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DIVISIONAL COURT.

O'SULLIVAN v. DONOVAN.

Company—Shares—Issue of Certificate—Payment by Promissory Note—Estoppel—Action to Cancel Shares—Status of Shareholder as Plaintiff—Right of Action—Payment of Promissory Note Pendente Lite—End of Cause of Action—Costs—Summary Application.

Appeal by plaintiff from judgment of BRITTON, J. (7 O. W. R. 78), dismissing action by a shareholder in the Pure Colour Company Limited (one of the defendants), brought to have it declared that 30 shares of the stock of the company for which a certificate (as fully paid up shares) was issued to defendant Donovan, were not in fact fully paid up, and for the delivery up and cancellation of the shares and certificate, and for indemnity by defendant Donovan to defendants the Pure Colour Co. against liability as the indorser of a promissory note given by Donovan for the price of the shares, which note had been discounted and was held by a bank at the time of the commencement of the action.

BRITTON, J., held that plaintiff had no status to maintain the action.

A. O'Heir, Hamilton, for plaintiff, contended that the transaction was illegal and ultra vires, as it amounted to a purchase of the stock by the company.

H. H. Bicknell, Hamilton, for defendants, contra.

The Court (Mulock, C.J., Anglin, J., Clute, J.), held that plaintiff had a cause of action at the time the action was begun, and reversed the judgment of the trial Judge; but they were of opinion that the cause of action was at an end when defendant paid the promissory note given for part of the price of his shares, and that either party might then have applied summarily for an order disposing of the costs: Eastwood v. Henderson, 17 P. R. 578.

Appeal allowed. Plaintiff to have costs up to time of payment, fixed at $300. No further or other costs to either party.

Teetzel, J. September 24th, 1906.

WEEKLY COURT.

Re CEMENT STONE AND BUILDING CO.

EGAN'S CASE.

Company—Winding-up—Contributory — Director — Entries in Register—Resolution of Directors—Attempt to Get Rid of Liability.

Appeal by Samuel Egan from decision of Master in Ordinary in a winding-up matter, ante 260.

W. E. Middleton, for appellant.

W. J. McWhinney, for the liquidator.

Teetzel, J., reversed the decision of the Master and allowed the appeal, but without costs.

Cartwright, Master. September 25th, 1906.

CHAMBERS.

SYMON v. GUELPH AND GODERICH R. W. CO.

Parties—Joinder of Defendants — Pleading — Statement of Claim—Joint or Several Cause of Action — Master and Servant—Injury to Servant—Joint Employment — Particulars—Rule 192.

Action against the Guelph and Goderich Railway Company, the Canadian Pacific Railway Company, and the Can-

ada Foundry Company jointly. The statement of claim stated that plaintiff was employed by the Canadian Pacific Railway Company to work upon the construction of a line of railway which was being constructed by the Canadian Pacific Railway Company under the name of the Guleph and Goderich Railway, but which was leased and operated by the Canadian Pacific Railway Company; that during the progress of the work it became necessary to erect a steel bridge across the Grand river, and the Canada Foundry Company agreed with the other defendant companies to construct the bridge; that plaintiff was ordered by his employers to assist in this work, and did so; that defendants undertook the placing of the necessary girder, and plaintiff assisted in this on his employers' orders; that the work of laying the girder was so negligently done that plaintiff was seriously injured; that all the apparatus used in placing the girder, including the roadbed upon which the cars rested, were under the control of "the defendants;" and that they were negligent in not providing a suitable and safe roadbed, as well as other proper and efficient apparatus. Certain specific defects were pointed out in the derrick used in laying the girder, and in the place adopted for that purpose. In the last paragraph it was said that "the said accident happened by reason of the said negligence of the said defendants, and by reason thereof the plaintiff suffered the injuries herein complained of."

On this defendants the Guelph and Goderich Railway Company moved for an order requiring plaintiff to elect against which defendant he would proceed, or else to amend his statement of claim, or furnish particulars.

Plaintiff, without waiting for the motion to be heard, furnished full particulars.

Defendants the Canadian Pacific Railway Company moved for a similar order.

Shirley Denison, for both defendant railway companies.

R. H. Greer, for the Canada Foundry Company.

Hugh Guthrie, K.C., for plaintiff.

THE MASTER:—The only question at present is, whether the statement of claim sufficiently alleges a joint cause of action against all three defendants.

