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DIVISIONAL COURT.

## WICKE v. TOWNSHIP OF ELLICE.

*Ditches and Watercourses Act—Award Directing Construction of Ditch—Failure of Land Owner to Do Part of Work Assigned—Letting Contract for Work—Charge on Land —"Owner"—Successor in Title—Construction of Act.*

Appeal by defendants from judgment of Judge of County Court of Perth, in favour of plaintiff, the owner of the east half of lot 19 in the 10th concession of Ellice, in an action brought to have it decided that a sum of $157 on the tax bill for 1905 was not a charge upon the lands. The plaintiff's predecessor in title had, it appeared, neglected to perform certain works under the decision of an arbitrator on a reference under the Ditches and Watercourses Act. The engineer proceeded to have the work done by tender, and the amount was charged against the property by resolution of council, dated 25th November, 1905, which directed the amount to be placed on the roll. Subsequently in 1905 plaintiff purchased the property and received a receipted tax bill for 1904.

E. Sydney Smith, K.C., for defendants.

R. S. Robertson, Stratford, for plaintiff.

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

MEREDITH, C.J.:—We have come to a conclusion different from that of the Judge from whose judgment the appeal is brought, as to the important question of municipal law which arises in this action.

We are unable to adopt the construction placed by the Judge upon the provisions of the Ditches and Watercourses Act, which led to his determining that defendants were not entitled to a charge upon the land of plaintiff for the amount paid by them for the cost of the construction of a drain which Maggie Gaul, from whom plaintiff derives title to the land, was by the award made under the Act required to construct, and which she failed to make as directed by the award, and which was afterwards constructed under the provisions of the Act by a contractor to whom the work had been let by the engineer.

The whole Act, and particularly the section upon which the question arises, is very badly drawn, and it is no wonder that opinions should differ as to the proper construction to be given to it.

We are influenced a good deal in coming to the conclusion which we have reached by a consideration of the scope and purpose of the Act, and the consequences of giving effect to the argument of counsel for plaintiff, which prevailed in the Court below.

The Act provides for the making of drains, where a small number of persons are interested, and the cost does not exceed $1,000.

It provides machinery for enabling a person who desires to have a drain constructed under the Act to bring the provisions of it into operation. All the persons who are interested, and through whose lands the drain is to pass, or whose lands are benefited by it, are required to be notified. If they fail to agree as to the construction of the drain and the proportions in which they are to contribute to its construction, the engineer of the municipality is called in, and if, after hearing the parties, he determines that the drain should be made, his duty is to make an award providing for the construction of it, and determining the portions of it which are to be made by the different owners, or those of them who he determines ought to be called upon to make any part of it at their own expense.

If a property owner fails to construct the portion of the drain allotted to him within the prescribed time, it is provided that the engineer may, after certain preliminary steps have been taken, let the work, and when it is finally completed the duty is cast upon him of certifying to its completion, the cost of it, the amount which the person who has done the work is entitled to be paid, and as to the person liable to pay that amount. The statute then casts upon the municipality—that was provided for the first time by the Act of 1894—the duty of paying to the person who has done the work, as certified by the engineer, the amount to which he is entitled, and a remedy over is given to the municipality for the recovery of the amount which it has paid on behalf of the property owner, and the question for decision is, what are the rights of the municipality in respect of the sum it is called upon in such circumstances to pay.

Throughout the Act the persons concerned are referred to as owners—sometimes as "owner party to the award"—and provision is made that the owners are to keep the drain in repair according to the directions of the award, and for enforcing that obligation; and in these provisions the persons concerned are referred to either as owner or owner party to the award.

It appears to us that the legislature must have used the term "owner" as meaning the owner for the time being. It would be an extraordinary thing if, after the proceedings had been begun under the Act, and when the arbitration was proceeding, an owner, who had been notified of the proceedings and was a party to them, could, by the conveyance of his lands to some other person, defeat entirely the purposes for which the proceedings had been instituted, and make it necessary to begin de novo. Still more extraordinary would it be if it were permissible, after the arbitration had been held and the award had been made, that the property owner might prevent the payment which he had by his default rendered it necessary that the municipality should make becoming a charge on his land, by conveying it to somebody else, and so leave the obligation to rest simply as a matter of duty, for breach of which an ordinary action would lie, and the burden upon the municipality of paying his debt, with only that remedy for recovering the amount paid.

The provisions of the statute (R. S. O. 1897 ch. 285) which are the most material ones to be considered, are secs. 29 and 30.

Section 29 reads as follows: "The engineer shall, within ten days after receipt of notice in writing of the supplying of material and completion of the work let, as in the next preceding section mentioned, inspect the same, and shall, if he find the material furnished and the work completed, certify the same in writing (Form H), stating the name of the contractor, the amount payable to him, the fee and charges which the engineer is entitled to for his services, rendered necessary by reason of the non-performance, and by whom the same are to be paid."

Turning to Form H in the schedule to the Act, which may be looked at to interpret the provisions of the text of it, the form of the certificate is given. It is addressed to the clerk, and reads as follows:—

"I hereby certify that.....has furnished the material and completed the work"—that is, the person to whom the work had been let—"which under my award made in accordance with the provisions of the Ditches and Watercourses Act, and dated the.....day of.....A.D. 189 , one....., owner of lot number (describe his land, giving township or otherwise), was adjudged to perform, and having failed in the performance of the same, it was subsequently let by me to the said ..... for the sum of $....., and as he has now completed the performance thereof, he is entitled to be paid the said amount.

"I further certify that my fees and charges for my services rendered necessary by reason of such failure to perform are (give items) $....., and said amount payable to the said contractor and the said fees and charges are chargeable on (describe property to be charged therewith), under the provisions of the Ditches and Watercourses Act, unless forthwith paid."

It will be noticed that while the section by which the form is prescribed says that the engineer is to certify by whom the money is to be paid, the form contains no provision of that character, but simply a provision for certifying that the amount payable to the contractor is chargeable on the property, which must of course mean the property upon or in respect of which the drain was by the award required to be constructed.

Then section 30 provides as follows: "The council shall, at their next meeting after the filing of the certificate or certificates as in the next preceding section mentioned, pay the

sums therein set forth to the persons therein named, and unless the owners within the municipality upon notice pay the sums for which they are thereby made liable, the council shall have power to cause the amount each owner is liable for, together with seven per cent. added thereto, to be placed upon the collector's roll, and the same shall thereupon become a charge against his lands, and shall be collected in the same manner as municipal taxes."

If the word "owner" is to be interpreted as we think it must be—as meaning the owner for the time being of the lot upon which the drain has been constructed—there is less difficulty in coming to the conclusion that the contention of defendants is right.

In that part of the section which reads, "The council shall have power to cause the amount each owner is liable for, together with seven per cent. added thereto, to be placed upon the collector's roll, and the same shall thereupon become a charge against his lands," the words "his lands" create some difficulty, but they cannot mean his lands generally and wherever they may be; that would be an extraordinary provision, and it is impossible to adopt that view. They mean, we think—as where a similar expression is used with regard to other sums charged—the land of the person in default, which is included in the drainage scheme. Reading the words "become a charge against his lands" as meaning "to become a charge against the lands of the owner," and owner as meaning "owner for the time being," the question is solved, because, so reading the section, the charge is upon the lands, and it matters not that plaintiff is not the owner who made default.

The view we have taken as to the proper construction to be given to the word "owner" is supported by what was said by the present Chief Justice of Ontario in Dalton v. Township of Ashfield, 26 A. R. 263. That case was the converse of this, and, dealing with the question of the right of a successor in title to an owner, this language is used by the Chief Justice: "The plaintiff's predecessor in title was a party to the award, and the plaintiff as his assign stands in his place, and is, I think, to be considered an owner, party to the award, under the Act."

The result is that, in our opinion, defendants were right in taking the position that the $157.27 in question was a charge upon the land of plaintiff, and the action therefore fails.

In view of all the circumstances, having regard to the difficulty of construction, bearing in mind that in cases of this kind different minds may fairly reach different conclusions, and that there is no certainty that the view which we have adopted, and according to which the rights of the parties are determined, accords with the intention of the legislature, as expressed in the ambiguous words in which it has chosen to declare its will, we are of opinion that neither party should have costs, either of the action or of the appeal, and the result is that the appeal is allowed without costs, and the judgment is reversed, and in lieu of it a judgment is to be entered dismissing the action without costs.

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TEETZEL, J. MARCH 19TH, 1906.

TRIAL.

## HAMILTON v. MUTUAL RESERVE LIFE INS. CO.

*Life Insurance—Benevolent Society—Assessments—Non-payment — Suspension — Forfeiture — Negotiations — Reinstatement—Release—Estoppel.*

Action by the personal representatives of Robert D. Hamilton, deceased, to recover $2,000, amount of an insurance certificate issued by the Provincial Provident Institution, dated 20th March, 1888, on the life of deceased, and taken over by defendants under an agreement with the Institution.

J. P. Mabee, K.C., for plaintiffs.

W. M. Douglas, K.C., and Shirley Denison, for defendants.

TEETZEL, J.:—Besides the representations, etc., in the application and the paid entrance fee, the consideration for the certificate is expressed to be "the further agreement to pay the sum of $1.50 dues semi-annually for expenses, together with the assessments for death losses, life benefits, and annuities claims, according to the tables printed hereon."

The certificate provides for the payment of $2,000 in 3 different ways: (1) upon the death of the insured while the

certificate is in force; (2) $1,000 in the event of permanent disability, such payment being in cancellation of one-half of the total benefit, balance being payable at death; (3) $200 per annum in the event of insured attaining the age of 77, or only $100 per annum in the event of his having previously received the $1,000 for permanent disability, each annual payment cancelling one-tenth of the certificate.

The Provincial Provident Institution were incorporated under R. S. O. 1877 ch. 67, "An Act respecting Benevolent, Provident, and other Societies."

In addition to what were called mortuary or premium assessments or calls, defendants had for some time prior to 15th April, 1901, been making special assessments or calls, called annuity assessments or calls, on the certificate-holders. These latter assessments do not appear to be according to the tables printed on the certificate, and the evidence does not shew when they were first resorted to or by what authority they were made.

The deceased received notice of one of these annuity calls, for $2.24, payable within 30 days after 15th April, 1901, and described as "annuity call No. 10," and at the same time he was notified of an "Annuity Reserve Deficiency Assessment," calling upon him to pay, within 30 days from 15th April, 1901, $147.18. That notice also informed him that, if he so desired, the amount would be lent to him by defendants upon the security of and as a lien upon his certificate, also that the said assessment was being levied upon all members of the Provincial Provident Institution holding certificates providing for the payment of annuity benefits, and explaining the cause thereof. . . .

In the notice of the annuity reserve deficiency assessment it is stated that "if the above call is not paid on or before 15th May, 1901, unless your certificate has become forfeited and void, and your membership has expired by reason of the non-payment of any previous sum due under said contract, the amount of this call will be treated as a lien bearing interest at 5 per cent. per annum against the insurance upon your certificate, and any dividends or surplus accruing thereon, which lien may at any time, upon your election, be paid in cash and cancelled," etc.

A letter to deceased from defendants' secretary, dated 10th June, 1901, directs attention to the fact that annuity call No. 10, $2.24, is past due and unpaid, and that "the

policy, therefore, appears in our books as lapsed." The letter also says: "If your purpose in withholding this payment was to surrender the annuity provision and to relieve yourself from the requirement to pay annuity assessments, please execute the enclosed form of application to that effect, and it will be submitted to the executive committee of the association, which has power to reinstate a delinquent member for good cause shewn."

The blank application enclosed was not signed, but further letters for information were written by deceased, and . . . a form furnished which deceased filled up and signed on 25th July, in which application is made "for reinstatement of my membership and of said certificate except as regards the annuity calls, and the liability for payment of future annuity assessments, which are hereby cancelled." The application was forwarded to and accepted by defendants.

