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FERGUSON, J. MARCH 14TH, 1903.

CHAMBERS.

GOLDBERG v. DOHERTY MANUFACTURING CO.

Pleading — Malicious Prosecution — Defence in Bar — Acquittal of Plaintiff on Criminal Charge—Certificate of Trial Judge—Good Grounds for Prosecution.

Motion by plaintiff in an action for malicious prosecution to strike out a paragraph of the defence.

The plaintiff was arrested at the instance of defendants and tried before a Judge and jury upon a criminal charge and acquitted. At the request of counsel for the prosecution (the defendants) the Judge indorsed upon the indictment the following: "I hereby certify that in my opinion there was good reasonable and probable cause and ground for the institution of this prosecution."

The plaintiff having brought this action to recover damages alleged to have been sustained by reason of such prosecution, the defendants pleaded the certificate as a defence in bar.

The plaintiff moved to strike out this defence.

R. M. C. Toothe, London, and J. F. Faulds, London, for plaintiff.

F. F. Harper, London, for defendants.

FERGUSON, J., struck out the paragraph containing this defendant on the ground that it was not an answer to the action and was embarrassing. Costs in the cause.

MONCK, JUN. J., WENTWORTH. MARCH 19TH, 1903.

FIRST DIVISION COURT, WENTWORTH.

HARVEY v. MCPHERSON.

Division Court—Jurisdiction—Splitting Cause of Action—Promissory Notes—Consolidation of Claim in Proof against Insolvent Estate.

The defendants purchased goods from the plaintiffs from time to time in continuous account, for some of which they

gave to the plaintiffs promissory notes, the balance being charged in open account.

The defendants made an assignment for the benefit of their creditors. The plaintiffs filed with the assignee an affidavit of claim, in the body of which they stated their claim to be $2,554.41 "for merchandise." They received from the assignee 25 cents on the dollar and applied it generally on the whole claim.

They then instituted four actions against the defendants, one in the High Court for part of their claim, and three actions in the above Division Court on three individual promissory notes, not included in the High Court claim.

One of the Division Court actions was discontinued. In the remaining two Division Court actions the plaintiffs gave no credit for the dividend which they had received, but, after the evidence had been taken, they admitted that they should have done so.

P. D. Crerar, K.C., for defendants, contended that in bringing separate actions in the Division Court the plaintiffs had split their cause of action within the meaning of sec. 79 of the Division Courts Act.

Darcy Tate, for plaintiffs, cited Real Estate Loan Co. v. Guardhouse, 29 O. R. 602; Re Franklin v. Owen, 15 C. L. T. Occ. N. 105, 158, 185; Clark v. Barber, 26 O. R. 47.

MONCK, J.—I think the facts in the present case are distinguishable from those in the ruling cases, and that, had an action been brought in the High Court, there would have been but one count in the statement of claim.

The plaintiffs elected in the proof filed with the assignee to consider their claim a consolidated one for merchandise, and could so have declared in the High Court action. They accepted their dividend and applied it on the corpus of their claim.

I find, therefore, that in these several plaints the cause of action has been split within the meaning of sec. 79, and that this Court has no jurisdiction to try them.

WINCHESTER, MASTER. MARCH 23RD, 1903.

CHAMBERS.

ST. AMAND v. INTERSTATE CONSOLIDATED MINERAL CO.

Particulars—Master and Servant—Action under Workmen's Compensation Act—Defence of Statutes—Right of Plaintiff to Particulars.

Motion by plaintiff for particulars of a paragraph of the defence. Action for damages for injuries sustained by plain-

tiff while in defendant's service. The claim was made under the Workmen's Compensation for Injuries Act. The defendants denied negligence, and pleaded contributory negligence, and "the provisions of the Act to secure compensation to workmen in certain cases and the Mines Act, chapters 160 and 36 of the Revised Statutes of Ontario and amending Acts." Plaintiff asked particulars under the paragraph quoted, including the sections or parts of the Acts referred to in such paragraph.

George Bell, for plaintiff.

Casey Wood, for defendants.

THE MASTER held that plaintiff was entitled to particulars, for, even if the plea were "not guilty by statute," the section of the statute relied on should be given. Taylor v. Grand Trunk R. W. Co., 2 O. L. R. 148, distinguished. Pullen v. Snelus, 40 L. T. N. S. 363, Neil v. Park, 10 P. R. 476. McKay v. Cummings, 6 O. R. 400, 403, and Dodge v. Smith, 1 O. L. R. 46, referred to. Order made for particulars. Costs in the cause.

BRITTON, J. MARCH 23RD, 1903.

WEEKLY COURT.

BRADBURN v. EDINBURGH LIFE ASSURANCE CO.

Constitutional Law—Powers of Dominion Parliament—R. S. C. ch. 127, sec. 7—Interest—Rate of—Mortgage—Redemption—British Insurance Company Lending Money in Canada — Contract — Application of Law of Canada—Tender of Mortgage Money—Agents in Canada—Bill of Exchange.

Special case.

The plaintiffs were the executors of the will of the late Thomas Bradburn.

After previous negotiations between solicitors for the parties, Thomas Bradburn on the 9th October, 1895, made formal application to Kingstone, Wood & Symons, solicitors for the defendants, for a loan of $50,000 at 4½ per cent. for 10 or 15 years. The defendants had in Toronto, in addition to the solicitors named, an advisory committee. The application was referred to this committee, the committee recommended the loan, and the application and recommendation were forwarded by Kingstone, Wood & Symons to the defendants' manager in Edinburgh, who submitted the matter to the board of directors of the defendants. The directors accepted the loan, and Thomas Bradburn was notified of such acceptance by cable.

The loan was made, the security therefore being;—

1st. A mortgage upon real estate in Ontario dated 25th January, 1896.

2nd. A mortgage upon leasehold dated 17th February, 1896, expressed to be made as collateral security for the mortgage upon the real estate.

3rd. A bond by Thomas Evans Bradburn, son of Thomas Bradburn, and now, as an executor, one of the plaintiffs in this action. This bond was in the penal sum of $100,000, conditioned for the payment by Thomas Bradburn to the defendants of the money to become due on, and for the performance of the covenants in, the mortgage given by Thomas Bradburn on the realty.

