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MABEE, J. JANUARY 12TH, 1906.

CHAMBERS.

RE WILCOX v. STETTER.

Surrogate Court—Renewal of Cause into High Court—Difficulty and Importance of Questions Arising—Value of Estate.

Motion by plaintiff, executrix of the alleged last will of John Slaght, for removal of this cause from the Surrogate Court of Norfolk into the High Court, defendants having filed a caveat against the probate going to plaintiff.

J. E. Jones, for plaintiff.

A. G. Slaght, for defendants.

MABEE, J.:—The affidavit upon which the motion is based is made by plaintiff's solicitor, and states that there is a controversy as to the validity of the will, defendants contending that the deceased was not, at the time of its execution, of sound and disposing mind, memory, and understanding; that it was not executed according to the Wills Act; that the deceased did not know or approve of the contents of the will; that it was obtained by fraud, misrepresentation, and undue influence; and that it was made in breach of a certain agreement made by the deceased in his lifetime with one of the defendants upon behalf of and for the other defendants. The affidavit also states "that the questions to be tried and determined are of such importance and difficulty that the same

can be more effectually tried and disposed of in the High Court of Justice than in the Surrogate Court."

Defendants oppose the removal of the cause, and their solicitor files an affidavit stating that in his belief the matters in question are such that they can be properly tried in the Surrogate Court; he does not state what these matters are, neither affirming nor denying that the questions are as set out in the affidavit of plaintiff's solicitor. The valuation of the estate, according to the schedule filed, is stated at $2,150.

. . .

Section 34, sub-sec. 2, of R. S. O. 1897 ch. 59, provides that "no cause or proceeding shall be so removed unless it is of such a nature and of such importance as to render it proper that the same should be withdrawn from the jurisdiction of the Surrogate Court and disposed of by the High Court, nor unless the property of the deceased exceeds $2,000 in value."

Ample machinery is provided by the Surrogate Courts Act and Rules for the trial of issues such as this, and I think all such cases should be left for trial in the Surrogate Court which do not clearly and beyond reasonable question fall within the above section.

How can it be said from the foregoing affidavit that this cause is of such a nature and importance that it should be withdrawn from the Surrogate Court?

The last alleged ground of opposition by defendants may be discarded entirely, as that could form no ground for withholding probate; and the others are simply the usual questions that are presented in almost every issue of this sort; and there are no facts connected with any of these alleged issues set out in detail in the material, upon which I can say this particular cause is of "such a nature and importance" that renders its removal into the High Court proper.

I think the Court must be furnished with the facts connected with each case when applications of this sort are made, to enable a clear conclusion that it comes within the section.

I have the less hesitation in refusing this application, as the amount involved is so near the statutory limit; otherwise I might give the applicant an opportunity of supplementing his material.

Motion dismissed with costs.

BRITTON, J. JANUARY 15th, 1906.

TRIAL.

MERCHANTS BANK v. STERLING.

Principal and Agent—Moneys Advanced by Bank to Agent—Liability of Principal—Evidence—Letter of Authority—Construction.

Action to recover money advanced by plaintiffs to one E. J. Witherford, the agent of defendants, for the purpose of buying, taking care of, and shipping live and dressed hogs in and about the village of Wheatley and town of Leamington, in the county of Essex.

T. H. Rodd, Windsor, and W. T. Easton, Leamington, for plaintiffs.

A. H. Clarke, K.C., and R. L. Gosnell, Blenheim, for defendants.

BRITTON, J.:—Defendants reside at Blenheim. Witherford, at the time of the transactions in question, resided at Wheatley. Plaintiffs had a branch at Leamington, and a sub-agency at Wheatley. Defendants at first sent money direct to Witherford. Sometimes it was sent by express and sometimes to the bank for Witherford. Witherford used to get the money from the bank upon his own cheque, and at times the account was overdrawn. The account with plaintiffs was opened on 18th December, 1902. Witherford then got $5,000 from defendants, and deposited it with plaintiffs to his own credit, and drew cheques against it. So far as appears, this account was not overdrawn until about 10th February, 1903, when there was an overdraft of $58. This was paid, and the account continued, and from March, 1903, the practice was for Witherford to get what he wanted and have the overdraft paid by his drawing through plaintiffs upon defendants for any debit balance.

