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BRITTON, J. JANUARY 23RD, 1902.

TRIAL.

BANK OF OTTAWA v. LEWIS.

Partnership—Authority of Partner—Bill of Exchange—Notice.

Creighton v. Halifax Banking Co., 18 S. C. R. 140, followed.

Action to recover amounts of two bills of exchange drawn by defendant McGregor, in the name of the firm of Lewis & McGregor, upon Vipond, Peterson, & Co, in favour of the plaintiffs.

The defendants were partners in the auction and commission business in fruit, and each had, besides, a separate business of his own. The defendant Lewis had a private bank account with Molsons Bank in Ottawa, and McGregor kept one with plaintiffs.

J. Christie, Ottawa, and Wentworth Green, Ottawa, for plaintiffs.

W. Wyld, K.C., and Glyn Osler, Ottawa, for defendants.

BRITTON, J.—The bills were drawn upon blanks furnished by plaintiffs, and, although drawn to their order, were indorsed by McGregor in name of Lewis & McGregor, and also by McGregor individually. They were discounted by the plaintiffs for McGregor, and the proceeds placed to his private account, and checked out by him. . . . The partnership was not registered. The partners agreed that Lewis was to use his private account for firm purposes. The business was to be conducted on a cash basis, practically, and the only authority McGregor had was to accept drafts for goods bought and received by the firm, and to make the drafts payable at Molsons Bank, where they were to be paid by Lewis. . . . The plaintiffs were not notified of the limitations of McGregor's authority. . . . I find as to the first bill (1) that Lewis did not authorize McGregor to draw in the firm name; (2) that the proceeds were placed to McGregor's account and drawn out and used by him to carry out his own purposes, and for purposes which Lewis did not desire, and used so without his knowledge; (3) that Lewis

never gave plaintiffs to understand that McGregor had any authority to use the firm name to obtain money to be placed to his own credit, or for his own purposes, and that such authority was never given; and (4) that there was nothing in the former dealing between the plaintiffs and McGregor to warrant them in believing he had such authority. This brings the case within Creighton v. Halifax Banking Co., 18 S. C. R. 140, and plaintiffs cannot recover on the first bill. The case as to the second bill is in a different position. On the conflict of testimony between the partners, I have come to the conclusion that Lewis knew of the bill, assented to it, and received from McGregor its proceeds, and is liable.

Judgment accordingly.

Christie & Green, Ottawa, solicitors for plaintiffs.

O'Gara, Wyld, & Osler, Ottawa, solicitors for defendants.

FERGUSON, J. JANUARY 27TH, 1902.

CHAMBERS.

McCAULEY v. BUTLER.

Solicitor—Costs—Collusive Settlement of Action—Notice of Lien.

Sanvidge v. Ireland, 14 P. R. 29, followed.

Appeal, by solicitor for plaintiff, from order of local Judge at London dismissing application of the solicitor for payment of his costs out of the fund arising upon a settlement of the action, and paid over between the parties behind the back and against the notice of the solicitor.

G. C. Gibbons, K.C., and P. H. Bartlett, London, for solicitor.

A. B. Cox, London, for defendant.

FERGUSON, J.—Action for criminal conversation, being brought for trial at London. The parties resided at Lucan, 12 or 14 miles from London, Ontario, where their solicitors resided. On December 14th, 1901, defendant sent a messenger to his solicitor to inform him of the intended settlement. The messenger was at once referred by him (Mr. Meredith) to Mr. Toothe, the plaintiff's solicitor. Mr. Toothe thereupon telephoned to Mr. Meredith and said: "I understand there has been another settlement, and I will look to your client, and to every person who had a finger in this settlement for my costs, and to this man Butler, who, I always understood, was good. I gave him fair warning and notice that my costs had not been paid." The messenger returned the same day to Lucan, and the settlement was carried out on Monday 16th December. . . . The

