THE

# ONTARIO WEEKLY REPORTER.

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CARTWRIGHT MASTER. NOVEMBER 28TH, 1903.

CHAMBERS.

## CANADIAN GENERAL ELECTRIC CO. v. TAGONA WATER AND LIGHT CO.

*Summary Judgment—Motion for—Defence—Liability of Company for Indebtedness Exceeding Statutory Limit.*

Motion by plaintiffs for summary judgment under Rule 603 in an action for the price of goods sold and delivered.

E. G. Long, for plaintiffs.

J. W. Bain, for defendants.

THE MASTER.—The amount of the claim was admitted. The motion was resisted on the ground that the affidavit of defendants' general auditor shews that the indebtedness of defendants largely exceeds the limits prescribed by R.S.O. 1897 ch. 199, and that under secs. 11 and 40 the directors are personally liable, but not the company. Whether this contention is right, and whether sec. 11 gives an exclusive and not an alternative remedy, is a question fairly arguable: Jacobs v. Booth, 85 L. T. R. 262.

Motion refused. Costs in the cause.

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CARTWRIGHT, MASTER. NOVEMBER 28TH, 1903.

CHAMBERS.

## HUNTER v. BOYD.

*Pleading—Statement of Claim—Amendment before New Trial—Rule 312—"At any Time"—Special Damage.*

Motion by plaintiff for leave to amend the statement of claim by inserting a paragraph alleging special damage.

The action had been tried, but a new trial had been ordered (ante 724).

W. R. Wadsworth, for plaintiff.

W. R. Riddell, K.C., for defendant.

THE MASTER.—Having regard to the language of Rule 312, as explained in Williams v. Leonard, 16 P. R. 544, Patterson v. Central Canada S. and L Co., 17 P. R. 470, and Chevalier v. Ross, 3 O. L. R. 219, the plaintiff must be allowed to make such amendments as he may be advised and set up a claim founded on special damage. The words "at any time" in Rule 312 have never been limited except in such cases as Johnston v. Consumers' Gas Co., 17 P. R. 294, and Sales v. Lake Erie and Detroit River R. W. Co., 17 P. R. 224. It was expressly decided in the Duke of Buccleuch, [1892] P. 201, that even after a case had been to the House of Lords a new plaintiff might be substituted for one wrongly so made. The decision was based on this, that the words "at any stage" meant "so long as anything remains to be done." In the present case, if plaintiff can maintain his action, he is entitled to an opportunity of shewing any special damage he may have suffered. But defendant must be fully indemnified.

Order made as asked. Plaintiff to file and serve such amendments as he may be advised within a week. Defendant to have eight days within which to deliver such amended defence as he may be advised. Costs of this motion and all costs lost or incurred by reason of this order to defendant in any event.

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MACLAREN, J.A. NOVEMBER 28TH, 1903.

CHAMBERS.

## RE BOYD, BOYD v. BOYD.

*Will—Construction—Legacy — Deferred Payment of — Executor — Mortgage—Change of Circumstances.*

Motion by plaintiffs for an order on defendant, executor of a joint will made by his father and mother, for an account, and for payment into Court of moneys to which plaintiffs are entitled. The testator and testatrix had, previous to making the will, sold their farm to defendant, and he gave them a mortgage back for $2,000, with interest at five per cent. This sum was to be divided among the plaintiffs, grandchildren of the testator and testatrix. Defendant paid the interest to his mother until her death in 1886.

He sold the farm, and had since received the amount of the mortgage from the purchaser, and given a discharge. The will contained a provision that the bequests to plaintiffs should not be payable during the lifetime of defendant, "unless at his own option and free will, but shall become due and payable, with all additions of interest, when claimed after his death."

T. D. Delamere, K.C., for plaintiffs, contended that, on account of the altered circumstances, they were now entitled to their legacies.

J. H. McGhie, for Margaret Doan.

C. Swabey and F. A. Kerns, Burlington, for the executor.

MACLAREN, J.A. (sitting for a Judge of the High Court), held that the provision giving the executor the option of deferring payment of the legacies during his lifetime, was made in his case as mortgagor, and this relation no longer existing, and he having now no interest in deferring the payment of the legacies, plaintiff had become entitled to them.

Order made directing a reference to the local Master at Milton to take the accounts and to fix the compensation of the executor. The moneys in his hands to be paid into Court at once. Further directions and costs reserved.

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BOYD, C. NOVEMBER 30TH, 1903.

CHAMBERS.

## NOXON CO. v. COX.

*Venue—Motion to Change—County Court Action—Contract — Clause Governing Venue—Construction—Enforcement*

Appeal by defendant from order of Master in Chambers (ante 1046), refusing to change the venue from Woodstock to Goderich and to transfer the action from the County Court of Oxford to the County Court of Huron.

