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BRITTON, J. MAY 15TH, 1905.

TRIAL.

FITZGERALD v. McGILL.

Partnership—Special Partner—Agreement — Construction — Liability for Losses—Salary of Active Partner—Account —Dispensing with Reference—Interest—Costs.

Action to recover $2,000 which plaintiff alleged he lent to defendant to put into a grocery business at Collingwood.

R. McKay, for plaintiff.

J. Birnie, K.C., for defendant.

BRITTON, J.:—The terms on which the $2,000 was advanced by plaintiff are stated in what defendant calls "a business letter" written by him to plaintiff, dated 21st March, 1898. . . . The letter was written at Collingwood and states: "As I am about to open out a store in this town, and understanding that you are willing to invest the sum of $2,000 in my business, I hereby accept your offer, providing that you are willing to share the losses in the business, should there be any, or, in other words, not to hold me responsible for the money invested by you if I should fail in the business. On the other hand, I promise to let you have the net profits, as your interest in this business appears, if the said business produces profits, which I anticipate it will. Further, if at any time you should want your invested money, you will require to give me, say, 2 years' notice."

Plaintiff by letter of 24th March written to defendant replied: "The terms mentioned in your letter concerning the money are quite satisfactory, and I will forward it on next week." And he did forward the $2,000, which defendant received, and started a grocery business.

It was not in the contemplation of the parties that plaintiff should have by name, or in management or in work, anything to do with the business to be established. Defendant had the sole control of it. Plaintiff never in any way interfered. Defendant now says the business did not succeed. It has been wound up, and, as there were no profits, plaintiff is not entitled to recover.

I am of opinion that plaintiff is not entitled, upon the evidence before me, to recover the $2,000 as a debt. It is quite true that defendant always speaks of the business as "my business," and there was the stipulation that plaintiff should at any time, upon giving 2 years' notice, get his "invested money;" but that was upon the clearly implied understanding that the business continued as "a going concern," and that the money remained invested in the business. Now there is no business, and, as defendant contends, no money remaining invested in it.

I am of opinion that as between these parties the matter must be treated as one of partnership, and that plaintiff is entitled, if he desires it, to have an account taken, and to have it taken upon the basis and with the direction that defendant is not entitled to the salary claimed by him as against plaintiff.

Defendant says he was, by agreement with plaintiff, entitled to wages at the rate of $55 a month, the same amount as was paid to one Darrock. This plaintiff disputes. He says there was no such agreement. It would seem quite reasonable, in ordinary circumstances, that the active partner, as against the dormant one, should receive a salary, but this is not an ordinary agreement of partnership. . . . Defendant put into this business only $963 as against plaintiff's $2,000. From all that appears, a business of this kind could have been managed by Mr. Darrock and Mr. White without defendant, or by defendant and one of the others. Defendant, with a view to building up a business and without consulting with plaintiff, incurred large expenses. I

find that there was no agreement that defendant should get a salary, and, in the absence of any agreement, and as against plaintiff, he is not entitled to charge it.

Defendant has submitted what he says is a just and true statement of all the partnership business and the accounts connected therewith, and plaintiff seems willing to accept these, instead of a reference to . . . the Master. This cannot be unfair to defendant, for, on looking at the accounts, I find there are at least some small items, apart from defendant's salary, open to question. . . .

[Items of account set out and result shewn of net loss in business of $1,673.10.]

Plaintiff contends this loss must be borne by the parties in equal shares. That is the rule, in the absence of any agreement to the contrary, but where it has been agreed to share profits in certain proportions, the inference, in the absence of any agreement to the contrary, is that losses are to be shared in the same proportion. The agreement in this case as to profits was that plaintiff was to get the net profits as his interest would appear. . . . Plaintiff's part of the loss is $1,127.67; defendant's is $545.43. Deducting the $1,127.67 from the $2,000 . . . the balance will be $872.33, which amount plaintiff is now entitled to recover from defendant.

I allow interest on this money withheld from plaintiff from 1st October, 1900 . . . at 5 per cent. per annum. This will amount to $201.71, making in all $1,074.04.

I allow any necessary amendment to meet the case made by the evidence.

Declaration of partnership, of dissolution, and that . . . defendant is indebted to plaintiff in . . . $1,074.04, including interest.

As to costs, this would be treated as an action for an account, and the old rule was to give no costs in such actions up to the decree directing the account. Plaintiff claimed the whole $2,000 as a debt; in this he has not succeeded. Defendant sought to appropriate $1,540 as salary to himself; in this he has not succeeded. So I give no costs.

MAY 15TH, 1905.

DIVISIONAL COURT.

RE LUMBERS AND HOWARD.

Landlord and Tenant — Overholding Tenants Act — Summary Proceeding by Landlord to Obtain Possession—Jurisdiction of County Court Judge—Dispute as to Length of Term—Application for Review.

Appeal by William Howard, the tenant, from order of MACMAHON, J., ante 721, dismissing motion by tenant for an order, under sec. 6 of the Overholding Tenants Act, directing the senior Judge of the County Court of York to send up the proceedings before him, under the Act, for the recovery by the landlord of possession of the demised premises, to the High Court.

W. H. Blake, K.C., for the tenant.

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

THE COURT (MEREDITH, C.J., BRITTON, J., TEETZEL, J.), dismissed the appeal with costs, holding that the case came within sec. 3 of the Act, and referring to Moore v. Gillies, 28 O. R. 358, and Re Grant and Robertson, 3 O. W. R. 846, 8 O. L. R. 297.

MAY 15TH, 1905.

DIVISIONAL COURT.

FULMER v. CITY OF WINDSOR.

BANGHAM v. CITY OF WINDSOR.

Consolidation of Actions—Different Plaintiffs—Same Defendant—Common Subject—Inconsistent Claims — Stay of Action—Setting down for Trial.

Appeal by plaintiffs in both actions from order of FALCONBRIDGE, C.J., ante 591, reversing order of Master in Chambers, ante 589, and directing that plaintiff Bangham be added as a party defendant in Fulmer's action, and staying Bangham's action.

W. M. Douglas, K.C., for plaintiff Fulmer.

A. R. Clute, for plaintiff Bangham.

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

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), allowed the appeal of Bangham, and made an order staying proceedings in Fulmer's action and directing that he be added as a defendant in Bangham's action. Costs here and below to be costs in the latter action unless the trial Judge otherwise orders. The Judge at the trial to dispose of the costs of Fulmer's action.

MAY 15TH, 1905.

DIVISIONAL COURT.

MEECH v. FERGUSON.

Sale of Goods — Action for Price — Warranty of Quality— Deduction for Inferiority—Notice of Breach.

Appeal by defendant from judgment of junior Judge of County Court of Leeds and Grenville in favour of plaintiff for the recovery of $75.57 with County Court costs in an action for $100.25, the balance of the price of two lots of cheese sold to defendant.

G. F. Henderson, Ottawa, for defendant.

W. E. Raney, for plaintiff.

The judgment of the Court (MEREDITH, C.J., FALCONBRIDGE, C.J., ANGLIN, J.), was delivered by

ANGLIN, J.:—The cheeses were sold as and warranted to be "finest" at 8 5-8 cents per lb. Defendant received and retained the cheeses, but, alleging that they were of inferior quality, remitted to defendant a cheque for $458.47, being, as he alleged, their total fair value, based for one lot, known as the South Branch lot, on a price of 7 cents per lb., and for the other lot, known as the Garatton lot, on 7 1-8 cents per lb.

In regard to the South Branch cheeses the Judge finds explicitly that they were of inferior quality, but that a fair deduction on this account would be 1 cent per lb. in lieu of the 1 5-8 cents retained by defendant; and on this head he allowed defendant $15.42. . . . A perusal of the evidence satisfies me that the Judge's finding of fact cannot be disturbed. . . .

