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MULOCK, C.J. JANUARY 10TH, 1906.

TRIAL.

DORAN v. HOGADORE.

Trade Mark—Infringement—Similarity of Design—Passing off—Deception.

Action for an injunction and damages in respect of defendants' alleged infringement of a trade mark for braces or "suspenders." Plaintiffs carried on business as the Dominion Suspender Co. at Niagara Falls, and defendants as the Berlin Suspender and Button Co. at Berlin. Plaintiffs labelled their goods in this way: "Made in Canada. Guarantee: If this suspender stamped Trade D Mark is not in every way satisfactory after you wear it bring it back and get another pair instead. D. S. Co.. makers." Defendants used a similar label, substituting "Trade B Mark" for "Trade D Mark" and "B. S. Co." for "D. S. Co."

W. R. Riddell, K.C., H. E. Rose, and Alexander Fraser, for plaintiffs.

J. E. Jones and J. J. A. Weir, Berlin, for defendants.

MULOCK, C.J.:—The view which I have formed of this case is such that there would be no advantage in my taking further time to consider it.

For 18 or 20 years the plaintiffs have been carrying on business as dealers in and manufacturers of suspenders or braces; their business having attained an annual output of from $200,000 to $250,000 a year. In developing that business they have advertised very largely. One of their trade marks, which they have been using for many years, is the letter "D," shewn on or affixed to their goods in various ways; sometimes by means of a label, sometimes by being stamped on the leather portions of the goods, sometimes by being engraved on a button; and they have developed a large demand for these goods.

The defendants are engaged in a similar business, and have recently adopted the letter "B" as a trade mark. They have not given any evidence, and therefore we have perhaps nothing definite to go upon as to the extent of their business, and as to whether or not any confusion in the minds of purchasers from the similarity of trade marks "D" and "B" would be more to the benefit of one party than the other; but, in the absence of such definite information, and in view of the fact that the defendants' conduct is the cause of any such confusion, it may be fair to assume that any advantage arising from the confusion would accrue to defendants and not to plaintiffs.

For some time defendants used as a trade mark the letters "B. S. Co.," meaning, I understand, "Berlin Suspender Company." About 8 months ago they abandoned the use of these letters and began to use the letter "B." It is clear that when that change was made defendants had in mind the letter "D," with the words "trade mark" above and below, that was associated with the plaintiffs' business; because one of the defendants, when having his trade mark prepared, obtained the "copy" by detaching it from plaintiffs' goods, and in transmitting this copy to the engraver mentioned the fact that the plaintiffs had a trade mark "D." It is evident, therefore, that they did not in error or in ignorance of plaintiffs' practice adopt "B" as their trade mark, but with full knowledge that plaintiffs were using the letter "D" in the manner described. Thus they began endeavouring to obtain for their goods, if my conclusion is right, the market which had been developed on behalf of the plaintiffs. Simultaneously with adopting the letter "B" they adopted a label corresponding word for word with the label of plaintiffs, except that defendants used the letter "B," and at the bottom of

it put the letters "B. S. Co." instead of plaintiffs' "D. S. Co." I do not observe any difference between the two labels, either in size, character of letters, number of letters per line, number of lines, colour of paper, or position upon the suspenders; I discover no difference except that in defendants' label they have used the letter "B" instead of "D," and that in the signature or printed initials at the bottom they have changed the "D" in "D. S. Co., makers," to "B," making it "B. S. Co., makers." It would appear, therefore, if defendants' intention has any bearing upon the case, that the adoption of these features of plaintiffs' methods sheds a light upon the object of the defendants in using the letter "B" on the button and in the stamping, which is the only part of the case we have now to deal with, because defendants have since action abandoned any right to use the label.

Mr. Jones in his able argument commented on the fact that plaintiffs when deciding to bring action, or when feeling that they were aggrieved, took no exception to anything but the label. At that time, when writing the letter in question to the defendants, the plaintiff W. L. Doran complained only of the use of the label, not of the button. I think that at that period, interpreting his condition of mind as matters then stood, the more manifest infringement—the label—overshadowed in importance the infringement in respect of the button, so that he did not dwell then upon that infringement. It is since then that the use of the label has been abandoned.

Mr. Jones has argued that this is a matter to be entirely determined by the eyesight of the Judge; that I sit in the place of the public. That is true in a sense; but I must use more than my eyesight. In a case like this I may also use my sense of hearing. If for example there be a similarity of sound, that has to be considered; because the reputation that the trade mark acquires in the public mind is a reputation which may reach the public mind through various faculties. Take, for example, a blind person, who has never seen the letter "D," or an illiterate person. He may be told that there is a good suspender known as the "D" suspender. That person would from his sense of hearing acquire the knowledge of the use of the letter "D." Again, an honest salesman, if asked for "D" suspenders, might easily think that "B" suspenders were asked for, owing to the similarity in sound of the two letters.

When it is contended that the Judge must regard the case from the standpoint of the public, that contention means that he must put himself as far as possible in the position of an ordinary purchaser; not in that of a man going in to purchase goods with the aid of a microscope, but of one doing business as it is ordinarily done. A person having, from advertisement or otherwise, acquired an impression that a particular article is a desirable one, goes into a shop expecting fair, honest, and candid dealing on the part of the salesman; he does not expect to be deceived; and therefore he is not called upon, I think, to examine the trade marks critically, but only in a casual way. If this view be correct, it may be admitted that the ordinary purchaser in so purchasing may be deceived, although by a more critical examination he would have been able to distinguish between the respective trade marks. It is a not unusual thing for a person of even more than ordinary care and intelligence to be mistaken or deceived, often only discovering the mistake or deception after it has occurred and when something has called his attention to it.

If defendants were desirous of changing their trade mark "B. S. Co." to some other, how comes it that of all the other designs which ingenuity could have applied they hit upon a letter of the alphabet nearest in appearance and in sound to that of plaintiffs? Is it a coincidence, or were defendants endeavouring to substantially copy plaintiffs' trade mark, with such a slight variation as would enable them to evade the legal consequences of infringement, and thus secure to themselves the benefit of the confusion in the public mind? I would have thought that if defendants had an honest explanation to give, one of them would have gone into the witness box and offered it. He has not done so.

