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CARTWRIGHT, MASTER. MAY 27TH, 1907.

CHAMBERS.

CLARKSON v. JACOBS.

Pleading — Statement of Claim — Specific Performance — Indefiniteness—Documents—Rules 275, 469—Amendment.

Motion by defendant Woodworth, one of eight defendants, for an order striking out the statement of claim as embarrassing or requiring plaintiffs to amend.

Featherston Aylesworth, for applicant.

R. F. Segsworth, for plaintiffs.

THE MASTER:—This is one of the many actions arising out of dealings with mining lands. Woodworth was the agent of the owners, who gave him authority to sell for $150,000, as set out in a letter of 22nd March, 1906. On that day plaintiffs agreed with Woodworth to buy at that figure, as appears by a letter of that date from plaintiffs to defendant. At that time it was agreed that the owners should give an option to Woodworth to hold as trustee for defendants, and that when a further sale was made plaintiffs should have for their profit the excess over $150,000. At the same time plaintiffs offered the property to three of the other defendants for $200,000, and on 2nd April an agreement of sale was executed. Plaintiffs ask specific performance of this last agreement and payment to them by Woodworth of $25,000, as set out in a letter from him to them of 3rd April, 1906. The statement of claim then sets out a certain agreement of 7th April made between the

purchasers from plaintiffs and the other two individual defendants by which the latter and Jacobs were to make the payments under the agreement of 2nd April to form a company to take over and work the property. Plaintiffs then set out that the 6 individual defendants conspired to defraud plaintiffs not only of the $25,000 which they were to receive from Woodworth, but also of certain shares which they were to receive in the first formed of the two defendant companies.

I agree with the argument that the statement of claim is not in itself sufficiently explicit to require the applicant to plead thereto, unless he is otherwise fully informed of the facts. Rule 275 has not been complied with, as several documents are referred to of which it cannot be said that the effect has been given.

It is admitted that the defences of all the other defendants have been delivered, they having availed themselves of Rule 469 and been furnished with copies of the various documents which are referred to in the statement of claim. This, however, they were not bound to do. Rule 469 is not intended to qualify Rule 275, but to enable the other side to see whether the effect of a document mentioned in their adversary's pleading has been correctly stated.

Plaintiffs should amend within a week, and defendant Woodworth will have 8 days to plead. It would be wise to furnish copies of the documents referred in the statement of claim at the time of its delivery, if the applicant wishes for them.

The costs of this motion will be to defendant in any event.

BOYD, C. MAY 27TH, 1907.

TRIAL.

MARTIN v. GIBSON.

Company — Directors — Issue of New Shares — Allotment by Directors to themselves at Par — Shareholders — Rights of Minority—Voting Power—Ultra Vires — Ratification — Statutes—Fraud—Injunction—Costs.

Action by Richard S. Martin, suing on behalf of himself and all other shareholders of the Hamilton, Grimsby, and

Beamsville Electric Railway Company, against J. M. Gibson and others, directors of the company, and against the company, J. W. Nesbitt, and J. G. Gauld, for a declaration of the invalidity of the issue by the directors of 2,000 shares of capital stock of the company, for an injunction, and other relief.

G. T. Blackstock, K.C., and H. E. Rose, for plaintiff.

G. Lynch-Staunton, K.C., and M. J. O'Reilly, for defendants Gibson and others.

A. M. Stewart, for defendants Nesbitt and Gauld and the company.

BOYD, C.:—While many subsidiary questions have been raised and discussed, the main point of controversy rests on the manner of allotment of the new issue of capital stock. The first batch of 350 shares the directors allotted ex parte to themselves at par, and also allotted the remaining 1,650 to themselves at par, after issuing a circular to which the objecting plaintiffs made no response except by way of protest. The directors did not wish and did not purpose or intend to allot the new stock among the shareholders pro rata, but so to deal with the last 1,650 as to appropriate for themselves enough shares to give them more than a two-thirds majority in value of shareholders.

At the time of the increase of capital there was a distinct cleavage of the shareholders into two bodies: the majority, represented by the directors, advocated a policy of expansion and betterment which would call for large expenditure and a withholding of dividends; the minority, representing over one-third of the whole, were strongly in favour of such management and husbanding of the road and its resources as might secure some return to the shareholders in the way of dividends.

The special Act incorporating the company provides for the substantial action and influence of a minority of the shareholders over one-third in voting value, and in certain cases disqualifies the majority from exercising control unless that majority is of at least the two-thirds in value of the body of shareholders.

Thus the capital stock may be increased upon sanction of two-thirds at least in value of the shareholders: 55 Vict. ch. 95, sec. 15 (O.), as expanded by R. S. O. ch. 170, sec.

34 (6). And certain traffic and other arrangements with other companies are permissible only upon terms to be approved of by two-thirds in value of the shareholders: special Act, sec. 46 (1892).

By the allotment of 350 shares of new stock at par by the directors to five of their own number (being the first named 5 defendants), without any intimation of what was being done, the board changed the voting power of the company so that the plus-one-third minority was converted into a minus-one-third, and the former mere majority, represented by the directors and those holding shares in sympathy with them, was enlarged into plus-two-thirds majority. The power of revision and sanction conferred by the statute on the plaintiffs and those they represent as being a plus-one-third minority was by this arbitrary action of the directorate overborne and practically expunged. This was on 2nd April, 1906. Then on 16th October, 1906, the balance of the increased capital (viz., 1,650 shares) was allotted by the directors to the same 5 defendants.

I am of opinion that the minority shareholders were not required to submit to the form of application proposed by the circular letter issued. They were invited to state whether they desired to increase their holdings, and it was on terms that such shares might be allotted as to the directorate seemed desirable and necessary. There was no recognition of any right on the part of existing shareholders to claim a pro rata division of the proposed new issue, and at this time by the appropriation of the 350 shares the minority had become less than one-third in value of the shareholders. Therefore I do not hold the plaintiffs to be precluded by the limited opportunity afforded by the circular from now seeking relief in respect of the total issue and allotment of the new stock. The action of the directors is left open to the investigation of the Court.

The only statutory direction which I can find or to which I have been directed as to the allotment of this stock is the general Act (incorporated with the special), R. S. O. ch. 170, sec. 34, No. 16, which enacts that the directors shall make by-laws for the management and disposition of stock . . . . not inconsistent with the laws of the province. I do not find nor was I referred to any by-law of the company with relation to the allotment or disposal of new shares—or indeed as to any stock or shares. The matter then rests on

the general powers and functions of the directorate of such companies. The underlying principle of action is to be found in the language of Romilly, M. R., in York v. Hudson, 16 Beav. 491, where he says: "A resolution by the shareholders that shares shall be at the disposal of directors is that it shall be at the disposal of trustees, i.e., that the persons intrusted shall dispose of them within the scope of the functions delegated to them in the manner best suited to benefit their cestuis que trust." Now, the persons to be considered and to be benefited are the whole body of shareholders—not the majority, who may for ordinary purposes control affairs—but the majority plus the minority—all in fact who being shareholders constitute the very substance (so to speak) of the incorporated body. Touched with this test, it would seem very plain that the action of the directorate was to benefit themselves as shareholders—the appropriation of the new shares gave them the absolute control of corporate affairs and removed any opposition that might arise from the united action of the reduced minority. The act of the directors changed the plus-one-third minority into a minus-one-third and enlarged the minus-two-thirds majority into an overwhelming majority, who might act in spite of and overrule all opposition from the dissentient shareholders.

This transaction appears to me in principle to be in excess of the powers of management intrusted to the directors for the benefit of the company. It is a one-sided allotment of stock which ignores the just claims of many shareholders, and in effect amounts to a prejudicial encroachment on the voting power of the minority. The principle of decision in Punt v. Lynn, [1903] 2 Ch. 517, and other cases, is applicable to shew that this method of manipulating shares either with a view to or which results in an unfair control of the voting power is ultra vires of the directorate and not susceptible of being ratified by the majority of the shareholders. Anything looking to a confiscation of corporate rights or privileges by a majority at the expense of a minority is frowned upon by the Court: Griffith v. Paget, 5 Ch. D. 898; Meunier v. Hooper, L. R. 9 Ch. 350; Percival v. Bright, [1902] 2 Ch. 425.