On 27th November, 1903, defendants gave to plaintiffs' manager at Leamington a letter as follows: "Please cash E. J. Witherford's cheques to farmers for live and dressed hogs each week and draw on us for the amount at sight each week until further notice."

The account was continued until 10th September, 1904, when it was overdrawn to the amount of $650.30. On that

day defendants notified Mr. Burns, plaintiffs' then manager at Leamington and Wheatley, that Witherford had "skipped," and that no more of his cheques were to be paid by plaintiffs, and no more were paid. None, so far as appears, were presented after that date, although on that date and before notice one for $85.25 and one for $46.25 had been presented and paid.

Plaintiffs never notified defendants of how money was paid, and defendants always had their accounting direct with Witherford. The drafts were always paid, drawn by Witherford through the bank. There was a settlement between Witherford and the defendants on 18th August, 1904, and no question was raised by them of their not being liable for any of the money paid by plaintiffs on any cheque of Witherford. The comparatively small amount of business done after 18th August, 1904, up to 10th September, was precisely the same as before.

On 8th June, 1904, plaintiffs sent on Witherford's draft for $1,002.50 on demand; on 15th June another for $1,002.50 on demand; on 30th June another demand draft for $2,205,50, but this was drawn by E. J. Witherford, per D. G. Scott, manager, upon defendants. On 13th July another at sight for $2,205.50; on 26th July another at sight for $1,503.75; on 30th July another at sight for $501.25; on 16th August another at sight for $902.25. All these were paid in due course, upon presentation.

On 31st August another draft was sent on by plaintiffs to defendants, drawn by E. J. Witherford at sight, for $2,005. This was refused and protested, but paid by defendants on 8th September, and the costs of protest were also paid. At that time defendants were continuing Witherford as their agent.

. . .

Upon the whole evidence, I think the real agreement between plaintiffs and defendants was, that plaintiffs would be the custodians of money to be given by defendants to Witherford for the purpose of buying live and dressed hogs. It was a matter of convenience to defendants, and apparently of not very much profit to plaintiffs. . . . It never was, in my opinion, within the contemplation of defendants to ask the bank to keep an eye upon Witherford's expenditures. The meaning is that this money was to go to Witherford for the purpose of buying the hogs, and that the general places and persons where and from whom hogs were to be bought were farms and farmers.

I feel quite sure that it was open to Witherford, and that he would have defendants' sanction, to buy from any one who had the animals, either "live or dead." The letter written by defendants is, in general terms, intended to cover just what defendant Sterling said in his evidence, and was not intended to mean that the bank was to find out exactly to whom the money was being paid and what it was being paid for, except in a general way, and that the drafts might be made by Witherford instead of by the bank, as the literal interpretation of the letter would make it.

Taking this view of the whole matter, it seems to me that defendants must be held indebted to plaintiffs for the payment of the Witherford cheques. Plaintiffs have acted in perfect good faith with defendants. Nothing else is charged against them, and the dealings since the letter are in no respect different from before. No objection was made by defendants on any settlement with Witherford, or in refusing any drafts paid by him in favour of plaintiffs until the refusal of the $2,005 draft, which was subsequently paid. Defendants, therefore, recognized Witherford as their agent, and they were responsible for what he did as between him and plaintiffs.

It is not a case in which defendants were guaranteeing an indebtedness of Witherford. It was never intended that Witherford should be a debtor to plaintiffs. Defendants recognized themselves as debtors, and expected to pay that indebtedness when drawn upon for the amount of it. That seems to be clear by their accepting drafts when made by Witherford.

Upon the whole case, I think that defendants are liable.

. . .

Judgment for plaintiffs for $650.33, with interest and costs.

CARTWRIGHT, MASTER. JANUARY 16TH, 1906.

CHAMBERS.

WRIGHT v. ROSS.