Now, what are the elements in reference to this button which would be likely to deceive or lead to mistake? I do not agree with Mr. Jones that the test is simply as to whether the letter "B" may be confounded with the letter "D." The case is not limited to that bald question. It was not necessary, I would think, if defendants were anxious to avoid confusion, for them to have selected, as they seem to have done, a button precisely like that of plaintiffs, upon which to engrave the letter. It is the same as that of plaintiffs' in shape, in material, in design, in colour, in position. I do not say that defendants could have used the letter "B"

with safety in connection with the suspenders at all; but certainly they might have created more doubt as to their object if they had put their letter "B" on the brass buckle or elsewhere, instead of on a button precisely like plaintiffs' button. I do not say that even if they had done that they would have been able to successfully defend this action; but I think they have been fairly successful in leading to confusion and doubt on the part of purchasers by selecting a letter like the letter "B," the most similar in size and appearance and sound to that of the plaintiffs; placing it on the same kind of button, of the same shape and appearance, and in the same place.

Any doubt or confusion on the part of purchasers has been brought about by the action of defendants; and we have it from 3 witnesses at least—who seem to be fairly intelligent young men and quite familiar with plaintiffs' goods—that they in purchasing in the ordinary way, and seeking to purchase plaintiffs' goods, found themselves purchasers of defendants' goods instead. It would therefore seem that defendants' action is likely to cause confusion between their goods and plaintiffs', and also to lend itself to the passing off of their goods for those of plaintiffs.

There will therefore be judgment for plaintiffs, restraining defendants from infringing plaintiffs' trade mark; and plaintiffs are entitled to a reference as to damages and to the costs of this action up to the judgment. Costs of the reference to be disposed of by the officer taking the same.

JANUARY 22ND, 1906.

C.A.

CANADIAN PACIFIC R. W. CO. v. OTTAWA FIRE INS. CO.

Fire Insurance—Property along Line of Railway Damaged by Fire from Engines—Property in Foreign Country—Standing Timber—Powers of Ontario Insurance Company to Insure—Application of Policy to Other Property—Validity of Policy—Statute of Foreign Country—Mistake.

Appeal by plaintiffs from judgment of CLUTE, J., 5 O. W. R. 496, 9 O. L. R. 493, dismissing action to recover for

losses under policy, or moneys paid as premiums for insurance.

W. R. Riddell, K.C., and Angus MacMurchy, for plaintiffs.

G. F. Shepley, K.C., and F. A. Magee, Ottawa, for defendants.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A.), was delivered by

OSLER, J.A.:—Defendants are an insurance company incorporated under the Ontario Insurance Act, registered and licensed to transact the business of fire insurance. It has not been suggested that there is anything to prevent them from carrying on business in the State of Maine, U. S.

They issued a policy of insurance, No. 43,618, in favour of plaintiffs, who have a line of railway running through part of that State, which reads in part as follows: "*On property as follows all more fully described in application for this insurance, which forms part and parcel of this policy, to wit*:—

"On property as per wording hereto attached.

"Canadian Pacific Railway Company, $75,000. On all claims for loss or damage caused by locomotives to property located in the State of Maine, not including that of the assured, or upon land owned, leased, or operated by the assured. The loss paid by the assured upon all verdicts, judgments, and settlements for said claims against the assured or the railroad company owning the line of road, shall be considered full proof of all claims under this policy. . . .

"It is also understood and agreed that this company shall not in any event be liable under this policy for loss to property located outside the State of Maine.

"It is understood and agreed that this company shall not in any event be liable under this policy for a greater sum than $20,000 for loss or damage caused by any one fire.

"It is understood and agreed that this insurance company shall not be liable under this policy except upon claims upon which the insured's payment is $5,000 or more on account of loss by any one fire, and then this company shall be liable only for the amount of loss sustained in excess of $5,000. . . ."

The words italicized are part of the printed form of the policy. The remainder of the clause quoted is type-written on a sheet of paper attached to the face of the policy, immediately following the former words, signed by the chief agents of the company, and otherwise authenticated as part of the policy.

The defendants covenant with insured (printed form) "that if the property hereinbefore mentioned is destroyed or damaged at any time between the hour of 12 o'clock noon of the 11th day of May, 1903, and the hour of 12 o'clock noon of the 11th day of May, 1906, they will make good unto the assured all such loss or damage by fire not exceeding in respect of each of the several subject matters above specified the sum set opposite thereto or the interest of the assured therein, and not exceeding in the whole the sum of $75,000, the said loss or damage to be estimated according to the actual cash value of said property at the time the fire shall happen."

A previous policy, No. 29,412, for $75,000, substantially in the same terms, dated 9th May, 1901, had been granted by defendants to plaintiffs, which was afterwards renewed for a year from 11th May, 1902. The premium paid on the grant and the renewal was the sum of $5,000 on each occasion. On this no claim for loss had ever arisen.

Plaintiffs' claim is in the alternative; either the first policy is valid and covers the risks alleged to be insured against, and they are entitled to recover the losses paid by them; or both policies are in toto invalid and ultra vires of defendants, as being a kind of policy, sc., a guarantee policy, which under the Act they had no power to grant, and are not fire insurance policies, in which case they never attached, and plaintiffs are entitled to recover back the premiums paid by them as upon an entire failure of consideration.

Defendants deny that the policy is a guarantee policy, but say that the only property the loss of which is in question in the action and for the destruction of which plaintiffs had paid, was standing timber, to the insurance of which their statutory powers do not extend. Plaintiffs contend that if that be so (which they deny), the parties to the contract never were ad idem, as plaintiffs intended to obtain insurance against the destruction by fire from their locomotives of standing timber along their line of railway, and, if they

did not get it, the policy never attached, and so the consideration failed and ought to be recovered back on that ground.