The defendants relied on Hinds v. Town of Barrie, 6 O. L. R. 656, 2 O. W. R. 995, and Grandin v. New Ontario S. S. Co., 6 O. W. R. 553.

The plaintiff cited Rule 192. But if he was obliged to rely on this he must fail, as is shewn in Quigley v. Waterloo Manufacturing Co., 1 O. L. R. 606. . . .

Here in the last paragraph, as confirmed by the particulars, there is prima facie a joint cause of action alleged. Whether or not this can be proved at the trial so as to maintain this assertion is not now to be determined. In disposing of the motion, however, the particulars given by plaintiff cannot be overlooked, as they must be considered as amendments of the statement of claim when furnished at this stage of the action: see Smith v. Boyd, 17 P. R. at p. 467; Milbank v. Milbank, [1900] 1 Ch. 384; Temperton v. Russell, 9 Times L. R. 319 (per Bowen, L.J.)

Here, if looked at in the most unfavourable light, the particulars . . . might seem to set up a joint cause of action in respect of the roadbed against all the defendants, and a separate cause of action against the foundry company in respect of the derrick. From the view of Rule 192 taken by plaintiff's counsel, he, no doubt, thought that these, even if different causes of action, could be joined.

It might have been better to have waited before giving particulars. The motive of the haste was, no doubt, the desire to get to trial at Guelph assizes next week, if possible. As the statement of claim itself stands, "the defendants" spoken of throughout must be all the defendants. This, so far as the roadbed is concerned, is not qualified by the particulars, and in the following paragraphs there is a sufficient allegation of joint liability for plaintiff's injury.

There might have been less difficulty in disposing of the motion if these particulars had not been furnished.

Even as the matter stands, it does not seem necessary to read the statement of claim in the light of the particulars so as to require plaintiff to elect. In paragraph D. of the particulars plaintiff charges that all the defendants were engaged and concerned in placing the girder; and in paragraph F. that all the defendants are responsible for the condition of the roadbed, and that in other respects (i.e., I

suppose the derrick and its management) the foundry company are referred to.

This latter part is ambiguous. It may, however, be taken to mean only that the foundry company were in charge of this part of the joint operations, in view of the statement of claim and the particulars, as a whole.

In any case the present motion will not have been useless. The plaintiff will perhaps find that if he succeeds in the action he will do so as being the servant of all the three defendants and can only recover damages accordingly. If it was a joint work it must have been a joint employment.

It was said in one case by Bowen, L.J., that one party could not dictate to the other how he was to plead. And in Hinds v. Town of Barrie, 6 O. L. R. at p. 660, Osler, J.A., expressed his regret that the authorities required plaintiff to elect, and gave "liberty to amend by setting up, if she can, a joint cause of action."

It therefore seems right to dismiss the motions with costs in the cause. Defendants should plead within a week after the issue of this order. Plaintiff, if he desires to do so, can amend his particulars and statement of claim. This should be done before the order is issued, so that defendants may know what case they have to meet.

If plaintiff is not making any separate claim against the foundry company, this might be recited in the order, and so any amendment by plaintiff may be unnecessary if he is prepared to stand by his pleadings in their present shape.

CARTWRIGHT, MASTER. SEPTEMBER 26TH, 1906.

CHAMBERS.

RE BANK OF TORONTO AND DICKINSON.

Interpleader—Money Deposited in Bank to Credit of Three Executors—Right of Two to Withdraw—Dispute—Right of Bank to Interplead—Bank Act.

Motion by the Bank of Toronto for an interpleader order.

H. E. Rose, for the bank.

Job Dickinson was not represented.

H. J. Scott, K.C., for the other two executors.

THE MASTER:—The facts, which are not in dispute, are as follows. There is a sum of $1,060.97 standing to the credit of "the executors of the estate of the late Job Dickinson." Of the will dealing with this estate William, Elias, and Job (the younger) are the three executors, and the amount in question was deposited to the credit of the account by cheques signed by all three of the executors.

On 2nd June last Job Dickinson served a formal written notice on the bank forbidding them to pay out any of the moneys except on a cheque signed by all three executors. Subsequently two cheques, both dated 27th March, for $1,000 and $19.32 respectively, were presented. They were not signed by Job Dickinson, and were therefore refused. Elias Dickinson has instituted a Division Court action against the bank for non-payment of the $19.32 cheque.

