage for Further Repair—Payment of Amount Demanded in Respect of Further Repair—Assertion of Lien and Right to Detain Car for Balance Due for First Repair—Conversion—Detinue—Return of Car—Damages—Costs—Counterclaim.

Action for damages for the conversion of a motor-car; and counterclaim for the amount of an account for repairing the car and for storage charges.

The action and counterclaim were tried without a jury at Sandwich.

A. St. G. Ellis, for the plaintiff.

F. C. Kerby, for the defendant.

SUTHERLAND, J., in a written judgment, said that the plaintiff was the owner of a motor-car, valued when he bought it at about $1,000. On the 14th January, 1919, he took it to the defendant's service garage to have it overhauled and repaired. It remained there till about the end of the month, when the plaintiff went to the shop and asked for it. The plaintiff said that the defendant then presented him with a bill for $102.75, at the same time stating that the repairs were completed. The defendant, on the contrary, said that he then told the plaintiff that the speedometer was not yet fixed, but that the plaintiff could take the car out and bring it back later to have that done. The plaintiff, at the time, remonstrated about the size of the bill; he said that the defendant said he would have it looked over.

After the plaintiff had taken the car away, and while it was still in his possession, the bill was again presented, and he paid $35 on account, again remonstrating as to its size. He stated that the speedometer worked all right at first after he took the car away, but then began to fail to record the speed properly. He thereupon brought back the car to the garage to have this attended to. It was repaired; and the plaintiff again went to the garage for his car; he was then told that he would not be permitted to take it away unless he paid the balance of the bill. He thereupon consulted a solicitor, and was advised to pay the $1 charged for

* This case and all others so marked to be reported in the Ontario Law Reports.

fixing the speedometer and get a separate bill and receipt therefor, which he did. The defendant still refusing to give up possession of the car without payment of the balance of the account, the plaintiff's solicitor wrote to the defendant on the 13th February, 1919, stating that unless the car were delivered to the plaintiff by the next morning at 11 o'clock, an action for conversion would be begun. No answer being received, this action was begun, the plaintiff claiming as damgaes the value of the car, placed at $1,200, and such other relief as he should be entitled to.

The defendant entered an appearance, and on the 19th February his solicitor wrote to the plaintiff's solicitor stating that before action the plaintiff had been requested to pay the balance of the bill, $67.75, and unless he did so he would be charged at the rate of 75 cents a day for storage.

The defendant was not, in the circumstances, lawfully entitled to retain possession of the car on the ground of having a lien thereon for the work done. He had, no doubt, a lien for the account of $102.75 up to the time that he allowed the plaintiff to take the car away. A lien implies the right of continuing possession or the continuing right of possession: Forth v. Simpson (1849), 13 Q.B. 680; Wallace on Mechanics' Liens, 2nd ed. (1913), p. 139.

On the car being brought back for repairs to the speedometer, the lien did not re-attach, unless when the car was allowed to go there was an agreement between the parties that the lien should continue and that meantime the plaintiff should be merely the agent of the defendant as to possession. No such agreement was proved. The lien was therefore lost.

As to the counterclaim for storage charges: it has been held that where goods are detained adversely to the owner and charges are incurred, no claim can be properly made against the owner: Somes v. British Empire Shipping Co. (1860), 30 L.J.Q.B. 229, 8 H.L.C. 338; Leake on Contracts, 6th ed. (1912), p. 34 (Canadian notes). It would unquestionably be so if the holding were unlawful.

The plaintiff's claim was for detinue rather than for conversion. There had been no wrongful appropriation to his own use by the defendant, no wrongful deprivation of possession permanently or for any very substantial time, when the action was begun.

The plaintiff was the owner, and had a right, at the time he commenced his action, to sue in detinue, the defendant still being in possession of the car.

The proper form of judgment was for delivery by the defendant to the plaintiff of the car, and for damages, which should be fixed at $20.

The defendant should have judgment upon his counterclaim for $67.75, the balance of his account, which was substantially proved at the trial.

The plaintiff should have costs, fixed at $75, against the defendant; and there should be no costs of the counterclaim to either party.

The amount of the defendant's judgment is to be set off pro tanto against the amount of the plaintiff's judgment.

The car should be returned in as good condition as it was when the action was commenced. In default of the defendant returning the car and paying the amount found against him within 10 days, there should be judgment for the plaintiff for the value of the car, placed at $800, less $67.75, and with costs payable by the defendant to the plaintiff.

SUTHERLAND, J. JULY 18TH, 1919.

ELLIOTT v. HEWITSON.