. . .

I am of opinion that the judgment should be affirmed.

There is no reason for saying that the policy is not a fire insurance policy. The plaintiffs call it a "liability" insurance policy, whatever that may mean, but it is essentially a policy of insurance against loss by fire, and, if they had any insurable interest in the property destroyed, they might insure it in any company whose charter powers extended to the insurance of such property, just as a common carrier might do.

"Any legal or equitable estate which may be prejudicially affected or any responsibility which may be brought into operation by a fire will confer an insurable interest:" Bunyon on Fire Insurance, 4th ed., p. 13.

"Interest may arise from mere liability. An insurable interest may arise from mere liability which the insured incurs with relation thereto, though he is not in possession of the property, and has no interest therein beyond the danger of pecuniary damage from the loss of the property by reason of such assumed liability; such liability may arise by statute or by contract or may be fixed by law from the obligations which the insured assumes:" Am. & Eng. Encyc. of Law, 2nd ed., vol. 13, p. 147; and see Hart v. Western R. W. Co., 13 Metc. 99.

The statute law of the State of Maine has for many years imposed such liability and conferred an insurable interest in property the subject of it upon corporations in the situation of plaintiffs.

"When a building or other property is injured by fire communicated from a locomotive engine, the corporation using it is responsible for such injury and may procure insurance thereon:" Revised Statutes ch. 51, sec. 87. A similar provision exists in other State jurisdictions, and it has recently found a place in our own legislation: Dominion Railway Act, 1903, sec. 239.

The State law has been considered in many cases, some of which are cited in the judgment of Clute, J. It is not necessary to refer to them at length. The liability and right to insure in respect of the interest created is generally recognized. In some of these cases fences and forest trees are

held to be included under the expression "buildings and other property," as property for the destruction of which the corporation is liable, and in respect of which the statute creates an insurable interest, whether an insurer can be found to take the risk or not: Grissell v. Housatonic R. W. Co., 54 Conn. 447; Pratt v. Atlantic and St. Lawrence R. W. Co., 42 Maine 579.

It seems hardly necessary to say that the power of a particular insurance company to take the risk does not depend upon the statute which confers upon the railway company the right to insure against it. That must depend upon the charter or statutory powers of the insurance company, and this is where plaintiffs' chief difficulty arises, in so far as it is contended that the policy in question covers standing timber.

Section 166 of the Insurance Act enacts that "every company licensed and registered for the transaction of fire insurance may, within the limits prescribed by the license and registry (secs. 53, 54), insure and re-insure dwelling houses, stores, shops, and other buildings, household furniture, merchandise, machinery, live stock, farm produce, and other commodities, against loss or damage by fire or lightning . . ."

Defendants are restricted to insurance upon property which comes within the classes of property here specified. Plaintiffs' contention is that standing timber (which, taken by itself and unaffected by any contract respecting it, is admittedly part of the realty), comes within the term "other commodities," but I do not think so. The sense in which those words is used is indicated by the words which precede them and with which they are connected, "household furniture, merchandise, live stock, farm produce," which are contrasted with insurable interests in the realty, "dwelling houses, stores, shops, and other buildings." The word "commodity" is susceptible of many meanings, some of them abstract, some of them archaic and obsolete. It may be descriptive of quality, advantage, or opportunity. A foot path may in one sense be a commodity, and so may a bush or forest in a farm, but we do not now use the word in that sense, or in many of the senses of which a reader of Shakespeare, for example, can readily recall the instances. Here I think it is used in its ordinary business and derivative sense of anything movable, that is, a subject of trade or acquisition:

Century Dictionary; and again in the Oxford Dictionary, sub voce. "specially in commerce, a kind of thing produced from a sale, an article of commerce, an object of trade. In plural, goods, wares, and merchandise." The same in the Standard Dictionary.

Standing timber along defendants' line of road was therefore not covered by the policies.

It by no means, however, follows that the policies were void or inofficious, since there was abundance of other property in which plaintiffs had a statutory insurable interest which was effectively insured thereby.

I think plaintiffs have entirely failed upon the evidence to shew that insurance of standing timber was a matter about which they were bargaining with the insurance company, in the sense that they brought it to their notice that their application for insurance was intended to include it. The description of the subject matter of the insurance was prepared by plaintiffs, and the policies attached upon everything which defendants were capable of insuring. The premiums therefore cannot be recovered back.

I agree therefore with the judgment of the Court below in thinking that the action fails on both grounds, and would dismiss the appeal.

TEETZEL, J. FEBRUARY 22ND, 1906.

WEEKLY COURT.

RE TURNBULL.

Will—Construction—Control of Estate—Life Interest—Intestacy—Statute of Distributions—Right of Next of Kin of Life Tenant to Share.

Motion by executors of will of Alexander B. Turnbull for order determining a question arising under the 2nd paragraph of the will, which was as follows: "If I predecease my wife Harriet Turnbull, I bequeath to her the whole control of my real and personal estate, as long as she lives." By the 3rd and 4th paragraphs the testator gave, after the death of his wife, his real estate (farm) and the stock and implements appertaining thereto, to certain of his step-children. The will contained no residuary clause. Besides the stock and implements, testator's personal estate consisted of a

mortgage for $900. The widow survived the testator only a few days, and made no disposition of the mortgage.

H. J. Martin, for executors and stepchildren.

C. Evans-Lewis, for next of kin.

TEETZEL, J.:—I am of the opinion that the proper construction of the clause in question is, that the widow had only a life interest in the mortgage, with power of control during her life. . . .

[Percy v. Percy, 24 Ch. D. 616, and Hancock v. Watson, [1902] A. C. 14, distinguished.]

The widow having failed to make any disposition, the remaining interest would fall into the testator's undisposed of estate, and go according to the Statute of Distributions, R. S. O. 1897 ch. 335. . . .

