THE

# ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING JUNE 13TH, 1903.)

VOL. II. TORONTO, JUNE 18, 1903. NO. 23.

CARTWRIGHT, MASTER. JUNE 8TH, 1903.

CHAMBERS.

## FARMERS' LOAN AND SAVINGS CO. v. MUNNS.

*Summary Judgment—Rule 603—Implied Covenant for Payment—Instrument of Charge—Defence—Unconditional Leave to Defend.*

Motion by plaintiffs for summary judgment under Rule 603 in an action on the covenant for payment deemed to be contained or implied in a transfer by way of mortgage or charge under the Land Titles Act.

F. J. Dunbar, for plaintiffs.

G. Grant, for defendant.

THE MASTER.—The plaintiffs' claim in this case is similar to the cause of action in Wilkes v. Kennedy, 16 P. R. 204. In that case the charge was created by an instrument dated 15th March, 1890. In the present case the charging instrument bears date 22nd October, 1890. A further coincidence is found in the fact that in Wilkes v. Kennedy a "William Munns" was one of the mortgagees under whom Wilkes claimed as assignee. In that case Munns made an affidavit corroborating the defence of Kennedy that at the time of the creation of the charge "it was clearly understood and agreed that the equity of redemption alone was being dealt with and that he was to give no covenant for payment of mortgages thereon, but that the land alone was to be liable." . . . Mr. Munns, being now the defendant, has made an affidavit similar to that made for Kennedy. . . .

In my opinion, the motion must be refused, in face of the uncontradicted affidavit. This, as it seems to me, is corroborated in an unusual way by the only affidavit filed in support of the motion. . . . That affidavit verifies the indorsement on the writ of summons. I have tested the figures, and find that no interest has ever been paid from the very first on the principal sum. The result is, that interest and

compound interest largely exceed the principal. It is not to be forgotten that the liquidator of the plaintiffs (whose clerk makes the affidavit) is not in a position to know what may have been said by the officials of plaintiffs in October, 1890. . . . Besides this, the instrument contained a covenant by one Henderson, which, as defendant contends, took the place of the mortgagor's covenant. These two circumstances are very cogent, in my opinion. They are both quite independent of defendant's assertion, and until explained or displaced tend strongly to corroborate defendant's story.

In view of the language of Lord Halsbury, cited by the Chancellor in Wilkes v. Kennedy, from Jones v. Stone, [1894] A. C. 124, and of the whole current of the later decisions down to Jacobs v. Booth's Distillery Co., 85 L. T. R. 262 (for which I again refer with much pleasure to Mr. A. MacGregor's very useful article in 39 C. L. J. p. 259), there can be no doubt that the motion cannot succeed.

The liquidator was acting reasonably and according to his duty in making the motion, and was very excusably in ignorance of the facts alleged in defendant's affidavit. Under these circumstances, the costs of the motion will be in the cause.

[On appeal from this decision, argued by the same counsel, on the 12th June, 1903, before STREET, J., the Master's order was set aside, but the defendant was given leave, upon payment of costs, to file a further affidavit, and have the motion reheard.]

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CARTWRIGHT, MASTER. JUNE 8TH, 1903.

CHAMBERS.

## CAMPBELL v. BAKER.

*Staying Proceedings—Former Action Pending—Identity of Matters in Controversy—Consent Judgment.*

On the 7th January, 1901, an action was commenced by the present plaintiff against Croil and McCullough to recover an amount alleged to be due by them on certain mortgages. The statement of claim was delivered on 20th February. On the same day an agreement was made by the defendants in that action to sell to the Bakers, who were defendants in the present action, so much of the lands embraced in the first action as were sought to be recovered and otherwise dealt with in the present action. To this agreement the plaintiff assented on certain terms not necessary to set out. This first

action being at issue on 12th October, 1901, the parties executed an agreement for a consent judgment for plaintiff for $3,750 without costs, and providing that all the properties mentioned in the statement of claim should be sold by the plaintiff and defendant Croil, and the proceeds divided equally between plaintiff and defendants.

