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HIGH COURT OF JUSTICE.

DIVISIONAL COURT. MAY 31ST, 1912.

HAMILTON v. VINEBERG.

Building Contract—Architect—Counterclaim—Further Counterclaim by Party Brought in as Defendant to Counterclaim—Irregularity—Waiver—Practice—Liquidated Damages for Delay—Extras—Assent of Owner—Absence of Collusion between Architect and Contractor—Certificate of Architect—Finality—Cause of Delay—Costs—Scale of Costs—Evidence—Findings of Trial Judge—Appeal.

Appeal by the defendant from the judgment of SUTHERLAND, J., ante 605.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

H. Cassels, K.C., for the defendant.

E. C. Cattanach, for the plaintiffs and one Burnham, defendant by counterclaim.

RIDDELL, J.:—Hamilton and Walker are a contracting firm; they entered into a written building contract with Vineberg to build according to the plans of Burnham an architect; after they had finished their work, as they assert, they assigned all moneys due under the contract to Gray, and, with Gray as a co-plaintiff, sued Vineberg. Vineberg defended, and added a counterclaim, himself being therein plaintiff, and Hamilton and Walker, Gray, and the architect, Burnham, being the defendants, claiming that the work, etc., was done badly by Hamilton and Walker, with the "connivance" of Burnham, and so the amount paid was more than enough. He claims also against Hamilton and Walker and Burnham for breach of contract—

and against Hamilton and Walker for $250 liquidated damages for delay; further, that Burnham acted with such gross carelessness and negligence and so ignorantly, as well as collusively, with Hamilton and Walker, that the certificates given by him should be set aside and cancelled.

Burnham (by the same solicitor as Hamilton and Walker) sets up a counterclaim against this counterclaim for $60 on account of contract, $48.72 being 3 per cent. of extras, in all $108.72, and interest thereon. Upon this Vineberg joins issue.

The action came on for trial before my brother Sutherland at the non-jury sittings at Toronto; and he gave judgment for the plaintiffs for $1,544.04, being $1,453.49 and interest, with costs, and for Burnham, defendant by counterclaim, upon his counterclaim to the counterclaim of Vineberg for $60 and costs, dismissing the counterclaim to the original action with costs. Vineberg now appeals.

It is well established that a third party brought in, as Burnham was, by counterclaim, cannot himself set up a counterclaim against the plaintiff by counterclaim: Street v. Gover, 2 Q.B.D. 498; Alcoy and Gandia R.W. and Harbour Co. v. Greenhill, [1896] 1 Ch. 19; General Electric Co. v. Victoria Electric Light Co. of Lindsay, 16 P.R. 476, 529: unless what is called a counterclaim is in reality but a set-off or a defence: Green v. Thornton, 9 C.L.T. Occ. N. 139; General Electric Co. v. Victoria Electric Light Co. of Lindsay, 16 P.R. 476, at pp. 481, 534. That a claim for wages can be neither set-off nor defence to an action founded upon tort such as this, requires no authority.

But the plaintiff by counterclaim has joined issue on the counterclaim by Burnham, and gone on to trial without objection; and I think he cannot now complain of the irregularity. In Hyatt v. Allen, ante 370, the Divisional Court thought that an irregularity not unlike the present might be waived. Here Burnham might have brought his action against Vineberg; and possibly that action, while not consolidated with the present, might have been ordered to be tried at the same time. If the claim be considered well founded, we might say something as to the scale of costs, as the learned trial Judge has not passed upon that matter.

The first claim set up by Vineberg is that for $250 claimed for delay, and he appeals to clause 6 of the contract, which reads: "The contractors shall complete the whole of the work . . . to the satisfaction of the said architect by the 1st day of March, 1910, when the said house shall be complete and ready for occupation; and, failing to do so, they shall pay the

owner . . . $25 for each week, or part of a week, elapsing thereafter, until the said house is ready for occupation, such sum not to be a penalty but as liquidated damages . . . which damages may be deducted by the owner out of any balance payable to the contractors herein."

