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SEPTEMBER 22ND, 1903.

DIVISIONAL COURT.

TODD v. TOWN OF MEAFORD.

Railway—Municipal Corporation—Expropriation of Land—Agreement with Land Owner—"Without Prejudice"—Possession—Compensation — Damages — Action—Arbitration—Costs.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J., ante 12, in so far as it was in favour of defendants in an action against the town corporation and the Grand Trunk Railway Company for compensation for lands taken and for injury to lands.

It was proved that the provisions of sec. 121 of the Railway Act, 1888, empowering the construction of branch lines by existing railway companies had been complied with by the deposit of plan, profile, and book of reference of the lands intended to be taken, in the registry office of the county, and that the same had been approved by the Railway Committee. After this, and pursuant to the provisions of the special Act 63 Vict. ch. 77 (O.), the defendants negotiated with the plaintiff for the acquisition of the land he owned, which was depicted on the plan, with the result that an agreement was entered into on the 3rd October, 1900, between the plaintiff and the railway company, by which he agreed to sell and convey to the company the piece of land required for the work, for $500. Those acting for the town corporation were not willing to give more than $200, and it was then stipulated in the agreement that "in the meantime (i.e., till this term of the agreement as to price was settled) the plaintiff consented to the company proceeding with their works on the land "without prejudice to the said Todd." The railway company forthwith entered upon the land and prosecuted

their operations, but no agreement was reached as to the price. This action was then brought.

G. H. Watson, K.C., for plaintiff.

R. C. Clute, K.C., for defendant town corporation.

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

THE COURT (BOYD, C., FERGUSON, J.), held that the plaintiff's consent to the railway company proceeding with work on the land (though "without prejudice") precluded him from suing as in trespass. The taking possession became a rightful act, and it was not to prejudice plaintiff in getting proper compensation. But the method of ascertaining compensation was to be restricted to the statutory proceedings, which preclude a right of action in the ordinary manner. Knapp v. London, Chatham, and Dover R. W. Co., 2 H. & C. 212, Jones v. Stanstead, etc., R. R. Co., L. R. 4 P. C. at p. 115, and Parkdale v. West, 12 App. Cas. 602, referred to.

On the merits, sufficient compensation was not awarded by the judgment in appeal, as nothing was allowed for the severance of the land, and the price was not so liberal as is usual in compulsory acquisition of land, but it was not open to award more in this action as against the railway company. The judgment deals with the money paid into Court by the town corporation and declares this to be sufficient compensation. The judgment should direct that amount of money to be paid on account of the plaintiff's claim, without prejudice to his prosecuting proceedings for further recovery from the company, if so advised, and with this qualification the appeal should be dismissed without costs. There appeared to be no cause of action against the town.

SEPTEMBER 22ND, 1903.

C.A.

LAISHLEY v. GOOLD BICYCLE CO.

Master and Servant—Dismissal of Servant—Damages—Loss of Anticipated Commissions on Sales of Goods—Subsequent Employment during Period Originally Contracted for.

Appeal by plaintiff from judgment of FERGUSON, J. (1 O. W. R. 566, 4 O. L. R. 350) dismissing action for breach of contract and wrongful dismissal of plaintiff from the employment of defendants as an agent for the sale of bicycles.

G. H. Watson, K.C., and R. D. Moorhead, for appellant.
W. Nesbitt, K.C., and H. S. Osler, K.C., for defendants.

The judgment of the Court (Moss, C.J.O., Osler, Maclennan, Garrow, and Maclaren, JJ.A.), was delivered by

Garrow, J.A.—The action was brought upon a contract in writing, dated 23rd December, 1897, made between plaintiff and defendants, the material provisions of which are as follows: the defendants thereby employed the plaintiff as manager of the defendants' business (which was that of manufacturing and selling bicycles), and particularly of the sales and collections department of the defendants' business, to be carried on in a certain limited and specified territory within the Provinces of Manitoba, Ontario, Quebec, Nova Scotia, and New Brunswick, with the option to the defendants at the end of the first year to extend the territory over which the plaintiff was to act, so as to include the whole Dominion —an option afterwards duly exercised.

