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REYNOLDS, JUN. CO.J. MAY 20TH, 1903.

SIXTH DIVISION COURT LEEDS AND GRENVILLE.

ACHESON v. BASTARD SCHOOL TRUSTEES.

Public Schools—Contract with Teacher—Execution by Trustees—Necessity for Meeting—"Continuation Class"—Appropriation of Payment — Former Contract Continuing — Computation of Salary—Days of Absence.

A plaint by Samuel Acheson against the board of public school trustees for school section No. 11 of the township of Bastard. The plaintiff's claim was for balance of salary as teacher under a contract with the defendants dated 14th December, 1901. The following were the particulars:

1902.		
Aug. 29.	Salary from 2nd Jan. to 29th Aug., 1902..	$277 25
	"Continuation grant," as per contract....	30 00
Nov. 4.	Amount payable under R. S. O. ch. 292, sec. 7, sub-sec. 6, to 4th Nov...........	102 24
Nov. 20.	Amount payable under same statute to date of issue of summons...............	34 08
		$443 57
	Cash on account	289 97
		$153 60

The plaint was tried at Delta on 13th May, 1903.

William Wyld, Ottawa, for plaintiff.

M. M. Brown, Brockville, for defendants, contended that the agreement sued on, being the second agreement between plaintiff and defendants, not having been signed at a meeting

of the trustees regularly called, but being signed by the individual trustees upon being called upon at their houses for that purpose, was not binding: Lambier v. South Cayuga School Trustees, 7 A. R. 506.

Reynolds, Jun. Co.J.—In this case I find that there was no meeting of the trustees, as required by sec. 20, so as to make the re-engagement of, or second agreement with, the plaintiff binding on the defendants; consequently plaintiff cannot sue on that agreement.

There is. however, little practical difference, inasmuch as I hold that plaintiff would only have been entitled to that proportion of the grant in respect of the continuation class applicable to the period from January to June, 1902, and the $17.04 paid by the defendants would amply pay this.

I further find that this sum of $17.04, being expressly paid (as per Alex. Stevens's letter of 29th October, 1902) for his continuation work, cannot now be taken into account. It could not be recovered back by the defendants or now applied by them to any other indebtedness to the plaintiff.

I further find as a fact that plaintiff was engaged by defendants, as per agreement of 14th January, 1901, at a salary of $450 per annum, and, the second agreement not being binding, this old agreement continues (McPerson v. Usborne School Trustees, 1 O. L. R. 261), and the parties' rights must be determined by that.

I further find that plaintiff taught during the period from 1st January, 1902, to end of August, 1902, when his services ended, pursuant to his notice on 29th August, the last teachingday in August, which termination defendants fully assented to.

I find that this period embraced 131 teaching days (see Education Department circular, form 94). Plaintiff claims to be paid for 130 of these days; defendants say he is entitled to be paid for only 128 of these days, and they have paid him for that number.

Respecting these days in dispute, I find as follows: One day was an election day, when plaintiff was absent with the consent of the trustees, but at his own cost and charges. This day plaintiff does not claim. The two days in dispute arise as follows: The entrance examination for High School purposes was held in the spring (probably June) of 1902, at the Delta school house. This was appointed by the department, and the inspector, I presume by recommendation of the county council under 1 Edw. VII. ch. 40, sec. 411.

As a consequence of this the Delta school was closed during the days of this entrance examination—a number of plaintiff's pupils wrote on this examination.

The inspector appointed the plaintiff to go to another school, viz., that at Newborough, and preside at the entrance examination there. Consequently plaintiff was not teaching on the days of the examination. The examination lasted three days. Defendants have only deducted two days, probably because the third day was a Saturday.

On the usual method of computing (sec. 81 (4) of Act), plaintiff's salary for these two days would amount to $4.27.

Plaintiff did not notify defendants that school would be closed on these days. Stevens, one of the defendants, says that had they been notified another room suitable for the school, or for holding the entrance examination, could have been provided without any additional expense to defendants. There is no evidence before me that such a course is ever adopted, and, in view of the fact that the inspector, who would understand such matters best, sent the plaintiff to Newborough, and of the number of plaintiff's own pupils who were writing on this entrance examination, and the disorganization which would naturally follow, I do not think such a course would have been adopted by the trustees, even if plaintiff had formally notified them of the fact of the examination, and requested instructions.

From the evidence I hold that defendants are not entitled to treat these two days as being days on which plaintiff absented himself from their services and his duties, and that he is entitled to be paid for them, and in view of the way the parties have presented the case before me, and the way teachers are paid when absent on sick leave, I find he is entitled to $4.27 for them.

If the calculation be made the other way, viz., by deducting these days from the total teaching days of the year, there would still be a sum of money coming to the plaintiff.

I find, therefore, that the plaintiff is entitled to recover $4.27, and as plaintiff's salary was not paid in full at the expiration of his agreement, he is entitled under the statute to recover at the rate in the agreement till suit brought. The rate in the agreement being $2.13 per day, and there being 58 teaching days from 29th August to 22nd November, date of issue of summons, he is entitled to $125.67 additional, making a total of $129.94.

The plaintiff, as before intimated, is not entitled to anything more in respect of the continuation class.

I direct judgment to be entered for $129.94, and costs payable in 15 days.

CARTWRIGHT, MASTER MAY 26TH, 1903.

CHAMBERS.

FARMERS' LOAN AND SAVINGS CO. v. EARHEART.

Summary Judgment — Mortgage — Defence — Release — Conveyance—Question to be Tried.

Motion by plaintiffs for summary judgment under Rule 603.