The mortgage was for £10,273 19s. 6d sterling, with the proviso that it was to be void on payment at the office of the British Linen Company Bank in London, England, of the principal sum, with interest, also payable at that bank, at 4½ per cent. per annum, as follows:—Principal on 15th January, 1906, and the interest half-yearly on 15th January and July in each year. All moneys to be paid in gold coin, or its equivalent in sterling money, if required. It was expressly provided in the mortgage that a bank draft on London, England, made in favour of the mortgagees, payable on presentation thereof, and delivered to the agent in Toronto aforesaid of the mortgagees, or mailed in the post office at Peterborough aforesaid, addressed to the said British Linen Company Bank, directed to be placed to the credit of the mortgagees, and duly registered, should, unless subsequently dishonoured, be considered as equivalent to the payment at the office of the said British Linen Company Bank in London, England, of a like amount to that named in said draft on the day of such delivery or mailing.

It was also provided that the mortgagor should have the right to pay on account of principal at the end of any year of the said term, the sum of £1,027 8s. 0d. ($5000), on condition of 4 months' previous notice of intention to make such payment.

Owing to loss by fire and the application of certain insurance money, the mortgage was reduced to £8,441 2s. 0d. sterling of principal, and at the time of the commencement of this suit stood at that amount.

In June, 1902, the executors (plaintiffs), for the purpose of winding up or "making an adjustment of the affairs of the estate," desired to pay off this mortgage. Negotiations followed. The defendants refused to accept the money on such terms as the plaintiffs offered, and the plaintiffs there-

upon invoked R. S. C. ch. 127, sec. 7, claiming the right to pay all this mortgage by paying the principal and all interest which had accrued, and three months' added interest. On the 3rd December, 1902, the plaintiffs formally tendered to Kingstone, Symons & Kingstone, as solicitors and agents for the defendants, at their office, Toronto, a bank draft on London, England, for £8,683 5s. 0d., making up the amount as follows:—

For principal.....	£8,441	2	0
For interest to 3rd Dec., 1902.....	146	14	9
For three months' interest by way of bonus.....	94	19	3
For costs of cablegram.....		9	0
	£8,683	5	0

This was refused.

It was admitted in this case and for the purposes of this action, that the figures were correct in amount on the basis stated in the offer.

The defendants set up the contentions (as stated in the special case):—

1. That sec. 7 of ch. 127, R. S. C., was ultra vires of the Parliament of Canada.

2. That, even if intra vires, it was not intended to apply to such mortgages as those in question in this action.

3. That the parties contracted with a view to the application of the law of England as to payment of the mortgage.

4. That, as defendants were a company authorized by an Imperial Act to lend money in Canada before the passing of the British North America Act, R. S. C. ch. 127, sec. 7, was not intended to and did not abrogate or diminish the powers previously granted to the defendants by their Imperial Act.

5. That the tender was not sufficient.

6. That the whole facts did not disclose any cause of action by the plaintiffs against the defendants.

A. P. Poussette, K.C., for plaintiffs.

F. W. Kingstone and D. T. Symons, for defendants.

J. R. Cartwright, K.C., for the Attorney-General for Ontario.

The Minister of Justice for the Dominion was notified, but was not represented.

BRITTON, J. (after stating the facts).—The right to interest upon a contract for the same made in a Province is certainly a civil right in the Province, but, if the Dominion

alone has jurisdiction to legislate on the subject of interest, then the Province can deal with it as a civil right, only within the lines and subject to the limitations and restrictions laid down and imposed by Dominion legislation. [Reference to Attorney-General v. Mercer, 3 Cart. at p. 107.]

This is one of the cases in which the jurisdiction of the Province and the Dominion overlap. Lending money upon real estate or chattels and taking mortgages therefor is a question of property. Money is seldom lent except at interest, and, next to getting security for its repayment, interest is the most important thing connected with the loan, and interest is one of the subjects reserved for the Dominion. The Dominion Parliament has dealt with it in passing the statute under consideration, and there is the general presumption that the Legislature does not intend to exceed its jurisdiction.

It is argued for the defendants that the right of the Dominion to legislate is only as to rate, as to usury, leaving details and matters affecting contracts to the Province. On the other hand, it is argued by plaintiffs that the Dominion was intended to have and has power to deal with interest as to rate, and also when it shall and shall not be payable, even if in so dealing with it, in concrete instances, there is an apparent interference with property and civil rights.

The following cases and other cases establish that subjects, apparently within Provincial jurisdiction, may be dealt with, to a greater or less extent, by the Dominion, when necessary "to complete by ancillary provisions the effectual exercise of the powers given to the Dominion by the enumerated subjects in sec. 91:" Lefroy, p. 432: Citizens Ins. Co. v. Parsons, 4 S. C. R. 330; Edgar v. Central Bank, 15 A. R. 207; Tennant v. Union Bank, [1894] A. C. 31.

[Reference also to the following cases: In re Parker, 24 O. R. 373; Lynch v. Canada North-West Land Co., 19 S. C. R. 204; Regina v. Wason, 17 A. R. 231.]

After the best consideration I can give the matter, my conclusion, contrary to first impression, is, that sec. 7 is within the competence of the Dominion Parliament. In so holding I do not overlook the argument that, as a logical result, the Dominion can legislate to limit any contract to the shortest duration where interest is involved: nor do I overlook the decision in Parsons v. Citizens Ins. Co., 7 App. Cas. 96, that, "property and civil rights" in sec. 92 "include rights arising from contract, and are limited to such rights only as flow from the law." It is, however, one thing to legislate where the contract has sole reference to security for

money lent at interest, and quite a different thing to legislate in reference to other contracts where interest is only an incident. The question is simply as to the power. The wisdom of the Dominion Parliament is likely to be equal to that of the Province, and private rights in regard to interest are not less likely to be protected in the Dominion than in the Province. . . .

Section 7 is not restricted to such mortgages as are mentioned in sec. 3. By plain and unambiguous language it applies to every mortgage on real estate executed after the first day of July, 1880, where the money secured "is not under the terms of the mortgage payable till a time more than five years after the date of the mortgage."