The term of employment was to be for three years from 1st January, 1898; the defendants agreed not to sell or assign any bicycles to any person except the plaintiff, to be brought into the said territory for sale; the plaintiff agreed to organize the defendants' business throughout the whole of the said territory, and in so doing and in carrying on the same, after organization, was to adopt and maintain the system employed by the Singer Manufacturing Co., with such modifications thereof from time to time as might be in the interests of the defendants; the plaintiff was to select and appoint the necessary agents, etc., throughout the said territory, and arrange salaries, with power to dismiss and reappoint such agents, etc.; he was to travel throughout said territory from time to time and exercise personal supervision over the whole territory and the persons in the employment of the defendants, and to devote his whole time and attention to the business of the defendants, except two weeks in each year for a holiday. The plaintiff's headquarters were to be at the city of Toronto, subject to removal at the end of the first year, at the option of defendants, to the city of Brantford, where defendants' factory was situated. The business at Toronto and elsewhere throughout the said territory was to be transacted in the name of the defendants; remittances from customers were to be made to the defendants in their name to the office at Toronto under the plaintiff's management until the removal to Brantford, and out of the moneys received the plaintiff was to pay expenses, and he was to remit the balance to the defendants by depositing such balance in

a chartered bank at Toronto to the defendants' credit. Plaintiff's remuneration was to be, first, a salary of $20 per week; second, a commission of 5 per cent. on the net cash remittances from time to time made by the plaintiff to the defendants as thereinbefore provided; and, third, a premium of 50 cents on each bicycle sold or leased within the said territory during the said term; and all his travelling expenses were to be paid by defendants. But in case of the defendants exercising the option to extend the territory (as they did) the plaintiff's remuneration was to be 3 per cent. instead of 5 per cent. upon net remittances, and no premium on the sale or lease. The plaintiff's remuneration was to be paid weekly, and might be deducted by him out of the defendants' money in his hands. The defendants agreed to supply to the Goold Bicycle Co., Limited, Toronto (i.e., the Toronto office under plaintiff's management) bicycles and parts thereof, sufficient from time to time to fill the orders obtained by the plaintiff and the other employees of the defendants, within the said territory, unless the defendants were prevented from so doing by strikes or accidents or other causes entirely beyond the defendants' control. The contract contained no provision for the determination by either party of the employment during the said term of three years.

The plaintiff entered upon the employment and remained therein until the 17th November, 1899, when he was dismissed by the defendants. The only reason assigned for the dismissal was that the defendants had sold their business, and for this reason did not require the plaintiff's services any longer. The sale by defendants of their business was made in the form of an amalgamation or combination with four other similar companies, the new company taking over the factories and other assets of the defendants, except the outstanding book debts, etc., and in the new company so formed the plaintiff was, upon his dismissal by the defendants, at once employed at a fixed salary of $3,000 per annum.

Ferguson, J., found all the facts, properly I think, in favour of the plaintiff. He held that the plaintiff was entitled to the $20 per week for the full period of three years, and to the commission of 3 per cent. upon the amounts in respect of sales made in the year 1899, but he disallowed the plaintiff's claim for damages in respect of the amounts payable as commission which he would presumably have received from the sales after his dismissal down to the end of the term. . . .

I am, with deference, unable to agree with the conclusions of the learned Judge disallowing all damages in respect

of the commission on prospective sales during the balance of the term.

By the terms of the contract the plaintiff was bound to serve for three years. He had served for almost two-thirds of the period, and his earnings in commission during the actual service are proved, and amount to a large sum, so large indeed as to clearly shew that from that source, and not from his fixed salary of $20 per week, he was to derive the chief consideration on his part for entering into the contract. This is also indirectly shewn by the fact that immediately after his dismissal he was employed by the new company at the large fixed salary of $3,000. It would be at least an illogical result to hold the defendants liable for the $20 per week, and to relieve them from a much larger sum in commissions, a result to be struggled against, in my opinion, as not merely illogical but wholly unjust to the plaintiff.

The breach is clear, and admitted, and the only reason, apparently, for not permitting the ordinary consequences of adequate damages being awarded to the plaintiff, is because such damages are, it is said, too vague and conjectural, which is the question to be determined on this appeal.

Damages very seldom are capable of exact calculation, and yet I think many cases can be found in which damages have been awarded where the basis for a calculation was less certain than in this case. To begin with, there is the undisputed fact of the plaintiff's past earnings from commissions in 1898 and 1899; certainly some evidence of what he would probably have earned in 1900, and, indeed, in my opinion, strong evidence, unless affected by counter-evidence on the part of the defendants to shew that these past earnings were abnormal, or that the business had depreciated or come to an end. But we have here not merely the past earnings, but the fact that the bicycle business was continued under the new company after plaintiff's dismissal during the year 1900, but with, it is said, a diminished market. The manager for the new company puts this depreciation at about 40 per cent. of the previous year's demand; and another witness called by the defendants, at about 50 per cent. Giving credit to these witnesses, it appears to me that there is proper and even sufficient material for a reasonably correct calculation of the amount of the damages in question to which the plaintiff is entitled, having regard, of course, to what the situation and outlook were at the time of the breach in November, 1899, and which damages I would fix, after making all just deductions, at $1,000, for which he should, in my opinion, have judgment.

