THE

ONTARIO WEEKLY REPORTER.

(To and Including April 4th, 1903)

VOL. II. TORONTO, APRIL 9, 1903. No. 13

WINCHESTER, MASTER. MARCH 30TH, 1903.

CHAMBERS.

CANADIAN BANK OF COMMERCE v. TENNANT.

Writ of Summons—Renewal of—Efforts to Ascertain Whereabouts of Defendant—Statute of Limitations—Order for Renewal—Application to Set aside—Discretion.

Motion by defendant to set aside ex parte order for renewal of writ of summons, the renewed writ, and the service thereof on defendant. The action was brought to recover the amounts due upon two promissory notes made by defendant, one for $800, dated 12th June, 1895, payable four months after date, the other for $210, dated 23rd August, 1895, payable four months after date, and interest on both sums. The action was begun by writ of summons issued 11th October, 1901. The writ not having been served, the plaintiffs on 10th October, 1902, obtained ex parte from the local Master at Sarnia the order renewing the writ, upon an affidavit made by a clerk in the office of plaintiffs' solicitors, stating "that inquiries have been made to ascertain the whereabouts of the defendant, but that, so far, such inquiries have been without success; that at the time of making the notes sued on defendant resided in the city of Toronto, but that plaintiffs have been unable to locate the said defendant." The writ was renewed, and the renewed writ was served on the defendant at the city of Toronto on 7th March, 1903. Upon this application defendant filed an affidavit setting forth that he had lived in Toronto continuously since the notes were made and giving his house and office addresses, which appeared in the city directory for 1901 and 1902, and that from 11th October, 1901, to 10th October, 1902, he could have been found in Toronto either at his office or house. In answer plaintiffs filed an affidavit of their manager at Sarnia and a clerk formerly employed by their solicitors. These affidavits shewed that after instructions for suit had been given inquiries were made to locate defendant and that the payees of the notes informed the deponents that defendant had left Toronto and was living in Buffalo, but that, although further inquiries were made, they were unable to ascertain his whereabouts until February, 1903.

J. H. Tennant, for defendant.

D. L. McCarthy, for plaintiffs.

THE MASTER.—While there can be no doubt as to the residence of defendant being in Toronto during the period after the issue of the writ, and that he could have been readily served at any time after its issue, and while the Court regards with jealousy applications for extending the time for service, especially where, but for the existence of the writ, the ordinary period of limitation would have expired, yet, the plaintiffs not having withheld any evidence from the local Master in applying for the ex parte order, and having explained their efforts to ascertain the whereabouts of defendant to his satisfaction, his order should not be set aside. Howland v. Dominion Bank, 15 P. R. 56, and Mair v. Cameron, 18 P. R. 484, distinguished. Defendant having had good reason to make the application, costs to be costs in the cause.

MARCH 30TH, 1903.

DIVISIONAL COURT.

SMALL v. AMERICAN FEDERATION OF MUSICIANS.

Contempt of Court—Motion to Stay Appeal by Defendants in Contempt—Disobedience to Injunction—Unincorporated Association —Body Improperly Served with Process—Costs.

Motion by plaintiff to stay defendants' appeal from order of MEREDITH, J. (ante 99) affirming order of Master in Chambers (ante 26) dismissing a motion by defendants to set aside an order for service of the writ of summons upon them by serving the defendant D. A. Cary substitutionally. The motion to stay the appeal was made on the ground that defendants were in contempt for having disobeyed an injunction granted on 11th January, 1903 (ante 33) restraining defendants from inducing, persuading, or ordering one Cresswell to refuse to continue in plaintiff's employment and to break his contract with plaintiff.

