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HIGH COURT OF JUSTICE.

MEREDITH, C.J.C.P., IN CHAMBERS. OCTOBER 19TH, 1909.

THOMPSON v. EQUITY FIRE INSURANCE CO.

Appeal to Privy Council—Judgment of Supreme Court of Canada —Application to Stay Execution—Forum—Judgment Certified to Court below—High Court—Order Staying Execution—Leave to Appeal.

The appeal of the defendants from the judgment of the Court of Appeal, 17 O. L. R. 214, was allowed: Equity Fire Insurance Co. v. Thompson, 41 S. C. R. 491; and the plaintiffs applied to a Judge of the Supreme Court of Canada, after the judgment of that Court had been certified to the High Court of Justice, and the defendants' costs taxed, for a stay of proceedings, and an order was made staying the proceedings, on security being given, until the disposal of an application for leave to appeal to the Privy Council. Security was given in a manner agreed to by the parties. The application for leave to appeal was made on behalf of the plaintiff Thompson only, and, when the defendants found that the plaintiffs the Union Bank were not appealing, they issued an execution against the bank for the costs.

H. D. Gamble, K.C., for the plaintiffs, moved in the High Court before FALCONBRIDGE, C.J.K.B., to stay that execution, on the ground that the bank held the policy as security for a loan, and that if they were made to pay the costs, the plaintiff Thompson would have to pay them to the bank, and they would be lost to him.

W. E. Raney, K.C., for the defendants, contended that the High Court had no jurisdiction to stay execution; the only Court that

could do that was the Supreme Court of Canada; and that at all events the defendants had a judgment against the bank and had a right to enforce it, the bank not appealing.

FALCONBRIDGE, C.J., made an order staying execution.

Raney, K.C., for the defendants, moved before MEREDITH, C.J.C.P., for leave to appeal to a Divisional Court from the order of FALCONBRIDGE, C.J., citing the Supreme Court Rule 136 and Union Investment Co. v. Wells, 41 S. C. R. 244.

Gamble, K.C., for the plaintiffs, relied on the Supreme Court Act, R. S. C. 1906, ch. 139, sec. 58; Con. Rule 818 (b); Hargrove v. Royal Templars, 2 O. L. R. 126; Tinsley v. Toronto R. W. Co., 12 O. W. R. 511; Shelfer v. City of London, [1895] 2 Ch. 388; Dueber Watch Co. v. Taggart, 19 P. R. 233; Earle v. Burland, 8 O. L. R. 174.

MEREDITH, C.J. (oral):—The case which Mr. Raney has cited, Union Investment Co. v. Wells, 41 S. C. R. 244, shews that the Supreme Court has, at a certain stage at all events of the proceedings, stayed proceedings upon its judgment pending an application for leave to appeal to the Privy Council, but I think that it will be found that that power is exercised only where the appellate Court, the Supreme Court, had not certified its judgment to the Court below under sec. 58 of the Supreme Court Act.

I have no doubt whatever that when the Supreme Court has certified its decision to the Court below, and its decision becomes a judgment of that Court, it is competent for the latter Court, which is in this case the High Court, to stay proceedings in a proper case for exercising that jurisdiction.

It is conceded that as between Thompson and the company there ought to be a stay. I understand that counsel have agreed that the security which was given upon an application to the Supreme Court for a stay shall stand as security for the costs awarded to the defendants. It seems to me, therefore, that the proper order is, and that the Chief Justice of the King's Bench properly directed, that the execution shall not be enforced against the plaintiffs until the determination of the appeal, and no leave to appeal from his direction should therefore be given. I cannot see that any substantial right is involved.

Costs to the plaintiff in the appeal.

RIDDELL, J. NOVEMBER 5TH, 1909.

CHISHOLM v. HERKIMER.

Parties—Band of Indians—Representation of Class by Members—Rule 200—Order of Local Judge—Jurisdiction—Con. Rules 47, 48—Petition to Set aside Order and Judgment and other Proceedings Founded thereon—Practice.

This action was brought in the High Court on the 3rd March, 1909, by a solicitor to recover payment for his services to a Band of Indians in obtaining a decree against the Crown for a large sum: Henry v. The King, 9 Ex. C. R. 417.

This action was against the Chief Councillor and 4 other Councillors of the Band, on behalf of themselves and all other members of the Band, and the Band, as defendants.

