THE

ONTARIO WEEKLY REPORTER

(TO AND INCLUDING OCTOBER 15TH, 1904.)

VOL. IV. TORONTO, OCTOBER 20, 1904. NO. 8

OCTOBER 10TH, 1904.

C.A.

REX v. WHITESIDES.

Criminal Law—Conviction under Liquor License Act—Warrant of Commitment—Arrest in another County—Warrant not Indorsed by Justice of that County—Habeas Corpus—Conviction for Second Offence—Form—Finding of Previous Conviction—Order of Proceedings—Amendment.

Appeal by prisoner from order of ANGLIN, J., ante 113, upon the return of a habeas corpus and certiorari in aid, refusing to discharge the prisoner and remanding him to the custody of the keeper of the common gaol of Northumberland and Durham. The prisoner was in custody by virtue of a warrant of commitment issued upon his conviction by the police magistrate for the town of Bowmanville and county of Durham on 11th July, 1904, for selling liquor without license. He was sentenced to imprisonment with hard labour for 4 months as for a second offence against the Act, sec. 72. The gaoler made his return to the habeas corpus, assigning the warrant of commitment as the cause of detention. The conviction and proceedings before the magistrate were returned upon the writ of certiorari in aid, and an amended conviction was also returned. It was objected that the warrant was defective in form; that the arrest thereunder was irregular or void, the warrant not having been backed by a justice of the peace of the county of Victoria, in which county the prisoner was arrested, and whence he was taken to gaol at Cobourg. It was contended that the conviction, as well in its amended as in its original form, was invalid, as the finding in respect of the previous conviction was omitted in the latter and improperly set forth in the former, and also because the magistrate had entered upon the inquiry as to the previous conviction before adjudicating upon the guilt of the prisoner in respect of the

charge then before him, contrary to the provisions of sec. 101 of the Liquor License Act.

W. J. Tremeear, for the prisoner.

J. R. Cartwright, K.C., and McGregor Young, for the Crown.

The judgment of the Court (Moss, C.J.O., Osler, Maclennan, Garrow, Maclaren, JJ.A.) was delivered by

Osler, J.A.—All the objections urged against the proceedings fail. The second deposition of Chief Constable Jarvis shews that the magistrate had already adjudicated upon the charge laid in the information then before him before entering upon the inquiry as to the fact of the previous conviction. The affidavits from which it was argued that he had probably not done so are too vague and indefinite to warrant an assumption to the contrary of the deposition; but the amended conviction, though carelessly prepared and not following accurately the form given in the schedule to the Act, may be upheld, although it states the previous conviction as if the magistrate had then adjudicated and made it, instead of stating it as a fact found upon inquiry after conviction on the charge then before him. If necessary, the conviction may be amended upon the evidence: 1 Edw. VII. ch. 13 (O.); Criminal Code, secs. 889, 896. Under these circumstances, a defect in the warrant of commitment will not aid the prisoner: In re Shuttleworth, 9 Q. B. 650, 658: though it might be different if the conviction were not before the Court, and nothing appeared to support the detention but a defective warrant: In re Timson, L. R. 5 Ex. 257. But in form there is no substantial objection even to the first warrant of commitment. It follows with reasonable fidelity the form schedule L. of the Act, and avoids, as also does the conviction, the mistake the draftsman has fallen into of attaching a punishment of 3 months' imprisonment, instead of 4, to a second offence.

There is nothing in the objection that the arrest was made in the county of Ontario without the warrant having been backed by a justice of that county. The warrant of commitment is sufficient to justify the prisoner's detention in the gaol of the proper county, and the Court will not, on habeas corpus, inquire into any irregularity in his caption. The distinction in this respect between the practice in criminal and civil cases has been settled too long and too firmly to admit of the point being now debated: Rex v. Marks, 3 East

157; Ex p. Kraus, 1 B. & C. 258; Ex p. Scott, 9 B. & C. 446; Eggington's Case, 2 E. & B. 717. . . .