There are in the American cases relied on by the learned Judge at the trial, all of which I have carefully perused, doubtless expressions of opinion which in themselves, and as applied to the facts in this case, would uphold his conclusion as correct.

On the other hand, I find authoritative decisions in the English reports which, it appears to me, in their facts are practically identical with the facts in the present case, in which plaintiff's legal right to recover is established.

Reference to Rhodes v. Forwood, 1 App. Cas. 256; Turner v. Goldsmith, [1891] 1 Q. B. 544; Ogdens v. Nelson, [1903] 2 Q. B. 57.

But the State decisions relied on do not, I think, represent a general rule of decision recognized even in the United States.

For instance, in a work often referred to and cited, the American and English Encyclopædia of Law, 2nd ed., vol. 20, p. 39, I find this summary of the law under the head of "Master and Servant," "Where damages consist of profits lost," "Where the contract has been wrongfully terminated by the master, and the resultant damages, if any, consist in profits lost, such profits are the proper measure of damages, and are recoverable if the evidence furnishes reasonable data upon which to base them; if, however, the employee has never performed any service under the contract, and there is no proof upon which such profits can be estimated, they are deemed too remote and speculative to constitute the basis of a recovery"—which seems to me to be a fairly accurate working definition, although much must always depend upon the nature of the contract, and the facts appearing in each particular case.

Upon the whole I am of the opinion that the plaintiff's appeal should be allowed with costs, and that he is entitled to judgment against the defendants for $1,000 and the costs of the action.

CARTWRIGHT, MASTER. SEPTEMBER 23RD, 1903.

CHAMBERS.

BROWN v. HAZELL.

Venue—Laying in Wrong County—Rule 529 (b)—Opposition to Change—Fair Trial—Prejudice—Jury—Costs of Motion.

It was admitted that the cause of action, if any, arose in the county of Wentworth, where also the parties resided.

The plaintiff having named Toronto as the place of trial, the defendants moved under Rule 529 (b) to change it to Hamilton.

G. C. Thomson, Hamilton, for the defendants.

M. Malone, Hamilton, for the plaintiff.

THE MASTER.—It was argued that sufficient grounds were shewn in the plaintiff's affidavit to authorize the dismissal of the motion. Plaintiff has also offered to bear any extra expense occasioned by a trial at Toronto. He alleges that the business of the defendants is so large that "the number of farmers in the county of Wentworth with whom the defendants do not trade or do business is small, while their customers both in the city of Hamilton and in the county of Wentworth are very many;" that consequently the defendants are "personally known to the great bulk of the farmers of the county of Wentworth, as well as to a large portion of the inhabitants of Hamilton." For those reasons he alleges that "it would be almost an impossibility to get an impartial jury to try this action at the city of Hamilton."

A similar question came before me in the Town of Oakville v. Andrew, 2 O. W. R. 608, and I refer to what was said there on p. 609.

The present case is very much stronger for the defendants. The population of Wentworth is at least four times that of Halton. It cannot be presumed that out of 80,000 persons, of whom many hundreds must be on the jury panels, twelve cannot be found to give an impartial verdict. . . .

The venue must be changed from Toronto to Hamilton. The costs of this motion must also be to the defendants in any event, because naming Toronto as the place of trial was a violation of Rule 529 (b). I would repeat what I said long ago in Murphy v. Township of Oxford (affirmed on appeal by the Chancellor on 25th January, 1897, not reported), that in cases coming under Rule 529 (b) the duty of the plaintiff's solicitor is to conform thereto. For, in the first place, the action may eventually be settled before trial, and, even if not settled, the plaintiff has no right to impose on the defendant the burden of moving to restore the venue to what is prima facie the right county town.

If the plaintiff thinks he can make out a case, he should proceed under Rule 529 (d), and assume the onus himself, instead of trying to throw it on the defendant.

CARTWRIGHT, MASTER. SEPTEMBER 23RD, 1903.

CHAMBERS.

BECKER v. DEDRICK.

Particulars—Statement of Claim—Information for Purpose of Pleading—Sufficiency of Particulars already Delivered—Trial—Examination for Discovery.

This action was brought to set aside a judgment on which a writ of fi. fa. was issued in 1891, and to set aside a sale made thereunder of a steam barge belonging to plaintiff, and also to set aside an alias fi. fa. issued under the same judgment on the 22nd February, 1902.

The defendants moved for an order for particulars, but, after service of the notice of motion, the plaintiff delivered particulars pursuant to a previous demand. Defendants, not being satisfied with the particulars delivered, pressed the motion.