On the 12th June, 1909, an order was made in the action by one of the local Judges at London, reciting that the class was numerous and the 5 individual defendants were members of the Band, and directing that the 5 defendants should defend on behalf of the Band for the benefit of all members of the Band, and that all members of the Band should be bound by any judgment that might be pronounced in the action in the same manner and to the same extent as if they were personally made parties to the action.

On the same day, no appearance having been entered, an order was made by the same local Judge reciting the order just mentioned, and that the 5 defendants named appeared by their counsel, and had submitted the rights of their co-defendants, the other members of the Band, and of the Band, to the Court, and submitted, as well on their own behalf as on behalf of all other members of the Band and the Band to such order as might be made herein, and ordering that the plaintiff be at liberty to enter final judgment against the defendants for $10,700.47 and interest, and that said judgment should be binding upon the whole of the members of the Band in the same manner and the same extent as if they were personally made parties to this action. Upon this order judgment was entered on the 15th June, 1909, for the plaintiff against the defendants for $10,824.01 to be paid to the plaintiff.

On the 29th June, 1909, an order was made by the same local Judge appointing the plaintiff receiver to receive all moneys due the defendants from the Government, and enjoining the defendants from receiving it until the plaintiff's judgment was paid.

The Band was composed of 267 persons.

Six members of the Band and also the Superintendent-General of Indian Affairs and the Minister of Justice now petitioned the Court that it might be declared that the proceedings before the local Judge were null and void in so far as they purported to affect the rights of the Band or the members of the Band other than the individual defendants, and that they be set aside and vacated. The 6 petitioners, members of the Band, asked relief on behalf of themselves and all other members of the Band.

W. E. Middleton, K.C., and H. S. White, for the petitioners.

R. V. Sinclair, K.C., and H. E. Rose, K.C., for the plaintiff.

RIDDELL, J.:—I take it for granted that the plaintiff has an honest claim to quite the amount of his judgment, and that he has acted in good faith throughout. I do not think that anything turns upon how the petition came to be lodged—apparently it was at the instance of the authorities in Ottawa. . . "It is absolutely immaterial what motive has induced the plaintiff to bring this action. Once it is brought, the Court must decide according to law, whatever be the motives and wishes of the respective litigants:" Halsbury, L.C., in Powell v. Kempton Park Racecourse Co., [1899] A. C. 143, 157; Freeman v. Canadian Guardian Life Insurance Co., 17 O. L. R. 296; Township of Bucke v. New Liskeard, etc., Co., ante 123. The petitioners may petition or move as representing the class to which they belong, i.e., the members of the Band; whether the Superintendent-General or the Minister of Justice can, need not be considered. Nor do I pay any attention to the manner in which the case is brought before the Court. If the proper practice should be by appeal under Con. Rule 48 (see Con. Rule 47 (a), (c), (d)), I shall consder this such an appeal; or if in another way, then I consider it so brought—making all necessary amendments, extension of time, etc. All these niceties of practice go to costs, and I do not think this a case for costs in any event.

The order for judgment does not make the judgment binding upon the Band, and any order for receiver, etc., based upon the proposition that the Band are bound by the judgment is, of course, irregular and cannot stand.

But the chief difficulty is as regards the judgment binding the several members of the Band. That could only be if the order for representation is valid. Such an order can only be made by the Court: Con. Rule 200. The local Judge is not the Court, and has no power to make such an order: Re Reid, 13 O. W. R. 1026. . . .

Con. Rule 368 applies only to business properly brought before the Judge in Chambers: Re Reid, supra; and Con. Rule 47 restricts the power of the local Judge to certain particular kinds of motion unless the parties agree or the solicitors for all parties reside in the county. Here the petitioners had no solicitor, and they did not consent.

I do not forget that the petitioners were not formally parties to the action, and that the solicitors for all those who were formally parties did reside in the county; but I think before an order can be made by a local Judge binding those not formally before the Court, they must either agree that the motion be heard by him or have a solicitor residing within the county at least.

The order for representation will be set aside, and also all orders and judgments based upon this order, except so far as they affect the individual defendants.

No costs.

RIDDELL, J. NOVEMBER 5TH, 1909.

RE STORY.