The plaintiffs claim to be entitled to the benefit of sec. 25 of R. S. O. ch. 205. . . . The words of this section are wide enough to apply to mortgages executed before the passing of that Act. There is no restraint as to its application such as is found in R. S. C. ch. 127. It is contended that this Ontario Act applies only to mortgages of loan corporations. I do not decide this.

Nothing turns on the company's Act of incorporation. The company has its head office in Edinburgh, and has the right to lend money in Canada. It is given the right, as a company, to do what an individual can do, but it can have no higher or other right.

It was argued that, as the money is payable in Scotland, the law governing the right to pay or to refuse payment must be the law of Scotland. . . . As the mortgage gives the mortgagor the option of paying in Canada, the contract may be considered as if made in Canada and to be performed here; the loan was, in fact, made here, upon property here. The law of Canada must govern in relation to the contract and its incidents.

Applying the principles laid down in Hamlyn v. Talliskers Distillery, [1894] A. C. 202, Jacobs v. Credit Lyonnais, 12 Q. B. D. 589, Re Missouri S. S. Co., 42 Ch. D. 321, and South African Breweries v. King, [1899] 2 Ch. 173, it must be found that the contract was intended to be governed by the law of Canada. . . . Upon the whole case, I think the agency of Kingstone, Symons & Kingstone is established, and that tender to them of the bill of exchange as payment of the mortgage money must be considered as good and sufficient. Scully v. Tracey, 21 O. R. 454, distinguished. . .

As this is an application under the statute, Brown v. Cole, 14 Sim. 427, approved in Bovill v. Endle, [1896] 1 Ch. 648,

does not apply to the extent of depriving plaintiffs of their right to have interest cease. Plaintiffs are entitled to a declaration that no further interest shall be chargeable, payable, or recoverable after 3rd December, 1902, on the principal or interest due under the mortgage or upon the bond given as collateral security, so long as plaintiffs are ready to pay, and do pay, if defendants will accept, the sum of £8,683 5s. 0d. tendered.

If defendants shall hereafter be willing to accept the amount as tendered, and if upon notice thereof plaintiffs do not pay, the mortgage shall stand to be collected or enforced as if this action had not been brought. Defendants must pay the costs.

FALCONBRIDGE, C.J. MARCH 23RD, 1903.

TRIAL.

SIPLE v. BLOW.

Easement—Right of Way—Maintenance of Gates—Pleading—Amendment.

Action for a declaration that plaintiff has a right to maintain gates sufficient for the passing of ordinary farm vehicles at the easterly and westerly entrance of a certain lane, and for an injunction restraining defendant from interfering with the maintenance of such gates.

S. G. McKay, Woodstock, and G. F. Mahon, Woodstock, for plaintiff.

E. D. Armour, K.C., and J. W. Mahon, Woodstock, for defendant.

FALCONBRIDGE, C.J. — The amendment proposed by plaintiff at the trial ought not to be allowed. It aimed at converting a claim of right to maintain gates at the easterly and westerly entrances of the lane (in effect, conceding defendant's right to use the lane) into a claim denying any right to defendant whatever. See Newby v. Sharpe, 8 Ch. D. 39; Cargill v. Bower, 10 Ch. D. 502; Raleigh v. Goschen, [1898] 1 Ch. 81. Defendant seems to have established his defence. There is a passage in Washburn on Easements, 4th ed., p. 255, which appears to favour the right to maintain gates, but no English authority is cited there, and it appears to be opposed to the law as stated in Gale on Easements, 7th ed., p. 536, and cases cited in note (e). Amendment refused, and action dismissed with costs. Thirty days' stay.

BOYD C. MARCH 23RD, 1903.

TRIAL.

FERGUSON v. CORNELIUS.

Parent and Child—Agreement for Maintenance of Parent—Payment of Money—Recovery Back on Non-performance—Following Money into Land—Lien—Costs.

Action by a father (78 years old) against his daughter to recover $800 paid by him to her in consideration of an agreement to maintain him, and to set aside the agreement, and for other relief.

E. G. Porter, Belleville, for plaintiff.

W. B. Northrup, K.C., for defendant.

BOYD, C.. gave judgment for plaintiff for re-payment of the $800, less $250, and for a charge on the land purchased by defendant with the money, subject to the mortgage thereon. The $550 to be payable back at the same time as the mortgage on the land, with interest meanwhile at five per cent. If any default in payment, the lands to be sold on summary application to the Court, for which leave is reserved in this action. Not a case for costs to either side: Watson v. Watson, 23 Gr. 70.

BOYD, C. MARCH 23RD, 1903

TRIAL.

TORONTO GENERAL TRUSTS CORPORATION v. CENTRAL ONTARIO R. W. CO. RITCHIE v. BLACKSTOCK.

Railway—Judgment for Sale of—Rights of Public—Bondholders—Mortgage—Enforcement by Sale—Statutory Authority to Sell—46 Vict. ch 24 (D.)—Vacating Consent Judgment—Judgment in Defended Action Directing Sale—Form of Judgment—Reference—Costs—Fraud—Control of Railway Company—Status of Directors—Quorum—61 Vict ch. 29 (D.).

In the first action, in which a judgment was pronounced by consent for the sale of the defendants' railway, an issue was directed by an order of FALCONBRIDGE, C.J., (1 O. W. R. 713), upon a petition to vacate the judgment upon the ground of fraud, and that the consent was not the real consent of defendants.

The second action was brought for an injunction to restrain the sale, to prevent defendants controlling the railway company, and for other relief.

The issue and the second action were tried together.

A. B. Aylesworth, K.C., and W. Barwick, K.C., for plaintiff Ritchie.

W. R. Riddell, K.C., T. P. Galt, and R. McKay, for defendants.

D. L. McCarthy, for plaintiffs the Toronto General Trusts Corporation.

BOYD, C.—The important question here discussed was, whether the judgment directing the sale of the railway was well founded in law.