C. A. Moss, for plaintiff.

J. G. O'Donoghue, for defendants.

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

STREET, J.—Since the argument of this motion it has been held by a Divisional Court (Metallic Roofing Co. of Canada v. Local Union No. 3, ante 183) that an association similar to defendants is not a body capable of being sued or

being served as a body under the Rules of Court. . . The object of the appeal sought to be stayed is to obtain a similar determination with regard to the position of the defendants. If they are a body not capable of being sued and not capable of being served, they are not capable of being enjoined or of committing a contempt; and, as the very object of the appeal is to determine whether defendants can be sued and served with process, we cannot determine whether a contempt has been committed without hearing the appeal. Besides, the rule that a party guilty of contempt can take no steps in the action is not a universal one; one exception is, that the party, notwithstanding his contempt, is entitled to take the necessary steps to defend himself. The defendants are ordered to appear within ten days to the writ of summons, on pain of having judgment signed against them; and they have the right to shew, if they can, that the service upon them is not permitted by the practice: Fry v. Ernest, 9 Jur. N. S. 1151; Ferguson v. County of Elgin, 15 P. R. 399. Motion refused; but, as it appears that the president of the body called the American Federation of Musicians, with full knowledge of the injunction, has made the most strenuous efforts to procure Cresswell to break his contract, there should be no costs.

WINCHESTER, MASTER. MARCH 31ST, 1903.

CHAMBERS.

O'FLYNN v. MIDDLETON.

Lis Pendens—Discharge—Claim for Costs—Land in Question in Redemption Suit—Lien—Charging Order.

Motion by defendant for order removing and discharging the registry of a certificate of lis pendens, on the ground that plaintiff was not entitled to register one in this action, which was brought to recover the amount of a bill of costs and to establish a lien on land for such amount. Plaintiff admitted that he could not retain the lis pendens against all the lands described, but contended that as to 25 acres he had a lien and was entitled under Rule 1129 to a charging order for the amount of his costs. The action was defended and defendant had counterclaimed against plaintiff.

C. A. Moss, for defendant.

E. E. A. DuVernet, for plaintiff.

THE MASTER held that the question whether plaintiff is entitled to a lien on the 25 acres was one for the trial Judge after the whole evidence had been adduced. Whether a solicitor has a lien or is entitled to a charging order against the

land in question in a redemption suit for his costs incurred therein, will then be decided. Scholefield v. Lockwood, L. R. 7 Eq. 83, and Bailey v. Birchell, 2 H. & M. 371, referred to. Order made setting aside certificate of lis pendens so far as it affects defendant's land other than the 25 acres. Costs in cause to defendant. The action should go to trial at the first sittings.

MARCH 31ST, 1903.

DIVISIONAL COURT.

BEDDELL v. RYCKMAN.

Discovery—Examination of Party—Affidavit of Documents—Action by Shareholder against Directors of Company for Account of Profits—Purchase of Businesses by Directors and Sale by them to Company—Postponement of Consequential Discovery till Liability Established—Sum Paid by Underwriting Shares—Discount on Shares Subscribed.

Appeal by defendant Cox from order of BRITTON, J., in Chambers (ante 148) affirming order of Master in Chambers (ante 186) requiring appellant to file a further and better affidavit on production, and to attend at his own expense to be further examined for discovery touching the matters in question in this action, and to answer all proper questions that might be asked of him, including those which he refused to answer upon examination on 20th November, 1902, and 7th January, 1903.

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

W. R. Riddell, K.C., and W. A. Lamport, for plaintiff.

The judgment of the Court (MEREDITH, C.J., MACLAREN, J.A.) was delivered by

MEREDITH, C.J.—The case made by plaintiff in his statement of claim is a single cause of action based upon the proposition that the appellant and his associates, as to the transactions detailed in the statement of claim, in the circumstances under which these transactions took place, stood in a fiduciary relation to defendent company, which prevented them from making any profit for themselves out of the purchase of the five businesses which were acquired by the appellant and his associates, and were afterwards transferred to defendant company for $4,740,000, a sum far in excess of the purchase prices paid by them, and the relief claimed is an account and payment by defendants other than the company of the difference between the aggregate of the prices paid by appellant and his associates and what was