Will—Construction—Bequest to Wife of "Benefit" of Property during Widowhood—Fee Simple in Land, Subject to Divesting on Marriage—Use of Personal Property—Disposition of Part not Used.

T. M. S., dying in 1906, left a will dated in 1905, containing the following: "I will and bequeath to my wife R. S. all the furniture and everything in the house at my death. I also will that my wife R. S. do have the benefit of all my real and personal property particular all monies as long as she remains my widow: and in the event of her having any of my money at the time of her death, the same shall be divided amongst my children or their heirs equally." J. W. and R. S. were appointed executor and executrix.

The estate consisted of land valued at $250, household furniture, book debts, cash in bank $333.80, and a mortgage dated 18th July, 1905, for $2,500, to become due in annual payments of $100 each without interest, on which $2,300 was owing.

The widow desired to be paid the instalments as they became due and were paid, but the executor thought she was entitled to the interest thereon only.

Both desired the opinion of the Court.

W. T. J. Lee, for the executor.

W. N. Ferguson, K.C., for the widow.

No one for the others interested.

RIDDELL, J.:—"Benefit" is not a word of art, not a technical legal expression, such, for example, as "heirs of the body," to which a certain fixed interpretation must be given. It may imply an absolute interest or a life interest or any less interest. . . .

[Reference to In re Phené's Trusts, L. R. 5 Eq. 346; Armstrong v. Armstrong, L. R. 7 Eq. 518.]

The will should be given the same effect as though it had read, "I also will to my wife R. S. all my real and personal property . . . as long as she remains my widow, and in the event of her having any of my money," etc., etc.

The result would be that as regards the real estate she has a fee simple, subject to be divested upon her marrying again, in which case there is an intestacy. In respect of the personal property, she has the right to use it as she requires—if any be consumed during widowhood it is gone. In the case of the money, whether secured by mortgage or not, she has the right to spend it as she requires. She will, therefore, be entitled to receive the instalments of the mortgage as they are paid. Whether she is entitled to anything further, it is not necessary upon this application to determine.

Nor is it necessary to determine the result if she should marry again: In re Mumby, 8 O. L. R. 283; In re Tuck, 10 O. L. R. 309; Theobald on Wills, Can. ed., p. 497 (a), and cases cited.

Costs of all parties out of the fund.

RIDDELL, J., IN CHAMBERS. NOVEMBER 6TH, 1909.

KELLY v. ROSS.

Defamation—Pleading—Statement of Defence—Newspaper—Mistake—Statements about Plaintiff not Complained of — Averment of Truth—Mitigation of Damages.

This was an action for libel, based upon an article in the Ottawa "Evening Journal" of the 21st January, 1909, the concluding sentence of which was complained of: "Comments of Mr. Justice Grantham in England on Kelly's conduct and conviction with Earnest Terah Hooley, the notorious London promoter, were also given."

After delivery of the statement of defence an order was made striking out paragraph 3 thereof and allowing the defendants to amend: 14 O. W. R. 617, at p. 619. The defendants amended by substituting the following for the former paragraph 3: "3. The said article, to which these defendants crave leave to refer in full upon the trial or other disposition of this action, was one of considerable length, and contained many statements concerning the plaintiff, all of which, except the statement expressly complained of in this action, were and are true in substance and in fact. But for the mistake aforesaid the whole of the said article would have been true in substance and in fact. Such mistake was made without any malicious motive or intent whatever."

A motion was made before the Master in Chambers to strike out this paragraph, and the Master made the order asked for, but allowed an amendment to be made substituting for this paragraph such allegations as might be proper to set out the alleged mistake of the defendants in printing "conviction" instead of "connection."

The defendants appealed.

H. M. Mowat, K.C., for the defendants.

W. R. Wadsworth, for the plaintiff.

RIDDELL, J.:—It is not contended nor can it be that the defendant in an action of libel can say, by way of defence to the action, "I did not say of you what you claim that I did, but I did say of you something else, and that is true." Rassam v. Budge, [1893] 1 Q. B. 571, concludes that question.