The railway of defendants, a company of Provincial incorporation, has been declared to be a work for the general advantage of Canada, and has been since 1884 subject to the law of the Dominion (47 Vict. ch. 60, D.). In 1882 the company made the issue of first bonds, now sought to be enforced, under statutory powers, by which the lands, tolls, revenues, franchises, and other property, real and personal, of the company, were hypothecated, mortgaged, and pledged in security for the due payment of the amount of the bonds: 45 Vict. ch. 61, sec. 7 (O.), and R. S. O. 1877 ch. 165, sec. 9, sub-sec. 11. The form of the transaction was, that the issue of these mortgage bonds was secured by a deed of trust whereby was conveyed to the Toronto General Trusts Corporation the railway, its lands, rolling stock, present and future property and effects, franchises, and appurtenances, subject to the payment of the working expenses of the railway. This mortgage conveyance was subject to conditions before default and after default in payment. The condition now relevant is that which applies to default in payment of the principal of the bonds. Thereupon, upon request of the bondholders representing 75 per cent. in amount, the trustees shall elect and declare all the bonds to be due and shall take proceedings to enforce payment of the principal of the bonds as speedily as possible instead of operating the road and conducting the business thereof as is provided in case of default being made in the payment of interest. That is, if default is made in the principal moneys, the trustees are to intervene, not to take control of the road for the purpose of conducting the business, but are to take proceedings in the Courts to enforce payment. The suit has been rightly instituted under this requirement.

Now, the situation of the bondholder as chargee of the land of the railway company was first considered in this Province by Spragge, V. C., in Galt v. Erie, etc., R. W. Co., 14 Gr. 499. He pointed out that the cases of mortgagees of

railways in England do not apply, as there only the "undertaking" is involved, which is something exclusive of the land: p. 501. . . . And he concludes, for the same reasons which guided Esten, V.-C., in an earlier case respecting the rights of judgment creditors of a railway company (Peto v. Welland R. W. Co., 9 Gr. 455), that the railway should not be sold by the Court because the vendee could not exercise the franchise, i.e., conduct and operate the railway. . . .

[Drummond v. Eastern R. W. Co., 24 L. C. Jur. 276, and Stephen v. La Banque Nationale, M. L. R. 2 Q. B. 491, referred to.]

The statute passed by the Parliament of Canada in 1883 (46 Vict. ch. 24) applies to this road and to these bonds, though they were made the year before. It provides for the sale of a railway to a purchaser not having corporate powers, when (1) the sale is under the provisions of any deed of mortgage, or (2) at the instance of the holders of any mortgage bonds or debentures for the payment of which any charge has been created thereon, or (3) under any other lawful proceeding. This enactment does not enlarge the contract in the way of giving new rights, but is of a remedial nature, which may well be applied for the benefit of existing engagements. The effect of a judicial sale of the road is thus not to work destruction to the concern, but to continue its operation by a new owner under sanction of Government license or legislative authority. See Shepley v. Atlantic R. R. Co., 55 Me. 406, and Bickford v. Grand Trunk R. W. Co., 1 S. C. R. at p. 738.

These sections were commented on by Lord Watson in Redfield v. Wickham, 13 App. Cas. 476, as clearly shewing that the Dominion Parliament has recognized the rule that a railway may be taken in execution and sold in ordinary course of law. The reason of this decision rests on the fact that "the Legislature had made provision for the transfer of their undertaking:" per Lord Watson in Grey v. Manitoba, etc., R. W. Co., Shorthand notes in Privy Council, p. 14. . .

In brief, the legislation permits a mortgage of the lands of the company. The right of such a mortgage is to enforce his security by a sale of the land. There is now no countervailing right on the part of the public, based upon the policy of the Legislature, to prevent a sale being had; for, upon and after the sale, the road will still run its course and serve the public as when in the hands of the original corporation.

For these reasons. . . . I find no error in the judgment to sell the road. But, because of the importance of the

contest and as a favour to the Company, I vacate the consent judgment and allow an amendment of the pleadings to set up this defence in law as of the 20th March, and I now give judgment upon that amended record directing a sale of the road. The relief can only be granted upon payment of all costs occasioned by the application of the company to be allowed to defend.

As to the form of the judgment, it should be referred to the Master to inquire who are the debenture holders and what is due to each of them and to sell the road to satisfy their claims. If there is undue delay in taking the accounts, leave to apply to expedite the sale. The rival bondholders to have the right to attend on settling advertisement and conditions of sale and to have leave to bid—though this is, perhaps, not necessary to be mentioned in the judgment. The costs heretofore occasioned by advertising the immediate sale to be paid by the company as a part of the costs above referred to.

So far as the attack made upon the proceedings is based upon fraud or other like ground, it fails, and I dismiss that branch of the litigation with costs to be paid by Ritchie.

There is another branch of contestation involving the status of directors and as to who is the solicitor of the railway company. Having regard to this judgment, and the fact that the receiver already appointed will continue in possession till the sale, and is a person satisfactory to all the litigants, it does not appear to me essential to make nice critical discrimination as to legal rights in the present directorate. The voice of the shareholders has been heard, and the large majority are in favour of what I may call the Ritchie nominees, and they ask for this amendment.

The normal body of directors of the company is 7, of whom 4 form a quorum. By the resignation of the 4 directors whose places became vacant on the acquisition of Payne's interest by Ritchie, there were but three left—less than a quorum. According to Newhaven v. Newhaven, 30 Ch. D. 350, these, being less than a quorum, were unable to transact any business or even to fill the vacancies.

Under a direction that "the continuing directors might act notwithstanding any vacancy in their body," it was held that less than a quorum might validly act: Re Ross, [1901] 1 Ch. 117. That is a more helpful provision than is found in the Railway Act providing for vacancies to be filled by death, etc. But, if such appointment is not made, such death, absence, or resignation shall not invalidate the acts of the remaining directors: 61 Vict. ch. 29, sec. 51. . . . But should not those who remain be sufficient to form a

quorum? Section 54 says that the act of a majority of a quorum shall be deemed the act of the directors. And sec. 53, that the directors at any meeting at which not less than a quorum are present shall be competent to use and exercise all or any of the powers vested in the directors. This latter provision seems to require at least a quorum to exist and be present before effective action can be taken. My strong impression is, that neither set of directors can claim to represent the company as a matter of legal right; but it is not necessary, in order to do substantial justice, to decide thus. And as to this contest for the controlling directorate, I make no order and give no costs.