It seems to be settled that language such as appears in this clause does not bind the contractor to complete, not only the work set out in the contract, but also the "extras" which may be ordered, within the time set.

In Dodd v. Churton, [1897] 1 Q.B. 562 . . . it was held that the contractor in such a case is exonerated from the liability to pay liquidated damages unless by the terms of the contract he has agreed that—whatever additional work may be ordered—he will, nevertheless, complete the works within the time originally limited. And this is so even if the contract contain a clause giving the architect power to extend the time for completion in case of extras being ordered . . .

[Reference also to Westwood v. Secretary of State, 7 L.T.N.S. 736, 11 W.R. 261, 262; Roberts v. Bury Commissioners, L.R. 4 C.P. 755, L.R. 5 C.P. 310; Jones v. St. John's College, L.R. 6 Q.B. 115; Gray v. Stephens, 16 Man. L.R. 189; Holme v. Guppy, 3 M. & W. 387.]

The learned trial Judge, upon evidence which wholly justifies such a finding—as he says that he believes the evidence of Hamilton and Burnham—finds that Vineberg gave a verbal assent to an order for the alterations; and the architect gave a written order . . .

The defendant Vineberg now complains that the direction in this order, "all work done as an extra where owner and contractor has not agreed on price before commencing said work the contractors must keep an account of all materials and time spent on said work, so that price of said work may be given by the architect as per agreement," was not followed by the builder. But this is not either in the contract or in the order a prerequisite either to doing the work or to being paid for it—it is a direction given by the architect (who is in this particular matter the agent of Vineberg) in order that he may the more easily and accurately fix and ascertain the price to be paid. The omission to keep track does not disentitle the contractor to be paid—although it would justify the architect in allowing as little as he could.

From a perusal of all the evidence, I can see nothing to indicate that the architect acted otherwise than honourably, nor

is there any indication of collusion between architect and contractor. Under these circumstances, the certificate of the architect must be final.

Moreover, the finding of the trial Judge that the delay was caused by the owner himself, I think is wholly justified—as are the other findings made by him.

I think the appeal should be dismissed with costs—but with a direction that the costs to be allowed Burnham in his judgment against Vineberg are to be costs on the Division Court scale without a set-off—the costs of the appeal to be on the scale of an appeal to the High Court from a Division Court judgment. In other words, Burnham is to be put in the same position as though he had brought his action in the Division Court; but Vineberg should pay on the appeal costs as though he had unsuccessfully appealed to the Divisional Court from a Division Court judgment.

BRITTON, J., agreed in the result, for reasons stated in writing.

FALCONBRIDGE, C.J.:—I do not think that, in view of the finding (which is not attacked) that the architect was not guilty of fraud or collusion with the plaintiffs, this appeal can succeed on any of the grounds put forward. As to the extras, the architect certainly took a great deal for granted in favour of the plaintiffs. The evidence of the plaintiffs, leaving out the architect's extraordinary acquiescence in the plaintiffs' demands, and his apparent indifference to his client's interests, was, I think, so vague, sketchy, and unsatisfactory, that I should have been better satisfied if we could have seen our way to direct this branch of the case to be retried.

But, as the architect was the defendant's own agent, and the evidence satisfied the trial Judge, and as my learned brothers agree in thinking that on principle the course above suggested ought not to be adopted, I have not a sufficiently strong opinion to justify me in recording a dissent.

Appeal dismissed.

MIDDLETON, J. JUNE 6TH, 1912.

RICKLEY v. STRATTON.

Medical Practitioner — Malpractice — Negligence—Evidence — Damages—Costs.

Action by Benjamin Rickley, an infant of eight years, suing by his father and next friend, and by Elisha Rickley, the father, against a medical practitioner for malpractice in the treatment of the boy's broken leg, the boy claiming $600 damages and the father $400 damages.