I find upon the evidence that there was no "mortuary or premium assessment or call" in arrear at any time prior to the death of deceased. One of these, No. 116, for $20.02, fell due on 15th May, 1901, and was paid within the 30 days, and at the same time the deceased also paid the $2.24, but, owing to the latter sum not having been paid within 30 days of its due date, the company did not issue receipts for either of said sums until after reinstatement (3rd August, 1901), but placed both sums in suspense account, and the receipts were sent after the reinstatement. . . .

In the spring of 1902 the insured became permanently disabled, and applied to defendants for the payment of $1,000 under the terms of his certificate. The necessary proofs having been supplied, an agent of defendants called upon the insured, on 6th May, 1902, and obtained from him a release of all claims under the certificate and a delivery up of the same, in consideration of $500, for which the agent gave the insured a draft on defendants. On 8th May, through his solicitors, the insured repudiated the settlement and release, and demanded a return of his certificate, alleging that he had been deceived by the agent. Defendants refused to comply, retained the certificate, and insisted that the settlement was conclusive.

The insured died on the 19th July, 1902.

Defendants having, inter alia, set up the release as a bar to the action, an order was made for the trial of that issue before the trial of the other issues raised by the defence, and that issue was tried before Street, J., without a jury, and judgment was given in favour of plaintiff (2 O. W. R. 806), which was affirmed by the Court of Appeal (3 O. W. R. 851).

The other defences relied on are: (1) that the policy lapsed and all rights thereunder were forfeited by non-payment of the annuity call No. 10, for $2.24, within 30 days of 15th April, 1901; (2) that certain material statements and warranties contained in the application for reinstatement by the deceased were untrue, and therefore he never became reinstated, and his certificate was not revived, and remained lapsed, forfeited, and void; (3) that deceased failed to pay the $1.50 due on 15th May, 1902, being the semi-annual sum payable for expenses, whereby all benefits under the certificate became suspended.

By conditions in the policy, failure to pay the assessments within 30 days from date of notice suspends a member from all benefits, and the beneficiary named will not be entitled to any benefit in case of the decease of the member, and default in payment of the semi-annual dues on 15th May and November also suspends the member and all benefits under the certificate.

I am of opinion that, in the circumstances of this case, the non-payment of the $2.24 within the 30 days did not operate to suspend or forfeit the mortuary benefits secured by the certificate. All assessments to provide the fund out of which such benefits would be payable were duly paid. That defendants chose to treat the annuity or endowment provision of the certificate as severable from the general mortuary provision, is quite plain from their letters and circulars, and from the fact that they undertook to levy special and separate assessments to provide a separate fund to satisfy that provision.

It is also plain that defendants were desirous of making it clear to the insured that he might abandon this special provision and retain the other benefits under the certificate, and I think the fair inference is, that in making the large call and in the care taken to repeatedly point out the right to abandon the annuity privileges, defendants were anxious that a release of the privileges should be given.

The matter was very important to the insured, who was then 70 years old, and had paid all premiums for 13 years; should he live 7 years more, the first annuity would be payable.

These circumstances, combined with greatly increased assessments and an unexpected demand for $147.18, accompanied by the two proposals from defendants, one to lend him the $147.18 and the other to abandon his annuity benefits, would reasonably lead him to believe that no forfeiture of that portion of the benefits in respect to which he had made all payments would be exacted pending his election, and that at most he might forfeit the annuity benefits only if he failed to elect before the day appointed for the payment of annuity call No. 10. He is informed by defendants that his mortuary benefits may be continued independently of the annuity benefits, which they are the first to suggest abandoning.

I think the effect of the circumstances and defendants' proposal was to estop them from exacting a forfeiture of his mortuary rights, in the absence of any intimation by defendants that, notwithstanding the pendency of negotiations opened by them, a forfeiture of all his rights would follow if he did not within 30 days pay the $2.24, a payment which he would not require to make at all if he should adopt one of defendants' proposals.

It appears that a portion of call No. 10 is made up of $1.22 for interest on the $147.18, and it may be that neither of these calls is within the terms of the certificate, or otherwise authorized by the insured, in which case defendants would not be entitled to insist upon forfeiture for non-payment.

A forfeiture not being favourably regarded by courts of justice, strict proof is required from him who asserts it.

As pointed out before, neither annuity call No. 10, nor the assessment for the $147.18, appears to be according to the tables indorsed upon the certificate, and no direct evidence was put in at the trial shewing by what authority these assessments were made. . . .

Being of opinion that there was no forfeiture, it follows that no representations or warranties made by the insured

in connection with his application for pretended reinstatement would affect the validity of his certificate, for, if there was no suspension, there was no reinstatement.

It was argued for defendants, however, that deceased recognized his suspension in his application for reinstatement, and plaintiffs were, therefore, estopped from asserting that there was no suspension or forfeiture.

As I find that there was no forfeiture, I think plaintiffs are not estopped from so asserting, notwithstanding that in ignorance of his rights the deceased yielded to defendants' assertion that his certificate had lapsed, and adopted their suggestion to sign an application for reinstatement, in which it is recited that his membership and the certificate had expired.

Then, as to whether there was a forfeiture for the non-payment of the $1.50 on 15th May, 1902, I am of opinion that there was not. At that time defendants had possession of the certificate, and were insisting that all rights thereunder had been cancelled by the release obtained by their agent, and they are now, I think, estopped from saying, for the purposes of this defence, that it was, nevertheless, in existence, but forfeitable for non-payment of the half-yearly expense fee.

It would be imposing a great injustice on plaintiffs to allow defendants to avail themselves of the default to which the wrongful act of their agent, adopted by them, contributed, for it must be assumed that if the insured had not been induced to surrender his certificate, the half-yearly dues would have been paid as theretofore.

See Meyer v. Knickerbocker Ins. Co., 73 N. Y 516; Whitehead v. New York Life Ins. Co., 102 N. Y. 143; Ætna Ins. Co. v. Curley, 47 S. W. Repr. 586; Ins. Co. v. Egleston, 96 U. S. 572; Mutual Reserve Life Ins. Co. v. Taylor, 99 Va. 208; Covenant Mutual Ins. Co. v. Kentner, 188 Ill. 453; Bacon on Benefit Societies, 3rd ed., secs. 352-377.

Judgment will therefore be in favour of plaintiffs for $2,000 and interest, less the $500 paid into Court, which will be paid out to them, and costs of action, including costs of issue tried by Street, J.

FALCONBRIDGE, C.J. MARCH 19TH, 1906.

TRIAL.

## NATIONAL MALLEABLE CASTINGS CO. v. SMITH'S FALLS MALLEABLE CASTINGS CO.

*Trading Company—Contract—Consideration—Partly Executed Contract—Absence of Seal—Authority of President—Absence of By-law or Resolution—Ratification—Extra-provincial Corporation—Absence of License to do Business in Ontario—Pleading—Allowance of Time to Procure License.*

Action by an incorporated trading company, having their head office in the city of Cleveland, in the State of Ohio, against another incorporated company having their head office in Ontario, to recover $60,000 damages for breach of a contract whereby defendants, as alleged, agreed to furnish to plaintiffs a large and continuous supply of malleable iron couplers for a period of 3 years, at prices named.

The defendants denied the contract; alleged that if what might be construed as a contract was entered into, such contract was not made by defendants, but by one Frost, the president of the company, who was not authorized either by resolution or by-law to bind the defendants by any such contract; that plaintiffs never accepted the alleged offer of defendants in such manner as to make the same a binding contract upon plaintiffs; that there was no consideration for the alleged contract; that the alleged contract, if otherwise valid, was void for want of mutuality of obligation; and defendants claimed the benefit of the Statute of Frauds and R. S. O. 1897 ch. 146, sec. 9.

J. H. Moss and C. A. Moss, for plaintiffs.

W. Cassels, K.C., and W. D. McPherson, for defendants.

FALCONBRIDGE, C.J.:—The objections raised by defendants are entirely technical, but, as has been remarked in several cases, though technical, if they are in accordance with the law, the Court is bound to give effect to them.

In this case, however, I think that I am not bound to give effect to any of them. Defendants are a trading corporation, and the contract is one specially relating to the objects and purposes of the company. In being pressed in

argument as to the absence of the seal and of the word "limited," I am "invited to re-introduce a relic of barbarous antiquity:" per Cockburn, C.J., in South of Ireland Colliery Co. v. Waddell, L. R. 4. C. P. at p. 618. . . .

[Reference to Thompson v. Brantford Electric Co., 25 A. R. at p. 345.]

The contract is not executory, but partly executed. Plaintiffs have supplied patterns and core boxes, and the consideration need not be commensurate with the obligations: Westlake v. Adams, 5 C. B. N. S. 248, 265.

While there is no authority by resolution or by-law, there is authority derived from the practice of defendants' business, and subsequent correspondence recognizing this as a subsisting contract. See also Albert Cheese Co. v. Leeming, 31 C. P. 272.

It is further objected that plaintiffs are an extra provincial corporation carrying on business without a license, contrary to the provisions of 63 Vict. ch. 24 (O.) I do not think that they are carrying on business within the meaning of the proviso to sec. 6 of the Act, but if they were, I should think this objection ought to have been pleaded. The proviso to sec. 14 contemplates the further maintenance of an action brought before the granting or restoration of the license, and so, if defendants were allowed to amend by pleading this objection, the judgment, if in other respects in plaintiffs' favour, ought to be retained until plaintiffs should have an opportunity of applying for their license, and I therefore overrule this objection.

There will be judgment for plaintiffs, with costs, on the issues joined on the record; with a reference as to damages to the Master in Ordinary.

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MARCH 19TH, 1906.

DIVISIONAL COURT.

## HOVENDEN v. O. C. HAWKES LIMITED.

*Principal and Agent—Agent's Commission on Sale of Goods—Time for Payment—Rate of Commission—Contract—Correspondence—Payment for Samples Sent to Agent.*

Appeal by defendants from judgment of BRITTON, J., ante 132.

W. E. Middleton and R. G. Hunter, for defendants.

J. E. Jones, for plaintiff.

THE COURT (MULOCK, C.J., MACLAREN, J.A., CLUTE, J.), dismissed the appeal with costs.

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MARCH 19TH, 1906.

TRIAL.

## ROBINSON v. McGILLIVRAY.

*Bankruptcy and Insolvency—Preferential Transfer of Cheque—Deposit with Private Banker—Application by Banker upon Overdue Note—Set-off—Absence of Pre-arrangement.*

Appeal by plaintiffs from judgment of FALCONBRIDGE, C.J., dismissing with costs an action brought to set aside an alleged preferential transfer by defendant McGillivray to defendants Scott & Son.

Defendant McGillivray was a merchant carrying on a small general store in the town of Listowel; he kept his account with defendants Scott & Son, private bankers at Listowel, whose office was next door to him. McGillivray had borrowed $1,000 from Scott & Son in 1891, upon his note, which had been renewed several times until March or April, 1904, when it matured, and was not renewed but remained overdue in the hands of Scott & Son, neither principal nor interest being paid. Besides this, he owed plaintiffs, Robinson, Little, & Co., wholesale merchants in London, for goods supplied him, $1,000, part of which had been overdue for more than a year, and the rest not so long; he also owed John Macdonald & Co. $85.94, and George Watt & Son $82. He had no book debts due him; he owned the stock in his store, which was an old stock composed principally of remnants of bankrupt stocks he had bought. He had no other property but an equity of redemption in his store, subject to a mortgage for $2,050, and in his house subject to a mortgage for $1,000. The store was sold under the mortgage to Mr. Scott, one of the defendants, shortly after the impeached transaction, for the mortgage money, and the house has proved to be unsaleable.

On 5th September, 1904, plaintiffs, with the knowledge of Scott & Son, sold out his stock in trade to one Grant at 50 cents in the dollar; and received in payment Grant's cheque on Scott & Son's bank for $1,172.27, payable to his

own order, which he at once took to Scott's bank and deposited it there to his own credit. Scott knew that the sale was about to be made, and had lent Grant the money to make the purchase, and he knew that the money was to be deposited in his bank by McGillivray. In anticipation of this, he had, on 3rd September, charged up the $1,000 note of McGillivray, with $40 interest, to the latter's account, there being at the time only a small balance of $58.42 cash at credit of the account. The amount of Grant's cheque, when deposited, was applied by Scott in payment of the $1,000 note and interest, leaving a balance of $190.69 at credit of the account, $100 of which was paid by McGillivray to plaintiffs, and $85.94 to John Macdonald & Co. The deposit of the cheque of Grant with Scott & Son was attacked in this action as a preference.