It was suggested, perhaps rather than argued, that what was done was in pursuance of the discretionary power conferred upon the directors by sec. 6 of the special Act. That

enables the directors in their discretion to exclude any one from subscribing for stock who in their judgment would hinder, delay, or prevent the company from proceeding with and completing their undertaking under the provisions of the Act. I think the provision contains its own express limitation as to time; the road as then contemplated was finished before their exclusive action was taken. And another limitation is that it applies to new subscribers, and not to those who have the status of shareholders. Being shareholders, the plus-one-third minority had a statutory footing to refuse assent to an increase of capital, and also to refuse sanction to any of the special schemes for extension provided for in sec. 46 of the Act of 1892. It may be that it was not in the immediate and direct contemplation of the directors to oust the minority from their place of vantage, but this was the inevitable effect of what was done; and, while this consideration helps to eliminate the element of fraud, it does not lessen the injurious effect of the partial allotment. I do not find any fraud to be established, and it is not necessary to allege it in order to get relief. The costs have been but little—if at all—increased in this regard, so that costs of the action may be awarded to the plaintiffs, excluding any costs arising from the charge of fraud.

The judgment should be so framed as to restrain voting upon the increased capital shares, and declaring that the allotment to the 5 directors and their appointees was in excess of the powers of the directors. If necessary, the allotment may be vacated so that the whole increased issue may be laid open to be properly disposed of having regard to the interests of all the shareholders.

It has not been necessary to consider the doctrine of "inherent right" which is discussed and upheld in the American cases, but I am inclined to think that the same conclusion as has been arrived at in this case would have held good even if no element of the plus-one-third minority had entered into consideration, on the general principle and guide in dealing with the distribution of new stock and the claims of existing shareholders that "equality is equity."

During the argument I gathered that the money paid for the 350 shares is still unexpended by the company; if this is the case, that money should be refunded. If expended, it should be repaid by the company to the 5 defendants who paid for the same.

CARTWRIGHT, MASTER. MAY 28TH, 1907.

CHAMBERS.

PHERRILL v. SEWELL.

Particulars — Statement of Claim — Conspiracy — Libel and Slander—Affidavit—Amendment — Rule 268 — Disclosing Evidence.

Motion by defendants for particulars of statement of claim before delivery of statement of defence.

J. W. McCullough, for defendants.

T. N. Phelan, for plaintiff.

THE MASTER:—The motion is supported only by an affidavit of the agent of defendants' solicitor. This does not state that particulars are necessary for formulating the defence.

The statement of claim alleges that defendants unlawfully conspired together and with 32 persons whose names are given "and with other persons at present unknown to plaintiff," to publish a libel in the form of a petition to the council of the township of Markham asking that plaintiff be removed from certain premises occupied by her in said township. It then sets out the petition and charges publication to the members of the township council and others in attendance thereat, as also to those whose names are set out in the preceding paragraph, with a sufficient innuendo.

In the succeeding paragraph defendants are charged with slander also uttered at the same time to the persons already mentioned, and charging plaintiff with a want of chastity.

Plaintiff then alleges that she has been greatly injured in her character and reputation, and claims $10,000 damages.

Apart from the absence of any sufficient affidavit of the necessity of particulars at this stage, there does not seem any reason for the order asked. The main grounds of the action are libel and slander. As to these only 3 defences are possible, and none of them would derive any assistance from the particulars demanded.

The 4th paragraph should be amended by inserting the words "spoke and" before the word "published" in the

3rd line so as to make it clear that this charge is one of slander. If plaintiff wishes to avail herself of R. S. O. 1897 ch. 68, sec. 5, sub-secs. 1 and 2, it should now be done. There is no allegation in the statement of claim of any special damage.

The statement of claim otherwise seems to comply with the provisions of Rule 268. To give what defendants ask would be to require disclosure of plaintiff's evidence. So far as this is to be had, it can be obtained on discovery.

The motion is dismissed, but with costs in the cause, as paragraph 4 was not clear, and may perhaps be further amended as indicated above. . . .

The indorsement on the writ of summons is only for libel and slander. From this it would appear that plaintiff is not making any separate claim for conspiracy. It would seem to be self-evident that the real ground of action must be what took place at the council meeting when the petition was presented and the alleged slander uttered.

MAY 28TH, 1907.

DIVISIONAL COURT.

MOFFAT v. CARMICHAEL.

Costs — Scale of — Action for Injury to Land — Easement — Disturbance — Value of Land — Amount of Damages — County Courts Act—Jurisdiction of County Courts.

Appeal by defendant from order of CLUTE, J., in Chambers, reversing ruling of a taxing officer upon taxation of plaintiff's costs of an action in the High Court, and directing that the costs be taxed upon the High Court scale.

The appeal was heard by BOYD, C., ANGLIN, J., MAGEE, J.

W. Proudfoot, K.C., for defendant.

T. P. Galt, for plaintiff.

BOYD, C.:—The learned Chief Justice who tried the case succinctly sums up what was the subject of the litigation in these words: "The action is for damages for the

injury said to be caused to the plaintiff's house by the severance of a building—the plaintiff's and defendant's houses having been built as one building and a severance having been made by the defendant . . . which it is said was negligently and improperly done so as to cause damage to the plaintiff's house." The plaintiff is adjudged entitled to succeed, and for injury to her property damages of $140 are awarded.

The Chief Justice does not decide that the action was of the proper competence of the County Court—he leaves that open upon taxation—but expresses the opinion that, in view of the small amount which plaintiff was willing to accept before litigation ($40 or $50), she might well have sued in the County Court. And, of course, if the question of jurisdiction had not been raised by defendant, all would have probably gone on without objection.

But, upon strict law, I think that the case is one which was not within the jurisdiction of the County Court, because the value of the house in question must manifestly be more than $200. Though the injury arose from the disturbance of the right of support of plaintiff's house, yet the injurious effects of the severance extended to the structure itself, which was damaged to the extent of $140. The County Court has jurisdiction in actions for injury to land where the value of the land does not exceed $200: R. S. O. 1897 ch. 55, sec. 23 (8). Here was injury to land in respect of the house erected upon and forming part of it to the extent of $140—but the house itself and land affected were worth over $200—so that the lower Court was ousted of jurisdiction.

No doubt, the right of easement was disputed and established, but the effect of disturbing plaintiff's easement was to damage her land (i.e., house)—and the test of jurisdiction is the value of the land.

I therefore agree in Mr. Justice Clute's ruling that plaintiff should get costs on the High Court scale. The appeal is dismissed with costs.

As to the cases cited for the appeal, Stotworthy v. Paull, 55 L. J. Q. B. 228, is the decision of the Court upon an English statute whose language is very different from ours. Stewart v. Jarvis, 27 U. C. R. 467, related to former legislation as to the jurisdiction of County Courts now changed.

The present sections of the County Courts Act as to jurisdiction must be read so as to harmonize the 1st and 8th subsections of sec. 23. . . .

ANGLIN, J., gave reasons in writing for the same conclusion.

MAGEE, J., also concurred.

MAY 28TH, 1907.

DIVISIONAL COURT.

NATIONAL CASKET CO. v. ECKHARDT.

Trade Name—Infringement—Similarity—Distinction — Advertisements—Absence of Fraud or Deception—Passing off Goods.

Appeal by plaintiffs from judgment of MACMAHON, J., 9 O. W. R. 313, dismissing an action brought to restrain defendant from using the name "National Casket Company" to the prejudice of plaintiffs.

E. F. B. Johnston, K.C., and R. McKay, for plaintiffs.

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

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

BOYD, C.:—Having read all the evidence, I find a conspicuous absence of testimony to indicate that any one has been misled or confused in regard to any relation or connection between the American and the Canadian company. Theories are broached and hypothetical questions are asked as to whether the name and manner of advertising adopted by defendant would not suggest that the National Casket Co., the plaintiffs, were doing business in Ontario under the conduct of defendant as agent and manager; but no witness declares that such was the action of his mind, and many witnesses negative such result and say that it would never have occurred to them. That this last estimate is the correct one I cannot bring myself to doubt, upon consideration

of all the testimony and circumstances of the case. The defendants had for about 20 years a name and business of renown among the undertaking fraternity, and had nothing to gain by merging himself in a foreign company. His standing was old and well established when plaintiffs began to do business in a small way in some few places in Canada. He carried on business under the name of "Eckhardt Casket Company" till his place was completely destroyed by fire in April, 1904. Before this, and before he knew of any business being done in Canada by plaintiffs, he and 5 other undertaking firms agreed to form a consolidated company, and obtained letters patent in May, 1903, by the name of the "National Casket Company Limited." This name they decided upon without reference to the American concern of that name, under influence of the stirrings of national life then becoming manifest in Canada. After the fire defendant's business was suspended about 2 years; he acquired by purchase all interest in the patent after the consolidation scheme failed. After the fire and upon the commencement of his new business in August, 1905, he changed the name of his business to the "National Casket Co.—Eckhardt's"—registered his business in that name, and advertised extensively in that name in all trade papers and by the usual methods of circulars, catalogues, and sample cards. Some of these reached the hands of or were seen by plaintiffs in August, September, or October of the same year. He then made appeal to the Canadian trade constituency, consisting of 1,700 or 1,800 dealers in all Canada, most of whom were personally known to defendant. These people—the initiated public—well understood the meaning of the advertisement as compared with the advertisements and circulars contemporaneously issued by plaintiffs. It did not occur to any of them to suppose that what was advertised by defendant was the establishment of an agency or branch of the American company in Canada with defendant as its manager; on the contrary, as one witness, Leitch, said, referring to the methods of advertising of both companies in their appeal to the trade, "I never thought of them as connected, because one was in Canada and the other in the United States." To his mind the generic word "National" sounded a distinct allusive note in each name.