J. L. Whiting, K.C., and J. E. Madden, for the plaintiffs.
W. S. Herrington, K.C., for the defendant.

MIDDLETON, J.:—The child was injured on the 12th December, 1911. The defendant was called in upon the same day; and, after ascertaining the nature and extent of the injury, proceeded to treat the child in a way that is characterised by the witnesses on both sides as being exceedingly skillful: to use the words of one of the witnesses, it was "a good example of up-to-date surgery." The leg, after being straightened, was duly fastened to splints, a weight was attached and the patient was then left till the morning, when it was intended to set the broken limb. On the morning of the 13th, it was found that the bone was almost exactly in place, and the setting was accomplished without difficulty. The patient was made comfortable and was left to the care of the mother. The defendant called several times and examined the limb, doing all that was necessary; and, up to a date as to which there is some uncertainty—but which I fix as the 22nd December—there is no room for any adverse comment upon his treatment or conduct, and apparently the child was on the high way to recovery. This would be some ten days after the fracture.

I quite accept the defendant's statement as to the course adopted by him in the treatment of the child; and, speaking generally, I much prefer his evidence to the evidence of the parents.

On that day it appears that he had an idea that the bandaging of the leg or the weight attached had been tampered with, probably with the view of easing the pain which the child necessarily suffered, incident to the healing of the broken limb; and he then very fully and carefully warned the mother, in whose

care the child was, of the danger of deformity resulting from any interference with the bandaging and other appliances.

The plaintiffs lived a considerable distance from Napanee, the residence of the defendant, and travelling at this time was difficult, owing to the poor condition of the roads. The plaintiffs were poor people, and could only afford to pay very small remuneration. Up to this time the defendant had only received $5 on account of his services, and later on $5 more in full of his charges, and he looked upon the case as practically a charity case; though this can make no difference in his liability.

There was a telephone in the village, to which the father and mother and other members of the family had easy access; and the defendant came to the conclusion that the leg was so well bandaged in the splints, and that the mother so thoroughly understood the necessity for leaving it quite undisturbed, that further visits were not necessary. He, consequently, gave instructions that, if anything went wrong, he was to be called from Napanee by telephone, and he stated that there was no necessity for frequent visits.

There is a good deal of confusion upon the evidence as to what took place next. The defendant has no detailed record of the case to aid his memory. The mother is most positive in her statements, but I do not think she can be relied upon. She fixes the date of the next visit as being the 31st December, and says that upon that day the defendant stated that he would come in about a week and remove the splints. The defendant has no recollection of this visit, and places his next visit as being on the 7th January. The mother says that on the 5th January, a Friday, the doctor came and removed the splints, and that the limb was then found to be crooked, and in bad shape; that the doctor made light of the condition of the limb, and declared it was all right and would be a useful limb, and that the shortening was very trifling. The defendant denies this visit entirely.

It is common ground that on the 6th January, Saturday, the father called upon the defendant and told him that the limb was not straight, and that the mother was much dissatisfied with its condition. The defendant suggested that, if the bone had united improperly, the leg might have to be again broken. The doctor then called on the 7th, the occasion which he says was his first visit after the 22nd December. The leg was then undoubtedly in a most unsatisfactory condition. The broken bone, the part of which had been placed end to end, had slipped, the lower section had crossed over the upper section and had united at the point of crossing. The two portions of the bone were at an angle of 135 degrees.

The mother refused to allow the bones to be severed, and the doctor tried to reduce the angle by a proper splint, but failed, as the adhesion was too firm. He advised an operation in the hospital; and there is a good deal of dispute as to the attitude of the different parties; but nothing turns upon this, as in the end the child was taken to the Kingston Hospital, and was there operated upon, very skillfully, by Dr. Anglin. The bone was separated where the improper union had formed; the broken ends were successfully united; and, after some weeks, the child was returned to its mother with the leg in an entirely satisfactory condition.