On the 25th October, 1901, such a judgment was accordingly pronounced, and the lands were duly offered for sale, and bought by Croil. The sale was conducted by the Master at Cornwall, as provided by the judgment, and on 15th March, 1902, he made his report, finding a certain amount due. The defendant Croil appealed therefrom; and on the 10th October, 1902, an order was made referring back the report, and directing the Master to report as to title and to ascertain "what amount, if any, is due by the said John H. Croil to the plaintiff upon an adjustment of all the matters in question between the parties," and directing that upon payment within 20 days thereafter of such amount a vesting order already made should be handed to said Croil.

The Master made his further report on 17th February, 1903, finding a balance of $1,024.85 due by Croil and McCullough to plaintiff. From this report the defendants again appealed, and on 2nd April last an order was made reducing the amount due by defendants to $898.85 and extending time for payment until 15th June instant.

From this order the defendants were appealing to the Court of Appeal, and a bond for security for costs had been filed and had not been disallowed. The present action was commenced on 5th May, 1903, to recover possession of the parcel sold to the Bakers under the agreement of 20th February, 1901. The statement of claim was delivered on 18th May. Thereupon the defendants moved to stay the action, as provided by sub-sec. (9) of sec. 57 of the Judicature Act. The cause was at issue and notice of trial had been given.

J. H. Moss, for Croil.

William Johnston, for defendants the Bakers, supported the motion.

C. H. Cline, Cornwall, for plaintiff, shewed cause. He urged that this action was only to recover the amount due by Croil and to acquire possession to prevent irreparable injury to the plaintiff. He offered to consent to the motion if defendants would give any substantial security.

THE MASTER.—I am of opinion that the motion must prevail. The whole matter now in controversy between the

parties is before the Court in the original action. Until it has been finally determined, any other proceeding would seem to be vexatious if not an abuse of the process of the Court. The very absolute character of a consent order or judgment was pointed out and acted on by the Court of Appeal in Re Canadian Pacific R. W. Co. and City of Toronto, 27 A. R. 54 at p. 63, where the order of Armour, C.J., giving certain directions to the referee, was reversed, as being ultra vires. This second action is a distinct violation of the consent judgment. Any good that could possibly result from it can be far more quickly had under Rule 827. By the provisions of that Rule any security to which plaintiff is entitled will undoubtedly be given him as a term of stay of execution if defendants make default on the 15th June. It certainly seems to me that in any case the plaintiff was bound to wait until it was shewn that defendants were going to make default. They may be, they say they are, able to pay the whole $900 into Court to abide the result of the appeal, if so ordered by the Court.

I think, therefore, that for these three reasons the present action should be stayed:—

1st. Because it is a breach of the agreement in pursuance of which the consent judgment was made.

2nd. Because the time for payment, as finally fixed, of the amount due by defendants, has not yet arrived.

3rd. Because any relief the plaintiff could get thereby will be more effectually obtained by application to the Court of Appeal under sub-sec. (2) of Rule 827.

The action should be stayed at least until 16th June, with liberty to plaintiff to apply for leave to proceed, if so advised. The costs of this motion should be to the defendants in any event.

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CARTWRIGHT, MASTER. JUNE 9TH, 1903.

CHAMBERS.

## LAKE SUPERIOR POWER CO. v. HUSSEY.

*Consolidation of Actions—Refusal to Direct Stay—Direction to Enter together for Trial.*

Motion by defendant to stay the action until the determination of a similar action by the same plaintiffs against Martha Baldwin, on the ground that the validity of a certain tax sale is the only question to be decided in each action.

W. E. Middleton, for defendant.

R. U. McPherson, for plaintiffs.

THE MASTER.—The actions were commenced just a year ago. They are now at issue and ready for trial at the ensuing assizes at Sault Ste. Marie. The defences, though generally similar, are not identical. I have looked at the case of Township of Tilbury West v. Township of Romney, 19 P. R. 242, and the cases cited in the judgment of Mr. Justice Street, which seem very applicable to the present motion. I cannot see any authority which would justify me in granting the order except upon the terms that the defendant in this case would agree to be bound by the result in the other action. Even then I do not think that plaintiffs could be obliged to accept any such limitation of their right to proceed with both these actions, as a matter of precaution. Unexpected and unforeseen delays might easily occur, e.g., the death of defendant or abatement or inevitable delay from some other cause. The only order that can be made, in my opinion, is . . . that plaintiffs should enter the two actions together, so that the trial Judge can direct that the evidence in the first action be held to have been taken in the other, so far as applicable. . . .

