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APPELLATE DIVISION.

MARCH 16TH, 1914.

SWALE v. CANADIAN PACIFIC R.W. CO.

Railway—Carriage of Goods—Sale of, to Pay Charges—Liability of Railway Company—Conversion and Abstraction of Goods—Absence of Evidence — Liability as Involuntary Bailee—Wilful Neglect or Misconduct — Onus—Acts of Auctioneers Employed by Railway Company—Proof of Loss of Plaintiff's Goods—Negligence—Findings of Fact of Trial Judge—Appeal—Evidence as to Receipt by Railway Company of Missing Goods—Inventories—New Trial as to Part of Goods Alleged to be Missing—Judgment Disposing of Others—Relief against Third Parties—Costs.

After the judgment of the Appellate Division in this action delivered on the 4th December, 1913 (5 O.W.N. 402, 29 O.L.R. 634), argument was heard on the other branches of the case by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

W. Laidlaw, K.C., and J. Bicknell, K.C., for the appellants, the defendant company and the third parties.

Shirley Denison, K.C., for the defendants, the Canadian Pacific Railway Company, on the appeal of the third parties.

W. M. Hall, for the plaintiff, the respondent.

The judgment of the Court was delivered by HODGINS, J.A.: —The respondent Swale has so pleaded in this action as to base her claim upon the abstraction by the railway company and its agents, and the conversion to their own use, of the goods in question. There is no evidence to support this charge, but the making of it caused the parties to insist on their legal rights, and has made it necessary to deal with the issues more exactly than

the case would otherwise seem to demand. The liability of the railway company is only that of an involuntary bailee, and it held the goods, under the statute, at the risk of the owner. It can only be made liable for wilful neglect or misconduct, such as conversion or wilful misdelivery: Shaw v. Great Eastern R.W. Co., [1894] 1 Q.B. 373; or, if it did not act as reasonable men would act. See 5 O.W.N. 402, 29 O.L.R. 634. On this basis the claim against the railway company, and its claim over against the third parties, must be dealt with.

The railway company admits the sale of the ninety-seven packages or cases of settlers' goods and effects, except the goods removed by the respondent Swale, but there is no admission that the goods claimed by the latter as missing were among those settlers' goods and effects; and the contention is strongly pressed that the respondent Swale has failed to prove the delivery to the railway company of the actual goods set out in this list. These goods are said to have been among those packed up in England, partly by T. Swale and partly by Davies Turner & Co. The onus is upon the respondent Swale to prove her damages, and such a cause therefor as will render the railway company liable, upon the principle already laid down; and it is not incumbent on the appellants to prove affirmatively that they had used reasonable care: Marsh v. Horne (1826), 5 B. & C. 322.

The respondent's case as opened was for "nearly one hundred articles missing" and for "eight or ten overcharges," i.e., less accounted for than received; and her counsel stated that he was not concerned as to how the accounts were rendered by the third parties to the railway company, but only how the latter rendered them to the respondent, and that the real point of the case was with regard to the missing articles. . . .

No attempt was made before trial, by comparison of the rough list, packers' list, and shippers' list—whether admissible or not—and by inquiries from the shippers, to determine if there was any real loss of the respondent's goods, quite apart from the legal liability. . . . I attach a good deal of importance to the action of the respondent's husband in regard to the goods taken away before the sale. . . . It must be obvious that no list made prior to his selection would be of any value, unless he himself kept a record of what he was taking away. Hence what he did and his assistance to Suckling in making a list of the remaining goods, and his abstention from any complaint till November, and then only as to the Sèvres china, is of importance as shewing that the absence of a prior list cannot

be deemed negligence on the part of Suckling & Co., the third parties. . . . The goods selected by Swale were packed by him and shipped by him to Gravenhurst the night before the sale. . . . The goods filled six hogsheads and one barrel, weighing 1,950 lbs., and no list was then made of them by Swale or any one else; and the list now produced appears to have been prepared . . . five months after the sale. . . . The learned trial Judge has, however, accepted the list given by Swale of these goods as accurate; and I think that his finding cannot be disturbed. . . . After the sale, Swale claimed the unsold goods on behalf of the respondent, and Suckling, it is said, agreed to his taking them away. He took a velvet pile table cover and two large linen sheets, sold the grandfather's clock for $90, found a mirror unsold and asked for a case of Sèvres china, which has since been returned. He has accepted $25 for two Chippendale chairs said to be missing. Swale had an accounting with Suckling for the articles bought by him, amounting to $418.85 on the 22nd October.