Save in respect to one matter, everything that has been suggested against Dr. Stratton is entirely without foundation; and, although the child is not now in a satisfactory condition, the defendant is in no way to blame for anything that took place after the child was taken to the hospital and placed in charge of the doctors there.

Doctor Anglin was a witness at the trial, and had not seen the child from the time it was discharged from the hospital early in April until the day of the trial. At the trial he examined the child, and found that, owing to the failure of the mother to obey his instructions and prevent the child standing upon the injured limb, most of the benefit of the operation had been lost; and the leg is now almost as crooked as before the operation at the hospital.

There is no doubt that on the 7th January the leg was in very bad shape, and that the condition of the bones then resulted in a shortening of over two inches. The question is as to the cause of this condition and the responsibility for it. On the 22nd December, the healing had undoubtedly reached a critical stage. The bone would not then have knit by the formation of any new bony structure, or, at most, the bony structure would have been of a very fragile nature; at the same time, the bone would have then united by the formation of callous or cartilaginous material; and, unless displaced by some misadventure, there was no reason why the healing should not satisfactorily progress.

At the hearing it was suggested that the mother must herself have loosened the splints or taken off the weight at some time between the 22nd December and the 7th January. She denies this. The husband denies it also, although he was not present more than a small portion of the time; and the child also denies it. Although I have grave suspicion, I do not think that, in the face of these denials, I can find in favour of this contention,

more particularly as Dr. Anglin stated that the child was exceedingly restless, and that the displacement of the bone may have been occasioned by this, quite apart from any improper conduct on the part of the mother.

One thing is clear: that between the 22nd December and the 7th January, and probably almost immediately after the 22nd, the bone somehow became displaced and remained displaced sufficiently long to become firmly fixed by the 7th January.

The negligence which is now suggested—though this I think was not present to the mind of the parties when the action was brought—is that the defendant ought to have realised the necessity of inspecting the limb every four or five days, so that he might see if displacement had taken place, either by the restlessness of the patient or by the carelessness or worse of the mother, so that the bone might be restored to its proper position before an adhesion had taken place or it had become so firmly fixed as to necessitate a serious operation.

Upon this point there is a conflict of evidence. Some of the medical men thought that, under the circumstances, the defendant had done all that he was called upon to do; that, having explained the danger to the mother, he was justified in relying upon her communicating with him if any displacement took place. Dr. Anglin said that the danger was a real danger, and that Dr. Stratton "took a chance." Further than this he declined to go. Others went farther, and said that, having undertaken the case, the doctor was not justified in taking a chance which might result so seriously to the child.

After considering the matter as carefully as I can, I do not think that the defendant was guilty of any actionable negligence; and, in my view, the action fails.

Had I come to the opposite conclusion, the damages to be awarded would have been a comparatively small sum; as there is no possible liability of the defendant save for the failure to attend the patient between the 22nd December and the 7th January, which resulted in the improper union of the bone. This necessitated the operation in the Kingston Hospital. In Kingston, the child was treated as a free patient, and the items inserted in the bill with respect to hospital charges, Dr. Anglin's bill, and nursing, are fictitious. Dr. Wilson's bill is unpaid; and I am satisfied that it was prepared for the purpose of the litigation.

The whole financial loss to the father would be covered by a small sum, and I would assess his damages at $50. The infant plaintiff would be entitled to something, because of the pain

and suffering incident to the operation at Kingston. I would assess these damages at $150; and I would, in that event, refuse to interfere with the operation of the rule as to setting off costs; because the claim made is, I think, unfair and exaggerated.

As it is, I dismiss the action with costs.

LATCHFORD, J. JUNE 6TH, 1912.

*ROBINSON v. GRAND TRUNK R.W. CO.

Railway—Carriage of Live Stock and Man in Charge—Injury to Man by Negligence of Railway Company—Liability—Special Contract of Exemption made with Shipper—Privilege of Travelling at Half-fare—Claim for Injuries—Want of Knowledge of Terms of Contract.

