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TEETZEL, J. JULY 9TH, 1904.

CHAMBERS.

RE WILLIAMS v. BRIDGMAN.

County Court—Jurisdiction—Attachment of Debts—Assignment of Moneys Due to Judgment Debtor by Garnishee—Assignee as Claimant—Issue Directed—Amount Involved—Claim for Equitable Relief—Prohibition—Transfer to High Court.

Motion by claimant for prohibition against further proceedings in a garnishee matter pending in the County Court of Elgin under an order of the junior Judge of that Court.

The plaintiff had an unsatisfied judgment against defendant for $315, obtained in the County Court; and the defendant held a judgment for $420, upon which it was admitted that there was owing at the time of the attachment $270 beyond what was sufficient to satisfy solicitors' liens.

The judgment creditor caused an attaching order to be issued on the garnishee, and upon the return of the order one Clary appeared as claimant under an alleged transfer from the judgment debtor.

The judgment creditor desiring to contest this claim, an order was made by the Judge directing an issue in which "the question to be tried shall be whether the money owing by the garnishee was, at the time of the service on the said garnishee of the garnishee order herein on the 19th day of April, 1904, attachable by the above named judgment creditor as against the claim of the said claimant as set forth in his affidavit above named."

Against this order the motion for prohibition was made by the claimant, who also asked in the alternative that the issue should be transferred to the High Court of Justice.

W. M. Boultbee, for claimant, contended that, as the contest between the judgment creditor and the claimant involved the determination of the validity of the assignment of these moneys as against the judgment creditor, the proceeding was in the nature of an action for equitable relief, and the amount involved being over $200, the County Court had no jurisdiction to try the issue, the jurisdiction of the County Court in actions for equitable relief being limited to $200.

W. J. Tremeear, for judgment creditor.

TEETZEL, J.—Rule 912 provides that "the garnishee shall be deemed indebted, although the debt sought to be attached has been assigned, charged, or incumbered by the judgment debtor, if the assignment, charge, or incumbrance is fraudulent as against creditors, or is otherwise impeachable by them."

In the affidavit of the judgment creditor's solicitor filed on the motion for attachment, he states his belief that the assignment to the claimant is void as a fraud on creditors, also that no consideration was given for same.

The existence of a formal assignment is not disputed; and it is admitted that the amount of the garnishee's indebtedness which would be recoverable under the attachment but for the assignment, exceeds $200.

The issue was directed under Rule 920, under which the Judge may, after hearing the parties, order payment of the amount due from the garnishee, or may order an issue or question to be tried, and may bar the claim of the third party, or make such other order with respect thereto as may seem just.

In this case the learned Judge exercised his discretion by directing an issue to be tried. This Rule is in aid of the preceding Rules providing for method of attachment of debts by a judgment creditor. No provision is made for directing the trial of an issue in the High Court in the case of a County Court attachment; and, in the absence of authority to the contrary, I think the meaning of the Rule is that the method thereby provided for determining the question whether a certain debt is attachable, notwithstanding that a claim is made to it by a third party, must be adopted in the County Court in all cases where the attachment is under a County Court judgment, notwithstanding that the amount which may be recovered by such attachment exceeds $200.

The judgment creditor is pursuing her legal rights under a judgment in the County Court, which happens to be for

more than $200, and, if the claimant is right in his contention, she would have to abandon all excess over that sum in order to have an issue tried in that Court, which involves determining whether the claim set up by the claimant is legal and binding upon the moneys attached, and in the end it may be found that such claim has no foundation in law.

No qualification of or exception to the general jurisdiction conferred by Rule 920 is provided for, and it must therefore have been intended that in all cases of County Court attachments the County Judge would be empowered to determine whether a debt was attachable to the extent of satisfying the judgment, whether it exceeded $200 or not.

Being of opinion therefore that the County Court has jurisdiction to try this issue, and there appearing to be no good reason for transferring it to the High Court, the motion must be dismissed with costs.

JULY 9TH, 1904.

DIVISIONAL COURT.

SMITH v. CLARKSON.

Staying Proceedings—Action Trivial or Frivolous—Account—Previous Accounting before Surrogate Judge—Mala Fides—Insolvency of Plaintiff—Security for costs.

Appeal by plaintiff from order of ANGLIN, J., ante 593, staying the action unless the plaintiff should give security for costs.

F. E. Hodgins, K.C., for appellant.

W. E. Middleton, for defendant.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) was delivered by

MEREDITH, C.J.—It is clear that the Court has inherent jurisdiction to dismiss an action which is absolutely groundless.

The accounts which plaintiff brings his action to have taken have already been approved by the Judge in the proper Surrogate Court, and no ground whatever is suggested upon which they can be impeached, neither fraud nor mistake being shewn, and the accounts as so approved would be binding upon plaintiff in this action.

It was urged by Mr. Hodgins that the Surrogate Judge had no jurisdiction upon an appointment to pass the accounts to fix the trustee's remuneration, but with that we do not

agree. The passing of the accounts necessarily involved the consideration of the items by which the trustee claimed to discharge himself, and therefore the sum to be retained by him as compensation for his services; but, even if that were not so, the appointment was in fact for the purpose of fixing the remuneration as well as of passing the accounts.

It is clear also that plaintiff has not any substantial interest in the litigation. Technically he has an interest, because the amount of his liabilities would be decreased by the amount which, if he should succeed, would be struck off the allowance which had been made to the trustee; but the reduction would, in any case, be very small.

It is apparent also that the action is brought not for the bona fide purpose of having the accounts taken in the High Court, but in order to force the trustee to pay a claim which plaintiff makes against him, the liability for which the trustee disputes.

The result of the litigation, too, if unsuccessful, would be to take from the creditors part of the fund which is now available for the payment of their claims, for the trustee would be entitled to be indemnified out of the trust estate for his costs. . . .

While the power of the Court to stay an action in limine, on the ground that it is an abuse of the process, ought doubtless to be exercised only in a clear case, I am of opinion that, in the circumstances of this case, my brother Anglin's order was rightly made.

Appeal dismissed with costs.

BRITTON, J. JULY 11TH, 1904.

CHAMBERS.

RE ENTERPRISE HOSIERY CO.

Company—Winding-up—Second Petition—Duty of Second Petitioner to Inform Court of First—Order—Conduct of Proceedings—Costs.

On 6th June, 1904, the Homer P. Snyder Manufacturing Co. of Little Falls, New York, filed a petition for an order for the winding-up of the above company under the Dominion statute. Notice of presentation was given for 17th June, 1904.

On 13th June Minnie Boucher, a creditor of the company, filed a petition for the same purpose, and on the same day counsel for this petitioner and for the company appeared before BRITTON, J., and an order was made on consent for

the winding-up of the company, counsel for the company waiving the 4 days' notice required by the Act. No intimation was made to the Judge that another petition was pending. The issue of the order so made was stayed, and the petition of the Snyder Co. came before BRITTON, J., on notice to Boucher and the company.

W. G. Thurston, for the Snyder Co.

W. M. Douglas, K.C., and W. A. Sadler, for Boucher.

W. H. Blake, K.C., and W. A. McMaster, for the company.

BRITTON, J.—It was frankly stated and stoutly contended that the insolvent company had the right to prefer liquidation by a friendly creditor, and that there was no duty or obligation on the part of the company or of the second petitioning creditor to inform the Judge of any pending prior petition or proceedings. I do not attempt to formulate any general rule to govern in such matters, but content myself with saying that the Judge should be informed of any such prior proceedings, and that an attempt to forestall a bona fide application by a friendly one—which sometimes might be a collusive one—is not, in my opinion, a practice that should be encouraged.

The Chancellor in Re Alpha Oil Co., 12 P. R. 298, says it is advisable to follow the rules for guidance to be found in English cases. I follow in this case, so far as applicable, Ex p. Mason, In re White, 14 Ch. D. 71.

A creditor presenting a winding-up petition, with notice that another creditor has already presented a petition with the same object, does so at his own risk as to costs, and must prove not merely that he had reason to suspect that the first was not bona fide, but that mala fides or collusion actually exists: Re Building Societies Trusts, 44 Ch. D. 140. . . .

Winding-up order made; the Snyder Co. to have the order and the conduct of the proceedings, and to get the costs of their petition and proceedings and of the order.

The present case is somewhat different from the usual one in this respect, that the material supplied before me by the petitioning creditor Boucher was used, and in the result avoided the necessity of the first creditor proceeding further with the proposed examination of witnesses, and I therefore order that the costs of her petition down to the hearing before me be paid out of the estate of the Enterprise Hosiery Co.

MACMAHON, J. JULY 11TH, 1904.

WEEKLY COURT.

GRATTAN v. OTTAWA ROMAN CATHOLIC SEPARATE SCHOOL TRUSTEES.

Schools—Separate Schools—Qualification of Teachers — Religious Community — Contract with—Invalidity—Residence of Teacher—Payments for Furnishing—Duration of Contract—Erection of School House.

Motion by plaintiff for judgment in action for an injunction to restrain defendants from entering into a contract with the Brothers of the Christian Schools for the direction of a boys' separate school for the parish of Notre Dame in the city of Ottawa, and from constructing a school building such as proposed by the contract.

Plaintiff was the owner of property in the city of Ottawa, and was assessed as a separate school supporter, and in his affidavit stated that the Order of the Brothers of the Christian Schools, who were proposed as teachers, did not possess certificates of qualification as prescribed by the regulations of the Education Department of the Province of Ontario.

On 19th May a resolution was passed by the separate school board that from and after 1st September then next the services of the Christian Brothers be secured as teachers of the boys' school on Murray street, and that a new school be erected at a cost of $20,000.

The contract contained the following provisions: (1) The residence of the community shall be suitable to the common life followed by the Brothers, and shall contain the various apartments necessary for a religious institution, etc. (2) Water, fuel, and light to be furnished for the establishment; the premises to be in keeping with the number of Brothers who there reside. (3) The director's salary to be $300, that of the other Brothers, 13 in number, $250 each. The janitor to be at the expense of the school board. (6) The trustees are to pay for each Brother, independently of salary, once for all, $100 for house furnishing; the Brothers to acquire the said furniture a fifth per year, and consequently at the expiration of 5 years, they will remain indisputable proprietors of said furniture. (7) Should it happen that the trustees would not require the Brothers of the Christian Schools, or that the latter should decide to withdraw from the school, notice should be given in each case, by writing, before 1st January of the scholastic year, but the said contract to cease with the scholastic year. (8) The Brothers of the Christian

Schools are to give by 1st September the necessary Brothers for 12 classes, that is, 14. (9) A Brother of the English language to form part of staff, to be employed in teaching said language in the school, when the thing becomes possible. (12) The Brothers are to live in community according to their rules, and under the direction of their Superior. (15) The present contract is made for a period of 10 years, but the cancelling may be effected from year to year by either parties in giving the above mentioned notice.