Venue—Change—Provisions of Contract as to Place of Trial —Construction.

Motion by defendants to change the venue from St. Thomas to St. Catharines.

The statement of claim alleged that plaintiffs entered into an agreement in writing with defendants, dated 22nd June, 1905, to buy certain machinery, for which they gave 7 promissory notes and a chattel mortgage; that the machinery was furnished a month later than the contract provided; and that when furnished it was entirely useless. The claim was to have the agreement, notes, and chattel mortgage delivered up and cancelled. Defendants' head office was situated at St. Catharines.

A. C. McMaster, for defendants

R. U. McPherson, for plaintiffs.

THE MASTER:—The agreement in question is under seal, and contains the following provision: "In case any litigation in any court shall arise out of this transaction, or on any of the securities relating thereto, it is agreed that the trial shall take place in the county where the head office of the company (defendants) is located, or elsewhere as may be determined by the company." . . .

It is argued that these words do not apply, because this action is not based on the agreement, but on the assertion that no agreement was ever entered into binding upon plaintiffs, who are therefore entitled to ask for rescission.

To this view I am unable to accede. The action here must be said "to arise out of this transaction," for the whole of the facts leading up to it must be gone into at the trial.

Unless plaintiffs were asking cancellation on the ground of never having signed the agreement, or of their signature having been obtained in some way by fraud or under duress, &c., I think the clause would govern, and oblige the venue to be laid at St. Catharines. . . .

[Reference to Greer v. Sawyer-Massey Co., 6 O. W. R. 594; Goodison v. Thresher, ib. 20; and Printing Co. v. Sampson, L. R. 19 Eq. at p. 495.]

There is no allegation here of any other reason for the action than the failure of the machinery to satisfy plaintiffs, and they must be held to their solemn covenant.

The order will issue as asked. Costs in the cause. . . .

JANUARY 16TH, 1906.

DIVISIONAL COURT.

BUCK v. CANADIAN PACIFIC R. W. CO.

Railway—Injury to Passenger—Negligence—Invitation to Alight—Calling out Name of Station—Findings of Jury —New Trial.

Motion by defendants to set aside verdict and judgment for plaintiff for $500 damages and costs in an action for negligence resulting in injuries to plaintiff, tried before BRITTON, J., and a jury at Milton, and to dismiss the action or for a new trial.

Plaintiff, a young woman of 23, was a passenger in a train of defendants from Guelph Junction to Milton. When the train left Guelph Junction, a brakesman called out that Milton was the next station, and when the train stopped or slowed up at the Grand Trunk diamond, before reaching Milton, plaintiff, thinking Milton had been reached, went out on the car platform, and, the vestibule door being open, and the train giving a jolt, the plaintiff was thrown from the platform to the ground and injured. It was shewn that plaintiff knew that the practice was to call out "Milton" again before reaching that station, and it had not been called out when plaintiff went on the platform. The following were the questions put to the jury, with their answers: (1) Were defendants guilty of any negligence in respect to plaintiff as a passenger on train No. 6 on the evening of 12th September, 1904? Yes. (2) If so, what was that negligence? For not have the door of the vestibule properly closed. (3) Was the negligence, if you find any, the cause of the accident to plaintiff? Yes. (4) Did the train on the occasion in question come to a stop at or near the distant semaphore in approaching Milton, or at any point after leaving Guelph Junction and before the accident happened? We believe the train did stop. (5) Could plaintiff, by the exercise of reasonable care, have avoided the accident to her? Believing as we do that she was jolted off car, had no time to exercise care.

Shirley Denison, for defendants.

W. E. Middleton and W. I. Dick, Milton, for plaintiff.

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

BOYD, C.:—The jury have found that plaintiff was injured by the negligence of defendants, and that the

door of the vestibule was not properly closed. This may be connected with the other finding, that when on the steps at the opened door of the vestibule plaintiff was jolted from the car by its starting after the stop. But there is a link wanting to shew that plaintiff was properly at the door of the car. This might be, if what occurred amounted to an invitation to alight; and there is evidence to warrant such a finding; but the jury have not so expressly found; and this creates such an uncertainty as to leave the action really undetermined. All that can be done is to direct a new trial, with costs to the ultimately successful party. The vestibule question is raised in the record, and plaintiff may amend by making a more explicit statement if so advised.