The actual receipt of the missing goods, a list of which is produced by the respondent, is strongly disputed by both the railway company and the third parties. . . . The list of missing goods is a compilation made long after the sale, during the next year, and from a black book. When Swale made his selection of goods before the sale, he made no list of them, nor of the goods as laid out, nor of those left over, nor did he at the sale or previous to it, nor after it, while on the spot, make any complaint or shew any of the lists he had. And this has made it almost impossible for any effective check to be had of the belated list made up from his private sources and depending for its validity entirely upon the fact, is proved, that Davies Turner & Co. properly packed all he left and safely kept all he gave them. . . .

The method of keeping the accounts is not germane to the question of the abstraction or loss of the goods, and throws no light on it. As this Court has held that the railway company is liable only for wilful neglect or misconduct, what the third parties did or omitted to do, either as found by the trial Judge or as modified by the considerations just mentioned, is quite distinct from that sort of wilful misconduct which renders its perpetrator liable where in custody of goods of a third person. Nor, as will be observed, does it throw any real light on the point which is vital to the respondent, in view of the fact that no attention at the proper time was called to any goods as miss-

ing, except some specific ones since accounted for. Did these missing goods actually arrive in these cases or were they lost or abstracted in England or forgotten to be packed by the employees of Davies Turner & Co. there? This is the point, and it is, except in a few instances, left entirely in doubt. . . . The learned trial Judge . . . merely says that he is satisfied that the ninety-seven cases delivered to the third parties contained all the goods said to have been shipped from England. . . .

Suckling says that he saw the Brussels carpet in lot 168, and the wolf robe in the pile of rugs sold, so that the identification is confined, apart from those taken by Swale before the sale, those sold to him, and those sold to the public, to a typewriter-stand, a fitted luncheon-basket, two pair garden-shears, and a brass syringe, all valued at $26.25.

The history of the goods which he alleged were packed by Davies Turner & Co. is as follows. He produces a list of goods that were in the house at Monmouth previous to being packed. The list, he says, was an inventory taken by him in Monmouth before they were shipped. They were put, unpacked, into large vans, sent to Liverpool, and packed there by Davies Turner & Co. in their warehouse. These he never saw after they were taken loose into the vans. Exhibit 22, the shipping list, is an inventory taken by Davies Turner & Co.'s men before the goods left Monmouth, and is unverified. Exhibit 23, the packers' list, came, so Swale says, with the bill of lading, but it is also unverified. The appellants' argument is that any of these goods were liable to abstraction in the vans, and in Davies Turner & Co.'s warehouse, and that some may have been forgotten, and that the small cases into which Swale packed his goods, were also subject to the same contingency. To found a claim upon the railway company here or against Suckling & Co., it is obvious that this argument must be met. Did they all actually arrive in Toronto? is the point which, to my mind, admits of question. Bearing in mind that the onus is on the plaintiff to shew wilful neglect or abstraction, it seems impossible to assume against the appellants the arrival of all these goods, and then to found upon that assumption the finding that the appellants were guilty, under the circumstances already stated, of not merely want of ordinary care but wilful neglect.

This would be to carry responsibility too far. On the other hand, to cut down the respondent's claim to the $26.25 might result in a denial of justice, if evidence can be had to shew that

these goods were actually packed in Liverpool and securely kept until shipped to Canada. . . .

I think that the respondent should have the opportunity of giving evidence to clear up this vital point. The only solution, therefore, is a new trial, which should be confined to the goods in the list of those missing which are not covered by this judgment.

There are some matters dealt with by the judgment in appeal which may be disposed of now. The learned trial Judge allows $84.75 for goods sold and accounted for at less than their sale-price. . . .

I would deduct $29.05 from the $84.75 allowed by the judgment.

The packing cases are allowed at $75. The evidence is that Rawlinson got the seven or eight cases opened in the lane for which he paid his own carter $7. The rest, according to Jenkins, had to be broken up owing to the lack of space and the size of these cases, and he says they were of no value in that condition. . . . But I do not think the respondent can, in any case, receive any allowance for them. She surely must be subject to the exigencies of space and the actual conditions surrounding the sale. If it was necessary, and it is not contradicted, to break up these cases and reduce them to a state where they are useless, the respondent cannot complain, if they therefore had no commercial value, any more than she can contend that her goods did not bring the price they would have if she had been selling them in her own way, and without pressure.

I see no reason for disallowing the advertising, except $5, which is admittedly a discount received by the auctioneers, and that item should be allowed at $40. The repairs seem also to be a fair charge, $36.65.