As to the Garatton cheeses the case assumes a different aspect. Counsel for defendant argued . . . upon the footing that the Judge had found in his favour upon the question as to the quality of the cheeses, but had held his

client disentitled to a reduction in price on this account because of his failure to give prompt notice of his contention that the cheeses were inferior and to afford the vendor an opportunity to protect himself by taking back his goods, or directing some other disposition of them. A careful perusal of the reasons for judgment discloses no finding that the Garatton cheeses were of inferior quality. . . . No doubt, the Judge proceeds upon the failure of defendant to give reasonably prompt notice of his objections to the quality of the Garatton cheese. But this delay is first referred to rather as indicative of the purchaser's satisfaction with the quality than as disentitling him as a matter of strict law to compensation, if in fact the quality was inferior. . . . Though not definitely based upon the want of notice to him of objection to the cheeses, the Judge's conclusion in plaintiff's favour seems to depend almost entirely upon that ground.

This sale was of a specific lot of cheese. It was accompanied by a warranty of quality. If that warranty was broken, the purchaser's right was not to reject the cheese; his remedy was to sue for damages for breach of warranty, or he might claim a reduction on that account in the vendor's action for the price: Behn v. Burness, 3 B. & S. 755. To maintain either position it is not at all essential that he should give notice of his contention that the warranty of the vendor has been broken: Pateshall v. Tranter, 3 A. & E. 103; Fielder v. Starkin, 1 H. Bl. 17; Poulton v. Lattimore, 9 B. & C. 259.

It therefore becomes necessary to consider what, upon the evidence, should be the finding as to the alleged breach of warranty in regard to the Garatton cheeses, and, if there were breach, to what reduction in price it should entitle defendant. . . . The evidence, in my opinion, fully justifies a finding that the warranty of quality was broken. . . . My conclusion is, that a cut of 1 cent per lb. would be the proper allowance to make. This would entitle plaintiff to recover 1-2 cent per lb. or $20.05.

The judgment below should, therefore, be varied by reducing the recovery of plaintiff from $75.57 to $35.47. Taking all the circumstances into account, justice will probably be better done by allowing no costs here or below to either party.

MAY 15TH, 1905.

DIVISIONAL COURT.

SHEPPARD PUBLISHING CO. v. PRESS PUBLISHING CO.

Master and Servant—False and Malicious Statements by Servant Injurious to Business of Former Employer—Benefit of Master—Action on the Case—Trade Slander—Liability of Master—Scope of Employment—Company—Judgment against both Master and Servant—Joint Tort-feasors—Measure of Damages—Findings of Jury—Judgment Notwithstanding Wrong Finding—Rule 615.

Appeal by plaintiffs from so much of the judgment of ANGLIN, J., at the trial, upon the answers of the jury to questions submitted, as dismissed the action as against defendant company; and cross-appeal by defendant Tibbs from so much of the judgment as adjudged that plaintiffs should recover $180 and costs against him.

E. F. B. Johnston, K.C., and W. J. Elliott, for plaintiffs.

W. R. Riddell, K.C., and W. T. J. Lee, for defendant company.

D. O. Cameron, for defendant Tibbs.

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

CLUTE, J.:—The case was tried with a jury at Toronto on 3rd February, 1905, when questions were submitted to the jury, on the answers to which the trial Judge, as he was bound to do under the authority of Perkins v. Dangerfield, 51 L. T. N. S. 535, directed judgment to be entered against defendant Tibbs for $180, and for an injunction as prayed, with costs of action on the High Court scale, and dismissed the action with costs on the High Court scale as against defendant company.

Plaintiffs carry on business in the city of Toronto as printers and publishers, and are the proprietors and publishers of a newspaper called "The Toronto Saturday Night," and they also publish and sell to the publishers of newspapers throughout the Dominion of Canada, a publication known as an annual Christmas or holiday number, which is

disposed of by such purchasing newspaper publishers as a Christmas or holiday number for their papers. Plaintiffs have been publishing the said periodical for many years and allege that it is an important and lucrative part of their business, from which they have derived considerable profits. Defendant Tibbs was in the employment of plaintiffs prior to November, 1903, in the capacity of salesman, selling the periodical above referred to, and in that capacity travelled each year through different parts of the Dominion of Canada, and became personally acquainted with plaintiffs' customers. He left plaintiffs' employment in November, 1903, and entered that of defendant company.

By their statement of claim plaintiffs charge that the defendant company decided to issue a publication, under the name "Christmas Number," similar to the publication issued by plaintiffs, and to sell the same to publishers of newspapers to be issued by them as Christmas numbers for their various publications; that for the purpose of carrying out their intentions, the defendant company sent out defendant Tibbs as their salesman much earlier in the season than it was the custom of plaintiffs to send out their salesman, and that defendant Tibbs travelled as such salesman for defendant company throughout the Dominion of Canada, soliciting orders for the publication of defendant company from the various customers from whom formerly he had solicited orders on behalf of plaintiffs. They further charge that for the purpose of inducing the various customers of plaintiffs and others to give their orders to defendant company for the said publication, defendant Tibbs and defendant company, through and by Tibbs as their accredited agent and representative, falsely and maliciously made to many persons untrue and fraudulent statements, . . . intending thereby to injure the trade and business of plaintiffs, and well knowing the same to be untrue.

The statements differed somewhat from each other, but were to the effect that the Press Publishing Company (the defendant company) had taken over the business of the Sheppard Publishing Company (the plaintiffs) or that part of their business relating to the publication of the Christmas annual, and that plaintiffs were going out of that branch of the business. These words, or words to the like effect, were spoken to the different publishers, Wilson, Elliott, Featherston, Gordon, Denholm, Fanson, Ellis, and Hogg.

The questions submitted to the jury and their answers thereto are as follows:

1. Did defendant Tibbs utter the words charged or words conveying the same meaning to Wilson, Elliott, Featherston, Gordon, Denholm, Fanson, Ellis, and Hogg, or any of them? Answer: Yes.

2. To which of these men did he utter such words? Answer: To all of them.

3. Did he utter them maliciously? Answer: Yes.

4. What damages do you find plaintiffs have proved that they have sustained in consequence of each of the statements which you find Tibbs uttered? Answer: Wilson, $50; Elliott, $30; Featherston, ——; Ellis, $15; Gordon, $20; Denholm, $25; Fanson, $15; Hogg, $25.

5. Did Harkins, knowing that Tibbs had uttered the words charged, to Elliott, and knowing that they were false, and intending to do so, ratify what Tibbs had done? Answer: No.

6. Did Tibbs in uttering any of such words, which you find he did utter, act within the scope of his employment by the Press Publishing Company for their benefit? Answer: No.

7. What general damage, if any, do you find plaintiffs sustained in consequence of such statements charged, which you find Tibbs made? Answer: None.

Upon these questions and answers the trial Judge directed to be entered the judgment appealed from.

It is clear that Tibbs was employed by defendant company to sell their Christmas number, and as such agent was acting for and on their behalf and within the scope of his employment in obtaining orders for them, and the jury have found that he uttered the words charged maliciously. The defendant company received these orders and filled them and collected the subscription price; in other words, took advantage of the representations that were made by defendant Tibbs.