JANUARY 16TH, 1906.

DIVISIONAL COURT.

COPELAND-CHATTERSON CO. v. BUSINESS SYSTEMS, LIMITED.

Pleading—Statement of Claim—Joinder of Causes of Action—Introductory Statements—Libel—Special Damage—Infringement of Several Patents for Invention—Company—Wrongs before Incorporation—Trial—Separation of Issues.

Appeal by defendants from order of TEETZEL, J., ante 42, upon appeal and cross-appeal from an order of the Master in Chambers, 6 O. W. R. 555. The order appealed against directed that a separate record be made up and a separate trial had of plaintiffs' claim for infringement of certain patents of invention, but leaving the other claims in the action to be tried together, viz., claims for libel, conspiracy, etc.

G. H. Kilmer, for defendants, contended that there should be a further separation of the issues, or that some of the claims should be excluded.

W. E. Raney, for plaintiffs, contra.

THE COURT (BOYD, C., STREET, J., MABEE, J.), ordered that the appeal should be dismissed, upon plaintiffs undertaking to abandon the personal libel claims.

CARTWRIGHT, MASTER. JANUARY 19TH, 1906.

CHAMBERS.

ROYAL ELECTRIC CO. v. HAMILTON CATARACT CO.

Venue—Change—Companies — Place of Residence — Place where Cause of Action Arose—Preponderance of Convenience—Witnesses.

Motion by defendants to change the venue from Toronto to Hamilton.

W. E. Middleton, for defendants.

Britton Osler, for plaintiffs.

THE MASTER:—From the statement of claim it appears that "the plaintiffs are duly incorporated companies doing business throughout the Dominion of Canada, and having their head office at Montreal, and the defendants are duly incorporated companies having their head office at the city of Hamilton."

The action is on 2 agreements made 8 and 6 years ago for the purchase of certain machinery from plaintiffs.. This was delivered at Hamilton to defendants, who did not find it satisfactory. After many fruitless attempts at settlement, this action was begun on 4th May, 1903.

The statement of defence alleges that plaintiffs did not perform their contract (among other defences); and defendants counterclaim for $100,000 damages resulting from such failures on the part of plaintiffs, and for loss occasioned to defendants by their consequent inability to perform their contracts with their customers. . . .

The cause of action seems to have arisen at Hamilton. It is there that defendants reside, so far as companies can be said to have a residence, while plaintiffs in the same way reside in the province of Quebec. On this ground, as well as on that of preponderance of convenience, in view of the allegations in the counterclaim as well as in the statement of defence and the claim, the defendants argue that the motion should succeed, relying on . . . Saskatchewan Land and Homestead Co. v. Leadley, 9 O. L. R. at p. 561, 5 O. W. R. 449. . . .

In the present case the difference between Toronto and Hamilton is not on its face, in any serious sense, of importance to plaintiffs, while it would appear from Mr. Hawkins's

affidavit that it will be a cause of great inconvenience to defendants to be brought from Hamilton here, as their officers and servants would be necessary witnesses. This might result in serious public inconvenience, and even danger. Any argument against the motion founded on delay is met by the fact of negotiations for settlement . . . And, as the Hamilton assizes commence on 5th March, there is no objection on the score of delay of the trial. This is especially so when the action has hitherto proceeded in such a leisurely way.

In all the circumstances, I think defendants are entitled to have the trial at Hamilton. This I take to be the effect of the Leadley case (supra), as applied to the facts of this case, set out in Mr. Hawkins's affidavit filed in support of this motion, and not controverted in its statements as to witnesses.

The costs as usual will be in the cause.

The greater advantage of a trial out of Toronto as to delay and inconvenience is very forcibly set out by Meredith, J., in the Leadley case, at pp. 558 and 559 of 9 O. L. R.