Water—Obstruction of Flow of Natural Watercourse by Building of Tunnel—Flooding of Neighbour's Land—Cause of—Evidence—Extraordinary Freshet.

Action for damages to the plaintiff's land and buildings and crops by flooding.

The action was tried without a jury at Brampton.

F. W. Wegenast and C. E. H. Freeman, for the plaintiff.

G. W. Mason and A. G. Davis, for the defendant.

SUTHERLAND, J., in a written judgment, said that the plaintiff was a florist; in 1913 he bought lots 30 and 31 on the north side of Market street, in the town of Brampton. A small natural watercourse, after crossing Joseph street, in the town, ran through the plaintiff's land in a south-easterly direction to a point in the northerly limit of Market street, where it crossed that street, under a bridge, and continued for several hundred feet to where it crossed Church street, under another bridge, and then turned southerly. One Williams, the owner of land on the south side of Market street, in or about April, 1914, constructed a tunnel throughout the full width of his property from Market street to Church street, clearing out the bed of the watercourse for that purpose. The defendant afterwards became the owner of Williams's land. After the making of the tunnel, the plaintiff built

a greenhouse upon his land. In February, 1918, the plaintiff's land was flooded and injury done to his crops, greenhouse, and the flowers therein; and in previous years some damage was said to have been done. He attributed the injury to the construction of the tunnel and the obstruction of the natural flow of the stream; and in this action he claimed $995, the larger part being for the damage done in February, 1918.

The learned Judge, after reviewing the evidence, said that he was unable to come to the conclusion that any injuries sustained by the plaintiff in February, 1918, were the result of the building of the tunnel. He was convinced, on the contrary, that, having regard to the abnormal and apparently unprecedented freshet that occurred at that time, the floor of the plaintiff's greenhouse would have been flooded had no tunnel existed at all.

Reference to Greenock Corporation v. Caledonian R.W. Co., [1917] A.C. 556, upon which the plaintiff relied; and to Judge v. Town of Liverpool (1916-18), 28 D.L.R. 617, 57 Can. S.C.R. 609.

The other claims for damages were not sustained by the evidence.

Action dismissed with costs.

KELLY, J. JULY 18TH, 1919.

JOHNSTON v. TOWNSHIP OF KORAH.

Highway—Nonrepair—Municipal Act, sec. 460 (1)—Injury to Persons—Automobile Going over Side of Bridge—Guard-rail—Sufficiency—Finding that Township Corporation not Negligent—Negligence of Plaintiff, Owner and Driver of Vehicle—Evidence—Onus—Motor Vehicles Act, sec. 23.

Action for damages for the death of the plaintiff's son and injury to the plaintiff himself in an automobile accident upon a highway in the township of Korah. The plaintiff, suing on behalf of himself and his wife, alleged that a bridge upon the highway, over the side of which the automobile went, was not in a proper condition of repair, and that the condition of the bridge was the cause of the accident.

The action was tried without a jury at Sault Ste. Marie.

U. McFadden and E. V. McMillan, for the plaintiff.

Grayson Smith, T. L. Monahan, and J. McEwen, for the defendants.

KELLY, J., in a written judgment, said that what the plaintiff complained of was the want of a proper guard-rail at the side of the bridge. There was a guard-rail, but the plaintiff asserted that it was insufficient.

The learned Judge referred to sec. 460 (1) of the Municipal Act, R.S.O. 1914 ch. 192, and Dillon on Municipal Corporations, 5th ed., sec. 1694, p. 2359; and said that, when all the conditions were considered, he was unable to conclude that the defendants failed in their duty to keep the bridge in such condition as to enable persons, by the exercise of ordinary care, to travel over it with safety and convenience. The defendants were not chargeable with negligence which caused the accident.

If the defendants had been negligent, the plaintiff's own negligence would stand in the way of his success in this action. In the learned Judge's opinion, the accident was the direct and immediate result of the plaintiff's own negligence and his inexperience and inability to operate and direct the car which he was driving.

Even if there was not positive evidence on which to find that the plaintiff was negligent, he had not discharged the onus cast upon him by sec. 23 of the Motor Vehicles Act, R.S.O. 1914 ch. 207.

Action dismissed with costs.

MACGILLIVRAY v. DAVIS—KELLY, J.—JULY 16.