The present action was brought on 24th October, 1904, within 60 days after the alleged preference, and was brought on behalf of plaintiffs and all other creditors of McGillivray.

FALCONBRIDGE, C.J., after reserving judgment, dismissed the action with costs, upon the ground that McGillivray, when he deposited Grant's cheque, believed that he was able to pay 100 cents in the dollar to his creditors, and did not know that the overdue note had been charged up against him.

The appeal was heard by BOYD, C., STREET, J., BRITTON, J.

G. C. Gibbons, K.C., and F. R. Blewett, Listowel, for plaintiffs.

T. G. Meredith, K.C., for defendants Scott & Son

BOYD, C.:—The account given by the debtor McGillivray of the transaction is, that, without any arrangement with defendants Scott & Son, he sold out his stock in trade to one Grant in the ordinary course of business, at 50 cents in the dollar. He received Grant's cheque for the amount, which he forthwith deposited to his own credit in the private bank of defendants Scott & Son. He had a bank account with Scott & Son, and had been dealing with them for years, and getting advances also, which had been standing for some time, on a note for $1,000. In this way the proceeds of the sale came into the possession of defendants Scott & Son.

Scott's account is that he was always led to believe that McGillivray would pay his debts in full, and that he had a promise from McGillivray that he would pay the old debt when he sold his stock. He heard, about the time of sale, that Scott was going to sell, and he provided funds to another customer, one Grant, to enable him to purchase. Scott says that he expected when McGillivray got the proceeds of sale he would deposit them with his bank in the usual way. Anticipating this, he directed the note to be charged up in McGillivray's account as of 3rd September, but of this McGillivray was not aware, and when the deposit was made and carried to McGillivray's credit on 5th or 6th September, the effect was to retire the old note which had been debited to the account. Afterwards to confirm and evidence the transaction according to the custom of the bank, McGillivray gave his own cheque for the amount of the note to the bank, and got back his note as paid.

There is no evidence of any pre-arrangement which conduced to this result, and McGillivray is vouched as being an honest man by the opposing counsel.

It appears to me (though the question is one of nicety), that the transaction is not within the scope or the language of the Act. Suppose McGillivray had carried out his intention of paying Scott out of the proceeds of sale; he might have insisted on Grant paying cash—which he had at the bank—and out of this money he could have taken up the note. That would be a valid payment in money, which is excepted from the operation of the Act: Campbell v. Roche, 18 A. R. 646, and especially by Osler, J.A., at pp. 655-6. This case was affirmed by the Supreme Court, 21 S. C. R. 646. However, that was not done, but, instead of that course, he did, as was expected by Scott, but not pre-arranged, deposit the proceeds of the sale, as represented by Grant's cheque, to his own credit in Scott's bank. That, I take it on the evidence, was in the ordinary course of business; it was not, in the language of R. S. O. 1897 ch. 147, sec. 2, sub-secs. 1 and 2, "a transfer or delivery over of the security" (i.e., cheque) "to or for a creditor." There was no transfer of anything to his creditor at that juncture by the insolvent; there was simply a deposit made by him in his usual banking place, with a banker who also happened to be his creditor. This, which is the turning point of the controversy, is a dealing not touched by the provisions of the statute. The

proceeds of the sale then became money standing at the credit of the customer McGillivray—out of which he could, of course, pay in money, as he pleased, any having just claims on him: Davidson v. Fraser, 23 A. R. 459, and especially judgment of Burton, J.A., at p. 443. This was affirmed in the Supreme Court, 28 S. C. R. 272. See also Mackay v. Union Bank, 26 A R. 154.

I find no evidence of any intent to prefer, within the meaning of the Act, in regard to this deposit of money in defendants' bank, and to invoke the provisions of the Act there must be concurrence of intention of both payer and receiver to obtain an unjust preference over the body of creditors: Benallack v. Bank of British North America, 36 S. C. R. 120. The preference in this case arose from the act of the law operating a right of set-off or of retainer for the benefit of the banker, who was also the creditor. The money was lawfully in the banker's hands as being deposited by his customer, and he will not be deprived of it without satisfaction of the balance legally due to him: Stephens v. Boisseau, 23 A. R. 230, affirmed in the Supreme Court, 26 S. C. R. 438.

Appeal dismissed with costs.

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

STREET, J., dissented, giving reasons in writing.

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TEETZEL, J. MARCH 20TH, 1906.

TRIAL.

## SCOTT v. GRIFFIN.

*Fraudulent Conveyances—Fraudulent Transfer of Personal Property—Action to Set aside — Following Proceeds—Equity of Redemption in Land — Status of Judgment Creditor as Plaintiff—Expiry of Execution — Laches in Bringing Action—Absence of Fraudulent Intent.*

Action by a judgment creditor of defendant Joseph Griffin to set aside, as a fraud upon creditors, a transfer of

that defendant's business assets to defendant F. M. Griffin in the year 1886, and certain conveyances of land made to defendants F. M. and Ann Griffin.

W. H. Blake, K.C., and J. S. Robertson, St. Thomas, for plaintiff.

J. Farley, K.C., and J. Bicknell, K.C., for defendants.

TEETZEL, J.:—The debtor did not assign for the benefit of creditors, and the action is not a class action, but on behalf of plaintiff only; and, as respects the personal estate transferred, it was conceded by plaintiff that none of it was in existence when the action was commenced. Robertson v. Holland, 16 O. R. 532, 539-540, is authority against plaintiff being entitled to follow the proceeds. See also Stuart v. Tremain, 3 O. R. 190.

The title to the lands in question had, for some time prior to the transfer of the business to F. M. Griffin, stood in the names of third parties. The properties were also all under mortgage, and the equity of redemption was of doubtful value at that time. When the properties were conveyed to his co-defendants, the interest, if any, of Joseph Griffin would not have been exigible under an execution against lands.

A further difficulty, I think, in plaintiff's way is the fact that at the commencement of the action plaintiff's writs of execution upon his judgment had, by lapse of time, ceased to create any lien upon any property of the debtor. The writ of execution was issued 1st March, 1889, and this action was commenced 27th May, 1903. Upon the authority of In re Woodall, 8 O. L. R. 288, 4 O. W. R. 131, I take it that plaintiff's only right under the judgment is to bring an action upon his debt, and, if this is so, his status in attacking an alleged fraudulent conveyance of land is not higher than that of a simple contract creditor.

It cannot be said that the effect of the conveyance prevents his reaching the lands exigible under his judgment, since this right, if it ever existed, expired long before action.

I think, however, upon the facts the plaintiff's case entirely fails. The action is brought 17 years after the chief transaction complained of (the transfer of the business) took place, and, while it does not appear that any witnesses who could have thrown light on the transactions have died in the meantime, or that original books and papers connected

with the matter have been lost, or destroyed as useless, I think that plaintiff having during all these years lain asleep on his supposed rights, every intendment at this distance of time should be made in favour of what has been done as being lawfully and properly done. See Bain's Appeal, [1905] A. C. 329. I am furthermore satisfied upon the evidence that, so far as defendants F. M. Griffin and Ann Griffin are concerned, there never was any intention to defraud plaintiff, and that the transfers were accepted by them bona fide and for value, and the consideration paid in each case was, I think, adequate. Nor can I say that the evidence satisfies me that Joseph Griffin in connection with the transfers intended to defraud plaintiff. The only adverse comment I feel justified in making in regard to him is that, in view of the admittedly large income he has been enjoying for many years, I think he could, and as an honest man should, have made provision for paying plaintiff's judgment against him.

The action will be dismissed with costs, but I direct that one-third of such costs, being the portion I appropriate to defendant Joseph Griffin, should be credited on plaintiff's judgment.

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MARCH 20TH, 1906.

DIVISIONAL COURT.

## CANADA PERMANENT MORTGAGE CORPORATION v. BRIGGS.

*Bill of Exchange—Discount by Mortgage Company—Ultra Vires—Breach of Trust — Dishonour of Bill — Action against Persons Negotiating — Duty to Return Trust Funds.*

Appeal by defendants Alfred and Bertha E. Hall from judgment of MEREDITH, J., in favour of plaintiffs in action to recover $730 from the appellants, alleged to be owing in the circumstances set forth below.

W. M. Douglas, K.C., and J. M. Ferguson, for appellants.

M. R. Gooderham, for plaintiffs.

The judgment of the Court (MULOCK, C.J., TEETZEL, J., ANGLIN, J.), was delivered by

MULOCK, C.J.:—Defendant Bertha E. Hall on 14th March, 1903, opened a deposit account with plaintiff company, carrying on business in the city of Toronto, and, at intervals from that date until 8th May, 1905, defendant Alfred Hall, her husband, deposited moneys to her credit, she in the ordinary course withdrawing the same by her cheques.

On 8th May, 1905, defendant Alfred Hall attended at plaintiffs' place of business in Toronto, and handed to the ledger-keeper, William Howlett, the first and second of a sight draft for £150, dated 8th May, 1905, drawn by George E. Briggs upon Waugh & Musgrove, solicitors, and the Bank of England, Cockermouth, at the same time handing to him one of the company's ordinary slips filled in by defendant Alfred Hall, in his own handwriting, as follows: "Credit Bertha E. Hall, No. 3327. Deposit by A. Hall, 8th of May, 1905."

The ledger-keeper at once handed the draft to the accountant, who, having converted the sterling into currency, put down the figures of the amount to be deposited under the deposit column, $730, and returned the deposit slip to the ledger-keeper, who thereupon credited the amount to Mrs. Hall's account. The plaintiffs made no charge of any kind, whether in the way of exchange, discount, or otherwise, their action in connection with the draft being wholly gratuitous, and simply in order to accommodate their depositor, Mrs. Hall.

Mr. Howlett frankly admitted that he was unable to remember exactly what instructions Mr. Hall had given him, but his having at once, without hesitation, credited the amount to Mrs. Hall's account goes to shew that he understood Mr. Hall's instructions to be that the transaction was a deposit of money.

Mr. Hall on his examination swore that he directed the ledger-keeper to place the amount to his wife's credit when it was realized, but this statement is not reconcilable with what Mr. Hall wrote on the deposit slip itself, wherein he described the transaction as a "deposit by A. Hall, 8th of May, 1905." The whole interview, according to Mr. Hall's statement, lasted but a minute and a half. At the time of

this amount being credited there was only a sum of $2.71 to Mrs. Hall's credit. The same day, Mrs. Hall having learned of the item being credited to her, drew a cheque upon the account in her husband's favour for $375, and, later, transferred the bulk of the balance to him, and when, on 6th June, plaintiffs were advised of the dishonour of the draft, she had withdrawn from the account all the money to her credit except $80.12. This amount defendants consent to plaintiffs retaining, which reduced the amount of their claim in this action to $640.98.

Hall and his wife resist plaintiffs' claim, on the ground that the transaction was a loan on a security of a bill of exchange, which plaintiffs by their Act of incorporation are not at liberty to make, and was therefore illegal and void and incapable of affording plaintiffs any cause of action.

The trial Judge in his judgment said: "It is difficult for me to imagine any defence, any answer, to the claim for a return of the money. Honesty would compel the return, the law likewise compels the return, and there is no defence in fact to this action."

If there were no question of ultra vires or illegality, the money would be recoverable as money had and received. If the transaction were held to be illegal, the money would as a trust fund be recoverable. The plaintiffs are intrusted with moneys of shareholders and depositors to be applied in manner authorized and not prohibited by their statute of incorporation. The funds are trust funds, and any other application of them would be a breach of trust. The legal effect of defendants' contention is that they have been parties to a breach of trust, in having possessed themselves of certain trust funds held by plaintiffs for the benefit of their cestuis que trust.