I have not failed to consider, in exercising my discretion, that Mr. Ritchie has expended time, energy, and resources in the development of this enterprise, and he should have a fair chance of obtaining the best return that can be had from the undertaking.

If plaintiffs the trustees cannot collect costs now allowed them in any other way, they should receive these costs from the funds of the railway company.

MARCH 23RD, 1903.

DIVISIONAL COURT.

HAND v. SUTHERLAND.

Sale of Goods—Running Account—Action for Balance—Questions of Fact—Appeal.

Appeal by defendant from judgment of District Court of Algoma in favour of plaintiff for $481.34. Plaintiff was a wholesale butcher and defendant a retail butcher, both at Sault Ste. Marie. They had formerly been in partnership, but had dissolved, and for a year or two before August, 1900, and down to the latter part of 1901, they had been on friendly terms, and had carried on large transactions with one another in a spirit of mutual trust and confidence. They bought from and sold to one another large quantities of meat, and they frequently borrowed from one another and exchanged meat as they needed it. This action was brought to recover a balance alleged to be due to plaintiff in respect of the transactions between the parties.

W. E. Raney, for defendant.

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

THE COURT (STREET, J., BRITTON, J.) held that, as the questions involved were purely questions of fact, there were no grounds upon which they could interfere with the conclusions of the Judge of the District Court. Appeal dismissed with costs.

WINCHESTER, MASTER. MARCH 24TH, 1903.

BOYD, C. MARCH 27TH, 1903.

CHAMBERS.

BERTRAM v. PURESLEY.

Venue—Change of—Cause of Action—Residence of Parties—Rule 529—Expense—Undertaking.

Motion by defendant to change venue from Brantford to Simcoe in an action for slander. Six distinct causes of action were alleged, five of which arose in the county of Norfolk, and one in the city of Brantford. The parties lived in the county of Norfolk.

Rule 529 provides that where the cause of action arose and the parties reside in the same county, the place to be named as the place of trial shall be the county town of that county, unless otherwise ordered by the Court or a Judge upon the application of either party.

A. G. Slaght, for defendant.

L. F. Heyd, K.C., for plaintiff.

THE MASTER held that, had the venue been originally laid at Simcoe, the preponderance of convenience attempted to be shewn upon this application in favour of Brantford would not have been sufficient to warrant the change; and, under all the circumstances of this case, the venue should be changed to Simcoe. Order accordingly. Costs in the cause. Only necessary affidavits to be allowed for on taxation.

Upon appeal from this order, argued by the same counsel:—

BOYD, C., affirmed the order, upon defendant undertaking to pay the extra expense, if any, of a trial at Simcoe.

BOYD, C. MARCH 24TH, 1903.

TRIAL.

MANNING v. SMALL.

Contract—Services as Agent—Promise of Employment—Recovery of Money for Breach.

Action to recover payment for services under contract.

S. H. Bradford and B. E. Swayzie, for plaintiff.

W. Barwick, K.C., and H. J. Wright, for defendant.

BOYD, C.—It is sufficiently proved that plaintiff worked in the interests of the defendant with a view of procuring

him the lease of the Grand Opera House in the city of Toronto from the plaintiff's uncle, under promise that, if the lease was secured, the defendant would give the plaintiff compensation to the value of at least $600 by certain employment indicated. Negotiations were going on for a considerable period, and it is no answer to the claim that during part of the time plaintiff was in the employment of defendant. The work of intervention at Toronto was quite distinct from the employment at Guelph, and it was engaged in on a well proved promise of being compensated for. Deducting what plaintiff made in other employment, there should be judgment in his favour for $450 and costs.

BOYD, C. MARCH 24TH, 1903.

TRIAL.

McMAHON v. COYLE.

Landlord and Tenant—Breach of Covenant in Lease—Assignment without Leave — Re-entry for — Formal Execution of Deed of Assignment after Action.

Action to recover possession of land tried with a jury at Belleville.

E. G. Porter, Belleville, for plaintiff.

R. C. Clute, K.C., and W. S. Morden, Belleville, for defendant.

BOYD, C.—The jury found that there was no consent of the plaintiff to the transfer of the lease from defendant Coyle to his co-defendant. It was argued that the right to re-enter applied only to the breach of an affirmative covenant, but not that of a negative covenant, i.e., one not to do a particular act. In my opinion there is a right of re-entry on failure to perform the covenant. Under the lease in question, made pursuant to the Short Forms Act, the statutory right of re-entry is "in case of breach or non-performance of any of the covenants or agreements" therein contained, of which one is not to sublet without leave. As held by Wilson, C.J., in Toronto Hospital Trustees v. Denham, 31 C. P. 203, it applies to acts as well of omission as of commission, and extends therefore to the assignment without license. There has been a plain breach of the covenant not to assign without leave, and the right to re-enter follows: Eastern Trust Co. v. Dent, [1899] 1 Q. B. 835. It is immaterial that the docu-

ment shewing the transfer was not executed until after action brought, as the agreement was made, all terms settled, and transfer of possession given. Judgment for plaintiff for possession and for $344.50 damages and costs of action.

MARCH 24TH, 1903.

DIVISIONAL COURT.

METALLIC ROOFING CO. OF CANADA v. LOCAL UNION NO. 30, AMALGAMATED SHEET METAL WORKERS.

Trade Union—Combination of Workmen to Injure Business of Employers—Evidence of—Interim Injunction.

Appeal by defendants from an order in the nature of an interim injunction made by MEREDITH, C.J., on the 2nd October, 1902, restraining defendants, their officers, servants, and agents, from using any threats or making any communications in writing or otherwise to plaintiffs' customers, or any of them, to cease dealing with plaintiffs. The plaintiffs were a company manufacturing metallic roofing and other metal goods, and defendants were a trades union, and individual members of it. Plaintiffs failed to agree with the union as to the terms upon which their employees should work for them, and they fell under the displeasure of the union. The union thereupon, with the object of forcing plaintiffs to come to their terms, notified plaintiffs' customers that the men employed by the customers would refuse after a certain date to handle any of the goods manufactured by plaintiffs, because plaintiffs were unfair to organized labour.