It is, doubtless, upon the answer to the 6th question that the trial Judge entered judgment in favour of defendant company. But how could the jury properly find that Tibbs did not act within the scope of his employment? He was sent out for the express purpose of taking subscriptions for the Christmas number, and in order to induce the persons

mentioned to give their orders he made the representations charged. These representations were false in fact, and known by him to be false. They were acted upon by the persons to whom made, to plaintiffs' injury, to the amount found by the jury. It cannot, of course, be disputed that Tibbs acted within the scope of his employment in seeking to obtain the orders, for he was sent out by defendant company for that express purpose. He was acting, therefore, within the scope of his employment in seeking to procure the orders, but the mode or manner in which he sought to procure them, in other words, the argument that he used, was not authorized by the company. But can this make any difference? The defendant company have availed themselves of his acts. They have adopted what he has done by not only accepting the orders, but when they were repudiated on this very ground by insisting upon their fulfilment. The company, having, therefore, deliberately adopted the acts of Tibbs, ought to be held responsible for his acts, of which they have taken advantage. The recent case of Citizens' Life Assurance Co. v. Brown, [1904] A. C. 423, clearly lays down the principle which, I think, governs this case. That indeed was an action for libel. The present action is an action on the case, but the principle is the same in both. Lord Lindley says (at p. 427): "The law upon this subject cannot be better expressed than it was by the acting Chief Justice in this case. He said: 'Although the particular act which gives the cause of action may not be authorized, still, if the act is done within the course of employment which is authorized, then the master is liable for the act of his servant.' This doctrine has been approved and acted upon by this Board (in Mackay v. Commercial Bank of New Brunswick, L. R. 5 P. C. 394; Swire v. Francis, 3 App. Cas. 106); and the doctrine is as applicable to incorporated companies as to individuals. All doubt on this question was removed by the decision of the Court of Exchequer Chamber in Barwick v. English Joint Stock Bank, L. R. 2 Ex. 259, which is the leading case on the subject. It was distinctly approved by Lord Selborne in the House of Lords in Houldsworth v. City of Glasgow Bank, 5 App. Cas. at p. 326, and has been followed in numerous other cases." See also Lindley's Law of Companies, 6th ed., p. 257, and the cases there cited.

It seems clear that in the present case the representations made were within the scope of the agent's employment.

"An act is said to be within the scope of the servant's employment when, although itself unauthorized, it is so directly incidental to some act or class of acts which the servant was authorized to do, that it may be said to be a mode, though no doubt an improper mode, of performing them. For an impropriety or excess on the part of the servant in the course of doing something which was authorized the master will be responsible, but not for an act wholly unconnected with the class of acts which the servant was authorized to do:" Clerk & Lindsell's Law of Torts, 3rd ed., p. 70; Beard v. London General Omnibus Co., [1900] 2 Q. B. 530. "The master's liability for the unauthorized torts of his servant is limited to unauthorized modes of doing authorized acts:" Gracey v. Belfast Tramway Co., [1901] 2 I. R. 322; and it will make no difference that the servant has express orders not to commit the impropriety. The master cannot discharge himself from liability by giving instructions to the servant as to the manner in which his duty shall be performed: Limpus v. London General Omnibus Co., 1 H. & C. 526, 538.

I am of opinion that the findings of the jury in answer to questions 1, 2, 3, and 4 and the undisputed facts of the case, if there were nothing more, entitled plaintiffs to judgment against defendant company.

It was argued by counsel that defendant company were not liable because a corporation, it was said, is not liable in an action of slander, citing Marshall v. Central Ontario R. W. Co., 28 O. R. 241; Odgers, 3rd ed., p. 435. However that may be, I do not think the present action is one of slander. It is, in my opinion, an action on the case, although the pleadings take very largely the form of an action of slander. . . .

[Reference to Ratcliffe v. Evans, [1892] 2 Q. B. 524, and Riding v. Smith, 1 Ex. D. 91.]

The present action is, in my judgment, not slander, but an action on the case for false and malicious statements made in reference to plaintiffs' business, and resulting in loss to plaintiffs. I can see no reason, in principle, why a corporation should not be held liable in such a case for the acts of its servant or agent, acting within the scope of his authority.

It was urged, however, that plaintiffs must elect against which of the defendants they will take judgment—if entitled against either—but that they cannot have it against both.

I do not think this position can be maintained. Both defendants are wrongdoers, one the master and one the servant. The master takes advantage of the servant's acts and profits by them, and is liable for his wrongdoing. Upon what principle, then, can it be said that the servant is not to be held liable for his wrongdoing? It is a general rule in cases of tort that all persons concerned in the wrong are liable to be charged as principals. . . .

[Reference to Barwick v. English Joint Stock Bank, L. R. 2 Ex. 259; Swift v. Winterbottem, L. R. 8 Q. B. 244; Mackay v. Commercial Bank of New Brunswick, L. R. 5 P. C. 394; Swire v. Francis, 3 App. Cas. 106; Clerk & Lindsell's Law of Torts, 3rd ed., pp. 56, 57, 69, 70; Limpus v. London General Omnibus Co., 1 H. & C. 526.]

Doubtless, where the tortious act is done for some ulterior motive, e.g., to gratify personal spleen, and not in the interest of his employer, his principal is not liable: Croft v. Alison, 4 B. & Ald. 590. It is not pretended in the present case that any ulterior motive induced the act.

It was further urged by Mr. Riddell that, inasmuch as defendant company had not made a profit out of the transaction, they were not liable to the amount of damages found against defendant Tibbs. But this, I think, is not so. The true measure of the master's liability is the same as if the act had been committed by himself, and is the amount of loss suffered by plaintiffs by reason of the servant's wrongful act: Clerk & Lindsell's Law of Torts, 3rd ed., p. 80.

It was also urged on behalf of defendant company that judgment having been entered against Tibbs, that was a bar to further judgment against the company: Willcocks v. Howell, 8 O. R. 576. It is quite true that, in acts of joint tort, if one of the joint tort-feasors be sued and judgment recovered against him, that is a bar to further action against his joint tort-feasors. But here the action was brought against both, judgment was obtained against one, and plaintiffs are now moving for judgment against the other. This they have a right to do: Morel Brothers & Co. (Ltd.) v. Earl of Westmorland, [1904] A. C. 11, at p. 15. In the present case, while the judgment has been settled and signed, it has not been entered. I do not think there is anything in this objection.

The question remains—having regard to the answer given by the jury to question 6—whether the case ought to be sent

back for a new trial . . . or is one properly falling within Rule 615, where the Court has before it all the materials necessary for finally determining the question in dispute. Question 6 reads: "Did Tibbs, in uttering any of such words which you find he did utter, act within the scope of his employment by the Press Publishing Company, for their benefit?" Answer: "No." Does this mean that he did not act within the scope of his employment and did not act for the benefit of the company, or does it mean that, although he acted within the scope of his employment, yet in doing so it was not for the company's benefit? Probably the former is what the jury intended. If the latter, then, in my view of the law, plaintiffs would, notwithstanding the answer to question 6, be entitled to judgment against both defendants. But, assuming the answer to negative both branches of the question, can the Court, upon the findings of the jury and the admitted facts in this case, finally determine the question in dispute without sending the case back for a new trial? . . .

[Reference to Hamilton v. Johnson, 5 Q. B. D. 263; Yorkshire Banking Co. v. Beatson, 5 C. P. D. 109; Lancey v. Brake, 10 O. R. 428; Stewart v. Rounds, 7 A. R. 515; McConnell v. Wilkins, 13 A. R. 438; Rowan v. Toronto R. W. Co., 29 S. C. R. 717; Donaldson v. Wherry, 29 O. R. 552; Clayton v. Patterson, 32 O. R. 435; Jackson v. Grand Trunk R. W. Co., 2 O. L. R. 689, 32 S. C. R. 245; Sibbald v. Grand Trunk R. W. Co., 18 A. R. 184, 207; Jones v. Howe, L. R. 5 Ex. 115; Millar v. Toulmin, 17 Q. B. D. 603; Ogilvie v. West Australian Mortgage and Agency Corporation, [1896] A. C. 257.]