[Reference to Osterhout v. Osterhout, 3 O. W. R. 249, 7 O. L. R. 402, 4 O. W. R. 376, 8 O. L. R. 685; Scott v. Joselyn, 26 Beav. 174.]

It not being necessary, I do not decide whether the words of this will would authorize the widow to absolutely dispose of the mortgage in question either by deed or will.

A question having been raised . . . as to the right of the widow to share under the Statute of Distributions, notwithstanding her life interest in the whole mortgage, I think she was so entitled, and therefore her next of kin will now take the moiety to which she was entitled: Pickering v. Stamford, 3 Ves. 335; Re Twigg's Estate, [1892] 1 Ch. 579; and Re Harrison, 2 O. L. R. 217.

Costs of all parties out of the estate.

BRITTON, J. MARCH 5TH, 1906.

CHAMBERS.

STURGEON v. PORT BURWELL FISH CO.

Venue—Change of—Fair Trial—Convenience—Expense—Witnesses.

Appeal by defendants from order of Master in Chambers dismissing application of defendants to change place of trial from Goderich to Simcoe.

F. Arnoldi, K.C., for defendants.

W. Proudfoot, K.C., for plaintiff.

BRITTON, J.:—Plaintiff resides at Bayfield, county of Huron. His son George, as a fisherman, was in the employ of defendants on their fishing tug "Star." On 19th November last, on Lake Erie, about 4 miles from Port Burwell, a large wave struck this tug, washed George overboard, and he was drowned. Negligence is charged against the defendants, in sending the boat out in such rough weather as prevailed that day, and in not having the boat properly equipped for the work.

The defendants ask to have the venue changed, 1st, because they think they are not likely to get a fair trial at Goderich. That argument was fully met. There is no sufficient reason shewn why there should be any apprehension of any favour to the plaintiff or prejudice against the defendants at Goderich. If the case is tried by a jury, the defendants by their right of challenge can in the large county of Huron probably have no juror upon the trial of this case who ever heard of it before the opening of the sitting of the Court.

The second ground is saving of expense and because of convenience.

The defendants name, in the affidavit of Mr. Boyd, 19 witnesses likely to be required at the trial, and other persons are named in a supplementary affidavit as likely to be required.

The plaintiff names 19 or 20 persons whom he says he will require.

It will be a matter of surprise if either calls half the number named.

The defendants evidenced the most perfect good faith in making the liberal offer of advancing, at once, to the plaintiff's solicitor a sum sufficient to pay the difference in the expense of plaintiff's witnesses to St. Thomas instead of to Goderich, if plaintiff would consent to go to trial at St. Thomas. I regret that plaintiff's solicitor did not see his way to accept this offer.

The plaintiffs must necessarily, as it appears to me, have some witness or witnesses from Port Burwell. The burden of proof is upon him and he accepts it, and now there is no middle way open. I must follow as well as I can the decided cases. It is of course "well settled practice" that the

plaintiff's choice of place of trial will not be interfered with except on substantial grounds.

I can only say that there is not here any such "proved preponderance of convenience in favour of the change" of place of trial to either Simcoe or St. Thomas as would warrant it: Halliday v. Armstrong, 3 O. W. R. 410. The difference of expense and the fact that the cause of action arose in the county of Elgin are not sufficient to do away with the plaintiff's prima facie right to have the trial at Goderich: McDonald v. Dawson, 8 O. L. R. 72, 3 O. W. R. 773.

The appeal must be dismissed; costs to be costs in the cause.

BRITTON, J. MARCH 5TH, 1906.

CHAMBERS.

CLARK v. NISBET.

Dismissal of Action—Want of Prosecution—Frivolous or Vexatious Action.

Motion by defendants for an order dismissing the action for want of prosecution and as frivolous and vexatious.

F. Arnoldi, K.C., for defendants.

J. M. Ferguson, for plaintiffs.

BRITTON, J.:—I am of opinion that the defendants who have been served and who have appeared, are entitled to have this action, as against them, dismissed for want of prosecution, with costs as against the plaintiffs. No reasonable or sufficient excuse has been offered for the delay in filing and serving a statement of claim. Upon the undisputed facts the action was begun under circumstances which should have made the plaintiffs particularly careful to do, in time, whatever was necessary to be done. It is certainly not a case in which the plaintiffs are entitled to any indulgence. The facts satisfy me that the action is really frivolous and was intended to be and is in fact a vexatious one and an abuse of the process of the Court.

The note which the plaintiff Clark says he holds, and by virtue of which he claims to be a creditor of the estate of J. B. Hill & Co., is one upon which Dr. Lipsey was indorser and which Dr. Lipsey settled. He never gave to the

firm of Robinson & Green any authority to hold this note as their own or to sell it to the plaintiff Clark. Clark explains how he got the note, and (speaking of notes against J. B. Hill & Co.) says: "They were lying on the table and I spoke to Robinson about the value of them, and he said Mr. Honsinger was buying a couple of other notes, and I said, what is he paying? And he said, 8 or 9 cents, I forget which, on the dollar; and I asked if he would give me a chance, and he said, yes. Robinson and I had a current account. He owed me about $23 at that time, and I said I would take the note for the account, and whatever is over I will do further work; and he said I could have it, so I took the note."

The examination of plaintiff Clark taken on the 22nd and 24th February, the whole of which I have read with care, satisfies me that the pretended purchase and taking over of this note by Clark was part of a scheme to vex and embarrass the defendants. J. B. Hill is apparently hopelessly insolvent, and is now out of the province. Clark is apparently a man not able to pay costs if costs are awarded against him. The estate of J. B. Hill & Co. was and is in litigation with Mr. Green, one of the firm of Robinson & Green, from whom plaintiff Clark says he got the note.

I have read all the affidavits and the material used on this motion, and the conclusion is irresistible that this is an action absolutely without merits.

The action is practically for the alleged sacrifice of the stock of J. B. Hill & Co. by a sale at 45 cents on the dollar. The interest of Hill under the circumstances can be considered as only nominal. The interest of Clark, if he was a bona fide holder for value of the note claimed, is only a pecuniary interest to the extent of a trifle.