The beneficial ownership of trust funds is not destroyed because, through a breach of trust, their control may have passed from that of the rightful owner to a stranger. His possession of them gives him no right to their retention, but simply converts him into a trustee compellable to restore the funds to their rightful custodian: Hardy v. Metropolitan Land Co., L. R. 7 Ch. 430; Earnest v. Croysdill, 2 De G. F. & J. 197; Brice on Ultra Vires, 3rd ed., p. 688; Cunliffe v. Blackburn Building Society, 9 App. Cas. 857; Rolland v. La Caisse D'Economie, 24 S. C. R. 410.

Hall and his wife became possessed of the funds in question, they say, because of a breach of trust on the part of plaintiffs, to which these defendants were parties. They must, therefore, return this property, which is not theirs, and which they have no right to retain.

The appeal should be dismissed with costs.

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MARCH 20TH, 1906.

DIVISIONAL COURT.

## REX v. KEHR.

*Criminal Law—Search Warrant—Information — Failure to State Grounds of Suspicion—Insufficiency—Removal of Warrant by Certiorari—Power to Quash.*

Motion by defendant to make absolute a rule nisi to quash a search warrant issued by the police magistrate for the city of Toronto, dated 9th January, 1906, and the information upon which the warrant was issued, dated the same day, to search the defendant's business premises in the city of Toronto. The warrant and information were returned upon certiorari.

W. J. Tremeear, for defendant.

J. R. Cartwright, K.C., for the Crown.

J. W. Curry, K.C., for the magistrate and informant.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

CLUTE, J.:—Mr. Cartwright raised the objection that there is no precedent for quashing a search warrant, and referred to Jones v. German, 18 Cox C. C. at p. 415, where the matter is discussed, counsel observing, "It is not suggested that a search warrant can be quashed," and reference is there made to Regina v. Justices of Roscommon, [1894] 2 I. R. 158, where it was held that a decision of justices committing a defendant for trial cannot be brought up by certiorari.

Mr. Tremeear admitted that he could find no English authority where a search warrant had been brought up on certiorari and quashed, nor have I been able to find any such authority.

In Regina v. Walker, 13 O. R. 83, a search warrant and other proceedings were brought up by certiorari and the search warrant was quashed. . . .

[Reference also to Sleeth v. Hurlbert, 25 S. C. R. 620, 630, 27 N. S. Reps. 62.]

The proceeding removed must be of a judicial character: Paley on Summary Convictions, 8th ed., p. 444, note (a); Regina v. Overseers of Salford, 21 L. J. M. C. 223; Regina v. Aberdare Canal Co., 14 Q. B. 584; . . . The King v. Justices of Sunderland, [1901] 2 K. B. 357. . . .

The magistrate has to be satisfied by information upon oath, not only that the informant suspects and that he has just and reasonable grounds to suspect, but also of the causes of suspicion, in order that he may be able to judge whether the case is a proper one to grant his warrant for search or not; in short, he must exercise a judicial discretion upon the facts brought before him.

In my opinion, the proceedings were properly brought before this Court by certiorari, and the Court has jurisdiction to quash a search warrant where a sufficient case is made out.

On 9th January, 1906, George Kennedy, a detective on the Toronto police force, laid an information against defendant before the police magistrate under sec. 394 of the Criminal Code, and on the same day the same George Kennedy laid the following information for a search warrant: . . . "Said informant upon his oath saith he is informed and verily believes that there is reasonable ground to believe that there is at the office of Duncan R. McNaught, 6 King street west, in the city of Toronto, certain books, papers, chattel mortgages, notes, memoranda, and documents, which will afford evidence that Herman C. Kehr, of the city of Toronto, did conspire with Duncan R. McNaught, by deceit, fraud, and other fraudulent means, to defraud the public. . . . Wherefore your informant prays that a search warrant may be granted to him. . . :"

[The warrant followed the information, and was under the hand and seal of the police magistrate. It was addressed

to the chief constable and other police officers of the city of Toronto, etc.]

On the back of the warrant as returned was indorsed: "Jan'y 9th, 1906. Executed this date by Act. Det. Kennedy and a number of letters and papers seized."

In Regina v. Walker, 13 O. R. 83, 95, the information on which the warrant issued was held insufficient because "it did not disclose the facts or circumstances which went to shew the just and reasonable cause the informant had to suspect that liquor in respect of which an offence was committed was on the defendant's premises." . . .

The words of the Code, sec. 569. are: "Any justice who is satisfied by information upon oath in form "J" in schedule 1 hereto, that there is reasonable ground for believing," etc. . . .

I am of opinion that this case is not distinguishable from Regina v. Walker; that the information, being the basis of the subsequent proceedings, and without which the justice is not authorized to act, must contain that which the statute contemplates, namely, "the causes of suspicion whatever they may be," in order to satisfy that justice that there is reasonable ground for believing "that there is in the place to be searched . . . anything which there is reasonable ground to believe will afford evidence as to the commission" of the offence charged. Here the information upon which the warrant is based shews no ground of suspicion or belief whatever. The informant simply says that "he is informed and verily believes that there is reasonable ground to believe that there is at the office" certain documents, etc., "which will afford evidence," etc. What he is informed or what he bases his belief upon is not stated. It is not stated upon what the belief is founded, and the magistrate has to go entirely upon the belief of the detective that there is ground for believing. Belief at two removes is not sufficient ground, I should think, upon which to base proceedings of so serious a character as that of searching a man's office and carrying away the documents and papers relating to his business.

There being no sufficient information upon which to base the warrant, it was, in my opinion, illegally obtained, and must be quashed.

In the view I take, it is unnecessary to deal with the other objections.

The order, as a condition of quashing the search warrant, will provide that no action shall be brought against the police magistrate or against any officer acting on the search warrant to enforce the same.

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MARCH 20TH, 1906.

DIVISIONAL COURT.

## McKERGOW v. COMSTOCK.

*Discovery—Examination of Plaintiff — Libel — Absence of Justification—Defences in Denial and Qualified Privilege —Relevancy of Questions Put to Plaintiff—Mitigation of Damages—Honest Belief in Truth of Matter Published.*

Appeal by plaintiff from order of FALCONBRIDGE, C.J. (ante 273) dismissing appeal from order of Master in Chambers (ante 197) requiring plaintiff to attend for re-examination for discovery and to answer certain questions which he had, upon advice of counsel, declined to answer when under examination.

J. Jennings, for plaintiff.

C. A. Moss, for defendants.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

ANGLIN, J.:—This action is brought for alleged libel contained in letters written by defendants, in substance charging plaintiff with having concocted a false statement of the affairs of a joint stock company, of which he was secretary, in order to induce defendant Comstock to subscribe for $5,000 worth of shares in such company.

The defence consists of general denials and pleas of qualified privilege. Defendant Comstock alleges a business connection of a confidential nature relating to the matters in question with his co-defendant, to whom it is charged he made publication. Defendant McCullough pleads that John McKergow, the father of plaintiff, to whom he published the alleged libel, was financially interested in the company, and that such interest and personal friendship with John

McKergow and plaintiff required defendant McCullough to make the communication complained of.

Plaintiff's reply puts in issue the facts alleged by defendants in support of their pleas of privilege, and the sufficiency in law of such facts, if established. It also charges that publication to John McKergow of the alleged libel was "in pursuance of an illegal conspiracy between the two defendants to extort moneys from the said John McKergow by threatening criminal proceedings against his son, the plaintiff in this action, and with no other purpose or object whatsoever."

The questions which plaintiff refused to answer relate to his keeping of the books of the company, to his signing company cheques and to details of and matters covered by certain items contained in the alleged falsified financial statement presented to defendant Comstock, the preparation of which was admitted. These questions, counsel for plaintiff maintained, were intended to elicit answers which could only be relevant were the truth of the libel put in issue by plea of justification.

Mr. Moss argued that the questions were relevant because touching facts which, if proved, might tend to mitigate damages, and might also tend to satisfy the jury that defendants had honestly believed that plaintiff had done that with which he is in the libel charged.

The general proposition that, where justification is not pleaded, evidence to prove the truth or the falsity of the alleged libel is inadmissible, has been too long and too firmly established to admit of controversy: Ross v. Bucke, 21 O. R. 692. The truth of the libel is not in issue upon this record.

Though many questions may be put and many answers elicited for purposes of discovery, which would not be permitted at trial, and everything is relevant upon discovery which may directly or indirectly aid the party seeking discovery to maintain his own case or to combat that of his adversary, clearly irrelevant matters may not be inquired into, and relevancy must be determined by the pleadings, construed with fair latitude. The examining party may not, in the absence of some special antecedent fiduciary relations between himself and his antagonist, "fish" for material to support a case which he has not set up. It is said to be specially objectionable that a defendant in libel or

slander, who has not pleaded justification, should seek on discovery to elicit from the plaintiff information to enable him to determine whether he may venture to put such a plea upon the record: Beaton v. Globe Printing Co., 16 P. R. 281, 287, 290.

In mitigation of damages a defendant may not give evidence of facts which, if proved, would constitute justification: Watt v. Watt, [1905] A. C. 115, 118. Upon a plea clearly specifying portions of a libel distinctly severable from the rest, and justifying such portions, evidence of their truth may be given in mitigation, but without such a plea such evidence cannot be received upon that ground. Indeed, it would seem that evidence which would in itself go to establish justification may be received in mitigation, if the defendant, pleading the facts to which it relates . . . expressly disavows the truth of the libel, and discredits such evidence as proof thereof: Switzer v. Laidman, 18 O. R. 420.

Apart from any question of privilege, bona fides is always material upon the question of damages. . . . Pearson v. Lemaitre, 5 M. & G. 700, 719. The existence or absence of express malice is the issue to which such evidence is relevant, and, as the lack of honest belief is cogent evidence of such malice, the existence of such belief goes far to negative it.

As the record now stands, the pleas of qualified privilege set up by defendants are distinctly put in issue by the reply. . . . Honest belief of defendants at the time of the publication in the truth of the matter published being certainly not admitted by the reply, it would, in my view, be quite open to plaintiff, should the trial Judge rule that the occasion of publication is (upon admitted facts) privileged, or would be privileged upon certain facts in dispute being found by the jury in defendants' favour, to adduce in rebuttal evidence to establish malice, and, for that purpose, to prove any facts which would tend to shew a lack of honest belief on the part of defendants at the time of publication: Jenoure v. Delmage, [1891] A. C. 73.

At this stage of the litigation it is impossible to anticipate what the ruling upon the issue as to privilege may be. But defendants have a right to a discovery which may prove serviceable should the ruling upon that question be favourable to them. They are not bound to rely upon the presumption of absence of malice which arises from privilege;

they may anticipate an effort on the part of plaintiff to rebut that presumption by any means open to him; and, to aid them in combatting whatever case plaintiff might, not probably but possibly, endeavour to make in order to establish express malice, they are entitled presently to all relevant discovery. Whether at the trial any evidence so obtained can be used by defendants—otherwise than in mitigation of damages—must depend upon whether the ruling upon the legal question involved in the plea of privilege is favourable to them, and upon the course which, in that event, plaintiff may be advised to take to rebut the presumption of absence of malice thus raised. . . .

[Reference to Odgers on Libel and Slander, 4th ed., p. 645; Manning v. Clement, 7 Bing. 362; Huson v. Dale, 19 Mich. 17.]

It remains to be considered whether the questions objected to are relevant to an issue as to the honest belief of defendants at the time of the publication.

The reasonableness of the grounds upon which defendant founded his belief is, of course, not open for inquiry—if the jury is convinced that he did in fact honestly believe in plaintiff's guilt. But, in determining whether such honest belief did in fact exist, the character of the grounds upon which plaintiff founded it must weigh much with the jury. I confess that I find it difficult to understand that evidence upon some of the matters to which the questions excepted to by plaintiff relate, might not appreciably aid the minds of the jurymen in reaching a conclusion upon the issue whether the alleged belief of defendants in the truth of the libel was honest. At bar counsel for plaintiff stated that he had no intention of disputing the reality and the honesty of the belief of defendants in plaintiff's guilt when the alleged libel was published—that he regarded his present pleading as precluding his doing so. . . .