It was not contended that the Brothers of the Christian Schools possessed certificates of qualification as prescribed by the regulations of the Education Department, but it was shewn by the affidavit of a member of the community that they had been established in the Province of Quebec since 1837 and in the city of Ottawa since 1864. By sec. 36 of the Separate Schools Act, R. S. O. ch. 294, "the teachers of a separate school shall be subject to the same examination and receive their certificates of qualification in the same manner as public school teachers generally; but the persons qualified by law as teachers, either in the Province of Ontario or at the time of the passing of the British North America Act, 1867, in the Province of Quebec, shall be considered qualified teachers for the purposes of this Act.

G. F. Henderson, Ottawa, for plaintiff.

N. A. Belcourt, K.C., for defendants.

MacMahon, J.—The latter part of sec. 36 is an addition made in 1886 to sec. 30 of R. S. O. 1877 ch. 206, and is an enabling enactment solely for the benefit of those who in 1867 were qualified teachers under the law as it then existed, either in Ontario or Quebec. And no person who after the year 1867 became qualified as a teacher in the Province of Quebec is qualified to teach in Ontario without passing the examinations and obtaining the certificate required by sec. 78 of the Act. The contract proposed to be entered into is, therefore, invalid. The duties of the board of trustees are defined by sec. 33. No authority is conferred upon the board to expend the money of the supporters of the schools in providing a residence for the teacher or teachers or for a chapel, common room for studies, or for cells, infirmary, dormitory, etc., as set out in clause 1 of the contract.

The only authority conferred on trustees to implement the salary of a teacher is by sec. 34, and it gives the trustees no power to expend school moneys in the erection of a residence for the teacher.

There is no authority in the trustees to make the expenditure provided for in clause 6.

Boards of trustees are not authorized to enter into a contract with any teacher beyond the period of one year, and clause 15 is therefore invalid.

Judgment for plaintiff with costs declaring the whole agreement invalid and restraining defendants from entering into it.

TEETZEL, J. JULY 11TH, 1904.

TRIAL.

VALIQUETTE v. FRASER.

Negligence—Injury to Person—Falling of Wall of Building—Exceptional Storm—Defective Construction—Knowledge of Owner—Employment of Competent Superintendent.

Action by the widow and children of J. S. Valiquette for damages occasioned by his death while employed in the boiler house of defendants Fraser, engaged in putting in machinery for one Campbell, his employer, under a contract which Campbell had with the Frasers. The action was brought against the Frasers and one Garrock, a contractor who did the brickwork in the erection of the boiler house. While Valiquette was at work in the boiler house, the end fell in, causing his death.

Plaintiffs alleged negligence against both defendants. The charge against defendants Fraser was that the boiler house was built without proper plans and without precautions to ensure that the walls were safe and proper. As against Garrock plaintiffs alleged that he was guilty of negligence in using bad mortar, etc.

During the course of the trial the Judge dispensed with the jury.

J. Lorn McDougall, Ottawa, and E. J. Daly, Ottawa, for plaintiffs.

A. B. Aylesworth, K.C., and J. Christie, Ottawa, for defendants the Frasers.

B. B. Matheson, Ottawa, for defendant Garrock.

TEETZEL, J.—Defendants did not employ an architect to prepare plans and specifications for the building, but adopted the plans and specifications which had been prepared by Allis, Chalmers, & Co., of Chicago, a well known firm of architects and contractors, who had prepared plans and specifications for the St. Anthony Lumber Company at Whitney. . . .

The Frasers arranged with that company to have their plans and specifications copied, and for the purpose of obtaining the copies and to obtain tenders and superintend the construction, they employed a Mr. Proper, who, though not a professional architect, had had very extensive experience in mill construction work. Some variations were made by Mr. Proper in these plans. . . .

The plans for the roof were prepared by the Dominion Bridge Company, who under contract constructed and put on the roof.

The brickwork was done under contract by defendant Garrock, who commenced his work early in March, 1903, and . . . a portion of his work was done during frosty weather.

The building was completed with the exception of putting in some interior machinery, in which the deceased was engaged under his employer Campbell on 6th August, 1903, when suddenly the end wall of the boiler house gave way and fell into the building, inflicting injuries to deceased which caused his death the next day.

According to the evidence, a very severe gale of wind was blowing when the wall fell in . . . and defendants contended that it was the suddenness and violence of the storm that caused the accident, and that they could not, by the exercise of the utmost care, foresee and provide against the irresistible force of the storm. . . .

The end of the power house was near the edge of a lake, and faced a stretch of 2 or 3 miles of open water, and I think, while defendants could not be expected to provide against storms of the violence of a cyclone or tornado, that it was reasonable to expect from the location and position of the boiler house that it would be subjected to more than ordinary wind strain at times. . . .

I do not think the storm was greater or more violent than a properly constructed wall should have withstood.

There was great conflict of evidence between the experts called by plaintiffs and those called by defendants. . . .

I am of opinion that it was not unreasonable for defendants to adopt the plans and specifications which had been used in the construction of the building at Whitney, and also it was not unreasonable for them to employ Mr. Proper, although not an architect, to take charge of the construction; but I am also of opinion that in fact the wall was not sufficient to withstand the wind pressure that might reasonably be expected in that locality. . . .

Notwithstanding my conclusions of fact, I am unable to find that defendants were guilty of such negligence as to render them liable to plaintiffs.

It seems to me quite clear that defendant Garrock is not responsible; for, while it is a fact that some of his work was done during frosty weather, and on that account the adhesive qualities of the mortar were unavoidably affected to some extent, I am of opinion that the brickwork, having regard to the season of the year in which he performed his contract, was reasonably sufficient, and that he was not guilty of any negligence in performing his work.

There was no evidence whatever pointing to any personal knowledge upon the part of the other defendants as to any weakness of the wall, and in adopting the plans upon which the Whitney boiler house had been built, and in employing a man—though not a professional architect—of high reputation as an experienced superintendent of construction, and in placing their contracts with contractors of repute, defendants did all that reasonably prudent men might be expected to do.

If there was any error, it was one of judgment on the part of Mr. Proper, and, in face of the fact that a number of architects of high standing, testified their indorsement of all that was done by him, and their approval of the plans, I do not think I can attribute to defendants that want of ordinary care in constructing their building which would make them liable in damages to plaintiffs. The efficiency of the design was a matter upon which opinions might honestly differ, and their adoption therefore was not negligence in Proper.

I do not think it follows as a matter of law that, because as a fact the wall was not sufficient for the purpose for which it was intended, defendants are liable, unless it appears that defendants themselves knew or ought to have known of the defect, or employed an incompetent superintendent or one who was guilty of negligence.

Defendants are not liable to plaintiffs as insurers. I do not think the insufficiency of the designs or of the wall was so manifest that it could have been detected by any ordinary inspection; in fact, honest differences of opinion might very well occur between architects as to the sufficiency, as was shewn by the variety of testimony at the trial; and no obligation is to be implied by law that a building is absolutely safe: see Searle v. Laverick, L. R. 9 Q. B. 122.

I also refer to Black v. Ontario Wheel Co., 19 O. R. 578; Pollock on Torts, 6th ed., p. 489; Thompson on Negligence, secs. 1058, 1059; Marney v. Scott, [1899] 1 Q. B. 986; Carter v. Metropolitan Co., L. R. 1 C. P. 300; Broggi v. Robins, 15 Times L. R. 224; Louisville v. Allen, 78 Ala. 494; Pilcher v. Lemon, 12 N. Y. App. 356; Lane v. Cox, [1897] 1 Q. B. 415.

Action dismissed without costs.

BRITTON, J. JULY 11TH, 1904.

TRIAL.

TRIMBLE v. LAIRD.

Sale of Goods—Lien for Balance of Purchase Money—Informal Document Creating Equitable Lien—Notice to Purchaser—Notice to Chattel Mortgagee — Solicitor — Knowledge.

Action to recover from defendant Laird the balance due upon the price of a portable saw-mill plant sold by plaintiff to Laird and to establish and enforce as against defendants Bedford and Sale a lien upon the plant for such balance.

A. H. Clarke, K.C., for plaintiff.

J. P. Mabee, K.C., for defendant Sale.

J. L. Murphy, Windsor, for defendant Bedford.

BRITTON, J.—On 2nd September, 1899 . . . plaintiff agreed to sell to defendant Laird the portable saw-mill plant for $500, payable $150 in cash and by two notes of $175 each at one and two years . . . Defendant Sale (a solicitor) personally acted for the parties in having the bill of sale and promissory notes drawn, and he paid to plaintiff . . . the $150 cash. There is nothing in the bill of sale about the property not passing till paid for, or about any vendor's lien, or security of any kind, but there was written upon each note, by defendant Sale, at his suggestion, . . . words importing that plaintiff held a lien upon the property sold for the amount of the unpaid purchase money. . . . The notes themselves are lost. . . .

On 5th October, 1899, defendant Laird gave defendant Sale, as trustee, not having any cestui que trust, a chattel mortgage on the property bought from plaintiff, together with other property, for securing $3,000 said to have been advanced to Laird.

On 2nd June, 1900, defendant Laird sold his . . . Duck Island property, including the mill plant purchased from plaintiff, to defendant Bedford. Defendant Sale was a party to the agreement between Laird and Bedford. . . .

On 5th June, 1900, defendant Bedford executed to defendant Sale a chattel mortgage for $5,279.13 on all the property Bedford got from Laird, including the mill plant. . . .

I find that, at the time of the sale by plaintiff to defendant Laird of this mill property, there was an agreement between plaintiff and defendant Laird, fully understood by defendant

Sale, to whom was left the carrying it out, that there should be a lien in favour of plaintiff upon the property he was selling to Laird for the unpaid purchase money represented by the two notes for $175 each.