plaintiff has little or no property. The defendant is a man of substance. The appeal was very learnedly and with much force argued on each side. . . . The word "lien" was not used over the telephone, but the clearest kind of statement was made that plaintiff's solicitor would look to the defendant for his costs of action. The claim so made could, in the circumstances, rest upon no other footing than a lien, and as between solicitors the words used were sufficient. They go much further than those used in Sullivan v. Pearson, L. R. 4 Q. B. 153, 38 L. J. Q. B. 65; besides, that case was not determined on the letter. Thus there was notice on the 14th of the month to defendant's solicitor of the lien claimed. . . . I am precluded by what I said in Sanvidge v. Ireland, 14 P. R. 29, from holding that notice to the solicitor was not notice to the defendant. . . . In Boursot v. Savage, L. R. 2 Eq. at p. 142, Kindersley, V.-C., says: "It is a moot question upon what principle this doctrine rests," and "my solicitor is *alter ego*; he is myself." I allow the appeal. Defendant is to pay plaintiff's solicitor his costs of the action between solicitor and client, the costs of the motion and the costs of this appeal, all are to be taxed, and paid forthwith, thereafter. Thomas Hodgins and John Fox were not properly made parties. . . . I give no costs against them, nor to them.

R. M. C. Toothe, London, solicitor for plaintiff.

E. Meredith, London, solicitor for defendant.

Moss, J.A. JANUARY 27TH, 1902.

CHAMBERS.

Re HOLLAND.

Will—Legacy Duty—Discretion of Executors to Pay out of Residue—Executors may, before a Year from Death of Testator, Credit Amount of a Legacy on Mortgage, Payable at any Time, Given by Legatee, if Satisfied of Sufficiency of Assets—Legatee Predeceasing Testator—Lapse.

Manning v. Robinson, 29 O. R. 483, approved.

Motion by widow of a testator and one of his executors under Rule 938, for advice of the Court.

The testator directed his executors to pay his just debts, funeral and testamentary expenses, and, after giving certain legacies, devised the residue of his estate.

R. C. Clute, K.C., for applicants.

R. U. McPherson, for residuary legatee.

Moss, J.A.—The legacy duty is properly deducted from the legacies, and should not be paid out of the residue, and the executors have no discretion to pay such duty out of the residue: per ARMOUR, C.J., in Manning v. Robinson, 29 O. R. 483. There is nothing affording any reason for saying that the executors were bound to pay the pecuniary legacies, or any of them, before the expiration of one year from the testator's death. Therefore, none of the pecuniary legacies bear interest from the testator's death. As M. T. Herrington is entitled to pay off any portion of the principal money of her mortgage at any time, there was nothing to prevent the executors, if satisfied of the sufficiency of the funds in their hands for other purposes, from exercising their discretion in favour of paying her legacy by crediting it against her mortgage, before the expiration of one year from the testator's death. The legacy of $200 to William Purvis, who died some days prior to the decease of the testator, intestate, and left surviving several children, lapsed. Costs out of the estate.

S. J. Young, Trenton, solicitor for executors.

McEvoy & Perrin, London, solicitors for residuary legatee.

FERGUSON, J.

JANUARY 27TH, 1902.

TRIAL.

CANADIAN BANK OF COMMERCE v. TOWN OF TORONTO JUNCTION.

Municipal Corporation—Not Liable for Costs of Advertising Tax Sale Ordered by Treasurer — Absence of By-law or Resolution of Council—R. S. O. ch. 224, sec, 224.

Warwick v. County of Simcoe, 36 C. L. J. 461, approved.

Action to recover $462.50, amount of a bill of the York Leader & Publishing Co. for advertising a sale of lands for arrears of taxes. The company assigned the claim to plaintiffs.