paid by the company to them in cash and shares. There are at most but two issues of fact between the parties, viz., as to the existence of the alleged fiduciary relationship, and as to the appellant and his associates having purchased the businesses for less than they received from the company ; and what is not relevant to these issues relates to the state of the account, on the footing that the liability of appellant and his associates is established. It is admitted that they received from the company a sum in cash and stock far in excess of what they paid, and the only matters really in controversy are their liability to account for the profit, and, if liability be established, the amount for which they are answerable. In this view of the case, there is no difficulty in directing that discovery as to details of the expenditures made by the appellant and his associates in acquiring the businesses, or consequential discovery as it is termed, should be postponed until their liability to account has been established ; nor will the plaintiff be prejudiced by such a course being taken; while, if it is not taken, and it turns out that plaintiff fails to establish liability, the appellant will have been compelled to make discovery as to matters in which neither plaintiff nor defendant company has any interest. It is the practice of the Court, as a general rule, to postpone consequential discovery until liability has been established: Great Western Colliery Co. v. Tucker, L. R. 9 Ch. 376 ; Re Leigh's Estate, 6 Ch. D. 256; Benbow v. Low, 16 Ch. D. at p. 98 ; Parker v. Wells, 18 Ch. D. 477 ; Verminck v. Edwards, 29 W. R. 189 ; White v. Ahrens, 26 Ch. D. 717 ; Fennessy v. Clark, 37 Ch. D. 184 ; Hurst v. Barber, 12 P. R. 467; Graham v. Temperance and General Life Assce. Co., 16 P. R. 536 ; Dickerson v. Radcliffe, 17 P. R. 586 ; Sydney Cheese and Butter Factory Assn. v. Brower, 19 P. R. 152 ; Evans v. Jaffray, 3 O. L. R. at p. 341 ; Bray on Discovery, p. 125 ; Leitch v. Abbott, 31 Ch. D. 374; Elmer v. Creasy, L. R. 9 Ch. 69, and Owen v. Morgan, 39 Ch. D. 316, distinguished.

As to the sum of $250,000 said to have been paid to the National Trust Company for underwriting the shares of defendant company, the appellant ought not to be required to make further answer. He admitted that this payment was made, and no object is to be gained by requiring him to repeat that admission. If plaintiff establishes the liability of appellant and his associates to account, and they seek to discharge themselves pro tanto by this payment, it will form an item in the account, as to the particulars of which the appellant should not now be required to answer. If plaintiff seeks to charge appellant and his associates as directors of

the company with the $250,000 as an unauthorized and illegal payment, out of the company's moneys, no such case is made on the pleadings, and the inquiry is irrelevant.

For the last of these reasons, appellant should not be required to make further answer as to the shares subscribed for by him or the discount or allowance said to have been made to him in respect thereof.

The reasons given apply to the affidavit on production as well as to the further examination.

Appeal allowed: orders set aside, and original application dismissed. Costs here and below to appellant in any event.

MEREDITH, J. APRIL 2ND, 1903.

TRIAL.

KRUG FURNITURE CO. v. BERLIN UNION No. 112 AMALGAMATED WOODWORKERS INTERNATIONAL UNION OF AMERICA.

Trade Union—Unlawful Acts of Members—Watching and Besetting—"Boycotting"—Organized Body or Union—Parties—Question as to Incorporation—Pleading—Waiver—Acts of Foreign Member of Union—Agency—Injunction—Damages.

Action by a company carrying on business at Berlin against an association or federation of woodworkers and certain individuals, being officers, members, or agents of the Union, to recover $2,000 damages for wrongfully and maliciously procuring plaintiffs' workmen to break their contracts and cease working for plaintiffs, and $5,000 damages for conspiring against plaintiffs, and for an injunction restraining defendants from watching or besetting the railway station at Berlin or the works of plaintiffs, or the approaches thereto, or the places of abode of the workmen employed by plaintiffs, for the purpose of persuading or otherwise preventing persons who have or may enter into contracts with plaintiffs to commit a breach of such contracts, or persuading or preventing such persons from entering into plaintiffs' employment.