I find that defendant Bedford, in purchasing from Laird the property, including what was purchased from plaintiff, assumed as a liability which, as between Bedford and Laird, Bedford was to pay, the unpaid balance to plaintiff, but Bedford was not called as a witness, and there is nothing in the evidence to shew that Bedford at the time of his purchase had any notice or knowledge of plaintiff's lien. . . .

This case seems to me somewhat different from that of a mortgagee under an unregistered mortgage—or a mortgage in which chattels are insufficiently described, as against a subsequent purchaser or mortgagee with notice . . . See Tidey v. Craib, 4 O. R. 696; Moffatt v. Coulson, 19 U. C. R. 341.

This case is also very different from that of a vendor under special agreement that title to property is not to pass to purchaser until fully paid for.

The writing upon the notes, although not signed and not incorporated in the instrument itself, shews an intention of the parties to charge the particular property sold with the payment of the notes. The property is sufficiently identified with the debt, and I am of opinion that as against Laird plaintiff was entitled to an equitable lien upon the property.

If in law it can be avoided, Sale should not be allowed to be heard objecting to the lien. The principle involved in the decision in Blackley v. Kenny, 16 A. R. 522, should, if possible, be applied.

But there was the sale to Bedford, and, so far as appears, without notice of the lien. This is not a question of liability upon the notes, but of property, of remedy in rem, and I cannot say that plaintiff could have followed the property in Bedford's hands. Although Sale acted in the transfer between Laird and Bedford, he did not act as Bedford's solicitor so that Bedford would be affected by Sale's knowledge of the lien. Bedford is still the owner of the property subject to the mortgage. His interest may be—possibly is—valueless, but legally Sale is entitled to stand upon Bedford's title. . . . It seems, looking at it apart from the dry legal question, inequitable to permit Sale, even as trustee, to hold this property apart from plaintiff's supposed lien, but I fear it cannot be prevented. . . .

Upon the whole case I must decide in favour of defendants Bedford and Sale as to assertion of lien. Action as to them dismissed but without costs.

Judgment for plaintiffs against defendant Laird for amount of claim.

JULY 11TH, 1904.

DIVISIONAL COURT.

COULTER v. COULTER.

Limitation of Actions — Real Property Limitation Act — Character of Possession — Occupation of House as Part Compensation for Services.

Appeal by defendant from judgment of BRITTON, J., at the trial, in favour of plaintiffs, trustees under the will of James Coulter, father of defendant, in an action to recover possession of a house and about 3-5 of an acre of land in the village of Weston.

The defence was that defendant had acquired title by virtue of the Real Property Limitation Act.

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

A. F. Lobb, for plaintiffs.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) was delivered by

TEETZEL, J.—Defendant has been in continuous occupation of the house since February, 1884, and has during these years cultivated the adjoining land, in varying quantities, for garden purposes. . . .

The trial Judge held that defendant had entered into possession of the house not as tenant, but as servant, of his father, and that his possession in that way continued until the employment of defendant in his father's foundry business ended in 1899, and therefore that the Statute of Limitations never began to run till that time. . . .

I think the effect of all the evidence upon the relationship between the father and the two sons is that he allowed each of them the use of a house and garden, and each to draw from the business what was necessary for his living expenses beyond the use of his house and garden, and that, while the business was advertised as James Coulter & Sons, the capital was all furnished by the father, and there is no evidence of any right in the sons to draw from the resources of the business beyond what was necessary to maintain their respective

families. Whether the two sons expected to succeed to the business does not appear.

I think the evidence fully justifies the conclusion of the trial Judge, and that defendant was given, first, the rent of the house and afterwards the use and occupation of it as part compensation for his services in his father's business, and under these circumstances I also agree with the trial Judge that the Statute of Limitations would not begin to run in favour of defendant so long as the employment continued, the enjoyment of the premises being a part return for his services. . . . Under such circumstances, title cannot be acquired by length of possession during such employment. See Berti v. Beaumont, 16 East 33; The King v. Chestnut, 1 B. & C. 473; The King v. Snape, 6 A. & E. 278; Moore v. Dougherty, 5 Ir. L. R. 449 (1843.).

The occupation of the premises by defendant was ancillary or incident to his employment by the testator. In other words, I think the service and the occupancy were incidents of one arrangement or agreement between father and son, and that no other tenancy relationship ever existed between the parties.

Appeal dismissed with costs.

JULY 11TH, 1904.

DIVISIONAL COURT.

BRADLEY CO. v. WILSON LUMBER CO.

Appeal—Division Court Appeal—Jurisdiction to Hear—Condition Precedent—Notice of Setting down.

Motion by plaintiffs to quash appeal by defendants from order made in 10th Division Court in county of York dismissing defendants' application for a new trial of the action after a judgment in favour of plaintiffs.

The grounds of the motion were, (1) that the certified copy of the proceedings in the Division Court, which was filed in due time, did not contain the notes of the evidence taken at the trial, and (2) that, although the appeal was set down in due time, the defendants did not, as required by sec. 158 of the Division Courts Act, give notice of the setting down and of the appeal and of the grounds thereof to plaintiffs at least 7 days before the commencement of the first sittings of a Divisional Court which commenced after the expiration of one month from the decision complained of.

H. W. Mickle, for plaintiffs.

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

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) held that the notice of setting down was a condition precedent to the jurisdiction of the Court, and the second ground of objection was fatal. Nothing was decided as to the first ground.

Appeal quashed without costs.

BRITTON, J. JULY 12TH, 1904.

TRIAL.

McLAUGHLIN AUTOMATIC AIR BRAKE CO. v. ALLAN.

Execution—Sheriff's Sale under—Patent for Invention—Irregularities at Sale—Want of Proper Notice—Advertising—Setting aside Sale—Action—Parties—Costs.

Action by execution debtors against execution creditors, sheriff, and purchaser, to set aside a sale, under execution, of a patent for invention.

E. S. Wigle, Windsor, for plaintiffs.

J. W. Hanna, Windsor, for defendants Allan and Iler.

A. H. Clarke, K.C., for defendants the Lake Erie and Detroit River R. W. Co.

BRITTON, J.—The Lake Erie and Detroit River R. W. Co. on 3rd November, 1903, upon a judgment which they had recovered, issued a writ of fi. fa. against the goods and lands of one William G. McLaughlin and the plaintiffs for the recovery of $498.67 with interest. This writ was delivered to and received by the sheriff on 4th February, 1904. With the writ the sheriff received a letter from the solicitor for the execution creditors . . part of which is as follows: "Direct your efforts to making the money out of the plaintiff company. I am informed that they own at least one patent for invention in Canada. . . . I suggest your taking steps to realize out of the patent of invention as the most effective means of securing payment."

The sheriff notified the plaintiff company. He prepared an advertisement of sale, dated 9th February, 1904, and on that day sent the draft of it to the solicitor for the execution creditors, who revised, corrected, and returned it to the sheriff. . . . The sheriff then made 3 copies, one of which he personally posted up on the fence at Bermsky's woodyard; the other two he gave to his bailiff Wright, with instructions to hand one to Mr. Rodd, secretary of plaintiff

company, and to post the other up. The notice of sale was of all the right and interest of William G. McLaughlin and the McLaughlin Automatic Air Brake Co. in a certain patent of invention (describing it.) The sale was for 10 a.m. on 20th February, 1904, at the office of the sheriff, Sandwich. . . .

On the day and at the hour named for the sale four persons were present. . . . The sheriff offered the patent for sale. The letters patent were not produced, but offered as described in notice. William G. McLaughlin says he bid $590. There is not an agreement between the witnesses as to the bidding or as to just what took place at the sale, but the bidding was confined to McLaughlin, Norman Allan, and one Guitard. . . . Finally Norman Allan bid $605, and he was called the purchaser. Although he bid only $605, the sheriff's fees were added, and his bid was treated as $646.14, which amount was paid by cheque of defendant Henry W. Allan. . . .

I do not think the sale can stand. The sheriff acted in a way which must be considered negligent in law in conducting the sale. He apparently treated the matter rather as a settlement than as a sale, and this is shewn by his getting $646.14 when only $605 was bid. He did not consider that the execution debtors, the owners of the patent, had rights which he, the sheriff, as a public officer, was bound to consider. The sheriff took no steps to ascertain the value of the patent which he in form seized, and which he was offering for sale. He knew that the execution debtors, the owners of the patent, were not represented. . . .

The case is one in which the sheriff must be held to proof that he complied strictly with what was required by law of him. It has not been proved that notice was given as required by law. The sheriff's bailiff did not say he put up any notice. The one put up by the sheriff personally was put up after the 9th February; the exact time is not given. The place where put up can hardly be considered, upon the evidence, as a compliance with the law. See Rule 875.

The owners of the patent considered it valuable. The sheriff, without inquiry, with no special direction at the time to sell, assumed to sell the whole patent, and he did this under a fi. fa. It might have been very different if he had returned this writ and had received a writ of ven. ex.

There must be a reasonable and proper care to advertise: Crume v. Murphy, 20 L. R. Ir. 57. See Jones v. Jones, 15 Gr. 40; Barker v. St. Quentin, 12 M. & W. 441.

I see no reason . . for joining the railway company, the execution creditors, as defendants. . . . I think there should be no costs to these defendants. . . .

Judgment for plaintiffs against defendants Allan and Iler setting aside the sale with costs.

MEREDITH, J. JULY 12TH, 1904.

TRIAL.

BELL TELEPHONE CO. v. TOWN OF OWEN SOUND.

Municipal Corporations—Telephone Poles and Wires in Streets —Power of Interference—Good Faith—Collateral Purpose —Enforcing Tax — Injunction — Federal and Provincial Legislation—Underground Wires— Supervision.

Action to restrain defendants from interfering with certain work of plaintiffs in the town of Owen Sound.

G. Lynch-Staunton, K.C., for plaintiffs.

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

MEREDITH, J.—The facts of this case are simple and free from doubt. Plaintiffs' system of telephone communication has been in operation in defendants' municipality for some years, and, as usual in this country, by means of overhead wires upon wooden poles. Their office was upon the main street of the town, and the wires were carried into it from two poles—carrying the wires from opposite directions over the main street—on the opposite side of the street to a pole upon the same side, and thence into the office. They removed from that office into a new one, next door to it, and so it became necessary to move the wires, and that plaintiffs proposed doing by putting them underground, instead of overhead, thus removing one at least of their large and anything but picturesque poles, and all the danger and unsightliness of a great number of wires crossing the main street in two directions.