The business done by defendant at the time of the fire was about equal to one-half of all the Canadian trade, being

in figures an output at the rate of $250,000 a year, and his present business is about the same as when the fire interrupted its course. Turning to plaintiffs, the total amount of their goods shipped to Canada since the beginning of their operations in this country amounts to $22,000—up to the date of the fire in 1904 the total, according to their shewing, was less than $10,000. The total number of undertakers to whom they sold is from 41 to 45, and not one is called to shew any mistake or confusion arising out of the names adopted and advertised by plaintiffs and defendant respectively.

Unless the Court takes upon itself to say, contrasting the advertisements, etc., that the one can be mistaken as a modification of the other, the judgment in appeal must be upheld. I do not pretend to be wiser in this regard than the many witnesses belonging to the trade who were called, and none of them could say that he was misled or likely to be misled in the premises. That is the test to be applied in this case—the appeal to do business by the various advertising methods of both parties is made to members of the trade, and not to the general public, and, in my opinion, there is no evidence, either by word of mouth or by inspection of eye, to lead to a conclusion that defendant's business name, as distinguished by the addition of his personal name, misleads or confuses or tends to mislead or confuse the customers who purchased caskets in Canada.

I would dismiss the appeal with costs.

MAY 28TH, 1907.

DIVISIONAL COURT.

ROMAN CATHOLIC EPISCOPAL CORPORATION v. O'CONNOR.

Will — Execution — Procurement by Importunity — Influence Exercised by Sister over Dying Man—Setting aside Will—Establishment of Earlier Will — Construction — Action—Costs.

Appeal by plaintiff from judgment of MABEE, J., in an action for a declaration that a certain instrument in writing

executed on 9th August, 1902, was not the last will and testament of Cornelius McAuliffe, deceased, and to establish a will executed 3 days earlier, and for construction. MABEE, J., found in favour of the later will, and construed it as an absolute bequest of all the testator's property to his sister Johanna McAuliffe, who had since died intestate. The defendant O'Connor was the executor named in both wills, and under the earlier will he and the plaintiff were given the property after a life estate to the sister. The testator and his sister were unmarried, and there were no known relatives.

H. T. Kelly, for plaintiff.

J. B. Dow, Whitby, for defendant O'Connor as executor and in his personal capacity.

D. Henderson, for defendant O'Connor as administrator of the estate of Johnanna McAuliffe, and for the Attorney-General for Ontario.

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

RIDDELL, J.:—Cornelius McAuliffe, an old man of 68 or 70, lived in Whitby with his still older sister, Johanna McAuliffe; they had no known relatives living, and had lived in Whitby or the vicinity for over 35 years. She was a most economical woman, almost insane on the subject of money, suspicious of every one about her, and willing to do almost anything to gain money or to get it into her possession.

About the beginning of August, 1902, Cornelius was so ill that a doctor had to be called in; the patient was found to be very weak, suffering from catarrhal inflammation of the stomach, which caused vomiting, intense nausea, great weakness, depression, and indeed prostration. He "got weaker all the time," and this condition, instead of improving, got worse. The sister was his only nurse and attendant, and it seems clear that she frequently spoke to him and troubled him about his property. On 6th August, 1902, John O'Connor was told by Cornelius that he was very weak and likely to die, and to call in Mr. O., a solicitor whom he knew and had seen passing. Mr. O. had been previously employed professionally by the sick man. Mr. O. drew up a will in accordance with the instructions of the testator,

and it was executed on 6th August, 1902, and left with the testator. He was then confined to his house and lying on the sofa by the fire, or possibly in bed.

On 9th August, 1902, Johanna came to the door as Mr. O. was passing and called him in. The will of the 6th was read over and explained. Cornelius was then very ill indeed and in bed. Johanna insisted on a change being made in her favour. The sick man was very unwilling to make the change, but his sister became very much excited, she spoke in a commanding way, was exceedingly boisterous, and expressed a determination to have the will changed or she would destroy it. She went to the bed and stood over the testator and told him she would have it changed. The testator swore at her and told her to go away, but it does not seem that this had any effect. She continued to insist, and, as the solicitor says, "after she had worried and tormented her brother till he was all tired out, he said to me, 'Well, make it to please her, Mr. O., I am sick, I am dying soon, and I must have peace'—words to that effect, begging for quiet." This whole scene lasted about an hour. The man was dying, and he knew it; the disease from which he was suffering rendered him exceedingly weak, and very much depressed, and he was in the condition (the medical evidence shews) in which he would do anything and give in in anything for the sake of peace and quiet. "He knew he was dying," says the medical attendant, "and would yield to anything." The sister is said to have been a woman of strong body and strong will. The testator died on 13th August.

I am of opinion that a will procured as this was cannot stand.

More than two centuries ago, Rolle, C.J., laid down that if a man makes a will in his sickness by the over-importunity of his wife, to the end he may be quiet, this shall be said to be a will made by constraint, and shall not be a good will: Hacker v. Newborn, Styles 427; and much the same thing is said in Lamkin v. Babb, 1 Lee Ecc. R. 1. I do not find that this exposition of the law has ever been questioned. All the cases are collected in Williams on Executors, vol. 2, ch. 1, sec. II.; and the conclusion I have arrived at seems to be entirely supported by the authorities there cited.

Of course, "importunity" in its correct legal acceptance must be of such a degree as to take away from the testator free agency; it must be such importunity as he is too weak

to resist, such as will render the act no longer the act of the deceased nor the free act of a capable testator: Williams on Executors, 9th ed., p. 39.

All these conditions—or, speaking more strictly, this condition—we find clearly proved in the present case. . . .

[Reference to Boyser v. Rossborough, 6 H. & C. 2; Sefton v. Hopwood, 1 F. & F. 578; Lovett v. Lovett, ib. 581; Hall v. Hall, L. R. 1 P. & D. 481; Parfitt v. Lawless, L. R. 2 P. & D. 462; Baudains v. Richardson, 22 Times L. R. 333.]

Had I come to a different conclusion, I should, as at present advised, have had great difficulty in following the learned trial Judge in his interpretation of the will in respect of the estate taken by Johanna. I am not satisfied that the words of this will can be successfully distinguished from those of the wills in such cases as Bibbens v. Potter, 10 Ch. D. 733; Constable v. Bull, 3 De G. & S. 411; In re Pounder, 56 L. J. Ch. 113. But it is unnecessary to pursue this inquiry, in the view I have taken of the case.

Regularly the judgment of this Court would be that the will of 9th August should be declared invalid and the will of 6th August be declared valid, and an order made vacating the probate of the former and directing the proving of the latter. In the very peculiar circumstances of representatives here, the proper result will be, I think, best reached by a declaration that the executor of the late Cornelius McAuliffe took the estate of his testator upon the trusts of the will of 6th August. And . . . the costs of all parties, both of the action and of the appeal, may be paid out of the estate.

MAY 29TH, 1907.

DIVISIONAL COURT.

PATTERSON v. DART.

Limitation of Actions—Real Property Limitation Act — Conveyance of Land — Security — Agreement — Default—Redemption—Sale—Possession.

Appeal by plaintiff from judgment of MACMAHON, J., 8 O. W. R. 800, dismissing the action with costs.

The appeal was heard by MULOCK, C.J., MAGEE, J., CLUTE, J.

Walter Mills, Ridgetown, for plaintiff.

E. F. B. Johnston, K.C., and J. M. Pike, Chatham, for defendant.

CLUTE, J.:—. . . The two questions for decision on this appeal are: First, is plaintiff barred of the right to redeem by the Statute of Limitations? Second, if not, did plaintiff effectually release his equity of redemption to defendant by the agreement of 27th April, 1895.