W. H. Blake, for plaintiffs.

C. C. Going, Toronto Junction, for defendants.

FERGUSON, J.—Mr. Jackson, the treasurer of defendants, indorsed on the letter of March 5th, 1900, notifying him of the assignment to the plaintiffs, as follows:—"Whatever amount may become due to the 'Leader & Recorder' for advertising tax sale for 1900, will be paid by me to the Canadian Bank of Commerce." . . . On September 29th,

1900, the plaintiffs wrote asking payment, to which request Jackson replied that nothing was due. On March 4th, 1901, this action was begun, not against the treasurer, but against the corporation. There has not been any by-law or resolution of the council regarding this matter, nor has the town made any contract in respect of it. . . . R. S. O. ch. 224, sec. 224, provides for the purposes of collection of taxes that the treasurer and mayor of a town shall perform, upon its incorporation, the like duties as are in the Act, before, in the case of other municipalities, imposed on the county treasurer and warden respectively. In this case the warrant was issued by the mayor of the town. . . . I entirely agree with the judgment of the Judge of the County of York in Warwick v. County of Simcoe, 36 C. L. J. 461. Under sec. 224, the treasurer is an officer pointed out by the legislature, and commanded to perform certain duties for the general good, and in neither case can the municipality interfere with the officer in the performance of those defined duties. The treasurer in the present case did not at any time attempt to pledge the defendants' credit, and he had no power to do so, and they are not liable. Action dismissed with costs.

Blake, Lash, & Cassels, Toronto, solicitors for plaintiffs.

C. C. Going, Toronto Junction, solicitor for defendants.

MacMahon, J. JANUARY 27TH, 1902.

TRIAL.

DUNN & CO. v. PRESCOTT ELEVATOR CO.

Bailment—Warehouseman—Negligence of—Loss of Corn Stored in Elevator from Heat—Measure of Damages.

Action tried at Ottawa, brought to recover damages for alleged negligence, want of skill, and improper conduct of defendants in storing, warehousing and taking care of 50,000 bushels of corn, ex steamer Niko, and 62,300 bushels, ex steamer Nicaragua, to arrive at defendants' elevator in April, 1897, composed of old hard, dry corn, No. 3.

J. Leitch, K.C., for plaintiffs.

J. A. Hutcheson, Brockville, for defendants.

MacMahon, J.—The duty of a warehouseman is stated in Beven on Negligence, 2nd ed., p. 999. See Snodgrass v. Ritchie, 17 Rettie 712; Brabant v. King, [1895] A. C. 632, at p. 640; Powers v. Mitchell, 3 Hill (N.Y.) 545. . . . The defendants had ample facilities for turning over the

corn, and expressed their intention so to do, and had they carried it out the corn would have been preserved in good condition. . . . None of these employed by defendants were experienced in the work of taking care of grain in an elevator except one, and, although directions were given by plaintiffs in their telegrams and letters of May 22nd, 26th, and June 2nd and 3rd, to keep the corn turned, which could be done at the rate of 6,000 or 8,000 bushels an hour by transferring from one bin to another, and for which the company had ample facilities, this duty was neglected, and it was not turned over between May 22nd and June 4th. The measure of damages is the difference between what the corn was worth, and would have realized at Prescott on June 15th, had it been in perfect condition, viz., 27 cents a bushel, and what it was worth there and could have been sold for in its damaged condition.

Leitch & Pringle, Cornwall, solicitors for plaintiffs.

F. J. French, Prescott, solicitor for defendants.

ROBERTSON, J.

JANUARY 27TH, 1902.

TRIAL.

HARRIS v. BANK OF BRITISH NORTH AMERICA.

Contract—Delivery of Deed in Escrow—Non-performance of Condition—Option—Trust.

Action tried partly at Barrie and concluded at Toronto, brought to recover $3,122.50.

J. K. Kerr, K.C., and R. D. Gunn, Orillia, for plaintiff.

John Greer, for defendant bank.