The thing was so obviously better for every one concerned that it is impossible to imagine any objection in good faith to it. In the interests of the public and in the interests of defendants nothing but advantage could come from thus changing the mode in which the wires crossed the thoroughfare. It is plainly insincere . . to suggest that the road or the sidewalk would or could be injured by the work if done even with ordinary care. It could be done in a few hours, if need be, without inconvenience to traffic at all, and without interfering in the least degree with the sidewalk or curb or gutter, or doing a particle of injury to any of them or to the roadbed. The road is but a macadamized one, and one that

is often opened for far less generally useful purposes. Any objection to the work on this ground is purely a subterfuge to cover some ulterior purpose, and that purpose is plain, namely, to coerce plaintiffs to pay to defendants a tax upon their business in the municipality, which defendants have no sort of legal right to enforce or demand. Their objection to the work is not made in good faith, but is for a purpose ultra vires and wholly unwarranted.

Legislation, both federal and provincial, has conferred upon plaintiffs certain powers in respect of public ways. These powers are conferred quite as much in the public interest and for the benefit of the public as for the private gain of plaintiffs, and are subject to certain restrictive powers conferred upon the municipalities—these powers being also conferred in the public interests and to be exercised for the public benefit as much as for the protection of the rights and interests of the municipality. Whether federal or provincial legislation is to prevail, or whether both in regard to matters in which there is no conflict between them, are questions not necessarily requiring consideration in this case, upon the facts before set out. But it may be said that if provincial legislation prevails, plaintiffs have admittedly the right to carry their wires under the street as they desire to do, and defendants have no power to prevent the work. In any case the Legislature has power to legislate as to public ways and municipal corporations, and, it may be, to confer an additional right upon plaintiffs in such ways and against such corporation, even if the general right of legislation in respect of plaintiffs and their undertakings belongs to Parliament. Parliament has clearly and distinctly given plaintiffs power to carry their wires over or under public streets, but has made that right subject to the restrictive rights before alluded to. The latter rights must be exercised in good faith and for a legitimate purpose, and should be reasonably exercised; instead of that, they have been unreasonably exercised, in bad faith, and for a purpose not authorized or within the power of defendants, so that, whatever these rights may be, plaintiffs are entitled to succeed in this action: see London and North Western R. W. Co. v. Mayor of Westminster, [1904] 1 Ch. 759.

Defendants will, therefore, be perpetually restrained from interfering with the work of plaintiffs in carrying their wires to their new office under instead of over the highway, for the purpose of exacting any tax or payment, disconnected from such work, from plaintiffs, or otherwise than in good faith and in accordance with the federal legislation.

Whatever may be the powers of a corporation when plaintiffs first enter the municipality, or when they are making great changes in their works after such entry, in this case defendants, acting in good faith, cannot impose restrictions beyond providing for the careful doing of the work and restoration of the street, so that no loss is sustained or injury done to defendants, or to any one entitled to the use of the highway, by reason of the work. That is a thing commonly provided for in municipal by-laws requiring the work to be done under the direction of a competent officer of the municipality, and sometimes the deposit of a reasonable sum of money to ensure the doing of the work as so directed, or if not so done of enabling the corporation to have it so done and to pay for the work out of the money so deposited.

Defendants must pay the costs of the action, subject to their right to set off the additional costs, if any, caused by the trial at Hamilton, instead of at Owen Sound.

Upon the broad question of the powers of municipal councils under sec. 3 of the federal enactment as amended . . . the extravagant claim of defendants that it rests with the municipal councils to determine as they see fit when and how plaintiffs shall construct their lines, seems to me quite unwarranted by the enactment. . . .

[Reference to City of Montreal v. Standard Light and Power Co., [1897] A. C. 527, and City of Toronto v. Bell Telephone Co., 6 O. L. R. 335, 2 O. W. R. 750.]

The section presents no difficulty to my mind; in the interests of the public the clear rights of user of the highways are given to plaintiffs; they could not carry on their operations very well without them; in the interests of the public, and for the protection of the interests of the municipalities in the highways, these rights are to be exercised under the supervision of an officer of the municipality, in such manner as the council may direct, in regard to the location of the lines which plaintiffs under their rights intend to construct, and in regard to the opening up of the streets; that is, acting in good faith the council can thus control the placing in the particular highways selected by plaintiffs of the poles or of the wires underground, as plaintiffs may decide to place them, and require all that to be done which will best tend to prevent unnecessary obstruction to the highway and save the municipal corporation from loss or expense by reason of plaintiffs' works.

On this ground also plaintiffs' case can be rested, but I have preferred to put it on the other ground, as it seems to be necessary that the municipality should know that the powers conferred upon them are not to be exercised for what

have been called in one of the leading cases sinister or collateral purposes. When Parliament or the Legislature permits money to be made by municipal corporations out of power conferred on them, it usually says so, as in such enactments as secs. 639, 640 (4), 657, and 331, of the Consolidated Municipal Act, 1903.

ANGLIN, J. JULY 13TH, 1904.

WEEKLY COURT.

ATTORNEY-GENERAL FOR ONTARIO v. TORONTO JUNCTION RECREATION CLUB.

Company—Revocation of Charter—Action by Attorney-General—Proceeding by Order in Council while Action Pending—Injunction—Crown.

Motion by defendants for an interlocutory injunction restraining plaintiff from recommending to the Lieutenant-Governor in council that an order in council be passed cancelling the charter of defendants, and from doing any other act or thing with the object of cancelling the said charter or procuring the same to be cancelled otherwise than by order of the Court in this action.

E. F. B. Johnston, K.C., for defendants.

J. R. Cartwright, K.C., and H. H. Dewart, K.C., for plaintiff.

ANGLIN, J.—The defendants are a body corporate by letters patent issued under the Ontario Companies Act, R. S. O. 1897 ch. 191.

Section 4 of that statute reads: "The incorporation of every company hereafter by letters patent shall be governed by this Act, and all the provisions of the Act shall apply to every such company, subject to the provisions of any general Act applying to such company."

Section 99 is as follows:—"The charter of a company incorporated by letters patent may, at any time, be declared to be forfeited, and may be revoked and made void by an order of the Lieutenant-Governor in council, on sufficient cause being shewn to the Lieutenant-Governor in council in that behalf, . . ."

Since this action has been at issue the Attorney-General has summoned the defendants before him to shew cause why their charter should not be revoked. It is to prevent the exercise of the power of revocation that the present motion is made.

Counsel argued at some length that the Crown, by assenting to a statute expressly providing for the incorporation of companies by letters patent, and the cancellation of such letters patent, waived its prerogative right to grant and to revoke such letters. I find it unnecessary to deal with this question. Assuming the power of revocation now to depend upon the statute, it may well be that its provision, in form conferring or reserving a right, in substance and in reality imposes a duty to be discharged in all proper cases for the public well-being: Julius v. Bishop of Oxford, 5 App. Cas. 214. Where a mere right or privilege may be waived or suspended, a duty cannot be thus abandoned. But, whether the right of cancellation of letters patent of incorporation be now only statutory and merely a power, not a duty, or whether the prerogative right still subsists, in my opinion the bringing of this action has not clothed the Court with jurisdiction to restrain its exercise.

Counsel argued that the Crown, seeking the aid of this Court, adopting remedies assigned to its subjects, waives rights and privileges peculiar to itself, and subjects itself to such orders and mandates as the Court may, under like circumstances, issue against a subject litigant. To sustain this proposition upon the authority of Regina v. Grant, 17 P. R. 165, counsel stated that the Crown, for the purposes of any action which is instituted, submits itself to all the ordinary rules of practice and procedure of the Court which it enters. Not conclusive upon the question now under consideration, which is not one of practice or procedure, the statement is subject to several notable qualifications and exceptions.

For instance, the Crown, though it has the same right of discovery as a subject, may not be ordered itself to give discovery: Attorney-General v. Newcastle, [1897] 2 Q. B. 384. The right to withhold discovery is a prerogative of the Crown which it does not relinquish by instituting litigation. The Crown, suing through its duly constituted officers, upon obtaining an interlocutory injunction, may not be required to give an undertaking as to damages: Attorney-General v. Albany Hotel Co., [1896] 2 Ch. 696. "The King's Majesty cannot be nonsuit, because in judgment of law he is ever present in Court:" Co. Litt. 139 b. Jure Coronæ, the Sovereign is entitled to be actor in any litigation affecting his rights: Attorney-General v. Barbour, L. R. 7 Ex. 177. The Crown, as a prerogative right, is exempt from payment of costs. As a plaintiff, therefore, the Crown by no means puts itself in all respects in the plight of a subject-litigant.

If seeking the opinion of the Court upon any matter relating to the exercise of prerogative rights or executive func-

tions, involves the suspension, even temporary, of such rights or functions, very grave consequences may ensue. Thus should the Attorney-General bring action for a declaratory judgment upon a question whether, under certain circumstances, the title of the Legislature had expired by fluctuation of time, pending the determination of such action by a judgment pronounced in due course, it might be argued that the prerogative right of the Lieutenant-Governor to summon or to dissolve the legislative body would be in abeyance and could not be employed, whatever urgency might arise for its exercise. Again, should the Attorney-General for Canada institute legal proceedings against the Attorney-General for Ontario to obtain a decision of the Court as to whether, in regard to certain offences, the prerogative right of pardon is vested in the Governor-General or in the Lieutenant-Governor, it would follow that pendente lite His Excellency's pardoning power in regard to such offences would be suspended. I cannot assent to this proposition.

The Lieutenant-Governor in council may, upon many grounds other than those set forth in the statement of claim in this action, and constituting sufficient cause, deem it expedient to revoke the charter of the defendants. Circumstances may at any moment arise which will render it the sworn duty of the Attorney-General, as one of His Honour's advisers, to counsel and promote such action. By asking this Court to declare certain stated facts to be a sufficient cause for revoking such a charter, the minister cannot divest himself of the duty and responsibility undertaken by his oath of office, to advise that executive action be taken in the interests of the Crown, "which are now about equivalent to those of the public," upon other facts, or even upon the same facts, if the urgency of the case which they establish for cancellation of the defendants' charter should, pending this litigation, make itself apparent. It may well be that when the Attorney-General began this action, his view was that public interests would not suffer by the delay involved on its due prosecution. He may now have good reason to believe otherwise. Counsel may have advised that this Court may see fit to decline to grant a merely declaratory judgment. Whatever the reasons for which, in the exercise of his discretion and the discharge of his duty, the Attorney-General may deem it right to advise executive action, I cannot find any ground for holding that he can be restrained from tendering such counsel, or from assisting in the necessary steps to give it effect.