MABEE, J. JANUARY 19TH, 1906.

CHAMBERS.

RE HUNTER, MOORE v. HUNTER.

Administration Order—Summary Application—Status of Applicant—Assignee for Creditors of Person Interested under Will—Issue as to Lease Made by Executors—Direction to Bring Action.

Application by Francis D. Moore, assignee for the benefit of creditors of Garner Hunter the younger, for an administration order.

W. R. Smyth, for the applicant.

C. A. Moss, for the executors.

MABEE, J.:—Counsel for the applicant, the assignee for the benefit of creditors of Garner Hunter the younger, alleged that one of the principal objects he had in view in obtaining an administration order was to attack the lease of the property given by the executors Hunter and Garlick to the executor Hunter in September last, for a term of 10 years. I suppose the applicant, as the general assignee under the statute, has the same status upon this application as the assignor would have had if the motion was made by him, but I am of opinion that this is not a case for administration upon

a summary application, and the questions arising can only be properly determined in an action. The assignee may have leave (if necessary) to bring an action for administration, as well as for such special relief as he may be advised to claim. This motion was a proper step for him to take, and the costs of it may be costs in the action, and, if none is brought within 30 days, the motion will be refused without costs.

ANGLIN, J. JANUARY 19TH, 1906.

WEEKLY COURT.

EDDY v. BOOTH.

Parties—Action for Injunction—Interference with Supply of Water—Navigable Stream—Conflicting Leases from Dominion and Provincial Governments—Attorneys-General—Necessity for Consents—Scope of Action.

Motion by defendants to stay or dismiss the action for failure of plaintiffs to bring in the Attorney-General for Canada and the Attorneys-General for Quebec and Ontario as parties, pursuant to an alleged order or direction of BOYD, C., and on the ground that without these parties the action should not be allowed to proceed.

The action was brought to restrain the defendants from prosecuting certain works upon the Ottawa river, which, as plaintiffs alleged, would unduly interfere with and lessen the supply of water to which they claimed to be entitled as lessees of certain water lots from the government of the province of Quebec. Defendants claimed the right, as lessees of the government of the Dominion of Canada, and acting with the sanction and approval of such government, to proceed with the undertakings to which plaintiffs took exception.

G. F. Shepley, K.C., and A. B. Aylesworth, K.C., for defendants.

I. F. Hellmuth, K.C., and W. Nesbitt, K.C., for plaintiffs.

ANGLIN, J.:—The action came on for trial before the Chancellor at Ottawa in December. He then expressed the view that it would not be possible to do complete justice or finally to dispose of the rights of all parties interested unless the Attorney-General for Canada were made a party to the litigation. He is also reported to have stated that "if the Crown (Dominion) and the provinces refuse to be-

come parties, that is a ground which may justify another course."

I have seen the Chancellor, and he tells me that it was his intention merely to refuse to permit the trial to proceed until plaintiffs should have taken such steps as were open to them to bring in the Dominion and the two provinces as parties. He did not determine nor intend to determine that, if plaintiffs should be unable to procure the addition of these parties to the record, their action might be perpetually stayed or dismissed. He intended, in that event, to leave it to the Judge before whom the action should be brought to trial to decide what course to pursue.

Meantime plaintiffs have applied to the Minister of Justice for his consent to add him as a party defendant representing the Crown in right of the Dominion. The letter of the Deputy-Minister in reply cannot, without hypercriticism, be deemed aught else than a refusal to give such consent. Without his consent, the Court will not make an order adding the Attorney-General as a party; and, whatever might be the effect of such an order if made in invitum, plaintiffs certainly cannot without it bring the Attorney-General in.

There is said to be a statutory obstacle which would prevent the Attorney-General for Quebec giving any consent to the addition of his name as a defendant.

The Attorney-General for Ontario has intimated that he, too, would refuse to consent to be added as representing the Crown in right of the province of Ontario. But, unless the Attorney-General for Canada should be made a party, there would be little, if anything, gained by having the provinces of Ontario and Quebec represented, and they, too, may not be added unless with their consent.

