THE

# ONTARIO WEEKLY REPORTER.

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STREET, J. OCTOBER 24TH, 1902.

CHAMBERS.

## DUNLOP PNEUMATIC TIRE CO. v. RYCKMAN.

*Pleading—Counterclaim—Exclusion of—Defendants to Counterclaim out of Jurisdiction—Foreign Trade Mark, Subject of Counterclaim—Hardship—Injustice.*

Appeal by plaintiffs and Palmer, one of the defendants to the counterclaim, from an order of the Master in Chambers refusing their application to strike out the counterclaim of the defendants the Dunlop Tire Company, referred to as "the Canadian company." The plaintiffs are referred to as "the English company."

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

W. E. Middleton, for the counterclaiming defendants.

STREET, J. (after setting out the facts at length):—The action is brought by the English company to restrain the defendants from exporting pneumatic tires from this continent and competing with the plaintiffs in their business in other parts of the world, contrary to the terms of the agreement of 13th December, 1898, which the plaintiffs say is binding upon all the defendants.

The defendants the Canadian company deny that the agreement is binding upon them, but say that, if it is, it does not represent the real bargain which was made between the plaintiffs and Ryckman, and they claim a rectification of it. They further say that the plaintiffs did not deliver the whole of the rights of the American company, as they agreed to do in the agreement, and that the Canadian company has been obliged to pay large sums to obtain those rights, and they ask that the plaintiffs be ordered to repay these sums and the damages they have been put to in consequence. They further ask for a declaration of their rights under certain parts of the agreement. All these claims are put in the form of a counterclaim by the Canadian company against the plaintiffs alone, and, in my opinion, they are very proper subjects for a counterclaim in this action.

The remainder of their counterclaim is, however, of a much wider character. It alleges that under the proper construction of the agreement of 13th December, 1898, the Canadian company is entitled to the use of certain trade marks in connection with tires exported by them to countries outside America; but that the plaintiffs, along with two persons, Garland and Palmer, and an Australian company, none of whom is a party to the action, have fraudulently and with knowledge of the rights of the Canadian company conspired together to cheat them of their rights by registering the said trade marks in the name of the Australian company, and they ask for an injunction and damages against Palmer, Garland, the Australian company, and the plaintiffs.

The complaint of the Canadian company in this part of the counterclaim is that the defendants to the counterclaim, by certain acts done in Australia, have interfered with their trade there. Of the defendants to the counterclaim Palmer is the only one within the jurisdiction of the Court; Garland lives in Australia, and the Australian company has its head office there. The plaintiffs in this action, who are the remaining defendants to the counterclaim, have their head office in England, and have neither business nor offices in Ontario. None of the parties defendants to the counterclaim, except the defendant Palmer, has pleaded to it or admitted the jurisdiction of the Court.

I think an examination of the pleadings and of the issues sought to be raised by the counterclaim against the new parties is sufficient to establish the injustice to the plaintiffs of allowing the question of the Australian trade mark to be raised and disposed of in the present action. It is manifest that great delay must necessarily be encountered in taking the evidence, which must be taken in Australia as well as in England, in disposing of the question of the trade marks. In the meantime the defendants the Canadian company have everything to gain and nothing to lose by the delay, for they will, of course, continue to carry on the foreign business which the plaintiffs seek in the action to restrain. I can see no such intimate connection between the subject of the action and the subject of the counterclaim as to oblige the Court to require both to be disposed of in the same action. I can see that to allow the counterclaim would operate as so great a hardship upon the plaintiffs as to amount almost, if not entirely, to an actual denial of justice to them, and I am, therefore, of opinion that the appeal should be allowed as to that portion of the counterclaim which begins with the 16th paragraph of the defence and counterclaim, and relates to the

claim against the plaintiffs, Garland, Palmer, and the Australian company in respect of the trade mark, and that this portion of the counterclaim should be excluded, with the right, of course, to the Canadian company to make it the subject of a separate action, if so advised.