[Regina v. Jones, 8 C. L. T. Occ. N. 332, overruled.]

Appeal dismissed.

ANGLIN, J. OCTOBER 11TH, 1904.

CHAMBERS.

DUNSTON v. NIAGARA FALLS CONCENTRATING CO.

Particulars—Statement of Defence—Application before Examination for Discovery—Particulars for Pleading—Particulars for Trial—Affidavit in Support of Application.

Appeal by plaintiff from order of Master in Chambers, ante 218, dismissing motion by plaintiff for particulars.

A. R. Clute, for plaintiff.

A. B. Armstrong, for defendants.

ANGLIN, J., dismissed the appeal.

OCTOBER 11TH, 1904.

DIVISIONAL COURT.

BLEASDELL v. BOISSEAU.

Judgment—Set-off of Judgment Purchased by Defendant—Equitable Right—Discretion—Attachment of Debts.

Appeal by defendant from order of ANGLIN, J., ante 155, reversing order of Master in Chambers directing a set-off of plaintiff's judgment against defendant (assigned to one Dickson) against a judgment recovered by the Accountant of the Supreme Court against plaintiff and assigned to defendant. Anglin, J., also held that an attaching order obtained by the Accountant could not be maintained by defendant.

W. E. Middleton, for defendant, contended that a set-off should be directed or the attaching order made absolute.

C. A. Moss, for Dickson, contra.

THE COURT (BOYD, C., MEREDITH, J., IDINGTON, J.) held that the judgment at the suit of the Accountant against Plumer, Bleasdell, and Lester having been assigned (as to defendant Bleasdell) to the applicant Boisseau, he was entitled to the benefit of the then existing and the still operative attaching order, obtained on that judgment against the

moneys recovered in this action against Boisseau at the suit of Bleasdell. The acquisition of the judgment against Bleasdell was not intended to operate as a satisfaction of the attaching order; that remained outstanding for the protection of Boisseau as against the claim of Bleasdell in this action. The principle of Trust and Loan Co. v. Cuthbert, 14 Gr. 440, applied, even if the assignment of the judgment at the suit of the Accountant had been as to all the defendants. By setting off the judgments the Court gives effect to the attaching order as operative and does substantial justice as between plaintiff and defendant.

Appeal allowed and order of Master restored. The appellant to have his costs of the original application. No costs of the appeals.

BRITTON, J. OCTOBER 12TH, 1904.

TRIAL.

RANDALL v. OTTAWA ELECTRIC CO.

Negligence—Electricity—Use of Pole by Stranger—Liability—Findings of Jury—Cause of Action—Claim of Wife for Injury to Husband.

Action commenced on 25th May, 1902, and brought by Thomas E. Randall, by his next friend, and by Randall's wife, to recover damages for injuries sustained by Randall on 19th September, 1901. Randall was a linesman in the employ of defendants the Ottawa Electric Co., and was by that company sent to do some work on a pole in the city of Ottawa. In doing that work he accidentally came in contact with a live wire, was thrown to the ground, and was so seriously injured that he became insane. The action was brought against the electric company and Ahearn and Soper (Limited). At the first trial the action was dismissed as against the electric company, and the jury disagreed as to the other defendants. The case was taken to a Divisional Court, to the Court of Appeal, and to the Supreme Court of Canada (6 O. L. R. 619, 2 O. W. R. 146, 1022, 34 S. C. R. 698), with the result that a new trial was ordered as against defendants Ahearn and Soper. That trial took place at Ottawa on 22nd and 23rd September last. In answer to questions submitted the jury found that these defendants were quilty of negligence, which was the proximate cause of the injury to Randall, in leaving the tie wires uncovered and in not cutting off, close, the ends of these tie wires; and that he could not by the exercise of reasonable care have avoided the injury. Defendants Ahearn and Soper did not own the pole on which

they put their wire and as to which the jury found negligence, nor had they, so far as appeared, the consent of the owners to use it, and the electric company were not shewn to have had any express consent or authority to use that pole, but Randall, in the ordinary course of his employment, was sent to this pole to put upon it a transformer for the purpose of supplying light to the adjacent building.