F. J. Dunbar, for plaintiffs.

H. R. Frost, for defendant.

THE MASTER.—By deed dated 1st June, 1893, defendant mortgaged to plaintiffs certain real estate securing $700 and interest. On 19th June, 1902, interest was in arrear, amounting to $166.89. On 26th May, 1902, defendant signed an offer to purchase the land from the liquidator of plaintiffs for $600. The offer is now before me. Annexed to it is the recommendation of the acceptance of such offer by the liquidator . . . stating that the claim of the company is $1,015; that the land is valued . . . at $600; and that Mr. Earheart now offers $600 cash. It is admitted that the offer was accepted and the land was conveyed to a nominee of defendant, who had advanced the $600, which was duly paid to the liquidator. . . . On 21st October last an action was commenced in a County Court to recover from defendant the balance still alleged by plaintiffs to be due on the mortgage. An appearance being entered, a motion was made for summary judgment. On consent of all parties on 7th March last an order was made transferring the action to the High Court; and on 19th May this motion was made for summary judgment. . . .

Defendant's solicitor states as his ground of defence that when the sale of the lands was made to him, he fully understood that upon payment of $600 plaintiffs would have no further claims upon him in reference to the mortgage.

If this proves to have been a mistake on his part, it was certainly a very natural mistake.

In Jacobs v. Booth's Distillery Co., 85 T. L. R. 262, the true principle was declared to be this: "Judgment should only be ordered where, assuming all the facts in favour of defendant, they do not amount to a defence in law."

Applying this test to the facts of the present case, it is clear that the motion must be refused. Looking at the whole transaction and the documentary evidence, it may yet be held that plaintiffs have no further claim on defendant. . . .

The motion is refused, and, as this same point was taken by defendant on the motion in the County Court, I make the costs to him in any event. I do not see how plaintiffs could have expected to succeed. See Warner v. Bowlby, 9 Times L. R. 13.

CARTWRIGHT, MASTER. MAY 26TH, 1903.

CHAMBERS.

McDONALD v. PARK.

Parties—Joinder of Causes of Action—Action to Set aside Will and Establish Earlier Will—Different Beneficiaries—Inconvenience —Jurisdiction of High Court.

Motion by defendants other than George McDonald and the infants to strike out paragraph 4 of statement of claim and make other necessary excisions, on the grounds of (1) improper joinder of separate and distinct causes of action, and (2) that the cause of action set up in paragraph 4 could not be properly tried in this Court.

W. E. Middleton, for applicants.

C. A. Moss, for defendant George McDonald, supported the motion.

The infants were not represented.

Casey Wood, for plaintiff, shewed cause.

THE MASTER.—I think the motion should succeed. . . This is an action to set aside a will of plaintiff's mother (which was admitted to probate on 3rd January, 1903), on ground of want of testamentary capacity on the part of the testatrix at the time of its execution in November, 1902. Of this will the defendants Duncan and Ireland are executors, and the infants take nothing under it.

The paragraph of the statement of claim which is sought to be expunged sets out a prior will, alleging same to be the last will and testament of the testatrix, and paragraph 5 of the prayer for relief asks a declaration of the Court to that effect. Of that will the plaintiff and his father, the defendant George McDonald, were named executors. The infant defendants and any subsequent issue of the defendant Ann Jane Park were devisees under this earlier will.

From this it appears that there are two separate causes of action: (1) to set aside the will of November, 1902, of which probate has already been granted; (2) to establish the will of October, 1898, as the true last will of the testatrix.

There are also two distinct sets of defendants. On the first branch the infants are not properly parties. On the second branch the executors are not necessary parties. It appears to me that this cannot be done. As I understand the cases, you cannot join separate causes of action against separate sets of defendants. You may join separate causes of action against the same defendants; or you may join (in some cases) separate defendants where there is only one cause of action.

The latest case on the point (Chandler and Massey, Limited, v. Grand Trunk R. W. Co., decided on 15th May instant) is to be found in 2 O. W. R. 427. There, in giving the decision of a Divisional Court, Sir W. R. Meredith, C.J., said: "Collins, L.J., puts the matter very clearly in Thompson v. London County Council, [1899] 1 Q. B. at p. 844. . . . We must interpret Rules 186 and 192 in the light of the authorities, and follow Quigley v. Waterloo Mfg. Co., 1 O. L. R. 606, which proceeds upon the English cases. Here the causes of action against the two defendants are distinct, and they cannot be sued in the alternative." This is sufficient to dispose of the motion.

But I think it well to point out that the second ground of action could not be "conveniently disposed of in the same action with the first." If the two grounds were allowed in one action, the defendants might, by way of counterclaim, set up a later will than that of October, 1898, which might make it necessary to call in other defendants than those already before the Court. And these in their turn might set up another will or codicil still later. The state of the record in such a case would be indeed astonishing.

But, even as now constituted, it is impossible to see what advantage can result from the objectionable paragraph. Until the will admitted to probate has been finally set aside, it would be idle to attempt to establish another. And a final determination of the first point might not be reached for some years—or conceivably the evidence given at the trial might shew that as early as October, 1898, the necessary testamentary capacity was wanting. Again, if the will of November, 1902, was set aside, the will of October, 1898, if no later was proved, would be prima facie valid. Then the defendants would become the real plaintiffs in that issue, and the plaintiff would be the defendant. It is inconceivable that both issues could be tried at the same time. One would have to be postponed. These considerations seem to shew that the two causes of action could not conveniently be tried together, and therefore cannot conveniently be joined. The

rule is well understood that this question of convenience is a very important factor in determining the application even of the apparently unlimited power given to a plaintiff by Rule 232 to join several causes of action: see remarks of Lord Selborne in Burstall v. Beyfus, 26 Ch. D. 39 (H. & L. p. 411), that this Rule (232) authorizes the joinder not of several actions against distinct persons, but several causes of action.