W. H. Blake, for defendant Trading Corporation.

ROBERTSON, J.—I find as facts, on the evidence, that plaintiff in all respects fully and completely performed his agreement, dated June 23rd, 1898, for the sale of certain mining properties to A. J. Mangold, acting for defendant corporation, after inspection of and examination of title, etc., to the claims; that after inspection and putting a man in to work the claims as he saw fit, and paying five per cent. of the purchase money, Mangold requested plaintiff to execute bills of sale and deposit them with the manager of Bank of British North America, Dawson Branch, accompanied by a letter to him dated October 8th, 1898:—"We beg to deposit with you this day two bills of sale from R. A. Harris to A. J. Mangold . . . the said deeds to be

held by you in escrow, and to be forwarded by you to your branch in London, England, to be so held until April 7th next, when they are to be returned to your branch in Vancouver, to be delivered by them to R. A. Harris, or his order, unless on or before said 7th day of April there be deposited to his credit in your branch in London, England, the respective sums of $3,122.50, when the deed of sale regarding 76 A on Hunker is to be delivered to Mr. Mangold, or his order. . . . If the said amounts be paid before 7th day of April next, you will please instruct your branch in London to forward same to your agency in Vancouver, to be paid over immediately to the order of Mr. Harris. R. A. Harris, A. J. Mangold." On 7th April, 1899, Mangold wrote the following letter to secretary of the bank in London:—"Referring to the bill of sale held by you on behalf of Mr. R. A. Harris of a part share of the claim 76 A Hunker, and which document is to be handed over to me or my order on payment of $3,122.50, I now hand you the equivalent of this sum, but, inasmuch as the bill of sale is not accompanied by any documents verifying the title to the property, I must request you to hold the money in escrow, either here or at Vancouver, until the manager of the Pioneer Trading Corporation of Klondike, on behalf of which company I negotiated this option, is satisfied that the title is correct, when the money can be handed over to Mr. Harris in exchange for a properly executed bill of sale, for which the manager's receipt shall be your full and sufficient discharge." Under these circumstances, I find that the $3,122.50 was not paid to the credit of the plaintiff as required by the letter of the 8th October, 1898, and therefore the plaintiff had no cause of action against the bank, and, as the bill of sale was sent by it to Vancouver, there was no breach of trust. . . . Upon the execution of the letter of the 8th October, 1898, the option to purchase was at an end, and the agreement to buy complete to be carried out, and consummated by the payment six months later of the $3,122.50, and neither Mangold or the corporation had a right to withdraw, and had no other step been taken, the plaintiff was in a position to sue for specific performance and recover the $3,122.50. If not, the plaintiff, in order to save his title, would, according to the mining regulations, have been obliged to have gone on to the claim and done representation work during the whole of the six months allowed for payment of the balance of the purchase money; whereas, in fact, the corporation went into possession and

did that work, and nothing was said to plaintiff as to anything being unsatisfactory until the letter of April 7th, 1899. . . . The cases do not support the contention that the option to purchase extended up to the end of the six months from October 8th, 1898. I dismiss the action with costs as to the bank. who may deduct their costs out of the fund of $3,122.50 in their hands. I give judgment for plaintiff for balance of fund, and direct the defendant corporation to pay to plaintiff his costs and the costs deducted by the bank.

R. D. Gunn, Orillia, solicitor for plaintiff.

Smith, Rae, & Greer, Toronto, solicitors for Bank of British North America.

Blake, Lash, & Cassels, Toronto, solicitors for Pioneer Trading Corporation.

JANUARY 29TH, 1902.

DIVISIONAL COURT.

WOLFF v. KEHOE.

Statutes—Highway—Trees, etc., "Left Standing" on—Meaning of—R. S. O. ch. 243, sec. 2, sub-sec. 4.

Appeal by plaintiff from judgment of County Court of Carleton.

Glyn Osler, Ottawa, for plaintiff.

R. V. Sinclair, Ottawa, for defendant.

The Court (MEREDITH, C.J., LOUNT, J.) held, in disposing of the appeal, that R. S. O ch. 243, sec. 2, sub-sec. 4, which enacts that "every growing tree, shrub, or sapling, whatsoever planted or left standing on either side of any highway for the purposes of shade, or ornament," etc., means growing tree, etc., left standing *by a municipality*.