E. E. A. DuVernet and J. A. Scellen, Berlin, for plaintiffs.

J. P. Maybee, K.C., for defendants.

MEREDITH, J.— . . . "Boycotting" is, in some of its forms, very obnoxious to the law. That defendants were guilty of that crime and the wrongs complained of is, upon the evidence, very plain. Indeed it is, to a certain extent, admitted by them in their consent to the interlocutory injunction made against them in the action; for injunctions are not consented to by, and do not go against, persons who

have not done, and do not intend to do, any wrong: see Quinn v. Leathem, [1901] A. C. 495; Reed v. Friendly Society. [1902] 2 K. B. 9; Lyons v. Wilkins, [1899] 1 Ch. 255. Because of some disagreement between plaintiffs and their "finishers," the woodworkers left the plaintiffs' employment and began a sympathetic strike." They had a right to do so, so long as they broke no contract; and no complaint is made in that respect; what is complained of is the subsequent conduct of defendants. Their main purpose in striking was to compel plaintiffs to accede to the demand of the finishers. Their plan to force plaintiffs to submit was to prevent other workmen taking the places of the strikers, and to constrain such of plaintiffs' workmen as had not left, to leave their employment, and to prevent the sale of the goods made by them, so that plaintiffs would be put in the position that they must submit or close their factory. So long as the workmen resorted to lawful means only to accomplish a lawful object, they were within their right; but any unlawful object, or unlawful means to obtain a lawful object, should meet with prompt prevention and punishment. One of the first acts of the workmen who struck and of other members of the organized body to which they belonged, was to organize watchers to beset and watch every day all trains with a view to intercepting any one who might have the appearance of a workman employed or seeking employment by plaintiffs, and to beset and watch plaintiffs' factory and premises for the purpose of preventing new workmen from entering plaintiffs' employment and of constraining their workmen to leave such employment. The conduct of those who beset and watched the factory was often of an offensive and highly reprehensible character. In regard to boycotting, that mainly relied upon and proved was the intimidation of persons who bought and sold the product of plaintiffs' factory. The result has, in one case at least, been an intimidation of the dealer to such an extent that he is afraid to disclose the facts except secretly. The defendants must be held to really intend that which is the plain effect of their actions, the injury of the plaintiffs by intimidation. Quinn v. Leatham, [1901] A. C. at p. 38, and Shilton v. Ellersby, 6 E. & B. 74, referred to.

It is too late for the defendant union, the organized body, to contend that they are not incorporated, and therefore that the action should be dismissed as against them. They have, without objection, appeared, pleaded, and consented to the interloctuory order against them, by the name under which they are sued. The Rules of the Court

require that the defence of nul tiel corporation shall be expressly pleaded: 280,281. Duke of Bedford v. Ellis, [1901] A. C. 1, and Taff Vale R. W. Co. v. Amalgamated Society of Railway Servants, ib. 426, referred to.

As to the individual defendants (other than Mulcahy) they took an active part in the wrongs mentioned, and so are individually answerable for the injury done. All that was done was the result of organized combined action on the parts of the members of the union, under the leadership and encouragement of these individual defendants. Defendant Mulcahy was the chief presiding officer of the whole organized body, and came to this country for the purpose of aiding, encouraging, and directing the operations of the striking workmen and their associates. He is chiefly answerable for the concerted acts of the strikers during the time he was with them. It is no answer to plaintiffs' complaint to say that he was a stranger here, and unacquainted with the laws of the land. Before undertaking or encouraging any act aimed at the injury of another, and especially any act likely to cause a breach of the peace, he ought first to have ascertained whether it was lawful or unlawful. This defendant was a party to the unlawful and wrongful acts committed by his co-defendants, and is answerable with them for the consequences. Plaintiffs are entitled to a perpetual injunction restraining defendants from unlawfully besetting or watching plaintiffs' factory and from all wrongful obstruction of or interference with plaintiffs in their trade and business, and to damages, against all the defendants, assessed at $100, with costs.