The foregoing makes it unnecessary to consider the second ground of objection set out in the notice of motion. I will only say that, so far as I can learn, no case can be found in which a plaintiff has come direct to the High Court to establish a will, there being neither probate granted of any other will nor any proceedings pending in a Surrogate Court in respect of another will. The language of sec. 38 of the Judicature Act seems to contemplate an attack by the plaintiff and an attempt to have a will declared void, not established. The cases cited by Mr. Wood seem to be all of this character. Cameron v. Cameron, 10 P. R. 572, is not on this point at all. In Appleman v. Appleman, 12 P. R. 138, all that was decided was that a defendant contesting the validity of the will propounded in the Surrogate Court might by way of counterclaim propound two earlier wills under which he claimed in the event of the last in date being invalidated.

But, however this may be, the motion must be allowed on the other ground. The costs will be to the defendants in the cause.

I may add that a further consideration of the judgment of the Chancellor in Quigley v. Waterloo Mfg. Co. makes it quite clear to my mind that the present is not a case in which the principle of Child v. Stenning, 5 Ch. D. 695, and similar cases, can apply.

CARTWRIGHT, MASTER. MAY 26TH, 1903.

CHAMBERS.

MORLEY v. CANADA WOOLLEN MILLS CO.

Pleading—Statement of Claim—Enlargement of Claim made by Writ — Wrongful Dismissal of Servant — Introductory Statements — Depreciation in Stock of Company—Representations—Particulars.

Motion by defendants to strike out the 2nd, 7th, and 8th paragraphs of the statement of calim, because they tend to prejudice, embarrass, and delay the fair trial of the action,

and are irrelevant to the issues, or in the alternative for particulars.

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

C. A. Moss, for plaintiff.

The Master.—The action is for alleged "wrongful dismissal" as indorsed on the writ. This claim is enlarged in the statement of claim by setting up in the 7th paragraph that owing to plaintiff's alleged wrong the value of certain shares of the defendant company owned by him, and for which he paid $5,200, has been largely impaired. It is further enlarged by setting up in the 8th paragraph that, since the plaintiff's dismissal, the defendants have asserted that his resignation was demanded on the ground of incompetence, whereby the defendants have largely injured the plaintiff in his business reputation.

The 2nd paragraph, as I understand it, is not necessarily objectionable. It is perhaps merely introductory, and might have been joined to the 3rd. The 2nd paragraph does not make any distinct complaint against the defendant company, It indicates probably the opening of the plaintiff's evidence at the trial. I do not see how it can be prejudicial or embarrassing in that view.

Of the 7th paragraph I take a less favourable view. Between the alleged wrongful dismissal of the plaintiff and the depreciation of his shares there is no apparent connection, and none is suggested. There is no allegation, e.g., that since the plaintiff's dismissal the shares, if offered for sale, have depreciated in the market, and that this depreciation was in any way caused by such dismissal. If the plaintiff really means to urge this as a substantial ground of damage, the defendants are entitled to have the matter made clear either by amendment or by particulars which, as was said by Vaughan Williams, L.J., in Millbank v. Millbank, [1900] 1 Ch. at p. 385, is another way of expressing the same thing.

The 8th paragraph, it was admitted by Mr. Cassels, "might be made into a cause of action." I think it does already set up a cause in respect of which the plaintiff would be entitled to recover on same being proved. The complaint is of "injury to the plaintiff in his business reputation." The defendants are, however, entitled to have such particulars of the alleged injurious statements as will enable them to shape their defence as they may think best. The matter at present is left wholly to conjecture.

I am not sure if the defendants complained of the statement of claim being unduly enlarged. But if so, I do not think it was, following Smythe v. Martin, 18 P. R. 227. In any case such amendments would be allowed, as is shewn by Hogaboom v. McCulloch, 17 P. R. 377, and Patterson v. Central Canada L. and S. Co., 17 P. R. 470. In Sugarman v. Robinson, 17 P. R. 419, at p. 425, Sir W. R. Meredith, C.J., said (in a case not similar, though analogous) that, the plaintiff having stated that he could not at present give any particulars of certain injurious statements, he was entitled to leave to examine the defendant to enable him to furnish them.

In case I am wrong in the view I have taken of the 2nd paragraph, and if the plaintiff intends to make any claim in respect of the representations made to him before the incorporation of the defendant company, or in respect of the purchase of the $5,200 stock, as having been induced by such representations, then full particulars should be given so as to enable the defendants to know what is being set up by this paragraph and to make such defence as they may be advised.

The costs of this motion should be to the defendants in the cause.

Moss, C.J.O. MAY 26TH, 1903.

WEEKLY COURT.

MACDONELL v. WEST.

Partition — Petition under Partition Act—Parties—Execution Creditor of Co-parcener — Preservation of Lien — Registration of Certificate of Allowance of Petition—Failure to Renew Execution —Conveyance by Co-parcener to Bona Fide Purchaser—Priorities.

At the date of the filing of the petition for partition herein, the Michigan Clothing Company were entitled to a general lien upon the undivided estate or interest of the defendant Charles A. Loughin in the lands described in the petition, by virtue of a writ of execution against goods and lands in the hands of the sheriff. And the petitioner made them parties defendants to the petition in respect of such lien.

The lien was still subsisting at the date of the allowance of the petition on the 14th June, 1899. Pursuant to sec. 29 of the Partition Act, a certificate of the allowance of the petition was registered in the registry office on the 16th June, 1899.

The Michigan Clothing Company's writ of execution, not having been renewed, expired in the sheriff's hands on the 25th February, 1900. By two conveyances dated the 24th April, 1900, and the 25th April, 1902, respectively, the defendants Charels A. Loughin and Martha A. Loughin, his wife, granted and conveyed all their estate and interest in the lands to one Mary E. Gamble.