Mr. Johnston concedes that, if this action were discontinued by leave of the Court (Rule 430), or even if it had

been tried and the Court had, by its judgment, declared the facts submitted not to be a sufficient cause for revocation, the Lieutenant-Governor in council might immediately proceed to annul the defendants' charter. If, having, as a suitor, obtained the opinion of the Court, the Crown is not obliged to abide by the decision which it has so invited, it is difficult to understand why it should be bound to await the actual pronouncement of a judgment, which it may disregard when given.

There are some reasons why, if I at all doubted the lack of jurisdiction to grant the order asked, I should hesitate to hold the Crown's rights, statutory or prerogative, to be in abeyance pending this action.

That the Court has not jurisdiction, at the suit of a subject, to command, or to restrain, the Crown or its officers acting as its agents or servants, or discharging discretionary functions committed to them by the Sovereign, is established by many authorities, of which, as one of the most recent, I may refer to The Queen v. Secretary of State for War, [1891] 2 Q. B. 326, 334, 338. For the exercise of the powers or the discharge of the obligations with which the Court is here asked to interfere, the Attorney-General is answerable and responsible to the Crown alone. He owes no duty to the defendants.

No precedent has been cited for the granting of such an injunction on the application of a subject-defendant, though many suits affecting rights of the Crown have been maintained by the Attorney-General in England and her colonies. Such actions are in fact the suits of His Majesty, instituted by his law officer, the Attorney-General, and it is not therefore surprising that the research of the learned counsel for the defendants has unearthed no instance of any such anomalous order as that which he now asks, by which His Majesty, through the instrumentality of this Court, would restrain himself in the exercise of functions of his executive government. Cockburn, C.J., says: "This Court cannot claim even in appearance to have any power to command the Crown; the thing is out of the question:" The Queen v. Lords Commissioners of The Treasury, L. R. 7 Q. B. 388, 394.

Upon the argument before me counsel for the defendants suggested that, though the order asked should be refused, an expression of opinion that the Attorney-General should, pending this action, refrain from pursuing the course to which the defendants have taken exception, would be respected by him. While I have no doubt that the Attorney-General would pay due regard to any proper expression of judicial opinion,

I must decline to assume the rôle of adviser upon the propriety or impropriety of any course which he sees fit to take in such matters. Any expression of my opinion, beyond what is proper and necessary for the disposition of the motion before me, would be extra-judicial, and probably impertinent as well. It is no part of the function of a Court of law, at the request of the party in the position of the defendants, to express "some sort of pious opinion as to the mode in which the discretion of the Attorney-General, and the Attorney-General alone, should be exercised, in a case in which he thinks it his duty to intervene:" per Lord Halsbury in London County Council v. Attorney-General, [1902] A. C. 165, at p. 168.

Being clearly of opinion that this Court has no jurisdiction to entertain it, I must dismiss the motion made on behalf of the defendants. I think the Attorney-General entitled to his costs, if he claims them: Daniel's Ch. Pr., 7th ed., p. 60.

MacMahon, J. July 13th, 1904.

TRIAL.

DELAPLANTE v. TENNANT.

Contract—Sale of Goods to be Manufactured—Breach—Construction of Contract—"If it is Satisfactory"—Damages—Property Passing—Destruction by Fire—Appropriation of Goods to Contract.

Plaintiff wrote to defendant on 11th April, 1902, as follows: "Re 1902 cut of hemlock. We will give you $8.75 per M. for all your hemlock at Bracebridge, cut to our order, less 2 per cent., 30 days from date of shipment, the whole to be shipped out by Mar. 1st, 1903, or paid for less 2 per cent. This offer includes all hemlock to be cut at the switch, providing the manufacture and sorting is the same as the Bracebridge stock. Kindly send us an acceptance of this offer."

To this defendant replied on 15th April: "In reply to yours of the 11th inst. re my cut of hemlock, say that I will accept your offer of $8.75 per M. less 2 per cent. thirty days from date of shipment. Stock to be taken each month and 25 per cent. advanced. The whole to be shipped out by March 1st or paid for. This will include the hemlock at the switch if it is satisfactory."

Defendant, after the contract was entered into, cut and delivered all the hemlock at Bracebridge, mentioned in the first paragraph of the offer, but delivered none of the hemlock at the "switch."

At the time the offer was made, there were logs at the switch, from which 402,500 of lumber was manufactured. These logs were sold by defendant on 15th September, 1902, and were cut in March, 1903, and the lumber realized $10.25 per thousand.

Plaintiff sued for damages for the breach of the contract. There was a counterclaim for the price of certain lumber.

J. Baird, for plaintiff.

R. U. McPherson, for defendant.

MacMahon, J.—The offer by plaintiff to purchase the hemlock at Bracebridge included the offer to purchase that at the "switch," and formed one contract, unless the words "if it is satisfactory" contained in the defendant's letter precludes it from being an assent to the plaintiff's offer for that particular hemlock.

On 12th August, 1902, plaintiff wrote asking defendant: "How about the stock at the switch? Have you cut any of it yet? When do you expect to cut it?" On 14th August defendant replied: "About the stock at the switch, I have been unable to get any one to cut it, and do not think I will be able to get it cut this fall."

On 13th February, 1903, plaintiff in writing to defendant asked: "When do you expect to cut out the 6,000,000 feet at the switch which we bought last year? Kindly let us know by return mail." On 16th February defendant replied: "I have sold my stock to the Laidlaw Lumber Company. I had some financing to do with them on the stock now cut, and had to sell to them on that account. I have sold the logs at the switch."

On 26th February defendant wrote to plaintiff: "I could not get them (the logs at switch) cut satisfactorily, so had to sell them in the logs. When we made the deal last April about the Bracebridge, they were included if satisfactory only. At that time I had the contract let for the sawing, but later my man threw up the job, and I could not get any one else to do it, and that is the reason why I sold the logs as they were." . . .

Defendant had until 1st March, 1903, in which to get out the hemlock, and in his letter of 14th August, 1902, he thought he would not be able to get it out that fall. There is no assertion that under the agreement it must be "satisfactory" to him whether he will get it out or not. The letter would lead the person receiving it to assume that, as he could not get it out that fall, he intended getting it out the following winter and spring in time to comply with the terms of the contract. Yet in the following month (15th

September) he sold the logs at the switch and gave no notification to plaintiff of what he had done or that he did not intend filling the contract from some other source.

No one ever heard of goods being supplied to an intending purchaser which were to be to the "satisfaction" of the vendor, or that an article to be manufactured was to be manufactured to the "satisfaction" of the manufacturer.

Plaintiff said that by the words "if satisfactory" he meant that if he got the hemlock cut so as to be satisfactory to himself he (plaintiff) was to have it. As the hemlock at Bracebridge was to be cut to the order of plaintiff, and as the hemlock at the switch was included in the offer, that likewise was to be cut to his order, i.e., cut to his satisfaction.

The effect of the offer made by plaintiff was, I consider, in no way varied by the words "if it is satisfactory" in defendant's acceptance.

Defendant agreed to sell all lumber that would be cut from the logs at $8.75 a thousand, and nothing turns on the words "to be cut." The contract is of a like character to that of a mill-owner selling the whole output of his mill for the season at a named price per thousand feet.

Hemlock lumber advanced in March, 1903, and $11 per thousand was then paid Mr. Bawden for hemlock f. o. b. at the mills. The plaintiff paid higher prices, but I accept Mr. Bawden's statement as being a fair average price.

Plaintiff is entitled to recover $2.25 per thousand on 402,000 feet.....$904.50.

I find that when plaintiff purchased he told defendant he was purchasing on his own account, and that Laidlaw & Co. had no interest in the lumber, although he assigned his interest in lumber at Bracebridge to Laidlaw & Co., from whom he received a profit of 75 cents per thousand.

Then as to the counterclaim. Defendant claimed from plaintiff $157.80 and interest from 1st March, 1902, balance owing for lumber sold by defendant to plaintiff on 12th April, 1902. . . .

This was part of the Bracebridge cut, and according to defendant's evidence all the lumber that was cut and piled in the yard at Bracebridge was paid for by the end of March, 1902, and all shipped out. After that plaintiff ran his mill for two days, and the counterclaim was for two days' cut of lumber which defendant stated was put in piles, and each pile marked L.A.D. & Co. as indicating L. A. Delaplante & Co., under which name plaintiff was carrying on business.

This lumber was burned in a fire on defendant's premises on 20th April, 1903.

On 12th June, 1903, defendant wrote plaintiff; "According to my books, there is a balance coming to me of $157.80,

that is with the lumber you had burned. Not hearing from you, I will draw on you for the above amount."

The contract provides that lumber is to be paid for in 30 days from shipment, and defendant loaded the lumber on the cars at Bracebridge and said he regarded it as part of the contract to do so; when loaded on the cars he drew against the shipments. There was no intimation to plaintiff that the lumber had been cut or was then in the yard, nor is there in the correspondence put in at the trial any notification that the lumber had been destroyed until the letter of 12th June, 1903, when defendant said he intended drawing for "a balance coming to me of $157.80, that is with the lumber you had burned."

As the usual course was for defendant to place on the cars the lumber appropriated to the contract with plaintiff, and then draw against it, I think there was no "unconditional appropriation," of the particular lumber the price of which is now claimed, until placed on the cars.

There will be judgment for plaintiff on his claim for $904.50 with costs, and judgment dismissing defendant's counterclaim with costs.

JULY 13TH, 1904.

DIVISIONAL COURT.

CHRISTIE v. COOLEY.

Deed—Construction—Temporary Grant of Strip of Land—Erection of Building—Destruction or Damage by Fire—"Shall Remain Standing"—Rebuilding or Repair.

Appeal by defendant from judgment of County Court of Hastings in favour of plaintiff in an action to recover possession of a strip of land 4 feet wide, part of lot 5 on the easterly side of Water street, in the town of Trenton.