The general account would seem to stand as follows:—

Accounted for		$1,790.20
Paid for (chairs)		25.00
To be paid for		26.25
Additional receipts..	$84.75	
less..	29.05	
		55.70
Still in dispute		887.50
		$2,784.65

Paid over	$1,505.63	
Chairs paid for	25.00	
Commission	190.00	
Cartage	18.80	
Paid Jenkins	30.10	
Advertising	40.00	
Repairs	36.65	
Still in dispute	887.50	
		$2,733.68
Leaving due the respondent		$ 50.97

The account regarding the missing goods, so far as it can be taken, is as follows:—

List of missing articles		$1,168.75
China case returned	$100.00	
2 chairs paid for	25.00	
Brussels carpet (sold in lot)	30.00	
Wolf skin robe (sold in lot)	25.00	
Packing cases disallowed	75.00	
		255.00
		$913.75
To be paid for—		
Typewriter stand Yost	$6.25	
Fitted luncheon-basket	5.00	
Pair garden shears	7.50	
Brass syringe	7.50	
		26.25
Balance still to be investigated		$887.50
The full claim of the railway company is	$1,657.79	
on which has been paid	1,505.63	

Leaving due the railway company $ 152.16, for which they should have judgment.

I think the proper disposition of this troublesome matter would be to give the respondent judgment for the $50.97, to be paid to her now, and direct a new trial limited to the items in the list of missing articles totalling $887.50, the evidence already taken to be read at the new trial, with the right to all parties to give additional evidence as they may be advised; the respondent

to have, if she desires it, a commission to examine witnesses in England, in which all parties may join. The costs of the former trial, including the third party costs, to be reserved to be dealt with at the new trial, and the railway company to await the result thereof before being entitled to enforce their judgment for $152.16. Upon that trial all questions between the railway company and the third parties are to be open. One set of costs of this appeal, excepting therefrom the costs of the earlier argument upon which judgment was given on the 4th December, 1913, to be to the appellants in any event of the action when finally disposed of. The judgment to be now entered should be considered as disposing of the questions of law already decided, as well as the questions of fact now dealt with, so that any appeal may include both. If the respondent does not elect within one month to take a new trial, judgment is to be entered for her for $50.97, with the general costs of the action, and for the railway company for $152.16, with costs of this appeal as above-mentioned, to be set off, pro tanto, against the respondent's judgment. There should also then be judgment against the third parties for the balance paid by the railway company, without costs, and no costs of the appeal as between the railway company and the third parties.

JANUARY 17TH, 1914.

KOSTENKO v. O'BRIEN.

Master and Servant—Injury to Servant—Negligence—Defective System—Cause of Injury—Finding of Fact of Trial Judge—Appeal—Opening up Judgment for Admission of Further Evidence—Costs to be Paid by Appellants.

Appeal by the defendants from the judgment of SUTHERLAND, J., 5 O.W.N. 689.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

G. H. Watson, K.C., for the appellants.

A. G. Slaght, for the plaintiff, the respondent.

THE COURT vacated the judgment of SUTHERLAND, J., which was in favour of the plaintiff for the recovery of $900 and costs,

and ordered that the case should be opened up and the trial continued before SUTHERLAND, J. The appellants to pay the costs of the appeal forthwith after taxation, and also to pay the additional costs, if any, occasioned to the respondent if the trial is continued at Toronto.

MARCH 18TH, 1914.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. MOORE.

Company—Managing Director — Transactions with — Claims and Cross-claims—Account—Mortgage—Credits—Salary—Commission—Findings of Trial Judge—Variation on Appeal.

Appeal by the defendant and cross-appeal by the plaintiffs from the judgment of KELLY, J., 5 O.W.N. 183.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

A. J. Russell Snow, K.C., for the defendant.

J. L. Whiting, K.C., and A. B. Cunningham, for the plaintiffs.

THE COURT varied the judgment of the trial Judge by directing that the defendant should have credit for $2,000 upon a claim allowed against him at $8,166.66; and, with this variation, dismissed the defendant's appeal. No costs of that appeal to either party. The plaintiffs' cross-appeal dismissed with costs.

MARCH 18TH, 1914.

LABINE v. LABINE.

Partnership—Action to Establish Agreement and for Share of Profits of Sale of Mining Claim—Evidence—Findings of Fact of Trial Judge—Appeal.

Appeal by the plaintiffs from the judgment of LATCHFORD, J., 5 O.W.N. 609.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

G. H. Watson, K.C., and T. W. McGarry, K.C., for the appellants.

R. McKay, K.C., and A. G. Slaght, for the defendant, the respondent.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

MIDDLETON, J. MARCH 16TH, 1914.

CARRIQUE v. PILGAR.

Mortgage—Action for Foreclosure and Posession—Interest and Instalments of Principal Provided for not in Arrear—Breach by Mortgagor of Covenant to Insure—Inability to Obtain Insurance—Re-demise Clause—Right of Mortgagee to Possession, but not Foreclosure—Costs.