A. A. Miller, for defendant.

C. A. Moss, for plaintiffs.

BOYD, C.—The contract sufficiently, though inaccurately, expresses that the venue shall be local in any action upon the contract at the option of the manufacturers. That is, it shall be tried in the locality where the head office of the company is situate, in the appropriate Court, if the company, as plaintiffs, so elect. The expression in the contract is

that the "suit may be entered, tried, and finally disposed of in the Court where the head office of the Noxon Company (Limited) is located." That is, of course, literally insensible; the head office is not in the Court, though it may be in the town and in the county in which the Court is held, whether Division or County Court.

I affirm the Master's order, but it will be right to express what is offered by the company, that the extra expense of trying at Woodstock, instead of Goderich, is to be borne by plaintiffs in any event.

Costs of appeal in the cause.

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MACLENNAN, J.A. NOVEMBER 30TH, 1903

C.A.—CHAMBERS.

## RE RAWDON VOTERS' LISTS.

*Parliamentary Elections—Voters' Lists—Notice of Complaint—Mistake in—Amendment—Form—Sufficiency.*

Reference under sec. 38 of the Ontario Voters' Lists Act upon a case stated by the Judge of the County Court of Hastings.

One Robert Tôtton, a duly qualified voter, filed with the clerk of the municipality six several notices of complaint, one in respect of voters in each of the several polling subdivisions of the township, for that purpose in each case using the form No. 6 prescribed by sec. 17 (1) of the Act.

In each of his notices the complainant made the mistake of placing in list No. 2 of the form, which was intended for cases of misnomer only, names which should have been placed in list No. 3, as being names which should, for various reasons, not have been inserted in the voters' list at all. It was conceded that all the names placed in list No. 2 were the true names of the persons, and there were no cases of misnomer. The ground of objection was stated after each name, most of them being by reason of non-residence, absence from the municipality or electoral division, or not being of age. There were a number of names properly placed in list No. 3, objected to on similar grounds to those specified in list No. 2.

The notice signed by the complainant referring to the several lists of names was "that the several persons whose names are mentioned in the first column of the subjoined list No. 2 are wrongly stated in the said voters' list as shewn in said list No. 2," and "that the several persons

whose names are set forth in the first column of the subjoined list No. 3 are wrongfully inserted in the said voters' list as shewn in said list No. 3."

The printed heading of list No. 2 was: "List No. 2, shewing voters wrongly named in voters' list." And that of No. 3: "List No. 3, shewing persons wrongfully inserted in the voters' list."

It was objected before the County Court Judge that none of the names in list No. 2 could be removed from the list, inasmuch as there was no error in any of the names and that the time of appealing having elapsed, no amendment of the notice could be allowed which would have the effect of disfranchisement. On the other hand, it was contended that the grounds of objection being specified in each case, the notice was sufficient, or at all events might be amended.

The questions referred were, whether the notice was sufficient to entitle the complainant to prove his objections, and if not, whether it might be amended.

R. A. Grant, for Robert Totten, the complainant.

F. Arnoldi, K.C., for certain voters, contra.

MACLENNAN, J.A.—By sec. 32 of the Act it is declared that "the Judge shall have power to amend any notice or other proceeding upon such terms as he may think proper."

It seems to have been contended before the learned Judge that, inasmuch as the effect of an amendment whereby the names in question or any of them should be struck off the voters' list, would be to disfranchise voters, it ought not to be allowed, for it would in effect be filing a new complaint after the time for complaining had elapsed. But it is to be observed that the inquiry before the Judge is not whether any voter is to be disfranchised, but whether certain persons are or are not entitled by law to vote, or to exercise the franchise. If persons not entitled to vote are left on the list, that is a most serious wrong done to all who are so entitled, and if the names of such persons are stricken off, they suffer no wrong.

There is, therefore, in my opinion, no ground on which a notice of objection, such as that in question, should not be amended by the Judge as freely as any other notice. Neither can it be an objection to an amendment that the time limited by the Act for serving notice of objection had elapsed, inasmuch as the matter cannot come before the Judge at all until after that time.

I am, therefore, of opinion that the learned Judge might have amended the notice, if he thought any amendment

necessary. But I am of opinion that in this particular case no amendment was necessary.

Although the names were not placed in the proper list as intended by the statute, no one could be misled by that, inasmuch as the objection to each name is distinctly specified and set forth opposite to each name; and the complaint is that the names on the list No. 2 are wrongly stated in the voters' list, as shewn in said list No. 2. The forms prescribed by the Act need not be followed with exactness. What the Act, sec. 4, declares is, that the forms set forth in the schedule, or forms to the like effect, shall be deemed sufficient for the purposes mentioned in the schedule. So long as the nature of the objection to any particular name on the list is made reasonably clear by the notice, that, in my opinion, is sufficient, even if the form in the schedule to the Act be not followed at all.

The complaint should, therefore, be referred back to the learned Judge to be heard and disposed of according to law.

