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BURBIDGE, J. MARCH 4TH, 1902.

EXCHEQUER COURT OF CANADA.

FINDLAY v. OTTAWA FURNACE AND FOUNDRY CO.

Industrial Design—Manufactured Imitation of—Infringement—Register of Designs—Jurisdiction of Exchequer Court.

Action for injunction to restrain the defendants from infringing the registered industrial design of the plaintiffs in respect of the "Royal Favorite" cooking stove, by applying the said design, or a colourable imitation thereof, to the manufacture of the stove named by the defendants the "Royal National," or by selling or exposing for sale or use the said "Royal National" stoves, or colourable imitations of the "Royal Favorite" stoves, and to have the register of industrial designs rectified by expunging therefrom the industrial designs of the defendants' "Royal National" stoves.

W. D. Hogg, K.C., for plaintiffs.

G. F. Henderson, Ottawa, for defendants.

BURBIDGE, J.—I do not think anything would be gained by reserving this case. It is largely a question of fact that is to be determined, and the question has been very fully discussed. I have no doubt that I have jurisdiction in the matter, and I think it clear that the plaintiffs have a registered design in respect of which they are entitled to protection.

As to the law bearing on the case, it is, I think, to be found in the cases referred to in In re Melchers, 6 Ex. C. R. at p. 101—Harper v. Wright, Holdsworth v. McCrea, and Hecla Foundry Co.'s case—and Oliver v. Thornley, 13 Cutl. P. C. 490.

Then as to the question of imitation, it seems to me that the stove the defendants are making, the "Royal National," is, as it is now manufactured, an obvious imitation of the plaintiffs' "Royal Favorite," for which the latter have a registered design. I do not think I am called upon to express any opinion as to whether or not the defendants might make a stove similar in dimensions and shape to the "Royal Favorite" that would not be an imitation of the "Royal Favorite." The only question here is whether the

"Royal National" is an imitation or infringement of the plaintiffs' registered design, and I think it is. I confine myself to that issue, and I hold myself free to deal, upon its merits, with any other case that may arise.

Now, as to the remedy. I think the plaintiffs are entitled to an injunction against the manufacture and sale of the "Royal National" stove in the form in which it has been manufactured and with the design adopted by the defendants. I do not say that the defendants are not entitled to manufacture a stove to be called the "Royal National," only that they are not to manufacture it in the form and with the design shewn in evidence in this case. I agree with Mr. Henderson that if an injunction should be granted there should also be an order to expunge from the register of industrial designs the defendants' registration of the "Royal National." There will be such an order.

On the question of the disposition to be made of the "Royal National" stoves already manufactured by the defendants, I understand the parties to say that it is possible that they can come to an agreement as to that; but if they are not able to do so, there will be a reference to the Registrar to ascertain how many there are of such stoves; and the question of the disposition to be made of them will be reserved until after his report is made.

I think the plaintiffs are entitled to their costs, to be taxed.

O'Connor, Hogg, & Magee, Ottawa, solicitors for plaintiffs.

MacCraken, Henderson, & McDougal, Ottawa, solicitors for defendants.

OSLER, J.A. APRIL 28TH, 1902.

C. A.—CHAMBERS.

McCLURE v. TOWNSHIP OF BROOKE.

BRYCE v. TOWNSHIP OF BROOKE.

Drainage Referee—Official Referee—Jurisdiction—Judicial Officer—Leave to Appeal.

Motion by defendants for leave to appeal from the judgment of a Divisional Court (FALCONBRIDGE, C.J., STREET, J.), *ante* p. 274.

J. H. Moss, for defendants.

G. H. Watson, K.C., for plaintiffs.

OSLER, J.A.—There is a plain and weighty reason for giving leave to appeal in this matter, viz., that the judgment in question involves the status, jurisdiction, and authority of a judicial officer, and the validity of proceedings which

may be taken by him hereafter under the order of the Divisional Court. Plausible reasons have been suggested against the view of the Divisional Court. Leave to appeal granted on the usual terms.