The remainder of the counterclaim was not objected to, and should stand, and the defendants the Dunlop Tire Company, Limited (called herein "the Canadian company"), should pay the costs of the application and appeal.

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OCTOBER 27TH, 1902.

DIVISIONAL COURT.

## ABBOTT v. ATLANTIC REFINING CO.

*Principal and Agent—Undisclosed Principal—Action by Agent—Breach of Contract—Construction of Roof—Guarantee—Representation as to Ownership—Addition of Principal as Party—Recovery—Damages.*

Appeal by defendants from judgment of County Court of Simcoe in favour of plaintiffs in an action originally brought by George A. Abbott alone upon a guarantee by defendants that a roof completed by them upon a new building belonging to Mary S. Abbott, wife of George A. Abbott, would remain waterproof for five years, and an agreement that in case of its leakage within that time they would repair it at their own expense. Mary S. Abbott was afterwards added as plaintiff. She was erecting the building in question upon her own land for herself; her husband was acting as her agent in making the contracts for its erection, and superintending the work done on her behalf, but had no personal interest in it. The defendants became aware that a roof was to be put on, and wrote the husband that in order to introduce their roofing material into "your town" they would put on "your roof" for a fixed price. To this he replied in his own name accepting their offer to put on "my roof;" and thereupon they gave the guarantee now sued on, in which they referred to the roof as "your roof," and also again used the expression "your town."

W. M. Boultbee, for defendants, contended that to permit evidence shewing that the husband was acting merely as agent for the wife would be to allow him to contradict the writings in which he described the roof as his.

J. C. Brokovski, Coldwater, for plaintiffs.

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

STREET, J.—In my opinion the expressions did not necessarily imply the representation on the husband's part that he

was owner of the roof or of the building; they seemed to be used merely as conveniently descriptive of the subject matter under discussion. It was competent for the wife to shew that her husband had entered into the contract as her agent, and to recover damages from defendants for the breach of it. Lucas v. De la Cour, 1 M. & S. 249, and Humble v. Hunter, 12 Q. B. 310, distinguished.

The breach was well established; the roof leaked badly, and in the end became practically almost useless in spite of defendants' efforts to repair it. The damages should not be confined to the cost of repairs of the roof. It was within the contemplation of the parties that if the roof leaked the building and its walls and contents would suffer. No one but a party or privy to the contract could recover for its breach; the husband was neither party nor privy; it was not in contemplation of the parties that he should have goods there, and the action as against him should be dismissed. The wife is entitled to recover for the loss of the roof because she will have to replace it, and for the damages to the walls, carpets, etc. These damages will easily mount up to $200, at which they were assessed. Judgment for plaintiff Mary S. Abbott for $200, with costs from the time she was made a party. Action as regards plaintiff George A. Abbott dismissed with costs of defendants as against him down to but not inclusive of notice of trial. No costs of appeal to either party.

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WINCHESTER, MASTER. OCTOBER 28TH, 1902.

CHAMBERS.

## RE EXCELSIOR LIFE INS. CO. AND DE GEER.

*Insurance—Life—Policy in Favour of Mother—Advance by Mother on Faith of—Subsequent Marriage of Insured—Apportionment in Favour of Wife—Claim by Mother as Beneficiary for Value.*

Motion by the company for leave to pay into Court $174.25, being the balance due by them under policy No. 5032 on the life of James De Geer, which was claimed by the mother and also by the widow of the insured. The claimants did not object to payment in, and consented to their rights being disposed of in Chambers.

The policy was issued on the 20th September, 1898. The insured was then unmarried. The sole beneficiary was his mother, and she was not at that time a beneficiary for value. On the 24th September, 1900, the mother advanced the insured $100, on the faith of a letter in which he assured her that she would be safe in making the advance, by reason of the policy being in her favour. The insured was married in

March, 1901, and on the 21st September, 1901, he signed a direction and apportionment of the full amount of the insurance money in favour of his wife, which direction was given to the company immediately thereafter. He died on the 16th June, 1902. The amount payable by the company under the policy was $974.25. They paid the widow $800. She claimed the balance also under the direction made by the insured, and the mother also claimed it by virtue of the promises made by the insured.