Costs to plaintiffs in any event.

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MEREDITH, J. MAY 29TH, 1903.

CHAMBERS.

## BLACKWELL v. BLACKWELL.

*Pleading—Statement of Claim—Non-conformity with Writ of Summons—Amendment—Practice.*

Appeal by defendants from order of Master in Chambers, ante 411, refusing to strike out certain paragraphs of the statement of claim.

M. Wilkins, Arthur, for appellants.

J. H. Spence, for plaintiff.

MEREDITH, J., ordered that, upon plaintiff consenting to make certain amendments to the statement of claim, the appeal should be dismissed, and costs should be in the cause. But, in default of such amendment, the appeal should be allowed with costs and the paragraphs stricken out as asked.

MACLAREN, J.A. JUNE 8TH, 1903.

C.A.—CHAMBERS.

## CRAIG v. SHAW.

*Court of Appeal—Leave to Appeal—Special Reasons—Sale of Goods—Action for Price—Place of Delivery—Inspection—Defect in Quality.*

Motion by defendants for leave to appeal from order of a Divisional Court, ante 449, affirming judgment of trial Judge.

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

R. J. McLaughlin, K.C., for plaintiffs.

MACLAREN, J.A., held that there were not sufficient special reasons for treating the case as exceptional and granting leave to appeal. Motion dismissed with costs.

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JUNE 9TH, 1903.

DIVISIONAL COURT.

## KELLY v. WILSON.

*Chose in Action — Assignment of — Order for Payment of Money — Equitable Assignment of Fund—Existence of Fund—Finding of Fact.*

Appeal by defendant Wilson from judgment of FALCONBRIDGE, C.J., in favour of plaintiff in action to recover $310, the amount of an order given to plaintiff by defendant Aldous upon defendant Wilson, as follows: "Pay to Edward Kelly the sum of $310 and charge same against sale of stock and business as arranged between us."

D. L. McCarthy, for defendant.

A. Weir, Sarnia, for plaintiff.

The judgment of the Court (BOYD, C., FERGUSON, J., MACMAHON, J.) was delivered by

BOYD, C.—It is conceded that the order to pay is in terms a good equitable assignment of the fund, if there was an existing fund out of which it was to come. That being so in law, I think the finding of the Chief Justice on the facts, with his estimate of the witnesses, is one that ought not to be disturbed. Affirming the judgment on the facts, that on the law follows.

Appeal dismissed with costs.

CARTWRIGHT, MASTER. JUNE 10TH, 1903.

CHAMBERS.

## CONMEE v. LAKE SUPERIOR PRINTING CO.

*Libel—Pleading—Statement of Defence—Fair Comment — Privileged Occasion—Public Interest.*

Motion by plaintiff to strike out the 4th and 5th paragraphs of the amended statement of defence of defendant Russell, and the 3rd paragraph of the amended statement of defence of defendant company, or in the alternative for a further and better statement of the nature of the defences, or for particulars of the paragraphs. The action was for libel.

N. W. Rowell, K.C., for plaintiff.

C. A. Moss, for defendants.

THE MASTER.—The grounds of objection are set out in the notice of motion. The main ground was, that, if the defence set up was "fair comment," the pleadings should be in the form ordered in Crow's Nest Pass Co. v. Bell, 4 O. L. R. 666. That, however, was a case in which there could not be any claim of privilege.