APRIL 28TH, 1902.

DIVISIONAL COURT.

PICHÉ v. MONTGOMERY.

Landlord and Tenant—Excessive Distress—Irregularities—Waiver—Sale for Full Value—Account of Proceeds.

Appeal by plaintiff from judgment of County Court of Carleton in action for damages for illegal distress.

The trial Judge held that under an agreement between plaintiff and defendant Montgomery, the landlord, the former, after receipt of notice to quit, had taken certain goods as exemptions and left the rest to pay the rent, and had thereby waived all irregularities. He found $104 due at time of seizure.

W. E. Middleton, for plaintiff.

A. D. Lees, Ottawa, for defendant.

MEREDITH, C.J.—The finding as to rent due was correct, and upon the evidence the distress was not excessive. There was evidence to support the finding below as to waiver, and therefore such finding ought not to be disturbed. The contention that the sale should have been stopped as soon as contents of barber shop had been sold because sufficient had been realized to satisfy rent, expenses, and water rates, though not taken below, fails because the goods sold for their full value and the whole proceeds were accounted for to plaintiff or his solicitor.

FERGUSON, J., concurred.

Appeal dismissed with costs.

A. E. Lussier, Ottawa, solicitor for plaintiff.

Lees & Kehoe, Ottawa, solicitors for defendant.

MAY 3RD, 1902.

DIVISIONAL COURT.

BAILEY v. GILLIES.

Guarantee—Consideration—Novation—Statute of Frauds, sec. 4.

Beattie v. Dinnick, 27 O. R. at p. 295, explained.

Appeal by defendants from judgment of ROBERTSON, J., in favour of plaintiff in action to recover amount due for work and labour in driving saw logs down the Madawaska river to Arnprior, for one J. McCrea, who was under contract with defendants for that purpose, and part of whose work was subsequently, by agreement with defendants, per-

formed for them by plaintiff. The trial Judge found that defendants were anxious to have the drive finished, and agreed with McCrea, and also with plaintiff, to take over from McCrea the several contracts he had with defendants and other owners of saw logs and to pay plaintiff what was due him at the time from McCrea, and also for continuing the drive.

W. M. Douglas, K.C., for appellants.

A. B. Aylesworth, K.C., for respondent.

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

MEREDITH, C.J.—The facts and the findings of the learned Judge are fully set forth in his considered judgment, which was delivered on the 11th June, 1901, and it is unnecessary to repeat them.

I should have had some difficulty in coming to the conclusion that the judgment of my learned brother could be supported merely upon the ground that a new and substantial consideration passed from the respondent to the appellants for the promise made by them to pay what was owing to the respondent for the work done by him for McCrea on the drive, and that sec. 4 of the Statute of Frauds did not, therefore, apply.

Tumblay v. Meyers, 16 U. C. R. 143, and the observations of my brother Street with regard to that case in Beattie v. Dinnick, 27 O. R. at p. 295, are referred to by my brother Robertson, and were relied on by the respondent's counsel as establishing that proposition; but, looking at the whole of my brother Street's judgment and the cases referred to by him, it is plain, I think, that he did not intend to express his assent to it.

Expressions of opinion in some of the English cases, no doubt, lend support to the contention, but, as Mr. De Colyar points out (3rd ed., p. 130 et seq.), the law is otherwise, and so it was decided to be by the Court of Appeal in James v. Balfour, 7 A. R. 461. See also Barburg India Rubber Comb Co. v. Martin, 18 Times L. R. 428.

The judgment may, however, be supported upon one or other of two grounds:—

(1) That the result of the transactions between the appellants and McCrea and the respondent was that, upon the taking over by the appellants of the drive from McCrea, the appellants assumed the liability of McCrea to the respondent, and the respondent accepted the appellants as his debtors in place of McCrea, whose liability to the respondent was put an end to; in other words, on the ground of novation.