The right of plaintiff to possession depended on the meaning and effect to be given to an instrument dated 15th January, 1883, made between one Gordon, then the owner of the whole of lot 5, and plaintiff.

At the time the instrument was executed, there was in course of erection on the lot, which had a frontage of 66 feet on Water street, a three-storey brick building, divided into 3 stores, each of the same width.

The northerly part of the lot had been purchased by plaintiff from Gordon. The southerly part was retained by Gordon, and the buildings on it, and so much of the part sold to plaintiff as was covered by the middle store, were intended to be used as an hotel.

The building came up to the street line in front, and extended back to a depth of 50 feet, leaving an open space behind it of about 26 feet in depth.

Gordon was at the same time negotiating for the sale of the remainder of the lot to one Perrault, but Perrault was not willing to buy unless he could obtain the right to build an addition to the hotel covering the strip in question as well as the land of Gordon. This strip Gordon endeavoured to get plaintiff to give up; plaintiff refused to do that, but agreed to give up a limited right to it.

Perrault then bought from Gordon, and erected the contemplated addition to the building.

The instrument of 15th January, 1883, was made in pursuance of the Act respecting short forms of conveyances; by it Gordon purported to grant to plaintiff the northerly 25 feet of the lot together with the northern store, etc. The instrument contained a clause by which plaintiff authorized and empowered Gordon to appropriate and use a longitudinal strip of land along the northerly side of the 25 feet, of about 4 feet in width, extending from the rear of the brick block to the river Trent, for the purpose of erecting a suitable building in rear of and in connection with Gordon's remaining interest in the strip, free from all claims for ground rent and of ownership in respect of the proposed erection—"this grant to remain in force only so long as the said building so to be erected shall remain standing on the said 4 foot strip, and no longer."

In 1899 a fire occurred, the effect of which was somewhat seriously to damage the addition to the hotel, including the part built on the strip.

Plaintiff contended that, as the result of this fire and damage, the building no longer "remained standing" on the 4 foot strip, and that the right of defendant, who owned whatever interest in the strip was conveyed to Gordon, to appropriate and use it, was at an end.

At the trial there was a conflict of testimony as to the extent of the injury done to the building, and the County Court Judge found in favour of plaintiff's contention.

E. D. Armour, K.C., for defendant.

T. A. O'Rourke, Trenton, for plaintiff.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) was delivered by

MEREDITH, C.J. (after setting out the facts):—The proper conclusion upon the evidence is, in my opinion, that there was nothing like a complete or total destruction of the

building; it was, no doubt, somewhat seriously damaged, but not to such an extent that it was necessary to rebuild it, using the word "rebuild" in contradistinction to "repair;" the addition was, no doubt, rendered temporarily unfit for occupation, though a part of it seems to have been used in the hotel business after the fire and before its restoration; the repairs were made and the building was restored, though its height was reduced by one storey, for the purpose, as was testified, of affording better light to the upper part of the main building, and the restoration was completed very soon after the fire, and at a comparatively trifling cost, and one that bore but a small proportion to the value of the restored building.

It is also a fair conclusion from the evidence that a prudent owner of both building and land would have taken the same course that defendant took, and would have repaired as she did. . . .

The building was not . . destroyed, but only damaged, by the fire, and had the event on which the right of defendant was to come to an end, been "the destruction by fire" of the building, I should have had no doubt that that event had not happened.

When, as in this case, a building is damaged, though not so seriously but that it can be and is repaired and made fit for use again for the purpose for which it was originally designed, at a comparatively trifling expense, and with but a brief interruption to the use of it, it would, in my opinion, be quite inappropriate to speak of it as having been destroyed. The building was, in my opinion, not destroyed but only damaged, and not rebuilt but only repaired.

I refer to Wall v. Hinds, 4 Gray (Mass.) 256; Spaulding v. Munford, 37 Mo. App. 281; Einstein v. Levi, 25 N. Y. App. Div. 565. . . .

If plaintiff's contention is well founded, had a fire . . occurred the very next day after the instrument was executed, resulting in the roof being burnt off . . or even partly so, but so as to render the building temporarily, though for never so short a period, unfit for occupation, and although a very small expenditure of money and a very few days would be required to repair it so as to restore it to its original state, the right to occupy would be gone forever, and defendant bound to give up possession, leaving the building to become the property of plaintiff, for him to make it good, if he chose, at a trifling cost.

I cannot bring myself to adopt a construction of the instrument which would produce such a result, and, however precarious may be the tenure of defendant—and as to this I express no opinion—it is not, in my opinion, so

precarious as to have been put an end to by what has happened.

Appeal allowed with costs, and action dismissed with costs.

MEREDITH, C.J. JULY 15TH, 1904.

TRIAL.

HARRIS v. SIMPSON.

Sale of Goods—Action for Price—Injury after Delivery—Warranty—Examination.

Action to recover the price of skins sold by plaintiff to defendants.

D. O. Cameron, for plaintiff.

G. F. Shepley, K.C., for defendants.

MEREDITH, C.J., held, on the evidence, that the skins substantially answered the contract which was entered into between plaintiff and defendants' agent Emory, and that they were injured while undergoing the process of dressing after they had been purchased by and delivered to defendants. Plaintiff warranted that the skins would be suitable, if and when properly finished, for making up into fine ladies' mantles; if the skins had not been injured in the dressing they would have been suitable for that purpose. Plaintiff took back the skins, but he did so not unconditionally, but in order to examine them. Judgment for plaintiff for $967.20 with costs. Plaintiff was entitled to the money in Court.

JULY 15TH, 1904.

DIVISIONAL COURT.

MILLOY v. WELLINGTON.

Husband and Wife—Wife Living apart from Husband—Foreign Divorce—Invalidity—Form of Marriage with Defendant—Criminal Conversation—Abandonment of Wife—Question for Jury—Judge's Charge—Adultery before Form of Marriage—Rumours—Hearsay Evidence—Improper Reception—Submission to Jury—Misdirection—Excessive Damages—New Trial.

Appeal by defendant from judgment of ANGLIN, J., in favour of plaintiff, upon the findings of the jury, for $5,000 damages, in an action of criminal conversation.

The charge to the jury is reported in 3 O. W. R. 561.

Defendant asked to have the action dismissed, or in the alternative for a new trial, on the grounds of the improper reception of evidence, misdirection, and excessive damages.

The appeal was heard by MEREDITH, C.J., MACMAHON, J., TEETZEL, J.

C. H. Ritchie, K.C., and E. B. Ryckman, for defendant.

W. R. Smyth, for plaintiff.

MEREDITH, C.J.— . . . Plaintiff and his wife have lived separate from one another since 1889 or 1890, and since that separation have never even met, nor has any communication passed between them.

They were married in 1875, and no serious disagreement occurred between them up to the end of December, 1889, when the wife went from her home at Niagara to visit her parents at Toronto . . . Plaintiff was not willing that she should pay this visit, though it does not appear that he forbade her to make it. . . They differ widely as to the causes which led to the wife never having returned to her husband.

According to plaintiff's story . . . while his wife was absent in Toronto on this visit, he accidentally discovered that in the previous October or November, when she went to Buffalo, ostensibly to pay a visit to a Mrs. Campbell, promising to return the next evening, she had deceived him, as Mrs. Campbell was not then living in Buffalo but in Toronto, and that she had also deceived him on her return from Buffalo on the second evening after she had gone there, by telling him, when he asked for an explanation as to why she had not returned on the previous evening, that Mrs. Campbell had insisted on her remaining with her for another night; that upon making this discovery he became suspicious, but of what he did not say, and wrote to his wife for an explanation, and receiving none that his suspicions deepened to such an extent that in the January following he caused to be published in three of the Toronto newspapers a notice that his wife had left his bed and board on the 30th December.

According to the testimony of the wife, she did not deceive plaintiff as to the visit to Buffalo, or tell him that she was going to Mrs. Campbell's, nor did she say that she would remain away for one night only, or make any such explanation as plaintiff said that she had made on her return from Buffalo; that no letter asking for an explanation of this or

any other matter was received by her from plaintiff, but that the reason for her not having returned to her home was that some time in January, on an examination being made of her person by a physician, it was discovered that she was suffering from what was apparently (for she was not permitted to testify as to the nature of it as told to her by the physician) a venereal disease communicated to her by her husband; that upon this discovery being made, after consultation with her parents, she decided not to return to her husband, and it was arranged that her father should communicate to plaintiff her determination and the reason for it, which she believed her father did.

Plaintiff denies having received any such communication, and all knowledge that any such accusation was made against him, and he also gave an emphatic denial of the accusation itself.

If the story told by plaintiff be accepted as true, it is not, I think, open to doubt that the attitude which he took was that he would not receive his wife back until she had given him the explanation which he demanded of her, and that he in effect put her away because she had not complied with his demand, although, according to his testimony, he stood ready at all times to receive any explanation which she should choose to make, and to receive her back if it was satisfactory to him.

There was, in my opinion, making the same assumption as to plaintiff's story, no justification whatever for his action, nothing to warrant him in concluding, if he did conclude, that his wife had done anything which entitled him to put her away, and nothing to excuse, and still less to justify, the course which he took in publishing to the world that she had left his bed and board.

If, on the other hand, the wife's story be accepted as true, there was strong, if not conclusive, evidence that plaintiff had been guilty of conduct which fully justified her refusal longer to cohabit with him.

In either view, the separation was caused by the wrongful act of plaintiff, and the case is not, therefore, that of a wife who is living separate from her husband without his consent, and the right of plaintiff to recover is not, therefore, to be determined upon the principle enunciated by the Chief Justice of Ontario in Bailey v. King, 27 A. R. at p. 712. . .

I proceed now briefly to notice the course of events after the separation took place. After the lapse of a year, the

wife went to Chicago to earn a living for herself, and remained there about three years. While in Chicago she obtained, in the Circuit Court of Cook County, in the State of Illinois, a decree purporting to dissolve the bonds of matrimony between her and plaintiff, and to confer upon her the right to resume her maiden name, Anna Douglas. The decree is dated 15th February, 1892, and by its terms is conditional, and subject to be set aside at any time within three years . . .

Plaintiff's wife returned to Canada, and from the date of the decree ceased to bear plaintiff's name, and has ever since, until she went through a form of marriage with defendant, borne and been called and known by her maiden name.