Apart from application to dismiss for want of prosecution, the question would be whether the defendants should be protected by ordering the plaintiffs to give security for costs, as was done in Smith v. Clarkson, 7 O. L. R. 460, 3 O. W. R. 593, affirmed by a Divisional Court, 8 O. L. R. 131, 4 O. W. R. 55, or to have action dismissed as frivolous and vexatious.

As the plaintiffs have not thought proper to deliver a statement of claim, and as the action is not meritorious, there is no reason why it should not be dismissed for want of prosecution, and with costs.

SCOTT, LOCAL MASTER. MARCH 6TH, 1906.

MASTER'S OFFICE.

MURPHY v. CORRY.

Solicitors—Action for Compensation for Services—Prosecution of Claim against Dominion Government—Quantum Meruit—Nature of Services—Commission.

Reference for trial of an action brought by a firm of solicitors against a firm of contractors to recover a balance of $1,227 alleged to be due for services rendered in connection with prosecuting a claim against the Dominion government.

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

W. J. Code, Ottawa, for defendants.

THE MASTER:—Defendants say that plaintiffs have been overpaid, and counterclaim for the alleged excess. A bill has been rendered shewing in detail the services performed and the disbursements incurred, and charging a lump sum of $3,500 to cover both. Certain credits are given totalling $2,273, leaving a balance of $1,227. It is admitted that the Solicitors' Act does not apply, and that defendants are not entitled to the delivery of any further bill. The only question therefore is: to what amount are plaintiffs entitled on a quantum meruit?

According to the American and English Encyc. of Law, 2nd ed., vol. 3, p. 420, the circumstances to be considered in arriving at a proper amount to allow in such a case are, the amount and character of the services rendered, the labour, time, and trouble involved, the character and importance of the litigation in which the services were rendered, the amount of money or the value of the property to be affected, the professional skill and experience called for, the character and standing in their profession of the attorneys, the result secured, and the ability of the client to pay.

The circumstances under which the services in question were rendered were as follows:

Defendants on 7th May, 1896, entered into a contract with the Crown for the construction of section No. 2 of the Trent canal, including the lift lock at Peterborough. The latter was the first of its kind on this continent and the

largest in the world, and the work was therefore quite unfamiliar to both engineers and contractors. As a consequence plans were frequently changed, much extra work was found to be necessary, and prices were several times revised by the Crown. The extent of these changes will be evident from the fact that while the original contract price was about $275,000, the total amount eventually paid to the contractors (exclusive of a claim for about $40,000, which is still pending), was $655,893.42. The first revisions of prices were obtained in May, August, and September, 1900. In the negotiations leading up to them the defendants were represented by Mr. A. W. Fraser, K.C., and Mr. J. T. Lewis, but after the revisions were granted these gentlemen ceased to have any connection with the matter. Further differences arose as to extras and as to prices, and Mr. N. A. Belcourt, K.C., and later Mr. G. H. Watson, K.C., were retained by defendants to press their views on the government. As a result of these representations the Department of Railways and Canals consented in September, 1901, to a reference of the matters in dispute to 3 engineers for inquiry and report. This agreement was embodied in two documents, one relating to concrete prices only, whereby the Minister of Railways and Canals undertook to submit the findings for the consideration of the Governor in council, and the other relating to the balance of the disputed items, whereby the chief engineer of the department undertook to embody the findings in an estimate. In neither case was the award to be binding on the Crown. The amount paid up to this time or shortly afterwards on the basis of the old figures was $520,754.86, and the amount claimed by the contractors before the board of engineers was $420,837.37. The recommendations of the board, as eventually figured out, meant an allowance to the contractors of $31,856 for concrete, and $162,186.41 for other work, but of this latter sum it is said that about $35,000 would have been payable in any event. The board further recommended the payment by the government of interest and costs, though these matters were in no way referred to them. The inquiry by the board was of an informal nature, and neither party was represented by counsel, the connection of Messrs. Belcourt and Watson with the matter having practically ceased on the obtaining of the two agreements of reference. After the arbitrators had come to a decision, plaintiffs were retained to supervise the preparation of their award, which is dated 18th January, 1902, and

to endeavour to obtain payment of the amounts from the government. The work they did covered a period of over 2 years, commencing in October, 1901. No other solicitors were employed by defendants during that time. Numerous difficulties lay in the way of securing payment. As regards the concrete the Minister had undertaken no more than to submit the matter for the consideration of his colleagues, and, despite the efforts of the plaintiffs, the claim, amounting with interest to about $40,000, is still unpaid. As regards the interest and costs, the matter was entirely open, there being neither legal obligation to pay nor even an agreement to consider the recommendations of the engineers. As regards the other items, while the chief engineer had undertaken to embody the findings in an estimate, it was found he could not do so until directed to by the Minister, and the latter and his colleagues had first to be persuaded of the justice of the claims. The government did not conclude to adopt these latter findings until November, 1902. Then came differences as to the applying of the prices fixed to the actual quantities. This occupied another month, and the estimate was not signed by the chief engineer until 15th December. Next came difficulties with the Auditor-General, which occupied about three months, and culminated in the overruling of his objections by the treasury board. Further difficulties arose with the Auditor-General as to the issue of a cheque, necessitating the intervention of the Department of Justice, and the first instalment of the money did not reach defendants until 17th June, 1903, after a year and a half's work on the part of plaintiffs.

The claims for interest and costs were still more difficult to put through, as the government was neither legally liable nor committed in any way to their payment. As the result, however, of persistent argument on the part of plaintiffs, fortified by the citation of precedents, the government did eventually, in August, 1903, agree to the payment of interest and of one-half the costs of the arbitration. Then came a fight as to the amount of the interest. As the new prices were applied to numerous items which had previously been paid for on a lower scale, the calculation was necessarily very complicated, and there was, moreover, room for wide differences of opinion as to the method of calculation. The department made the total about $12,000, and this amount was actually placed in the estimates laid before Parliament.