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CARTWRIGHT, MASTER. DECEMBER 2ND, 1903.

CHAMBERS.

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

*Summary Judgment—Motion for—Action on Covenant in Mortgage—Defence—Denial of Execution and Consideration.*

Motion for plaintiffs for summary judgment under Rule 603.

The action was brought to recover the amount due under a covenant for payment contained in a mortgage deed purporting to be executed by defendant (and his wife to bar dower), on 27th May, 1893, and witnessed by a law student in the office of the solicitors of plaintiffs.

The writ of summons was issued on 26th August, 1903. Interest was claimed from 27th May, 1895, only. The defendant was served on 29th August, and entered an appearance.

Before action defendant had had some correspondence and other negotiations with plaintiffs' solicitor, in which he did not repudiate his liability, and offered to give a note for $50 to obtain a release.

In answer to the motion defendant made an affidavit denying that he ever executed a mortgage to plaintiffs, and that he ever received from them the consideration of $325 stated.

F. J. Dunbar, for plaintiffs.

W. J. Elliott, for defendant.

THE MASTER.—Defendant was cross-examined upon his affidavit. He seems to have been a very straightforward and candid witness, and I have no doubt he honestly believes that in some way he was tricked into signing the mortgage and other documents connected with the loan, if the signatures are really his. He will not positively deny that they are his.

Neither the wife nor the witness to the mortgage was asked to give any evidence on the motion.

It is to be observed that defendant never paid any interest on the mortgage, nor was he ever asked to do so. Yet plaintiffs give credit for the interest for the first two years. By whom this was paid has not been shewn. . . .

[Jacobs v. Booth's Distillery Co., 85 L. T. R. 262, and Munro v. Orr, 17 P. R. 53, referred to.]

Under all the facts of this case . . . I think there is a triable issue to go before a jury as to whether the mortgage in question was the genuine and bona fide act of defendant.

Motion dismissed. Costs in the cause.

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CARTWRIGHT, MASTER. DECEMBER 2ND, 1903.

CHAMBERS.

## WILLIAMS v. HARRISON.

*Writ of Summons—Renewal after Expiry—Statute of Limitations—Setting aside ex Parte Order—Material Evidence Withheld.*

Motion by defendant Joseph Harrison to set aside an order of 26th August, 1903, made by a local Judge, on the ex parte application of plaintiff, for the renewal of a writ of summons issued on the 1st May, 1900, in an action upon promissory notes, and the renewal and service on the applicant.

It was admitted that the writ had expired on the 1st May, 1901, and had not been renewed before the order in question, and that recovery on the notes was barred by the Statute of Limitations, unless the action saved the plaintiff's rights.

T. P. Galt, for applicant.

C. A. Moss, for plaintiff.

THE MASTER.—The original order was before me, and is stated to be made " on reading the affidavit of E. L. Dicken-

son, filed, and upon hearing the solicitor for the plaintiff. So I must assume that this was all the material laid before the local Judge. . . That affidavit . . states the facts to a certain extent; but no mention is made of the writ, nor of the dates of the notes sued on, nor of the fact that they were all barred on the 6th May, 1901, more than two years before the order now under consideration. . . .

[Doyle v. Kauffman, 3 Q. B. D. 7, and Hewett v. Barr, [1891] 1 Q. B. 98, referred to.]

Canadian Bank of Commerce v. Tennant, ante 277,393, 5 O. L. R. 524, shews that I am competent to entertain the motion, but that I can rescind the order only on the ground "that material evidence was withheld on the application." Now, in view of these two English cases and of the decisions in our own Courts, I think that this was the case, though I am satisfied that it was not intentional.

In the order of the local Judge there is no reference to the writ, nor is it made an exhibit to Mr. Dickenson's affidavit. There is nothing, therefore, to lead one to suppose that the bar of the statute had been brought to the notice of the Judge. Had this been done, it is not to be supposed that, in face of the authorities, the order would have been made; and, therefore, I feel justified in setting it aside, as I would do had I been led into a similar error, and as I did in Bolster v. Booth, ante 890. . . .

St. Louis v. O'Callaghan, 13 P. R. 322, is the only case that in any way favours the plaintiff. But it is said there that in the last renewal the affidavit on which it was granted expressly stated that "the Statute of Limitations had not run against the plaintiff's claim."

I have not overlooked the vigorous contention of plaintiff's counsel that the discretion of the learned local Judge could not be interfered with. But, as was said in effect by Cockburn, L. C. J., in Doyle v. Kauffman, no Judge has discretion to interfere with the operation of a statute. It must, therefore, be presumed that there was no such intention, unless the contrary is proved beyond all possibility of doubt. . . .

The motion must be granted, and the order, renewal of writ, and service, set aside.

I think it is not a case for costs.

DECEMBER 2ND, 1903.

DIVISIONAL COURT.