No authority on the exact point was cited by either counsel, nor have I been able to find any in our own Courts. No doubt, on the one hand, it is competent for one executor to act by himself so long as he is acting in good faith. On the other hand, it would seem against reason that a bank, being in no way interested in the matter, should be put in peril because executors have fallen out.

It would seem that the provisions of the Bank Act may properly be extended to the present case. Section 65, subsec. 2, allows repayment of deposits on the receipt of a majority if standing in the names of more than two persons, "except only in the case of a lawful claim by some other person before repayment." The present case seems to come within this reservation. A lawful claim must be taken to mean one which is prima facie substantial.

This was apparently the view taken by my predecessor in a case of Dollery v. Dominion Bank, decided by him in June or July, 1899 (see Chambers judgment book, vol. 37, p. 144). . . .

In the present case the bank are wholly blameless. And unless it can be successfully contended that a deposit receipt is materially different from a current account, I think the bank are entitled to such an order as was made in the Dollery case.

If the parties are willing, the money can be retained by the bank as if it was in Court. Probably the three executors will be able to adjust their difficulties and to agree in the management of the estate without any further litigation.

I have also been referred to a case of Gollis v. Dominion Bank, decided by Meredith, C.J., in July, 1903. . . . See, too, Morse on Banking, 4th ed., vol. 2, sec. 438, and cases cited; also vol. 1 of same work, sec. 342, first clause.

CARTWRIGHT, MASTER. SEPTEMBER 27TH, 1906.

CHAMBERS.

CANAVAN v. HARRIS.

Discovery—Examination of Defendant—Refusal to Answer Questions—Relevancy—Pleading—Statement of Claim.

Action by the widow of the late John Canavan to recover damages for his death. It was alleged that the deceased was run over by a servant of the defendants who was acting within the sphere of his ordinary duties.

In the 5th and 6th paragraphs of the statement of claim it was charged that defendants' servant was intoxicated at the time of the accident, and had been for some time previous of unsteady habits and frequently intoxicated, and was not fit to be intrusted with the business of defendants, as they well knew.

The statement of defence denied formally all the material allegations of the statement of claim. It then alleged that the deceased was the cause of his own death, or else that it was inevitable accident.

This statement of defence was delivered on 4th September.

The defendant John B. Harris was examined for discovery on 18th September. He refused to answer questions directed to sustain the allegations in the statement of claim of the defendants' servant having been addicted to the use of intoxicating liquor, to the knowledge of defendants, prior to the accident.

The plaintiff now moved for an order requiring defendant John B. Harris to attend again and answer the questions.

W. T. J. Lee, for plaintiff.

W. R. Riddell, K.C., for defendants.

THE MASTER:—I think the motion must succeed, and the questions should be answered. As long as paragraphs 5 and 6 appear in the statement of claim, plaintiff is entitled to have full discovery in regard to them.

Every fact material to his case on which a party relies is to be stated in his pleading, and evidence of all such facts can be given at the trial. If any fact is stated as a ground of action or defence which the other side considers irrelevant, and therefore embarrassing, he should move to strike it out. This was done in such cases as Flynn v. Toronto Industrial Exhibition Association, 2 O. W. R. 1047, 1075, 6 O. L. R. 635, and Gloster v. Toronto Electric Light Co., 4 O. W. R. 532. Whether or not such a motion would succeed in the present case I have not now to consider. . . .

If alleged facts are material, they can be proved at the trial. If not material, they should be struck out unless clearly introductory or incapable of affecting the result.

SEPTEMBER 27TH, 1906.

DIVISIONAL COURT.

MILLER v. BEATTY.

Water and Watercourses—Dam—Flooding Lands of Riparian Owner—Cause of Injury—Damages—Release—Statutory Powers.

Appeal by plaintiff from judgment of ANGLIN, J., 7 O. W. R. 605, dismissing the action with costs.

R. McKay, for plaintiff.

E. E. A. Du Vernet, for defendants.

THE COURT (FALCONBRIDGE, C.J., BRITTON, J., CLUTE, J.), dismissed the appeal with costs.

CARTWRIGHT, MASTER. SEPTEMBER 28TH, 1906.

CHAMBERS.

LONDON AND WESTERN TRUSTS CO. v. LUSCOMBE.

Third Party Procedure—Winding-up of Company—Action by Liquidators against Directors for Paying Dividends out of Capital—Bringing in Shareholders who Received Dividends as Third Parties.

Motion by defendants for order for trial of third party issue.