It is, perhaps, difficult to reconcile all the Canadian cases with the later English cases . . . as to when the power given by Rule 615 ought to be exercised. But, having regard to the facts in each particular case and the manifest object of the Rule, it would seem to be proper to exercise the power there given in any case in which, upon the facts known, no jury would be justified in finding a contrary verdict, and where there is no reason to suppose that on a second trial further evidence may be adduced or that facts may be more fully brought out which may change the result, and provided all necessary materials are before the Court for finally determining the question at issue between the parties. The Court is not justified in discarding the findings

of a jury simply because it is dissatisfied with them, nor can the Court be substituted for a jury in determining the facts, where there is reasonable evidence pro and con, that ought to be submitted to a jury.

In the present case, taking the view that I do of the liability of defendant company for the acts of their agent, and it being clear that the agent was acting in the course of his employment in canvassing for subscriptions, although he made statements which were not authorized by the company, no finding such as is made in answer to question 6 can be sustained, nor is there any reason to think that new light can be thrown upon the case by a new trial. There can, therefore, be no object, so far as I can see, in sending the case back for a new trial, when, upon the view taken, only one result ought to follow.

I am, therefore, of the opinion that judgment should be entered against both defendants with costs, and that plaintiffs' appeal should be allowed with costs, and the appeal of defendant Tibbs be dismissed with costs.

BOYD, C., TEETZEL, J. MAY 16TH, 1905.

ELECTION COURT.

RE SAULT STE. MARIE PROVINCIAL ELECTION.

Parliamentary Elections — Corrupt Practices — Summary Trial of Offenders—Jurisdiction over Foreigners—Service of Summonses in Foreign Country—Application of Con. Rule 162 (e)—Furnishing Refreshments to Voters—Procuring Personation of Voters—Procuring Unqualified Persons to Vote—Providing Free Transportation for Voters—Transportation by Water—Construction of Statute—Ejusdem Generis Rule — Fines—Costs—Imprisonment—Evidence of Person Accused—Certificate of Indemnity.

Summonses against Galvin, Coyne, Kennedy, and Lamont, for corrupt practices committed at a provincial election.

E. E. A. Du Vernet, for prosecutor.

R. McKay and W. M. McKay, for the accused.

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

BOYD, C.:—The preliminary objection in the cases of Galvin and Coyne as to want of jurisdiction ought not to prevail. These persons, claiming to be American citizens,

have thought proper to intervene in the conduct of the Sault Ste. Marie provincial election, and have been proved to have committed illegal and corrupt acts in connection therewith. The fact of foreign nationality or residence is the only matter which can be urged to exempt them from the penal consequences of their violation of the statute. But they have attorned to the jurisdiction of the Ontario Court by promoting and committing unlawful acts affecting the public election, which were consummated within the territorial boundary of the province. We are satisfied that both objectors are aware of the summonses and might have been present in person had they so desired, and we are empowered to pronounce judgment in their absence: Election Act, sec. 188 (5). Each summons was personally served on these persons when out of the jurisdiction, and the complaint is as to torts or violations of the Election Act committed within the jurisdiction of the province. It was argued that there was no rule or practice permitting service in such cases outside of Ontario. Con. Rule 162 (e) applies to a tort within the jurisdiction, and this Rule is made applicable to proceedings in the Election Courts by Rule LXIV., passed 23rd December, 1903, by the Judges of the Court of Appeal for Ontario, under the authority conferred by R. S. O. 1897 ch. 11, secs. 112, 113.

As to Patrick Galvin it is proved that he furnished meat and drink and refreshment to voters while going to and returning from the polls within the jurisdiction of the Court, in going to Michipicoten Harbour and Helen Mines and returning therefrom on 26th, 27th, and 28th October, 1903, contrary to sec. 162 of the Election Act. We further find Galvin guilty of having aided and abetted, counselled and procured, the commission of the offence of personation of voters, contrary to the provisions of sec. 167 of the Act, and of having induced and procured persons to vote at the election knowing that they had no right so to vote. For this offence a penalty of $100 is imposed. For the former offence a penalty of $200 is imposed: see sec. 162 (1) and sec. 188 (7) of the Act. The costs of and incidental to this prosecution to be paid by Galvin after taxation. The prosecutor electing to recover these amounts by process sued out of the High Court, the payment thereof by Galvin is ordered forthwith.

As to William Coyne, we find it proved that he provided free transportation for voters on the railway from Michipicoten Harbour to Wawa and return transportation on the

said railway free of charge. The penalty of $100 is imposed, pursuant to sec. 165 of the Act, and costs of prosecution. We find it proved also that Coyne provided for the giving of meat, drink, refreshments, and provisions in a miscellaneous manner to voters during the election for the purpose of influencing persons to vote, and for this the penalty of $200 is imposed with all costs of and incident to the prosecution. These sums, as the prosecutor elects, to be recovered as in the case of Galvin. We do not find that any penalty can be imposed for the free transportation provided by Coyne by means of the steamer "Minnie M." The statute contemplates transportation by land and not on water. "Railway, cab, cart, waggon, sleigh, carriage, or other conveyance," are the words used, and, on the principle of noscitur a sociis, the last larger word "conveyance" cannot be so enlarged as to take in a steam vessel propelled on the water. See sec. 165 (1), (2), (3), of the Election Act.

As to Kennedy, his own evidence exculpating himself is more than countervailed by independent evidence given by the prosecutor. Kennedy was put in charge of the boat and its supplies, and on reaching Canadian waters these supplies of provisions and drink were furnished free to the voters on board both before and after and on the polling day. For this Kennedy is responsible, and he is found guilty under sec. 162 of the Act, and a penalty of $200 and costs is imposed. He is also guilty of assisting in the personation of voters and procuring and inducing those to vote who had no right so to do, contrary to secs. 167 and 168 of the Act, and for this a penalty of $100 and costs is imposed. Each of these fines and costs, if not paid within one week after taxation of the costs, shall be enforced by imprisonment of Kennedy for 6 months in the Central prison unless the amount of the penalties and costs shall be sooner paid: see sec. 188 (11), (15).

Upon the summons issued calling on J. B. Lamont to shew cause why he should not be found guilty of certain alleged corrupt practices under the Election Act of Ontario—such as illegally paying railway fares of voters and providing refreshment for voters, contrary to the statute, and for bribing certain voters—the only evidence taken was that of the person accused, which was given under the general objection raised by his counsel that he should not be called on to criminate himself. We directed him to give evidence, and he did so, making personally no objection to answer any of the questions asked. His own evidence is sufficient

to shew that he has in some respects acted in contravention of the provisions of the Election Act, and is exposed thereunder to certain punishment in the way of penalties. It was argued that his evidence was taken under the provisions of the general Act as to testimony, 4 Edw. VII. ch. 10, sec. 21 (O.), by which it is provided that no one shall be excused from answering on the ground of possible self-incrimination, provided that he objects to answer on that ground. The general claim of privilege, however, was made on behalf of Lamont by his counsel at the outset, and, besides this, the provisions of the general Evidence Act do not derogate from or supersede the special and particular provisions of the Election Act as to the investigation of corrupt practices and the trial of persons connected therewith. By the Election Act the person examined is not excused from answering on the ground of possibly or surely inculpating himself; he must answer, but his testimony is not to be used against himself in that inquiry, and, if he answers truly, he is entitled to claim a certificate of indemnity: sec. 189 (a) and (b). The new section of the Evidence Act applies only to cases where "but for the section the witness would have been excused from answering," and this is manifestly not such a case, where the evidence is by the prior Election Act compellable. Lamont, having answered truly (so far as we can judge) all the questions put to him, is entitled to be indemnified against any penal results which might otherwise follow from the disclosures he has made, and he cannot in this proceeding be convicted on his own testimony, and against him there is no other. He gets his certificate and pays no costs.