Evidence upon the questions—whether it was plaintiff's duty to sign cheques (10), whether he did in fact sign cheques of the company (11), whether he kept its books (14), whether he left its cash book behind him when he resigned (15), why he signed cheques after serving a notice of resignation (19), and after leaving the service of the company (47), what he referred to by the words "my cheque" in a telegram (29), to what date his admitted statement was prepared (37), what certain items in the state-

ment included (38, 40, 42), whether stock was taken for the preparation of the statement (41), whether he had signed certain cheques as an officer of the company (43, 46)—while it might go towards establishing some facts which would be serviceable in support of justification, if pleaded, cannot, I think, be pronounced a priori wholly irrelevant of an issue as to the honest belief of defendants in the truth of the alleged libel at the time of publication. If all these questions were answered favourably to defendants, the answers would not in themselves suffice to support a plea of justification—would not prove the truth of the alleged libel. The questions cannot on that ground be disallowed. The discovery sought is in no wise oppressive. If it were to be now adjudged wholly irrelevant, the trial Judge would be bound to discard such evidence, unless defendants should before trial successfully invoke the intervention of the Court of Appeal. Unless it be unavoidable, they should not now be put in that position. On the other hand, it by no means follows that, if we refuse to disallow the questions put to plaintiff, because unable at this stage of the litigation to pronounce the matters to which they relate wholly irrelevant, the trial Judge will be bound to receive in evidence the answers given. His freedom in ruling upon evidence at the trial will not be at all affected by such a judgment. Authorities dealing with interrogatories, upon the relevancy and propriety of which the Court must pass before they are put, may not always be relied upon as guides in determining whether a party should be upheld in his refusal to answer questions put to him under a system of discovery which is broader and more elastic.

For these reasons I think plaintiff's appeal should be dismissed as to the questions above enumerated.

Question No. 45 appears to me to require the witness merely to state an amount which a statement presented to him is said to shew on its face. It seems a useless, and as such an improper, question.

Question No. 44, whether plaintiff when drawing certain cheques considered the debts for which they were drawn to be debts of the company, is, I think, quite irrelevant in the absence of a plea of justification.

These two questions should not be answered.

With this variation, the appeal will be dismissed with costs to defendants in the cause.

MACLAREN, J.A. MARCH 20TH, 1906.

C.A.—CHAMBERS.

## RE BURGESS.

*Appeal—Leave—Order of Divisional Court—Surrogate Court Appeal—Selection of Trust Company as Administrator—Further Appeal to Court of Appeal.*

Motion by Robert Burgess and 9 others of the next of kin of Archibald Cecil Burgess, deceased, for leave to appeal to the Court of Appeal from an order of a Divisional Court allowing an appeal from an order of the Judge of the Surrogate Court of Lanark, and referring the matter back to the Judge to appoint the Toronto General Trusts Corporation administrators of the estate of the deceased. The order of the Divisional Court further directed that the Judge should take and pass the accounts and fix the compensation of George Arthur Burgess as administrator of the estate up to the time that the corporation should take over the estate.

J. A. Allan, Perth, and J. E. Cook, for the applicants.

G. H. Findlay, Carleton Place, for George Arthur Burgess and others, respondents upon the proposed appeal.

C. A. Moss, for the Toronto General Trusts Corporation.

MACLAREN, J.A.:—The applicants contended that, as they were five-sixths of the next of kin of the deceased, their nomination of another trust company should have been accepted. They also objected to the appointment of the Judge of the Surrogate Court of Lanark to pass the accounts, as he had already virtually passed upon them in another capacity.

. . .

It appears that an action has been instituted in the High Court by George Arthur Burgess, in which all the other parties in this matter are defendants, to establish the validity of an alleged will of the late A. C. Burgess.

The objection as to the appointment of the administrators seems to be based rather upon the choice of solicitors for the estate than upon the appointment of the administrators themselves, and I cannot see that this can properly be urged or considered as a reason in support of the appeal now sought to be brought.

On the merits of the application I do not find that the applicants have shewn that there are sufficient special reasons for treating the case as exceptional and allowing a further appeal. On the contrary, it appears to me to be a case in which the statute of 1904 contemplated that the decision of a Divisional Court should be final. So far as I can see, the rights of the applicants with reference to the passing of the accounts will be sufficiently protected, and it is in the interest of justice and of the estate that the litigation over the appointment of an administrator should not be prolonged and the passing of the accounts delayed by allowing a further appeal.

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BOYD, C. MARCH 21ST, 1906.

CHAMBERS.

## ATTORNEY-GENERAL v. HARGRAVE.

*Pleading—Defence and Counterclaim—Irrelevancy—Embarrassment—Action by Attorney-General for Cancellation of Mining Leases—Attack on Status of Plaintiff—Suing in Private Interest—Registration of Cautions—Counterclaim for Damages by Reason of.*

Appeal by defendants from order of Master in Chambers, ante 368, striking out paragraphs 12 and 13 of the statement of defence and the whole counterclaim.

E. F. B. Johnston, K. C., for defendants.

A. W. Ballantyne, for plaintiff.

BOYD, C.:—This action is brought to repeal and avoid mining leases of public lands in Ontario alleged to be granted by the Crown through misrepresentation and fraud on the part of defendants. The Crown is represented in the Courts in matters of provincial sovereignty by the Attorney-General for Ontario, and in that capacity this plaintiff represents the interests of the public. He has an important duty to perform in the interests of the community, and has ample discretion to act on such information as appears to him to justify resort to the Courts.

The matters pleaded by way of defence which have been struck out go to attack his status as suing not in the interests of the public, but at the mere private solicitation of interested individuals. Such a line of defence is not open to investigation in the Court, for the general rule is that the exercise of his discretion in the commencement and conduct of litigation is not subject to the control of the Court in which the proceedings take place. . . . Regina v. Prosser, 11 Beav. 306. . . . Redress is to be sought in another manner if any abuse exists. He is subject to the responsibilities to which every public servant is liable in the discharge of his duty, and, as said by Lord Langdale, "subject to the jurisdiction which the Courts may have over him upon a charge properly brought against him for a negligent or erroneous performance of his duty:" p. 314.

The issue in this case is, whether defendants have improperly obtained the grants which are attacked, and the Court is not concerned with any collateral inquiry. In commencing these actions to vacate patents, the Attorney-General is, in effect, exercising what is in the nature of a judicial function, and his discretion is not open to be reviewed by the Court: Ex p. Newton, 4 E. & B. 869. . . . London County Council v. Attorney-General, [1902] A. C. at pp. 168-9.

I think the Master rightly struck out these objectionable paragraphs of the defence, 12 and 13.

And also the counterclaim should be struck out from this record. The caution amounts to no more than a notice of adverse claim, equivalent to a lis pendens, and expires by lapse of time or otherwise as may be directed by the Court in an action; it does not form a blot on the title (sec. 90 of the Land Titles Act); and no pleading is necessary in order to have it vacated.

The claim for damages or compensation by reason of lodging a caution "without reasonable cause," under sec. 89 of R. S. O. 1897 ch. 138, is a matter of distinct claim against the Crown, and should not be pleaded upon the record, for it is not justiciable as of right in an action: Hurtubise v. The Queen, 2 Ex. C. R. at p. 433; see Rule 923.

Appeal dismissed; costs in cause to plaintiff.

MABEE, J. MARCH 21ST, 1906.

TRIAL.

## GRIBBON v. KING.

*Limitation of Actions—Possession of Land—Fiduciary Relations between Owner and Persons in Possession—Debt Due by Owner—Recovery of Possession upon Payment of Debt—Equitable Decree—Costs.*

Action to recover possession of 40 acres of land in the township of Ancaster, originally brought by Gibbon, lessee of Henry Spohn, against King and Mary Spohn. Henry Spohn was added as a co-plaintiff.

W. M. McClemont, Hamilton, and H. H. Bicknell, Hamilton, for plaintiffs.

William Bell, Hamilton, for defendants.

MABEE, J.:—I do not think, upon the facts appearing in evidence, that defendant Mary Spohn has established a title by possession to the lands in question as against Henry Spohn, the holder of the paper title. Owing to the dealings between the parties and the fiduciary position in which J. V. Spohn, the husband of Mary, stood, it is impossible to fix any time when it can fairly be said that his holding of the land was adverse to plaintiff Henry Spohn; nor do I think, apart from the legal objection strongly urged by plaintiffs that the outstanding mortgage prevented the statute running, that the possession of Mary since the death of her husband has been adverse to plaintiffs.

Defendant Mary Spohn is, however, I think, rightfully in possession of these lands, and plaintiffs have no right to recover possession from her without payment to her of the sum of $1,500 which is owing to her by Henry Spohn. The husband of Mary had been in partnership in Texas with plaintiff Henry and another brother. This partnership was dissolved by the death of Mary's husband in 1893, when it was agreed that Mary should be paid $2,000 as her husband's share in the partnership. She was afterwards paid $505.04, but never received the balance. Mary Spohn's statement that her share, she being the sole devisee under her

husband's will, was fixed at $2,000, is confirmed by Henry Spohn's letter of 23rd July, 1895. Mary left Texas in 1893, where the surviving partners continued the business, retaining the interest of the deceased partner—there appears to have been no other taking of the accounts than the fixing of the deceased partner's share at $2,000.

It is true that the defendant Mary Spohn says she took possession of the lands quite apart from the $2,000 indebtedness, and that she sets up an adverse possession, but I think a fair inference from what was done would be that if Henry had paid the balance of the $15,000 she would not have claimed the land as against him, nor can Henry complain if she is permitted to hold the land as against him for the payment of the $1,500, as in a letter written by him of 3rd January, 1905, he says that Mary was to take the farm and get what she could from it for from 3 to 5 years, and then he proceeds to try and figure out how she has been paid the balance of the $2,000, but he charges her with a great deal more rent than she had received, and allows her no interest upon the $1,500 from year to year. He says also in a de bene esse examination of 20th July, 1905, that there was no agreement as to how long she was to have possession of the lands, but that it was understood that everything would be settled up when he came to Canada; and in another letter of 15th May, 1905, he says that when he came to Canada she insisted upon being paid upon the basis of the $2,000 settlement, and from this he endeavoured to recede, giving various reasons about loss of the partnership property; but, as I regard the evidence, there had been a settlement long before the time these excuses were being advanced, and Mary had been entitled to be paid that money ever since she left Texas in 1893. . . .

The rentals received by defendant Mary for the 40 acres amount during the period she has been collecting them to about the same sum as the interest on the $1,500 . . . at 5 per cent., and I therefore set the one off against the other.

Plaintiff's counsel urged that the Statute of Limitations was an answer to the claim for the $1,500. I think not. It is not pleaded. The debt was owing in Texas, and there is no evidence that there is any such statute there. It was partnership funds left in the estate, and after letting defendant Mary keep possession of the lands for 12 years or more,

she probably thinking no claim would be made to them if she made no further claim to the $1,500, and the equity of redemption in the lands being estimated at about the same sum that was owing her, it would be a fraud if the statute ran against the debt owing to her and not in her favour as to possession.

I think plaintiff Henry should have offered to pay defendant Mary or have an account taken of the rents before bringing this action, and that substantial success has been with her.

I therefore direct defendants to give up possession to plaintiffs upon payment by Henry Spohn to Mary Spohn of $1,500 together with her costs of defence, and, in default of such payment, I dismiss the action with costs.

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MABEE, J. MARCH 21ST, 1906.

TRIAL.

## HEATH v. HAMILTON STREET R. W. CO.

*Negligence—Injury to Person Bicycling by Overtaking Street Car—Unusual Position of Car—Speed—Defect in Fender—Failure of Plaintiff to Look behind — Contributory Negligence—Proximate Cause of Injury—Case for Jury—Motion for Nonsuit.*

Action by the widow of Arthur G. Heath to recover damages for his death caused, as alleged, by the negligence of defendants.