It is quite obvious that with the Crown in right of the Dominion and the Crown in right of the provinces not before the Court, the determination of several issues raised upon the record will be as difficult as it may be embarrassing and delicate, and that it will be, at all events directly, of little advantage to the parties. But the latter risk plaintiffs express their readiness to take.

If, as plaintiffs allege, defendants are, within the province, invading plaintiffs' rights, and are, to plaintiffs' disadvantage, diverting a portion of the natural flow of the waters of the river Ottawa, I do not think that such redress as this Court can give should be denied them, because in ascertaining whether plaintiffs are entitled to the relief they seek as against

the present defendants, it may become necessary to inquire into and to pass upon the title, the rights, and the interests of persons who refuse a consent without which plaintiffs are unable to bring them before the Court.

Having regard to the provisions of Rules 206 (1) and 202, the trial of this action should, in my opinion, be allowed to proceed.

This motion being in reality part of the trial, the costs will be costs in the cause.

JANUARY 19TH, 1906.

DIVISIONAL COURT.

CONNELL v. ONTARIO LANTERN AND LAMP CO.

Master and Servant—Injury to Servant—Negligence—Defective Condition of Machine—Findings of Jury.

Motion by defendants to set aside verdict and judgment for plaintiff for $1,000 and costs in an action for damages for negligence, tried before MEREDITH, J., and a jury at Hamilton, and to dismiss the action or for a new trial.

Plaintiff was a workman in the service of defendants in their factory at Hamilton. He was injured while at work upon a punching machine, which came down and cut off three of his fingers. The negligence charged was that the machine was in a defective state, "repeating" or coming down without the operation of the treadle used for bringing it down. The jury found that there was a bad nut and a loose spring. The action was brought under the Workmen's Compensation for Injuries Act.

E. E. A. DuVernet, for defendants, contended that there was no evidence of negligence to go to the jury, or, if there was, that the verdict was against the weight of the evidence.

P. D. Crerar, K.C., for plaintiff.

The judgment of the Court (BOYD, C., CLUTE, J., MABEE, J.), was delivered by

BOYD, C.:—Having read all the evidence, it appears to me that the jury could well have found as they did, and that no good reason is shewn for our interference. It is proved that the machine in question was in a defective condition, evidenced by its repeating motion at unexpected times when no pressure was put on the treadle. Defendants' own witnesses prove that the machine, which was a very old one and long

in use in the shop, and the only one of its kind, had a habit of repeating when the tension was too loose. The superintendent says the report to him was that it did not repeat of late years. But the witnesses for plaintiff say that the bad habit of repeating continued down to the time of the accident. Brydges and Burns reported the defect to the foreman Langley, whose duty it was to repair, and so did plaintiff, and Langley is not called to displace this damaging evidence. There is no proof that any sufficient measures were taken to remedy this bad habit, and all the evidence on both sides agrees that the cause of this unexpected repeating was the weakness of the spring, which might be either because it was too short, or because of the loosening of the nut from the jar of operating. Motion dismissed with costs.

BRITTON, J. JANUARY 20TH, 1906.

TRIAL.

O'SULLIVAN v. DONOVAN.

Company—Shares—Issue of Certificate—Payment by Promissory Note—Estoppel—Action to Cancel Shares—Status of Shareholder as Plaintiff—By-law of Directors—Acquiescence by Plaintiff.

Action by a shareholder in the Pure Colour Company Limited (one of the defendants) brought to have it declared that 30 shares of the stock of the company for which a certificate (as for fully paid up shares) was issued to defendant Donovan, were not in fact fully paid up, and for the delivery up and cancellation of the shares and certificate, and for indemnity by defendant Donovan to defendants the Pure Colour Co. against liability as the indorser of a promissory note given by Donovan for the price of the shares, which note had been discounted and was held by the Bank of Hamilton at the time of the commencement of the action.