H. L. Drayton, for defendants.

L. F. Heyd, K.C., for plaintiff.

THE MASTER referred to Spedding v. Fitzpatrick, 38 Ch. D. 410, and Odgers on Pleading, 5th ed., pp. 173, 178; and continued:—

Conceding that the particulars in the present case are not very artistically framed, can it be said that the applicant cannot tell what is going to be alleged. and if possible proved, against him? The main foundation for the action is the definite allegation in paragraph 4 of the statement of claim that plaintiff was never served with a writ of summons. If this can be proved, the judgment is irregular, and all proceedings founded thereon would be certainly voidable, apart from the question of lapse of time.

Then as to dates of sale of the barge, as well as of all the other proceedings, these are or should be matters of record in the Court itself, and can easily be ascertained by the defendants. . . .

I confess that I do not see how I can say that I am satisfied that the defendants cannot tell what is going to be proved against them.

In view of the decision of Meredith, C.J., in Uda v. Algoma Central R. W. Co., 1 O. W. R. 246, I think the motion should be dismissed. On examination for discovery defendants will be able to obtain all the information they require for the trial. At present they have enough to enable them to plead, and that is all particulars are for: Smith v. Boyd, 17 P. R. at p. 467. . . .

I therefore think that the motion should be dismissed with costs in the cause to plaintiff. If, after discovery made, defendants still think there is ground for renewing their demand, they may do so. . . .

CARTWRIGHT, MASTER. SEPTEMBER 25TH, 1903.

CHAMBERS.

MOFFATT v. LEONARD.

Security for Costs—Residence of Plaintiff out of Ontario—Assets in Jurisdiction—Costs of Motion.

Motion by the defendant for security for costs, on the ground that plaintiff resides out of Ontario (Rule 1198 (*a*)).

C. A. Moss, for the motion.

A. W. Ballantyne, for plaintiff.

THE MASTER.—There was sufficient proof of assets within the jurisdiction to defeat the motion, but I reserved judgment on the question of the costs to see if defendant rightly brought the motion or not.

This depends on whether plaintiff is a resident out of Ontario. . . . The plaintiff is manager of a joint stock company, carrying on business in Ontario and having its head office at Woodstock. The plaintiff's wife and family reside in Woodstock. He is agent of the company at Detroit, but visits his family, as it is set out in defendant's affidavit, "once a fortnight and sometimes once a month, which visits generally extend over a Sunday only, and not as a rule for a longer time than a day and a half." The plaintiff does not qualify this any further than by saying he has resided in Woodstock for past 18 years and still considers it his fixed place of abode. Neither party was cross-examined.

Applying the decision in Nesbit v. Galna, 3 O. L. R. 429, 1 O. W. R. 218 to this case, I think the plaintiff is a resident in Ontario. . . . The converse is to be found in the present case. It is my opinion that the plaintiff's ordinary place of residence is at his wife's home in Woodstock, and that his residence in Detroit is merely temporary.

To hold otherwise would render many citizens of Ontario non-residents in such a sense as would require them to give security for costs in any case in which they were plaintiffs (or possibly defendants counterclaiming).

The motion is dismissed—costs in the cause.

FALCONBRIDGE, C.J. SEPTEMBER 25TH, 1903.

BUCKINDALE v. ROACH.

Security for Costs—Costs of Former Action Unpaid—Instructions Given by Same Plaintiff—Action Brought in Name of Wrong Person—Form of Order.

On settling the order pronounced by the Master in Chambers, ante 775, it was confined to an order for security for costs with a stay of proceedings, plaintiff not being allowed the option of paying the costs of the former action.

Plaintiff appealed from the order.

S. B. Woods, for the appellant.

J. W. McCullough, for the defendant.

FALCONBRIDGE, J., affirmed the order of the Master as originally pronounced, varying the order as drawn up and issued by giving the plaintiff the option of paying the costs of the former action. Costs in the cause.

MACMAHON, J. SEPTEMBER 25TH, 1903.

TRIAL.

DORAN v. McLEAN.

Way—Claim to Right of Way—Evidence—Dedication—Way of Necessity—Trespass—Injunction—Damages.

Action for trespass to land. Defendant claimed a right of way through the land in question, which was vested in fee in Martin Casselman at the time of his death in 1881. During his lifetime those engaged in lumbering operations in the vicinity passed through there occasionally during the winter months, and some of them passed through without molestation from him, but a barrier was placed by him along this piece of land which prevented the use of it as a highway by anyone, unless the barrier placed there by Casselman was removed.

C. G. O'Brian, L'Orignal, and W. S. Hall, L'Orignal, for plaintiff.

J. Leitch, K.C., for defendant.

MACMAHON, J., held on the evidence that Casselman never intended to dedicate that land to the public as a highway.