Or (2) that, assuming that McCrea's indebtedness to the respondent was not put an end to, the appellants took over the work, and the promise to the respondent was to pay the indebtedness out of the moneys coming to McCrea from the appellants, or which might come to the hands of the appellants from the other persons whose logs formed part of the drive. These moneys, according to the evidence, were turned over by McCrea to the appellants upon the express promise by them that they would pay the men who agreed to remain and did remain on the drive until it was put through or they were discharged, as the respondent did, not only the wages thereafter earned by them, but what was coming to them for the work they had done while McCrea had had charge of the drive.

In either view, the promise of the appellants was not within sec. 4 of the Statute of Frauds: De Colyar on Guarantees, 3rd ed., p. 81 et seq., 103; Clark v. Wendell, 16 U. C. R. 352.

The judgment should, therefore, be affirmed, and the appeal from it dismissed with costs.

T. H. Grout, Arnprior, solicitor for plaintiff.

Thompson & Hunt, Arnprior, solicitors for defendants,

MAY 3RD, 1902.

DIVISIONAL COURT.

WEBB v. GAGE.

Mechanics' Lien — "Owner"—Lease—Covenant by Lessee to Erect Buildings on Land.

Gearing v. Robinson, 27 A. R. 364, followed.

Appeal by defendant Gage from judgment of Master at Hamilton in action to realize a lien. In 1899 defendant Gage leased certain land to defendants the Hoepfner Company for 99 years, by indenture, which contained a covenant by lessees to build works and plant to the value of $100,000, which, when completed, were to become the property of the defendant Gage. The plaintiff claims a lien in respect of work done and materials furnished to the buildings, and the question raised is whether, by reason of the terms of the lease, the defendant Gage is an owner within the meaning of sec. 2, sub-sec. 3, of the Mechanics' and Wage-earners' Lien Act. There was no evidence outside of the lease of any request by defendant Gage to plaintiff.

G. Lynch-Staunton, K.C., and W. S. McBrayne, Hamilton, for appellant.

G. H. Levy, Hamilton, for defendants the Hoepfner Company.

G. F. Shepley, K.C., and W. Bell, Hamilton, for plaintiff.

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

MEREDITH, C.J.—Mr. Shepley conceded that unless this case could be distinguished from Gearing v. Robinson, 27 A. R. 364, he could not support the judgment; and he contended that the existence of the obligation imposed on the company to erect the buildings and of the provision as to their becoming the property of the appellant, neither of which existed in Gearing v. Robinson, made the cases distinguishable.

I am, however, not of that opinion.

As I understand the decision in Gearing v. Robinson, it is necessary in order to charge the interest of the appellant in the land, that the respondent should shew not only that the work was done and the materials were furnished on behalf of the appellant or with his privity or consent or for his direct benefit, but also at his request either express or implied.

Mr. Justice Maclennan said (p. 372): "Mrs. Robinson had an interest in the land, and the work was done for her at her request and upon her credit and on her behalf, etc., and there is no evidence of any request by the sub-lessors nor of any dealing of any kind between them and the plaintiff."

Substituting for "Mrs. Robinson" the "company" and for "sub-lessors" "the appellant," this statement of the learned Judge seems to me to apply exactly to the facts of this case.

In Graham v. Williams, 8 O. R. 478, 9 O. R. 458, cited with approval, it was decided that mere knowledge of or mere consent to the work being done is not sufficient, and that there must be something in the nature of a direct dealing between the contractor and the person whose interest is sought to be charged, to entitle the contractor to a charge on that interest.

In some of the American States a construction more favourable to the contractor has been given to Mechanics' Lien Acts, the provisions of which were somewhat like those of our Act, which are in question here, though not identical with them, but we are, of course, bound to follow the decision of the Court of Appeal of this Province in preference to those decisions; and following it the appeal must be allowed and the judgment appealed from be varied by directing the action as against the appellant to be dismissed with costs, and the respondent must pay the costs of the appeal.

Bell & Pringle, Hamilton, solicitors for plaintiff.

Gibson, Osborne, O'Reilly, & Levy, Hamilton, solicitors for the Hoepfner Company.