R. McKay, for the company and the widow, relied on secs. 151, 159, and 160 of the Insurance Act, and Potts v. Potts, 31 O. R. 452.

C. E. Hewson, K.C., for the mother, relied on Book v. Book, 1 O. L. R. 86.

THE MASTER.—Since the decision of the Court of Appeal in Book v. Book, 1 O. L. R. 86, the sections referred to have been amended by 1 Edw. VII. ch. 21, sec. 2, providing that "a beneficiary shall only be deemed a beneficiary for value when he is expressly said to be so in the policy." In my opinion, the widow of the insured is entitled to the amount in dispute, the amendment governing the case and placing the law as it was declared by Meredith, J., in Book v. Book, 32 O. R. 206, whose decision was reversed by the Court of Appeal, 1 O. L. R. 86.

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WINCHESTER, MASTER. OCTOBER 29TH, 1902.

CHAMBERS.

## MACLEAN v. WOOD.

*Particulars—Statement of Claim—Action to Set aside Resolution of Shareholders of Company—Allegation of Non-compliance with Companies Acts—Submission to Court.*

Motion by defendant Wood for particulars under paragraphs 10 and 11 of the statement of claim. Action to set aside a resolution passed by the shareholders of the defendant company, the World Newspaper Company of Toronto, as being illegal, fraudulent, and void, and for an injunction. The plaintiffs in their statement of claim set out the resolution complained of and the calling of the meeting of the shareholders, etc., and in the 10th paragraph alleged "that in calling said meeting of shareholders and in the conduct of said meeting and the passing of said resolution, the provisions of the Ontario Companies Act and amending Acts were not complied with." Paragraph 11 was as follows:

"The plaintiffs submit that the said resolution and the passing thereof as aforesaid was illegal, fraudulent, and void."

G. M. Kelley, for defendant Wood.

J. A. MacIntosh, for plaintiffs.

THE MASTER.—Particulars under paragraph 10, shewing in what respects the provisions of the Acts were not complied with, should be given: Pullen v. Snelus, 40 L. T. N. S. 363. Paragraph 11 is not an allegation, but merely a submission, and no particulars are necessary.

Order made for particulars of paragraph 10. Costs in the cause.

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OCTOBER 29TH, 1902.

DIVISIONAL COURT.

## CONLEY v. ASHLEY.

*Promissory Note—Action on—Defence of no Consideration—Evidence of Contemporaneous Oral Agreement — Contradictory Written Documents—New Trial—Objection to Evidence not Taken at Trial —Discretion of Court.*

Appeal by plaintiff from order of Judge presiding in 1st Division Court in county of Hastings refusing a new trial after a verdict for defendant on a trial with a jury in that Division Court. Action to recover $100, being the balance unpaid upon a note for $600 made by defendant, dated 15th December, 1897, payable six months after date to Cynthia A. Loucks or order, and by her indorsed after its maturity, for a valuable consideration, to plaintiff. The defence was that defendant received no consideration for the making of the note, and that, at the time he signed it, it was agreed between him and Albert Loucks, the husband of the payee, that he was not to be personally liable upon it, but was to pay it out of certain moneys coming to his hands for one Harford Ashley. The Judge left the matter to the jury as one entirely at large upon the question of consideration, and open to them, without special regard to the writings, and to be determined upon the whole evidence.

