THE

ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING JUNE 21ST, 1902.)

VOL. I. TORONTO, JUNE 26, 1902. NO. 24.

BOYD, C. JUNE 10TH, 1902.

TRIAL.

PATRIARCHE v. KAMMERER.

Promissory Note—Presentment—Notice of Dishonour—Demand Prior to Action—Power of Attorney—Bills of Exchange Act, secs. 57, 85.

Action for re-delivery of 70,000 shares of mining stock, subject to the payment by plaintiff of two promissory notes for $400 and $250 respectively, or for payment over of the proceeds of the sale of the shares, if sold, after payment of the amount of the notes. Counterclaim for payment of two notes of $5,000 and $300 respectively, made by the Electrical Maintenance and Construction Company, of which the plaintiff is manager, and for the delivery of 30,000 shares of mining stock in the same company, which had been delivered to the defendant with the 70,000 shares, but had been borrowed by the plaintiff from him afterwards. The notes were indorsed by the defendant by counterclaim, Frances M. Patriarche, wife of the plaintiff. The defendant claimed payment of the four notes less $100 paid on account of the $300 note. The defendant Frances M. Patriarche alleged that she had not due notice of dishonour of the notes for $5,000 and $300 respectively, and that they had not been duly presented for payment.

N. F. Paterson, K.C., for plaintiff.

G. T. Blackstock, K.C., for defendant.

BOYD, C.—I held at the hearing that the shares of the Blaine Company were held by the defendant in security for all that he owed, i.e., for the $5,000 note, the $400 note, and the $250 note, mentioned in pleadings.

I find that the plaintiff and wife are both liable for the amount of the $5,000 note payable on demand with interest

from 8th day of April, 1902. I do not give effect to the contention that they are or either of them is discharged from liability because it was not presented within a reasonable time. See Bills of Exchange Act, 1890, sec. 85. All the circumstances of the case repel the idea that any detriment has resulted from the delay; rather was it in ease of the indorsers that time should be given as a matter of grace till funds could be obtained from the works in construction at Orillia.

Judgment should be against them personally for the amount. I find, however, that the wife is discharged or is not liable as indorser on the other notes of $400 and $250. No evidence of presentment and notice of dishonour has been given as to these, and, apart from that, the power of attorney under which the husband signed his wife's name is not sufficiently comprehensive to embrace these notes. The context of the power of attorney shews that it was intended to give authority to indorse in connection with financial dealings and transactions with the Imperial Bank of Canada, and no connection has been established between that power of attorney and these notes or the said bank.

Judgment should be against the plaintiff alone on these last two notes, with interest on the $400 note from 31st July, 1900, and with interest on the $250 note from the 12th May, 1902, when the counterclaim was made.

As to this demand note, there is no evidence of any presentation to or of any demand prior to the action. (See Bills of Exchange Act, sec. 57.)

Judgment may be entered against the electrical company for the balance of $200 on their note of 20th April, 1900, with interest from the date of payment of $100 thereon (this precise time does not appear in the pleadings or evidence).

The defendant is entitled to enforce his lien by sale of the 70,000 shares in his hands of the Blaine stock, and is entitled to a declaration that the lien extends to the other 30,000 shares transferred to the plaintiff Patriarche on 17th June, 1901, and then agreed to be returned.

The plaintiff's action is dismissed with costs.

The defendant's counterclaim is allowed with costs against Patriarche; but as to his wife no costs for or from her.

N. F. Paterson, Toronto, solicitor for plaintiff.

Beatty, Blackstock, Nesbitt, Fasken, & Riddell, Toronto, solicitors for defendant.

FALCONBRIDGE, C.J. JUNE 10TH, 1902.

WEEKLY COURT.

Re PADGET AND CURREN.

Will—Construction—Life Estate.

Motion under Vendor and Purchaser Act.

The question was as to the estate taken in certain land by James Charles Padget under the devise in the will of his father in the following terms:—

To my son James Charles all the south-east portion of aforesaid lot 15 in the 2nd concession Rideau front containing 125 acres, but excepting and reserving therefrom the one acre hereinafter reserved for my daughter Matilda McCaffrey, together with the east half of the rear 30 acres owned by me at the rear of lot 15 in the 3rd concession Rideau front, all in the said township of Gloucester, subject however to the following conditions and obligations, that is to say, that my son James Charles shall pay to his mother each year at such time or times as my said executors shall appoint, the sum of $100 during her lifetime. That he, my said son James Charles, shall not and is hereby restricted from, at any time during his lifetime, selling, incumbering by way of mortgage or loan, or in any way raising money or money's worth on the said above described real estate, but he may farm-rent said farm property, and collect and enjoy said rent, provided in the event of my said son James Charles dying without leaving lawful heirs, the above described farm property shall become the property of my son Alexander, and in the event of his being married at the time of his death, but leaving no children, then and in such event my said son Alexander shall pay to the wife her dower value, but in the event of my son James Charles leaving issue, the above farm property shall pass to his children unclouded by conditions of title. My said son James Charles shall also be entitled to one-half share in barn hereinbefore mentioned, and the right of a roadway to and from said barn.