An order for sale in lieu of partition of the lands was made on the 3rd December, 1901. On the 31st December, 1901, they were sold to a purchaser, and subsequently the purchase moneys were paid into Court.

On the 20th May, 1902, an order was made adding Mary E. Gamble as a party to the proceedings with respect to any right, title, claim, or interest she might have in the proceeds of the sale. On the 9th June, 1902, the Michigan Clothing Company placed an alias fi. fa. in the sheriff's hands, and thereafter the local Master proceeded to ascertain the respective rights and equities of the parties.

The company claimed payment to them of the portion of the purchase moneys attributable to Charles A. Loughin's interest, and to be entitled thereto notwithstanding the conveyances to the defendant Mary E. Gamble. It was shewn that the company had not been paid the amount of their judgment debt, and that the failure to renew the fi. fa. was through oversight and inadvertence. On the other hand, the local Master found that the defendant Mary E. Gamble was a bona fide purchaser for value, and held her entitled to the moneys.

The company appealed from the report.

The question on the appeal was whether the filing of the petition, the order of allowance, and the registration of the certificate of allowance, operated to preserve the company's lien and rights against the lands, so as to dispense with renewal of the writ of fi. fa.

The appeal was heard by Moss, C.J.O., sitting for a Judge of the High Court.

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

Grayson Smith, for defendant Mary E. Gamble.

Moss, C.J.O.—The certificate of allowance of the petition is clearly "an instrument," within sec. 2 (1) of the Registry Act. It is a certificate of a proceeding in a Court, and under sec. 92 of the Act the registration thereof constituted notice to all persons claiming any interest in the lands subsequent to such registration.

If, therefore, the company's lien was preserved by the proceedings taken prior to her purchase, the defendant Mary E. Gamble was affected with notice of the lien at the time of the conveyance to her.

It is proper, though not compulsory, in the first instance to make a person having a lien on the estate or any part thereof by decree, mortgage, or otherwise, a party to the proceedings. If a person having a lien on the undivided share of a person interested in the lands is made a party, his lien is confined to such share. But failure to make him a party in the first instance does not impair or affect his lien: sec. 21. And in either case he is left to make proof of his claim at a future stage. The exact effect of the allowance of the petition is not declared by the Act, but I think it clear that it has not the force of a judgment or order establishing the claim of any party. Upon the allowance the parties shall and may appear, and, by a concise statement of facts by way of defence, and further according to the practice of the Court, shew title as to the proportion which they or any of them claim of the premises: secs. 31, 32. If none of the parties answer within 15 days next after service of the order of allowance of the petition, the petitioner shall be at liberty to sign judgment of partition and proceed as directed: sec. 34. Where a sale is determined upon, inquiries and proceedings are directed for the purpose of ascertaining and settling the claims of creditors or persons having liens or incumbrances: secs. 44, 45, 46.

And this inquiry should extend not merely to the existence of liens at the date of the filing of the petition, but to the time when the reference is being proceeded with: Robson v. Robson (1884), 10 P. R. 324.

The allowance of the petition seems to operate to no greater extent than to declare the regularity of the proceeding, and to enable the petitioner to give notice of the lis pendens by registration of the certificate, and to call upon the other parties to the petition to make answer if so advised. It does not, nor does registration thereof, determine anything as to the rights of the parties or dispense with proof of the title to, and claims against, the land.

In Yale v. Tollerton (1866), 2 Ch. Ch. 49, Vankoughnet, C., held that a judgment creditor, having obtained a decree in Chancery for equitable execution by sale of his debtor's interest in certain lands while executions against lands were in force in the sheriff's hands, was not required to keep the

executions renewed in order to preserve his rights. This decision is said to have been affirmed by the full Court on rehearing. See Wilson v. Proudfoot (1868), 15 Gr. at p. 107. The reference to 13 Gr. 302 is incorrect. The decision of the full Court does not appear in Grant's reports or elsewhere that I can discover.

Vankoughnet, C., also held, in another case, that the filing of a bill in Chancery to enforce equitable execution of a judgment was equivalent to a seizure at law: Ex relatione Mowat, V.-C., in Wilson v. Proudfoot, supra. The facts are not shewn, but it must have been a case in which there could have been no execution of the fi. fa. by the sheriff.

In Yale v. Tollerton the interest sought to be made available by the execution creditor was such as could not be taken or sold by the sheriff under the writ of fi. fa., and resort to equity was necessary in order to render it available.

That being so, there seemed no good reason, after a decree had been obtained, for continuing in the sheriff's hands a writ under which he could take no effectual proceeding. As much had been done to constitute an inception of a seizure under the fi. fa. as the nature of the case permitted. Vide Doe Tiffany v. Miller (1850), 6 U. C. R. 426; Bradburn v. Hall (1869), 16 Gr. 518.

It is important to note that the execution creditor not only instituted the proceedings—was the actor in them—but carried them to decree during the currency of the writ.

In the present case the Michigan Clothing Company were not the actors in instituting the partition proceedings. And they do not appear to have done anything towards establishing their claim in the proceedings until long after the expiry of the fi. fa.

During its currency they took no step to preserve their rights. They put in no answer or concise statement of facts shewing their claim under sec. 31 of the Act. When the order for sale was pronounced they had not proved their claim, and their fi. fa. was spent. And until an order for partition or sale was obtained there was nothing to prevent the petitioner from dismissing the petition. The petitioner was dominus litis, and the proceedings had not attained the stage at which the company could prosecute them: Handford v. Stone, 2 S. & S. 196; Taylor's Chancery Orders (notes to Order 184), p. 210.