A. B. Aylesworth, K.C., for plaintiff.

E. G. Porter, for defendant.

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

STREET, J.—The case went to the jury upon improper evidence and with a charge in which the true questions for their determination were not presented. The evidence of the defendant, which was admitted to prove that, although he signed the note in question and delivered it to Albert Loucks,

a contemporaneous parol agreement existed under which he was not to be personally liable upon it, but was to pay it only so far as moneys of Harford Ashley came to his hands for the purpose, should have been rejected: New London Credit Syndicate v. Heale, [1898] 2 Q. B. 487; Young v. Austin, L. R. 4 C. P. 553; Abrey v. Crux, L. R. 5, C. P. 37: and the jury should have been told that the debt due by Harford Ashley to Albert Loucks, and the forbearance of Albert Loucks in consideration of the giving of the notes, were a sufficient consideration for the making of them by defendant, and the binding character of the sealed agreements executed by defendant and Harford Ashley should have been pointed out to them. Under ordinary circumstances, where objection has not been clearly taken at the time to the admissibility of evidence, and to the charge to a jury, it is a sound rule to refuse to allow a new trial upon these grounds. But where, as here, it plainly appears that there has been an entire misconception on all hands of the real points in issue, and a mistrial has been the result, the Court should exercise its discretion and direct a new trial, because, apart from the evidence of defendant, which is in direct contradiction of his own solemn agreements, there is nothing whatever to support the verdict in his favour.

Appeal allowed, and new trial directed. Costs of first trial and appeal to be costs in the cause.

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BRITTON, J. OCTOBER 30TH, 1902.

TRIAL.

## ELLIOTT v. HAMILTON.

*Execution—Sale of Land under—Assignment for Benefit of Creditors—Priorities—Costs.*

Action to recover possession of the east half of lot 8 in the 7th concession of the township of Tay. On 5th January, 1878, plaintiff recovered judgment against defendant, who was the owner of the land in question, for $1,567.80 debt and $22.75 taxed costs. On 19th December, 1896, a writ of fi. fa. was issued against the goods and lands of defendant, and placed in the hands of the sheriff of Simcoe. The sheriff subsequently made a return of "nulla bona" to that part of the writ requiring him to make the money out of defendant's goods, and he seized and duly advertised for sale the interest of defendant in the land in question. The sale took place on the 27th February, 1899. On the 24th February, 1899, defendant made an assignment for creditors under R. S. O. ch. 147, to one Clarke. On the day of sale, and before

the actual sale, the sheriff received a letter from the defendant's solicitor, who then was acting for the assignee, notifying him (the sheriff) of this assignment, and asking him to send memorandum of costs to assignee. There was no tender of amount of costs, no deposit of moneys, and no undertaking on the part of the solicitor that the costs would be paid. The plaintiff's solicitor was present, and the sheriff informed him of the contents of this letter. As costs had been incurred, the sheriff was advised that he had the right to go on and sell, and he sold pursuant to notice. The plaintiff became the purchaser, and a deed to him was executed by the sheriff in due course. The assignee, notwithstanding the sheriff's sale, assumed the right to sell, and did sell and execute a conveyance to one William Hamilton (a son of defendant) of the same land.

D. B. Simpson, K.C., for plaintiff.

R. D. Gunn, K.C., for defendant, contended that under sec. 9 of R. S. O. ch. 147, the sheriff had no right to sell after notice of assignment, and that plaintiff took nothing by his deed. It was admitted that defendant was still in possession, but only as the agent of William Hamilton, and that he claimed as such.

BRITTON, J., held, following Gillard v. Milligan, 28 O. R. 645, that the plaintiff was entitled to recover. Judgment for plaintiff with costs.

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MACMAHON, J. OCTOBER 30TH, 1902.

TRIAL.

## BAIN v. COPP.

*Insurance—Life—Policy on Life of One Person for Benefit of Another—Assignment—Death of Assured—Claim by Administrator.*

Interpleader issue tried at Toronto.

By a covenant in a mortgage made by defendants to the Star Life Insurance Company, the mortgagors were required to assure and keep assured with that company during the continuance of the mortgage one or more lives to the extent of £2,500 sterling, and to pay to the insurance company the premiums on such insurances. Defendants endeavoured to insure the life of Alfred E. Copp, son of defendant William J. Copp, but he failed to pass the medical examination. The plaintiff's son, a medical student, on 20th January, 1886, signed an application for insurance on his life for £2,500. This application was accepted by the insurance company, and a policy issued thereon, dated 13th April, 1886. The plaintiff's son reached his majority on 27th February, 1886.