On the other hand, it was argued that the defendants did not intend to plead justification, and were not obliged to do so—that what they desired to set up was, that these statements were made on a privileged occasion and in good faith and as matters that were spoken of freely and generally at the time; that the plaintiff now occupies a prominent position, as he himself sets out in his statement of claim, being now and having been for the past 14 years a member of the Legislative Assembly; that by his own statements and justification of his conduct he had openly challenged and invited criticism and inquiry; and that the defendants were only acting within their rights and in the public interest in asking explanations of certain alleged actions of his which seemed inconsistent on their face with his self praise; that these criticisms were such as are usual in an electoral campaign, and are not taken too seriously, so that plaintiff was not damaged to any appreciable extent thereby.

In Odgers on Libel, 3rd Eng. ed., pp. 47 and 48, instances will be found of similar published statements about public men and matters, and the remarks of Cockburn, C.J., and of Lord Herschell in some of these cases. The former has pointed out how the rights of the press have been enlarged in

recent years and how necessary it is that they should not be restricted unduly.

I have compared the pleadings in their amended form as now on the record with those in Dryden v. Smith, 17 P. R. 505, which is a similar case. Equally strong statements of alleged facts are to be found there set out in the 5th paragraph of the statement of defence, but it was never objected there that the defendant must justify these facts before he could be allowed to plead fair comment.

I may be wrong in the view I have taken of these pleas in the limited time at my disposal, but I am of opinion that the defences here are really similar to those in Dryden v. Smith. To the judgments in that case I would refer for my reasons in holding that this motion should be dismissed as far as striking out or directing further amendments of the pleadings is concerned. As to the particulars asked for, I don't think they are necessary. The statements of the charges and counter-charges are nothing more than allegations in mitigation of damage, as shewing that no one would be likely to pay any great attention to them. . . .

I now therefore adopt what I said (p. 510) in Dryden v. Smith, and direct the motion to be dismissed. I think the pleadings might have been made clearer, so that the costs may be in the cause. . . .

After further consideration, I still think that the defendants are entitled to plead as they have done the defences on which they rely. Whether these defences will be considered sufficient by the Court and jury at the trial is not a matter which can be inquired into in Chambers.

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JUNE 10TH, 1903.

DIVISIONAL COURT.

## CORNELL v. HOURIGAN.

*Mortgage—Covenant—Sale of Equity of Redemption—Agreement to Look to Purchaser—Novation—Neglect of Assignee of Mortgage to Insure—Trusts—Parol Evidence.*

Appeal by defendants from judgment of BRITTON, J., ante 4, in favour of plaintiff in an action on the covenant contained in a mortgage deed.

G. Lynch-Staunton, K.C., for defendants.

D. O. Cameron, for plaintiff.

THE COURT (BOYD, C., FERGUSON, J., MACMAHON, J.) held that in equity the evidence was ample to sustain the con-

tention that there was a release agreed upon and acted on by both parties—in relinquishing and in acquiring the property —which precluded the legal enforcement of the covenant, because of the countervailing equities based upon this sufficiently proved arrangement. Williams v. Yeomans, L. R. 1 Eq. 184, referred to. Appeal allowed with costs and action dismissed with costs.

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JUNE 10TH, 1903.

DIVISIONAL COURT.

## HARVEY v. McPHERSON.

*Division Courts—Jurisdiction—Splitting Cause of Action — Promissory Notes—Consolidation of Claim in Proof against Insolvent Estate.*

Appeal by plaintiff from judgment of 1st Division Court in county of Wentworth (2 O. W. R. 251) dismissing the action because brought for only a part of plaintiff's claim, contrary to sec. 79 of the Division Courts Act.

A. McLean Macdonell, for plaintiff.

C. A. Moss, for defendant.

THE COURT (BOYD, C., FERGUSON, J., MACMAHON, J.) held that the promissory note sued on (dated 15th November, 1896) was when due a single cause of action, and remained so, and might be sued upon as such in a Division Court. What was relied on to shew that it was but a fraction of a cause of action, was, that the debtors, become insolvent, made an assignment for creditors, and that the holders proved their claim upon this and other notes, and in respect of goods and merchandize for which they did not hold notes, before the assignee, for the lump sum of $2,544.41, upon which was paid a dividend of 25 per cent. The holders had no security for their claim. The notes of the insolvents were not such security, and the notes could only be used as vouchers. This massing of the whole indebtedness for the purpose of proving in insolvency did not merge the whole into such unity that it became an unseverable claim. As against the debtors there was no change in liability upon the several notes as separate causes of action, and all that happened on account of the insolvency was, that 25 per cent. was paid and was to be credited on each note. Attwood v. Taylor, 1 M. & G. 307, Brunskill v. Powell, 19 L. J. Ex. 362, Franklin v. Owen, 15 C. L. T. Occ. N. 158, 185, and Richardson v. Martin, 23 W. R. 93, referred to.