Not only so, but he compelled those who attempted to use it to pay for its use, even in the winter, shewing that he was not providing a highway for the public. Casselman's sons, who were the devisees under his will, after his death partitioned the estate among them. The language of the partition deed shewed that this land was excepted out of a tract of 400 or 500 acres for the joint benefit of those owning the several portions, as a roadway. This defendant had no rights there. The roadway was not appurtenant to the land now owned by him. It was not a way of necessity, because it was shewn that from the land which the defendant owns there is a way out to the government highway leading to his market town, the village of Casselman. Judgment for plaintiff for $5 damages and an injunction restraining defendants from further trespassing on this property, with costs.

SEPTEMBER 25TH, 1903.

C.A.

DAWDY v. HAMILTON, GRIMSBY, AND BEAMSVILLE R. W. CO.

Street Railways—Injury to Person—Conductor Attempting to Pull Person on Moving Car—New Trial—Discretion—Interference.

Appeal by defendants from order of a Divisional Court, 5 O. L. R. 92, 1 O. W. R. 781, directing a new trial.

Action to recover damages for an injury received by plaintiff owing to alleged negligence of defendants.

The jury found that the plaintiff's injury was caused by the conductor seizing her hand and trying to pull her on the car, and that he acted negligently, and assessed plaintiff's damages at $650.

The trial Judge dismissed the action on the ground that in endeavouring to pull on a car a person who was merely standing on the platform and not attempting to get on, the conductor was not acting within the scope of his duty as the servant of defendants: Coll v. Toronto R. W. Co., 25 A. R. 55.

In the Divisional Court BOYD, C., was of opinion that the case had not been fully tried by the jury; that a question as to the scope of the conductor's authority should have been submitted to them. The other member of the Divisional Court, MEREDITH, J., agreed that there should be a new trial, being of opinion that there was some evidence of negligence.

E. E. A. DuVernet, for defendants, appellants.

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

THE COURT (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A), declined to interfere with the discretion exercised by the Divisional Court in granting a new trial.

CARTWRIGHT, MASTER. SEPTEMBER 26TH, 1903.

CHAMBERS.

DELAP v. CODD.

Writ of Summons—Service in Ontario on Defendant Resident out of the Jurisdiction—Appearance—Plea to the Jurisdiction—Dismissal of Action — Frivolous or Vexatious Action—Master in Chambers—Rule 261.

Motion by defendant Armstrong to set aside the proceedings against him in this action, on the grounds: (1) that he was improperly described in the writ of summons as being of the city of Ottawa, while to the knowledge of the plaintiffs he was resident in Montreal, in another Province; (2) that the writ and statement of claim shew no such cause of action as to give jurisdiction as against him to any Court in Ontario.

J. H. Moss, for defendant Armstrong.

W. E. Middleton, for plaintiffs.

THE MASTER.—As to the first ground, I think it is disposed of by Smith v. Hammond, [1896] 1 Q. B. 571. To the same effect is Snow's Annual Practice, 1902, vol. I., p. 6, and Western v. Percy, [1891] 1 Q. B. 304, at p. 310. In any case the defendant was served in Ottawa. This would give the Court jurisdiction, as I understand the judgment of Osler, J.A., in Murphy v. Phœnix Bridge Co., 18 P. R. at p. 497, and citations there given.

The defendant, then, having been properly served, is bound to appear. Having done so, he will be at liberty to set up as a defence any question of jurisdiction over the subject matter of the action, as he may be advised.

This was so held in Wilmott v. Macfarlane, 16 C. L. T. Occ. N. 83, decided in 1896 by the Queen's Bench Division.

The motion was also for an order to dismiss or stay the action as being frivolous and vexatious, and because it is sought to litigate matters which are pending before the Courts in England.

On this branch I do not express any opinion. As I understand the Rules on this subject, such a motion must be made before a Judge of the High Court: see Rule 261; Brophy v. Royal Victoria Ins. Co., 2 O. L. R. 651; McAvity v. Morrison, 1 O. W. R. 552. . . .

In my opinion, the motion fails and must be dismissed. The defendant should appear forthwith, and file his defence within a week or such other time as may be agreed on. This is to be without prejudice to any steps which defendant may thereafter think fit to take under Rule 261. Costs to plaintiffs in the cause.

TEETZEL, J. SEPTEMBER 26TH, 1909.

RE HUNTER.

Will—Construction—Shares of Children of Testator—Period of Vesting—Rents—Interest—Equal Division.

Motion by executors under Rule 938 for an order declaring construction of will of Edwin Hunter.