## ONTARIO PAVING BRICK CO. v. BISHOP.

*Mechanics' Liens—Liability of Owner to Contractor—Completion of Work by Owner—Right to Set off Difference in Price.*

Appeal by defendant Singer from the judgment of an official referee after the new trial of a mechanics' lien action by him pursuant to the order of a Divisional Court (ante 320). The action was brought by a material man who supplied materials to the contractor for the work done by him for the owner. The work was done by the contractor, the defendant Bishop, under an agreement with the owner (the appellant), and the work contracted for was the erection and completion of two brick houses in Crawford street, in the city of Toronto. By the terms of the agreement the work was to be completed on or before 14th August, 1902. The contractor proceeded with the work, but only a comparatively small part had been done on the 14th August, 1902. The owner entered into new contracts with other tradesmen for the completion of the work, and it was completed by them at his expense. The Referee decided that the owner was not entitled to set off against the value of the work done by the contractor the difference between the actual cost to the owner of the work and the price he had agreed to pay to the contractor.

W. E. Middleton and D. C. Ross, for appellant.

F. E. Hodgins, K.C., for the Rathbun Co., lienholders.

J. E. Irving, for plaintiffs.

J. E. Cook, for defendant Bishop.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) held that it was a proper conclusion from the evidence that there was an unqualified and absolute refusal by the defendant Bishop to go on with and complete the work on his contract after he had been more than once requested to do so, which evidenced an intention no longer to be bound by the contract, and justified the appellant in proceeding to complete; and the appellant was, therefore, entitled to recover the damages sustained by him owing to the default of defendant Bishop in the performance of his agreement. These damages exceeded the amount found due to defendant Bishop.

Appeal allowed with costs, and judgment appealed from set aside in so far as it affects the appellant, and action as to him dismissed with costs.

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MEREDITH, J. DECEMBER 3RD, 1903.

CHAMBERS.

## HENNBECKER v. McNAUGHTON.

*Costs—Leave to Appeal as to—Ex Parte Application—Discretion of Trial Judge—Scale of Costs.*

Motion by plaintiff ex parte for leave to appeal from the order as to costs made by MEREDITH, J., upon the trial of the action.

MEREDITH, J.—The application should have been made when the order was pronounced, and should not generally be made ex-parte at any time; but, if the applicant had made out a prima facie case, I should have directed notice to be given so that the subject in all its bearings might be discussed. . . . That, the first stage, however, fails.

The only ground upon which leave is sought is, practically, that the question might be better argued if plaintiff were given another chance. But in that I cannot agree. Counsel for plaintiff left nothing unsaid at the trial that usefully could be said in support of the desire for more costs.

I was, and am yet, of opinion that my discretion upon the subject was exercised as favourably towards the plaintiff as it rightly ought to have been, and that leave to appeal ought not to be given, unless, indeed, the intention of the Legislature to prevent such litigation over the mere question of costs, is to be frustrated. The subject was put in the discretion of the trial Judge, to be under ordinary circumstances and very generally determined by him.

The case is not one of any magnitude in any sense, and is one which, if the parties really wished to avoid costly litigation, might very well have been worked out in a lower Court. The plaintiff was too ready, if not eager, for litigation, and for an action in the High Court. It is not unusual for one who has paid his debt to bring an action to establish the fact by a judgment of the High Court. It need hardly be said that generally there is no ground for such litigation, and that no sort of encouragement should be given to it, else we might have persons litigiously built frequently bringing actions for a "declaration" of the Court that this or that trivial debt had been paid or satisfied. It is better to wait until sued in

the Division or County Court and there to plead payment. There was really no good ground for any injunction in this case; the real, the sole, substantial question was whether the small amoun t actually in dispute, and in respect of which any judgment of the Court was given, had been paid, that is, whether the witness Keene was or was not authorized by the defendants to receive for them the payments admittedly made to him by the plaintiff.

No order.

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HODGINS, LOC.J. OCTOBER 17TH, 1903.

DECEMBER 3RD, 1903.

EXCHEQUER COURT OF CANADA.

TORONTO ADMIRALITY DISTRICT.

REX v. THE "KITTY D."

*Ship—Foreign Fishing Vessel—Seizure for Fishing in Canadian Waters—International Boundary Line—Rules for Determining Dispute as to Situation of Vessel when Seized—Appreciation of Evidence—Certificate of Probable Cause for Seizure—Costs.*

The "Kitty D.," a fishing vessel, owned in the United States, was seized by the Canadian cruiser "Petrel" in Lake Erie, on the 3rd July, 1903, under R. S. C. ch. 94, for alleged fishing north of the international boundary line between Canada and the United States.

E. L. Newcombe, K.C., and L. Kinnear, for the Crown.

W. M. German, K.C., for the owners.

C. H. Ritchie, K.C., for the Government of the United States.

HODGINS, LOC. J.—The question in this case is whether a seizure of the United States fishing boat "Kitty D." by the Dominion cruiser "Petrel" on the 3rd July last for alleged fishing, was made in Canadian waters, north of the international boundary line.