Appeal allowed with costs and judgment to be entered for plaintiff with costs.

JUNE 11TH, 1903.

DIVISIONAL COURT.

## RE DENISON, REX v. CASE.

*Mandamus—Police Magistrate—Sentence for Criminal Offence—Personation of Voter—Referendum—Status of Applicant for Mandamus—Informant—Liquor Act, 1902.*

Appeal by E. J. Ritchie, private prosecutor, from order of BRITTON, J., ante 152, dismissing an application by the appellant for a mandamus to the police magistrate for the city of Toronto to impose upon Adam S. Case the sentence prescribed by sec. 167 of the Ontario Election Act, or, in the alternative, for an order of this Court imposing such penalty, under sec. 889 of the Criminal Code. Case was convicted by the magistrate for personation at the Referendum vote under the Ontario Liquor Act, 1902, and was sentenced to pay a fine of $50 and costs or to imprisonment for six months at hard labour. The prosecutor sought to have a fine of $400 and imprisonment for one year imposed. An information was laid by Sturgeon Stewart before the deputy returning officer, E. J. Ritchie, against E. A. Taylor (which was the name given by Case when he asked for a ballot), on the polling day, and before Case had left the polling place, charging him with personating James Brophy. Ritchie, on this information, issued his warrant for the apprehension of Andrew E. Taylor, and Case was thereupon apprehended and brought before the magistrate. On the 5th December, upon Case being brought up before the magistrate for trial, Ritchie laid an information against Case for an attempt to personate, and Case was tried and convicted as above.

A. Mills and W. E. Raney, for appellant.

J. Haverson, K.C., for defendants.

THE COURT (BOYD, C., FERGUSON, J., MACMAHON, J.) held that under secs. 4, 5, and 6 of the Election Act, R. S. O. ch. 10, the information which gave the magistrate jurisdiction was that laid by Stewart, and without such information the magistrate was powerless; and Stewart being the informant, he was the only person who could apply for a mandamus, and Ritchie was without any locus standi in this Court. Appeal dismissed. No costs.

JUNE 11TH, 1903.

DIVISIONAL COURT.

## RE TAGGART v. BENNETT.

*County Court Appeal—Right of Appeal—Final Order—Refusal to Vary Minutes of Judgment.*

Appeal by plaintiff from order of BRITTON, J., 2 O. W. R. 419, dismissing a motion by plaintiff for a mandamus to compel the Judge of the County Court of Middlesex to certify the proceedings in this case, pursuant to sec. 55 of the County Courts Act, so as to permit an appeal to a Divisional Court against an order of the Judge dismissing an application to vary the minutes of the judgment in this action as to setting off costs.

W. H. Bartram, London, for appellant.

No one contra.

The judgment of the Court (BOYD, C., FERGUSON, J., MACMAHON, J.) was delivered by

BOYD, C.—This is a matter interlocutory, from which no appeal lies under R. S. O. ch. 55, sec. 52. While provision is made for appealing from a decision of the Judge made under powers conferred by the Rules of Court (e.g., as to settling minutes), yet the last part of the section controls all the rest, and it is only in case the decision is in its nature final that appeal lies.

This is a mere interlocutory ruling, which will issue in final judgment, and from that judgment of the Court (if it be appealable) the appeal lies, and not from a proceeding which is but a step towards that judgment.

No order.

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JUNE 11TH, 1903.

DIVISIONAL COURT.