Biggar & McBrayne, Hamilton, solicitors for defendant Gage.

Moss, J.A. MAY 3RD, 1902.

C. A.—CHAMBERS.

MORRISON v. G. T. R. CO.

Discovery—Examination of Officer of Corporation—Railway Company—Engine-driver—Rules 439, 461—Leave to Appeal—Terms—Costs.

Motion by defendants for leave to appeal from order of a Divisional Court, *ante* p. 263.

D. L. McCarthy, for defendants.

J. G. O'Donoghue, for plaintiff.

MOSS, J.A.—The precise point does not seem to have arisen since McLean v. G. W. R. Co., 7 P. R. 358. The C. L. P. Act, sec. 56, was then in force, and it was decided that an engine-driver was not an officer within that section. The question arose again in a different form in Knight v. G. T. R. Co., 17 P. R. 386, and it was held that an engine-driver was not an officer within the Rule then in force. On the general question as to who are and are not officers of a corporation the views of the Judges are much at variance. In view of all the circumstances, I think leave to appeal should be given. The point is said to be, and no doubt is, one of much importance, not only to the defendants but to other large railway companies, having regard to the effect given to the depositions when used at the trial under Rule 461. Defendants should bear plaintiff's costs of the appeal as well as their own, in any event.

MAY 3RD, 1902.

DIVISIONAL COURT.

LAMPHIER v. STAFFORD.

Ditches and Watercourses—Construction—Deepening—Jurisdiction of Engineer—R. S. O. ch. 285, secs. 28, 33.

Appeal by defendant from judgment of FALCONBRIDGE, C.J., in favour of plaintiff for $5 damages and an injunction. Action for damages for trespass to land by alleged unlawful entry on plaintiff's land and digging a ditch. The defendant justified his acts under the Ditches and Watercourses Act, R. S. O. ch. 285, and the award thereunder of the engineer of the township of Richmond, in which the land is situate. The award provides for the clearing out and pos-

sibly deepening the existing ditch on the east side of the road allowance between the townships of Richmond and Tyendinaga, and also a ditch on the land in question, part of lot 2 in the second concession of Richmond, and directs one English, the owner of the south half of lot 2, to deepen the latter ditch five inches and clean out, so as to allow the water to run freely to the road ditch, and imposes on plaintiff the duty of maintaining the latter ditch after being cleaned and deepened by English. After English had finished the plaintiff filled up the ditch. Assuming that the provisions of sec. 28 were applicable, and that he had authority under it to let the work of cleaning out the ditch directed by the award to be done by English, the engineer inspected it, and finding it filled up, assumed to let the work of cleaning out to defendant, who was proceeding to do so when stopped by the injunction in this action.

H. L. Drayton, for defendant.

A. B. Aylesworth, K.C., for plaintiff.

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

MEREDITH, C.J.—It would appear to be reasonably clear that, but for the provisions of sec. 33, all that the Act deals with is the construction and the subsequent maintenance of ditches, and "construction" is defined by sec. 3 to mean "the original opening or making of a ditch by artificial means," and that is therefore what McHenry made his requisition for, and all that the engineer had any jurisdiction to deal with. Nor does sec. 33 help the appellant. It no doubt enables a land owner to make a requisition for the deepening, widening, or covering of an existing ditch, but the provision is not one enlarging the meaning of the word "construction" so as to make it include works of that character; it merely applies the Act to such works, and directs that the proceedings to be taken for procuring them to be done under the Act are to be the same as those which are to be taken for the construction of a ditch under the provisions of the Act.

I have searched without finding anything in the Act which empowers the engineer, when one kind of work is asked for, to direct another and different kind in whole or in part to be undertaken, and, with every desire to give to the Act the most liberal interpretation possible, I am unable to see my way to upholding the jurisdiction of the engineer to make the award and under the requisition in pursuance of which he assumed to make it.