Defendant was a married man, and on 20th February, 1899, a decree of a Nebraska Court was made, in a proceeding instituted by his wife, purporting to dissolve the bonds of matrimony between him and his wife. This decree, as I understand, did not become absolute until six months from its date had elapsed.

On 23rd September, 1899, defendant and plaintiff's wife went through a form of marriage at Rochester, in the State of New York, and have since then lived together as man and wife.

Plaintiff in his pleadings alleges that adulterous intercourse took place between his wife and defendant in 1895 and at various times since then and up to the commencement of the suit.

At the trial it was attempted to be shewn that defendant had committed adultery with plaintiff's wife before as well as after the marriage ceremony of 23rd September, 1899, but that attempt, as I shall afterwards point out, wholly failed.

According to the testimony of plaintiff, he was not notified of the divorce proceedings taken against him by his wife, though he admitted that he heard of them and of attentions that were being paid to his wife by defendant before the marriage ceremony took place, attentions, too, which, according to the information which he said he received, were of an improper character, indicating that adulterous intercourse was going on between them.

His attitude to his wife, during all this time, according to his testimony, was that he was ready and willing at any time, until he learned of the immoral relations existing between her and defendant and the granting of her divorce,

to take her back if and when the long delayed explanation which he had demanded should be forthcoming, and that he had not until then entirely abandoned hope of a reconciliation with her. . . .

If then the attitude of plaintiff towards his wife was what he testifies it was, and the jury must have found it to have been, what effect, if any, has the fact of his separation from his wife, unjustifiable as, in my opinion, it was, upon his right to recover in such an action as this against defendant for the adultery of which he was guilty in having, as admittedly he has had, sexual intercourse with plaintiff's wife on and after 23rd September, 1899.

It was at one time . . held that such an action does not lie where, at the time the act of adultery is committed, husband and wife are living apart by mutual agreement, the ground . . being that the criminal act is not the gist of the action, but that it is a civil action brought to recover satisfaction for a civil injury done to the husband, and that no injury is done to the husband who has voluntarily relinquished his wife, and cannot therefore be said to be deprived by the act of adultery of her comfort and society: Weedon v. Timbrell, 5 T. R. 357.

The authority of that case has been much shaken, I think, by what has been said and decided in subsequent cases, though the principle of it was applied as late as the year 1873 by Sir James Hannen in Malcolmson v. Givins, reported in the London Times of 27th February, 1873 . . and by the Court of Queen's Bench in this Province in 1869 in Patterson v. McGregor, 28 U. C. R. 280. . . .

An examination of the pleadings (in the last mentioned case) . . shews, I think, that they went further than did the defence in Weedon v. Timbrell, and alleged substantially what is spoken of by Alderson, J., in Winter v. Henn, 4 C. & P. 494, as a total and permanent giving up by the husband of all advantage to be derived from the society of his wife.

The authority of Patterson v. McGregor, so understood, is, I think, recognized by Osler, J.A., in Bailey v. King, 27 A. R. 703, where he quotes, apparently with approval, the language of Alderson, J., in Winter v. Henn. . .

[Reference to Evans v. Evans, [1899] P. at pp. 198, 201, 202; Izard v. Izard, 14 P. D. at p. 46; Gardner v. Gardner, 17 Times L. R. 331; Constantinidi v. Constantinidi, [1903] P. 246.]

If we were at liberty to deal with the case at bar on principle and unfettered by authority, I should be prepared to hold, in accordance with the view of the dissenting Judge in Patterson v. McGregor, and for the reasons given by him as well as those of Sir Francis Jenne in Evans v. Evans and of Mr. Justice Gorell Barnes in Gardner v. Gardner . . that the husband does not forfeit his right to maintain such an action as this by any act or misconduct of his own not amounting to connivance at or consent to his wife's adultery, and that no man can justify himself, when living with another's wife against her husband's consent, by setting up, as an absolute bar and answer to the husband's complaint, that the law can give him no redress because he has totally and permanently given up her society.

We are, however, I think, bound by what was decided in Patterson v. McGregor, and must follow it, leaving plaintiff, if he is so minded, to challenge the correctness of the decision in a Court which has the power to overrule it.

Having come to this conclusion, it follows that we must hold that my brother Anglin, in telling the jury, as he did, that, if they came to the conclusion that, before the adulterous intercourse between defendant and plaintiff's wife began, plaintiff had totally and permanently given up all the advantage to be derived from the society of his wife, he was not entitled to recover, rightly directed them.

I come next to the ground taken by defendant's counsel as to the improper reception of evidence.

The evidence which plaintiff was permitted to give, notwithstanding objection to its admissibility, was of rumours of various acts of infidelity committed by his wife with defendant long before they went through the form of marriage at Rochester. My learned brother Anglin admitted the evidence because, in his opinion, though otherwise it would not have been admissible, defendant's counsel "had opened the door" for its admission by asking plaintiff on cross-examination the following questions:—"You heard he (defendant) was paying some attentions to your wife?" "Did you ever go to him and tell him she was your wife?" "Did you write to him and tell him that she was your wife, and that you did not want him to have anything to do with her?"

Plaintiff had stated in his examination in chief, in answer to questions put to him (apparently without objection), that he had heard his wife's name connected with some person "along about the year 1896 or 1897;" that he had heard

it connected with defendant; that he heard it from more than one source; that the rumours were persistent; and that he thought they increased rather than diminished.

I am unable to understand how anything that was said or done by defendant's counsel opened the door to the admission of evidence of the particulars of what plaintiff had heard as to the relations between his wife and defendant. It was hearsay evidence, pure and simple, and not within any exception to the general rules of evidence that I know of.

It is true that the learned Judge warned the jury that nothing was proved by this testimony, and that they could not base upon it any finding against defendant, but still the testimony was given, and it is impossible to say that . . it . . . did not work a prejudice to defendant affecting the result of the trial.

I am also of opinion that, if the charge . . is to be taken to mean that, upon the testimony which was given as to the intercourse between defendant and plaintiff's wife, prior to their going through the form of marriage at Rochester, the jury might infer that defendant had been guilty of adulterous intercourse with plaintiff's wife, the jury were misdirected.

There was not, in my opinion, any reasonable ground for suspecting, much less for finding as a fact, that improper relations existed between defendant and plaintiff's wife before the marriage ceremony. . . . It would, in my opinion, be intolerable if a jury were permitted, upon evidence such as was relied upon to prove adultery before the Rochester marriage took place, to fasten guilt upon plaintiff's wife. . . .

As put by Mr. Bishop in his work on Marriage, Divorce, and Separation, vol. 2, sec. 1370, "Every act of adultery implies three things, the disposition in each of the two minds of two participants and the opportunity . . But one alone amounts to nothing, and two together without the third are entirely inadequate." Granting that there was the disposition on the part of defendant and the opportunity, there was absolutely no evidence of the third—the disposition on the part of plaintiff's wife—but, in my opinion, there was no reasonable evidence of any one of the three. . . .

From all that appears, the parties who are sought to be incriminated in this case, though by their cohabitation they have been guilty of adultery in the eye of the law, believed themselves to be free to marry. . . The case should have been absolutely and entirely withdrawn from the jury so far

as it rested on the charge of adultery committed before the marriage ceremony was gone through at Rochester. . .

[Reference to remarks of Lord Kenyon in Weedon v. Timbrell, 5 T. R. 357; Frank v. Carson, 15 C. P. 135; Davidson v. Davidson, 1 Deane Ecc. R. 132.]

Upon the question of damages: in an action of this character a very strong case must, no doubt, be made out to justify the Court's setting aside the verdict of a jury on the ground of excessive damages, but upon that ground also I think that this verdict must be set aside, for I am unable to understand how any twelve jurymen, acting reasonably, could upon the facts of this case have reached the conclusion that plaintiff was entitled to the sum which has been awarded to him as compensation for the loss which he sustained by the wrongful act of which defendant has been guilty. . . .

[Reference to Izard v. Izard, 14 P. D. at p. 47.]

The amount of the damages to be awarded was, no doubt, very largely in the discretion of the jury, and the Court would not be justified in setting aside the verdict merely because its own view did not accord with that of the jury on the question of damages; but in this case, in my opinion, the damages are so out of proportion to what appears to me would have been full compensation to plaintiff, that I am forced to the conclusion that, notwithstanding the direction of the learned Judge as to the true measure of damages, and his warnings as to what were not proper matters to be considered in assessing them, they have disregarded his instructions, and have sought to punish defendant for his conduct as they viewed it, and to discourage by their verdict attempts on the part of persons wishing to throw off the yoke imposed upon them by the marriage tie, to get rid of that yoke by resorting to means not recognized by the laws of this country as proper to be taken or effectual to accomplish the end they have in view. . . .

I have not overlooked what was said by plaintiff as to his having made up his mind when he heard the rumours which he said came to his ears of the improper relations said to subsist between his wife and defendant, to abandon his wife. Standing alone and unqualified, that admission would, in the view I have taken as to the law, be fatal to plaintiff's case; but, taking his evidence altogether, that admission was qualified, and perhaps the fair result of his evidence is that, having heard these rumours, and believing his wife to have been guilty, he was forced to abandon the hope which he had before entertained that his wife would yet repent and give

the explanation which he had demanded from her, and so a way be opened for a reconciliation between them and her return to him.

I have, therefore, though not without some hesitation, reached the conclusion that the case could not properly have been entirely withdrawn from the jury.

Order for new trial; costs of last trial and of this appeal to defendant in any event unless otherwise ordered by the Judge at the ultimate trial.

TEETZEL, J., concurred in the result arrived at by the Chief Justice.

MACMAHON, J., was of opinion, for reasons given in writing, that, on the ground of plaintiff's expressed intention to abandon his wife and his conduct for ten years in his actual abandonment of her, there was no case to go to the jury, and that the action should be dismissed with costs.

MEREDITH, C.J. JULY 16TH, 1904.

CHAMBERS.

RE GRAHAM.

Will—Bequest to Charity—Misnomer—Cy Pres Doctrine—Equal Division among Charities nearly Answering Description.

Summary application by executors under Rule 938 for the determination of a question arising on the will of Hester Graham, deceased. The paragraph of the will upon which the question arose was as follows: "I give and bequeath to the Widows and Orphans Home at Toronto the sum of $500." There was not at the time of the application, and as far as appeared never had been, in Toronto any charity answering to the name and description which the testatrix employed, but there were several charities in Toronto which were for widows or orphans or both and provided homes for them, and all the claimants were charities of that character.