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

W. M. McClemont, Hamilton, for defendants.

BRITTON, J.:—On 31st January, 1905, plaintiff and defendant Donovan were both shareholders and directors in the defendant company. On 3rd February, 1905, plaintiff subscribed for 30 shares ($3,000) of additional stock, and on the same day defendant Donovan subscribed for 30 shares ($3,000) of additional stock.

At the meeting of directors . . . held on 21st February . . . plaintiff was present, and moved a resolution authorizing the acceptance of Donovan's application for these 30 shares.

Defendant Donovan applied for and obtained certificates for these 30 shares . . . 27 on 5th April and 3 on 3rd May. . . . The note given by defendant Donovan was not given until 25th April. . . . He had from 5th to 25th April a certificate for 27 shares from the company with only $300 paid upon them. The note for $2,700, being the balance of the $3,000, was given payable 6 months after date, and so became due on 28th October, 1905.

On 19th October plaintiff's solicitors wrote to each of the defendants asking that the money be paid or that the stock be cancelled, and also asked the company to call a meeting of the directors to cancel this stock. Plaintiff knew the note had been given, and presumably knew the date of maturity . . . , and could easily have ascertained, if he did not know, that the bank held Donovan's certificate for shares as collateral security for payment of the note.

Defendants' solicitor on 20th October replied to the letters that the president of the company was in the North-West, and would be there for a month. They called attention to the fact that plaintiff himself was the holder of a certificate or certificates for unpaid stock, and they asked for a delay of proceedings until the return of the president, promising an early consideration of all matters in which plaintiff was interested. . . . Plaintiff declined to delay, and the writ in this action was issued on 23rd October. The note given for the balance on these shares was paid on 3rd November, and on that day defendants' solicitors wrote to plaintiff's solicitors notifying them of the payment of the note, and asking for a discontinuance of the action. Defendants did not offer to pay costs. To this letter, so far as appears, plaintiff's solicitors did not reply. They certainly did not offer to discontinue upon payment of costs. The parties preferred to stand on their strict legal rights, and on 6th November the statement of claim was filed. Upon the trial counsel for plaintiff conceded that, these shares having been fully paid by the payment of the note, nothing was then involved in this action but costs.

Was plaintiff in a position to maintain this action? He applied for and obtained certificates for 70 shares on 11th March. . . . He says it was a transaction not with the

company, but between him and E. R. Clarkson personally. It appears as a transaction between him and the company, and must be so considered.

On 21st February, in addition to accepting Donovan's application for 30 shares—and I think that acceptance must be considered as a formal allotment of the stock to him—there was passed by the meeting by-law No. 43 . . . . with the intention of creating upon all the shares allotted to any member, a lien for any debts, liabilities, and engagements of the shareholder to the company. Whether this by-law would be effective or not in creating a lien upon shares transferred to an innocent purchaser for value, is a question that need not concern me now. I think it was binding upon plaintiff, who was at the meeting and took part in favour of the by-law, and upon defendant Donovan, in reference to the shares they held and while they held them. The certificate of Donovan was retained by the company and handed to the Bank of Hamilton as security for the payment of the note given for the shares.

Under these circumstances, I think plaintiff could not, even if assuming to sue on behalf of all the other shareholders, maintain this action.

Then the suit ought not to be permitted by an individual shareholder if he had the means of procuring redress by the corporation itself, by a suit by the corporation, if suit necessary or otherwise, if any wrong done. Here no difficulty is shewn—no reasonable time, after notice by plaintiff, was given to defendant company to act.

This is not a case of issue of stock at a discount. It was issued at par, and the question is, simply, whether, after the note was given, and before payment of the note, it could be called paid up stock. In the absence of fraud, and where the certificate is held by the company as security for the negotiable note which was accepted for the stock, I am of opinion that there was no illegality in the mere issue of the certificate for paid up shares under the circumstances shewn.

In case of non-payment of the note, if it remained unpaid in the hands of the company, defendant Donovan's liability would remain to the creditors of the company. The certificate, in such circumstances, would not be an estoppel to the creditors if Donovan did not in fact pay the note and if the note was in the hands of the company.

I am of opinion that plaintiff was not in a position to sue, and the action should be dismissed with costs.