Action upon a mortgage, the plaintiff claiming foreclosure and possession.

G. G. Plaxton, for the plaintiff.

J. M. Godfrey, for the defendant.

MIDDLETON, J.:—The mortgage was originally for $3,400, payable $100 per annum on account of principal each year from its date—the 2nd April, 1906. Nothing is in arrear. More than the yearly instalment has been paid under a clause so permitting; $2,000 and interest from the last gale-day is yet to be paid.

The mortgage contains a covenant to insure for $1,450. The covenants are the ordinary short form covenants.

The husband of the mortgagor was found guilty of arson committed on an adjoining farm, and sentenced to two years' imprisonment in the central prison. His term will soon be up.

On learning of the fact of the conviction, the insurance company cancelled its policy; and, though new insurance has been twice placed on the property, in each case the company has

cancelled the risk; and counsel agreed that no insurance can be placed.

Some evidence was given to shew the value of the land, but this seemed to me to be quite beside the real point of the case. The mortgagor has contracted to give the mortgagee not only the land, but insurance on the buildings, as security for the debt; and the rights of the parties must depend upon the agreement. When the aid of the Court is invoked in "scant security" cases, the question of value is of course material; but I know of no power given to the Court to relieve a mortgagor from his contract.

If the property has the value the defendant thinks, there can be no real trouble in finding a new mortgagee, who will lend enough to pay the plaintiff off, and the plaintiff must abide by his readiness (stated in Court) to receive his debt at any time, even if not yet due.

No provision is made in the mortgage expressly dealing with the case of the mortgagor's inability to find a company ready to insure. There is the covenant to insure, and it is broken; and this, I think, gives the mortgagee the right to possession, as the re-demise clause (17) only gives the mortgagor the right to possession so long as there is no breach of any agreement to be found in the mortgage. On the breach of any covenant, the right of the mortgagee, incident to his ownership of the land in law, to possession of the land, revives.

There is no right to foreclosure, but the mortgagee may take possession if he is ready to become a mortgagee in possession and to become liable to account for his use and occupation.

The mortgagee may have his costs. They may be added to his debt or be set off against occupation rent; but I do not make any personal order for payment.

LATCHFORD, J. MARCH 16TH, 1914.

RUSSELL v. KLOEPFER LIMITED.

Assignments and Preferences—Mortgage Given by Trader for Pre-existing Debt—Agreement for Supply of Goods in Future—Insolvency—Knowledge of Mortgagee—Preference over other Creditors—Assignments and Preferences Act, 10 *Edw. VII. ch.* 64, *sec.* 6.

Action to set aside a mortgage made by one Leatherdale to the defendant company, on the ground that it was preferential

as against the creditors of Leatherdale other than the defendant company, and therefore fraudulent and void.

J. T. Mulcahy, for the plaintiff.
J. F. Boland, for the defendant company.

LATCHFORD, J.:—I found as a fact, at the close of the case, that Leatherdale was insolvent, to the knowledge of the defendant company's manager, at the time the mortgage impeached was given, and reserved judgment merely to enable Mr. Boland to submit—as he considered that he could—authority to establish that the verbal agreement made by Dawson, acting for the defendant company, with Leatherdale, to fill the orders the defendant company had theretofore refused to fill and to supply additional goods, coupled with the supply afterward of small lots of goods, brought the case within the exceptions mentioned in sec. 6 of the Assignments and Preferences Act, 10 Edw. VII. ch. 64, now R.S.O. 1914 ch. 134.

Numerous cases have been submitted, but none has application to the facts established in this.

The mortgage was not made "in consideration of a present actual bona fide sale or delivery of goods," and, therefore, does not fall within the protection afforded by sub-sec. 1 of sec. 6.

Nor is it validated by sub-sec. 5 (d) of the same section. The mortgage was indeed given for a pre-existing debt; but no advance in money was made by the defendant company to their debtor in the bona fide belief that the advance would enable him to continue his trade or business, and to pay his debts in full.

Mr. Dawson knew that Leatherdale's position was hopeless. His real and dominating purpose was to obtain from a person in insolvent circumstances security for a past, stale debt to the prejudice of the debtor's other creditors—the very kind of a preference the statute was passed to prevent.

There will be judgment declaring the mortgage void, and directing that the registration thereof be vacated, with costs.

FALCONBRIDGE, C.J.K.B. MARCH 16TH, 1914.

LANGLEY v. SIMONS FRUIT CO.

Assignments and Preferences—Transfer of Goods by Trader to Creditor—Insolvency of Transferor—Absence of Knowledge by Transferee and of Intent to Prefer—Actual Cash Advance of Money on Goods Consigned for Sale—Assignments and Preferences Act, 10 Edw. VII. ch. 64.