## AHRENS v. TANNERS' ASSOCIATION.

*Discovery—Examination of Officer of Defendant Association—Agent—Association of Incorporated Companies and Partnerships.*

Appeal by defendants from order of MEREDITH, C.J., ante 479, affirming order of Master in Chambers, ante 464,

directing Mr. D. A. Burns to attend for examination for discovery as an officer of defendants.

W. N. Tilley, for defendants.

C. A. Moss, for plaintiff.

The judgment of the Court (BOYD, C., FERGUSON, J., MACMAHON, J.) was delivered by

BOYD, C.—The statement of claim asserts that Mr. Burns was appointed "executive officer" of the association sued as the Tanners' Association, paragraph 5, but, according to the circular and the fact, he is only an agent. It appears that this association is a partnership or unincorporated company, consisting of a number of dealers in leather—in effect a syndicate made up of mixed partnerships and incorporated trading concerns—one of whom, the Breithaupt Leather Co., Limited, defends,because "sued as the Tanners' Association."

This company takes up the defence as being one of the constituents of the association defendant. This company can have officers within the meaning of the Rule as to discovery, but such officers the defendants cannot have as being a mere partnership. It does not follow from this method of defence that Burns, the agent of the association, becomes an officer of the Breithaupt Company, or is to be so regarded for the purposes of preliminary discovery. There is nothing to shew or to prove that he is an officer of the defendants or of the Breithaupt Company, who defend as for the Tanners' Association. If the whole body of the syndicate came in seriatim as defendants, like the Breithaupt Company, it would not make Burns an officer of each of them that happened to be incorporated so as to be examinable for discovery, and he certainly would not be such an officer as to any of the syndicate who are mere partnerships. In brief, the whole syndicate aggregated becomes the defendant, a mere association, which has an agent, Burns—but this Burns is not an officer of each member of the syndicate who is a corporate body.

This case seems to be unique, and the policy of the Court is not to liberalize the construction to be put upon this Rule: Morrison v. Grand Trunk R. W. Co., 5 O. L. R. 48, 1 O. W. R. 758; and, in my opinion, the order should be vacated—costs in cause to defendants.

OSLER, J.A. JUNE 11TH, 1903.

C.A.—CHAMBERS.

## RE LENNOX PROVINCIAL ELECTION.

*Parliamentary Elections—Bribery—Summonses to Persons Charged—Directions as to Trial.*

Application for summonses against various persons charged with bribery at the election .

E. Bristol, for applicants.

OSLER, J.A.—The applicants, if so advised, may take out a summons against each person charged, and, as there are not at present two Judges on the rota of election Judges available for the purpose of trying them, they must be made returnable, as provided by sec. 188 (2) of the Election Act, before any Judge of the High Court holding a sittings of that Court at Napanee for the trial of civil or criminal causes.

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JUNE 13TH, 1903.

DIVISIONAL COURT.

## PEARCE v. ELWELL.

*Master and Servant — Injury to Servant — Factory — Machinery—Absence of Guard—Defective Guard—Findings of Jury—General Verdict—Pleading—Notice of Accident.*

Plaintiff was a young woman employed by defendants in their laundry to work at a machine used for mangling and ironing clothes. While at work at this machine one of her hands was caught between two rollers and she was injured. She brought this action to recover damages for her injuries. The statutory notice of accident stated that it was caused by the absence of a guard to the machine. The statement of claim charged that the machine was a dangerous one, and was not properly guarded. Defendants alleged that it was properly guarded, and that the accident arose from plaintiff's carelessness.

The action was tried before BOYD, C., and a jury, at Hamilton.

Plaintiff and other witnesses swore there was no guard at the time of the accident. Other witnesses swore there was a guard. The machine with the guard on it was exhibited to the jury, and counsel for plaintiff contended that, even had the guard been on, it was not a proper or sufficient guard, and that it might easily have been made effectual without

impairing the usefulness of the machine. Witnesses for the defence swore that the machine was a modern one, and that the guard had been used on it as intended by the makers of it, and it was not shewn that any other machine of the kind had a better guard.

The Chancellor left the case to the jury without any written questions, instructing them that upon the evidence they might find either that the guard was or was not on at the time of the accident, and he also expressly left to them the question whether the guard was a sufficient one, if it was on at the time of the accident.