He assigned the policy to defendants after the date of it. The defendants paid the premiums on the policy up to the time of the assured's death on 12th April, 1902. Plaintiff claimed as administrator of the estate of the assured. The amount due on the policy was paid into Court by the insurance company, and this issue was directed.

S. W. McKeown and J. W. McCullough, for plaintiff.

D. E. Thomson, K.C., and J. A. Culham, Hamilton, for defendants.

MacMahon, J.—The question, which arose in North American Life Ins. Co. v. Brophy, 2 O. L. R. 559, 32 S. C. R. 261, under 14 Geo. III. ch. 48, sec. 1, does not arise here, the insurance company having treated the policy as a valid contract by paying the money into Court; and the defendants are, by virtue of the assignment to them, the owners of the policy, they having paid and satisfied the mortgage to the insurance company. Worthington v. Curtis, 1 Ch. D. 419, Vezina v. New York Life Ins. Co., 6 S. C. R. 30, and Hallendal v. Hillman, 28 O. R. 342 *n.*, followed.

Judgment for defendants upon the issue with costs.

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October 30th, 1902.

DIVISIONAL COURT.

## MACLELLAN v. HOOEY.

*Assessment and Taxes—Tax Sale—Objections to Validity—Uncertainty as to Lands Assessed—Irregularities—Statute Curing—Defects in Advertisement of Sale—New Trial—Absence of Material Witness—Taking Chances.*

Appeal by plaintiff from judgment of Meredith, J., dismissing an action to recover possession from defendant of lots 5, 6, 7, and 8 on the east side of Maclellan avenue in the town of Trenton, and to set aside a tax sale under which defendant claimed. The defendant in the alternative claimed a lien for taxes paid and for improvements. The plaintiff proved a paper title in himself, and upon defendant putting in his proofs of a tax title, the plaintiff relied upon certain objections to its validity, which were overruled by the trial Judge.

H. L. Drayton, for plaintiff.

H. S. Osler, K.C., and W. C. Mikel, Belleville, for defendant.

The judgment of the Court (Street, J., Britton, J.) was delivered by

Street, J.—. . . It was argued that the sale of the lots in question for arrears of taxes was invalid as to lots 7

and 8, because it was uncertain whether these two lots, which are on the east side of Maclellan avenue in Irvine's survey, or lots 7 and 8 on the east side of Maclellan avenue in the Jubilee survey, are the lots assessed and mentioned in the warrant and advertisement and in the certificates of sale.

In the assessment roll for 1892, however, being one of the years for which the taxes are charged on these lots, and for the arrears in which they were sold, lots 7 and 8 in the Jubilee survey are assessed as part of an undivided block of land described by metes and bounds in the roll, while lots 7 and 8 . . . in the Irvine survey are described as lying on the far side of an intervening cross street called King street from the lots in the Jubilee survey. There is, therefore . . . a sufficient distinction upon the face of the assessment roll, shewing plainly which assessment was intended to apply to the several parcels. These taxes undoubtedly remained unpaid for more than three years before the year in which the treasurer's list was made out under which they were sold, and there is, therefore, a sufficient foundation for the further proceedings.

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On the 17th January, 1898, a special Act was passed, ch. 56 of 61 Vict. (O.), reciting that many irregularities had occurred in the proceedings necessary for the levying of taxes in the town of Trenton, and the sales of lands for the same. Section 1 of the Act declares the assessments for the year 1892, inter alia, valid. Section 3 provides that "all sales of land for taxes under the said assessments, when any portion of the taxes in respect of which the sales were had were in arrear for the time required by the Assessment Act, and when the lands so sold have not been redeemed, as in the said Act provided, are hereby confirmed and declared valid and binding to all intents and purposes upon all persons concerned and as to the lands so sold."

The section, however, gives a year from the passing of the Act to the owners of all lands so sold for redeeming them by payment to the treasurer of the arrears of taxes. The plaintiff was aware in July, 1899, that the defendant had purchased the lands and had gone into possession of them, and was making large improvements. The present action was not brought until May, 1901.