Action in the name of the assignee, under an assignment for the general benefit of creditors, of the Better Fruit Distributors Limited, an insolvent company, by Norman H. Karn, a creditor of the company, authorised by order of the 25th April, 1913, under sec. 12 of the Assignments and Preferences Act, 10 Edw. VII. ch. 64, to set aside an assignment and transfer of goods by the insolvent company to the defendant company.

W. S. McBrayne and W. M. Brandon, for the plaintiff.
H. Howitt, for the defendant company.

FALCONBRIDGE, C.J.K.B.:—On the 7th November, 1912, the Better Fruit Distributors Limited, being then indebted to Karn and to the defendant company, and also to other persons, and being insolvent and unable to pay its debts in full, and not being warehousemen or otherwise entitled to issue warehouse receipts, assumed and purported to transfer and convey to the defendant company 4,500 barrels of apples, then in the premises of the Better Fruit Distributors Limited, at Hamilton, and on the 5th December, 1912, the said company purported further to transfer and convey to the said defendant company 3,000 barrels of apples.

David L. Dick, manager of the defendant company, admits on oath that Mr. Mallinson, president and general manager of the Better Fruit Distributors Limited, must have known that there was a "shortage," i.e., that the latter company was insolvent.

I do not think that, on the whole evidence, I would be justified in finding that Dick knew that the company was insolvent.

And I do not find that the transaction impeached was with intent and design to give the defendant company a preference or privilege over other creditors, or with intent to defeat, hinder, delay, or prejudice other creditors, or that it had that effect.

It was a very common and ordinary arrangement—an advance of money by the defendant company to the other company on apples consigned to the defendant company for sale, and for the proceeds of which the defendant company had to account.

In the present instance the defendant company made an actual cash advance of $6,750, plus $3,750=$10,500. The apples were bad, and there was a deficit on the consignments of $35.41, besides the above advances.

Action dismissed with costs.

KELLY, J., IN CHAMBERS. MARCH 17TH, 1913.

REX EX REL. BAND v. McVEITY.

Municipal Election—Proceeding to Avoid—Service of Notice of Motion on Defendant—Extension of Time for, Owing to Illness of Defendant—Municipal Act, 1913, *sec.* 165—*Scope of—Powers of Judge or Master in Chambers.*

Appeal by the defendant from two orders of the Master in Chambers of the 6th March, the first refusing to set aside a previous order extending until the 6th March the time for service upon the defendant of a notice of motion in the nature of a quo warranto under the Municipal Act, and the second extending the time for ten days further.

The defendant also asked for an order dismissing the quo warranto proceeding, on the ground that he was not served within the time prescribed by sec. 165 of the Municipal Act, 1913.

W. N. Tilley, for the defendant.

J. A. Macintosh, for the plaintiff.

KELLY, J.:—On a fiat issued on the 7th February, 1914, proceedings were instituted to void the election of the defendant as Mayor of the City of Ottawa, and a notice of motion to that end, returnable on the 21st February, was issued. On the same day (the 7th February) the Sheriff's officer was instructed to serve the notice on the defendant, and attempts were made to serve him personally, but without effect, he being seriously

ill and confined to the hospital; his medical attendant refusing to permit any person to have access to him. That continued to be the state of affairs until the 18th February, when, on an application by the plaintiff to the Master in Chambers for an order for substitutional service, an order was made extending the time for service until the 6th March. On the 28th February, the defendant moved before the Master in Chambers for an order rescinding the order of the 18th February, relying in part upon his sworn statement that he knew of no attempt to serve him personally with the notice of motion or other proceeding; that he made no effort or attempt to avoid service, and did not give instructions to any other person to prevent service being effected; and that he first learned of the order of the 18th February, on the 23rd February, from Mr. Beament, who appears from the proceedings to be the defendant's solicitor.

The application came on for hearing on the 6th March, as well as another application by the plaintiff for an order for well as another application by the plaintiff for an order for substitutional service. The application for the rescinding order was refused; and, on the plaintiff's motion for an order for substitutional service, the time for service was further extended for ten days from that date. Personal service of the original notice of motion on the defendant was effected on the 7th March.

The present application is by way of appeal from these two orders, and for an order that these proceedings be dismissed, on the ground that the defendant was not served within the time prescribed by sec. 165 of the Municipal Act, 1913. That section provides that "the notice of motion shall be served within two weeks from the date of the fiat, unless upon a motion to allow substituted service the Judge or Master in Chambers otherwise orders," and that it "shall be served personally, unless the person to be served avoids personal service, in which case an order may be made for substituted service."