O'Gara, Wyld, and Osler, Ottawa, solicitors for plaintiff.

Caron & Sinclair, Ottawa, solicitors for defendant.

FALCONBRIDGE, C.J.

JANUARY 27TH, 1902.

TRIAL.

HAGAR v. HAGAR.

Contract—To Build Walls of Barn—Good and Workmanlike Manner—Contractor not Liable if Roof Causes Walls to Fall—Plan—Costs.

Action tried at Hamilton, brought to recover damages by reason of the loss to plaintiff from the negligent construction by defendant of the walls of concrete of a barn to be

erected by him for plaintiff, and which plaintiff alleges defendant guaranteed would be done in a skilful and workmanlike manner.

S. D. Biggar, Hamilton, and W. S. McBrayne, Hamilton, for plaintiff.

W. M. German, K.C., for defendant.

FALCONBRIDGE, C.J.—The turning point is, who is responsible for the construction of the roof? The work of building the wall was done in a good and workmanlike manner, and the wall would have stood any vertical pressure which could fairly have been imposed on it, but no such wall could resist the outward pressure or "thrust" of a roof constructed as the one in question. . . . This is a case of hardship, while the result is, as a matter of law, that plaintiff cannot claim to have relied on defendant's plan, yet it probably contributed to the accident; therefore I shall not give costs against the plaintiff. Set-off of amount for extra work against plastering and pointing still to be done. Judgment for defendant for $230, balance of contract price, without costs.

Biggar & McBrayne, Hamilton, solicitors for plaintiff.

German & Pettit, Welland, solicitors for defendant.

LISTER, J.A. JANUARY 29TH, 1902.

COURT OF APPEAL—CHAMBERS.

HUNTER v. BOYD.

Leave to Appeal—Matter of Public Interest—Construction of Statute —R. S. O. ch. 129, sec. 11.

Motion by plaintiff for leave to appeal from order of a Divisional Court, reversing order of LOUNT, J., appointing an administrator *ad litem* to estate of defendant Boyd, deceased.

G. G. S. Lindsey, K.C., for plaintiff.

R. McKay, for defendants.

LISTER, J.A.—Action for damages for malicious prosecution. The Divisional Court held that in an action such as this such an administrator is not included within the description "administrators" in R. S. O. ch. 129, sec. 11. I think there is jurisdiction to entertain the motion. The question whether LOUNT, J., had jurisdiction, under the circumstances here, to appoint such administrator, depends upon the construction of sec. 11, and, having in view the

differences of opinion on the part of the Judges before whom the question has come, and that the construction of this section is, as affecting other than the parties to this litigation, a matter of public interest, a further appeal should be and is allowed upon security being given. Costs of motion to be in the appeal.

Lindsey & Wadsworth, Toronto, solicitors for plaintiff.

Beatty, Blackstock, Nesbitt, Chadwick, & Riddell, Toronto, solicitors for defendants

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JANUARY 30TH, 1902.

COURT OF APPEAL.

McKENZIE v. McLAUGHLIN.

Leave to Appeal—Special Circumstances — Discovery—Amendment after—Practice.

Motion by plaintiff for leave to appeal from order of a Divisional Court, *ante*, p. 58.

I. F. Hellmuth, for plaintiff.

G. F. Shepley, K.C., for defendant.

At the conclusion of the argument the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, LISTER, JJ.A.)—*Held*, that this was not a case of character or importance warranting the granting of special leave to appeal; that no real harm or prejudice would arise to plaintiff by his answering the questions; and that the constant practice is to amend the defence according to what is brought out on examination for discovery. Motion dismissed with costs.

ROBERTSON, J. JANUARY 31ST, 1902.

CHAMBERS.

HUNT v. ROBINS.