Under the circumstances, I think the proper conclusion is that the defects in the advertisement of sale, as well as any which preceded it, have been cured by the special Act which I have quoted. It is plain that the taxes for 1892, at all events, were in arrear at the time of the sale in 1896; that the only lots numbers 7 and 8 on the east side of Maclellan

avenue that were sold were those now in question in the Irvine survey, for the two lots 7 and 8 in the Jubilee survey had been redeemed before the sale. The sale of the lots in question falls, therefore, strictly within the terms of sec. 3 of the Act. In addition to this, it is plain that the owner was not in any way prejudiced by any ambiguity in the advertisement of sale, for both sets of lots were advertised for sale, and the owner must be taken to have known that her taxes were in arrear, and that her lots would be sold. The plaintiff, too, who purchased from the owner after the sale for taxes, has not been prejudiced, for he was aware of it, and treated with the town municipality for the purchase of their tax title, and was offered it at the price of the taxes and expenses. . . .

The plaintiff also asks for a new trial upon the ground that the mayor of Trenton was a material witness, and that plaintiff was prejudiced by his inability to procure his attendance at the trial. He was aware of this, however, when he brought the case on for trial . . . and it is too late now to complain. . . . His proper course was to have asked for a postponement of the trial.

The action was, therefore, properly dismissed, and the appeal should also be dismissed with costs.

See Lount v. Walkington, 15 Gr. 332; Hess v. Harrington, 73 Pa. St. 438; Black on Tax Titles, 2nd ed., sec. 407, notes 131, 132.

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WINCHESTER, MASTER. OCTOBER 31ST, 1902.

CHAMBERS.

## MORRISON v. MITCHELL.

*Particulars—Statement of Claim—Trade Mark—Infringement.*

Motion by defendants for particulars of certain paragraphs of the statement of claim in an action to restrain defendants from infringing plaintiffs' trade mark. Issue was joined and the action entered for trial.

C. A. Masten, for defendants.

Grayson Smith, for plaintiffs.

THE MASTER:—In the 6th paragraph the plaintiffs alleged that their goods had for more than ten years been known and described by the trade mark and design in question, which had acquired a particular reputation and value, and, by reason of such use and application by the plaintiffs, such trade mark and design had become the sole and absolute property of plaintiffs. The plaintiffs should not be ordered

to give particulars of whether it was intended by paragraph 6 to set up a common law trade mark. The paragraph itself contains as full particulars as plaintiffs are required to give. Gillatt v. Lumsden, 4 O. L. R. 300, distinguished. Reddaway v. Banham, [1896] A. C. 199, 210, referred to.

Under paragraph 8 the defendants asked particulars of the acts alleged to be done by defendants whereby they deliberately set about to attempt to appropriate plaintiffs' property. No particulars are necessary under this paragraph. It is immaterial to defendants what acts plaintiffs allege defendants have done in deliberately setting about to attempt, etc. What is necessary is to know what acts defendants are charged with doing in appropriating plaintiffs' property.

Paragraph 9 alleged that defendants at first appropriated and applied and used a single triangle to the valves manufactured and being sold by them. Defendants are entitled to particulars of the names and addresses of the persons to whom it is alleged the defendants sold valves marked with a single triangle.

By paragraph 10 the plaintiffs submitted that defendants had deliberately and wrongfully set about and attempted to appropriate the property of plaintiffs, and, if possible, to invade the rights of plaintiffs. As this submission follows the statements in paragraph 9 as to the acts of the defendants in using a triangle and triangles, no particulars are necessary.

By paragraph 12 it was alleged that defendants had been and were wrongfully and wilfully infringing upon the trade mark and design of plaintiffs in the manufacture and sale of goods similar to those of plaintiffs. Defendants are entitled to know in what respect they are charged in this paragraph, and full particulars should be given.