W. E. Middleton, for defendants.

Featherston Aylesworth, for third parties.

G. S. Gibbons, London, for plaintiffs.

THE MASTER:—The action is brought by the liquidators of the Birkbeck Loan Company, alleging that the defendants, who were directors of the insolvent company, improperly paid dividends out of capital, and to compel them to refund such amounts so improperly paid.

Two of the defendants obtained the usual third party order. They claim to be indemnified by the shareholders for any such money paid to shareholders, and two of the shareholders have been made third parties, as test cases.

It was contended by the third parties and the plaintiffs that the order should be discharged. It was not denied that there were 126 shareholders on the date of the Winding-up order, and that during the last 6 years there have been 48 transfers of shares.

The following cases were cited: Wye Valley R. W. Co. v. Hawes, 16 Ch. D. 489; Flitchoff's Case, 21 Ch. D. 520; Moxham v. Grant, [1900] 1 Q. B. 88; Davey v. Cory, [1901] A. C. 477.

These cases seem to shew that there is authority to issue the third party notice; that such an order should not be made

as "will hinder or embarrass the plaintiff in the prosecution of the action;" that if the shareholders or any of them had knowledge of the facts alleged against the defendants they would be liable to indemnify the directors.

The course taken by the defendants here seems to avoid the ground on which the third party notice was refused in the Wye Valley Railway case.

If it is the fact that all the shareholders are in the same position as the two now brought in, then it is not improbable that so many of the others as are solvent will abide by the result of the present procedure. In this way there will perhaps be effected a consolidation of 180 possible actions before they have begun (if such an expression may be allowed). This will certainly be so if the defendants succeed in obtaining an order for representation of the other shareholders by the two now brought in. At present I think the usual order should issue for the trial of the third party issues.

I do not see that the third parties can complain, as Moxham v. Grant, supra, shews that the liquidators might have sued every one who had received part of these dividends, if it had been thought best to do so, instead of attacking the directors.

TEETZEL, J. SEPTEMBER 29TH, 1906.

CHAMBERS.

TITTERINGTON v. DISTRIBUTORS CO.

Company — Winding-up — Action begun before Winding-up Order—Leave to Proceed—Special Circumstances.

Motion by defendants the Bank of Hamilton to rescind an order obtained by plaintiffs allowing this action to proceed, notwithstanding an order for the winding-up of the defendant company.

Britton Osler, for defendants the Bank of Hamilton.

Grayson Smith, for plaintiffs.

J. A. Macintosh, for the liquidator of the defendant company.

TEETZEL, J.:—A winding-up order with a reference to the Master in Ordinary was made after the announcement of the action. On 18th September plaintiffs, upon notice to the liquidator of the defendant company, but without notice to defendants the Bank of Hamilton, obtained an order from the Chancellor, sitting in Chambers, giving leave to the plaintiffs to proceed with the action . . . notwithstanding the issue of the order to wind up the defendant company.

The defendants the Bank of Hamilton claim to be assignees of unpaid calls on the stock in the defendant company subscribed by the plaintiffs and others. The claim indorsed on the writ is to set aside plaintiffs' subscription for stock in the company, upon the grounds of misrepresentation and failure of consideration, and because conditions precedent to the same have not been carried out, also for a declaration that the assignment to the bank . . . is invalid and inoperative as against plaintiffs.

After the order of 18th September was settled, but before its entry, the Chancellor, on application of the Bank of Hamilton, granted leave for a motion . . . to set aside the order made by him.

The bank, as the principal creditors of the insolvent company, and holding assignments of unpaid calls as security for their claim, are chiefly interested in saving time and expense in ascertaining the validity of the stock subscriptions.

The Master in Ordinary has all the powers of a High Court Judge in the winding-up proceedings, and disputes between stockholders and the liquidator can be much more cheaply and expeditiously disposed of before him than in an action.

It seems to me that to entitle a plaintiff to an order allowing him to proceed with an action, he should shew such special or unusual circumstances as make it reasonably clear that the matters in question cannot be satisfactorily dealt with by the tribunal specially provided in the winding-up proceedings.

In this case no such special or unusual circumstances are disclosed.

The order of 18th September will, therefore, be rescinded, so far as respects the claim in reference to plaintiffs' stock subscription, but, if so advised, plaintiffs may amend and proceed against the bank alone for a declaration that the assignment to the bank is itself illegal and void as against plaintiffs.

No order as to costs.