I think they were bound to keep alive the lien which they had at law, at least until there was some act or declaration

of the Court recognizing their claim as an existing one against the lands. The lien which the writ of execution had created was gone before the proceedings had become effectual to preserve it, and in the meantime the rights of the defendant Mary E. Gamble as a bona fide purchaser intervened.

The appeal is dismissed with costs.

CARTWRIGHT, MASTER. MAY 27TH, 1903.

CHAMBERS.

DIERLAMM v. TORONTO ROLLER BEARING CO.

Pleading — Statement of Claim — Statement of Cause of Action — Sufficiency—Damages for not Transferring Stock—Principal and Agent.

Motion by defendant Henderson to strike out statement of claim as not disclosing any cause of action against him.

A. E. Hoskin, for the motion.

W. E. Middleton, for plaintiff.

THE MASTER.—In the 3rd paragraph there is a statement that the plaintiff "procured the defendant A. E. Henderson to be appointed attorney to execute the necessary transfers." The next paragraph alleges a receipt for the stock certificates signed by said defendant. The following paragraphs allege repeated requests to defendant to excute the necessary transfers so as to vest shares in the plaintiff, and his refusal to do so or to return the certificates to the plaintiff. The concluding paragraph alleges great loss resulting to the plaintiff from such neglect and refusal.

On such a motion as the present the truth of the allegations is to be assumed. So viewed they seem to me to set out a good cause of action, if hereafter supported by proof and not displaced by the defendant. He is charged by the plaintiff with having received the certificates in order, as attorney for the parties, to execute the transfers necessary to vest the shares of the defendant company in the plaintiff, and with a refusal either to execute the transfers or return the certificates, thereby causing serious loss to plaintiff.

The motion fails and should be dismissed with costs to the plaintiff in any event.

CARTWRIGHT, MASTER. MAY 27TH, 1903.

CHAMBERS.

AHRENS v. TANNERS' ASSOCIATION.

Discovery—Examination of Officer of Defendant Association—Person Having Knowledge.

Some years ago fourteen of the principal tanners doing business in Canada constituted themselves a body called the Tanners' Association. Their object was to offer such inducements to purchasers of sole leather as would lead them to purchase exclusively from the members of the association. The management of this matter was given to Mr. D. A. Burns, as secretary of the association. The plaintiffs made all their purchases of sole leather from the Breithaupt Co. Becoming dissatisfied with the Tanners' Association, the plaintiffs on 26th February last began an action against "The Tanners' Association." The writ was addressed to all the present members of the association, and was served on Mr. D. A. Burns "as a person having the control or management of the partnership business carried on by the Tanners' Association." To this writ the Breithaupt Co. alone appeared, stating that they were "sued as the Tanners' Association." The statement of claim was served on the solicitors so appearing, and they duly filed a statement of defence for the Breithaupt Co., alleging, inter alia, that "D. A. Burns was only authorized to act for them in reference to the matters in dispute; that the plaintiffs were bound to furnish Mr. Burns with satisfactory evidence of any claim, but that they had not done so."

The cause being at issue, the plaintiffs' solicitors proposed to examine Mr. Burns. This the defendants declined to allow, offering to produce any officer of the Breithaupt Co. that the plaintiffs might select. The plaintiffs' solicitors pressed their right to examine Mr. Burns, and on the 22nd May instant moved for an order directing him to attend.

C. A. Moss, for the motion.

W. N. Tilley, for defendants, shewed cause.

THE MASTER.—Mr. Tilley cited Morrison v. Grand Trunk R. W. Co., 5 O. L. R. 38, 1 O. W. R. 180, 263, 758, laying stress on the point taken by the Court of the use that can be made of such depositions. But a perusal of the judgments in the case leads me to think that on the undisputed facts of this case Mr. Burns is examinable. He seems to me to be a very perfect illustration of the statement of Moss, C.J.O., in

5 O. L. R. at the foot of p. 42, that the apparent inclination is "to consider that the officer who from his position in the corporation's business would be the proper representative or mouthpiece of the corporation in respect of such business, is the proper officer to answer the interrogatories." See too the remarks on p. 43 (4th paragraph—first sentence especially).

The Breithaupt Co. (and they only) have appeared to the writ served on Mr. Burns. Their president, as stated in the affidavit of Mr. Ahrens, told him that "the association had authorized Mr. Burns, the secretary, to defend the action." It is submitted that if the Tanners' Association are to be looked at as the defendants, Mr. Burns is their only officer. If the Breithaupt Co. are (as they put themselves forward as being) for the purposes of this action, the Tanners' Association, then Mr. Burns is, for this branch of their business, the very officer to be examined. I refer also to Schmidt v. Town of Berlin, 16 P. R. 242, where Ferguson, J., held that the caretaker of a building owned by the defendant municipality was "an officer who would reasonably be supposed to have knowledge—if any person had knowledge upon the subject." I think the order should go, and with costs to the plaintiffs in any event.

MACMAHON, J. MAY 27TH, 1903.

TRIAL.

VICTOR SPORTING GOODS CO. v. HAROLD A. WILSON CO.

Patent for Invention—Infringement—Article Stamped "Patent Applied for"—Notice—Subsequent Patent.

Action for damages for infringement of a patent for a punching bag invented by plaintiff Whitney called "The Twentieth Century Punching Bag." The defendants, being aware of this bag being on the market, wrote to plaintiff company on 3rd April, 1901, asking them to ship one of their bags with platform to defendants at Toronto, and plaintiffs on the 11th April complied with the request. An application for a patent was sent by plaintiffs to the patent office at Ottawa on 7th March, 1901. The plaintiff Whitney said that on the platform sent to defendants there was a notice that a patent had been applied for. A patent was issued for the Dominion on the 21st January, 1902. Defendants admitted that they got a sample of the platform and examined it, but said they did not observe that a notice was stamped thereon

"patent applied for." Defendants got the bag and platform as a pattern from which to manufacture and sell in Canada.