A. E. Fripp, Ottawa, for plaintiffs.

W. R. Riddell, K.C., and C. Murphy, Ottawa, for defendants Ahearn and Soper.

BRITTON, J., held that, as between Randall and Ahearn and Soper, the former was not a trespasser, but was rightfully upon the pole. Ahearn and Soper must be taken to have known, in using that pole, that other persons would be just as likely to use it. It was in a central place, with large buildings near by, requiring light for illumination and for ordinary lighting. Ahearn and Soper ought so to have fastened the live wire placed by them on the pole as to render it reasonably safe for persons requiring to use it for any proper purpose connected with transmitting the current.

The jury were told that they might apportion the damages between the two plaintiffs. They assessed the damages at $2,500, and apportioned it $500 to the husband and $2,000 to the wife. The wife was entitled to be supported by her husband, and she had sustained damage by being deprived of her husband's support.

Judgment for plaintiffs for $2,500 (as apportioned by the jury) with costs, including costs of former trial and of appeal to Divisional Court, which were to abide the event.

CARTWRIGHT, MASTER. OCTOBER 13TH, 1904.

CHAMBERS.

BRUCE v. ANCIENT ORDER OF UNITED WORKMEN.

Parties—Interpleader Issue—Who should be Plaintiff—Insurance Moneys—Security for Costs.

A policy of insurance issued by the defendants on the life of Robert Bruce was made payable to his wife Jane Bruce. He had for many years been living with the plaintiff, who was called by that name and passed for his wife and by whom he had a family. Shortly before his death he made a will by which he bequeathed the policy to another Jane Bruce, whom he described as his wife, resident in Scotland, and to his daughter Elizabeth. Plaintiff having brought this action to recover the amount of the insurance, and the legatees having

also claimed the money, the defendants obtained an order for leave to pay the money into Court, and directing the trial of an issue between plaintiff and the legatees.

Upon settling the terms of the order, the questions, who should be plaintiff in the issue, and whether the legatees should give security for costs, were raised.

W. J. Elliott, for plaintiff.

F. S. Mearns, for legatees.

THE MASTER.—Applying the decision in Re Ancient Order of Foresters and Castner, 14 P. R. 47, I think the legatees should be plaintiffs, as the other Jane Bruce had the policy or certificate in her possession, and would have been paid had not the legatees intervened.

Should these legatees give security for costs? I think not, for this reason: the difficulty has been caused by the act of the insured himself. It may, therefore, be assumed that the Court will give costs to both parties out of the fund or else give judgment for defendants without costs. On the analogy of will cases, the former course will be adopted, so I do not make any order for security at present.

ANGLIN, J. OCTOBER 13TH, 1904.

WEEKLY COURT.

SLATER v. TOWN OF NIAGARA FALLS.

Interim Injunction — Comparative Convenience — Municipal Corporation—Contract.

Motion by plaintiffs to continue an interim injunction restraining defendants from entering into any contract each with the other based on the tender of defendants Barry & McMordie for the work known as "section No. 11," and, if contract already signed, from proceeding with the work.

Frank Ford, for plaintiffs.