Action for damages for injuries sustained by the plaintiff, by reason of the defendants' negligence, while the plaintiff was a passenger by the defendants' railway from Milverton to South River.

W. L. Haight, for the plaintiff.

D. L. McCarthy, K.C., and D'Arcy Tate, K.C., for the defendants.

LATCHFORD, J.:—That the defendants caused injury to the plaintiff by their negligence was formally admitted at the trial, where the damages which the plaintiff thus sustained were fixed by a jury at $3,000.

It is, however, contended on behalf of the defendants that they are relieved from liability by the terms of a contract made between them and one Dr. Parker, who shipped a horse, in charge of the plaintiff, from Milverton, in the county of Perth, to South River, in the district of Parry Sound. Dr. Parker had purchased the horse for his friend Dr. McCombe, of South River; and, at the latter's request, the plaintiff proceeded to Milverton to bring up the horse—the rules of the defendants requiring that live stock shipped more than one hundred miles should have a man in charge.

The plaintiff accompanied Dr. Parker to the railway station, and was present when the shipping bill and special contract upon which the defendants rely was signed by the agent and by Dr. Parker, who thereupon, at the instance of the agent,

*To be reported in the Ontario Law Reports.

handed it folded to the plaintiff. In the margin of the contract is written, "Pass man in charge at half fare." The plaintiff did not open or read the contract. Its purport was not made known to him by any one, nor was he required by the agent (as the form directs) to write his name upon it. He paid no fare, and was asked for none. Half-fare for him was, however, charged in the bill rendered to Dr. McCombe at South River for the carriage of the horse; and both charges were paid by Dr. McCombe. During the transit a rear-end collision occurred, at Burk's Falls, and the plaintiff sustained serious injury.

The contract under which the horse was carried was before the Board of Railway Commissioners of Canada for approval on the 17th October, 1904. . . . An order was . . . made which . . empowered and authorised the applicants to use the form submitted "until the Board shall hereafter otherwise order and determine."

The form signed by Dr. Parker is identical with that . . . authorised by the Railway Commissioners; and, though nearly eight years have since elapsed, no further or other order has been made . . . .

The important provision is as follows: "In case of the company granting to the shipper or any nominee or nominees of the shipper a pass or privilege at less than full fare to ride on the train in which the property is being carried, for the purpose of taking care of the same while in transit and at the owner's risk as aforesaid, then as to every person so travelling on such a pass or reduced fare the company is to be entirely free from liability in respect of his death, injury, or damage, and whether it be caused by the negligence of the company, or its servants or employees, or otherwise howsover."

In view of the decisions in Bicknell v. Grand Trunk R.W. Co. (1899), 26 A.R. 431, and Sutherland v. Grand Trunk R.W. Co. (1909), 18 O.L.R. 139, it cannot be doubted that the contract was binding upon Dr. Parker. That point, however, is not involved in the present case. . . . Is the plaintiff bound by a contract between the shipper and the carrier to which the plaintiff was not a party and of the terms of which he had no knowledge? I have been referred to no case which decides this affirmatively. . . .

[Reference to Goldstein v. Canadian Pacific R.W. Co. (1911), 23 O.L.R. 536.]

I am firmly of opinion that the plaintiff's common law rights against the defendants were not taken away by the contract made between the defendants and Dr. Parker. Any other

view appears to me necessarily to imply that, by a contract to which he was not a party, under which he derived no benefit—the reduction in fare benefiting only the consignee—and of the terms of which he had neither notice nor knowledge, his right to be carried without negligence on the part of the defendants was extinguished, and they were empowered, without incurring civil liability, to maim and almost kill him while he was lawfully upon their train. If such can possibly be the effect of the special contract, a higher Court must so decide.

I direct that judgment be entered for the plaintiff for $3,000 and costs.

FOX v. ROSS—MULOCK, C.J.Ex.D.—MAY 31ST, 1912.