W. S. Ormiston, Uxbridge, for executors.

R. J. Gibson, for residuary legatee.

H. Cassels, K.C., for the Old Folks' Home.

W. A. Baird, for the Aged Women's Home..

H. W. M. Murray, K.C., for the Protestant Orphans' Home.

J. T. Small, for the Church Home for the Aged.

MEREDITH, C.J.—It is impossible to say that any one of the claimants is the object of the bounty of the testatrix, but, according to the principles upon which the Court acts in such cases, the legacy does not therefore lapse, and the fund must be applied cy près. An equal division among the claimants of the fund, or what little will remain of it after paying the costs, would seem to me a proper application of it. Order accordingly. Costs of all parties out of the fund, and the division will be of what remains.

MEREDITH, C.J. JULY 16TH, 1904.

TRIAL.

BROWN v. DULMAGE.

Sale of Goods — Contract — Terms — Rescission — Resale of Goods by Vendor — Repudiation — Evidence — Amendment.

Action to recover $1,000 and interest. Plaintiff alleged that he entered into an agreement with defendant to purchase from him a stock of dry goods, clothing, and other merchandise, and shop fixtures, contained in a shop at Wingham; that it was one of the terms of the agreement that if, upon stock being taken, its value exceeded $7,000, the agreement was not to be binding; that he paid to the defendant $1,000 on account of the purchase money; that upon stock being taken the value was found to exceed $7,000; that he thereupon rescinded the contract, and gave notice to defendant that he had done so, and demanded the return of the $1,000 which he had paid; but defendant refused to repay it.

The agreement was in writing, dated 28th May, 1903. Its material terms were as follows:—"Stock, fixtures, etc., in the Kent block to be sold at 40 cents on the dollar invoice price—any dispute to be referred back to the stock sheet. Deposit to be $100. If stock exceeds $7,000 balance to rated (sic) at 30 cents on the dollar. $2,000 cash deposit on completion of stock taking. Balance in two and four months equal notes. It stock exceeds $7,000, deal may be declared off."

It appeared from the evidence that when the stock was taken its value was found to be $7,051, and it was upon this excess of $51 that plaintiff claimed to be entitled to declare the "deal off."

F. E. Hodgins, K.C., and D. S. Storey, Midland, for plaintiff.

W. A. Boys, Barrie, and R. H. Holmes, Wingham, for defendant.

MEREDITH, C.J.—I held at the trial that plaintiff had elected not to avail himself of the right which the agreement gave him to declare the "deal off" if the value of the stock should be found to exceed $7,000, and reserved judgment as to the effect of this finding upon plaintiff's right to recover.

It appeared further in evidence that after plaintiff had written to defendant declaring the "deal off" and demanding the return of the $1,000, defendant, after some correspondence with plaintiff, in which he took the position that plaintiff was bound to complete the purchase and insisted upon his doing so, gave notice to plaintiff of his intention to sell the goods, and that he would hold him responsible for all loss and damage which defendant might sustain "under the sale, together with all charges for storage."

Plaintiff having paid no attention to this notice, defendant, on the day fixed for the sale to take place, put up the goods for sale by public auction, but was unable to sell, because there were no bids, and he formally bid in the goods himself, not intending, as I find, to buy them, but because he believed that to be a formality necessary to be gone through. After this attempted sale, defendant proceeded to sell the goods by retail "over the counter," with the result that the net proceeds will fall considerably short of satisfying what remains due of the purchase money.

The mode of selling which defendant adopted was, as I find, a reasonable and practically the only one open to him, and that which was calculated to realize the best price for the goods.

My findings are conclusive against plaintiff's right to recover in this action.

It was urged, however, on the part of plaintiff, that before he attempted to call the "deal off" defendant had repudiated the contract, and that the action was sustainable on that ground.

The alleged repudiation consisted in defendant having written to plaintiff asking for the name of his indorser for the promissory notes which plaintiff was to give for the unpaid purchase money, and saying that he must have negotiable paper. . . .

Defendant did not say that he must have indorsed paper; his statement was that he must have negotiable paper, meaning, as the context shews, paper that he could discount at a bank, and he expressly says that if the bank will take defendant's paper without an indorser "it will be all right." In the next place, in order to determine whether there has been a repudiation, the question to be considered and determined is not whether the conduct of defendant was inconsistent with the contract, but whether his conduct was really inconsistent with an intention to be bound any longer by the contract; and the answer to the question, on the facts of this case, should be that defendant's conduct was not of the latter character; and further that plaintiff did not act upon what defendant did and elect on account of it not to perform the contract on his part.

It was also urged that the resale of the goods by defendant was not warranted, and an amendment was asked to enable plaintiff to set up a new case based upon that view.

It would, I think, serve no good purpose to allow such an amendment to be made, as I would allow it only on the terms of plaintiff paying the costs of the action up to the present time; and it is, I think, the better course to dismiss this action without prejudice to any action which plaintiff may choose to bring based upon the alleged wrongful act of defendant in selling the goods, or for an account of the proceeds of the sale . . ; and the action will, therefore, be so dismissed, and the dismissal will be with costs.

I must not to be taken to indicate that, in my opinion, any such action, on the facts of this case, is maintainable.

Moss, C.J.O. JULY 16TH, 1904.

C.A.—CHAMBERS.

SCOTT v. TOWNSHIP OF ELLICE.

Appeal—Court of Appeal—Leave — Special Circumstances—Absence of.

Motion by plaintiff for leave to appeal from order of a Divisional Court, ante 38, dismissing appeal by plaintiff from

judgment of FALCONBRIDGE, C.J., 2 O. W. R. 880, dismissing the action.

R. S. Robertson, Stratford, for plaintiff.

G. G. McPherson, K.C., for defendant corporation.

J. C. Makins, Stratford, for other defendants.

MOSS, C.J.O.—A perusal of the papers and further consideration confirm the opinion I formed during the argument of this motion that plaintiff has not been able to bring this case within the terms of sec. 77 (4) of the Judicature Act. His pecuniary interest is admittedly of the most trifling nature. It is not a case of conflicting decisions of the High Court or Judges thereof. And no other sufficient special reasons for treating the case as exceptional and allowing a further appeal have been shewn.

It was said that the Judges of the Divisional Court had misapprehended the facts with regard to plaintiff's status, that they had overlooked the fact that at the date of the passing of the by-law in question he was tenant of lot No. 9 in the 6th concession of Ellice, and that as such tenant he had a locus standi to impeach the by-law. But this tenancy had terminated before he commenced this action, and but for his tenancy under Mrs. Drown he would have ceased to be a ratepayer altogether. When he instituted these proceedings his sole right as former tenant of lot No. 9—if he had any—was to recover back from the township the few cents of taxes he had paid in excess of what he would have been obliged to pay but for the by-law, and for this he could have sued in the Division Court. Besides, I am not satisfied that, either at the trial or before the Divisional Court, he relied upon his position as tenant of lot No. 9. The written arguments and the notice of appeal to the Divisional Court appear to deal only with his position as Mrs. Drown's tenant. There does not seem to have been any misapprehension on the part of the Court of plaintiff's position.

The case seems to be the not uncommon one of a party who has deliberately selected his appellate tribunal remaining unconvinced notwithstanding the adverse decision of the forum of his choice. Plaintiff has the opinion of two Courts against him, but that of itself is no good reason for a further appeal. In other respects the case presents no features of sufficient importance to take it out of the general rule of the statute.

Motion refused with costs.

ANGLIN, J. JULY 16TH, 1904.

CHAMBERS.

RE CONNELL.

Lunatic—Petition for Declaration — Evidence — Interests of Alleged Lunatic.

Petition for an order declaring Thomas Connell a person of unsound mind.

W. E. Middleton, for petitioner.

G. H. Watson, K.C., for the lunatic.

ANGLIN, J.—Martin Connell, a brother of the alleged lunatic, petitions to have him declared a person of unsound mind and for the appointment of a committee of his person and estate. Upon the argument, counsel for the petitioner pressed for an order directing the trial of an issue to determine the question of Thomas Connell's sanity or insanity. Mr. Watson, on the other hand, urged that the petition should be dismissed upon the material now before the Court. Neither counsel favoured the idea of having the alleged lunatic examined by a physician to be appointed by the Court. Unless, upon the present material, I should think it proper to direct the issue he desires, Mr. Middleton requested an enlargement to enable him to cross-examine the deponents who have made affidavits in opposition to the petition. Finally both counsel agreed in requesting me to read the material filed and to make such order or direction as I should deem proper, Mr. Middleton, however, not waiving his request for an enlargement.

I have read all the affidavits. Thomas Connell is an old man about 80 years of age, suffering from the effects of a recent stroke of paralysis. There may be some doubt as to his sanity and as to his ability to manage his own business. Upon the present material the weight of testimony upon the question seems against the petitioner. If I thought it in the interest of Thomas Connell to do so, I should direct further inquiry either by the trial of an issue or examination by independent physicians. I do not think I should do either.

Mr. Middleton candidly stated that the danger against which the petitioner seeks to guard is some disposition of his brother's property in the interest of other members of the

family. Reading the material in the light of this statement, I fear that this is a case in which "the applicant lays more stress on the property than on the person of the lunatic." Thomas Connell is living with a niece with whom he has made his home for many years. There is not a scintilla of evidence that he is not well treated and cared for—better in all probability than he could be in any public institution. "Upon the applicant's own materials, I should say no case is made out for interfering with the custody of the alleged lunatic."

Neither is any case made out for present interference on the ground that the care or management of the property of Thomas Connell requires the appointment of a committee of his estate.

Dealing with this matter solely with a view to doing what seems best for the welfare of Thomas Connell, in my opinion further proceedings should not be permitted upon this petition. The only purpose of the cross-examinations proposed by the petitioner is, if possible, to establish the insanity of his brother. Even if this were made quite clear, I should feel bound to refuse this application. This is not the proper means to employ in order to pave the way for impeaching any disposition already made or which may hereafter be attempted of the property of this alleged lunatic.

As the whole application seems ill-founded and not in the interests of the only person whose welfare is to be considered in dealing with it, I feel bound now to dismiss it with costs.

I think this case is governed by the decision of the learned Chancellor in Re Clarke, 14 P. R. 370.