J. W. Nesbitt, K.C., for plaintiffs.

E. Bayly, for defendants.

MacMahon, J., held that what was stamped on the platform defendants were bound to take notice of, and they could not shield themselves from liability as infringers by saying that they did not observe that the notice was stamped upon the platform they received. There was no license given by plaintiffs to defendants to manufacture the articles, and plaintiffs were protected by the application which Whitney had made to the patent office in Canada: see Fowell v. Chown, 25 O. R. 71; Hovey v. Stevens, 2 Robb's Pat. Cas. 479; Pierson v. Eagle Screw Co., 3 Storey's Rep. 402; Ridout on Patent Law, p. 424.

Judgment for plaintiffs with costs for $100 damages and for delivery up to plaintiffs to be destroyed of the 45 bags and platforms on hand.

Cartwright, Master. May 28th, 1903.

CHAMBERS.

CORNEIL v. IRWIN.

Venue—County Court Action—Obligation to Bring Action in Court of County where Parties Reside and Cause of Action Arose—Rules 529 (b), 1216, 1219.

Motion by defendant to change the venue from St. Thomas to London, and to have the action transferred from the County Court of Elgin to the County Court of Middlesex.

C. A. Moss, for the motion.

W. J. Tremeear, for plaintiff.

The Master.—The parties, it is admitted, all reside in the county of Middlesex, where the alleged cause of action also arose. It is also apparent from the affidavits that there is, to say the least, no such preponderance of convenience as would justify a change either way. The point taken by Mr. Moss is new. So far as I am aware, it has not been the subject of any judicial decision, viz., that Rule 529 (b) applies to actions in County Courts.

If this was an action in the High Court, the venue would have to be laid at or changed to the city of London, under the provisions of this Rule 529 (b). The argument then is, that Rule 1216 is imperative: "These Rules, and the practice

and procedure in actions in the High Court of Justice, shall apply and extend to actions in the County Courts." And that, under Rule 1219, in this case, the venue, if laid by the plaintiff at St. Thomas would certainly be changed to London. The argument of Mr. Tremeear was that this construction of the Rules would oblige a plaintiff to bring his action in a County Court case in the Court of the county where the cause of action arose, if all the parties reside there, which he is not required to do in a High Court case; whereas in a County Court case he cannot bring his action in one county and lay the venue in another, as may be done in actions in the High Court.

To this the reply is made, that, if the combined effect of the three Rules already cited is to make this obligatory, the plaintiff in such a case must submit.

The origin of Rule 529 (b) was 58 Vict. ch. 13, sec. 21, which applied only to actions in the High Court of Justice. The only reported case on this section that I am aware of is Pollard v. Wright, 16 P. R. 505. There a Divisional Court in giving judgment said: "The policy of the Legislature evidently was that the expense of the trial of an action should be borne by the county in which the cause of it arose and all parties resided." The language is as applicable to the County Courts as to the High Court of Justice.

After consideration, I am of opinion that the motion must succeed. In no other way can effect be given to Rule 1216. As I view that Rule, it makes Rule 529 (b) as fully applicable to County Court actions as to those in the High Court. Had the statute alone been in force, the result might have been different, as it is clear in the present case that there is no practical difference in the matter of convenience.

The order will go to change the venue to London.

As the point is new, the costs of the motion will be in the cause.

CARTWRIGHT, MASTER. MAY 28TH, 1903.

CHAMBERS.

DREW v. TOWN OF FORT WILLIAM.

Venue—Change of—Preponderance of Convenience—Books of Municipality—View of Premises.

Motion by defendants to change the venue from Guelph to Port Arthur.

W. E. Middleton, for defendants.

C. A. Moss, for plaintiff.

The Master.—The plaintiff states that he himself will be the only witness on his own behalf, and that he does not think the defendants can have any more. They, however, depose, through their solicitor, that several will be necessary, including some present and past officials of the municipality.

The real question is as to the true construction of secs. 17 and 18 of 55 Vict. ch. 70, which seem to be in conflict. Something may turn on the actual condition of the lands in question. It might be of some advantage for the Judge at the trial to have a view; and Fort William is almost a part of Port Arthur. It may also be found helpful, if not absolutely necessary, to refer to the books and other records of the municipality. The expense of the journey from Fort William and return to Guelph is put at $70. In view of all these facts, I think a case of sufficient preponderance of convenience is made out to justify the change.

The costs of the motion are to be in the cause.

It will not be necessary for plaintiffs to give another notice of trial.

Cartwright, Master. May 28th, 1903.

CHAMBERS.

JOHNSTON v. LONDON AND PARIS EXCHANGE.

Security for Costs—Action for Penalties—Statute—Provision as to Consent of Attorney-General—Effect of Obtaining Consent—Unsubstantial Plaintiff—Common Informer—Rule 1200.

Motion by defendants Parker & Co. for an order requiring plaintiff to give security for costs of the action. The statement of claim alleged that the applicants had rendered themselves liable to penalties amounting to $3,640 under the provisions of 63 Vict. ch. 24, sec. 151 (O.)

R. B. Beaumont, for applicants.

George Bell, for plaintiff.

The Master.—The affidavit filed in support of the motion states that plaintiff is not possessed of property sufficient to answer the costs of the action if found liable therefor. This affidavit is not in any way denied.