In the prior action Armour, C.J., had declared the deed of 28th March, 1893, to be in fact a mortgage, and plaintiff entitled to redeem on payment of the amount found due in respect thereof, and in default to a sale of the lands, with a reference . . . to take the accounts. Instead of proceeding under this decree, the parties entered into a new agreement on 27th April, 1895; and this case turns largely on the legal effect of this agreement, having regard to what was done and left undone by the parties to it.

The trial Judge disposed of the case upon the ground that defendant had been in possession since 27th April, 1895, and any claim plaintiff may have had was barred by the statute at the time the writ was issued on 29th June, 1905. I am unable to reach this conclusion. In the first place plaintiff did not enter as mortgagee. He claimed under an absolute deed. It is true that the judgment in the former case declared him to be a mortgagee, but down to the date of the judgment, at all events, he had no right to avail himself of that position, as he claimed adversely to it: Faulds v. Harper, 11 S. C. R. 639. From November, 1894, he continued in possession, and was in possession when the agreement of 27th April, 1895, was made. Under that agreement the parties expressly fix the day for redemption as 1st July, 1895, and for payment of the amount due. But what amount? What is to be ascertained as provided in the agreement . . . by taking the amount of the advances made by defendant up to 1st February, 1895, therein fixed at $3,076.01. Te receipts are fixed at $1,679.29, and the estimated receipts to 1st July at $412.50, and estimated expenditure for taxes $161.50 and interest on the same $195. It then states the prior mortgage to be $6,000. Then follows this important clause: "The amount of the judgment

and costs as ordered by the Judge to be added to or set off against the above amounts shall be ascertained before 15th June, 1895."

So that under these costs were ascertained and set off the amount which plaintiff must pay to entitle him to redeem is unknown, and the document therefore provides that, immediately after the taxation of the costs payable by the said parties, the total amount payable by plaintiff to defendant "shall be ascertained by computing the amount paid out and allowed" to defendant, "as above set forth, including all amounts which will be necessarily paid out by him before 1st July, 1895, and the judgment with costs which was adjudged should be paid," etc., and deducting the amounts received by defendants as above mentioned and plaintiff's costs payable by defendant under said judgment, "and the said sum so ascertained," to be payable by plaintiff to defendant not later than 1st July, 1895. Plaintiff then expressly covenants to pay the sum so found due on the said date. Defendant then covenants, upon payment of such sum "so found to be due," to reconvey the said lands to plaintiff. The agreement further provides that if default is made in payment "of the said sum so found to be due" by 1st July, 1895, defendant may, without notice, advertise and sell the said lands, subject to a reserve bid of $7,700; that until such sale defendant shall be possessed of the rents and profits, and, after such sale, of the proceeds thereof, upon trust to pay the costs of sale and the "principal sum so found to be due in respect of the said lands and premises," and to pay any surplus to plaintiff.

The agreement then further provides that the property shall be put up at auction "as aforesaid" subject to a reserve bid of at least $7,700, after one advertisement of at least two weeks in local papers and by posters, and if there shall be no bona fide bid equal to or greater than $7,700, then plaintiff "shall receive credit for the sum of $1,700 upon his said indebtedness" to defendant, computed as aforesaid, "in the first place in extinguishment of the indebtedness with reference to the said lands and premises, and in the second place in reduction of the amount of the judgment of the party of the second part against the party of the first part. And the said party of the first part, his heirs and assigns, shall stand absolutely debarred and fore-

closed of and from all equity of redemption in and to the said lands and premises, and these presents shall be considered an absolute release to the party of the second part, his heirs and assigns forever, of all the right, title, interest, and equity of redemption of the party of the first part, his heirs, executors, administrators, and assigns, in, to, or out of the said lands and premises."

I am of opinion that defendant was in possession under the terms of the agreement as trustee for the purpose of carrying it out; that plaintiff's right to bring action to redeem was under the terms of this agreement, and that such action could not be brought before 1st July; that the action in effect would be for the recovery of the land upon payment of the amount due, to be ascertained pursuant to the terms of the agreement; that plaintiff was, in a sense, in receipt of the rents—that is, that defendant accounted to him for them in anticipation of their payment, and having done so he was entitled to retain possession under the agreement for the term he had thus paid for; and that no action would lie against defendant until 1st July, 1905.

It is contrary to the practice of the Court to decree the redemption of a mortgage before the day appointed for that purpose has arrived: Brown v. Cole, 14 Sim. 427: "because during that time the mortgage must remain as a security for the loan advanced, and it is not competent for the mortgagee or the mortgagor to disturb that relation:" Bovill v. Endle, [1896] 1 Ch. 651.

Whether a redemption suit is also an action for the recovery of land was much discussed in Faulds v. Harper, 11 S. C. R. 655. The Divisional Court (2 O. R. 405) followed Hall v. Caldwell, 8 U. C. L. J. 93, in preference to Foster v. Patterson, 17 Ch. D. 132, and Kinsman v. Rouse, ib. 104. The Court of Appeal treated Hall v. Caldwell as having been overruled. In the Supreme Court Strong, J., agreed with the Judges of the Divisional Court, "for the reason that since the two cases in 17 Ch. D. were decided the House of Lords has held in Pugh v. Heath, 7 App. Cas. 235, that a foreclosure suit is an action for the recovery of land. This being so, it follows, a fortiori, that a redemption suit is also an action or suit for the recovery of land."

Section 4 of the Real Property Limitation Act provides that no land or rent may be recovered but within 10 years after the right of action accrued. Section 5 provides that

the right to bring such action shall be deemed to have first accrued as therein mentioned. Section 5, sub-sec. 1, provides that where a person claiming such land or rent . . . has . . . been in receipt of the profits of such land or in receipt of such rent, and while entitled thereto . . . has discontinued such receipt, then such right shall be deemed to have first accrued at the last time at which any such profits or rent was so received.

In the present case plaintiff received the rents by having them expressly credited on the debt, under the agreement. His right of action then first accrued and time began to run against him. Section 19 does not apply—does not cover a case of express agreement which applies the future rents and gives a right of redemption at the time the last rents were so applied. To hold otherwise would, in my judgment, disregard the agreement of the parties. The mortgagor does in fact receive the rents to 1st July. They are applied on the mortgage, and it is declared that on that day plaintiff may redeem upon payment of the balance. If in this case he is barred, he would be equally barred if the agreement extended over 11 years, and the rents for all that time were applied on the mortgage, and redemption was expressly provided for at the expiration of the time; because, in the words of sec. 19, no such action shall be brought but within 10 years after the time when such acknowledgment was given. The reason why sec. 19 cannot, in my opinion, apply, is because plaintiff is in the receipt of the rents to 1st July, and by the agreement they are in fact applied on the mortgage, defendant receiving them as trustee for that express purpose.

Plaintiff's right to redeem may also be put on another ground. By deed defendant gave plaintiff the right to redeem on 1st July, 1895, and covenanted to convey. He is estopped from saying that plaintiff's right to bring action did not accrue on that day.

If an action would lie, I am of opinion that time would not run against plaintiff prior to that date. I do not think therefore that plaintiff is barred by the statute.

Nor do I think that what took place amounted to a release of the equity of redemption. The costs were not taxed by either party, and the amount to be found due under the terms of the agreement was never ascertained. Plaintiff never had, therefore, the opportunity of paying

defendant "on or before the first day of July." This was as much the fault of defendant as of plaintiff. Had the amount been ascertained, plaintiff covenanted to pay it, and on payment of the amount defendant was bound under his express covenant to convey the property to plaintiff. There was no default. . . .

All the proceedings, therefore, in respect of the proposed sale were wholly nugatory. It was only in the event of there being no bid equal to or greater than $7,700 that plaintiff was entitled to receive credit for $1,700 "upon his indebtedness" to defendant, "computed as aforesaid," and then that he should stand debarred and foreclosed of his equity of redemption. The occasion not having arisen to justify the sale, there could be none, and the provision for foreclosing the equity never came into operation.

With deference, I think the judgment of the trial Judge should be set aside and plaintiff allowed to come in and redeem, with a reference to the Master to take the accounts, making all just allowances for improvements and rebuilding after fire, after allowing for the insurance moneys received. Costs to the plaintiff in the Court below and of this appeal. Further directions and subsequent costs reserved.

MAGEE, J., gave reasons in writing for the same conclusion.

MULOCK, C.J., also concurred.

CARTWRIGHT, MASTER. MAY 30TH, 1907.

CHAMBERS.

COLLINS v. TORONTO, HAMILTON, AND BUFFALO R. W. CO.

PERKINS v. TORONTO, HAMILTON, AND BUFFALO R. W. CO.

Parties — Joinder of Defendants — Cause of Action — Joint Liability—Tort.