FALCONBRIDGE, C.J. APRIL 3RD, 1903.

TRIAL.

DAINARD v. MACNEE.

Solicitor—Lien on Title Deeds—Relationship of Solicitor and Client—Proceedings for Partition—Conveyancing Charges—Amount of Lien for—Assault—Costs.

Action to recover damages for detention of title deeds to certain land in the village of Milford, in the county of Prince Edward, and also for an assault alleged to have been committed by defendant upon plaintiff when he attended at defendant's office to get the deeds. Defendant alleged that he was retained as solicitor by Beatrice Hineman, one of the heirs-at-law of Samuel Jenkins, deceased, the father of plaintiff, to commence and carry on an action for the partition or sale of the land, and alleged his willingness to give up the

deeds on payment of his proper charges and disbursements in respect of those and other proceedings.

E. M. Young, Picton, and M. R. Allison, Picton, for plaintiff.

C. H Widdifield, Picton, for defendant.

FALCONBRIDGE, C.J.—At the trial I found as a fact that plaintiff had agreed to pay the costs of the proceedings for partition or sale; but these proceedings were not instituted by plaintiff; the retainer and instructions for them came from Mrs. Hineman, one of the other heirs-at-law. Therefore, defendant had no lien in respect of these charges, because the relationship of solicitor and client between defendant and plaintiff did not exist at the time when the debt was incurred: Poley's Law of Solicitors, p. 328, and cases there cited.

Defendant would not, in any event, have been entitled to commission under Rule 1146 (as the proceedings did not go on to actual partition), but only to a reasonable amount for the preparation of the notice of motion, about $7 or $8.

As to the fees, charges, and disbursements in connection with the conveyance to the corporation of the township of South Marysburgh, defendant rendered services to plaintiff in respect of which he has a lien. The amount of purchase money to be paid was $50, and a bill for $27.22 is somewhat startling.

The alleged assault amounted to nothing.

Action dismissed. Defendant asserted a lien in respect of one matter as to which he had no lien; and he insisted upon an extravagant amount being paid to him before he would deliver up the papers, viz., $75, although he afterwards offered to accept $50. Therefore, no costs. Plaintiff should have proceeded by summary application in the High Court, or else in a Division Court.

WINCHESTER, MASTER. APRIL 4TH, 1903.

CHAMBERS.

MORANG v. HOPKINS.

Particulars—Replevin for Books and Papers—Master and Servant—Facts within Knowledge of Both Parties.

Motion by defendant for particulars of statement of claim. Action for the return of certain books, papers, and

documents connected with the complication and publication of "Morang's Annual Register," and for an injunction restraining defendant from using the same in connection with any rival enterprise or otherwise to the detriment of plaintiff. The application was made before delivery of defence, and each party was allowed to examine the other for discovery, and had done so.

A. J. Russell Snow, for defendant.

J. H. Moss, for plaintiff.

THE MASTER.—It is evident from the examinations that defendant can plead without particulars, the whole question being whether plaintiff is entitled to the books, papers, and documents received by plaintiff or defendant, and whether addressed to the one or the other, during the period of defendant's employment by plaintiff. The defendant asserts a right to retain those that were sent to him direct and which he arranged for on his own account. Plaintiff claims these as well as those sent to plaintiff himself. Defendant knows what he has received better than plaintiff. The particulars of the agreement of service are equally within the knowledge of plaintiff and defendant. Motion refused. Defendant to deliver his defence forthwith. Costs to plaintiff in the cause.