G. S. Kerr, Hamilton, and G. C. Thomson, Hamilton, for plaintiff.

E. E. A. Du Vernet, for defendants.

MABEE, J.:—At the conclusion of plaintiff's case . . . defendants moved for a nonsuit, and it was thereupon arranged that the jury should assess the damages to which plaintiff would be entitled in case the Court should be of opinion that upon the facts appearing in plaintiff's case there was anything which could properly be submitted to the jury. The damages were assessed at $2,500. . . .

Deceased was a member of the fire brigade in the employment of the corporation of the city of Hamilton, and, having been on duty all night, was returning to his home at a few minutes after 7 o'clock in the morning of 4th October, 1905, on his bicycle, when the accident occurred. Before joining the fire department he had been a patrol driver in the police department of the city, and so was familiar with the city streets and the operation of the cars. York street, upon which the accident happened, was being repaired by the city, the macadam being replaced by asphalt, and so it became necessary for defendants to operate their cars on that street in such a manner that these improvements could be made. There are double tracks upon York street, and for some years it had been the established custom of defendants to use the northerly track for all west bound cars, and the southerly track for all cars travelling in an easterly direction; but for some days before 4th October the southerly track alone had been used. . . . No repairs had actually been commenced on the block between Park and Bay streets. . . . The deceased was bicycling westerly, and a short distance west of Park street was riding on the "devil strip," which was 4 feet 2 inches wide. A car was also travelling westerly, and having crossed Park street, the motorman, observing deceased same distance in front of this strip, shut off his power and commenced sounding the gong. He says he also tightened the brakes. The car, contrary to the usual custom, was travelling on the southerly track. The motorman gave as his reason for turning off the power and applying the brake that, having seen the deceased turn from the northerly track from behind a waggon also travelling westerly, he expected that deceased would cross over to the south side of the roadway, but deceased not doing so and continuing on the strip, the motorman loosened the brakes, but did not again turn on the power, and continued sounding the gong. The deceased, doubtless hearing the gong and the car overtaking him, and also no doubt supposing the car to be on the northerly track, turned upon the southerly track when only a short distance in front of the car, and without turning his head to see which track the car was on. The motorman said this was done when the car was only 6 or 8 feet from him; that he then reversed the controller; but the car overtook the deceased, ran him down, and killed him. The motorman said deceased was about 4 car lengths in front of him when he first saw him; that deceased did not appear to think he was

in any danger; that it was apparent, when deceased turned out upon the south track, that he thought he was turning into a place of safety; and that there was no appearance of any recklessness in the way deceased was riding.

Samuel Woods stated that when deceased turned upon the south track he was about 100 feet in front of the car, and not 6 or 8 feet as the motorman said.

The city engineer said he had notified the superintendent of defendants' railway to put in the necessary "turn-overs," that is, temporary switches, upon York street, while the repairs were going on, and that by using these "turn-overs" short parts of the line could be "cut out."

James Traynor, defendants' track foreman, said he had taken a temporary switch up to York street so that it could be put in if the city engineer required it to be done, but that the superintendent had not instructed him to put it down. . . . From Bay street easterly there were no warnings of any sort put up, nor were steps of any kind taken by defendants to indicate that they were operating their tracks from Bay street easterly otherwise than according to their usual custom.

The track foreman stated that there was nothing to prevent cross-over switches being put in, and it follows that, had that course been taken, the block between Bay and Park streets would not have been "cut out," that the cars would have been using the north track on the morning of the accident, and so this fatality would probably have been avoided. In making this observation, I am not overlooking the fact that notice had been given to defendants' officers that the city workmen intended starting work on that particular block on the morning of the accident, but this does not answer the argument . . . that work had not commenced on that block at the time of the accident, and when plaintiff's husband was killed there was no imperative necessity for defendants operating their cars at the point in question in an unusual manner. . . .

Complaint was made that the car was travelling at an excessive rate of speed. The evidence upon this is somewhat contradictory, some witnesses stating only 5 or 6 miles, while others say much faster; and it was strongly urged for plaintiff that, as the car travelled 189 feet after the power was turned off and the brakes tightened, then 89 feet after deceased was struck, notwithstanding that then the power was

reversed, and the body and bicycle acted as obstructions, in all 278 feet, this was evidence of excessive speed, in any event improper speed, at this point, and in the circumstances, and having in view the fact of the car travelling upon the southerly track.

It was also alleged that the fender was not in order. It was so constructed that when the front came in contact with any object, it would "trip," that is, the front would fall down upon the roadbed or rails. When it struck the bicycle it did not "trip." The motorman stated that there was a rod by means of which he could "trip" the fender, but that he had no time to do so; that the reason the fender did not trip was that it struck the bicycle at an angle, the wheel then going over and partly under the fender. Its tripping could not let it down to the roadbed. The fenders are constructed so that they fold up and are attached to both ends of the cars, so that they can be operated in either direction. Other witnesses stated that deceased was wheeling directly in front of the car, so that the fender could not have struck the wheel in the manner stated by the motorman. . . .

Defendants' counsel contended that . . . the causa causans was the negligence of deceased in turning in front of the moving car without looking to see which track the car was travelling upon, and it became the duty of the Court to withdraw the case from the jury. . . . No case was cited, nor have I been able to find one, where the rule was applied upon facts at all similar to those in this case. . . .

The practice of nonsuiting in cases of contributory negligence is to be limited to cases where it is plain and indisputable that the accident would not have occurred but for plaintiff's own want of proper care. . . . Scriver v. Lowe, 32 O. R. 290, following Brown v. Great Western R. W. Co., 52 L. T. N. S. 622.

The established practice of the Court is that actions of this class shall be tried by a jury, and so long as that practice obtains, I do not think the rights of plaintiff should be encroached upon by the Court, and, unless the Judge can say that upon no reasonable view of the evidence could negligence be inferred, the jury should be left to say whether from the particular facts before them it should be inferred.

I think, in the absence of any notice or warning to the contrary, the deceased might reasonably be said to have had the right to expect that defendants were operating their

cars as they had for years been accustomed to do, and that in turning over to the south track he was relying upon the established custom of defendants in running their westbound cars on the northerly track, and that in so doing he supposed he was avoiding instead of encountering danger. Of course, defendants had the legal right to use the south track as they were doing, but the question is whether they can, in these circumstances, apply against plaintiff the principles laid down in such cases as Danger v. London Street R. W. Co., 30 O. R. 493, and O'Hearn v. Town of Port Arthur, 4 O. L. R. 209, 1 O. W. R. 373.

I am not intending to say that defendants must necessarily be considered guilty of negligence in merely running a car in an opposite direction to which it had been usual to run it upon the south track; and possibly, if that fact stood alone as the charge of negligence, defendants' motion should be granted, but plaintiff alleges and proves facts connected with the operation of the car by the motorman, which, in conjunction with the unusual running of the car, make it, in my view, impossible to nonsuit. . . .

I think if the jury accepted the statement made by those witnesses not in defendants' employment, where they conflicted with those in the employment of defendants, that there was evidence upon which they could well found a verdict for plaintiff. . . . .

[Balfour v. Toronto R. W. Co., 5 O. L. R. 735, 32 S. C. R. 239, and Gallinger v. Toronto R. W. Co., 8 O. L. R. 698, 4 O. W. R. 522, distinguished.]

Judgment for plaintiff for $2,500 and costs.

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BOYD, C. MARCH 22ND, 1906.

WEEKLY COURT.

## STONE v. BROOKS.

*Illegal Distress—Damages—Violation of Agreement for Suspension—Trespass—Measure of Damages — Seizure and Sale of Stock of Business — Goodwill, Allowance for—Chattel Mortgage.*

Appeal by defendant from report of a referee upon a reference to assess damages in an action for wrongfully distraining and selling when no rent was due, and also for

wrongfully seizing and selling goods mortgaged by plaintiff to defendant at a time when defendant had no right to seize under the terms of the mortgage. The facts appear in the judgment of the Court of Appeal, 3 O. W. R. 527, directing a new trial. At the second trial the reference was directed. The referee assessed plaintiff's damages at $1,548.94. Plaintiff moved for judgment on the report.

J. E. Jones, for defendant.

J. MacGregor, for plaintiff.

BOYD, C.:— . . . All the evidence abundantly supports the conclusion of the referee, upon the facts, that, after the distress first made, there was a transaction between the parties which had the effect of suspending the proceedings until an opportunity was given of collecting the amount from the payment of accounts handed over, which would fall due on 1st March. The parties had been at variance as to what was really due in respect of rent—arising from the uncertainty in appropriating payments as between rent and payment on a chattel mortgage—but about 13th February its was agreed that the balance due was $162 on all accounts, and that certain accounts, known to be good, to the value of $162, should be assigned to the landlord, on payment of which, when they should become due on 1st March, all claim was to be satisfied in respect of which the seizure had been made. There was a stay of proceedings agreed on till 1st March, and the right secured by contract to satisfy the rent . . . on the faith of which these accounts were assigned. All these accounts were afterwards collected in full at the instance of the landlord, and, though he says only $70 reached his hands, that is not to be blamed on plaintiff. This is well proved by the writings and by parol, and a violation of this agreement amounted to a trespass by the landlord: Giles v. Spencer, 3 C. B. N. S. 245; Palmer v. Bradbury, [1899] 2 Q. B. 405.

Plaintiff's right to damages arose and is to be measured by the actual value of the goods, less the contra account for rent and chattel mortgage. Upon this value the evidence is very meagre, but it seems to me that the referee has erred in charging the amount of plaintiff's business as a going concern, including what was the goodwill. The referee has allowed as for value of goods bought from defendant, $2,500,

and bought by plaintiff afterwards, $1,300, in all $3,800.

. . .

I would deduct from the damages allowed by the referee $900 as for the goodwill. That was not sold, and it remained with the tenant for the remainder of his term had he chosen to remain in the premises and carry on the business. In any aspect the damages on this head are too remote, and should not be charged upon defendant. The net result is that from the referee's ultimate figure of $1,548.94, as the measure of recovery, should be deducted $900, leaving in plaintiff's favour $648.94. The costs before the referee have not been increased by this inquiry as to the goodwill, but there will be no costs of appeal from his report.

On motion for judgment I direct that plaintiff recover this amount of $648.94, with costs of action and reference.

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MABEE, J. MARCH 22ND, 1906.

TRIAL.

## HAMILTON STEAMBOAT CO. v. MACKAY.

*Water and Watercourses—Navigable Waters—Hamilton Bay—Deed—Grant of Wharf on one Side of Slip—Derogation from Grant—Use of Slip so as to Prevent Access to Wharf—Evidence of Mode of User at Time of Grant—Admissibility—Injunction.*

Action for an injunction to restrain defendants from using a certain slip at the foot of James street, in Hamilton, in any way that might derogate from a grant made by defendants to plaintiffs on 29th November, 1888, of a wharf on the easterly side of the slip, the waters of which formed part of the public navigable waters of Hamilton bay.

G. F. Shepley, K.C., and E. H. Ambrose, Hamilton, for plaintiffs.

J. W. Nesbitt, K.C., and J. G. Gauld, Hamilton, for defendants.

MABEE, J.:—The facts are not in dispute. Prior to the purchase of the wharf by plaintiffs from defendants, the former had been using the slip for the purpose of bringing their boats up to the easterly wharf, under an agreement with defendants, dated 28th December, 1887, and in speaking of the condition of matters at and prior to the purchase, and as to what plaintiffs were expecting to obtain by their purchase, one of the defendants says he knew plaintiffs were intending to run the "Modjeska" and "Macassa" in 1889; that they had never used anything but the slip prior to that time; that they were expecting to bring these boats into the slip; and that at and prior to that time no boats were or had been using the slip to approach defendants' westerly dock that would interfere with plaintiffs using the slip as they were expecting, and that could not lie side by side with plaintiffs' boats.