Motion in each action by defendants the Dominion Natural Gas Co. for an order requiring plaintiffs to elect against which defendant they would proceed.

G. M. Clark, for applicants.

D. L. McCarthy, for defendants the Toronto, Hamilton, and Buffalo R. W. Co.

J. G. Farmer, Hamilton, for plaintiff Collins.

D'Arcy Martin, Hamilton, for plaintiff Perkins.

THE MASTER:—The statements of claim are similar. In each case plaintiffs allege that the injuries to the two servants of the defendants the Toronto, Hamilton, and Buffalo R. W. Co. complained of were caused by an explosion in the premises of the railway company of gas furnished to them by the gas company pursuant to an agreement in that behalf.

In the first case paragraph 11 of the statement of claim is as follows: "The defendants are each responsible for the defective condition of the said plant, etc., and the negligent use of the said dangerous and highly explosive gas."

Paragraph 8 of the statement of claim in the Perkins case is identically the same.

It was argued that plaintiffs must elect under the authority of Hinds v. Town of Barrie, 6 O. L. R. 656, 2 O. W. R. 995. On the other hand were cited Symon v. Guelph and Goderich R. W. Co., 8 O. W. R. 320; Norman v. Hamilton Bridge Works Co., 9 O. W. R. 300; and Bullock v. London General Omnibus Co., [1907] 1 K. B. 264.

In view of these authorities it does not seem that the order should be made. Here, as in the Symon and Norman cases, there is a sufficient allegation of a joint liability; whether it can be sustained is not now in question. In the Bullock case the plaintiff claimed not only against the two defendants jointly, but also against each separately. This was held to be allowable. The observations of the Lords Justices in that case were, no doubt, obiter only. At the same time they cannot be ignored, especially in view of the remarks of the Master of the Rolls on Sadler v. Great West R. W. Co., [1895] 2 Q. B. 688, [1896] A. C. 450, pointing out that in that case no joint liability was alleged, but only two independent though contemporaneous torts. This is true also of Hinds v. Town of Barrie, as pointed out by Osler, J.A. It is to be wished that this or some similar case be taken to the Court of Appeal so that there may be

an authoritative exposition of Rule 186, as applied to actions of this class.

At present I think the motions fail. The defendants should plead in 8 days. The costs may be in the cause, the matter being one of some difficulty.

Campbell v. Cluff, 8 O. W. R. 740, 780, may be referred to, though not strictly in point.

ANGLIN, J. MAY 30TH, 1907.

TRIAL.

TORONTO GENERAL TRUSTS CORPORATION v. KEYES.

Gift — Fund Deposited with Trust Company by Settlor — Parting with Control—Dealings with Cheques for Income—Completed Gift—Rights of Beneficiaries—Trust—Interpleader Issue—Costs.

An interpleader issue directed to determine whether 3 sums of $1,000 each belonged to plaintiffs, as executors of the last will and testament of one Joanna J. Phelan, deceased, or to the defendants respectively.

M. J. Gorman, K.C., for plaintiffs.

H. Fisher, for defendants.

ANGLIN, J.:—The material facts are as follows: Joanna J. Phelan in her lifetime had on deposit for investment with the Toronto General Trusts Corporation the sum of $5,000. This money was held by the trusts corporation upon the terms of a guarantee investment receipt given to Mrs. Phelan and similar to that set forth below. In the year 1905, having a further sum of $3,000 available, Mrs. Phelan called upon the accountant of the trusts corporation and told him that she wished to deposit this $3,000 in the names of her two sisters, Agnes Keyes and Nora Brophy, and her sister-in-law, Julia Phelan (the defendants), giving to each $1,000. She asked that these moneys be placed to the credit of these three persons in the same manner as the

fund held by the company for herself. She then paid over to the accountant the sum of $3,000, and obtained from him three receipts, each in the following form:—

THE TORONTO GENERAL TRUSTS CORPORATION

GUARANTEE INVESTMENT RECEIPT

No. B 5. $1,000.00

"THE TORONTO GENERAL TRUSTS CORPORATION

acknowledges to have received from

Miss Julia Phelan
Mrs. E. Brophy
Miss Agnes Keyes

of Montreal, Que.,

hereinafter called the 'investor,' the sum of $1,000 in trust for investment on account of the investor upon the following terms which have been agreed upon, namely:—

"The said principal shall be invested in or loaned (sic) upon such securities as the corporation shall deem safe in the name of the corporation, but to be held by the corporation as trustee for the investor.

"The corporation hereby guarantees the repayment of the said principal sum on 1st February, 1906, together with interest thereon at the rate of 4 per cent. per annum payable half yearly on the 1st days of January and July in each year, the first payment of interest to fall due on the 1st day of July next.

"That in consideration of the above guarantee the interest or profits resulting from the investment or loaning (sic) of said principal moneys over and above the said rate of 4 per cent. per annum shall be retained by the corporation for its own use and benefit as a remuneration for such guarantee and for its services in procuring investments and collecting principal and interest.

"Upon payment of the said principal money and guaranteed interest, the trust securities shall become the property of the corporation freed from the terms of the trust and without any formal assignment or release from the investor.

"This receipt and guarantee is not assignable.

"In witness whereof is hereunto affixed the seal of the corporation, testified by the signatures of its vice-president and managing director, this 1st day of February, 1905.

"W. H. Beatty,
"Vice-President.
"J. W. Langmuir,
"Managing Director."

Mrs. Phelan informed the three defendants of what she had done. She told Nora Brophy that she had deposited $1,000 in her name in the trusts company, adding, as Nora Brophy testifies, that "it was just the same as if I put it there myself; and if I wanted to draw it at any time I could, and if I wanted to draw any part of it at any time I could do so." She also informed Mrs. Brophy of the deposits to the credit of Miss Phelan and Miss Keyes. Miss Julia Phelan was also informed by her that $1,000 had been invested in her name at 4 per cent., and that she had made a like investment for Miss Keyes. Miss Phelan was told as well that she could draw the money and that it was hers. Mrs. Phelan also told Miss Keyes that she had invested $1,000 in her name with the trust company and had made like investments for Miss Brophy and Miss Keyes.

The receipts obtained by Mrs. Phelan from the trusts corporation she retained in her own custody, and they were found amongst her papers after her death, which occurred on 18th October, 1906. She does not appear to have informed her beneficiaries of the existence of these documents. The accountant of the trusts corporation says that Mrs. Phelan, after making the deposit, never interfered with the matter in any way. The cheques for the interest which accrued during Mrs. Phelan's lifetime, bearing date 3rd July, 1905, 1st January, 1906, and 2nd July, 1906, respectively, were made payable to the 3 beneficiaries named in the guarantee receipts. These cheques appear to have been indorsed by the defendants in favour of Mrs. Phelan and were cashed by her for her own benefit. Though two of the defendants say that there was no understanding about the income from the money, I incline to the view that it was understood that the income was to go to Mrs. Phelan during her lifetime, and that it was pursuant to such an understanding that the cheques for the interest were in-

dorsed over to her by defendants. That the placing of the money in the names of the three defendants with the result that they, and they alone, would be entitled to receive payment of interest as well as principal from the trusts corporation, was intended and well understood by Mrs. Phelan, is made manifest by a letter which she wrote on 8th June, 1906, to one of the trusts corporation officials, in which she says: "I didn't expect that you could do anything without each one of us signing our cheques."

After the death of Mrs. Phelan, and before they had received notice of any adverse claim to these moneys, the trusts corporation on 1st January, 1907, issued and forwarded 3 cheques for $20 each to the 3 defendants. These cheques were paid in due course to defendants, and the trusts corporation obtained receipts for such payments. On 4th February, 1907, the trusts corporation were first notified on behalf of Mr. John Phelan, the husband of the late Johanna Phelan, that he asserted that the moneys represented by the 3 investment receipts in question constituted part of his late wife's estate. John Phelan is the residuary legatee under the will of his late wife. Upon receiving notice of this claim, the trusts corporation instituted these proceedings in order to have the title to these moneys determined.

The retention by Mrs. Phelan in her possession of the receipts themselves, and the fact that the income was applied for her benefit, though made available by the indorsement of defendants upon the cheques made payable to them by the trusts corporation, are relied upon to support the propositions that the gift of these moneys was imperfect, and that, being in favour of volunteers, it cannot be made complete by the aid of a court of equity. Most of the authorities cited for plaintiffs turn upon this point, others are instances of attempted testamentary dispositions.

For defendants it is contended that the action of Mrs. Phelan amounted to a complete gift to them of the moneys in question, or to a creation by her of a trust of such moneys in their favour and enforceable by them.