MAY 17TH, 1905.

DIVISIONAL COURT.

DONOVAN v. TOWNSHIP OF LOCHIEL.

Nuisance—Fouling Watercourse—Ditch Constructed to Carry Refuse from Factory—Liability of Municipality—Trespass—Local Board of Health.

Appeal by defendants from judgment of STREET, J., ante 222.

J. Leitch, K.C., for defendants.

D. B. Maclennan, K.C., for plaintiff.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), dismissed the appeal with costs.

OSLER, J.A. MAY 17TH, 1905.

C.A.—CHAMBERS.

CLIPSHAM v. TOWN OF ORILLIA.

Court of Appeal—Leave to Appeal from Order of Divisional Court—Trifling Amount—Questions of Fact—Controvertible Decision below—End to Litigation.

Motion by plaintiff for leave to appeal from order of a Divisional Court, ante 298, reversing the judgment of Anglin, J., at the trial, 4 O. W. R. 121.

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

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

OSLER, J.A.:—I think leave to appeal should not be granted. The judgment is for $75 only, and could not be increased even were the proposed appeal to be successful. The question is, whether there are special reasons for treating the case as exceptional and allowing a further appeal: 4 Edw. VII. ch. 11, sec. 76 (1) (g).

It is said that actions are pending at the suit of other persons arising out of the facts on which plaintiff relies to maintain this action. It does not, however, appear, nor indeed was it asserted, that these actions were to abide the event of this action. In them the facts may be more fully brought out, and further evidence given in support of the contention that defendants were in fact maintaining the temporary dam which caused, as it is said, the injuries of which plaintiff complains, or that it was maintained on defendants' property after notice to them to remove it, or that it was or was not a necessary part of the works which defendants were authorized to construct, and which they took over from their contractor.

The questions on which the judgment of the Divisional Court is founded are very much, if not altogether, questions of fact. It is contended that the Court took a wrong view of these facts upon the evidence; but, where the amount involved is so trifling, I doubt if that can be regarded as a special reason for treating the case as exceptional and allowing further litigation, at all events in the absence of some clear indication of mistake or error in dealing with the evidence as a whole, or unless it is plausibly shewn that on no reasonable view of the case ought the Court to have

arrived at the conclusion complained of upon the facts as presented.

So, too, as regards the questions of law. The motive of every appeal is, or ought to be, that the decision complained of is wrong in law upon the facts proved or which ought to be taken to be proved. Yet it is now an accepted principle that in many cases interest reipublicæ that litigation should cease at some stage short of the ultimate general court of appeal; even though the decision in the particular instance may be open to doubt. I do not say that is so in this case. I only say that where the amount at stake is very small, the fact that the decision either on the facts or the law may be thought controvertible is not by itself a special reason for treating the case as exceptional and allowing a further appeal.

The case of Attorney-General v. Todd-Heatley, [1897] 1 Ch. 560, referred to by Mr. Hodgins, was the case of a prosecution at the suit of the Crown for the abatement of a nuisance, and is not opposed to the authorities cited by the Chancellor in the last paragraph of his judgment (ante 302) as to what is necessary in the case of an action at the suit of a private person against one on whose land a nuisance created by a former owner is continued.

Motion dismissed with costs.

CARTWRIGHT, MASTER. MAY 18TH, 1905.

CHAMBERS.

WALLACE v. ORDER OF RAILROAD TELEGRAPHERS.

Writ of Summons—Service on Unincorporated Foreign Association—Parties—Service on Officers.

Motion by defendants to set aside service of writ of summons.

J. G. O'Donoghue, for defendants.

W. J. Tremeear, for plaintiffs.

THE MASTER:—Defendants are an unincorporated mutual benefit association, having their office at St. Louis, Missouri. In July, 1893, they received a certificate under R. S. O. 1897 ch. 203, sec. 10, sub-sec. 3 (a), exempting them from the operation of that Act. The certificate is still in force.

On 9th June, 1900, a certificate of membership was issued to one Vincent, by which it was agreed that, subject to certain conditions therein set out, the mutual benefit department of defendants, on proof of death of Vincent, would pay to plaintiffs such sum (not exceeding $500) as should be realized from an assessment levied on account of such death. It was further provided that "this certificate is issued and delivered and any claim thereunder shall be payable at the office of the said mutual benefit department in St. Louis, Missouri, and not elsewhere."

Vincent having died, plaintiffs commenced an action to recover the amount payable under the certificate. The writ of summons was served on Mr. Campbell, the third vice-president, who resides at Toronto, and also on D. L. Shaw, assistant secretary-treasurer, at London. . . .

The position of such unincorporated associations was considered to some extent in the case of Wintemute v. Brotherhood of Railroad Trainmen, 27 A. R. 524. The effect of that decision seems to be that such bodies are exempt from the provisions of the Acts relating to insurance. The question of service was not dealt with. It would seem, however, to follow from the recent judgment in Metallic Roofing Co. of Canada v. Local Union No. 30, 9 O. L. R. 171, ante 95, that the motion in the present case must prevail. . . .

Though the point was not in question, it would seem probable that, in some circumstances, plaintiffs might have recourse to Rule 200. But this must remain for future consideration. . . .

The motion must be granted.

But, as the point is new, the costs will be in the cause.

BRITTON, J. MAY 18TH, 1905.

CHAMBERS.

RE MANNING v. GORRIE.

Division Court—Jurisdiction—Account Involved—Balance of Unsettled Account over $400—Prohibition.

Motion by defendant for prohibition to the 10th Division Court in the county of York.

G. Grant, for defendant.

A. G. Slaght, for plaintiff.

BRITTON, J.:—The claim presented to the 10th Division Court and sued upon there is for a balance upon a contract for building a house, and is put as follows:

To amount of contract price.....	$930
By cash paid on account	835
Balance	$ 95

According to Re Lott v. Cameron, 29 O. R. at p. 72, this does not disclose on the face of the proceedings want of jurisdiction.

At the trial, apparently, the claim was not considered as a settled balance which plaintiff was entitled to recover without going into the account.

Plaintiff's affidavit for speedy judgment does not state his claim as balance on settlement, but simply $95 for materials furnished and work done in connection with house, etc.

On the trial judgment was given for plaintiff for $60.

Plaintiff now says that the balance was not $95, but $87.50, for which he should have sued.

The certificate of the Judge presiding in the Division Court is that he held that there was jurisdiction by reason of defendant signing the contract produced at the trial, fixing the amount at $930, and this he considered as settling and determining the account between the parties at $930 so as to make the amount now claimed not an unsettled account of over $400 under sec. 79 of the Division Courts Act, but a balance of a settled account, which he held may be any amount so long as it is settled between the parties by their contract or otherwise.

The learned Judge was, in my opinion, wrong in this. It is a case where, if only discretionary to grant prohibition by reason of want of jurisdiction not appearing on the face of the proceedings, I should exercise the discretion in favour of making the order. Kreutziger v. Brox, 32 O. R. 418, seems to me in point.

Order to go for prohibition, with costs, which I fix at $20.

TEETZEL, J. MAY 18TH, 1905.

WEEKLY COURT.

RE BARRETT.

Will—Gifts to Religious Societies—Charitable Uses—Time of Execution of Will—Computation of Six Months—Religious Institutions Act—Special Act—Provisions as to Execution of Will Six Months before Death—Repeal by Mortmain Act of 1892 (R. S. O. ch. 112)—"Land"—Proceeds of Sale—Mortmain Act of 1902—Effect of.

Motion by executors under Rule 938 for order declaring construction of will of Deniza Jane Barrett, deceased, the question for determination being, whether the gifts to the trustees of the Regular Baptist Church at Port Rowan, the Regular Baptist Home Missionary Society, and the Regular Baptist Foreign Missionary Society, were valid.