Captain Dunn, of the cruiser, stated that he left Port Dover on that morning at 6.30 o'clock and directed his officers to take the course to clear Long Point S.E. by S. $\frac{1}{4}$ S., which was the usual course in calm weather, but, owing to the variation of the compass, the true course would be represented by E. by N. $\frac{7}{8}$ N. That he set the log when they were immediately abreast of the Long Point light-house,

from which he was approximately about five-eighths of a mile: that after registering five knots he turned the "Petrel" on her course down the lake and ran down the boundary line E. by N. ½ N.; and shortly before noon the second officer came and told him there were two tugs, one of which was nearly directly ahead a little to the port, and the other away to the north of the boat; that he turned to the one on the north, which was about two miles off, and made a crescent towards the north-west for about ten minutes, and then south-west, and signalled her to slack speed and so overtook and seized her. The distance of these different crescent courses was not stated.

The other witnesses for the Crown were, First Officer Inkster, who stated that the "Petrel" left Port Dover at 6.30 o'clock that morning; that the usual course in calm weather was S.E. by S. ¼ S.; that he was on the bridge until 8 o'clock, when she was steering E. by S. ¼ S. from Port Dover; and that they passed Long Point about 8.30 at the distance of about half a mile.

Second Officer McPherson corroborated the first officer as to the course of the "Petrel" on the 3rd July, except as to the steering E. by S. ¼ S.—he making it S.E. by S. ¼ S. He also said that he could not tell whether they were south or north of the international boundary line; and he estimated that they were about one half mile from Long Point when the log was set, which he says is the usual distance, though it might vary several hundred yards.

The seamen who steered the "Petrel" on that day were also examined. Slade said that when he took the wheel the vessel was steering S.E. by S. ¼ S., thus confirming Second Officer McPherson, but when asked the nature of the turn from S.E. by S. ¼ S. he gave the course E. by N. ½ N. He admitted that he had only been a mariner for one season, and had not much experience in steering, and that he was not known in marine circles as a "wheelsman," and that this was the first time he had steered from abreast of Long Point out to the boundary line.

Campbell said that when he took the wheel at 10 o'clock the "Petrel" was steering E. by N. ½ N., and that he continued on that course; that he had never steered a boat until this summer. Neither of these seamen knew anything about a compass prior to their going on the "Petrel" last April.

Captain Spain gave evidence that he came to Port Colborne on the 8th July and hired the "Golden City," and steered out into the lake to see if he could find the nets of the "Kitty D.," which were reported to have been left in the

lake, and that he was accompanied by Captain Jones, of the "Kitty D.," and Mr. Dechart, one of the owners. He suggested that Captain Jones should take the wheel, but the captain of the "Golden City" did not give it to him. Jones then offered that if he were taken across to Dunkirk and could start from there, as he knew that course, he could find the "Kitty D.'s" nets, and he described to Captain Spain the kind of buoy attached to the nets of the "Kitty D." Jones's offer was, however, declined, and the "Golden City" returned, after failing to find the place where the "Kitty D.'s" nets had been set. Captain Spain further stated that the "Petrel" left Port Colborne on the following morning at 6 o'clock, and that he instructed Captain Dunn to go to Long Point and take the course he had reported to him he had taken on the 3rd July S.E. by S. ¼ S., for five miles out; that after steaming out for about five miles from Long Point he said they got to about a mile and three quarters north of the boundary line, and, owing to not having allowed for the over-registering of the log, the "Petrel" was a little further out than that. He also estimated from Captain Dunn's report that the place of seizure was 9¾ knots from Lapp Point on the Canadian shore; and he shewed that the British chart made Lapp Point 10½ miles from the boundary line, though the real boundary line there is 11¼ miles. According to his estimate the "Kitty D." was three-quarters of a mile north of the Canadian side of the boundary line, to which he would add on the statement of Captain Jones that the place of the "Kitty D.'s" nets was "five minutes north," a further three-quarters of a mile—making in all 1½ miles north on the Canadian side. But he admitted that he could only give the distances approximately.

The only witnesses for the Crown who gave evidence of the locality of the seizure, were Captain Dunn and Captain Spain, the latter only estimating the locality of the seizure on the report made to him by Captain Dunn.

The following may be taken as a fairly condensed summary of the defendants' evidence as to the seizure of the "Kitty D." on the 3rd July.