But it is argued that this paragraph is admissible pleading as bearing upon the question of damages, and Beaton v. Intelligencer Printing and Publishing Co., 22 A. R. 97, is cited. That, however, is quite a different case. Part of the pleading which had been excepted to set out the circumstances under which the alleged libel had been published. There could be no doubt, on the authorities quoted, that such circumstances could be proved as in mitigation of damages. Paragraph 7, leaving out some of the verbiage, set out circumstances rebutting malice; this also, it will be observed, is directed to damage; while paragraph 8 only "alleged . . what would be used as an argument to the jury in mitigation on production of the article itself." None of these paragraphs contained allegations against the plaintiff claiming that they were true; so that, even though Beaton v. Intelligencer Printing and Publishing Co. were considered as an authority as to what should be done on a motion to strike out paragraphs of the statement of

defence—and it is apparently not so considered in Fulford v. Wallace, 1 O. L. R. 278, see pp. 282, 283—the defendants are not advantaged.

It may be that the defendants are entitled at the trial to have the whole of the publication read, as is said in Cooke v. Hughes, 1 R. & M. 112; see also Thornton v. Stephen, 2 M. & R. 45; Hedley v. Barlow, 4 F. & F. 227. If so, they do not need this pleading.

I do not need to pass upon the somewhat perplexing question whether general evidence of the plaintiff's bad character, or rather reputation, could be given in evidence in mitigation: Jones v. Stevens, 11 Price 235; Scott v. Sampson, 8 Q. B. D. 491; Wood v. Durham, 21 Q. B. D. 507; Earl Leicester v. Walter, 2 Camp. 251; and like cases are not few in number, and deal more or less with the question.

Nor need I inquire whether, in order to mitigate damages, particular facts may be given in evidence tending to shew the character and disposition of the plaintiff—apparently such evidence cannot be given: Jones v. Stevens, 11 Price 235.

That is not what is peladed here. The plea is that a number of other statements were made by the defendants, and that such statements are true. No facts are specifically alleged. It is not said "the plaintiff did at such a time and at such a place do so and so." Such an allegation, if allowable at all—and as to that I do not decide—would be traversable, and the plaintiff would be prepared to meet it. As it stands, the plaintiff is left to fish out the facts which the defendants desire to prove as detrimental to his reputation. The pleading is bad, and the order appealed from is right.

The appeal will be dismissed, with costs to the plaintiff in any event.

RIDDELL, J. NOVEMBER 6TH, 1909

WILSON v. SONS OF ENGLAND BENEFIT SOCIETY.

Life Insurance—Beneficiary Certificate—Condition—Compliance with Rules of Society—Change of Occupation from Ordinary to Hazardous—Failure to Notify Society — Amendment of Rules—Forfeiture of Benefits.

Case stated under Con. Rule 372 for the opinion of the Court.

One Wilson became in 1905 a member of the defendant society, beneficiary department, and received a beneficiary certificate,

which directed payment of $1,000, in case of his death, to his wife, the plaintiff. He was then a carter, but later became a brakesman of freight trains, without notice to the defendants. He was killed in a collision while a brakesman.

In his application he agreed that compliance on his part with all the laws, regulations, and requirements enacted or which might thereafter be enacted by the society was the experss condition upon which he was to be entitled to participate in the beneficiary fund; the certificate itself recited this undertaking; and, by a writing on the face of the certificate, Wilson accepted it upon the terms and conditions mentioned therein, and agreed, for himself and those claiming through him and under the certificate, to be bound thereby.

Section 99 of the constitution (of 1908) separated applicants for and holders of beneficiary certificates into 3 classes, ordinary, hazardous, and extra-hazardous. The second included brakesmen, but not carters. Those in the hazardous class paid 20 cents per month per $1,000 more than those in the ordinary class.

Section 103 provided that if any member in the ordinary class changed his occupation to one in the hazardous class, he must give notice to the society, in which case his rating would be increased, and provided, in default of notice, for forfeiture of all benefits.

And sec. 106 provided that, in case of death during the continuance of the forfeiture, the beneficiary should not be entitled to any benefit under the certificate, notwithstanding continued payment of the ordinary class rates.

Wilson charged his occupation, but did not notify the defendants, and went on until his death paying the lower rate.

The question stated was, whether the defendants were liable to pay the amount or any part of the amount secured by the certificate.