The point raised in answer by Mr. Bell is new, so far as I am aware. The Act in question, by sec. 17, provides that no action shall be brought for penalties thereunder except by the Attorney-General or by some one who has first obtained his consent in writing. It is not denied that the consent of the Attorney-General has been given to the present

plaintiff, and it was contended by Mr. Bell that this consent is equivalent to an expression of opinion by the Attorney-General that the present action is in the public interest, and that, therefore, no impediment should be placed in the way of the plaintiff. He contended that this distinguished the present case from similar actions given by R. S. O. ch. 1, sec. 8, sub-sec. 30, as to which there is no restraint. He contended that to these latter Rule 1200 might reasonably be confined; that in cases under this Act or the similar provisions of 61 Vict. ch. 19, sec. 8, the plaintiff is not simply a common informer, but is the authorized agent of the Attorney-General, and can no more be required to give security than the Attorney-General himself, who, so far as I can see, would not be liable for costs if he failed in such an action. . . . Rule 934 would seem to limit the power of the Court to award costs against the Crown to proceedings on a petition of right. (See Attorney-General v. Toronto General Trusts Corporation, ante 271—Ed.)

Mr. Beaumont argued that the language of Rule 1200 was express, and that there was nothing in ch. 24 of 63 Vict. to limit the Rule or prevent its application. He urged that it could not be inferred that the Attorney-General would allow an unsubstantial plaintiff to commence an action and deprive defendants of the benefits of the Rule invoked. . .

The matter is not wholly free from doubt; but, in view of the uniform practice under Rule 1200, and the absence of any limitation as to this is the Act in question, I think this motion should succeed. The onus is, in my opinion, on the plaintiff to shew that the Rule does not apply to his case. I cannot say that I think he has satisfied it. Perhaps, if the case is carried further, he may be successful.

The usual order will go; costs in the cause.

STREET, J. MAY 28TH, 1903.

TRIAL.

DENISON v. TAYLOR.

Sale of Goods—Warranty—Nature and Extent of Warranty—Correspondence—Breach—Defect in Article Supplied—Damages—Consequential Loss—Valueless Article Supplied—Measure of Damages—Whole Price Paid.

Action for damages for breach of warranty and for misrepresentations upon the sale by defendants to plaintiff of a vault door. Plaintiff was a private banker. He bought the door from defendants in September, 1902, and on the 11th November, 1902, burglars destroyed the door and entered the

vault. Plaintiff claimed $250 for the door, $200 for property in the vault destroyed, and $1,800 for money and valuables taken away.

I. F. Hellmuth, K.C., and Shirley Denison, for plaintiff.

W. Cassels, K.C., and W. H. Blake, K.C., for defendants.

Street, J.—Plaintiff wrote defendants on 27th August, 1902, upon notepaper headed "R. E. Denison, banker:" "Can you give me a rough estimate of what a burglar-proof door . . will cost?" Defendants replied on 28th August: "We can build you a burglar-proof door of any size and description you wish. The cheapest door we now make is $250 . . . No. 67, the outer door being 1 1-8 inches thick, the entire surface protected with hardened drill-proof plate. . . . Next better quality of door to this is one 1½ inches thick, at $400, and the next $550." In this letter they enclosed cuts from their sample book of three vault doors, Nos. 67, 68, 69; the two latter were called "fire and burglar-proof vault doors." No. 67 was called "fire-proof vault door with chilled steel lining," and the printed note below the cut read, "The above cut represents our vault doors suitable for post offices, court houses, insurance offices, etc., and are made with a lining of chilled steel covering the entire surface of outer door."

The plaintiff replied to this: "Would No. 67 furnish a fair protection against burglars? Kindly answer this before Tuesday." The defendants replied on 2nd September, 1902, by telegram: "Letter just received. No. 67 door gives both fire and burglar-proof protection." On 11th September plaintiff wrote to defendants: "Please forward by first boat vault door No. 67 referred to in our recent correspondence." And on the same day defendants accepted the order. . . .

From the evidence I should come to the conclusion that the handle to the spindle by which the lock is turned had been knocked off, and dynamite had been introduced between the spindle and the door plates; the explosion of the dynamite then stripped the nuts which held the door plates together, and gave easy entrance to further explosives by which the door was wrecked. It appears from the evidence that less than half an hour's work by an expert would accomplish this result. The door having been taken to pieces during the progress of the trial, it was found that the centre layer of the three layers making up the door, which was supposed and represented to be hardened, drill-proof plates, was neither

hardened nor drill-proof and was easily perforated by an ordinary hand-drill in a minute and a half.

I am asked . . . to construe the correspondence between the parties as containing an absolute warranty on the part of defendants that the door furnished by them to plaintiff was proof against the efforts of burglars, without qualification as to time or place. This, as has been pointed out in the cases, would in fact amount to a contract, by defendants, insuring for years, if not for all time, the contents of the vault, whatever they might be, against burglars: Walker v. Milner, 4 F. & F. 745; Herring v. Skaggs, 62 Ala. 180; Sanborn v. Herring, 6 Am. Law Reg. 457. Such a contract might, of course, be made, but the responsibility incurred under it would be so great that the intention of the parties to make it ought clearly to appear. . . .

I think the warranty which was given is that which would have been created by an answer simply in the affirmative to the plaintiff's question whether the door in question would furnish "a fair protection against burglars." The defendants, therefore, I think, did warrant . . . that the door in question would furnish a fair, that is to say, a reasonable, protection against burglars; and . . . that the entire surface of the door was protected by hardened drill-proof plate which was composed of chilled steel. . . .

In my opinion, all the warranties I have referred to as having been given were broken. Through the negligence of defendants' workmen, and not by any wilful act of defendants, the door . . . was, as it now appears, lacking in the simplest and first requisite which should be found in a door intended to resist burglars, a chilled steel, or drill-proof lining. The lining which was intended to be drill-proof was there, but it had not been chilled, and could therefore be easily drilled in any part by an ordinary hand-drill. This defect, however, was not taken advantage of by the burglars who robbed the plaintiff. They appear to have proceeded upon the assumption that the door was drill-proof, and they adopted other means of introducing their explosive than by attempting to drill the door. . . .