F. C. McBurney, Niagara Falls, for defendant town corporation.

C. A. Masten, for defendants Barry & McMordie.

ANGLIN, J.—Counsel for the town corporation having declined to allow this motion to be dealt with as a motion for judgment in this action, to which course counsel for plaintiffs had assented, I dispose of it, as a motion to continue to the trial an interlocutory injunction, largely upon considerations of comparative convenience and the comparative damage which may ensue to either party from the adoption

of the courses open to me. Plaintiffs have established facts —at least by comparative proof—which render the legality of the course taken and proposed by defendants gravely doubtful. If denied the continuance of their injunction and successful at the trial in establishing their right to the relief they claim, plaintiffs might, and in all probability would, find a judgment declaratory of such rights of little or no value. The contract impugned by them might then have been in great part if not wholly executed. It seems to me better to prevent this and to defer the incurring of debts and the expenditure of money which might eventually prove to be illegal and unjustifiable, until the legality of the course proposed to be taken by defendants can be in due course determined.

Upon plaintiffs undertaking to bring this action down to trial at the ensuing sittings at Welland, the injunction will be continued until the trial. Costs reserved to trial Judge.

ANGLIN, J. OCTOBER 14TH, 1904.

WEEKLY COURT.

BOYS' HOME v. LEWIS.

Judgment—Construction—Order to Refund Money Retained by Executors—Joint or Several Liability—Interest.

Appeals by plaintiffs and defendants the executors from report of Master at Hamilton.

The appeal of the executors was upon the question of joint or several liability to refund moneys paid to them as legatees by themselves as executors. Leave for this appeal was given by a Divisional Court, 3 O. W. R. 779, on appeal from an order of STREET, J., 3 O. W. R. 625.

W. E. Middleton, for defendants the executors.

A. M. Lewis, Hamilton, for plaintiffs.

D'Arcy Tate, Hamilton, for defendants the Uffners.

ANGLIN, J.—. . . The first ground of appeal taken on behalf of plaintiffs is well founded and should be given effect to.

Upon the second ground of appeal the appellants seem to me entitled to part relief. Instead of being called upon to refund the whole sum of $235 paid them by the executors for interest pursuant to the report dated 23rd April, 1883, plaintiffs should only be required to refund so much of that sum as represents interest upon that portion of $5,510.57 to which, upon the new basis of distribution, they are not entitled.

Upon the third ground of appeal I am unable to give effect to the argument so ably presented by Mr. Middleton on behalf of the executors. The one-third of the residuary estate left in the hands of the executors, after they had made the payments directed by the judgment of 3rd May, 1883, they retained by virtue of a bequest thereof to "my said trustees or the survivor of them," as jointly entitled to such one-third. The subsequent division of this money between themselves in equal shares was their own act. The certificate of judgment in the Court of Appeal of 7th May, 1900, declares "that the defendants John Lewis and Robert Morgan are liable to make good and repay such portion of the sum of $5,510.57 retained by them as their share of the residue," etc. I read this language as meaning and requiring repayment by Lewis and Morgan of that which they had wrongly retained, namely, part of the one-third of the residuary estate jointly retained by them. I find nothing inconsistent with this construction of the formal certificate in the language of any of the opinions delivered by the members of the Court of Appeal (27 A. R. 242)—even if I am at liberty to resort to such opinions to aid in construing the language of the formal certificate of the judgment of the Court, which the Court itself—or the surviving members—declined to alter (Uffner v. Lewis, 3 O. W. R. 306). In my opinion, this ground of appeal, therefore, fails. . . .

No costs.

OCTOBER 14TH, 1904.

C.A.

RE NORTH RENFREW PROVINCIAL ELECTION.

RE MACDONALD.

Contempt of Court—Publication of Newspaper Article—Comment on Pending Election Petition — Prejudice — Petition not Prosecuted—Abuse of Forms of Court.

Motion by Mr. Dunlop, the respondent, to make absolute an order nisi to commit Mr. J. A. Macdonald, managing editor of the Toronto "Globe" newspaper, for contempt of Court in publishing in the newspaper on 6th May, 1904, an article commenting on matters alleged to be in question upon a petition pending against the respondent to avoid his election as member for North Renfrew in the Legislative Assembly of Ontario. The article was published and the motion made before the petition came on for trial.

The article was as follows:

"A Celebrated Election Case.