Plaintiffs nevertheless succeeded in having the calculation revised and the amount increased to $26,533.14, which, with costs and interest on costs, was paid in December, 1903. The total amounts secured by the defendants through the plaintiffs were therefore as follows:

Paid under the award	$162,186 41	
Less proportion for subsequent work at former prices, say..	35,000 00	
		$127,186 41
Interest		26,533 14
One-half costs of arbitration		2,209 50
Interest on costs		159 20
Total		$156,088 25

The bill rendered covers about 110 folios, and if the charges were extended at from $2 to $5 per hour, as contended for by defendants, the total would probably not amount to more than about $2,000. It does not seem to me, however, that this is necessarily the proper method of assessment, and I am further of opinion that an amount so arrived at would not, in the present case, be adequate remuneration. We are outside the region of tariffs. Any fixed charge per hour or per day would be purely arbitrary. If any analogy is to be drawn to tariff charges, the bulk of these services is in the nature of counsel work. Moreover, it is sworn that very many attendances on members and officials of the government, as well as on defendants, do not appear in the bill at all, and it is also sworn, and must indeed be obvious, that an immense amount of study of documents and figures was necessary to familiarize plaintiffs with the details of the case. It was even necessary for them to be thoroughly conversant with the details of the negotiations prior to the arbitration in order to meet the objections and smooth out the difficulties which were constantly arising. Then the personal equation counts for a great deal. Much persistence as well as tact and perseverance are necessary in order to carry a matter of this kind to a successful issue. Four Ottawa solicitors have been called as experts, and all swear that the charge of $3,500 is a reasonable one, and that such services are usually paid for at from 2½ per cent. to 5 per cent. of the amount in question. Two of them suggest 2½ per cent. of the amount claimed, or 5 per cent. of the amount

recovered, as proper charges. In Re Johnston, 3 O. L. R. 1, a somewhat similar case, 4½ per cent. appears to have been allowed by Mr. Thom. It is argued that, if the amount is fixed on a commission basis, allowance must be made for the services of the solicitors who were employed in connection with the matter prior to the retaining of plaintiffs. This is, no doubt, to some extent true. Plaintiffs obviously must not get credit for work they did not do. The result, however, accomplished with the assistance of Messrs. Fraser and Lewis, had only an indirect bearing on the recovery of the amount secured through plaintiffs; though the work of Messrs. Belcourt and Watson certainly contributed very materially towards bringing about the final result. If plaintiffs had had all to do with the matter from the first, they would, I think, have been entitled to more than 2½ per cent. of the amount recovered, whereas their claim in fact amounts to much less. Two and a half per cent. of the amount recovered would be $3,902.21. This includes nothing for the $40,000 concrete claim, and takes no account of the special difficulty of putting through the claim for interest and costs, with the securing of which no other solicitor had to do. Mr. D. O'Connor, a solicitor of wide experience in such matters, gives it as his opinion that the securing of interest from the government is so difficult that 5 per cent. of the amount recovered is no more than fair remuneration for the work entailed. If the commission on the interest and costs were put at 5 per cent., it would bring the total up to $4,624.74. an amount greater by $1,100 than the sum actually claimed. It must not be forgotten, however, that the amount involved, like the time occupied, is only one of the elements, though perhaps the most important element, to be considered. No hard and fast percentage can be fixed, just as no hard and fast charge per hour can be fixed. All the circumstances must be looked at and an amount arrived at which will on the whole be fair compensation for the services rendered.

After a careful consideration of all the facts, I have come to the conclusion that plaintiffs' charge of $3,500 is fair and reasonable, and that they are entitled to recover from defendants the balance of $1,227 claimed, with costs.

CARTWRIGHT, MASTER. MARCH 6TH, 1906.

CHAMBERS.

ATTORNEY-GENERAL v. HARGRAVE.

Pleading—Defence and Counterclaim—Irrelevancy—Embarrassment—Action by Attorney-General for Cancellation of Mining Leases—Registration of Cautions—Petition of Right—Premature Counterclaim.

Motion by plaintiff to strike out paragraphs 12 and 13 of the statement of defence, as well as the whole of the counterclaim for $25,000.

A. W. Ballantyne, for plaintiff.

J. Shilton, for defendants.

THE MASTER:—The action is brought by the Attorney-General for the province to have certain mining leases of lands in the Cobalt district cancelled, and to recover possession of the lands comprised therein, on the ground that the leases were obtained on affidavits of the necessary discoveries which were untrue to the knowledge of defendants.

The statement of defence sets out in some detail certain matters which occurred before the issue of the leases; it denies that the affidavits of discovery were untrue or that if so the defendants had any knowledge of this; and further it sets up the defence of a purchase in good faith for value without notice. The statement of defence then states the fact of cautions having been filed by the Attorney-General, and proceeds as follows:—

12. The said cautions were lodged illegally, improvidently, and without reasonable cause, and were so lodged by and at the instigation and on the clamour and false reports of certain interested individuals—amongst others, R. J. Tough and J. C. McMillan—who were desirous of wrongfully depriving the defendants of the said lands and acquiring title thereto in themselves, and who, immediately after they procured the said cautions to be lodged and as a direct result thereof, entered and trespassed upon the said lands, and on or about 28th June, 1905, made application to the said department for a title thereto, and by reason of the said cautions

having been lodged as aforesaid defendants have been prevented from dealing with their said lands so as to carry on successful mining operations thereon, and have been put to great loss, damage, and expense thereby and in defending their titles against the said trespassers and claimants.

13. The said cautions afforded the said parties mentioned in the preceding paragraph hereof a pretext for entering upon the said lands and prospecting for mineral thereon, and enabled them to make claim thereto on a pretended discovery of valuable mineral, and to mislead and induce the plaintiff to grant and allow them a hearing to dispute the defendants' title and to institute this action, which is a direct result of the said cautions and not in the public interest, nor is the plaintiff the real plaintiff, nor the solicitor on the record the real solicitor in the action, which is brought solely in the interests, for the benefit, and at the instigation of the said parties, whose personal solicitors are carrying on and conducting the proceedings herein, all of which has occasioned the defendants great loss, damage, and expense.