No objection was taken to the charge, and the jury found for the plaintiff and assessed the damages at $422.80. They found specially that the guard was insufficient. Judgment was entered for plaintiff for the damages found.

Defendants moved to set aside the verdict and for judgment in their favour, upon the ground that there was no evidence to support the finding, or for a new trial, upon the ground that the verdict was against the evidence.

J. W. Nesbitt, K.C., for defendants.

J. G. Farmer, Hamilton, for plaintiff.

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

STREET, J.—The issue as to whether the machine was properly guarded appears to be raised distinctly upon the pleadings, and to have been one of the matters upon which evidence was given on both sides at the trial. It was expressly submitted to the jury without objection, and I can see no reason . . . for holding that there should be a new trial because the jury may have based their verdict upon that ground.

The question of the contributory negligence of defendants was also left to the jury with proper instructions as to its effect. In the sealed verdict which they handed in, after stating that the guard was not a proper one, they say they "consider that the plaintiff is entitled" to recover the damages which they assess. This must be treated as a general verdict for plaintiff . . . and a finding in plaintiff's favour upon the question of contributory negligence is involved in it. . . .

Appeal dismissed with costs.

JUNE 13TH, 1903.

DIVISIONAL COURT.

## LIVINGSTON v. COUNSELL.

*Trusts and Trustees—Account—Contract—Parties.*

Appeal by plaintiff from judgment of MEREDITH, C.J., at the trial at Brantford, dismissing the action with costs, without prejudice to a further action being brought by the proper parties. The plaintiff is the wife of one W. C. Livingston, and the action was brought by her against Charlotte E. Counsell, executrix of the will of C. M. Counsell, deceased, claiming an account and payment of money. Thomas C. Livingston, the father of plaintiff's husband, was the owner of certain property in Winnipeg, subject to certain mortgages. On 27th October, 1897, an agreement under seal was entered into between him and the late C. M. Counsell, which provided that Counsell should advance $15,000 to him upon the security of a mortgage of his equity of redemption, and should discount for him the note of Thomas C. Livingston, indorsed by W. C. Livingston and plaintiff for $3,500, at three months, which note should be renewed from time to time for four years; that Counsell should forthwith be put in possession of the property and should collect the rents of it, and should apply them in payment of interest on the prior mortgages and his own mortgage, and of taxes, etc., and in payment to himself of a remuneration of $10 a month, and should pay any surplus to plaintiff. The advance was made and the note discounted, and plaintiff had to pay the note. Counsell went into possession of the property and collected the rents. The plaintiff alleged that Counsell or the defendant had not paid over the surplus over and above the sums authorized to be deducted from the rents, and asked for an account. The trial Judge ruled that Thomas C. Livingston was a necessary party to the action, but plaintiff declined to amend by adding him, and the action was thereupon dismissed as above.

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

J. L. Counsell, Hamilton, for defendant.

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

STREET, J.—Counsell became a trustee of the surplus rents for plaintiff under the agreement, but upon the facts of the case the trust would come to an end when the object of it,

which was the securing of plaintiff against loss, had been attained, and Livingston himself would then become beneficially entitled again to the surplus rents. There is plainly a sufficient interest in plaintiff to entitle her to maintain this action: Fletcher v. Fletcher, 4 Hare 67, 75, 78; Gandy v. Gandy, 30 Ch. D. 57, 54 L. J. Ch. N. S. 1154. But it is equally clear that defendant is entitled to have T. C. Livingston, with whom testator entered into the covenant to pay plaintiff, made a party to the action in order that he may be bound by the proceedings: Daniell's Ch. Prac., 7th ed., pp. 163, 172; Mitford's Eq. Pldg., 5th ed., p. 164. . . . Order made that, upon payment on or before 15th September next of the costs of the trial and of the appeal, plaintiff have leave to amend by adding T. C. Livingston as a defendant, with proper amendments to the proceedings, to be made before 1st October next; and that, in default of such payment or such amendments, the action and appeal be dismissed, both with costs, and the plaintiff's rights finally barred.