"The extraordinary, if not unprecedented, sum admitted to have been paid by Mr. Dunlop to secure his election for North Renfrew recalls what is, perhaps, the most celebrated election case to be found in the records of the Dominion Parliament or of the Ontario law Courts. This was the petition to unseat the late Mr. John Walker for the city of London 30 years ago. The two candidates at the election had been fellow-members of the Conservative party and warm personal friends. It were bootless to inquire what caused the rift in the lute, but something moved Mr. Walker to run against Mr. Carling, and he was elected by a narrow majority. The election was contested and Mr. Walker was unseated and disqualified. In view of the fact that Mr. Dunlop admits through his official agent an expenditure of over $7,000, it is more than interesting to note some of the features of the London case.

"The first point is that the agent of Mr. Walker admitted spending various sums paid openly to him by the respondent for legitimate purposes. The Judge who presided at the trial, the late Sir John Hagarty, summed these up at about $2,100, adding: 'It was not strongly pressed that such a sum would, under the circumstances, be extravagant, nor am I prepared to hold that it was.' As the learned Judge was horrified to discover that the expenditure all told amounted to $9,000, one may easily imagine what he would have thought of a 'legitimate' expenditure of $7,000, if such a thing had come under his notice. Among the items were $120 for livery-stable bills, $850 for printing and advertising, $300 for clerks and messengers, and $700 to ward committees for 'rent of rooms, refreshments, light, vehicles, driving about, canvassing, etc.'

"The personal complicity of Mr. Walker in the illegitimate expenditure which cost him the seat and eventually brought upon him the penalty of disqualification was raised not merely during the trial, but by the presiding Judge in his analysis of the case. One of his business partners admitted paying out between $5,000 and $6,000, in sums varying from $50 to $1,500. Another $2,000 was contributed by a member of a legal firm which did business for the respondent. It was argued strongly by the petitioner's counsel that Mr. Walker must either have known that all this money was being spent or have kept himself intentionally ignorant of it. All records of the respondent's organization and cam-

paign were destroyed or otherwise put out of the purview of the Court, and this strengthened the suspicion against him. The presiding Judge had no hesitation in avoiding the election, but as to the personal charge he gave Mr. Walker the benefit of the doubt, due to the fact that his oath was directly against evidence entirely circumstantial. However, the Court of Common Pleas, on appeal, unanimously held that he must have had some knowledge of what was done in his behalf, and pronounced the penalty of disqualification accordingly.

"What strikes one most forcibly in reading Chief Justice Hagarty's judgment is his naive expression of horror because the evidence disclosed 'an enormous amount of bribery and corruption.' The whole of the expenditure, including $2,000 of which the legitimacy was not questioned, amounted to only $9,000, and the net sum which brought about a state of 'wholesale corruption' was just about the sum which Mr. Dunlop's agent admits on oath to have gone for 'legitimate expenses.' It grieved the learned and amiable Chief Justice that 'a member of the legal profession should knowingly place in the hands of unscrupulous men a sum like $6,000 to be used in debauching and corrupting a constituency.' He describes the inquiry as 'startling,' and speaks of the 'vast amount of mischief and wickedness resulting from extensive bribery.' If there are any 'unscrupulous' election workers in Mr. Dunlop's party organization, it was certainly unwise, not to say dangerous, to place in their hands any considerable part of so suspiciously large a sum as $7,000. Judging from analogy, the inquiry in North Renfrew may be even more 'startling' than the one that made London famous for a generation."

The motion was heard by Moss, C.J.O., Osler, Maclennan, Garrow, Maclaren, JJ.A.