Except so far as the first of these paragraphs denies the existence of any good reason for filing the cautions in question, both of them are irrelevant and embarrassing and should therefore be struck out. The issues which they seek to raise could not be gone into at the trial, and no evidence could be given to support them.

If a plaintiff is asserting a legal right, his motives for so doing cannot be inquired into.

In Pender v. Lushington, 6 Ch. D. at p. 75, it was said by Jessel, M.R.: "Those who have the rights of property are entitled to exercise them, whatever their motive may be for such exercise, that is, as regards a court of law as distinguished from a court of morality or conscience, if such a court exists . . . I cannot deprive him of his property, although he may not make use of that right of property in a way I might altogether approve of."

In Allen v. Flood, [1898] A. C. at p. 93, Lord Watson said that it was useless to contend that "an act in itself lawful is converted into a legal wrong if it was done from a bad motive;" and at p. 94: "It is alike consistent with reason and common sense that when the act done is, apart from the feelings which prompted it, legal, the civil law ought to take no cognizance of its motive." If further authority is required, it can be found in the similar case of Chaffers v. Goldsmith, [1894] 1 Q. B. 186.

The counterclaim, in my opinion, must also be struck out for two reasons:—

(1) No action is maintainable against the Crown except by petition of right, and for this a fiat must first be had. If any remedy is attempted against any one by the ordinary procedure, it must be in the way pointed out in Muskoka Mill Co. v. The Queen, 28 Gr. 563.

It was sought to support the counterclaim by reference to Rule 238 and the case of Regina v. Grant, 17 P. R. 165. But any such contention has been disposed of by Anglin, J., in Attorney-General v. Toronto Junction Recreation Club, 8 O. L. R. 440, 4 O. W. R. 72. To allow a defendant in this way to avoid the necessity of resorting to a petition of right, would be to violate the firmly established rule that you cannot do that indirectly which you cannot do directly. If any authority is required for this proposition, it will be found in the judgment of Tindal, C.J., delivering the opinions of the Judges to the House of Lords, in Booth v. Bank of England, 7 Cl. & F. at p. 540; and in that of Moss, J.A., in Dryden v. Smith, 17 P. R. 500.

The second ground is that, even if admissible, the counterclaim is premature. It says "that plaintiff is indebted to defendants in the sum of $25,000 damages by reason of the wrongful acts on the part of the plaintiff and of the Department of Crown Lands as hereinbefore complained of and set out." This is based on sec. 89 of the Land Titles Act, R. S. O. 1897 ch. 138: "If any person lodges a caution . . . without reasonable cause, he shall be liable to make, to any person who may sustain damage by the lodging of such caution, such compensation as may be just; and such compensation shall be deemed to be a debt due to the person who has sustained damage from the person who has lodged the caution."

Without stopping to consider whether the Attorney-General or the Department of Crown Lands comes within the definition of the word "person" in sub-sec. 13 of sec. 8 of the Interpretation Act, it seems self-evident that until the present action has been finally disposed of and dismissed, no want of "reasonable cause" can be presumed. The so-called counterclaim is not really a counterclaim at all, in the true sense of the word. It has no separate and independent existence, but can only arise after the plaintiff has failed in his action. It is like the analogous action for malicious prosecution, in which it is a condition precedent to any

recovery by the plaintiff that he must shew a final termination in his favour of the prosecution of which he complains.

The learned Master of Titles tells me that he has never heard of any proceedings being taken under sec. 89, and I have not succeeded in finding any. . . . .

The motion is, in my opinion, entitled to succeed, with costs to plaintiff in any event.

MULOCK, C.J. MARCH 6TH, 1906.

CHAMBERS.

CHAMBERS v. JAFFRAY.

Discovery—Libel — Examination of Defendant — Answers Tending to Criminate—Privilege—Canada Evidence Act —Attachment.

Motion by plaintiff for an attachment against the defendant R. M. Jaffray for refusing on his examination for discovery to answer certain questions. The action was for libel alleged to have been published by defendants in a newspaper called the "Galt Daily Reporter;" and defendants in addition to other defences pleaded justification and fair comment.

J. B. Clarke, K.C., for plaintiff.

R. McKay, for defendant R. M. Jaffray.

MULOCK, C.J.:—On the argument plaintiff's counsel stated that the reason assigned by defendant R. M. Jaffray for his refusal was that the answers might tend to criminate him, and that the question for determination was whether defendant could be compelled to answer such questions.

Defendant's counsel acquiesced in this presentation of the case, resting his whole answer to the motion on the one single contention that in a libel action a defendant cannot be compelled to answer a question that may tend to criminate him.

The actual questions themselves were neither read nor discussed, and no exception was taken to the relevancy of any of them.

Since argument I have read the depositions of defendant upon his examination, from which it appears that he refused to answer a number of questions—some 26 in all—on the one ground only in each case, namely, that the answer might tend to criminate him.

From the manner, therefore, in which the case comes before me, it is not open to me to consider the respective questions themselves, and to determine whether defendant may on any ground whatever be excused from answering all or any of them, but I must assume that all the answers might tend to criminate him, and am restricted to determining whether, notwithstanding that circumstance, the defendant can be compelled to answer.

The principle of the common law of England securing to a witness the privilege of refusing to make answer to a question if it tended to expose him to a criminal charge, was based on the policy of encouraging persons to come forward to give evidence by protecting them as far as possible from injury: Best on Evidence, sec. 126.

The privilege, however, existed only so long as the witness's liability to such injury continued. When that liability ceased, the privilege also ceased: Regina v. Boyes, 1 B. & S. 311; Attorney-General v. Cunard, 4 Times L. R. 177; Regina v. Kinglake, 11 Cox C. C. 499.