Jones, her captain, said that he started from Dunkirk about 5 o'clock that morning and steamed out for about an hour and five minutes N. by W. ½ W. to where he had set his nets east by south on the 2nd July; that the buoy of his nets was about 9¾ miles from Dunkirk; and that his ship was seized by the "Petrel" at that distance from the United States shore. He also steamed out on the "Desmond" on the same course, 9¾ miles, and found his nets, and that one

of the corks was then taken off with the owner's mark "R. and D." on it, and that all the nets remained out until the 26th July, when they were taken up except one which he left, and he asserted that he was fishing at the time of seizure on the United States side of the boundary line, and so stated to the captain of the "Petrel."

Dewitt, one of the hands on board the "Kitty D.," said they left Dunkirk about five or half past or six o'clock, and steamed out into the lake for somewhere in the neighbourhood of an hour. He also said that about the end of July he saw the "Kitty D.'s" buoy and fished around it.

Helwig, the captain of the tug "Lucy," said that on the 3rd July he was out from Dunkirk about 9 or 10 miles, lifting his nets; that he was a little to the north of the "Kitty D." with his outer net, that he saw the "Petrel" go to the westward and seize the "Kitty D."; that on the 4th July he found that the "Kitty D.'s" nets, which had been set on the 3rd, had crossed his, which he had previously set on the 2nd July north and south; that his most northerly nets were a mile to the north of the "Kitty D.'s;" and he was positive that the "Kitty D." was in United States waters at the time of the seizure; and that his outer (north) buoy was also in the same water.

Connor, the engineer of the "Lucy," said that on the 3rd July they were about a mile north of the "Kitty D." and saw the seizure; that their nets had been set on or about the 2nd July north and south; and that in lifting them on the 4th they found that the nets of the "Kitty D." which had been set on the 3rd, had crossed the "Lucy's;" that their outer buoy was about a mile north of the "Kitty D.'s" nets. He also stated that it took him about thirty minutes to get to his inside buoy, and that his nets extended out $3\frac{1}{4}$ or 4 miles and made their distance from Dunkirk about 7 or 8 miles. And he also said that at the time of the seizure the "Kitty D." was in United States waters.

Captain Howison, of the United States navy, who had been sent by the Secretary of the Treasury of the United States to investigate the case, said that on the 27th July he left Dunkirk on the United States revenue cutter "Fessenden," preceded by the tug "Desmond" to shew him the locality of the "Kitty D.'s" buoy; that they found it, and had two corks taken off marked "R. & D."; and on returning to Dunkirk he logged the distance from the "Kitty D.'s" buoy which he found to be $9\frac{1}{2}$ statute miles. He further stated

that the international boundary line is about 11½ miles from Dunkirk, and a little over 2 miles north of the western buoy of the "Kitty D.'s" nets. He also stated that from where he found the buoy he could see the American shore, but not very well the Canadian shore.

Mr. Harvey, Consul of the United States at Fort Erie, went out from Dunkirk on the "Desmond" on the 7th July to the western buoy of the "Kitty D.'s" nets, Captain Jones, of the "Kitty D.," and others, being with him; that the time going out was one hour and six minutes; that he logged the distance, which he found to be 9¾ miles; that he took off a cork with the initials of the owners, "R. & D.," on which he put his own initials, and produced it at the trial; that in returning to Dunkirk it took one hour and seven minutes; and that the log shewed 9¾ miles from where the "Kitty D.'s" nets were found.

Donnelly, the captain of the "Desmond," said he was setting nets on the 3rd July and saw the "Kitty D." while about a mile south-east of the "Desmond"; that he was then about 7 or 8 miles from Dunkirk. He saw the "Kitty D." seized. He further said that he went out on the "Desmond" on the 7th July with Mr. Harvey, Captain Jones, and Mr. Ryan, one of the owners of the "Kitty D.," to take the distance from the shore to the "Kitty D.'s" buoy, and found the buoy, and took off one of the corks with "R. & D." on it; that the distance from Dunkirk to it was 9¾ miles, and that the time occupied was 1 hour and 6 minutes; and that on logging back the distance they found it the same.

Burns, captain of the fishing tug "Charm," also went out on the "Desmond" on the 7th July, and found the buoy of the "Kitty D.'s" nets less than ⅛ of a mile of 9¾ miles' distance from Dunkirk, and took off a cork marked "R. & D." He also said that the place where they found the buoy was about 2½ miles on the United States side of the boundary line.

Jones, on being recalled, stated that when he took Captain Howison out they went to the most northerly buoy of the "Kitty D.'s" nets.

Dechart, one of the owners, who went with Captain Spain on the "Golden City" on the 8th July, and on the "Petrel" on the 9th July, to find the "Kitty D.'s" nets, stated that they were unable to find their locality on both occasions.

From the above it will be seen that the weight of evidence as to the place of the seizure of the "Kitty D." is with the defence.