By paragraph 2 of his will the testator bequeathed and devised all his property, both real and personal, to his executors upon trust: (sub-sec. 1) to make certain allowances and payments to his wife; (sub-sec. 2) within four years after his decease to convert all his estate except the homestead residence, into cash, and out of the proceeds to retain and invest sufficient towards the payments to his wife, and the balance to divide equally amongst his five children, the share of his youngest son (Douglas Campbell Hunter) to be invested during minority, and the interest thereof, or so much as may be necessary, to be applied towards his maintenance and education, and the balance to be invested for his benefit; during said four years or while said property is unconverted; the rent and interest not required for payments hereinbefore directed, to be invested and to form portion of the corpus; (sub-sec. 3) upon the death or second marriage of his wife, the principal reserved for her benefit to be equally divided among the five children. By paragraph 3 the testator directed that the shares given to his children should vest in each of them immediately upon his decease, and that in the event of any of such children dying before receiving his or her share and leaving issue, the share of such child so dying should be divided equally among such issue.

A. H. Marsh, K.C., for executors.

George Bell, for Douglas Campbell Hunter, contended that under the latter clause of sub-sec. 2 of the second para-

graph of the will, no rents or interest should be paid out, except for the widow's annuity and for the payments directed to be made for the benefit of Douglas Campbell Hunter, until such youngest son should have attained 21.

A. G. F. Lawrence, for Mary E. Hunter and William R. Hunter.

TEETZEL, J.—. . . . The testator intended an equal distribution among his children, and that their shares should vest immediately upon his decease. The construction contended for by Douglas Campbell Hunter would be repugnant to this, and particularly to paragraph 3, which, being subsequent in the will, must prevail over any inconsistency therewith in clause 2 of sub-sec. 2 of the second paragraph. There should be a declaration that the shares vested at the testator's death, and that Douglas Campbell Hunter is not entitled to the benefit of more of the rents and interest moneys than are referable to his share of the principal. His application for an administration order is dismissed. Costs of all parties out of the estate.

TEETZEL, J. SEPTEMBER 26TH, 1909.

RE SWEAZEY.

Will—Construction—Legacies — Interest — Testator in Loco Parentis to Legatees — Period from which Interest Runs —Realization of Estate.

Motion under Rule 938 by the Toronto General Trusts Corporation, trustees, for an order determining what interest, if any, is payable under the will of the late Andrew J. Sweazey on legacies of $3,000 and $500 respectively to his grandchildren Andrew J. Sweazey and Amanda E. Sweazey.

After making provision for payment of debts and funeral and testamentary expenses out of his personal estate, the testator devised his real estate for the benefit of his wife during her life, with a provision for good and sufficient board for his grandson Andrew while he lived with the testator's wife, until he should reach the age of 12, and directed that within three years next after his wife's death his executors should sell the real estate, and, after providing for the payment of certain pecuniary legacies to his daughters, directed the balance to be divided equally between all his daughters, "reserving always from such division the sum of $3,000 and the further sum of $500 hereinafter bequeathed unto my grandson Andrew J. Sweazey and my granddaughter Amanda Emily Sweazey."

The gift to the grandson was in the following words: "I give and bequeath unto my grandson Andrew J. Sweazey the sum of $3,000, to be paid to him when he shall have arrived at the age of 21 years, but in case of his death before he shall arrive at such age the said sum shall be equally divided among all my daughters."

The gift to the granddaughter was in similar language.

The testator died in 1875, and his widow in 1902.

The trustees had, pursuant to the will, converted the real estate into money.

The grandson attained 21 and died. His representatives and the granddaughter claimed interest on the legacies from the testator's death.

W. S. McBrayne, Hamilton, for the trustees.

A. L. Baird, Brantford, for the granddaughter and the representatives of the grandson.

J. G. Gould, Hamilton, F. R. Martin, Hamilton, and M. G. V. Gould, Hamilton, for residuary legatees.

TEETZEL, J.—. . . . As regards the granddaughter, I do not think there is any evidence in the will itself or in the extrinsic evidence . . . to shew any intention on the part of the testator to place himself in loco parentis to her.

The question of whether a person has placed himself in loco parentis to a child so as to carry the moral obligation of maintenance, is one of intention: Powys v. Mansfield, 3 My. & Cr. 359. Having regard to the provisions made for the grandson, I think the testator's intentions in regard to his maintenance were limited to that provision.

After the children left the testator's home, they were voluntarily maintained by their mother, and I do not see how, in any event, the claim would now be made by them against the testator's estate for moneys paid by their mother for their maintenance.

Then as to the claim for interest on these legacies from the date the grandchildren respectively became twenty-one years of age, I am of opinion that interest cannot be allowed on either of these legacies until after the real estate was realized upon by the trustees.

While the legacies are bequeathed as payable at twenty-one, the governing provision of the will, it seems to me, is that the real estate, out of which the legacies could only be paid, should remain unsold for the enjoyment of the widow during her life, and that not until after the realization

thereof by the trustees within three years after the widow's death can these pecuniary legacies be paid.