Paragraph 13 alleged that in the manufacture and sale of the valves similar to the valves manufactured by plaintiffs, the defendants had appropriated and used and applied a trade mark and design of plaintiffs, and had done so with the wrongful purpose and intention of imitating and copying the trade mark and design of plaintiffs, and in that way of obtaining the benefit of plaintiffs' property and of the reputation of plaintiffs' goods. Paragraph 14 alleged that defendants were using and applying in the manufacture and sale of their goods a fraudulent imitation of the trade mark and design of plaintiffs. As it does not appear that the trade mark and design used by defendants is that referred to in the 9th paragraph, full particulars of the trade mark and design

complained of should be given, and also the other necessary particulars in connection therewith.

Paragraph 15 alleged that the defendants had, by their wrongful acts hereinbefore referred to, trespassed upon the goods and rights and property of plaintiffs and were answerable to plaintiffs for such wrongful acts. The facts which make up the trespasses should be given as particulars.

The defendants also asked for particulars of the names of the persons alleged to have been deceived into purchasing steam valves manufactured by defendants, believing that they were the goods manufactured by plaintiffs. No order should be made as to this, because the statement of claim does not contain the allegation.

Order accordingly. Costs in the cause.

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NOVEMBER 1ST, 1902.

C. A.

## GABY v. CITY OF TORONTO.

*Costs—Third Party—Indemnity—Extent of Liability—Court of Appeal—Time for Disposing of Costs—Several Appeals.*

Motion by defendants to settle minutes of judgment. Plaintiff had judgment at the trial against the defendants with costs, and at the same time defendants had judgment over against the third party Crang, by which he was ordered to indemnify them against the plaintiff's judgment and the costs, which up to that time and by that judgment had been ordered to be paid by them, and their own costs of defence. The defendants and Crang both appealed from that judgment, and Crang also appealed from the defendants' judgment against him. The appeals were, pursuant to order, argued together as one appeal, and on the 28th June, 1902, the Court dismissed the appeals against the plaintiff's judgment with costs to be paid to him by defendants, reserving the disposition of the third party's appeal from the defendants' judgment against him: ante 440. The plaintiff took out his certificate in that way, and at that time no order could have been made against the third party in respect of costs in favour of defendants, the question of his liability over being still undetermined. His appeal against defendants was dismissed with costs on the 19th September, 1902: ante 606.

A. F. Lobb, for defendants, contended that the order should contain a direction that the third party should also

pay the costs which defendants have paid or may have to pay under the judgment of 28th June to plaintiff—the costs of their own appeal and the costs of the third party's appeal against them—as they would not otherwise receive the full indemnity to which they were by his contract entitled from the third party.

J. Bicknell, K.C., for the third party.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

OSLER, J.A.:—The appeal being a step in the cause, presenting it to the Court for review just as it came before the Court below for trial, this Court has the same jurisdiction over all the costs of the proceedings therein as the trial Judge had over those which had been incurred when the case was before him. The Court is disposing of all appeals, for convenience sake, as well as to prevent delay in the recovery of the judgment to which plaintiff was entitled, by two orders instead of one, and the time to deal with the question of what costs defendants should receive from Crang is when that part of the appeals which concerns his liability to them falls to be decided. The jurisdiction to do this was not at an end when the order of the 28th June was made, and the proper time to deal with these costs is when the Court is dismissing the third party's appeal, and thus making a final disposition of the litigation as it came before the Court. As to the costs of the third party's own appeal against plaintiff, they should have been ordered to be paid by the third party to plaintiff directly, instead of by defendants in the first instance. The defendants are entitled to be recouped by the third party the costs which may have been paid by them under that part of the order. As to the other costs defendants ask for, they are entitled to them, as their proceedings were not taken unnecessarily or wantonly, but reasonably and in their own interest and for their own protection. They are, therefore, within the scope of the third party's contract of indemnity, and the order should go in the form proposed by defendants. No costs of this motion. The taxing officer should see that the order does not bear with undue severity upon the third party, seeing that all the appeals were argued together, that he had the labouring oar in them all, and that the contention of defendants as to his liability turned chiefly, if not altogether, upon the construction of the contract between them.