J. G. O'Donoghue, for defendants.

W. N. Tilley, for plaintiffs.

THE COURT (STREET, BRITTON, JJ.) held that there was sufficient evidence of concerted action on the part of defendants to make out a prima facie case of combination on their part, and the object of the notices might properly be assumed, for the purposes of the motion, to have been to injure plaintiffs' trade to such an extent that they would be forced to accede to the terms proposed by defendants unless they preferred to stand out and be ruined. All these matters may appear differently at the trial, which should not be prejudiced by a discussion of them now. The evidence upon which

Meredith, C.J., acted was a sufficient basis for an interlocutory injunction. Quinn v. Leathem, [1901] A. C. 495, referred to. Appeal dismissed with costs.

BOYD, C. MARCH 25TH, 1903.

CHAMBERS.

BURKHOLDER v. GRAND TRUNK R. W. CO.

Damages—Apportionment—Widow and Infant Children of Person Killed in Railway Accident—Compensation—Payment into Court—Other Provisions for Widow.

Motion by plaintiffs for judgment in terms of a settlement between the parties by which defendants agreed to pay $4,800 to plaintiff as compensation for the death of the husband of the adult plaintiff and the father of the infant plaintiffs.

W. W. Osborne, Hamilton, for plaintiffs.

D. L. McCarthy, for defendants.

F. W. Harcourt, official guardian, approved of the settlement on behalf of the infant plaintiffs, and asked the Court to apportion the $4,800 between the adult and infant plaintiffs.

BOYD, C.—In case of death by accident the damages are usually apportioned by the jury among those entitled to share as provided by R. S. O. ch. 135. But in case the matter does not go before a jury, but a sufficient sum is paid into Court to satisfy the action, then it may be brought summarily before a Judge to make just distribution. The fact should not be overlooked in this case that some provision has been made for the widow by an insurance of $1,000 in her favour. It is fair in this case to allow the widow one-fourth of the $4,800, that is, $1,200, and to each of the four infants $900. Sanderson v. Hardreson, 36 L. T. N. S. 847, and Bulmer v. Bulmer, 25 Ch. D. 413, referred to. Judgment as agreed upon and apportioning the money as stated. The infants' shares to be paid into Court, and $200 a year to be paid out half-yearly to the widow for their maintenance for three years.

WINCHESTER, MASTER. MARCH 27TH, 1903.

CHAMBERS.

RE SOLICITOR.

Solicitor—Application for Delivery of Bill—Security for Costs—Applicant out of Jurisdiction—Solicitor Setting up Champertous Agreement—Præcipe Order—Setting Aside—Order for Delivery of Bill.

Application by John Allen to set aside a præcipe order requiring him to give security for the solicitor's costs of an application for delivery and taxation of bills of costs. The original application for the order for delivery and taxation was brought on at the same time. The applicant resided at the time of the application in the United States of America. He employed the solicitor to act for him in connection with certain litigation relating to land in the county of York, at a time when he (the applicant) lived in this Province. The solicitor stated that in 1897 the applicant was indebted to him in $400 costs and disbursements in a High Court action, and sundry small book accounts, and that there was then an action of ejectment pending between the applicant and his son to obtain possession of the land mentioned; that the applicant having no means to pay the costs or to furnish funds to carry on the litigation, it was agreed between the solicitor and the applicant that the land should be leased and the rents paid to the solicitor in full of his costs, etc.

T. H. Lloyd, Newmarket, for applicant.

J. W. McCullough, for solicitor.

THE MASTER.—The solicitor has brought himself, if not within the decisions as to champerty and maintenance, perilously nearly so. Wood v. Downes, 18 Ves. 120, James v. Kerr, 40 Ch. D. 449, Hall v. Hallet, 1 Cox (Ch.) 135, Carter v. Palmer, 8 Cl. & F. 705, Ex. p. James, 8 Ves. 337, Luddy's Trustee v. Praed, 33 Ch. D. 500, Robertson v. Furness, 43 U. C. R. 143, Locking v. Halsted, 16 O. R. 32, London Mutual Fire Ins. Co. v. Jacob, 16 A. R. 392, and authorities cited in the last case, referred to. The transactions between the solicitor and his client are, upon the solicitor's own admissions, of such a character as to warrant the client in asking the Court to investigate them. The solicitor was entitled under Rule 1199 to a præcipe order for security for costs, as it appeared on the face of the notice of motion that the applicant did not live in the jurisdiction. But the facts of this case entitle the applicant to have the præcipe order set aside: Sample v. McLaughlin, 17 P. R. 490. Order made

setting aside præcipe order and directing delivery by the solicitor of bills of costs within two weeks. Applicant to have costs of both applications against the solicitor.

BOYD, C. MARCH 27TH, 1903.

CHAMBERS.

HALLIDAY v. RUTHERFORD.

Costs—Scale of—Action in High Court—Payment of $300 into Court—Inquiry as to Creditors' Claims — Certificate for County Court Costs—Refusal of Set off.

The Master in Chambers, having summarily determined claims to a sum of $300 paid into the High Court (1 O. W. R. 816) afterwards gave a certificate shewing that he had ruled that plaintiff was entitled to costs on the scale of the County Court without any set-off to defendant. Defendant moved to set aside the certificate.

John MacGregor, for defendant.

F. C. Cooke, for plaintiff.

BOYD, C.—By the Law Reform Act of 1868 the equity jurisdiction of the County Court was abolished, and provision was made for carrying on such cases as were of minor importance in the Court of Chancery, with provision for a lower scale of costs—which were approximately such as would be taxed in a County Court equity action. This lower jurisdiction in Equity was retained in the Superior Court till 1896, when equitable jurisdiction was restored to the County Court: 59 Vict. ch. 19, sec. 3 (O.)

A phrase has remained from this state of equitable jurisdiction between 1868 and 1896, which has been used by the Master in this case. He has awarded costs to plaintiff on "the lower scale." That per se imports taxation on the footing of the County Court tariff, but excludes the allowance of any set-off of costs. The Master's intention in this case was so to award the costs that the plaintiff should tax County Court costs without any diminution. That has been made plain by a supplementary certificate, which is now moved against.

It was competent for the Master so to make plain his award of costs, but his meaning was plain enough without such a certificate.