The boats operated by plaintiffs are the same that the defendants speak of, and the user by plaintiffs of the slip and of their premises has in no way changed since the purchase. Defendants, however, assert the right to use the waters of the slip to bring large freighters up to their westerly dock, the beam of these boats being such that if plaintiffs' boats happen to be in the slip when these large boats enter, the former cannot get out, and it has frequently occurred that one of plaintiffs' boats would arrive at the mouth of the slip with a load of passengers and be unable to enter or reach her accustomed landing place on account of some large boat lying at defendants' wharf. This state of affairs has created much trouble and inconvenience to plaintiffs, and, no doubt, if relief is granted to them, it will cause much loss to defendants. . . .

The deed of conveyance to plaintiffs simply defines by metes and bounds the property conveyed, and apparently covers the entire frontage along the easterly side of the slip; there are no reservations, nor does the conveyance cover any portion of the land lying beneath the waters of the slip. It was stated that during the negotiations for the purchase plaintiffs wished some clause inserted in the conveyance giving them the exclusive right to use the waters of the slip, and that defendants refused to concede this. I do not, however, regard this as material in considering the question involved, which appears to me to be simply whether any user of the slip by defendants in a way that interferes with

the use and enjoyment of it as an approach to plaintiffs' wharf as it existed at the time of the deed, and as defendants knew plaintiffs expected to continue, is a derogation from defendants' grant.

Defendants contended that plaintiffs could use the southerly end of the wharf when large steamers were in the slip, and not bring their boat into the slip at all, but the plans shew the water to be much shallower there; the place is more exposed, and, as the coal is stored at the southerly end of their wharf, it is apparent that any interference with the mode and system adopted by plaintiffs in operating their boats, and handling their passengers and freight, would cause them serious loss and inconvenience.

It was contended for defendants that because the waters of the slip were public and navigable, the ordinary rules of law that would be applicable if the slip were the property of defendants, or within their control, did not apply, but no authority was cited for that contention. Defendants, as the owners of the westerly wharf, would have all the rights incident to riparian proprietors adjacent to navigable waters, and, in the absence of anything to the contrary, their exercise of those riparian rights could not be encroached upon or interfered with; but I know of nothing to prevent a riparian proprietor from entirely divesting himself of the riparian rights incident to his property, or limiting those rights, no matter whether the property is situate upon public navigable waters or upon waters that are not public and navigable. The right of access to defendants' westerly wharf at the time of the conveyance was theirs and theirs only, and existed solely because the wharf property was contiguous to the waters of the slip, and where, as here, a man owns properties upon either side of a common approach, no matter whether the waters form part of a lake or bay and are public and navigable, I think the sale of one, and conveyance without limitation or reservation, prevents the use of the waters of the slip, as incident to the property retained, in any way that interferes with the use that was being made of the slip, as incident to the property purchased, at the time of such purchase.

There wharves are both private property, and no boat coming into the slip can use them for landing without the consent of the owners, and if boats should tie up at defendants' wharf without their permission, they would have the

right to cut them adrift without being liable for damages; so defendants, being owners of the westerly wharf, and it being under their entire control, can prevent the use of that wharf by any boats of a class so large that would interfere with that use of the waters of the slip that it was intended plaintiffs should have.

I am not overlooking the fact that, as appears by the map, the northerly boundary or terminus of James street comes down to the water at the southerly end of the slip, and that it is said to be the law that, where a public highway is laid out to navigable waters, the termination of such highway is presumed, as an incident to such highway, to be a public landing place. This may be so in this case. The evidence does not shew what in the way of street termination or wharf exists at the junction of the street and slip. There may be, and perhaps is, a public right to come up the waters of the slip to the foot of the street and there land. If such right does, however, exist, it does not affect the position of the parties or their rights in this litigation.

The right contended for by plaintiffs is, strictly speaking, not an easement connected with the wharf purchased by them, but a right to use the waters of the slip as the approach to their wharf in the manner and to the same extent as used by them under the former agreement between the parties, and as they used these waters at the time of the sale by defendants to plaintiffs of the easterly wharf.

The authorities establish that evidence is admissible to shew the mode of enjoyment of the property at the time of the conveyance and of its then state and condition; and I am of opinion that the user of the slip as contended for by defendants is a derogation from their grant of 29th November, 1888, and that plaintiffs are entitled to an injunction restraining defendants from using or permitting to be used the waters of the slip as an approach to the westerly wharf in any manner that interferes with the use by plaintiffs of the waters of the slip as an approach to the easterly wharf, as such use existed at and prior to the date of the grant.

Plaintiffs will have costs of action.

See Hall v. Lund, 1 H. & C. 676; Munn v. Illinois, 94 U. S. 113; Dutton v. Strong, 1 Black 23; Harrington v. Edwards, 17 Wis. 586; Suffield v. Brown, 4 De G. J. & S. 184.

MABEE, J. MARCH 22ND, 1906.

TRIAL.

## MALDEN R. C. SEPARATE SCHOOL (NO. 3 A) TRUSTEES v. MARTIN.

*Separate Schools—Formation of Union School Section—Defective Proceedings—Declaration that School not Legally Established—Injunction.*

Action by the trustees of Roman Catholic separate school section No. 3 (*a*) in the township of Malden against defendants, as trustees of an alleged separate school known as union Roman Catholic separate school No. 7 for the townships of Malden and Anderdon, for a declaration that certain notices given and steps taken for the formation of the last mentioned school were null and void; that defendants had no authority to establish and maintain their school at the expense in whole or in part of supporters of the school in plaintiffs' section; for an injunction, &c.

A. H. Clarke, K.C., for plaintiffs.

F. A. Hough, Amherstburg, for defendants.

MABEE, J.:—The school of which plaintiffs are trustees was formed as the result of a meeting held on 14th November, 1874; a school house was built; and the scheme has been in operation ever since. The persons who formed this school were resident in public school section No. 3, as defined by a by-law of the township of Malden passed on 27th November, 1871, the limits of the section being fully set out in that by-law.

Certain separate school supporters in Malden resident in the above section and in the adjoining township of Anderdon took steps to form a union separate school in 1905, and it is the validity of those proceedings that are now in dispute, plaintiffs alleging that the establishment of this last mentioned school will either compel them to abandon the maintenance of their school or double the taxes of those who support it. This, however, is immaterial, as, if the establishment of the school of which defendants are trustees is legal, there is an end of the question involved in this action.

A number of objections were taken to the various notices, calling of meetings, and process of organization of the school represented by defendants' trustees; but, in the view I take of the matter, it is necessary to consider one only of these objections.

Proceedings were taken under R. S. O. 1897 ch. 294, sec. 21, which provides that not less than 5 freeholders or householders and heads of families resident within any school section may convene a public meeting of persons desiring to establish a separate school for Roman Catholics in such school section. The mode of procedure adopted was to form a union separate school section, and, without considering whether that is contemplated by the Act, or whether the proper course to pursue would not have been to form independent separate schools in Malden and Anderdon, and then take the steps provided by sec. 29 to form them into a union section, it appears that there were 5 persons in the township of Malden who were householders or freeholders and heads of families, within sec. 21, who were in favour of the establishment of this school and who convened the meeting. It is contended by plaintiffs that 4 only of those persons were resident within school section No. 3, and that sec. 21 not being complied with, as the initial step in the matter, everything that followed was a nullity.

The by-law of 27th November, 1871, was amended by by-law No. 271 of the township of Malden, passed on 30th March, 1891, which purports to be a by-law to divide school section No. 2, Malden, into two sections, and it then, by its enacting clause, divides section No. 2 into 2 sections, to be thereafter known as section 2 and section 3, and the various township lots and parts of lots forming each of these sections, Nos. 2 and 3, are specifically mentioned and set forth in the by-laws, and lot No. 43 is designated as forming part of school section No. 3. This by-law, read in conjunction with that of 27th November, 1871, establishes two No. 3 sections, with the boundaries of each all clearly defined, and one of the 5 persons moving for the establishment of the new separate school lives on lot 43, and thus 4 are heads of families in what may be called old section No. 3 or 3 (A), and one in new section 3 or 3 (B); and so there are not 5 persons from the same section moving in the matter.

It was strongly urged for defendants that there were not two No. 3 sections; but the by-laws clearly shew that there

are, and that, prior to by-law No. 271, lot 43 was in school section No. 2, and does not now and never did form part of section 3, within which the other 4 heads of families reside.

It was also urged for defendants that, as the steps taken by the residents in Anderdon seemed to be regular, there was a corporation under the Act, of which defendants were trustees, quite apart from anything done by the residents of Malden, and the separate school supporters who fell within sec. 44 of the Act, must support this school, and they formed the ratepayers whose support was in dispute. This is by no means clear from the steps taken; the whole scheme was a joint one from the beginning, as all the persons living in both Malden and Anderdon in the area in question, and who wished the school formed, signed an agreement to become supporters of the same, if a union school was established, and, in my judgment, no valid union school was established.

Plaintiffs are entitled to a declaration that defendants have no authority to maintain their school at the expense, in whole or in part, of the supporters of the school represented by plaintiffs, and to an injunction restraining defendants from interfering in any way with the said school or the supporters thereof as such.

As defendants are not to blame for the error of the township officers who created confusion by establishing two sections known as No. 3 in the township, there will be no costs of the action.

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MARCH 22ND, 1906.

DIVISIONAL COURT.

## RE HARSHA.

*Extradition—Warrant of Commitment—Form—Persons to whom Addressed—Forgery—Statement of Offence in Warrant—Intent to Defraud—Proof that Offence Charged is a Crime in Foreign Country—Complaint—Information and Belief.*

Appeal by prisoner from order of BOYD, C., ante 398, refusing motion for a writ of habeas corpus.

J. B. Mackenzie, for the prisoner.

J. W. Curry, K.C., for the United States Government.

THE COURT (MULOCK, C.J., ANGLIN, J., CLUTE, J.), dismissed the appeal.

BOYD, C. MARCH 23RD, 1906.

CHAMBERS.

## IMPERIAL PAPER MILLS OF CANADA v. McDONALD.

*Parties—Motion to Add Defendant — Replevin — Counterclaim—Third Party Procedure—Rules of Court.*

Appeal by John Gray from order of Master in Chambers (ante 412) refusing a motion to add the appellant as a defendant, and appeal by defendants from the Master's order allowing plaintiffs to replevy the horses the conversion of which by defendants was alleged by plaintiffs in the action.

J. B. Clarke, K. C., for John Gray.

J. W. McCullough, for defendants.

Frank Ford, for plaintiffs.

BOYD, C.:—The question of pleading and parties falls more nearly within the rule laid down in Norris v. Beazley, 2 C. P. D. 80, than the ruling relied on in Montgomery v. Foy, [1895] 2 Q. B. 321. The former case decides that when a plaintiff, acting within his right, brings an action against one defendant for a distinct cause of action, it is not for the defendant to bring in another defendant against the opposition of plaintiff—one against whom plaintiff makes no claim, but who is sought to be added for the convenience of the original defendant. There must be a very clear and a very strong case made, to induce the Court to introduce a new defendant against whom the plaintiff does not wish to proceed, and whose presence is not necessary to determine the matters involved in the action as constituted between the original parties: see per Coleridge, L. C. J., 2 C. P. D. at p. 84. . . .

[Reference to McCheane v. Gyles, [1902] 1 Ch. 911, and discussion of Montgomery v. Foy.]

Here the action is tort against the immediate wrongdoers; they may or may not have redress against the man Gray who gave them the horses, but that is a matter between them, for which the Master has provided by the order in appeal. The whole issue is whether the horses belong to plaintiffs, or

how many of them do so. The presence of Gray is not necessary to enable final adjudication to be made in this controversy. And on the other alternative of the Rule 206 (2) Gray ought not to have been joined, because any wrongdoer can be sued separately at the option of the plaintiff aggrieved.

. . .

[Reference to Peterson v. Fredericks, 15 P. R. 361, 364, and Hewitt v. Heise, 11 P. R. 47.]

I would affirm the Master as to joinder of parties and as to the order to replevy with costs in cause to plaintiff.