Judgment Debtor—Examination—Making Away with Property—Committal—Rule 907.

Metropolitan Loan, etc., Co. v. Mara, 8 P. R. at p. 360, followed.

Motion by plaintiff to commit defendant Alson Robins under Rule 907.

Charles Millar, for plaintiff.

J. A. Keys, St. Catharines, for defendant Alson Robins.

ROBERTSON, J.—The defendant owned lands in Buffalo and Tonawanda, U. S. A. On the morning after the entry of judgment in this action, the defendant sent his mother to Buffalo and Tonawanda, and she sold both of properties, and advised him by telegraph. He says that the Tonawanda property, for which, in 1898, he gave $600, is in litigation, and he was anxious to get rid of it, so he sold it for a safe valued at $100, which he left in the purchaser's possesion, who still owes him $400 for balance of purchase money. When asked if the safe was worth more than $5 or $10, he replied, "I took the man's word for it." The property in Buffalo was sold for $1,600, and he says, "after paying the necessary expenses and interest I got $75 out of it." He states that the only means he has of paying the judgment is the lease and license of a saloon in St Catharines, Ontario; and that he sold his other properties for the purpose of defecting this judgment. Pending an adjournment with a view to settlement, the goods in the saloon and premises were sold for $700 under the execution issued by plaintiff, but defendant's wife established a claim before the County Judge of Lincoln, under the Creditors' Relief Act, for $1,000, and plaintiff has received only $91 on his claim for $1,435.59. It was objected that property in the U. S. A. is not exigible under execution here, because out of the jurisdiction. I do not think there is anything in the objection. It is clear defendant endeavoured to make away with those properties, to defeat or defraud the plaintiff, and being a resident of this Province, whatever he got for them he brought here, except the safe, which he never took into his possession. I am satisfied that these properties have not been rightly or legally dealt with by him, and he has not accounted for the proceeds, if he ever received anything, in a business-like way . . . I have no doubt that he has concealed or made away with his property in order to defraud the plaintiff. If I make the order asked for, it would amount to a sentence for a criminal offence: Hobbs v. Scott, 23 U. C. R. *per* DRAPER, C.J., at p. 622; and defendant cannot be relieved from it for 12 months: Jones v. Macdonald, 15 P. R. 345. I am unwilling therefore to make the order without giving defendant a further opportunity to see if some arrangement cannot be made between the parties: Metropolitan Loan and Savings Co. v. Mara, 8 P. R. per Wilson, C.J., at p. 360. I shall therefore allow a fortnight for further negotiation, but I hope I shall not be required to make an order.

BRITTON, J. FEBRUARY 1ST, 1902.

TRIAL.

PATTERSON v. TURNER.

Company—Agreement to Subscribe for Stock—Delay in Carrying out Objects of Company—Repudiation of Agreement—Judgment in Undefended Action against Company by Subscriber—Effect of—R. S. O. 1887 ch. 157, sec. 4—R. S. O. ch. 191, sec. 9.

Action by plaintiffs, suing on behalf of themselves and all other subscribers to an agreement to take stock in the Hotel Brant Co., to recover from defendant Turner $600, the amount of the par value of twelve shares which he agreed to take.