The proceeding to let the work as was done by the engineer was unauthorized by the Act. The provisions of

sec. 28, under which he assumed to act, were, I think, clearly not applicable. The work directed by the award to be done by English on the respondent's lands had been completed by him, and the proceeding should have been, if under the Act, that provided by sec. 35 for the neglect of the respondent to maintain the ditch as directed by the award. The provisions of that section were not complied with, and the acts of the engineer and of the appellant were therefore wholly unauthorized and illegal.

I desire not to be understood as not agreeing in the other reasons assigned by the learned Chief Justice for his judgment. I have formed and express no opinion as to them, not having found it necessary for the disposition of the appeal to do so.

The appeal, in my opinion, fails and should be dismissed with costs.

Deroche & Madden, Napanee, solicitors for plaintiff.

J. English, Napanee, solicitor for defendant.

MAY 3RD, 1902.

DIVISIONAL COURT.

CARR v. O'ROURKE.

Administration—Grant—Discretion of Court—Next of Kin—Persons to be Cited—Surrogate Courts Act, secs. 41, 59.

Appeal by plaintiff from judgment of Surrogate Court of Kent dismissing the action, which was brought by the brother of Daniel Carr, deceased, to revoke letters of administration of his estate granted to defendant, who is married to a niece of the deceased. Robert Daniel Payne, a nephew of deceased, had been in October, 1899, appointed committee of his person and estate. Plaintiff alleges that defendant is not one of the next of kin, and that as brother of deceased, plaintiff is entitled to administer. Daniel Carr left him surviving the plaintiff, and one sister, whose daughter is married to defendant. The Surrogate Court held that plaintiff, having for many years been a citizen of and domiciled in a foreign country, was not entitled to administer, providing that any other fit and proper person of equal degree of relationship to deceased or the appointee of such person applied, and that at all events plaintiff is practically blind, and, from age and physical infirmities, not a fit and proper person; that there was no evidence of collusion between the committee and plaintiff; and that it was not the practice to cite persons living outside the Province, where, as in this case, suitable relatives resided in it.

M. Wilson, K.C., and J. B. O'Flynn, Chatham, for plaintiff.

A. B. Aylesworth, K.C., for defendant.

The Judgment of the Court (MEREDITH, C.J., LOUNT, J.) was delivered by

MEREDITH, C.J.—Section 59 of the Surrogate Courts Act provides that in the case of a person who has died intestate, where it appears to be necessary or convenient, by reason of the insolvency of the estate of the deceased or other special circumstances, to appoint some person to be the administrator of the property of the deceased or of any part of it, other than the person who but for the provision of the section would have been entitled to a grant of administration, it is not to be obligatory upon the Court to grant administration to the person who but for the section would have been entitled to the grant, but the Court is empowered in its discretion to appoint such person as the Court thinks fit to be the administrator.

The cases decided on the analogous provision of the English Court of Probate Act, 1857 (20 & 21 Vict. ch. 77), have given a somewhat narrow construction to it, and it is possible that on the facts of this case the English Probate Court might not have exercised its discretion in favour of making the grant to the respondent.

By the provisions of sec. 41 of the Surrogate Courts Act, it is only the next of kin resident in Ontario who are required to be cited or summoned where the application is made by a person not entitled to the grant as next of kin of the deceased.

The Surrogate Court, therefore, had before it all those who are required to be cited or summoned, and the consent and request of all of them that the respondent should be appointed administrator, and, having regard to the nature of the property left by the deceased, which consisted of a farm as well as of considerable personal property which required to be looked after, and the age of Mary Payne and her illiteracy, it cannot be said, I think, that the learned Judge exercised his discretion improperly in directing the grant to be made to the respondent.

The practice of the Surrogate Courts of this Province appears to be to apply the provisions of sec. 59 more liberally than do the English Courts the corresponding provision of the English Probate Act, and I see no reason why the more liberal practice which has been adopted in this Province should not be continued.

Fraud and misrepresentation being out of the case, and the Surrogate Court having exercised its discretion in

favour of making the grant to the respondent, I doubt whether the case would be one for the revocation of the grant, even if it appeared that that discretion had been improperly exercised.