Apart from discretion, less was given to plaintiff than on the merits he might have claimed. The County Court has equitable jurisdiction where relief is sought in respect of any

matter whatsoever in which the subject matter involved does not exceed $200. Upon the affidavit it appears that plaintiff's solicitor on 30th October, 1902, held in hand creditor's claims to the extent of $211.40 unsatisfied. Of this, $11 is to be deducted for excess claimed by plaintiff, but to this there is to be added the claim of the creditor Geralamy, fixed in the Master's order at $36.92. By that order creditors' claims were directed to be paid to the extent of $189.47, and it is said that the others, which were small claims, were paid pending litigation. This appears also from the fact that the Master discharged the lien only upon payment of $300 into Court.

The Master thus did not give the plaintiff larger costs than he was entitled to when fixing the scale as that of a County Court action. I dismiss this application with costs.

BOYD, C. MARCH 27TH, 1903.

WEEKLY COURT.

YOUNGSON v. STEWART.

Costs—Partnership Action—General Costs—Surcharge—Costs between Defendants.

A partnership action. Motion by defendant Hopkins for judgment on further directions and for costs against defendant Stewart.

H. H. Robertson, Hamilton, for defendant Hopkins.

T. Hobson, Hamilton, for defendant Stewart.

BOYD, C.—The defendant Stewart should have the general costs of the cause from plaintiff, who began the action with a claim that Stewart had in hand assets of the firm sufficient to pay all the debts and furnish a surplus divisable among the partners. In the result it appeared that there were no assets, and that Stewart was out of pocket to the extent of $480. But as to certain costs in the Master's office, and upon his certificate, so much of the costs in his office as arose upon the surcharge of Hopkins in respect of the sum of $465 retained by Stewart should be taxed to Hopkins and paid by Stewart. The result of the action is in favour of Hopkins and Stewart, but plaintiff is a person of no substance, and there are no moneys out of which to pay them what the partnership owes them respectively, and none to

pay costs. The only direction that can be given is, that each is to contribute ratably to pay the other and to pay all costs: Norvell v. Norvell, L. R. 7 Eq. 537. That, in effect, is letting each pay his own costs, except as to the costs of so much of the proceedings in the Master's office as are given to Hopkins to be paid by Stewart.

BOYD, C. MARCH 28TH, 1903.

WEEKLY COURT.

ATTORNEY-GENERAL v. TORONTO GENERAL TRUSTS CORPORATION.

Costs—Special Case in Action to Recover Succession Duty—Costs Payable by Crown where Unsuccessful.

Motion for a direction as to the costs of action and special case as to liability of estate of Hugh Ryan, deceased, for succession duty, in which judgment was given by the Chancellor on the 11th December, 1902 (1 O. W. R. 807.).

W. E. Middleton, for plaintiffs.

A. E. Knox, for the trustees.

J. D. Falconbridge, for the adult beneficiaries.

BOYD, C.—In litigation under the Succession Duty Act which is remitted to the High Court there is power expressly given to deal with the costs: 62 Vict. (2) ch. 9, secs. 1 and 3. Generally such jurisdiction is conferred as is exercised by the Court in ordinary controversies between parties. The rule of dignity which formerly prevailed, that the Crown (and the Attorney-General acting for the Crown) neither asks nor pays costs, is practically suspended. In petitions of right costs are in the discretion of the Court (Rule 934), and so in cases of convictions being quashed or affirmed (Rules of 7th June, 1902). So, under the general head of "Crown Actions," "in case in any . . . proceedings before any Court . . . in Ontario, by or on behalf of the Crown . . . by virtue of any statute relating to the public revenue," costs may be dealt with as in actions between subject and subject (Rules 239, 240). The jurisdiction to give costs in a special case, though not provided for in terms, is conceded to exist under the Imperial Act 13 & 14 Vict. ch. 35, sec. 32, by which the costs in "special cases" are in the discretion of the Court—which is incorporated into our law by the Judicature Act,

R. S. O. ch. 51. The defendants were ready to pay or had paid all the duty which could be exacted, and the claim of the public officer for more failed. A burden is laid upon private estates by the Succession Duty Act; it should not be increased by the expense of litigation unless something exceptional has arisen. Although the matter turned upon the construction of the will, it is not a case for throwing the costs on the estate of the testator, the scheme of the will being well defined and the language used being apt for giving effect to the testator's intentions. The costs should be paid by the unsuccessful party (the Crown or the Attorney-General), but only one set of costs should be taxed to defendants.

MARCH 28TH, 1903.

DIVISIONAL COURT.

NOLAN v. OCEAN ACCIDENT AND GUARANTEE CORPORATION.

Life Insurance—Action on Policy—Condition as to Award—Application to Stay Proceedings.

Appeal by plaintiff from order of MEREDITH, J., (2 O. W. R. 98), reversing order of Master in Chambers (1 O. W. R. 777), refusing to stay proceedings in this action until the amount due plaintiff and the other matters in dispute shall have been ascertained by arbitration in the manner provided by the policy of insurance sued on.

S. A. Jones, for plaintiff.

H. Cassels, K.C., for defendants.

The judgment of the Court (FALCONBRIDGE, C.J. STREET, J., BRITTON, J.) was delivered by

STREET, J.—The case is governed by Spurrier v. La Cloche, [1902] A. C. 446, and no action lies, nor does the amount payable under the policy become due, until the determination of the arbitrators to be appointed under the agreement to refer contained in condition No. 15. That is an agreement to refer under sec. 6 of R. S. O. ch. 62, although plaintiff has not signed it; she cannot claim under the policy without assenting to its terms: Baker v. Yorkshire Fire and Life Ins. Co., 92 L. T. 111. Condition 15 does not appear to be in contravention of sec. 80 of R. S. O. ch. 203. It is

not a condition which necessarily extends the time of payment beyond sixty days after proofs of the claim have been furnished, for it may well be that the amount may be ascertained within the period mentioned. Appeal dismissed with costs.

MARCH 28TH, 1903.

DIVISIONAL COURT.

CROMPTON AND KNOWLES LOOM WORKS v. HOFFMAN.

Damages—Breach of Warranty on Sale of Machine—Loss of Profits—Defect in Machine—Property not Passing.