The position taken by the defendant is, in effect, that it is not shewn that he avoided personal service, and that, therefore, there is no power to grant an extension of time for the service. If that be the proper interpretation of the section, an extension of time for service could only be granted on practically the same state of facts as would justify the making of an order for substituted service.

That is not my view of the construction of that section. In my opinion, on an application for leave to serve substitutionally,

where it has not been made to appear to the Judge or Master in Chambers that there has been such an evasion of service as to warrant the making of an order for substitutional service, and where the failure to effect personal service is not due to inactivity or want of diligence on the part of those attempting the service, the time for service may be properly extended. Here, personal service within the prescribed time was impossible, not through any fault or want of diligence of the plaintiff, but by reason of the defendant's serious illness, and owing to the absolute refusal of his medical advisers and others under whose charge he was to permit of his being approached or of any service being made upon him. It may be that the Legislature in conferring the power to extend the time had in mind just such a case as the present one. It requires no straining of the language of sec. 165 so to construe it as to make it applicable to the conditions which we find in this case, and I cannot accept the narrower view contended for by counsel for the appellant, that the section has failed to make provision for an extension of time in the circumstances which here exist.

After careful consideration I have reached the conclusion that the extension of time was properly granted.

The appeal must be dismissed with costs.

LENNOX, J. MARCH 17TH, 1914.

RE DARCH.

Settled Estates Act—Interests of Life-tenant and Remainderman—Infant—Authority to Mortgage Land—Application of Mortgage-moneys — Repairs — Taxes — Insurance Premiums—Terms of Order.

Petition by Thomas Darch under the Settled Estates Act, heard at London Weekly Court.

T. G. Meredith, K.C., for the petitioner.
N. P. Graydon, for James Darch.
M. P. McDonagh, for the Official Guardian.

LENNOX, J.:—There was not any sharp divergence of opinion between counsel in this matter. The need of repairs is ad-

mitted on all hands; and that they can only be made by effecting a mortgage upon the property.

There are taxes in arrear which must be paid before long. These will amount to more than $100, and, it was thought, less than $200. It will take $900 to put the premises in repair and $100 for legal expenses.

There will be an order declaring that Thomas Darch is a tenant for life of the lands in question and authorising and empowering him to borrow by way of mortgage upon the security of these lands the sum of $1,000 and in addition a sum sufficient to discharge the taxes in arrear, the expenses of the loan, and the probable exepenses of the Official Guardian in seeing to the application of the mortgage-money; and, if the parties desire, it may include a premium for three years' insurance.

The mortgage will provide for an insurance to the full insurable value of the buildings when put into a state of repair by the expenditure of the $900 referred to. The mortgage-money, when obtained, will be placed in the hands of the Official Guardian, to be applied for the purposes aforesaid; the $900 to be paid out from time to time upon progress certificates of the contractor, approved by the solicitor for the applicant.

In the absence of any special provision in the will or settlement, as here, the life-tenant has a right to the full enjoyment of the property, and is not liable for permissive waste: Halsbury's Laws of England, vol. 24, p. 175, par. 333. He is not liable for accidental injury or inevitable accident, as, for instance, loss by fire or tempest: Halsbury, vol. 18, p. 498, par. 981; and is not bound to insure: Halsbury, vol. 25, p. 614, par. 1084. But there must be insurance as a condition of authorising this incumbrance upon the property, and to obtain the loan upon favourable terms; and both parties, life-tenant and remaindermen, are interested. The insurance premiums, therefore, from time to time, will be borne in the proportion of one-third by the life-tenant and two-thirds by those in remainder.

The order will provide that the life-tenant is to pay the taxes and interest charges upon the mortgage from time to time as they fall due, and subsequent premiums of insurance, as required, to keep the insurance upon the property in force, and also the amount of taxes now in arrear and one-third of the initial premium of insurance; these two latter sums to be added together and to be repaid to the mortgagee in three equal annual payments; and as to all the payments provided for in this paragraph, if the life-tenant makes default in payment of

them or any of them for one month after they respectively become due, the order will confer upon the Official Guardian authority to collect the rents of the premises until sufficient has been collected to make good the payments in default as aforesaid, together with the expenses of collecting the same, and so from time to time as often as defaults shall occur.

As to subsequent premiums above provided for, not included in the mortgage, the life-tenant shall have the right to recover from those in remainder or out of the property anything he pays, or which is paid out of rents, beyond his one-third share.

MIDDLETON, J., IN CHAMBERS. MARCH 18TH, 1914.

WOLSELY TOOL AND MOTOR CAR CO. v. JACKSON POTTS & CO.

Third Party Notice—Service out of the Jurisdiction on one of Several Third Parties—Order Permitting—Rule 25(g)—Necessity for Previous Service on Third Party in Jurisdiction—Conditional Appearance—Leave to Withdraw—Order for Service and Service Set aside—Order Allowing Re-service after Service on Third Party in Jurisdiction.