WINCHESTER, MASTER. APRIL 4TH, 1903.

CHAMBERS.

CHANDLER AND MASSEY (LIMITED) v. GRAND TRUNK R. W. CO.

Parties—Joiner of—Two Defendants—Different Causes of Actions—Sale of Goods—Claim against Vendee for Price—Claim against Carrier for Loss in Transit.

Motion by defendant company for an order requiring plaintiffs to elect to proceed against one defendant or the other alone. The plaintiffs alleged that they sold to the defendant William Kerr a static machine and outfit of the value of $430, and a water meter of the value of $27, and shipped them to him at Dunnville by the railway of the defendant company; that the machines arrived at Dunnville and were destroyed by fire in the freight sheds of defendant company. Plaintiffs claimed the value of the goods from defendant company as common carriers, or, in the alterna-

tive, if there had been a constructive delivery to defendant Kerr, they claimed the price of the goods from him.

D. L. McCarthy, for defendant company.

C. A. Moss, for defendant Kerr.

W. A. Sadler, for plaintiff.

THE MASTER held that, as plaintiffs claimed as owners of the machines as against defendant company, and against defendant Kerr on the theory that he was the owner, the case was not within the scope of Rule 186. Rivers v. Clark, L. R. 5 Eq. at p. 97, applied and followed. Quigly v. Waterloo Mfg. Co., 1 O. L. R. 606, Evans v. Jaffray, ib. 614, and cases therein referred to, considered. Order made staying proceedings until plaintiffs elect as against which defendant they will proceed. If they abandon the action against defendant company, the action will be dismissed with costs, including the costs of this application. But, if they abandon against defendant Kerr, the action as against him will be dismissed, and the costs of this application will be to defendant company in any event.

STREET, J. APRIL 4TH, 1903.

TRIAL.

SMART v. DANA.

Bond—Payment out of Fees of Office—Amount Stated in Patent—Sheriff—"Revenues"—Disbursements—Allowances Received as Assignee for Creditors and as Returning Officer—Penalty—Judgment—Breach—Damages—Assessment—Future Damages.

Action by the former sheriff of the united counties of Leeds and Grenville against George A. Dana, the present sheriff of these counties, and W. H. Comstock and James Cumming, upon a bond given by Dana as principal and the other two defendants as sureties, for $10,000. By letters patent under the great seal of the Province dated 1st November, 1898, Dana was appointed sheriff "in the room and stead of James Smart, Esquire, resigned," "subject to the condition that you, the said George Augustus Dana, shall during your occupancy of the said office . . . pay to the said James Smart out of the revenues of the said office, so long as the said James Smart shall live, at the rate of $1,200 per annum . . . the said James Smart having held the said office for many years, and, owing to the infir-

mities of old age, coupled with disabilities from an accident, being no longer able to personally discharge the duties of the same." The bond was dated 28th January, 1899, and was for the due performance of the terms of the condition. Payments were made by Dana to plaintiff in the years 1898-1902; and on 18th March, 1902, Dana resigned his position as sheriff for the purpose of avoiding any further liability under the bond and under the condition. He was re-appointed by letters patent dated 24th April, 1902, in which no conditions were imposed. The present action was brought on 11th April, 1902.