Neither of these legacies could have been sued for and recovered during the widow's life, and there being no default, and interest being given for delay in payment, the same cannot be exacted before the time at which by direction of the testator there would be a fund out of which the legacies could be paid. Upon this question I think the case governed by Re Scadding, 4 O. L. R. 632.

I therefore declare that interest on the said two legacies should be computed only from the time the trustees realized upon the real estate.

The cost of all parties should be paid out of this estate.

FALCONBRIDGE, C.J. SEPTEMBER 26TH, 1903.

CHAMBERS.

O'CONNOR v. O'CONNOR.

Jury Notice—Leave to File—Interpleader Issue—Equitable Issue—Jurisdiction of Court of Chancery.

Appeal by plaintiff from order of Master in Chambers (ante 737) refusing plaintiff leave to file a jury notice.

T. F. Slattery, for plaintiff.

W. B. Raymond, for defendant.

FALCONBRIDGE, C.J.—The issue is whether the defendant is entitled absolutely to hold the beneficiary certificate and the money payable thereunder, or whether he holds the certificate only as security for money lent, and therefore is trustee for plaintiff of the balance. This is within the jurisdiction of the old Court of Chancery, and therefore ought to be tried by a Judge without a jury. Appeal dismissed with costs to defendant in any event.

CARTWRIGHT, MASTER. SEPTEMBER 26TH, 1903.

CHAMBERS.

POSTLETHWAITE v. McWHINNEY.

Writ of Summons—Service out of Jurisdiction—One Defendant in Jurisdiction — Contract—Breach—Cancellation—Injunction—Parties—Trustee—Rule 162.

On 24th June, 1903, the plaintiff obtained an ex parte order for leave to issue a writ of summons for service out of

the jurisdiction. The plaintiff's affidavit on which the order was obtained stated that it was proposed to bring an action against two defendants, one of whom, McWhinney, resided in Ontario, and the other, Sarah Ann Postlethwaite, in England. The proposed action was to set aside an indenture under seal dated 31st March, 1903, to which plaintiff and defendants were all parties.

The writ of summons having been issued and served on the defendant Sarah Ann Postlethwaite in England, she made a motion to set aside all the proceedings against her, on the grounds: (1) that the material on which the order of 24th June was made was insufficient; and (2) that this case does not come within any of the clauses of Rule 162.

S. B. Woods, for applicant.

R. B. Beaumont, for plaintiff.

THE MASTER.—The motion was first supported on the assumption that plaintiff was invoking only the provisions of sub-sec. (g) of Rule 162. It was conclusively demonstrated that the order could not be sustained under that clause as a matter of right. Whatever doubts may have been entertained or suggested as to the meaning of the words "duly served," it is now clear from the decision in Collins v. North British Co., [1894] 3 Ch. 228, that these words require an action to have been already commenced and service effected on the party resident within the jurisdiction. . . . MacKay v. Colonial Investment Co., 4 O. L. R. 577, 1 O. W. R. 569, 592, 646; Muir's Annual Practice, 1903, p. 184.

Mr. Beaumont conceded that he could not rely on this ground, but he contended that he was clearly within the provisions of sub-secs. (f) and (e).

As to these I agree with the plaintiff.

Mr. Woods argued as to the claim of plaintiff for an injunction, that it was not mentioned in the affidavit of plaintiff on which the order of 24th June was granted, and. . . . that this was to be regarded with suspicion, citing De Bernales v. New York Herald, [1893] 2 Q. B. 97n. . . . There the claim for an injunction was added only by way of amendment. The action as originally framed was in respect of an alleged libel, and the claim for an injunction was considered an afterthought to bring the case within the Rule. Here, however, the claim for an injunction seems very appropriate, in view of the proceedings taken by defendant McWhinney against plaintiff in a Division Court, which proceedings are stayed by the indulgence of that Court until the present

action is determined. I do not think that it was necessary to state this claim in the affidavit. It is clearly ancillary to the claim for cancellation, and would be a not improper enlargement in the statement of claim of a special indorsement claiming the relief of cancellation.

Then as to sub-sec. (e). In Comber v. Leyland, [1898] A. C. 527, Halsbury, L.C., states the meaning of the corresponding English sub-section. . . .

In the present case it is not disputed that the contract was made in Ontario, and the payments were to be made there by plaintiff to the trustee for the benefit of plaintiff's wife. If, then, there had been default by plaintiff and he had gone away to Detroit, he could no doubt be sued here under this sub-section. I cannot, however, see that there is any breach by defendants or either of them. The acts of defendant Mrs. P., relied on by plaintiff as a ground of cancellation are not breaches of any contract made by her or her trustee. . . .