Title to Land—Patents from Crown—Description—Plans—Evidence—Title by Possession—Limitations Act—Act of Ownership—Cultivation and Cropping.]—The plaintiff claimed to be the owner in possession of the westerly part of Cotter's Island (or Bernhardt's Island) in the Bay of Quinté, in the county of Prince Edward, and complained that the defendant had trespassed and threatened to continue to trespass thereon, and asked for an injunction and damages. The plaintiff contended that the land in dispute was included in grants from the Crown to James Cotter, Wait Ross, and R. B. Conger in 1808, 1833, 1834, and 1845. The learned Chief Justice, after stating the description in the patents, and referring to plans and other evidence, stated his conclusion that the land in dispute was not covered by the patents referred to, and that the plaintiff had no paper title thereto.—The plaintiff also asserted title by possession. The evidence shewed that from 1834 until 1911 the plaintiff, by himself and others of whose possession he was entitled to the benefit, had each season cultivated the land in dispute. No one ever resided upon it, and no buildings were ever erected upon it. There was some vague evidence as to fencing; but the only fence of which there was any proof was one running northerly across the island to the north side, intended to prevent persons who used the east part of the island from trespassing on the west part. The user of the land was limited to cultivating and cropping during the summer season. For at least one half of each year no one was in possession. The learned Chief Justice said that during the winter seasons throughout the whole period there was at most only constructive possession, not "actual, exclusive, continuous, open or visible

and notorious possession:" Sherren v. Pearson, 14 S.C.R. 585. The lawful owner was not prevented from taking peaceable possession, and there was no trespasser against whom he could have maintained an action to recover the land. For about one-half of each year the possession was vacant, and on each such occasion the right of the true owner would attach and the Statute of Limitations cease to run, beginning again, but only from a new starting-point, when the plaintiff took possession each spring. His withdrawal during each winter lost to him the benefit of his possession up to the time of such withdrawal: Coffin v. North American Land Co., 21 O.R. 81. The action was dismissed with costs. M. R. Allison and P. C. MacNee, for the plaintiff. E. G. Porter, K.C., for the defendant.

BALDWIN v. TOWNSHIP OF WIDDIFIELD—BRITTON, J.—JUNE 1.

Municipal Corporation—Construction of Road Ditch—Surface Water—Flooding Lands—Absence of Negligence.]—The plaintiff, the owner of part of lot 19 in concession B. of the township of Widdifield, comprising $4\frac{95}{100}$ acres, complained that the defendants, about the year 1899, diverted the water from a certain stream or creek which ran across another part of lot 19, and, for the purpose of carrying off the water so diverted, constructed a ditch running easterly along the old Trout Lake road, which ditch was entirely unfit and inadequate for the purpose intended, and so the water flowed from it over the plaintiff's land, to her damage. The learned Judge, in his written reasons for judgment, stated the facts briefly; and then said that there was no sufficient evidence to establish the existence of any creek, properly so-called. All the water that was diverted was surface water, and would, had the road ditch not been made, have flowed upon lot 19, and would in great part have found its way to the place where the flooding complained of occurred. The defendants were not guilty of any negligence. Action dismissed without costs. G. L. T. Bull, for the plaintiff. G. H. Kilmer, K.C, for the defendants.

LLOYD v. STRONACH—MASTER IN CHAMBERS—JUNE 6.

Venue — Change — County Court Action—Witnesses—Convenience.]—Motion by the defendants to transfer the action from the County Court of the County of Huron to the County Court of the County of York. The action was for an account of sales of apples by the defendants for the plaintiff. The defendants swore to ten witnesses in Toronto, besides themselves, giving names and what the witnesses would be called to prove. The plaintiff swore to six witnesses in the county of Huron, but did not give names nor indicate what the witnesses would testify. All the transactions between the parties took place at Toronto. The Master said that, having regard to all the facts appearing, it seemed right to grant the motion and transfer the action. Order made as asked. Costs in the cause. D. D. Grierson, for the defendants. C. M. Garvey, for the plaintiffs.