C. H. Ritchie, K.C., for plaintiff.

A. B. Aylesworth, K.C., and M. M. Brown, Brockville, for defendants.

STREET, J., held that the bond was good, coming within the exception created by sec. 11 of 49 Geo. III. ch. 126, as to annual payments out of the fees of an office to a former holder of the office, where the amount so payable is stated in the patent. The word "revenues" used in the patent must be construed to mean the income of the office after deducting the necessary disbursements connected with it; such disbursements must be made from the receipts in any event, and if the balance remaining is less than the amount of plaintiff's annuity, the whole annuity cannot be paid out of it; therefore all he can claim is the balance, for his annuity is payable out of the fund. The exception in the statute should be strictly construed. The payment to be made is to be set aside annually, and to give proper effect to the restrictions with which the exception is fenced, it should be held that the annual sum is intended to be reserved, and paid out of the revenues of the year in which it becomes payable, and not out of those of any other year in whole or in part. The word "revenues" must be treated as the equivalent of "fees, perquisites, or profits" in sec. 11; and, as a sheriff is bound by sec. 14, sub-sec. (4), of R. S. O. ch. 147, to act as assignee for creditors if required to do so, the allowances made to him as assignee are "perquisites or profits" of his office, and therefore part of the revenue of it within the meaning of the patent and bond. So with payments made to him for services as returning officer. Plaintiff is entitled to judgment for the penalty of the bond. Damages to the issue of the writ assessed at $131.33 and interest, and execution to issue therefor. Execution stayed on the $10,000 until further damages shall be assessed for breaches, if any, occurring after the issue of the writ in the present action. As

defendant Dana only resigned his office on 18th March, 1902, and is willing to account under the terms of the bond to that date, the amount at present recoverable is not affected by any consideration as to the effect of the resignation upon future instalments. Plaintiff to have costs of the action on the High Court scale.

APRIL 4TH, 1903.

DIVISIONAL COURT.

RE JOHNSON, CHAMBERS v. JOHNSON.

Will—Construction—Bequest to One for Use of a Church—Trust—Mixed Fund—Perpetuity—Abatement of Legacies—Mortmain Acts.

Appeal by Jennie Ball and Elizabeth M. Rice, two of the legatees under the will of James Johnson, deceased, from an order of BOYD, C., in Chambers (1 O. W. R. 806), on a motion by the executor of the deceased under Rule 938 for an order construing the will.

J. G. O'Donoghue, for appellants.

D. W. Saunders, for the trustees of the church.

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

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

STREET, J.—Testator died 12th April, 1895, and by his will, amongst other things, directed his executors to sell his real and personal estate, and out of the proceeds, amongst other things, to pay the Reverend Nevin Woodside $2,000 for the use of the Reformed Presbyterian Church, such sums to be expended by him in the manner best calculated by him to advance the principles of that church; and he bequeathed $500 each to the appellants. It was admitted that the legacies in question were, in the result, payable almost entirely out of the proceeds of land directed to be sold by the will in question, and that, the fund being insufficient to pay all the legacies, there must be an abatement. . . . The bequest for the use of the church is a good charitable bequest for the advancement of religion: Baker v. Sutton, 1 Keene 232; Townsend v. Carns, 3 Hare 257; Thornton v. Howe, 31 Beav. at pp. 19, 20. Stewart v. Greene, Ir. R. 5 Eq. 470, distinguished. Being a good charitable bequest, it is not subject

to the law against perpetuities: Re Clark, [1901] 2 Ch. 110. The testator died after 14th April, 1892, and so the case is governed by sec. 8 of R. S. O. ch. 112, which exempts money arising from land from the operation of the Mortmain Act. Appeal dismissed with costs, payable out of the legacies of appellants, and any balance to be paid by themselves.

APRIL 4TH, 1903.

DIVISIONAL COURT.

REX v. LEWIS.

Criminal Law—Justice of the Peace—Summary Conviction under Master and Servant Act—Information—Nature of Offence—Reference to Act—Amendment of Information without Re-swearing—Absence of Objection—Form of Conviction—Omission of Date and Place of Offence—Amendment—Heading of Conviction—Costs.