Vendor and Purchaser—Agreement for Sale of Land—Agreement not Executed by Co-owner, Wife of Vendor—Purchaser Going into Possession of Part of Premises—Shutting off Supply of Gas and Water—Injunction—Payment for Articles Used.]—Motion by the plaintiff to continue until the trial an injunction restraining the defendants from cutting off or in any way interfering with the supply of gas and water to the plaintiff upon premises which the defendant Edward T. Davis had agreed to sell to the plaintiff; and motion by the defendants for an injunction restraining the plaintiff from trespassing and committing waste upon the same premises. The motions were heard in the Weekly Court, Toronto. KELLY, J., in a written judgment, said that the chief if not the only ground for opposition to the existing injunction, and the motion to continue it until the trial, was that the defendant Martha Davis, wife of her co-defendant Edward Thomas Davis, was a part owner of the property agreed to be sold to the plaintiff (her husband being the co-owner), and that she was not a party

to and did not execute the contract. The contract provided that the sale and purchase of the property be completed and possession delivered on the 15th May. On the 14th May the plaintiff moved into the property, the defendants being still in personal occupation of it: the sale had not then been carried out by the payment of the purchase-money and delivery of the deed. The plaintiff said that he moved in, in pursuance of an arrangement by which he was to occupy two rooms on the ground-floor, and give the defendants until the 5th June to vacate. Following the making of the contract, and continuing until a considerable time after the plaintiff had moved into the premises, communications and the draft conveyance and the draft mortgage were exchanged between the solicitors for the respective parties as if the defendant Martha Davis was a co-owner and a party to the sale; and it was not until June, when the defendants found difficulty in obtaining another house for themselves, that the objection was taken that the sale could not and should not be carried out, because Martha Davis was not a party to the contract. Both defendants were cross-examined on affidavits made in answer to the plaintiff's motion. Martha Davis was contradicted in several material respects by her husband—for instances, in her denial that she was present when the agreement for sale was made and signed and that she took part in discussing the terms of the sale. In answer to a question why objection was not taken to the plaintiff's moving into the house, Edward T. Davis said that he and his wife gave the plaintiff and his family a chance to go in because they had no place to go until such time as the defendants could move out. He also contradicted his wife when she denied that she accompanied him to their solicitor's office to give instructions for the preparation of the deed and submitting it to the plaintiff's solicitor. There was ample reason for continuing the injunction. It would not be conducive to the sanitation of the premises, or the health of the occupants of the house, to deprive the plaintiff and his family of the use of water and gas; and, in view of the plaintiff's evidence, and the admissions of the defendant Edward T. Davis, the other alternative—to compel the plaintiff to move out—would not be proper in the circumstances. The plaintiff should, however, pay a reasonable sum for the use of the gas and water: if the parties should not come to an understanding as to what was a reasonable sum, the case might be mentioned to the learned Judge. The injunction should be continued as asked; the defendants' motion should be dismissed; and costs of both motions should be in the cause. H. J. Macdonald, for the plaintiff. T. Moss, for the defendants.

McKERNAN v. KERBY—SUTHERLAND, J.—JULY 16.

Partnership—Failure to Establish—Lease of Building—Claim for Injury to Fixtures—Stated Account—Counterclaim—Costs.]—The plaintiff alleged that a partnership between him and the defendant was created by a document dated the 26th September, 1917; that on the 3rd December, 1918, a dissolution of the partnership was effected, and the defendant took over all the assets of the business and agreed to pay the liabilities; that since the dissolution the plaintiff had been called upon to pay liabilities of the business carried on by the alleged partnership, amounting to $1,482.37; and that the defendant had been called upon but had refused to pay these liabilities. The plaintiff claimed judgment against the defendant for the amount of the liabilities, a return of all assets taken over by the defendant and the amount of rent received from a sub-tenant of part of the building in which the business was carried on. The defendant denied the existence of any partnership and that there ever was any undertaking on his part to pay any of the obligations of the business or to save the plaintiff harmless in relation to any obligation in connection therewith. The document relied on by the plaintiff as creating a partnership was in form a lease of a building by the defendant to the plaintiff, but it contained certain covenants upon which the plaintiff founded his allegations. The defendant alleged that the plaintiff, by carelessness and negligence in the operation of the heating system of the building leased to him by the defendant, caused the destruction and loss of a boiler and injury to the goods elevator and power plant in the building, and he asserted a counterclaim for $1,500. The action and counterclaim were tried without a jury at Sandwich. SUTHERLAND, J., in a written judgment, after setting out the facts, said that the plaintiff had not made out a case for holding the defendant liable for the sums claimed; and that the documents dated the 3rd December, 1918, were a stating of the accounts between the parties arising out of the lease, and that the defendant was bound thereby, and could not now properly claim from the plaintiff the sums mentioned in the counterclaim. There should be judgment dismissing both action and counterclaim with costs. E. S. Wigle, K.C., for the plaintiff. R. L. Brackin, for the defendant.