I. F. Hellmuth, K.C., for Mr. Dunlop, the applicant.

A. B. Aylesworth, K.C., for Mr. Macdonald.

Garrow, J.A., referred to and quoted from the decisions in: In re Clements, 46 L. J. N. S. Ch. 383; Hunt v. Clark, 58 L. J. N. S. Q. B. 490; The Queen v. Payne, [1896] 1 Q. B. 577; In re Lincoln Election, 2 A. R. 368: and continued:—

It will thus be seen that there is high authority for the proposition that such an application as this should only be granted where it clearly appears that the course of justice has been or is likely to be restricted or impaired to the prejudice of the applicant unless summary punishment is inflicted upon the offender. If the article is merely libellous,

or if it is even strictly a contempt of Court, but not of such a nature as to impede the course of justice, then the applicant must resort to what other remedies, if any, the law gives him, and cannot successfully invoke the summary, and as it has been called, arbitrary remedy now sought. . . .

It is not even claimed by applicant that there was an intention to interfere with the course of justice. The utmost that is urged is, that the article is calculated to interfere with a fair trial.

Is the article then, under all the circumstances, one which, really and seriously, . . is calculated to interfere with a fair trial of the petition against the applicant? In my opinion, it clearly is not.

I am not sure that the petition itself is before us, but I will assume that it is the ordinary petition alleging corrupt practices. The trial will, therefore, take place before two Judges upon the rota, and no one will for a moment believe that their minds will be prejudiced or affected in the very slightest degree by the article, or otherwise than by the evidence adduced upon the trial.

The only remaining room for prejudice must be that the witnesses may in some way be affected. But how? I confess that I have tried in vain to imagine in what possible way or mode the witnesses either for or against the issue joined can or will be affected. There is no attempt in the article to discuss in advance the evidence to be produced; nor any suggestion of what it will or will not prove; no suggestion that all the witnesses who can testify will not do so or that they will not when called tell the truth and the whole truth, or that full effect will not be given by the Judges to the testimony when adduced.

The subject of the article, namely, the unusual amount, over $7,000, which the applicant had expended in the election in legitimate expenses, was a matter of public and general interest, and so a legitimate subject of newspaper comment. It was in fact public property, inasmuch as the statute requires the publication of the particulars of such expenses.

The inquiry in the election petition would not necessarily involve any question about the amount or character of the expenditure for legitimate expenses. That inquiry would apply, as I assume, solely to illegitimate expenses and other corrupt acts and practices.

Prima facie, therefore, comment, however strong, upon the amount of the legitimate expenses would not necessarily

infringe upon the rule against comments upon matters which are sub judice.

The gravamen of the charge is of course the reference in the article to the notoriously corrupt London election. That was the case not of legitimate but of illegitimate and corrupt expenditure, and the comparison made by the article was therefore at least illogical, in addition to being, as in my opinion it was, unfair and unjust to Mr. Dunlop. But, however unfair or unjust, or even libellous, it may be, I remain perfectly unconvinced that its publication can possibly affect a full, free, and fair trial of the pending petition. And being of this opinion, I think the present application fails, and should be dismissed, but, under the circumstances, without costs.

MOSS, C.J.O., MACLENNAN and MACLAREN, JJ.A., concurred.

OSLER, J.A.—. . . The disposition of this motion has been unavoidably delayed, but in the meantime the petition and cross-petition have been dismissed at a so-called trial. The Court cannot avoid taking notice of the manner in which this has been done, nor of the fact that, notwithstanding the gravity of the charges alleged by each party against his opponent and his agents, no particulars of corrupt practices were delivered on either side nor any evidence offered in support of the charges.

The only course left open to the trial Judges under such circumstances was to dismiss the petition and cross-petition, which having been done, if we may take notice of what has been publicly announced, the sitting member resigned.

The whole of the proceedings on both sides were so manifestly a sham and a user of the forms of the Court for some purpose other than of the real trial of the charges, that contempt of Court is not predicable of anything reflecting upon the parties to them. In scena non in foro res agitur, and whether the play is damned or applauded is no concern of a court of justice.

On this ground (but on this ground only) I would dismiss the motion, and so dismissing it I would dismiss it with costs.