Motion by defendant to make absolute a rule nisi quashing conviction of defendant under the Master and Servant Act. The prosecutor, one Stoddart, hired defendant in Toronto to go to Bradford to work for him, and, as defendant said he had no money to pay his railway fare to Bradford, he bought a ticket for defendant at his request and handed the ticket to the conductor for defendant. After defendant's arrival he worked for Stoddart for a few hours, not sufficient to repay Stoddart for his outlay, and then refused to do any more work, and left. Stoddart went to one Broughton, a justice of the peace, and swore to an information that "William Lewis did on the 28th July accept the sum of $1.30 to pay his fare to Bradford, on the condition that said amount was to be worked out, and that the said William Lewis refused to work after reaching this place, with the exception of four hours and thirty minutes." The magistrate thereupon issued a warrant to arrest defendant. In the warrant the facts stated in the information were substantially set out, but with the addition, at the end, of the words "consequently obtaining money under false pretences." Lewis was arrested and brought before the magistrate on Saturday, 2nd August, 1902, at 8.30 p.m. The magistrate, in the presence of the prosecutor, amended the information by adding at the end the words "as per section 14 (5a), Master and Servant Act, Ontario statutes 1901;" but the information as amended was not resworn. The amended information was then read over to the prisoner, and he was informed that he was to be tried under it as amended. He

made no application for adjournment, nor objection to the trial proceeding. The prosecutor gave evidence, and the prisoner was sworn and gave evidence on his own behalf, and the magistrate then adjudged that he should be fined $5 and $4.88 for costs, and that if the amounts should not be paid forthwith, he should be committed to the common gaol at Barrie for ten days; and a note of this conviction was made by the magistrate at the foot of the proceedings, and a formal conviction was drawn up afterwards. Lewis, after remaining in custody for about an hour, gave security for payment of the amount, and was released. The formal conviction stated that Lewis "having entered into an agreement with one Fred. Stoddart to perform work and services for the said Stoddart at the village of Bradford, under which he . . . received from the said Stoddart as an advance of wages the sum of $1.30 on a railway ticket for his transportation from Toronto to Bradford, did without the consent of said Stoddart leave his employ before the cost of such transportation had been repaid, contrary to the provisions of the Act respecting Master and Servant, R. S. O. 1897 ch. 157, as amended by 1 Edw. VII. ch. 12, sec. 14." Lewis was adjudged to pay $5 and $4.88 for costs, and, if these sums were not forthwith paid, to be imprisoned for ten days unless the several sums were sooner paid.

S. B. Woods, for defendant.

J. Bicknell, K.C., and A. E. Scanlon, Bradford, for the magistrate and prosecutor.

The Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) held that the nature of the offence intended to be charged against defendant was sufficiently clear in the original information, and any doubt was removed by the addition of the reference to the Act. The amended information was not resworn, but having been read over to defendant, and the trial having proceeded without any protest or objection on his part, and he having been sworn as a witness on his own behalf, the magistrate, having defendant before him, even though he may have been brought there improperly, might proceed to try him upon an amended information, not resworn, although the Act under which he was tried requires information on oath, provided defendant does not protest: Turner v. Postmaster-General, 5 B. & S. 756; Regina v. Hughes, 4 Q. B. D. 614; Dixon v. Wells, 25 Q. B. D. 249; sec. 896, Criminal Code.

The Court, being satisfied from a perusal of the depositions that an offence of the nature described in the conviction

had been committed by defendant, and that the magistrate had jurisdiction over it, should not hold the conviction invalid by reason of the fact of the date and place of the offence not being stated in it, for these clearly appeared from the depositions, and the Court had power under secs. 883 and 889 of the Code to amend the conviction by stating the offence to have been committed at Bradford on 29th July, 1902. On the evidence, it could not be held that defendant was not allowed to make his defence. The objection that the conviction was headed "conviction for a penalty to be levied by distress" was of no weight, for the body of the conviction was correctly drawn under the statute, and the heading is not a part of the conviction. The costs of conveying defendant to gaol were not included; but the conviction might, if necessary, be amended in that respect; as a matter of fact, there were no such costs. There is special power in the section under which defendant was convicted to award imprisonment in default of payment, and by R. S. O. ch. 90, sec. 4, this power covers costs as well as fine. Rule nisi discharged with costs.