I have found no case in which since the enactment of sec. 73 of the English Probate Act, which is the corresponding section to sec. 59 of our Act, a grant has been revoked because it has appeared that it was made in circumstances which according to the practice of the Probate Court it was not usual to treat as special circumstances within the meaning of sec. 73.

Cases decided before the change in the law effected by sec. 73 was made are distinguishable, because before that change it was obligatory on the Court, in case of intestacy, to commit the administration to the next and most lawful friends of the deceased (31 Edw. III. ch. 11), or to the widow of the deceased, or to the next of his kin or to both (21 Hen. VIII. ch. 5, sec. 3), and therefore the Court had no jurisdiction to commit the administration to a stranger, but now the Court is, by sec. 59, empowered in its discretion to commit the administration to a stranger if there are special circumstances which in its opinion make it necessary or convenient to do so.

Upon the whole, I am of opinion that the appeal fails and should be dismissed with costs.

J. B. O'Flynn, Chatham, solicitor for plaintiff.

J. B. Rankin, Chatham, solicitor for defendant.

MAY 3RD, 1902.

DIVISIONAL COURT.

KEENAN v. RICHARDSON.

Bankruptcy and Insolvency—Preference—Chattel Mortgage—Attack within 60 Days—Statutory Presumption—Satisfaction of Onus—Good Faith—Notice—Knowledge.

Dana v. McLean, 2 O. L. R. 466, followed.

Appeal by plaintiff from judgment of BOYD, C., dismissing action by plaintiff, a creditor of one J. Wilson, to set aside a chattel mortgage made by him to defendant on the 19th February, 1900, alleged to have been made with intent to give an unjust preference. The defendant held a mortgage for $7,000 on Wilson's farm, upon which interest amounting to upwards of $1,600 was in arrear. The mortgage contained a distress clause, in the form of the schedule to the Short Forms Act, and the evidence shewed that defendant believed he was entitled to distrain for $1,600, and

had threatened to do so when the chattel mortgage was given. This action was commenced on the 17th March, 1900.

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

G. G. McPherson, K.C., for defendant.

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

MEREDITH, C.J.—The onus, if insolvency of Wilson existed or was impending, was on the respondent to rebut the *prima facie* presumption of the intent to prefer which arises under sub-sec. 3 of sec. 2 of R. S. O. ch. 147.

The Chancellor was of opinion that this onus had been satisfied, and in that conclusion I agree.

Assuming that it was shewn that Wilson, when the chattel mortgage was given, was in insolvent circumstances, —for that is, I think, in some doubt on the evidence,—I agree in the findings of the Chancellor that this was not known to the respondent, and the proper conclusion upon the evidence is that reached by the Chancellor, that the chattel mortgage was made and taken in good faith and only for the purpose of securing the payment of the part of the arrears of interest which was secured by it, and for which it was believed by both parties to the transaction the respondent had an immediate right to distrain on the goods and chattels embraced in the chattel mortgage, and in order to relieve Wilson from the liability to have them distrained.

It does not appear to have been called to the attention of the Chancellor that the interest due was post diem interest, and that there was therefore no right to distrain for it, but that is, I think, unimportant, and does not affect the correctness of the conclusion that the *prima facie* presumption was rebutted and that the intent was not to prefer contrary to the provisions of the statute.

The fact that, when the chattel mortgage was given, the claim which the plaintiff was making was not to establish any debt or money liability of Wilson to her, but to have it declared that Wilson was trustee for her of certain land, or in the alternative to have it declared that she was entitled to a lien on this land for $400, is not unimportant in determining the question of intent in favour of the respondent.

The testimony of Wilson was relied on as establishing that the chattel mortgage was given for the purpose of protecting Wilson's chattel property against the claim which was being made by the appellant against him, but it is not very satisfactory, and, as against the positive contradiction of the respondent, is quite insufficient to justify a finding that the chattel mortgage was given with that intent.