A. B. Aylesworth, K.C., and G. H. Levy, Hamilton, for plaintiffs.

G. Lynch-Staunton, K.C., for defendant Turner.

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

BRITTON, J.—On 28th January, 1899, Turner signed the stock book of the proposed company, containing an agreement to take the number of shares set opposite the names of subscribers, and a covenant by the subscribers with each other to pay the amounts, when called in by the directors of the company, and to abide by the by-laws, etc., and, further these words, "no subscription to be binding until $40,000 has been subscribed hereon." The stock book also contained a prospectus stating the object of the company to be the acquiring of the Brant House property at Burlington, and the erection of a summer hotel, at once, so as to be ready for the summer season of 1899. The first subscription was made on 17th November, 1898. The defendant signed on 28th January, 1899, and others subscribed, in all, to the amount of $28,700 up to 29th March, 1899. Nothing further was done until October, 1899, when the plaintiff became interested, and on the 24th of that month signed the agreement in the stock book, and others subsequently signed, until the amount subscribed became $40,150. Letters patent issued on 24th November, 1899, fixing the capital stock at $50,000. The hotel was completed about the 1st July, 1900. In an undefended action the defendant obtained a judgment against the company declaring that he never was a shareholder. There is an important difference in the wording of R. S. O. 1897 ch. 191, sec. 9, and the earlier Act, R. S. O. 1887 ch. 157, sec. 4, as to who become shareholders. If the agreement to subscribe, signed by defendant, was produced and accepted by the Governor-in council as an agreement "in its

essential features," complying with the former Act, 1897, then by sec. 9, the persons named in the agreement were constituted the body corporate, and if this had been shewn, the result of the action might have been different. I think that the judgment does not, in itself, afford any defence in this action. But this action is not against defendant as a shareholder. It is simply an action upon his agreement, to compel him to accept the shares, and pay for them: see Ridwelly Canal Co. v. Raby, 2 Price 93. The difficulty, however, fatal to the plaintiffs' recovery here is, that they did not subscribe within a reasonable time after defendant and others had become parties to the agreement. Without fixing a day limit, I think that in order to make the agreement operative and binding upon any one to the others, the whole undertaking should have been proceeded with within a reasonable time from its inception. Upon the facts before mentioned, this was not done, and I am not able to find that at any time after 1st October, 1899, defendant Turner agreed to be bound by his subscription, or approved and agreed to proceeding with the work, as it was afterwards done, nor that plaintiffs signed the agreement in the stock book, relying on defendant Turner's approval and consent. It can hardly be said in face of defendant's letter of 13th December 1899, that he stood by and allowed plaintiffs to suppose that he consented. Action dismissed with costs.

Washington & Beasley, Hamilton, solicitors for plaintiffs and defendant company.

J. J. Scott, Hamilton, solicitor for defendant Turner.

BRITTON, J. FEBRUARY 1ST, 1902.

TRIAL.

ROBINSON v. McLEOD.

Trade Mark—Infringement—Trade Union—User by Non-members—Right of.

Action by plaintiff as organizer and general secretary of the Journeymen Tailors' Union of America, on behalf of himself and all other members of the union, to restrain defendant, his workmen and agents, from using or offering for sale any clothing, having attached or fastened upon it, any label or mark, being an imitation, counterfeit, or copy, or fraudulent or colourable imitation of the specific trade mark, registered, alleged to be the property of the plaintiff, and the other members of this union, and from in any way infringing his trade mark, and for damages.

H. Carscallen, K.C., and D'Arcy Tate, Hamilton, for plaintiff.

H. H. Bicknell, Hamilton, for defendant.

BRITTON, J.—The trade mark was registered in October, 1897, to be applied to the sale of clothing. The union is a voluntary unincorporated association of practical tailors, and was formed, and is continued, for promoting, among other things, the mental and physical welfare of its members, to aid in maintaining a high standard of workmanship, and to assist its members to obtain fair wages, etc. The defendant is not a member. The trade mark has been used since 1883, and has on it that date. It is admitted that the owners of the trade mark have no proprietary interest in the goods or garments to which the label or mark is to be attached. In the view I take of the case, I am obliged to give my decision upon the facts proved or assumed to be proved, and I purposely refrain from discussing whether there is any right to a trade mark independent of and disconnected from a business, and whether the specific trade mark is within the Dominion Trade Mark and Design Act, so as to entitle plaintiff to any protection against persons who may choose to use a similar mark. . . . One of the labels or marks used by defendant was once used by a union not now existing, and formerly in the city of St. Thomas. There is no evidence of calling in their labels, but at all events their label is not an imitation, much less a false and fraudulent imitation, of plaintiff's label. . . . The other labels plaintiff had are genuine. The plaintiff issues labels to tailors in good standing in the union, and that give these men a right to use the labels. They are for the protection of union men, and if the men use the labels improperly, and against the interests of the union, that is a matter for the union to consider in dealing with its members, but an employer, who is not a member, cannot be restrained from dealing with union men, or from putting a genuine label upon union work.