"There may be difficulty in reconciling with each other all the cases which have been cited. Perhaps they are to be reconciled and explained upon the principle that a declaration of trust purports to be, and is in form and substance, a complete transaction, and the Court need not look

beyond the declaration of trust itself, or inquire into its origin, in order that it may be in a position to uphold and enforce it; whereas an agreement or attempt to assign is, in form and nature, incomplete, and the origin of the transaction must be inquired into by the Court: and where there is no consideration, the Court, upon its general principles, cannot complete what it finds imperfect:" McFadden v. Jenkyns, 1 Hare 418, 462.

As I view the facts of this case, the settlor did "everything which, according to the nature of the property, was necessary to be done in order to transfer the property and render the settlement binding." She "transferred the property to the trustee for the purposes of the settlement:" Milroy v. Lord, 4 DeG. F. & J. 264, at p. 274.

She placed the money out of her power and control: she must be taken prima facie to have intended to part with the whole of the property; a trust having been declared, she could not recall it: Petty v. Petty, 22 L. J. N. S. Ch. 1065.

"The one thing necessary to give validity to a declaration of trust—the indispensable thing—I take to be, that the donor or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration, should have effectually changed his right in that respect and put the property out of his power, at least in the way of interest:" Warriner v. Rogers, L. R. 16 Eq. 340, 348.

The property being dealt with was money. The purpose of the settlor was to constitute the Toronto General Trusts Corporation trustees of this money for the defendants. That purpose is evidenced by the guarantee investment receipts, as well as by the statement of Mr. Clendinnen, the accountant of the trusts corporation. The fact that the documents evidencing the trust remained in the possession of the settlor did not prevent the trust being complete and executed. These receipts were not the instruments creating the trust; they were merely evidence of the trust created by the handing over of the money to and its acceptance by the trusts corporation. If a deed constituting a trust once delivered and executed is effectual, though held by the settlor (Fletcher v. Fletcher, 4 Hare 67, 69), a fortiori a trust completely declared is operative, though the acknow-

ledgment of the existence of the trust in documentary form be retained by the settlor.

The property, the subject of the trust, had been delivered to the trustees, and the trustees had accepted it upon the trust. The trust was thus made complete and enforceable: Wheatley v. Purr, 1 Keen 551; Stapleton v. Stapleton, 14 Sim. 186; Vandenberg v. Palmer, 4 K. & J. 204. Though not necessary to the completeness or efficacy of the trust, its existence was communicated to the beneficiaries, and was recognized by them, and by the settlor, in the subsequent dealings with the income cheques: Standing v. Bowring, 31 Ch. D. 282.

"Where the relation of trustee and cestui que trust is constituted, as where property is transferred from the author of the trust into the name of the trustee so that he has lost all power of disposition over it, and the transaction is complete as regards him, the trustee having accepted the trust, cannot say he holds it except for the purposes of the trust, and the Court will enforce the trust at the suit of a volunteer:" Fletcher v. Fletcher, 4 Hare at p. 74. The fact that the income was received by Mrs. Phelan during her lifetime, whether pursuant to an arrangement made contemporaneously with the creation of the trust or by the goodwill of the beneficiaries when they received their income cheques, does not affect the validity or enforceability of the trust of the corpus in their favour. An instance of retention of income by a donor is to be found in Standing v. Bowring, ubi supra.

I have carefully considered all the authorities cited by Mr. Gorman as well as those referred to by Mr. Fisher. I find nothing to raise any doubt that there was in this instance a complete and executed trust created by Mrs. Phelan, enforceable by the defendants, the cestuis que trust.

There will, therefore, be judgment for defendants upon the issue, with costs to be paid by the plaintiffs out of the estate of Joanna Phelan in their hands. The question was, however, properly raised by plaintiffs, in view of the claim made by the residuary legatee and the finding of the receipts amongst the effects of the deceased, and they should have their costs out of the estate in their hands: Wheatley v. Purr, 1 Keen at p. 558.

MAY 30TH, 1907.

DIVISIONAL COURT.

COPELAND-CHATTERSON CO. v. BUSINESS SYSTEMS LIMITED.

Contempt of Court—Disobedience of Injunction—Wilful Contempt — Company — Sequestration — Effect of Appeal to Court of Appeal from Judgment Containing Injunction—Order of Judge of Court of Appeal Staying Operation of Injunction—Stay of Proceedings in Court below—Jurisdiction to Entertain Motion for Sequestration — Process of Contempt — Securing Obedience to Injunction — Power to Punish—Locus Poenitentiae.

Apeal by defendants from order of MULOCK, C.J., 9 O. W. R. 610, upon an application by plaintiffs for an order directing the issue of a writ of sequestration against the estate of defendants (an incorporated company) for contempt of Court.

W. E. Middleton, for defendants.

W. E. Raney, for plaintiffs.

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

MEREDITH, C.J.:—The order appealed from recites that defendants by their counsel admitted a breach of the injunction as set out in the notice of motion for the order, and that they had been found guilty of contempt of the Court by "disobeying the injunction contained in the judgment pronounced in this action on the 22nd day of December, 1906, by making binders, holders, and sheets in imitation of the binders, holders, and sheets of the plaintiffs, contrary to the terms of the said judgment as set out in paragraph 24 thereof," and that plaintiffs were entitled to the issue of an order for a writ of sequestration as claimed in the notice of motion served, but that a stay of the issue of the writ had been directed to give defendants an opportunity of purging their contempt by presenting to the Court a satisfactory written apology, by making proper reparation for their act of disobedience, and by paying plaintiffs' costs

of the motion and of the reference directed by the Court in that event to be had, as between solicitor and client, and that in the event of defendants electing to present an apology to the Court and to comply with the directions of the Court, they should pay into Court by way of a fine a sum equal to their profits accruing from sales made in breach of the injunction down to 4th March, 1907, and that if such profits should be found to amount to less than $250, they should pay a fine of $250, and that, though the fine was a sum equal to the profits, its payment should not be regarded as a disposition of the profits themselves, and that defendants might on or before 6th April, 1907, elect to purge their contempt on the terms mentioned by filing a notice of their election with the registrar, and that thereupon there should be a reference to the Master in Ordinary to ascertain the profits accruing from sales made in breach of the injunction between 22nd January, 1907, and 4th March, 1907, and that in default of such election the writ of sequestration should issue, and that defendants should forthwith after taxation pay the costs of the motion as between solicitor and client, and that defendants had filed a notice, but that it was not an election pursuant to the terms of the judgment.

The order then directs the issue of a writ of sequestration, directed to the sheriff of the city of Toronto, to sequester the goods, chattels, and personal estate, and the rents and profits of the lands and tenements, of Business Systems Limited, the defendants, and to retain and keep the same under sequestration until the Court should make other order to the contrary; and the order further directs defendants forthwith to file with the registrar an account in writing and verified by affidavit of the binders, holders, and sheets made by them between 22nd December, 1906, and 4th March, 1907, in imitation of the binders, holders, and sheets of plaintiffs, and that the costs of the motion, to be taxed between solicitor and client, be paid forthwith after taxation by the defendants to the plaintiffs.

The 24th paragraph of the judgment is as follows: "24. And this Court doth further order and adjudge that defendants, their and each of their servants, agents, and workmen, be and they are hereby perpetually restrained from making binders, holders, or sheets in imitation of the said binders, holders, and sheets of plaintiffs."

The entry of judgment was stayed by the trial Judge for 30 days, and having obtained on 8th January, 1907, leave to appeal directly to the Court of Appeal, the defendants gave notice of appeal from the judgment of the Court of Appeal, and on 12th January, 1907, paid into Court $200 as security for costs under Con. Rule 826; on 12th February, 1907, they served notice of an application to Moss, C.J.O., for a stay of the operation of the injunction proceedings (Rule 827 (1d)), returnable on 16th February. On the return of this motion, at the request of plaintiffs, an enlargement was granted until 20th February, 1907. The motion was argued on the 20th and 21st of the same month, and on 4th March, 1907, judgment was given by Moss, C.J.O. (9 O. W. R. 390), granting the stay upon the undertaking of defendants to keep and file an accurate account of all sales and transactions in respect of binders, holders, and sheets, as specified in paragraph 24 of the judgment, made or entered into by them.

The notice of motion for the writ of sequestration was served on 22nd February, 1907.