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BOYD, C. MARCH 23RD, 1906.

WEEKLY COURT.

## RE WILKIE.

*Will—Construction—Bequest to "my Family"—Exclusion of Children of Deceased Child.*

Motion by the National Trust Company, administrators with the will annexed of the estate of Isabella Wilkie, deceased, for a summary order ascertaining the persons entitled to share in the estate of the deceased, directing that Alexander Wilkie, one of the sons of the testatrix, an absentee, be represented by the other parties in the same interest, allowing the administrators to pay into Court any moneys to which the absentee might be found entitled, and in the event of its being determined that the infant children of George Wilkie, deceased, one of the sons of the testatrix, were entitled to share in the estate, allowing the administrators to pay their shares into Court.

By the will in question the testatrix made certain specific bequests, and then directed that "what money remains to be equally divided amongst my family."

Several children of the testatrix survived her, and one son, George Wilkie, predeceased her, dying however after the date of her will, and leaving 3 infant children.

R. C. H. Cassels, for the administrators and the children of the testatrix.

F. W. Harcourt, for the infant children of George Wilkie, deceased.

BOYD, C.:—The construction of this will as to the phrase "what money remains to be equally divided amongst my family" is covered completely by authority. The gift to "my family" means, in the absence of any context (as here), children, and is a gift to a class. By this rule before the Wills Act, and not disturbed by it, one member of the class who dies before the testator disappears from the family, and the surviving children take all, to the exclusion of children of the deceased member. So that the residue here goes equally to the surviving sons and daughters: Re Harvey, [1893] 1 Ch. 567, and In re Clark, 8 O. L. R. 599, 4 O. W. R. 414.

Pay share of absentee into Court.

Costs out of estate.

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BOYD, C. MARCH 23RD, 1906.

WEEKLY COURT.

## GIBSON v. GARDNER.

*Account—Reference—Executor—Stated Account—Audit by Surrogate Judge—Consent Judgment — Re-opening Account.*

Appeal by plaintiff from ruling of Master in Ordinary in course of a reference under a consent judgment to take the accounts of defendant Gardner as executor. The Master certified that he had adopted the result of an accounting before a Surrogate Court Judge up to the time of such accounting.

F. Arnoldi, K.C., for plaintiff.

A. H. Marsh, K.C., for defendant Gardner.

F. W. Harcourt, for defendant Vera Burdett Gibson, an infant.

BOYD, C.:—The settled practice appears now to be in England as it has long been established here under the General Orders (now Con. Rules 665, 666, 667), that under a judgment or order to account the Master may inquire into, adjudge, and report upon settled accounts—and this whether the judgment is by consent or otherwise, and whether the matter be referred to in the pleadings or not. That convenient practice, recognized in Newen v. Wetten, 31 Beav. 315, is firmly grounded by the Court of Appeal in Holgate v. Shutt . . . 27 Ch. D. 111 and 28 Ch. D. 111. . . Edinburgh Life Assurance Co. v. Allen, 23 Gr. 230, which has been followed without question ever since.

But it is said that this prior investigation of the estate accounts before the Surrogate Judge of the locality is not a matter of settled or stated account, but is rather to be treated as res judicata, which should be set up in the pleadings. R. S. O. 1897 ch. 59, sec. 72, is this, that the account of the dealing of the executor with the estate being filed and approved of by the Judge shall be binding upon any person notified and attending on the proceedings in any subsequent investigation of the account in the High Court—except in so far as mistake or fraud is shewn in the account so approved. This investigation is substantially an auditing of the accounts, and it was so treated in Re Russell, 8 O. L. R. 481, 3 O. W. R. 926. It is just the sort of examination and approval of accounts that was dealt with in the English case cited in 27 and 28 Ch. D., where the audit was by an officer appointed under the rules of a benefit society. . . .

Appeal dismissed with costs.

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MARCH 23RD, 1906.

DIVISIONAL COURT.

## CAMPBELL v. CROIL.

*Mortgage—Sale—Purchase Money—Default — Deficiency—Money in Court — Payment out — Creditors of Partnership.*

Appeal by defendant Croil from order of BRITTON, J.,

ante 379, affirming order of Master in Chambers, 6 O. W. R. 933, directing distribution of fund in Court.

G. A. Stiles, Cornwall, for appellant.

E. C. Cattanach, for defendant McCullough.

W. E. Middleton, for plaintiff.

THE COURT (MULOCK, C.J., ANGLIN, J., CLUTE, J.), dismissed the appeal with costs, but without prejudice to any action which any creditor of the firm of Croil & McCullough may be advised to bring.

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ANGLIN, J. MARCH 24TH, 1906.

TRIAL.

## ROBERTSON v. NORTHERN NAVIGATION CO.

*Master and Servant—Contract of Hiring—Breach—Wrongful Dismissal—Attempted Alteration in Terms—Justification for Dismissal—Damages — Lack of Promptitude in Seeking other Employment—Impossibility of Performance of Contract—Destruction of Ship for which Plaintiff's Services were Engaged.*

Action for damages for wrongful dismissal of plaintiff from the employment of defendants as chief engineer of the steamer "City of Collingwood." Plaintiff alleged that he had been employed by defendants in and before 1904, and had been engaged by them for 1905, but that they refused to carry out their contract.

A. G. MacKay, K.C., for plaintiff.

W. Nesbitt, K.C., and Britton Osler, for defendants.

ANGLIN, J.:—. . . In 1904 plaintiff was first engaged by written contract at a salary of $900 for the season. In the previous year his salary had been the same, and his staff had consisted of a second engineer, 4 firemen, and an oiler. Plaintiff demurring to this, negotiations ensued between himself and the manager. Finally plaintiff proposed that "if

defendants would increase his salary from $900 to $1,000, he would agree to run the boat with 4 firemen and without an oiler." This was assented to by defendants' manager, Mr. Gildersleeve, who states that the written contract was not abrogated, but that defendants agreed to give plaintiff $100 as a bonus for 1904, in consideration of his dispensing with the oiler.

I find as a fact that the contract at $900 was rescinded and abandoned, and a new oral contract made, by which plaintiff was for the season of 1904 to receive a salary of $1,000 (not $900 plus a bonus of $100), and that a term of this contract was that plaintiff should have 4 firemen in his department, in lieu of 4 firemen and an oiler as theretofore.

In January, 1905, defendants offered plaintiff another steamer, but, upon his expressing a preference "to go on the 'Collingwood' again on the same terms as last season," he was advised by letter of 21st January that "as you have made a choice of the 'Collingwood' you are booked for her on the same terms as last year."

By letter, which he received about 1st March at Cleveland, plaintiff was for the first time informed by defendants that "we only intend to carry 3 firemen on the 'Collingwood.'" Plaintiff, intending to be in Collingwood early in March, did not write in answer to this letter. He reached Collingwood on 21st March and had some discussion with the manager about the proposed reduction in the number of firemen. Alterations in the method of handling ashes and in the appliances for opening and closing the boiler valves were suggested by the manager with a view to rendering the services of a fourth fireman unnecessary. Plaintiff thought that these changes would not be satisfactory, and insisted upon his contractual right to have 4 firemen. The manager insisted upon plaintiff undertaking to work with 3 firemen, and, upon his final refusal to do so, informed him that his "contract was cancelled." I find that this cancellation by the manager was solely because of plaintiff insisting upon his right to have 4 firemen for the season of 1905, as he had in 1904. It was suggested that a refusal of plaintiff to promise to report to the captain for inspection of his department, as demanded by the manager, amounted to insubordination justifying his dismissal. I find that when this question came up in . . . 1904, the manager, tacitly if not expressly, acquiesced in

plaintiff's view that it was unnecessary, if not undesirable, that such a report should be made. I further find that nothing was said upon this point when plaintiff was engaged for 1905, and that, when it was casually mentioned in the conversation of 21st March, the manager expressly waived it, saying, "We'll let that go." There was nothing in this alleged insubordination to justify defendants in cancelling plaintiff's engagement.

I therefore hold that defendants wrongfully dismissed plaintiff on 21st March, 1905, in breach of their contract to employ him for the ensuing season of navigation.

If it were necessary to consider the attitude of plaintiff, apart from an express contract as to the number of firemen to be furnished him, I might hesitate—in all the circumstances, and especially in view of what had taken place in 1904 in regard to the number of men to be employed in the engineer's department—to hold that the demand of the manager that the boat should be operated with 3 firemen was of such a character that refusal by plaintiff to accede to it would justify his dismissal. The failure of the manager to communicate this very important proposed change to the engineer when engaging him in January, wholly unexplained as it is, was, in the circumstances, I think, unfair, and would go far to justify plaintiff's refusal to accede to it 2 months later, when he was very much at the mercy of defendants for the season of 1905. But the express term of plaintiff's contract renders it unnecessary to pass upon this aspect of the case.

It remains to consider the quantum of damages recoverable. Plaintiff, after crediting moneys earned from various sources, now claims $569.31. . . .

Defendants urge that had plaintiff acted promptly upon receipt of their letter notifying him of the proposed change in the number of firemen, he could have obtained other employment and would have sustained no damage. When plaintiff received this letter he was in Cleveland. He intended returning home in a short time, and was in fact in Collingwood on 21st March. There is much to explain and excuse his failure to answer this letter. His course was by no means unreasonable. Moreover, he was not obliged to anticipate that defendants would adhere to their avowed intention to

reduce the number of firemen when confronted with his determination to insist upon his contractual rights and advised of his views as to the requirements of his department. Neither could I find upon the evidence that after his return from Cleveland plaintiff could have done better for himself or in ease of defendants than he has done since 21st March, 1905.

Then again defendants urge that plaintiff, a month before the close of navigation, left employment which he obtained. Upon plaintiff's evidence, the only evidence upon the point—which I fully accept—I find that he was justified in relinquishing that employment when he did.

Finally it is contended by Mr. Nesbitt that because the steamer "Collingwood" was burned on 19th June, 1905, the case must be viewed as if plaintiff's engagement by defendants had been for a period terminating with that day. Though for the purposes of this action it was admitted, after the evidence had been closed, that the steamer was in fact burned, there is no admission as to the cause of the fire, or that its occurrence is not ascribable to any default of defendants, or that had plaintiff been in charge of the engineer's department with a staff of 4 firemen, the steamer would have been destroyed as it was. Not only is no such matter pleaded by defendants—which, perhaps, is not strictly necessary—but there is not anything in evidence bearing upon it, as there might well have been had the pleadings or any evidence offered by defendants indicated that they intended to rely upon it. It would be most unfair to plaintiff to conclude anything against him in this action upon these matters, the onus being on defendants, seeking to set up the destruction of the steamer, at a date subsequent to the breach of contract, in mitigation of damages, at least to prove that that event happened without any default upon their part. Assuming plaintiff's contract to be one in which the continued existence of the "Collingwood" as a steamer should be deemed a condition of the continuance of the obligation of the parties, the distinct breach by defendants, long before the burning of the steamer, and the non-exclusion of default of defendants in connection with such burning, clearly distinguish the present case from Ellis v. Midland R. W. Co., 7 A. R. 464, Nicholl v. Ashton, [1901] 2 K. B. 126, Kell v. Henry, [1903] 2 K. B. 740, and Chandler v. Webster, [1904] 1 K. B. 493,

cited by Mr. Nesbitt, which all rest upon the well known doctrine enunciated in Taylor v. Caldwell, 3 B. & S. 826, 833. I find no authority for the proposition that, upon proof of mere impossibility of performance arising after breach by the employer, the servant would be, without more, and in the absence of any evidence that such impossibility had occurred without default of the employer, restricted in his recovery to such damages as he would be entitled to recover had his engagement been for a period terminating simultaneously with such impossibility happening. In my opinion, the quantum of damages recoverable is not so restricted. . . .

I therefore find plaintiff entitled to judgment, and I assess his damages at $550.69.

If defendants' contention as to the burning of the steamer were to prevail, I would assess plaintiff's damages at $363.65. . . .

Defendants will pay plaintiff's costs of this action.