G. F. Henderson, Ottawa, for vendor.

J. Bishop, Ottawa, for purchaser.

W. J. Kidd, Ottawa, for executors and a devisee.

C. J. R. Bethune, Ottawa, for infants.

FALCONBRIDGE, C.J.—The interests of the infants would not be bound by any order on this motion, but, as the property in question is of small value, and treating the

motion as made under Rule 938, I think it is sufficiently clear that the testator's intention was to give James Charles an estate for life only, and thus prevent the application of the rule as to restraint on alienation where an estate in fee simple is given. No order as to costs, except that vendor pay costs of infants.

JUNE 16TH, 1902.

C. A.

MACLAUGHLIN v. LAKE ERIE AND DETROIT RIVER R. W. CO.

Leave to Appeal—Supreme Court of Canada—Contract—Construction of—Case not Involving Large Interests or Great Loss.

Motion by plaintiff for leave to appeal from judgment of Court of Appeal (1 O. W. R. 266).

The motion was heard by ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.

F. C. Cooke, for plaintiff.

A. W. Anglin, for defendants.

OSLER, J.A.—The question was simply one of construction of the contract between the parties and the ascertainment of the defendants' rights thereunder. On this point there was a difference of opinion, but none on the question whether the contract ought to be reformed—a point which was throughout decided adversely to the plaintiff.

That there was a difference of opinion is not of itself a reason for granting leave to appeal, certainly not where the question at issue is not one of large and general application—Fisher v. Fisher, 28 S. C. R. 494, and James v. Grand Trunk R. W. Co. (not reported), illustrates both aspects of this—or the action is not one involving large interests or great loss to the unsuccessful party.

Here, what is complained of does not involve any change in the appearance of the plaintiff's patented invention, and is an improvement on it from the defendants' point of view. And, whether an improvement or not, it belongs to and may be made use of by the plaintiff as part of his invention. There is no evidence that he suffers or is likely to suffer serious damage by what is complained of, and the action appears to have been brought more because of the plaintiff's objection to any change being introduced by the defendants in working his invention than for any other reason, unless, indeed, it were to enable him to get rid of his agreement altogether.

We think that no case is made out for granting leave to appeal further, and, therefore, that the motion must be dismissed.

MACLENNAN and MOSS, JJ.A., concurred.

ARMOUR, C.J.O., dissented.

BRITTON, J. JUNE 21ST, 1902.

CHAMBERS.

REX v. MARTIN.

Conviction—Keeping House of Ill-fame—Evidence.

Application by Kate Martin for order for issue of writ of habeas corpus and certiorari in aid. She was convicted of keeping a house of ill-fame, and committed to the Mercer Reformatory for six months at hard labour.

J. M. Godfrey, for defendant, contended that there was no evidence shewing her to be the keeper of a house of ill-fame, as charged in the information.

BRITTON, J.:—Upon the evidence, if the magistrate accepted it, he was at perfect liberty to make a valid conviction for an offence under the statute within his jurisdiction to try, and, therefore, there is no probable and reasonable ground for the defendant's complaint that she is unlawfully detained. Motion dismissed.

Robinette & Godfrey, Toronto, solicitors for defendant.

BRITTON, J. JUNE 21ST, 1902.

CHAMBERS.

MURPHY v. BRODIE.

Stay of Proceedings—Consolidation of Actions—Parties—Jury Notice.

Appeal by defendant from order of local Judge at Sandwich dismissing application by defendant to stay proceedings in this action, or to consolidate it with another in which the same issues are involved, and from order granting plaintiff's motion to strike out jury notice.

Action to compel defendant to indemnify plaintiff for moneys expended by plaintiff as trustee for defendant and one Margaret Stuart upon a contract of indemnity made by the defendant. An action for account brought by Margaret Stuart against the plaintiff is pending, to which the present

defendant is not a party. After notice of trial for non-jury sittings given, defendant served jury notice and launched motion to consolidate or stay present action.

F. E. Hodgins, for defendant.

F. A. Anglin, for plaintiff.

BRITTON, J.—Appeal as to striking out jury notice dismissed.

Appeal as to order refusing to stay proceedings allowed, and order made postponing trial of this cause until after the sittings of the High Court of Justice to be holden at Sandwich on the 23rd instant, so as to permit the estate of Margaret Stuart to be represented, and to permit of the defendant herein being made a party in the suit of Stuart against the now plaintiff, as the plaintiff desires.

It seems to me quite clear upon the plaintiff's own shewing that if there is any liability on the part of the defendant in this action to the plaintiff, it is a liability as surety for the late Margaret Stuart in reference to hotel property, which property is in the control of plaintiff, and I think plaintiff cannot be prejudiced by this delay, so that an opportunity may be given to have the accounts of plaintiff investigated, and thus have the liability of defendant, and extent of that liability, determined.

Order as to costs varied and all costs of application to local Judge and of this appeal to be costs in the cause.

Leave to either party to make such further application as to consolidation or adding parties as they may deem necessary.

J. E. O'Connor, Windsor, solicitor for plaintiff.

Davis & Healy, Windsor, solicitors for defendant.