C. F. W. Atkinson, Port Rowan, for executors.

H. L. Drayton, for charitable devisees and legatees.

G. F. Shepley, K.C., C. P. Smith, and A. H. Backhouse, Aylmer, for other legatees.

TEETZEL, J.:—The estate consists of $3,900 realty and $6,041 personalty.

The will was executed on 4th December, 1903, and the testatrix died on 4th June, 1904, and one question raised upon the motion was as to whether the full period of 6 months had elapsed between the making of the will and the death of the testatrix; but I do not consider it necessary to determine that question, in my view of the effect of the provisions of the Mortmain and Charitable Uses Act, R. S. O. 1897 ch. 112, and the Mortmain and Charitable Uses Act, 1902.

The testatrix gave and devised all her real and personal estate to her executors and trustees, to sell, and, after payment of certain small legacies and debts and expenses, . . . to keep the residue of the moneys realized . . . and invest it in government bonds or other securities allowed by the laws of Ontario, and to pay the interest thereon to the trustees from time to time of the Regular Baptist Church at Port Rowan, upon certain conditions, and on failure of compliance

with the conditions, to pay one-half of the moneys to the Regular Baptist Home Missionary Society and the other half to the Regular Baptist Foreign Missionary Society for their sole use.

By 50 Vict. ch. 91 (O.) the said Missionary Societies or "Boards" . . . are authorized to receive gifts and devises of real and personal property, "provided that no gift or devise of any real estate or of any interest therein shall be valid unless made by deed or will executed by the donor or testator at least 6 months before his death."

Section 24 of R. S. O. 1897 ch. 307, being the Act respecting the Property of Religious Institutions, provides that any religious society may, by the name thereof or in that of trustees, etc., take by gift or devise any lands, etc., "if such gift or devise is made at least 6 months before the death of the person making the same," etc.

On the assumption that the full period of 6 months had not elapsed between the execution of the will and the death of the testator, and assuming also that the devise was one of "land" within the meaning of R. S. O. ch. 112, which provides that "land may be devised by will to or for the benefit of any charitable use," without any provision or condition that such will should be made at least 6 months before testator's death, Mr. Shepley argued that, notwithstanding said section, the above cited statutes giving the authority to the charities in question here to receive devises of real estate, subject to the proviso that the same should be made at least 6 months before the testator's death, still remained in force, and that the gifts of land in this case, therefore, had not been emancipated from this condition by virtue of ch. 112.

I am of opinion that this argument cannot prevail.

The provisions of ch. 112 first became law on 14th April, 1892, subsequent to both the above statutes. The Mortmain Act 9 Geo. II. ch. 36 having been held to be in force in Ontario, it was impossible by will to devise lands to charitable uses except as provided for by the Religious Institutions Act, or by special Acts such as 50 Vict. ch. 91, above cited.

The object of ch. 112 was evidently to remove every fetter upon testamentary power in favour of any charity, subject only to conditions therein mentioned, and it should be construed as an enabling Act and as impliedly repealing all inconsistent or repugnant limitations and conditions contained

in any previous Act curtailing the power of a testator to make an effective devise in favour of any charity at any time.

To hold that, notwithstanding sec. 4 of ch. 112, a devise in favour of a religious institution would fail unless the will was made at least 6 months before testator's death, would, I think, be to largely defeat the purposes of the Act.

It has long been held that gifts for religious purposes are within the term "charitable gifts or uses:" see Tyssen's Charitable Bequests, p. 118 et seq.; also Re Johnson, Chambers v. Johnson, 5 O. L. R. 459, 1 O. W. R. 806, 2 O. W. R. 289.

The 6 months' limitation contained in said two Acts, being inconsistent with and repugnant to the provisions of ch. 112 as to wills, must be regarded as impliedly repealed thereby. See In re Douglas, [1905] 1 Ch. 279 . . . The Queen v. Commissioners of Inland Revenue, 21 Q. B. D. 569; Hardcastle's Statute Law, 3rd ed., pp. 330 and 334; Maxwell on Statutes, 3rd ed., p. 214; Endlich on Statutes, secs. 205, 208, 230.

The argument proceeded on the assumption that the gift was of "land," and I have so far dealt with it in the same way. I think, however, that the gift is not of land, as interpreted by sec. 3 of ch. 112, but is a gift of "personal estate arising from or connected with land," within the meaning of sec. 8, which reads: "Money charged or secured on land, or other personal estate arising from or connected with land, shall not be deemed to be subject to the provisions of the Statutes of Mortmain or Charitable Uses as respects the will of a person dying on or after the 14th day of April, 1892, or as respects any other grant or gift made after that date."

The effect of this section is, I think, to enable a testator, as in this case, to devise his lands to his executors to sell and to pay the proceeds to a charity, freed from the provisions of the Mortmain Acts, so that it may be given as freely to a charity as pure personalty could always be given.

This is the view taken by Mr. Bristow in his treatise on the English Mortmain Act of 1891, pp. 33-35.

In sec. 3 of the English Act "land" is defined exactly as it is in sec. 3 of both the Ontario Acts, namely, "'Land' in this Act shall include tenements and hereditaments, corporeal or incorporeal, of any tenure, but not money secured on land or other personal estate arising from or connected

with land." But the English Act of 1891 has not a section corresponding with sec. 8 of ch. 112. . . .

[Reference to In re Sidebottom, [1902] 2 Ch. 389; In re Ryland, [1903] 1 Ch. 467.]

As against the right of the charities to take, it was further argued that, notwithstanding the provisions of ch. 112, the power of a testator by will to give lands or personal estate was restricted by the Mortmain and Charitable Uses Act of 1902 to wills made at least 6 months before the testator's death, by virtue of sub-sec. (6) of sec. 7 of that Act. But Re Kinney, 6 O. L. R. 459, 2 O. W. R. 881, is a distinct decision against this contention. The statute R. S. O. ch. 112 was based upon the English Act of 1891, and the Ontario statute of 1902 was based upon the English Act of 1888, and in In re Hume, Forbes v. Hume, [1895] 1 Ch. 422, it was held that sec. 4 of the Act of 1888, which corresponds with s. 7 of our Act of 1902, was, so far as it applied to wills, inconsistent with and repealed by sec. 5 of the Act of 1891, which corresponds with sec. 4 of ch. 112, and remains in force only so far as it is applicable to deeds.

The legislature of Ontario in enacting our statute of 1902 from the English Act of 1888, after having enacted ch. 112 based upon the English Act of 1891, which, as construed by In re Hume, had repealed sec. 4 of the Act of 1888, so far as respected wills, presumably had this fact in mind when in sec. 1 of the Act of 1902 it was provided that the Act should be read as part of R. S. O. ch. 112, and when introducing sec. 7, corresponding to sec. 4 of the English Act of 1888, by the words "subject to the provisions of the Revised Statutes chapter 112," etc.

The result . . . is, I think, to put our two Acts practically in the same position as the two English Acts stand, as determined by In re Hume, and therefore sec. 7 of the Act of 1902 does not apply to wills, but only to assurances inter vivos. See Re Kinney, above cited.

The declaration will, therefore, be in this case that the gifts to the charities are valid.

The costs of all parties to be paid out of the estate.

TEETZEL, J. MAY 18TH, 1905.

WEEKLY COURT.

RE HUYCK.

Will—Gift to Religious Society—Mortmain Act—"Charitable and Philanthropic Purposes"—Uncertainty in Objects of Gift.

Motion by executors under Rule 938 for order declaring construction of will of Thomas Huyck deceased.