The warranties given, however, have been broken, as I have pointed out, and the question is as to the amount of damages recoverable. I find that the loss of the money contained in the vault was not a natural consequence of the defects in the vault door, because the presence of these defects was not the reason why the burglars were enabled to break

it open, and the result would not have been different had the defects been absent.

The ordinary rule as to damages where an article supplied with a warranty that it is of a particular character or fit for a particular purpose proves to be of a different character or unfit for the purpose for which it is supplied, is that the purchaser is entitled to the difference in value between the article supplied and one which would have complied with the warranty. That rule is easily applied where the article actually supplied and that which should have been supplied have each some commercial value. In the present case it is difficult to apply it; the plaintiff needed a door which should afford reasonable protection against burglars, and defendants supplied a door which they warranted would give that protection. Being applied to the purpose for which it was intended, it was found not to comply with the warranty, and was rendered practically valueless. The defect was a concealed one, and, under ordinary circumstances, was only discoverable by a test which would destroy it. The defendant Thomas West in his evidence says that the door would not be called burglar-proof without the chilled steel plates which this door was warranted to contain and did not contain. The plaintiff, therefore, did not get that for which he paid, and which defendants warranted he should get; what they gave him in its place has become useless and valueless, while being put to the use for which it was intended. It is not, therefore, the case of a part loss, as it would have been had it been a mere case of a difference in commercial value, but that of a total loss, like that of the broken carriage pole in Randall v. Newson, 2 Q. B. D. 102.

The plaintiff is entitled, in my opinion, therefore, to recover as damages the price, $250, which he paid to defendants for the door in question, and the costs of the action.

CARTWRIGHT, MASTER. MAY 29TH, 1903.

CHAMBERS.

ST. MARY'S CREAMERY CO. v. GRAND TRUNK R. W. CO.

Judgment—Mistake in Date—Refusal of Party to Consent to Correction—Costs of Motion to Amend.

Motion by defendants for order to amend the judgment as drawn up and entered, by altering the date.

W. H. Blake, K.C., for defendants.

C. A. Moss, for plaintiffs.

The Master.—The difficulty arose, first, from the indorsement of the formal note of the judgment of Mr. Justice Meredith on the certified copy of the pleadings being dated 9th April, though not handed to the Registrar until the 14th, with the reasons for same. The second cause was that the draft judgment was not submitted to defendants' Toronto solicitors, as had been asked by letter of 8th May instant, and apparently agreed to. Through misapprehension, the formal judgment was not so submitted to them, but was initialled by the Stratford agents, who had no instructions to approve, and was entered at Stratford as of 9th April, instead of 14th. A certificate of the 14th being the real date, was obtained from the senior registrar at Toronto, and submitted to plaintiffs' representative at Stratford. He did not consent to the judgment being corrected, and this motion was launched on the 22nd instant.

The defendants now ask for costs.

It was pointed out in Bodine v. Howe, 1 O. L. R. 208, which was followed in McGuire v. Corry, ib. 590, that applications for consents should not be unreasonably refused. . .

In the present case I cannot see that defendants were in any way to blame for the error in the entry of judgment, which arose in the way already stated. . . . The costs of this motion should be to defendants in any event, as they were not in any way responsible for the erroneous date inserted in the judgment.

Meredith, J. May 29th, 1903.

LEMON v. LEMON.

Venue—Change of—Speedy Trial.

Appeal by Joseph Lemon from order of Master in Chambers (ante 445) changing venue from Toronto to Woodstock.

J. W. McCullough, for appellant.

W. E. Middleton, for Philip Lemon.

Meredith, J., allowed the appeal and set aside the order of the Master as regards venue. Costs in the cause.

MacMahon, J. May 29th, 1903.

TRIAL.

ARMOUR v. ANDERSON.

Money Lent—Action for—Weight of Evidence.

Action to recover $875 alleged to have been lent by plaintiff to defendant.

J. W. Nesbitt, K.C., for plaintiff.

S. F. Washington, K.C., for defendant.

MacMahon, J. (after setting forth the evidence).—The defendant denied having borrowed the money. . . . The defendant impressed me as being truthful, and the circumstances strongly corroborate his evidence that the plaintiff never lent him any money.

There will be judgment dismissing the action with costs.

MacMahon, J. May 29th, 1903.

TRIAL.

HARRIS v. BURT.

KING v. BURT.

Trespass—Assault—Personal Injuries—Damages.

Actions by Fanny Harris and Ettlestone Harris and by Solomon King and Amelia King against E. J. Burt and Robert H. Sanderson to recover damages for personal injuries sustained by plaintiffs by reason of the wrongful acts of defendants. Ettlestone Harris was the father of the plaintiffs Fanny Harris and Amelia King, and Solomon King was the latter's husband. The defendants were in the employment of the York Loan and Savings Company. On Sunday the 8th June, 1902, the plaintiffs were driving in High Park along a roadway a portion of which had been made by the York Loan and Savings Company, through whose lands it passed.

G. H. Watson, K.C., and S. C. Smoke, for plaintiffs.

W. M. Douglas, K.C., and W. H. Hunter, for defendants.

MacMahon, J., found that the plaintiffs were, with their horses, trespassing on the lands of the company adjoining the highway, and while so trespassing the defendants appeared and struck the horse owned by Solomon King, which caused it to run away, and occasioned injury to plaintiffs.

Judgment for plaintiff Solomon King for $400, for plaintiff Amelia King for $750, for plaintiff Ettlestone Harris for $75, and for Fanny Harris for $400, with costs.