W. A. Henderson, for the plaintiff.

S. W. Burns, for the defendants.

RIDDELL, J., held that the constitution and rules of 1908 applied to the fullest extent: Baker v. Independent Order of Foresters, 28 O. R. 238, 24 A. R. 585; Smith v. Galloway, [1898]1 Q. B. 71; McKechnie v Grand Orange Lodge of British America, 18 O. L. R. 555. There was no doubt that the certificate was wholly subject to the terms of the constitution, etc., of 1908.

The deceased by his change from an ordinary or non-hazardous occupation to a hazardous one, without notifying the defendants, himself effected a suspension of all the rights he himself, and by

consequence the beneficiary, had under the certificate. It can not avail that he did not know, if in fact he did not know, which does not appear; the constitution and by-laws are binding, even on those who do not know their provisions.

Any possible doubt which might otherwise have lingered must disappear before the case in our own Court of Appeal, Stamford v. Imperial Guarantee and Accident Insurance Co., 18 O. L. R. 562, and such cases as Thomas v. Masons' Fraternal Accident Association of America, 71 N. Y. Supp. 692. . . .

The answer to the question must be that the defendants are not liable at all.

The plaintiff will pay the costs.

MASTER IN CHAMBERS. NOVEMBER 10TH, 1909.

DOMINION IMPROVEMENT AND DEVELOPMENT CO. v. LALLY.

Consolidation of Actions—Practice—Stay of Proceedings—Costs—Rules 206, 312, 313.

Motion by the defendants to stay this action until the final determination of a former action.

Both actions were between the same parties, and for the same relief, viz., damages for trespass and a declaration of the plaintiffs' title to land.

There were two companies of the same name and composed of the same persons, one company incorporated in New York and the other in New Jersey.

The first action was brought by the New York company, and at the trial it appeared that the title to the land in question was in the New Jersey company. The trial was thereupon postponed.

Subsequently the New York company obtained a conveyance from the New Jersey company, and brought this action, the other still pending.

Featherston Aylesworth, for the defendants.

Grayson Smith, for the plaintiffs, asked to have the actions consolidated.

THE MASTER:—The facts here are unusual—perhaps unprecedented. No recourse can be had either to Rule 206 or Rule 313—and yet it would be contrary to the spirit of the Judicature Act,

as stated in Rule 312, to require the first action to be discontinued and all the proceedings already taken to be thrown away.

In accordance with that last mentioned Rule, I think an order may be made for consolidation, and that all proceedings in the first action may stand for all purposes in the consolidated action.

The costs of this order and all other costs either lost or occasioned thereby must be to the defendants in the consolidated action in any event.

DIVISIONAL COURT. NOVEMBER 10TH, 1909.

SMITH v. ELGINFIELD OIL AND GAS DEVELOPING CO.

Deed—Construction—"Oil Lease"—Lease or License—Dominion Petroleum Bounty Act, 1904 — Right of Lessor to Share in Bounty—"Producer."

Appeal by the defendants from the judgment of CLUTE, J., who tried the action without a jury, in favour of the plaintiff.

By the provisions of sec. 2 of the Dominion Petroleum Bounty Act, 1904, the Governor in council is empowered to authorise the payment out of the Consolidated Revenue Fund of a bounty of one and one-half cent per imperial gallon on all crude petroleum produced in wells in Canada on and after the 8th June, 1904, the bounty to be paid to the producer of the petroleum.

The action was brought to recover from the defendants the amount of the bounty received by them under the authority of this Act in respect of petroleum which belonged to the plaintiff and was sold by the defendants practically as his agents.

The plaintiff was a farmer and the owner of part of lot 14 in the 10th concession of the township of Dunwich, in the county of Elgin, and on the 11th November, 1907, he executed to the defendants what is popularly termed an oil lease of part of it.

This instrument was in the form of a lease, and by it the plaintiff granted, demised, and let to the defendants, "for the purpose and the exclusive right of drilling, boring, digging, excavating, and operating for," among other substances, petroleum, and "for laying pipes under or on top of the surface for transporting oil or gas and erecting tanks, derricks, pumping rig, and all necessary plant for pumping and storing such oil, gas, or other substance or deposit as aforesaid," that part of his land lying north-westerly of a road running through it, "to have and to

hold unto the said lessees for and during the term of five years from the date of the instrument, and as much longer as petroleum or any other of the substances mentioned in it should be found in paying quantities.