But there are also incidents to be taken into consideration which seem to be material to the decision. In taking the turn into the lake from Long Point on the 3rd July Captain Dunn stated that the rounding of the "Petrel" might increase the outward distance from Long Point by, say, 200 yards, and it might throw the ship out of her bearings that much, and that the turning might fluctuate from 200 to 500 yards off Long Point, which would seem to throw doubt as to the locality where the turning to the international boundary line actually took place; and to this he added that in taking a course along the international boundary line, there would, of course, be some deviation from a straight course to the right or left—a fact which it is reasonable to assent to, seeing that the vessel was proceeding on a liquid highway and out of sight of any distinctive land-mark on the shores; and on this day, through an atmosphere described in the logbook "wind, light, baffling to calm, heavy thunder squall with rain," and by several witnesses as cloudy, raining, misty; weather thick, kind of squally, rainy weather, quite a storm came up that day.

Then with these atmospheric difficulties there was the inexperience of the seamen in the practice of steering a ship, and their recent acquaintance with the points of a ship's compass, which leaves it somewhat doubtful as to their knowledge of its deviations, and especially, as it came out in the evidence, that the change of a quarter of a point in a compass would make a difference of a mile and a half right or left in a vessel's course over a distance of some 30 miles.

Add to this the fact that the buoy of the "Kitty D.'s" nets was a red pole, ten feet high, with an oil skin flag at the top, then a piece of a pair of overalls, and next below a piece of shirt, which neither on the search of the "Golden City" on the 8th, nor the search of the "Petrel" on the 9th July, was discovered—although the course of the "Petrel" on the 9th July is said by Captain Dunn to have been precisely the same as that taken by the "Petrel" the day he captured the "Kitty D."

Finally there are divergencies in the charts and in the estimates given by some of the witnesses of the distance of the international boundary line from both the Canadian and United States shores.

It has been well said by Judge Black, of the Quebec Admiralty Court, that "statements as to time and distance in maritime cases are probably more or less erroneous." And Sir William Scott, when dealing with the evidence of estimated distances at sea in the case of the "Twee Gebroeders," 3 Rob. at p. 163, says: "An exact measurement cannot be

easily obtained; but in a case of this nature, in which a Court would not willingly act with an unfavourable minuteness towards another State, it will be disposed to calculate the distance very liberally." And this conclusion was approved by the United States Admiralty Court in Soult v. "L'Africaine," Bee's Admiralty Reports, 205. For, as Sir William Scott afterwards said, in the "Twee Gebroeders" case, on p. 338, "it is scarcely necessary to observe that a claim of territory is of a most sacred nature. In ordinary cases, where the place of capture is admitted, it proves itself;" but he added that it is otherwise when it happens in places where it is contended that no right exists, and then the facts on which the right depends must be competently established.

These cases sustain the doctrines of international law which have been thus fairly stated in Barr's Private International Law, pp. 1067-8:—"In the case of any real doubt, the decision must be against the subjection of a ship to a territorial sovereignty. The hull of the ship presents at once to the mind the notion of the subjection of that ship to the law of her own flag. We cannot regard that subjection as removed, unless some sensible and unmistakable cause for its removal has intervened. Any other determination of the question would involve legal relations in uncertainty and confusion.

"On land-locked lakes surrounded by several States, the same principles as regulate the application of territorial law on dry land must rule, in so far as there are distinct boundary lines recognized. The well known rule for fixing these is that the centre of the lake determines them just as is the case with rivers. But if there is a condominium of the surrounding States, we are forced to consider a ship in matters of civil law, while she is on a voyage on the lake, as a part of the territory from which she hails, just as we do in the case of a ship upon the high seas. As regards contentious jurisdiction, there is a question about arresting a ship, but this expedient seems not to be desirable, because it might easily be abused, and would be exceedingly apt to lead to a small warfare of jurisdictions."

On the facts disclosed in the evidence, and aided by the authorities cited, I must find that the locality of the "Kitty D.'s" fishing on the 3rd July last, was not within the Canadian waters on the north of the international boundary line in Lake Erie, and that her seizure on that day by the cruiser "Petrel" cannot be sustained; and an order will issue for her restoration to her owners.

After the foregoing judgment had been delivered, the Crown counsel moved for a certificate of "probable cause for the seizure" under sec. 15 of R. S. C. ch. 194.

L. Kinnear, for the Crown.

W. M. German, K.C., for the owners.

HODGINS, LOC. J.—Since disposing of this case, the counsel for the Crown has moved for a certificate, under sec. 15 of the Act respecting Fishing by Foreign Vessels, R. S. C. ch. 94, that there was "probable cause" for the seizure of the "Kitty D." on the 3rd July last. That section provides that if such certificate is issued the owners "shall not recover more than four cents damages, and shall not recover any costs, and the defendant shall not be fined more than twenty cents." But I think sec. 20 of the Act relieves me of this responsibility of considering whether such a certificate should issue or not; for that section declares that "the Act shall apply to every foreign ship, vessel, or boat, in or upon the inland waters of Canada." My finding on the evidence was that this foreign ship "Kitty D." was not "in or upon the inland waters of Canada" at the time of her seizure, and I must therefore hold that such finding negatives the statutory power to grant the certificate moved for.