Appeal by the defendants and cross-appeal by the third parties from an order of the Master in Chambers allowing the third parties to withdraw the conditional appearance entered by them to the third party notice, and setting aside the third party notice, bnt giving leave to re-serve it.

J. J. Maclennan, for the defendants.
R. C. H. Cassels, for the third parties.

MIDDLETON, J.:—What is called a conditional appearance was entered by the Turnbulls, third parties, reserving to them leave to move to set aside the third party notice. This appearance was entered upon some misapprehension as to the true function of a conditional appearance. A conditional appearance is not intended to be a provisional appearance, as in England, but a form of appearance to be used where for some reason it is not convenient to determine the question whether the case can be brought within Rul 25 until the hearing of the action. Some

times this question depends upon a finding of fact collateral to the issues in the action, which cannot conveniently be made without a trial upon oral evidence. The conditional appearance is substituted for the practice which prevailed in the common law courts of requiring the plaintiff to prove at the hearing the facts necessary to bring the case within the provisions of the law permitting service out of the jurisdiction and in default to submit to a nonsuit.

Experience has shewn that it is only in rare cases that this or any similar expedient should be resorted to, it being generally desirable to determine the question of jurisdiction once and for all at the earliest possible stage of the action.

Under the circumstances disclosed, the Master exercised an entirely proper discretion in allowing the withdrawal of the conditional appearance.

Upon the cross-appeal, I also think the Master was right. The case can only be brought within Rule 25(g), and that does not apply unless the person within Ontario has been served at the time of the making of the application for an order permitting service out of the jurisdiction. This service not having been effected at the time the notice was served upon the Turnbulls, the order was properly set aside. Such service now having been made, the Master quite properly made a new order permitting fresh service out of Ontario.

As success is divided, costs here and below may be in the cause as between the defendants and the third parties.

The order made by the Master does not contain, as it should, a clause vacating the former irregular order permitting service out of the jurisdiction, and the service made under it. This clause should now be added.

LENNOX, J. MARCH 19TH, 1914.

HARRISBURG TRUST CO. v. TRUSTS AND GUARANTEE CO.

Railway Company—Mortgage to Secure Bondholders—Resignation of Trustee—Appointment of New Trustee—Security—Costs.

Application by the plaintiffs for an order appointing a trustee under a mortgage made by the Woodstock Thames Valley

and Ingersoll Electric Railway Company to the plaintiff company, in lieu of the plaintiff company.

M. H. Ludwig, K.C., for the plaintiffs.

W. T. McMullen, for the bondholders other than the defendants.

Grayson Smith, for the defendants.

LENNOX, J.:—The total issue of bonds under the mortgage amounts to $140,000; $27,000 of these bonds are held by the defendants, and $96,800 are held by bondholders represented by Mr. Ludwig and Mr. McMullen, who have signed consents to the appointment of Mr. Wallace as trustee. The other bondholders did not appear, and I appointed Mr. McMullen to represent them.

The mortgage contains provisions for the resignation of the trustees and the appointment of a trustee in their place. The Harrisburg Trust Company have tendered their resignation and refuse to act further as trustees of the mortgage; and there is no suggestion from any quarter that an effort should be made to retain them in the execution of the trusts. To appoint a new trustee under the provisions of the mortgage would be exceedingly inconvenient, if not impracticable or impossible, and in the end would result in the appointment I propose to make. I have power to make the appointment, I think, as a matter of inherent jurisdiction, as well as under the Trustees and Executors Act. Counsel for the defendants company insists that a trust company should be appointed; and, as a rule, I think that such an appointment is to be preferred to the appointment of private persons. I have come to the conclusion, however, that in this instance it may be more in the interest of all parties that Mr. Wallace, who is exceedingly familiar with the affairs of the railway undertaking, resides in Woodstock, is a bondholder to a large amount, and is acceptable to the majority of bondholders, should be appointed.

There will be an order approving and accepting the resignation of the Harrisburg Trust Company as trustees and appointing James Gamble Wallace, of the city of Woodstock, King's Counsel, trustee in their stead, upon his giving security, to the satisfaction of the Junior Registrar of this Court, for the faithful performance of the trusts; and there will be reserved in the order the right of any bondholder hereafter to apply to have

the security increased in case the condition of the railway company should at any time change or appear to make it necessary to do so.

The costs of all parties to this application will be paid out of the funds of the railway company.

WIGHTMAN v. COFFIN—KELLY, J.—MARCH 14.