Two grounds of objection to the order appealed from were argued by counsel for defendants:—

1. That the effect of the order of Moss, C.J.O., of 4th March, 1907, and of Con. Rule 829 was to stay all further proceedings in the action unless otherwise ordered by the Court of Appeal or a Judge of that Court, and that no leave having been obtained from the Court of Appeal, or a Judge of that Court, to make the motion for a writ of sequestration, Mulock, C.J., had no right or jurisdiction to entertain the motion or to make the order appealed from.

2. That Mulock, C.J., erred in assuming that process of contempt for the breach of the injunction is punitive in its character, that it is really a means of securing obedience to the injunction, and that, as the operation of the injunction had been stayed, no order should have been made.

Unless where the judgment appealed from awards a mandamus or injunction, in the case of a motion by way of appeal to the Court of Appeal, the execution of the judgment or order appealed from is stayed pending the appeal as soon as the security provided for by Rule 826 is allowed: Con. Rule 827 (1); but the Court or a Judge in the excepted cases may order that execution be stayed: Con. Rule 827 (2).

Rule 829 provides that "where execution of the judgment or order appealed from has become stayed, all further proceedings in the Court appealed from, other than the issue of the judgment or order and the taxation of costs thereunder, shall be stayed, unless otherwise ordered by the Court appealed to or a Judge thereof."

The order of the Chief Justice of Ontario does not in terms stay the execution of the judgment; its language is, "that the operation of the judgment appealed from herein restraining the defendants from making binders, holders, and sheets, in imitation of the binders, holders, and sheets made by plaintiffs, be stayed pending the hearing and disposition of the defendants' appeal to this Court from the judgment aforesaid."

Execution of the judgment not having been stayed by force of Rule 827, it is not stayed unless the order of Moss, C.J.O., has the effect of staying it, and it appears to me that his order has not that effect. As I read the order, all that is stayed is the operation of so much of the judgment as restrains defendants from making binders, holders, and sheets in imitation of the binders, holders, and sheets of plaintiffs, and Rule 829, which applies only where execution of the judgment or order appealed from has become stayed, has therefore, I think, no application. Indeed it may be open to question whether the Rule applies unless execution has become stayed by the automatic operation of the Rule, and it may well be that the framer of the Rules thought that where an order for the stay was necessary, the terms of the order would provide what effect it should have on the right of the parties to take further proceedings on the judgment.

. . .

[Reference to McLaren v. Caldwell, 6 A. R. 456, remarks of Burton, J.A., at p. 494.]

It was probably in view of this opinion . . . that the order of Moss, C.J.O., directs not that "execution" of the judgment but "the operation" of the judgment should be stayed.

Rule 830 being, in my opinion, for these reasons, inapplicable, there was nothing to take away the jurisdiction of the High Court to entertain an application by plaintiffs for an order for a writ of sequestration because of the disobedience of defendants in disregarding the prohibition contained in paragraph 24 of the judgment, while the operation

of that part of the judgment was not stayed—that is, between the expiry of the 30 days' stay granted by the trial Judge and 4th March, 1907, when the stay was granted by Moss, C.J.O.

It was strenuously urged by Mr. Middleton that it would be a great injustice to defendants, who were dissatisfied with the judgment and had appealed against it, that they should be required to obey the mandate of the Court contained in paragraph 24 of the judgment, at the peril of being liable to be punished for contempt, and that too where the case was one in which a Judge of the Court of Appeal had determined that it was proper that the operation of the judgment should be stayed pending the appeal, and had accordingly granted such a stay. With the hardships of a practice leading to such a result, we have nothing to do, but there was no reason why the defendants should have incurred that risk. They might have yielded obedience to the judgment while it was operative, and, if that would have involved serious loss, they might have obtained an extension of the stay granted by the trial Judge, or have procured a stay from the Court of Appeal, or a Judge of that Court, before the expiry of the stay granted by the trial Judge. They were in a position to move for such a stay at any time after 12th January, 1907, and, if the disposition of the motion had been delayed owing to plaintiffs asking enlargements of it, terms might have been imposed on them which would have protected defendants from incurring any penalty for contempt in not in the meantime yielding obedience to the judgment. . . .

[Reference to McGarvey v. Town of Strathroy, 6 O. R. 138; McLaren v. Caldwell, 29 Gr. 438; Dundas v. Hamilton and Milton Road Co., 19 Gr. 455.]

The first ground of appeal, in my opinion, fails.

The second ground, in my opinion, also fails.

I do not propose going through the cases cited by Mr. Middleton, all of which I have read. Several of them deal with the exercise by the Court of its jurisdiction to punish for contempt not committed in the face of the Court, and point out that this jurisdiction should be exercised sparingly, and only where the public interests require that it should be exercised. In all this I entirely agree, but it does not help much, if at all, to the solution of the question whether the order of Mulock, C.J., was rightly made in this case.

Nor is much assistance derived from the cases in which a distinction between a contempt which is punishable as a crime and one not so punishable is considered and pointed out. . . .

[Reference to remarks of Lindley and Lopes, L.JJ., in O'Shea v. O'Shea, 15 P. D. 59, 64; In re Freston, 11 Q. B. D. 545, 556, 557; Harvey v. Harvey, 26 Ch. D. 644, 654; In re Tuck, [1896] 1 Ch. 692, 696; D. v. A. & Co., [1900] 1 Ch. 484; Spokes v. Banbury Board of Health, L. R. 1 Eq. 42; Berry v. Donovan, 21 A. R. 14; Kerr on Injunctions, 4th ed., p. 593 et seq.]

The objections to the jurisdiction of Mulock, C.J., to make the order failing, and the Court being of opinion that the jurisdiction included power to punish for a wilful breach of the prohibition of the injunction, it follows that the appeal fails and must be dismissed with costs.

The defendants should, however, have a further day of grace granted to them to comply with the terms upon which the issue of the writ of sequestration should be suspended, and they will be allowed until 4th June to file with the registrar a notice of their election to comply with the terms mentioned in the recitals in the order appealed from, and in the event of their doing so they should have liberty, on proper terms, to apply to vary the order appealed from so as to make it such an order as would have been made if they had filed a proper notice of their election within the time limited by the order.

MAY 30TH, 1907.

DIVISIONAL COURT.

MUNRO v. SMITH.

MACKIE v. SMITH.

RICHARDSON v. SMITH.

Mines and Minerals — Ontario Mines Act, 1906 — Application to Record Staking out of Mining Claim—Duty of Mining Recorder to Receive—Ministerial Act—Result of Failure to Record—Rights of Applicants—Previous Adverse Claims Undisposed of—Bar to Recording Fresh Claims—Affidavit —Form—Construction of Act.

Appeals by defendant Smith, the mining recorder of the Temiskaming mining division, from orders of ANGLIN, J.,

8 O. W. R. 452, requiring the appellant, pursuant to the Mines Act, 1906, to accept the applications of the several plaintiffs for certain mining claims tendered to the appellant.

J. R. Cartwright, K.C., and W. D. McPherson, for the appellant.

J. Bicknell, K.C., for plaintiffs Munro and Mackie.

Grayson Smith, for plaintiff Richardson.

The judgment of the Court (MEREDITH, C.J., MAGEE, J., MABEE, J.), was delivered by

MEREDITH, C.J.:—The question for decision is whether a mining recorder is warranted by the Mines Act, 1906, in refusing to receive an application to record the staking out of a mining claim, otherwise in proper form, when presented to him under the provisions of sec. 156 of the Act, because an application has already been received by the mining recorder to record the staking out by another person of the same mining claim; in other words, whether, after an application has been received, the mining recorder may refuse to receive an application from another person to record his staking out of the same claim until the first application has been disposed of, and unless it is disposed of adversely to the application.

I agree with my brother Anglin's view that the duty of the mining recorder under sec. 156 is a purely ministerial one, and that if the conditions mentioned in the section are complied with by the applicant, it is the duty of the mining recorder to receive his application in order that it may be dealt with by him under the provisions of the Act, unless the contention of the appellant to which I have referred is well founded.

It is extremely difficult for me to reconcile with one another all the provisions of the Act bearing upon the question to be determined, but, after the best consideration I have been able to give to the matter, I have reached the conclusion that the contention of the appellant is not entitled to prevail.

It is important for the determination of the question to ascertain what are the rights, if any, acquired by the lodging

with the mining recorder of an application to record the staking out of a mining claim.