That the statutory presumption against the chattel mortgage may be rebutted, even if Wilson were insolvent, by shewing that it was given in good faith and without knowledge or notice to the respondent of the insolvency, was decided by the Court of Appeal in Dana v. McLean, 2 O. L. R. 466.

The appeal, in my opinion, fails and must be dismissed with costs.

MAY 3RD, 1902.

DIVISIONAL COURT.

PIMPERTON v. MCKENZIE.

Negligence—Injuries Caused by—Liability for—Duty—Volunteer.

Motion by plaintiff to set aside nonsuit entered by FALCONBRIDGE, C.J., and for a new trial in action by administratrix of estate and mother of Maurice Pimperton, deceased, to recover damages for his death. The defendant is lessee of a wharf adjoining the basin of the Rideau canal in the town of Smith's Falls, and uses a derrick erected for the purpose of unloading boats filled with coal, to be used by defendant in his business as a coal merchant. On 15th May, 1901, plaintiff's son came upon the wharf to help unload sand from a barge, whose captain had paid $5 for the use of the wharf, when, owing, as alleged, to the negligent construction and negligent staying and management of the derrick, by the defendant, who assumed it as a volunteer, the derrick overbalanced and fell upon the plaintiff's son and instantly killed him. The derrick was sustained by guy ropes, and defendant, it is alleged, did not fasten one securely, which was untied to enable the boom to be turned to the south. The Chief Justice distinguished this case from Collier v. M. C. R. Co., 27 A. R. 630, and withdrew the case from the jury at the close of the evidence on behalf of plaintiff, on the ground, that where one person charges negligence against another, the basis of the action must lie in some duty which was due by the defendant to the plaintiff; that in this case defendant had nothing to do with the unloading of the vessel, the sand was not for him, and he had not assumed any duty, but was acting as a mere volunteer.

G. H. Watson, K.C., for plaintiff.

A. B. Aylesworth, K.C., for defendant.

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

MEREDITH, C.J.—Having regard to the arrangement as to the use of the derrick and boom, which cast no duty upon the respondent as to the placing of them in position for use,

the evidence adduced by the appellant failed to make a case entitling her to have this question submitted to the jury.

The appellant also entirely failed to shew that the derrick and boom were improperly constructed or that they were not well fitted to perform the work they were intended to do, had they been properly managed and controlled by means of the appliances with which they were provided for that purpose.

If I am right thus far, the appellant's case as presented in her pleadings failed, but it was attempted to be supported at the trial and on the argument before us on another ground, viz., that the respondent had undertaken the duty of making fast the fourth guy rope, and that he had failed to perform that duty, and that this was the cause of the accident.

This contention also, in my opinion, failed; the testimony adduced for the purpose of shewing that the respondent undertook this duty and failed to perform it was, I think, quite insufficient to warrant a finding against him.

I have searched in vain for anything to indicate that those in charge of the work had delegated that duty to the respondent or that they relied on him to perform it. On the contrary, the witness Soper, one of the bargemen engaged on the work, according to his testimony, saw that the fourth guy rope was not tied, and apparently did and said nothing, although he knew that the result would be danger that the derrick might fall; if it was necessary to avoid that danger that the rope should be securely fastened, he would, had the respondent been the person who had undertaken the duty of doing this, either have called his attention to his neglect of his duty, or have called the attention of some one else connected with the barge to it; that he did not do so would seem to be attributable only to the fact that he did not suppose that this duty had been intrusted to or had been undertaken by the respondent.

I have assumed that, had this branch of the case been made out on the facts, the respondent would have been liable for the consequences of his failure to perform the duty he had undertaken. It is not, however, necessary to consider how far such an assumption is well founded, for on the facts, in my opinion, the appellant's case failed.

Having come to this conclusion, it follows that the ruling and judgment of the learned Chief Justice were right and the appeal fails and should be dismissed with costs.

Lavell, Farrell, & Lavell, Smith's Falls, solicitors for plaintiff.

Hall & Hall, Smith's Falls, solicitors for defendant.