The objects of the union are laudable, and so long as the attainment of these objects is sought in a proper way, and without infringing upon any other person's rights, there can be no complaint. Quinn v. Leathem, [1901] A. C. 495, is instructive as shewing that labour unions may go too far in attempting to interfere with persons who are not members. If defendant did, fraudulently and deceitfully and with intent to injure the workmen, or any of them, represented by plaintiff, sell to defendant's customers an inferior article,

as to material and workmanship, and if, to accomplish this, he improperly made use of a genuine label, I would hold him answerable, but nothing of the kind was proved, nor can be inferred from the evidence: see Clark Thread Co. v. Armitage, 67 Fed. R. 896. I find that the allegations of plaintiff are not sustained by the evidence; that there was once a Journeymen Tailors' Union of Canada, which had a label, although not registered as a trade mark; and that there is no evidence that defendant had knowledge that the local union at St. Thomas had ceased to exist, if, in fact, it did cease. Action dismissed with costs.

Carscallen & Cahill, Hamilton, solicitors for plaintiff.

H. H. Bicknell, Hamilton, solicitor for defendant.

FEBRUARY 1ST, 1902.

DIVISIONAL COURT.

RE YOCOM, HONSINGER v. HOPKINS.

Administration — Insolvent Estate—Creditors—Conduct of Proceedings—Discretion of Court, etc.—Rule 954.

Re Squire, 21 Ch. D. 647, referred to.

Where a creditor had been appointed administrator of an insolvent estate, and had realized $1,045 for the personalty; and it was shewn that the real estate was not worth the amount of the mortgages against it, and that the claims sent by creditors amounted to $3,450, of which $1,915.45 was claimed by a surety for the mortgage debt, as the amount of his probable loss, LOUNT, J., in the exercise of his discretion, under Rule 954, refused an administration order, because a sale of the mortgaged land was pending, and the result would so largely diminish the difficulty of winding up the estate.

On appeal.

W. J. Treemeear, for the plaintiff.

F. E. Hodgins, for defendant.

A Divisional Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.)

Held, that, as the plaintiff and the surety were entitled to litigate; as administration would settle these and all other questions at less expense; and as the mortgage sale had in the meantime proved abortive, and thus not decreased the difficulty of winding up the estate; that an administration order should be made, but without costs of

appeal, except that both parties might include their disbursements, as part of their disbursements in the administration proceedings.

The conduct of the reference was given to the administrator, because he was chosen by the creditors, and the plaintiff's claim was only $102.40, referring to Re Swire, 21 Ch. D. 647.

J. A. Robinson, St. Thomas, solicitor for plaintiff.

J. C. Eccles, Dunnville, solicitor for defendant.

OSLER, J.A. JANUARY 29TH, 1902.

COURT OF APPEAL—CHAMBERS.

RE NORTH WATERLOO ELECTION.

Controverted Election—Deposit—Rival Claimants—Disputed Facts—Issue must be Directed—Practice—R. S. O. ch. 11.

Application by the solicitors for the petitioner, under Rule 15 of the Rules of practice and procedure, etc., made pursuant to R. S. O. 1897 ch. 11, for payment to them of the fund of $1,000 deposited under sec. 14. The fund was also claimed by the subscribers of it.

W. E. Middleton, for solicitors.

W. M. Reade, Waterloo, for subscribers.

OSLER, J.A.—I cannot dispose of this matter otherwise than by directing the trial of an issue between the rival claimants, as the facts are disputed. The trial will be at Berlin, before a Judge without a jury, or elsewhere as I may order after hearing the parties. Costs reserved.