Summary Judgment—Dismissal of Action as Frivolous—Attempt to Re-litigate Questions Disposed of in a Prior Action—Substantial Identity of Causes of Action—Land Titles Act—Caution—Discharge.]—Motion by the defendants to dismiss the action, on the ground that it was frivolous, vexatious, and an abuse of the process of the Court, inasmuch as it was an attempt to re-litigate questions which had been determined and disposed of in an action by the plaintiffs against the Dominion Nickel Copper Company Limited. The claim in the present action was for a declaration that an agreement of the 28th January, 1911, between the defendants and the plaintiff Wightman was in full force and effect in respect of certain lands described in the endorsement of the writ of summons, and for an injunction restraining the defendants from disposing of or otherwise dealing with these lands to the prejudice of the plaintiffs. The learned Judge said that this same agreement was in issue in the prior action, the claim there made being for an injunction restraining the defendants in that action from operating or trespassing on the lands to which the agreement referred. That action failed, the Court holding: (1) that the agreement was not binding; and (2) that, even if it had been binding, it was put an end to prior to the action. An appeal to the Appellate Division was dismissed and the judgment upheld. In effect the present action is to re-litigate the case disposed of in the former one. The plaintiffs' case rests on the agreement of the 28th January, 1911, and that alone; the question of the right to succeed upon it having been disposed of—and adversely to them—in the former action, they are not at liberty to set up the same case again, and the action should be dismissed with costs: Macdougall v. Knight, 25 Q.B.D. 1; Stephenson v. Garnett, [1898] 1 Q.B. 677; Reichel v. Magrath, 14 App. Cas. 665.—The defendants also asked that a caution filed on behalf of the plaintiffs, against the lands described in the endorsement of the

writ of summons, should be discharged. The learned Judge said that, from an affidavit of the plaintiffs' solicitor, filed on the motion, it seemed that the plaintiffs' sole right to file this caution rested on the claim set up in the action. If that were so, the caution should be discharged. R. McKay, K.C., for the defendants. J. T. White, for the plaintiffs.

McINTOSH v. STEWART—CAMERON, MASTER IN CHAMBERS—MARCH 16.

Venue—Change—Expense—Necessity for View of Locus—Preponderance of Convenience.]—Motion by the defendant to change the venue from Toronto to Walkerton. The Master said that from the affidavits filed it was clearly established that a trial at Walkerton would be less expensive than a trial at Toronto. This, however, was not a sufficient reason to change the venue, particularly as the plaintiff's counsel on the hearing agreed to pay the extra expense of a trial at Toronto (see McDonald v. Dawson, 8 O.L.R. 72.) It seemed clear that a view would be required in this case by the trial Judge. Bearing this fact in mind and taking into consideration that a trial at Walkerton would be less expensive, there was a preponderance of convenience in favour of a trial there. Order made changing the place of trial to Walkerton. Costs of the application to be costs in the cause. J. H. Spence, for the defendant. Grayson Smith, for the plaintiff.

TRUSTS AND GUARANTEE CO. v. GRAND VALLEY R.W. CO.—LENNOX, J.—MARCH 19.

Railway Company—Receiver—Payments to Bondholders—Costs.]—Upon the application of certain holders of the bonds of the defendant company, an order was made requiring E. B. Stockdale, receiver of the defendant company, to pay forthwith, out of the sum of $4,800.62 in his hands as receiver, to the applicants, in the proportions shewn in schedules filed, a total sum of $2,627.50; and to the parties to the application their costs. J. G. Wallace, K.C., for the applicants. Grayson Smith, for the receiver.

BRITISH COLUMBIA HOP CO. v. ST. LAWRENCE BREWERY CO.—LEITCH, J.—MARCH 19.

Sale of Goods—Refusal to Accept—Breach of Contract—Damages.]—Action to recover damages for an alleged breach by the defendants of a contract bearing date the 20th September, 1912, for the sale by the plaintiffs to the defendants of a hundred bales of hops. The breach was the refusal to pay for the hops and to take delivery. The learned Judge sets out the contract in his written reasons for judgment and refers to the evidence. He finds that the plaintiffs were ready and willing and in a position to hand over the bills of lading and the hops the moment they were paid the cash. After the defendants had refused to take the hops, the plaintiffs advertised the hops for sale and sold them to the best advantage. Damages assessed at $1,230.23. Reference to Halsbury's Laws of England, vol. 10, pp. 333, 335; vol. 25, pp. 204, 205, 229, 267, 268; Biddell Brothers v. E. Clemens Horst Co., [1911] 1 K.B. 214, 934; E. Clemens Horst Co. v. Biddell Brothers, [1912] A.C. 18. Judgment for the plaintiffs for $1,230.23, with costs. H. E. Rose, K.C., for the plaintiffs. G. A. Stiles, for the defendants.