J. R. Brown, Picton, for executors.

G. H. Watson, K.C., for the charitable legatees.

W. E. Middleton and P. C. Macnee, Picton, for other beneficiaries.

TEETZEL, J.:—The will is dated 4th October, 1900, by which the testator gave all his real and personal estate to his executors upon trust to sell and convert into money, and out of the proceeds to pay debts, funeral and testamentary expenses, and certain personal legacies, and then follows a gift of the residue to the West Lake Monthly Meeting of Friends (Hicksite) of West Bloomfield, to be applied in charitable and philanthropic purposes as said Monthly Meeting or Society may direct. By codicil dated 3rd December, 1904 (the day before testator's death) the testator, after expressly revoking the gift to the Friends Society, gives some further money legacies, and closes his codicil as follows: "All the rest and residue of my estate not by me in my said will or by this my codicil thereto disposed of, I give and bequeath to the West Lake Monthly Meeting of Hicksite Friends of West Bloomfield to be applied or expended by the said Monthly Meeting or Monthly Meeting or Society may direct, and I direct my said Society in charitable and philanthropic purposes as the said trustees to hand over the said residue to the trustees of the said Monthly Meeting or to such committee or trustees as the said Monthly Meeting may appoint to receive same. And I do hereby ratify and confirm my said will in all other respects."

The estate consists of about $5,800 personalty and $1,600 realty.

The question for determination is, whether the residuary gift to the Society of Friends is valid. . . .

It is immaterial under the present law whether the testamentary assurance to a charity was made more or less than 6 months prior to testator's death. . . .

[Reference to Re Barrett, ante 790.]

I was at first very much impressed with Mr. Middleton's argument that this gift is void for vagueness and uncertainty in the objects to be benefited, in other words, that the purposes of the gift were so indefinite as to make it impossible either for the persons authorized to distribute or for the Court to make selections with any certainty; that the word "philanthropic" is wide enough to comprise purposes which are not charitable within the meaning of that word adopted by the Courts in considering gifts to charity; and that the words "charitable" and "philanthropic" gave a discretion to select either "charitable" or "philanthropic." . . .

[Reference to Re MacDuff, [1896] 2 Ch. 451; Re Jarman, 8 Ch. D. 584; Toronto General Trusts Co. v. Wilson, 26 O. R. 671; Ellis v. Shelby, 43 R. R. 188; Williams v. Kershaw, 42 R. R. 269; Grimond v. Grimond, 21 Times L. R. 323.]

It will be observed that in all these cases the conjunction "or" is used between the word "charitable" and the other descriptive word. I find no case where the word "and" has been used between the two descriptive words in which the gift has not been sustained, nor is there any case where the word "and" has been construed as giving a choice of purpose to the trustee, except Williams v. Kershaw, where 3 and not 2 descriptive words were used, and that case and Ellis v. Shelby and Re Jarman were cited in In re Best, [1904] 2 Ch. 354, in which it was held that the gift of a residue upon trust for "such charitable and benevolent institutions" as the trustees shall determine, is not void for uncertainty, but is a good charitable gift. . . .

[Reference to In re Sutton, 28 Ch. D. 464.]

In the present case I think charity was the dominant idea in the mind of the testator, and, while it is true that certain purposes may be philanthropic and not charitable in the ordinary sense, it is common knowledge that many subjects for benefaction are both charitable and philanthropic. For subjects possessing these common attributes reference need

only be made to many valid charitable uses specified in sec. 6 of the Mortmain and Charitable Uses Act of Ontario, 1902, . . . Without, therefore, discussing either the scope or the limitation of the meaning of either of these words, I think that "charitable" was the controlling word in the mind of the testator, and that it governs the whole gift, which can with certainty be administered either by the persons charged with selecting the purposes or by the Court.

Reference may also be had to In re Hunter, [1897] 1 Ch. 518; In re Douglas, 35 Ch. D. 472.

Order declaring the gift of the residue in the codicil a valid gift. Costs of all parties to be paid out of the estate.

ANGLIN, J. MAY 18TH, 1905.

TRIAL.

BLUMENSTIEL v. EDWARDS.

Set-off—Claim and Counterclaim — Costs — Powers of Trial Judge—Rules 253, 1130, 1165—Solicitor's Lien.

Settlement of minutes of judgment pronounced after trial of action and counterclaim with a jury.

G. M. Clark, for plaintiffs.

R. McKay, for defendant.

ANGLIN, J.:—Plaintiffs sued upon promissory notes for $1,506.30. Defendant did not dispute his liability upon these notes, but counterclaimed for damages for malicious prosecution, and was awarded by the jury the sum of $300. Judgment was ordered to be entered for plaintiffs for their debt and costs of action. I directed that against this, pro tanto, shall be set off defendant's verdict and his costs of counterclaim.

Upon settlement of the judgment two questions have arisen: (a) as to whether I intended such set-off to be effective notwithstanding any lien for costs which defendant's solicitors may claim; (b) if so, whether, in view of Rule 1165, I had power to so direct.

Under Rule 253 (Rule 375 of 1888 and 169 of the O. J. Act of 1881) my power as trial Judge to direct any set-off which I deem necessary or proper to do complete justice between the parties litigant, seems to me abundantly clear: Brown v. Nelson, 11 P. R. at p. 126. My discretion as to the disposition of these costs, conferred by Rule 1130, seems to be unfettered. I have never understood Rule 1165 to interfere with or diminish it. No doubt, where the judgment at the trial does not direct a set-off, the taxing officer's power to allow it is comparatively restricted, as is also that of a Judge in Chambers: Molsons Bank v. Cooper, 18 P. R. 396; Link v. Bush, 13 P. R. 425. All the authorities cited deal with the jurisdiction of the taxing officer and of the Court on appeal from him, where no set-off has been directed by the judgment under which the taxation is had. . . .

This is eminently a case in which the solicitors undertaking the business of the counterclaim should have satisfied themselves of their client's ability to pay them for it: Pringle v. Gloag, 10 Ch. D. 676. They knew of his liability to plaintiffs for a large sum of money. With that knowledge, they chose to counterclaim in the very action in which plaintiff sought recovery of his debt. The solicitors must have known that it was highly probable that the balance of indebtedness would turn out to be against their client. That risk they incurred. Having taken it, they cannot now ask the Court to compel plaintiffs, to whom defendant owes a large balance, their chances of collecting which seem slight, to increase that balance by paying defendant's solicitor and client costs. Having, as I believe, the power to prevent such an injustice being done the plaintiffs, I feel bound to exercise it, notwithstanding whatever hardship it may seem to entail on the solicitors. . . . more apparent than real, because, if they are unprotected, they took the risk of finding themselves in that position with full knowledge of the facts.

The judgment should, therefore, to carry out my intention, expressly direct that the amount recovered by defendant on his counterclaim for damages and costs, shall, notwithstanding any claim of lien on the part of the solicitors, be set off pro tanto against the sum awarded to plaintiffs for debt and their taxed costs.

CARTWRIGHT, MASTER. MAY 19TH, 1905.

CHAMBERS.

HOUSTON v. HOUSTON.

Venue—Motion to Change — Convenience — Expense—Early Trial.

Motion by defendants to change the place of trial from Guelph to Brampton or Orangeville.

W. E. Middleton, for defendants.

C. A. Moss, for plaintiffs.

THE MASTER:—This action was brought in June, 1904, by a man and his wife to set aside a conveyance made by them in December, 1899, to their son, the principal defendant. At the time of the execution of the deed in question the son executed what is called an annuity deed, by which certain benefits were secured to plaintiffs and to their children, the other defendants. The plaintiffs and the principal defendant reside in the county of Peel, but the other defendants are in different parts of the province and one in the United States. There is no statement in any of the affidavits of how many witnesses will probably be called on either side. But, assuming Brampton to be the natural place of trial, plaintiffs' solicitor's affidavit states that the expense of going to Guelph will not be more than $1.50 for each witness, and that it is easy to drive from Caledon to Guelph. . . .