Appeal by defendants from judgment of MACMAHON, J. (1 O. W. R. 717), allowing plaintiffs' claim and dismissing defendants' counterclaim. Action to recover the price of a goring loom and fittings which plaintiffs agreed to manufacture and deliver to defendants for $662.63, payable one-half cash, one-quarter on 1st December, 1900, and one-quarter on 1st April, 1901; the property to remain in plaintiffs until paid for. Counterclaim for damages for loss of profits by reason of the defective condition of the machine supplied, for the time and labour expended in endeavouring to make it work, for the material it spoiled, and for the services of an expert, etc.

G. G. McPherson, K.C., for defendants.

E. Sidney Smith, K.C., for plaintiffs.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

STREET, J.—The plaintiffs agreed either that the loom with its fittings should be shipped to defendants on or about 25th June, 1900, or else that it should be shipped within a reasonable time from the giving of the order, and, looking at all the circumstances, it is not unreasonable to hold that it should have been shipped so that defendants might, had it been complete and properly constructed, have been able to work profitably upon it by the 1st August. But plaintiffs never in fact supplied all the fittings they had agreed to supply, and they never supplied a loom properly constructed to do the work required of it by defendants, and to do which plaintiffs well knew the machine had been ordered.

There was an implied, if not an express, warranty that it should be fit for the purpose of making web similar to a piece furnished to plaintiffs by defendants. When a plaintiff sues for the price of a machine, a defendant may rely upon a breach of warranty to reduce the claim, even although the property has not passed to him: Cull v. Roberts, 28 O. R. 591. The plaintiffs cannot say that, although the machine sent by them was a defective one, yet a competent mechanic could have set it right in a few days, the fact being that a competent mechanic was not to be found in the country, and one had to be imported from Buffalo for the purpose. Defendants used their best endeavours, in good faith, from the time the loom reached them, to make it work; it would not work owing to inherent faults which they used every reasonable means to discover and correct. It was plaintiffs' fault that defendants did not, for a considerable time, earn the profits from the use of the machine which plaintiffs knew when it was ordered they expected to earn, and they are liable to make these profits good: Waters v. Towers, 8 Ex. 401; Cory v. Thames Iron Works, L. R. 3 Q. B. 181; Hydraulic Engineering Co. v. McHaffie, 4 Q. B. D. 670. Defendants were justified for at least six weeks in waiting for the parts which plaintiffs had not sent, and in looking about them for the proper means of setting the defects right, and should be allowed $180 for loss of profits, in addition to the $69 allowed them by the judgment appealed against. Judgment reduced from $495.63 to $315.63, and the latter sum to bear interest from 1st October, 1900, and defendants to have the costs of this appeal set off against plaintiffs' debt and costs.

MARCH 28TH, 1903.

DIVISIONAL COURT.

RUTHERFORD v. WARBRICK.

Deed—Conveyance of Land—Cutting down to Mortgage—Redemption—Condition—Revival of Debt Thrown off—Costs.

Appeal by plaintiff, Mary A. R. Rutherford, wife of Henry A. Rutherford, from judgment of BOYD, C., in a redemption action, allowing plaintiff to redeem, but directing that she should be charged in taking the accounts with a certain sum of $627.05 beyond the amount she contended she ought to pay. The Chancellor held that the conveyance from plaintiff to defendant, though in form absolute, was intended to operate only as a security, and that defendant was subject to be redeemed.

W. R. Riddell, K.C., and G. Grant, for plaintiff.
W. T. Lee, for defendant.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) did not differ from the conclusion of fact of the Chancellor. If the appellant had not been a debtor to the defendant, it would probably have been his duty to see that she had proper advice: see Cobbett v. Brock, 20 Beav. 324: but no such duty was imposed on him when she and her husband were both debtors. All the circumstances are inconsistent with defendant's contention that the conveyance to him represented a purchase by him, and that they were only consistent with the theory that it was intended as a security, and that plaintiff had made out a satisfactory case for cutting the conveyance down to a security.

On 5th April, 1902, defendant's debt then standing at $1,627.05 over and above the $2,000 secured by the transfer of the property, he agreed to accept $1,000 in satisfaction of it, and threw off the $627.05, upon being paid the $1,000. Under these circumstances it cannot be made a condition of plaintiff's right to redeem that the $627.05 should be revived against her.

Appeal allowed with costs, and judgment varied by declaring plaintiff entitled to redeem on payment of $2,000 and interest, and plaintiff should, according to the well settled rule in redemption cases where the right to redeem is disputed, have her costs to the hearing inclusive; such costs to be set off against defendant's debt. Reference to local Master at Brampton to settle amount and tax costs. Further directions and subsequent costs reserved.

STREET J. MARCH 20TH, 1903.

CHAMBERS.

McKINNON v. RICHARDSON.

Discovery—Examination of Party—Attendance by Consent at Place out of Party's Own County—Further Examination—Place for Holding.

The defendant's solicitor, having taken out an appointment for the examination for discovery of one of the plaintiffs in Guelph, undertook, at the request of the plaintiffs' solicitor, to produce the defendant at Guelph for his examination for discovery upon payment of his proper conduct money, although the defendant was entitled to be examined

in Orangeville, his county town. The conduct money was paid, and, upon the examination of the defendant at Guelph, it turned out that he knew very little personally of the matters in issue, and no notice to produce having been served, nor any request made for the production of documents, no documents were produced on the examination. The plaintiffs' solicitor then asked to have the examination adjourned to be continued in Guelph, and asked that the defendant, in the meantime, procure information from his agent, which would enable him to answer the questions put to him upon his examination for discovery. The examination was adjourned accordingly. The defendant did not appear upon the adjourned examination, but his solicitor attended and offered to produce him for examination at Orangeville, upon receiving his proper conduct money.

The plaintiff moved to commit the defendant for not attending upon the adjourned examination at Guelph.

F. C. Cooke, for plaintiffs.

H. D. Gamble, for defendant.

STREET, J., held that the defendant was not bound to go back to Guelph for examination for discovery; that his solicitor, having produced him there in the first instance, had fulfilled his obligation; and that, if the plaintiffs desired any further examination, they should pay the proper conduct money and examine the defendault at Orangeville.

Order made for examination at Orangeville, upon payment of the proper conduct money. Costs in the cause