The final result of my consideration of the matter is this. I think the plaintiff comes well within sub-sec. (g). I do not see how it can be argued that McWhinney is not a necessary party to the deed under which he is trustee, and after his taking action as such against plaintiff in the Division Court. But there is the objection of the undoubted irregularity if this sub-section alone is relied on. As to this, if necessary, I do not think that plaintiff should be driven to the useless formality of a second service in England. . . .

But as to (f), I think, for reasons already given, that the order was properly made, even though the claim for injunction was not set out in the affidavit of plaintiff. Having regard to all the facts and that the granting of an order under this Rule is in the discretion of the Court (see per Meredith, C.J., in Phillips v. Malone, 3 O. L. R. 53, and per Lopes, L.J., in De Bernales v. New York Herald, [1893] 2 Q. B. 98 n.) I think the order was rightly made under sub-sec. (f). If necessary for plaintiff to rely on (g), I would validate the service, as no possible injury can have been done to defendants.

The costs will be in the cause, for the reason given in MacKay v. Colonial Investment Co.

The defendants should appear and defend within a reasonable time. The order will be in the same terms as in the MacKay case, if on examination the variation made by the Divisional Court is found appropriate.

FALCONBRIDGE, C.J. SEPTEMBER 23RD, 1903.

CHAMBERS.

RE BLACK EAGLE MINING CO.

Sheriff—Right to Poundage—Goods Advertised for Sale but not Sold—Money "made" by Sheriff—Tariff C., Item 39—Possession Money—Amount of.

Appeal by the sheriff of Rainy River district from an order of the local Judge at Rat Portage. Some twelve executions against the Black Eagle Mining Company were placed in the sheriff's hands, and he seized personal property belonging to the company. A portion of this was sold for $2,200, and the right to poundage in respect to this amount was not disputed. He advertised other property for sale, but, pending an application for a winding-up order, he was directed to stay and did stay the sale until the 30th March. No settlement having been arrived at, the property was again advertised for sale for the 4th April. On the morning of that date the solicitor for the company came to the sheriff, and, in order to prevent the sale being proceeded with paid to him the balance due upon the executions (less the sheriff's fees), amounting to $16,000, or thereabouts. The sheriff claimed poundage upon this amount, which claim was disputed, and the defendants brought the matter before the local Judge under Rule 1192. The Judge, however, did not act upon this Rule, because he held that the money paid to the sheriff was not "made" within the meaning of item 39 of tariff C. attached to the Consolidated Rules, and that therefore the sheriff was only entitled to such allowance as might be made by the Judge under Rule 1190. The sheriff appealed from this decision. The company also cross-appealed on the ground that the local Judge should not have allowed more than $1.25 per day possession money.

W. M. Douglas, K.C., for the sheriff, contended that the money paid to the sheriff under the executions was "made" within the meaning of the tariff, citing Thomas v. Cotton, 12 U. C. R. 148; Consolidated Bank of Bickford, 7 P. R. 172; Morrison v. Taylor, 9 P. R. 390; and other cases. The old statute required the money to be "levied and made," but even in such cases the statute would be satisfied where the money was paid to the sheriff after the property had been seized and advertised for sale.

N. W. Rowell, K.C., for the company, contended that the sheriff was not entitled to poundage unless he levied the

money pursuant to the direction in the writ of execution, and to levy the money it was necessary to make a sale of the goods seized, citing French v. Lake Superior Mineral Co., 14 P. R. 541; Weegar v. Grand Trunk R. W. Co., 16 P. R. 371. On the cross appeal he contended that under the case of Hay v. Drake, 8 P. R. 122, not more than $1.25 could be allowed.

FALCONBRIDGE, C.J., held, following Thomas v. Cotton, 12 U. C. R. 148, and Consolidated Bank v. Bickford, 7 P. R. 172, that the money in question had been "made" by the sheriff within the meaning of that word as used in tariff C., relating to sheriffs' fees, and that the sheriff thereupon became entitled to full allowance of poundage as provided by the statute. He held that the matter, therefore, did not come within Rule 1190, and that nothing appeared in the circumstances of the case to justify a reduction of the sheriff's poundage, as such jurisdiction only arises under Rule 1192 when such poundage appears to be unreasonable. He further held, on the cross-appeal, that Hay v. Drake does not decide that the amount of possession money to be paid by the sheriff to a man in charge of the goods seized is limited to $1.25, but that the sheriff is entitled to pay such sum as is reasonable, and that the sum paid in the present case, $2.25 a day, was not an unreasonable amount to pay, considering the situation of the property seized in the district of Rainy River.

Appeal allowed with costs and cross-appeal dismissed with costs.