Following this was a provision as follows: "The said lessees to have the right at all times during the continuation of this lease to bring upon, erect, and remove off said lands all teams, tools, implements, machinery, pipes, fixtures, or plant necessary for the purpose aforesaid or in any way connected therewith, and for all such purposes to have the right of ingress, egress, and regress to and from said lands." .

Then followed this provision: "The said lessees to have, hold, remove, and dispose of, for their own use and benefit, all such petroleum, rock, or carbon oil, coal, salt, gas, or other substance or deposit as aforesaid, except as hereinafter excepted."

Then came what was in form a reddendum, which read: "Yielding and paying to the said lessor during the continuance of this lease, delivered in tanks free of expense, the one-eighth part of all such oil, coal, salt, or other substance or deposit as aforesaid produced or saved from the said lands except gas, the lessees to pay to the lessor in full consideration for each well yielding gas and being operated by the lessees the sum of $50 per annum."

The appeal was heard by MEREDITH, C.J.C.P., MAGEE and LATCHFORD, JJ.

Shirley Denison, for the defendants.

W. H. Barnum, for the plaintiff.

The judgment of the Court was delivered by.

MEREDITH, C.J.:—Exactly what the legal effect of this instrument is, it may be difficult to say. Does it operate as a demise of the land, as the draftsman appears to have thought, or only as a license to enter upon it for the purposes mentioned in the instrument, and to take and remove what it provides may be taken and removed by those who are termed the lessees?

I am inclined to think that the latter is its true nature; the limitation which it contains as to the purpose for which the land is granted, demised, and let, and the right which it confers of ingress, egress, and regress, seem inconsistent with the demise of the land, and look more like provisions appropriate to a license. They seem to contemplate, as I have no doubt was the intention of the parties, that the plaintiff should remain in possession of the land,

and that the defendants' rights should be confined to those expressly mentioned in the instrument.

Instead of the plaintiff receiving in specie the one-eighth of the petroleum to which he became entitled, by arrangement between him and the defendants the latter marketed the whole of it and accounted to the plaintiff for one-eighth of the net proceeds of the sale of it.

The defendants made application for the bounty payable for the whole of the petroleum, and received it, but refuse to account to the plaintiff for that part of it which was received in respect of his one-eighth, claiming that they and not the plaintiff were the producers of it and entitled to the bounty in respect of it.

Contrary to the impression I had upon the argument, I have reached the conclusion that the judgment of my brother Clute is right and should be affirmed.

The term "producer" is not a technical one, and is, I think, sufficiently elastic to warrant our holding that, on the facts of this case, the plaintiff was, within the meaning of the Act, the producer of the one-eighth of the petroleum to which he became entitled.

Although the provision as to the one-eighth is in form a reddendum clause, and the one-eighth is spoken of as something to be paid, yet, looking at the whole of the provisions of the instrument, I see no reason why it may not properly be held that the parties were tenants in common of the petroleum obtained from the plaintiff's land, the defendants being entitled to seven-eighths and the plaintiff to one-eighth of it.

The defendants were to have the land for the purpose of winning or producing the petroleum, but when the parties or the draftsman came to deal with the ownership of it, the provision is not that the defendants are to have, hold, remove, and dispose of the whole of it, but the whole of it "except as hereinafter excepted," referring plainly to the subsequent provision as to the plaintiff's one-eighth.

It is not, I think, an unreasonable view to treat the instrument as having constituted the parties co-adventurers in the undertaking, the plaintiff furnishing the land and the petroleum and other substances to be found in it, and the defendants furnishing the plant and machinery for and performing the work of searching for and winning them, and the petroleum or substance won, except the gas, as the property of the co-adventurers divisible between them in the proportions mentioned in the instrument, and in that view the plaintiff was the producer of the one-eighth of the petroleum to which he became entitled under its provisions.

So to treat the instrument does no violence to its language, and prevents the gross injustice which would result if the defendants' contention were to prevail, for the bounty is given to compensate for the lowering of the price of petroleum in the Canadian market consequent on the taking off of the duty on the imported article, and the effect of the defendants' contention would be that the plaintiff in respect of his one-eighth would receive no compensation for the loss he sustained by the lowering of its market value, but the compensation would go to the defendants, who sustained no loss from that cause.

Appeal dismissed with costs.

FORREST v. TURNBULL—DIVISIONAL COURT—NOV. 2.