With the introduction into Upper Canada, by 32 Geo. III. ch. 1, of the laws of England in regard to property and civil rights, this privilege became part of the law of the province, and, unless abolished by legislation, still continues.

The criminal law being by the B. N. A. Act one of the classes of subjects assigned exclusively to the legislative authority of the Parliament of Canada, it is competent to that Parliament to afford protection to a person against injury in a criminal prosecution because of his making incriminating answers, and this protection Parliament has sought to secure by 61 Vict. ch. 53, an Act to amend the Canada Evidence Act, 1893, and by 1 Edw. VII. ch. 36, an Act further to amend the Canada Evidence Act, 1893. The former of these statutes enact as follows:

"1. Section 5 of the Canada Evidence Act, 1893, is hereby repealed and the following substituted therefor:

"5. No witness shall be excused from answering any question upon the ground that the answer to such question may tend to incriminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown

or of any person; provided, however, that if with respect to any question the witness objects to answer upon the ground that his answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this section the witness would therefore have been excused from answering such question, then, although the witness shall be compelled to answer, yet the answer so given shall not be used or receivable in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in giving such evidence."

The statute 1 Edw. VII. ch. 36, amending the foregoing Act, enacts as follows:—

"1. Section 5 of the Canada Evidence Act, 1893, as that section is enacted by chapter 53 of the statutes of 1898, is hereby amended by adding thereto the following sub-section:—

"2. The proviso to sub-section 1 of this section shall in like manner apply to the answer of a witness to any question which pursuant to an enactment of the legislature of a province such witness is compelled to answer after having objected to do so upon any ground mentioned in the said sub-section, and which, but for that enactment, he would upon such ground have been excused from answering."

Read together, these two Acts, I think, protect a witness from any such liability arising from answers which a witness may be compellable to make in obedience to provincial legislation, and the legislature of Ontario has by 4 Edw. VII. ch. 10, sec. 21, enacted as follows:

"21. Section 5 of the Evidence Act is repealed and the following substituted therefor:—

"5. No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person; provided, however, that if with respect to any question the witness objects to answer upon the ground that his answer may tend to criminate him, and if but for this section the witness would therefore have been excused from answering such question, then, although the witness shall be compelled to answer, yet the answer so given shall not be used or receivable in evidence against him on the trial of any proceeding under any Act of the legislature of Ontario."

The effect of these various statutes is, I consider, to protect a witness who claims the statutory protection from the liability otherwise accruing to him from his incriminating answers, and puts an end to the privilege which such a witness formerly enjoyed.

On the argument numerous cases were cited on behalf of the defendant, but they were all decisions prior to the Ontario Act of 1904.

Mr. McKay argued that the protecting statute 61 Vict. does not apply to a party to a cause, but is limited to a witness not being a party. This same point was raised in Regina v. Fox, 18 P. R. 343, but the Divisional Court held in that action, which was one at the instance of the Crown to recover a penalty for violation of the statute, that the defendant could be examined for discovery.

The motion for the attachment is granted with costs in the cause to the plaintiff of the motion and of the further examination of the defendant R. M. Jaffray. The attachment, however, is not to issue for ten days. If, within that time, the defendant purges his contempt by answering the questions, the order need not issue.

For the reasons set forth in the introductory part of this judgment, it is to be understood that the granting of this order is not to be construed as determining the relevancy of any of the questions objected to, but is confined to the one abstract proposition that a party to an action is not excused from answering a question on his examination for discovery on the ground that the answer may tend to criminate him.

MARCH 8TH, 1906.

DIVISIONAL COURT.

BURROUGHS v. MORIN.

Landlord and Tenant—Injury to Goods of Tenant on Demised Premises—Damages—Reference.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., dismissing action brought by tenant against landlord for damages for disturbance of possession and injury to goods on demised premises.

J. H. Clary, Sudbury, for plaintiff.

C. McCrea, Sudbury, for defendant.

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

BOYD, C.:—There appears to be no dispute on the whole of the evidence that the roof of the building in which plaintiff occupied the store part, was removed by the orders of defendant, and when thus exposed a rain storm came on which came through the floor overhead of plaintiff's store and to some extent wet and damaged his stock of goods. This was done without warning or notice to plaintiff, and the storm during the night wrought the damage which was first discovered on the following day by plaintiff. He made some complaint of it and called in a traveller to look at the damage. Defendant knew that the rain had come in and spoke to plaintiff about it, and according to her account he made light of it. It was agreed at the trial that if any damage was shewn the amount should be ascertained by the Master—if on the main part of the case there was any cause of action.

The learned Chief Justice has found upon the evidence that notice of some improvements contemplated was given to plaintiff, and that he was content to have them made and so cannot complain on that score. But the evidence is, to my mind, very vague as to what was communicated to plaintiff. It seems well proved that she told him she was going to raise the building, but this he attributes to the White House hotel adjoining the premises occupied by plaintiff. Granted that some information was given, it is clear that no notice was given to plaintiff that the roof was going to be taken off and so expose his stock to the likely contingency of a rain storm or other damage from the elements. The raising of the building would not involve the removal of the roof, and he was not warned so as to be able to protect himself. He was rightly in possession of the store part and had no rights in or control over the floor overhead and the roof above that which was taken off. As one rightly in possession with a stock of goods he was entitled to complain and recover damages if by the negligent act of defendant they were exposed to the rain and rendered less saleable. This aspect of the case does not seem to have been presented at the trial, though it is set forth in the 5th paragraph of the statement of claim.

We are not impressed with the serious character of the alleged damage, but, as the evidence was not closed on this head, we must refer the matter to the Master to say how much should be allowed in respect of the goods damaged by the removal of the roof and the rain which thereby came into plaintiff's premises. Upon the report the matter will be disposed of by one of the Judges of this Divisional Court, as to costs and all the other issues the result of which at the trial is not disturbed by this appeal.

Just this one point of damages is open on the reference—all the other matters being found against plaintiff's contention.