By Rule 132 of the General Rules in Admiralty cases, it is provided that costs are to follow the event, and under that rule the owners are entitled to their costs of this action against the Crown.

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OSLER, J.A. DECEMBER 5TH, 1903.

CHAMBERS.

## RE WAY.

*Will—Construction—Bequest of Personal Effects—Mortgage—Liability for Debts and Expenses of Administration.*

Motion by executors under Rule 938 for order declaring construction of will of James Way, and for directions to executors. The testator died on 15th February, 1893. By his will, dated 10th January, 1876, he directed that his debts and funeral expenses should be paid by his executors, and the residue of his estate, real and personal, which should not be required for the payment of his just debts and funeral expenses and the expenses attending the execution of his will and the administration of his estate, he gave as follows: To his wife all his furniture, books, plate, and other personal effects; and so long as she remained his widow he devised to

her all his real property for her sole use and benefit so long as she should live; but if she should marry again she was to have one-third of the rents for life, and his daughter Eliza, being unmarried, should have the full use and benefit of two-thirds of the rents or net proceeds of the real estate until she marries or dies—"In the event of her marriage or death and my said wife being living but married again, then the two-thirds as aforesaid shall be from time to time equally divided amongst my children in Canada until the death of my wife. In the event of the death of my wife previous to the marriage or death of my daughter Eliza, then the said Eliza shall have the full use and benefit of the whole of the rents or net proceeds of my said real estate until she marries again. As soon as may be convenient after the death of my wife and the death or marriage of my said daughter, the property shall be sold and the proceeds divided" (among children and grandchildren). The testator left him surviving his widow and five daughters, all married, one being his daughter Eliza mentioned in the will. The daughters were still living. The widow died on 14th November, 1902, having made a will in favour of her daughter Sarah Jane Way. The estate of the testator consisted of household furniture and chattels valued at $250; policy of life insurance, $150; two parcels of real estate, valued at $2,400; and a mortgage on real estate. The testator's debts and funeral expenses and the expenses attending the execution and probate of his will were paid out of the insurance moneys. The real estate had not been sold, and the executors had not received any remuneration.

J. Dickson, Hamilton, for the testator's daughter Louisa May Robins, contended that the mortgage did not pass under the bequest to the widow, and also that it was liable, in priority to the real estate, to the payment of all his debts, funeral expenses, and expenses attending on the execution of his will and the administration of his estate.

D'Arcy Tate, Hamilton, for the daughter Sarah Jane Way, contended that the widow took the beneficial interest in the mortgage.

OSLER, J.A.—. . . . In my opinion the beneficial interest in the mortgage passed to the widow. Taking the whole clause in which the bequest of the personalty is found, it is in express terms a gift of the residue (Williams on Executors, vol. 2, p. 1317), and if the words "and other personal effects" are not cut down by the words which precede them, they are wide enough, having regard to the large meaning of the word "effects" (Roper on Legacies, 2nd Am. ed., pp.

279, 280, Am. & Eng. Encyc. of Law, 2nd ed., vol. 10 p. 448), to include a mortgage or other chose in action. Then, are they restricted by the preceding words to things ejusdem generis with property which these words describe? If the gift were not in terms or in effect residuary, and the will contained other dispositions of the personal estate, there might be room to infer that the testator was not using the general words in their larger sense. As it is, he shews that his intention was to dispose of the whole of his personal estate (of which at the date of his will the mortgage formed part), and unless the words he has used were given their larger meaning, his intentions would be frustrated, and part of the residue would remain undisposed of, a result which is always, if possible, to be avoided, and which nothing in the will invites: Hodgson v. Jex, 2 Ch. D. 122; In the Goods of Jupp, [1891] P. 300; In the Goods of Shepherd, 48 L. J. N. S. P. D. 62; King v. George, 4 Ch. D. 435; Dunally v. Dunally, 6 Ir. Ch. 540.

The whole of the property of the deceased being charged by his will with the payment of his debts and funeral expenses and the expenses attending the execution of his will and the administration of his estate, and the bequests and devises to the widow and others being residuary, the question whether the mortgage debt is liable in priority to the real estate for these expenses, is answered by sec. 7 of the Devolution of Estates Act, R. S. O. 1897 ch. 127, which enacts that the real and personal property of a deceased person comprised in any residuary devise or bequest shall (except so far as a contrary intention shall appear) be applicable ratably according to their respective values to the payment of his debts. As to funeral and other expenses, although the section is silent as to these, the result ought to be the same: Re Thomas, 2 O. L. R. 660, 664. Order declaring accordingly.

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## ERRATUM.

Page 1044, ante, 9th line from bottom. For "H. S. Osler, K.C.," read "W. R. Riddell, K.C., and W. E. Foster."