Limitation of Actions.]—An appeal by the plaintiff from the judgment of MACMAHON, J., 14 O. W. R. 478, dismissing an action brought to establish the plaintiff's right to certain land, was dismissed with costs by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and SUTHERLAND, JJ. G. G. McPherson, K.C., for the plaintiff. R. S. Robertson, for the defendants.

RYCKMAN v. RANDOLPH—MASTER IN CHAMBERS—NOV. 5.

Service of Writ of Summons—Foreign Partnership—Carrying on Business in Ontario.]—Motion by the defendants E. & C. Randolph and by John J. Dixon to set aside the service of the writ of summons on Dixon as being a person having the control or management at Toronto of the business of the defendants E. & C. Randolph, a New York firm. The Master held, upon the affidavits before him, that the defendants E. & C. Randolph were not carrying on business within Ontario when the service was effected. He referred to the Annual Practice, 1908, vol. 1, p. 650; Singleton v. Roberts, 70 L. T. 687; Grant v. Anderson, [1892] 1 Q. B. 108; The Princesse Clementine, [1896] P. 19; Baillie v. Goodwin, 33 Ch. D. 104; Mackenzie v. Fleming Revell Co., 7 O. W. R. 414; Comber v. Leyland, [1898] A. C. 524; Murphy v. Phœnix Bridge Co., 18 P. R. 495. Order made setting aside the service with costs, unless the plaintiff should prefer such an order as was made in Singleton v. Roberts. W. E. Middleton, K.C., for the defendants

E. & C. Randolph. Strachan Johnston, for Dixon. C. S. MacInnes, K.C., for the plaintiff.

McCall v. Kane & Co.—Riddell, J.—Nov. 6.

Particulars.]—The order of the Master in Chambers, ante 95, was affirmed. W. Laidlaw, K.C., for the defendants. W. E. Middleton, K.C., for the plaintiff.

Cooper v. James—Moss, C.J.O., in Chambers—Nov. 8.

Leave to Appeal.]—A motion by the defendant for leave to appeal to the Court of Appeal from the order of a Divisional Court affirming the judgment of the trial Judge in favour of the plaintiff, was refused, the Chief Justice saying that the issue was purely one of fact, and the evidence was amply sufficient, if believed—and the trial Judge did believe it—to justify his finding, and no substantial question of law or other good ground for further prolonging the litigation appeared. J. D. Montgomery, for the defendant. Featherston Aylesworth, for the plaintiff.

Duke v. Ulrey—Master in Chambers—Nov. 10.

Company — Winding-up — Stay of Action—Dismissal.]—The action was brought by the plaintiff on behalf of himself and all other shareholders of a limited company against the company and certain individuals to recover from the individuals, for the benefit of the company, secret profits alleged to have been made by the individuals in their dealings with the company. After the action had proceeded a certain length, an order was made for the winding-up of the company, which stayed the action. The defendants other than the company moved to dismiss it for want of prosecution. The motion was dismissed without costs and without prejudice to any application by either party to the Referee or the liquidator in the winding-up. F. R. MacKelcan, for the defendants Ulrey and Marskey. C. Kappele, for the defendant Barber. Casey Wood, for the plaintiff.

THOMPSON v. TALBOT OIL AND GAS CO. — DIVISIONAL COURT— NOV. 10.

Lease or License—Petroleum Bounty Act, 1904.]—This case was similar in its circumstances to Smith v. Elginfield Oil and Gas Developing Co., ante 147, and, for the reasons given for dismissing the appeal in that case, the appeal in this case was also dismissed with costs, by the same Divisional Court. J. M. Ferguson, for the defendants, appellants. W. H. Barnum, for the plaintiff.

GILLIES v. MANSELL—MASTER IN CHAMBERS—NOV. 11.

Summary Judgment.]—A motion by the plaintiff for summary judgment in an action for possession of a house was refused, the defendant setting up an agreement for occupation. Reference to Smith v. Kennedy, 14 O. W. R. 256, affirmed by Meredith, C.J., 25th June, 1909; Jacobs v. Beaver, 17 O. L. R. 496; Codd v. Delap, 92 L. T. 510; Jacobs v. Booth's Distillery Co., 85 L. T. 262; Auerbach v. Hamilton, ante 109. R. McKay, for the plaintiff. C. H. Porter, for the defendant.