Turning back to the group of sections headed "Mining Recorders, their Duties and Powers," it will be found that sec. 55 deals with the books to be kept by the mining recorder for recording claims, "and other entries therein as may be prescribed by the Minister." Section 58, though not very artistically framed, requires the mining recorder, forthwith after the presentation by a licensee of "an application for a claim," to enter in the proper book in his office the particulars of the application, and to file the application, sketch or plan, and affidavit (what these are is to be found by reference to sec. 156) with the records in his office, and that "if within 60 days of the date of the recording of a mining claim staked out after the passage of the Act, no dispute as to the rights of the licensee to the claim by reason of prior discovery or otherwise, has been lodged with the mining recorder, he may grant to the licensee a certificate" of the record of the staking out of a mining claim. By sec. 59 the applicant is at the time of the application to produce his miner's license to the mining recorder to whom the application is made, and the mining recorder is to indorse and sign upon the back of it a note in writing of each and every "such record made to such licensee," and the record is not to be complete or effective unless and until the indorsement is made and signed on the license. And by sec. 60 "any question or dispute as to non-compliance with the provisions of the Act regarding a mining claim prior to the issue of a certificate of record of staking out," is to be adjudicated on by the mining recorder subject to an appeal to the Mining Commissioner.

Section 140 provides as follows: "The application of a licensee for a record of the staking out of a mining claim shall not be deemed to confer any right whatsoever upon the licensee until such time as the staking out of the said mining claim shall have been recorded with a mining recorder, and a certificate of such record issued and delivered by the mining recorder to the licensee or some person on behalf of the licensee."

There is an apparent inconsistency between the provisions of this section and those of sec. 160, to which reference has been made, in that the requirement of the latter is that

the respective periods mentioned in it within which work is to be done by the licensee are reckoned immediately following the recording of the staking out of the mining claim.

The object of the provisions of sec. 160 is, I think, plainly to impose obligations to perform the work in order that the licensee may not be permitted, having secured the mining claim, to let it remain undeveloped, and it is somewhat singular that nowhere in the Act, as far as I have been able to ascertain, is there anything which defines or declares what rights a licensee who has recorded the staking out of a mineral claim and has obtained a certificate of the record of it, acquires in the land which is the subject of the claim before he obtains his patent for it, unless it be sec. 132, which provides that a person who in accordance with the provisions of the section stakes out a mining claim shall have the right to work the same and transfer the interest therein of a licensee to another licensee.

Section 160 must, I think, be read as meaning that the periods mentioned in it are to be reckoned from the recording of the staking out of the claim and the granting of the certificate of the record of it. The language of sec. 140 is clear and explicit, and secs. 132 and 160 must be read so as not to conflict with its provisions, and, when it is borne in mind that until the certificate is issued, the right of the licensee is not established, and it may turn out that his claim is an unfounded one, it would be most unlikely that it was intended to give him the right, and indeed to impose upon him the duty, of performing work involving considerable outlay, and apparently to give him the right to appropriate to his own use the minerals he might win in the course of his mining operations, until his claim has been established and the certificate of record has been delivered to him.

The form of the report which, by sec. 161, the licensee is to make of the work done by him, as required by sec. 160 (form 17), describes the licensee as the holder of the mining claim, which would, I think, be an inaccurate description of one who had not obtained a certificate of the record of his staking out, for until then he is merely an applicant for a record of his staking out, and he has, according to sec. 140, no right whatever until the certificate of record has been issued and delivered.

Section 71 may also be referred to. It makes the certificate of record when delivered, in the absence of fraud, final and conclusive evidence of the performance of all requirements of the Act except working conditions up to "that time," and makes the certificate, in the absence of fraud, not liable to forfeiture except for breach or non-compliance with the provisions of the Act in respect to work required by the Act to be thereafter performed on the mining claim.

If I am right in this view as to the position of the applicant for the record of the staking out of a mining claim, one would not expect that the filing of an application by, it might be, one who had no right whatever to a certificate of record, whose affidavit might be a tissue of falsehoods, should have the effect of defeating an honest claimant who was the real discoverer and had complied with the provisions of the Act, but had not succeeded in getting in his application until after the fraudulent applicant had reached the mining recorder's office and filed his application.

It may be said that there is no limit fixed after the discovery of valuable mineral for the staking out of the claim by the discoverer, and that in the case suggested, after the claim of the fraudulent applicant has been disposed of by tthe mining recorder, the discoverer may stake out his claim and file his application; but what is there to prevent some one else, after a disposition of the application has been made, going to the locality and doing just what has been done by his predecessor, if only he succeeds in getting to the locality before the true discoverer reaches it, and by a repetition of these methods the opportunity of the true discoverer to acquire any right to the claim being indefinitely postponed?

It appears to me that it is a much more reasonable construction to give to the Act, to interpret it as entitling any one who desires to do so, and complies with the provisions of sec. 156, to lodge his application with the mining recorder. What harm would such a course occasion to any one? The mining recorder would have all the claimants before him and would be in a position to settle all disputes and to grant to the person found to be entitled the certificate of record, instead of dealing with each claim separately, which, if there were many claimants, would cause long

delay, for at least 60 days must elapse between the receipt of each application and the disposition of it.

Section 132, which confers on a licensee who discovers valuable mineral in place the right to stake out thereon a mining claim, is, no doubt, qualified by the provision in these words, "provided that it is on Crown lands not withdrawn from location or exploration, and is not included in a claim staked out by another licensee or on lands the mines, minerals, and mining rights whereof have been reserved by the Crown."

This provision was relied on by Mr. McPherson as supporting the contention of the appellant that only one staking out was permissible, and that when once a claim was staked out it was in effect withdrawn from further staking out.

This argument, however, proves too much, for, if well founded, though the original staker-out had omitted for 15 days after staking out his claim to apply for the record of his staking-out under the provisions of sec. 156, and even if his claim were disallowed under the provisions of sec. 58, it would be impossible for any one else, though he were the first discoverer of valuable minerals in place, to stake out a claim.

I see no reason why this provision should not be read as meaning that there shall be no staking out of a claim where one already has been staked out, and a certificate of the record of the staking out has been issued and delivered.

If this be not the true meaning of the provision, the real discoverer would be prevented from staking out his claim if some more alert and unscrupulous licensee should succeed in staking out the claim before the real discoverer had done so.

This view of the meaning of the provision is strengthened if it be, as I have said in my opinion it is, that the right to work the claim mentioned in the concluding part of sec. 132 does not arise until the certificate of the record of the staking out of the claim is issued and delivered.

Upon the whole, I am of opinion that it was the duty of the appellant to receive the applications of plaintiffs as applications under secs. 58 and 156, in order that they might be considered and dealt with by him under the provisions of the Act.

Even if I had come to a different conclusion as to this, I should still be of opinion that the appellant was bound to receive the applications at all events as being objections to the granting of a certificate of record to the person whose application had been filed: sec. 58.

The difficulties which have arisen in this case will not occur in the future, for at the last session of the legislature the Mines Act, 1906, was amended by providing that the particulars of applications are not to be entered by the mining recorder if a prior application is already recorded for the same claim or any substantial part of it (sec. 13 (1)), and by changes in secs. 131 and 132 which give a right to stake out a claim on such lands as are mentioned in sec. 131 "if and only if the same are not at the time within any of the following descriptions, namely: (1) under staking or record as a mining claim, special mining claim, or placer mining claim not expired, lapsed, abandoned, or cancelled; (2) under an existing working permit; or (3) withdrawn. . ."

I cannot part with the case without pointing out that the expressions used in the Act as to "recording" indicate careless drafting.

In sec. 55, which refers to the books to be kept by mining recorders, the books are spoken of as being "for the recording of mining claims;" in the same section the recorder is to mark on his map "the claims as they are taken up and recorded;" sec. 58 speaks of "the recording of a mining claim;" sec. 59 speaks of the application as being "to record the staking out of a mining claim;" sec. 60 uses the expression "certificate of record of staking out;" sec. 67 speaks of "the certificate of record of the staking out thereof;" sec. 71 uses the expression "certificate of record of any mining claim;" sec. 109 says "no mining claim shall be staked out or recorded;" sec. 122 speaks of a certificate of record of the staking out of a mining claim; sec. 130 (1) speaks of recording a mining claim; sec. 140 goes back to the expression "for a record of the staking out of a mining claim." The group of sections commencing with 156 is headed "recording mining claims;" then sec. 159 speaks of a "recorded owner or holder" of an unpatented mining claim; sec. 160 (1) speaks of recording a mining claim, while sub-sec. 3 of the same section goes back to the expression "record of the staking of a mining claim;" sec. 166 reverts to the expres-

sion "recording of a mining claim;" form 13 describes the application under sec. 156 as an "application to record the staking out of a claim"—and that is what, according to the form, the applicant is to ask for.

All these varying expressions are intended to mean the same thing, and it is to be hoped that when the Act is consolidated or a revision of it takes place, an attempt will be made to use always the same expression when the same thing is meant.

The appeal must be dismissed with costs.