[Reference to McDonald v. Dawson, 8 O. L. R. 72, 3 O. W. R. 773; Saskatchewan Land and Homestead Co. v. Leadley, ante 449; Halliday v. Armstrong, 3 O. W. R. 410.]

In the present case the affidavits are very meagre, especially on the part of defendants, and do not give sufficient data to form a satisfactory judgment on the question of convenience. Whatever may be the truth on this point, it is not to be overlooked that this case can be tried at Guelph on 26th June next, whereas, if the motion succeeds, there will be a delay of 3 or 4 months. . . .

Under all the facts, the motion cannot succeed. Plaintiffs should not be delayed in having their rights determined and being left free to make such disposition of their estate as they may see fit if the impeached conveyance be set aside.

Motion dismissed. Costs in the cause.

This disposition of the motion is made on the assumption that the case will be tried at the ensuing Guelph non-jury sittings. If, for any reason, this should not be done, defendants are to be at liberty to move again, if so advised. . . .

ANGLIN, J. MAY 18TH, 1905.

TRIAL.

MILLOY v. McCLIVE.

Mortgage—Sale under Power—Surplus Proceeds—Distribution—Priorities—Receiver—Second Mortgagee—Claim of Receiver for Costs, Charges, and Expenses—Reference—Report—Claim to Moneys Paid by Mistake—Res Judicata—Estoppel—Amendment—Costs.

Colin and Effie Milloy, two of the plaintiffs, were, subject to an annuity in favour of one Euphemia Milloy, the beneficial owners of a wharf in the town of Niagara, of which James Aikins, their co-plaintiff, was appointed receiver by the Court. Defendants McClive and Gilleland were the personal representatives of the former first mortgagees of this property. Defendant Rowley held a second mortgage upon it.

In 1899 defendants McClive and Gilleland, in the exercise of the power of sale contained in the mortgage which had devolved upon them, sold the interest of plaintiffs Colin Milloy and Effie Milloy in the mortgaged premises, for $14,000. The solicitors for the mortgagee-vendors received the purchase money, of which, after their clients' claim had been satisfied, there remained a surplus of $3,419.21. This they distributed, paying $2,341.98 to plaintiff James Aikins as receiver, and the balance, $1,077.23, to defendant Rowley as second mortgagee.

Plaintiff Aikins passed his accounts as receiver before the local Master at St. Catharines on 23rd March, 1901, when, after debiting $2,341.98 received from defendants McClive and Gilleland, and all other moneys received by him, there was found to be a balance due him of $644.86, which sum plaintiff Aikins now sought to recover from defendants, on the ground that his right as receiver to payment of the full amount of his costs, charges, and expenses, according to the report of the Master, was prior to any claim of defendant Rowley as second mortgagee, and should have been satisfied in full before any moneys were paid to the latter.

E. E. A. DuVernet and A. C. Kingstone, St. Catharines, for plaintiff.

G. Lynch-Staunton, K.C., and A. W. Marquis, St. Catharines, for defendants McClive and Gilleland.

H. H. Collier, K.C., for defendant Rowley.

ANGLIN, J. (after setting out the facts):—The priority of the receiver over the second mortgagee is in effect, though not in terms, declared by the Master's report of 23rd March, 1901, confirmed on appeal by Robertson, J. Although, by order of the Chancellor of 5th October, 1900, the Master had been ordered to take accounts, tax costs, settle priorities, and report as to the proper distribution between the parties to the action in which the order was made—an action brought by S. R. Rowley against James Aikins—of any sum or sums arising from the sale of the property in respect of which Aikins was appointed receiver or agent, his finding is expressly restricted to a declaration that Aikins "was and is entitled to receive and retain in priority to the claim of Rowley under the said mortgage," the sum of $2,341.84 which he had received from the first mortgagees. On this reference plaintiff Aikins and defendant Rowley were represented. Defendants McClive and Gilleland were not parties and were not represented. . . .

If the sale of the property in 1899 is to be regarded as an act of the mortgagees—without the concurrence or approval of the receiver—it would probably be an undue interference and a contempt of Court. But this sale was manifestly had with the full assent of the receiver, and the approval of it by the Court may be inferred from the order of the Chancellor . . . of 5th October, 1900, above mentioned. McClive and Gilleland must, therefore, be deemed to have distributed the proceeds of that sale as delegates or agents of the receiver. The distribution made having been pursuant to his directions and with his full assent and approval, the receiver can have no claim against defendants McClive and Gilleland to account for moneys so paid over. The action against them fails and must be dismissed with costs.

In this view of the matter the payment of $1,077.23 to defendant Rowley is to be regarded as a payment by the receiver himself made under mistake of fact. As such, it is, to the extent of the mistake made, prima facie recoverable.

For defendant Rowley, however, it is urged that by settlement made in November, 1901, plaintiff Aikins abandoned any claim upon Rowley to recover from him the balance of $644.86 found due to the receiver by the report of the Master dated 23rd March, 1901. The settlement was of Rowley's appeal to the Court of Appeal from the order of Robertson,

J., dismissing an appeal by Rowley from that report. The report had declared Aikins's right to retain the $2,341.98 which he had received from the proceeds of the mortgage sale, but the Master had expressly refrained from making any finding as to the respective rights of Aikins and Rowley in respect to the $1,077.23 paid to the latter. I have before me the document of settlement . . . I am satisfied that it was not intended thereby to settle, adversely to plaintiff Aikins, any claim which he might have against the $1,077.23 paid to Rowley.

At the trial before me counsel for defendant Rowley sought leave to amend his defence by adding a plea that defendants are estopped from setting up their present claim as against him, because, under the order of the Chancellor of 5th October, 1900, this very question, amongst others, was referred to the Master, and, if desirous of disturbing the status quo, the plaintiffs should have then insisted upon an adjudication of their present claim. Instead of doing so, they accepted a report which, contrary to the requirements of the order under which it was made, expressly omits to deal with this question. Upon proper terms I think this amendment should be allowed. It cannot be said that it was incumbent upon Rowley, as much as upon plaintiffs, to see that the report of the Master dealt with their respective rights to this money. Rowley was in possession, and was content to be allowed to remain so. The plaintiffs it was who required relief. Their present claim in every sense properly belonged to the litigation then being dealt with, and, exercising reasonable diligence, plaintiffs should have pressed for its determination. Having then failed to urge this claim, they may not do so now: Henderson v. Henderson, 3 Hare 100, at p. 115. Not only did they not then seek it, when they had full opportunity, of which, if they intended to raise this question, it was their duty to take advantage, but they slept upon their supposed rights from March, 1901, until the commencement of this action in December, 1904. In the interval the position of matters may have changed greatly to the detriment of Rowley.

In these circumstances, I think the action must be dismissed as against defendant Rowley, but, because of the amendment which he found it necessary to seek, and upon which he virtually succeeds, without costs.

MAY 19TH, 1905.

DIVISIONAL COURT.

WRIGHT v. GRAND TRUNK R. W. CO.

Railway—Injury to Person Crossing Track—Failure to Look for Train—Efficient Cause of Accident—Nonsuit—Contributory Negligence.

Appeal by defendants from judgment of MEREDITH, J., upon the findings of a jury, in favour of plaintiff in an action for damages for injuries received by him owing to the alleged negligence of defendants.

At Seaforth the main line of defendants crosses the main street at right angles, Main street being practically north and south.

On 12th July, 1904, about 5.30 p.m., a freight train had passed east on the main track to a switch about 300 feet east of Main street, at which point it was intended that the train should be switched on to a siding further south to allow of the passing of a passenger train closely following. There was also a siding north of the main track.

Plaintiff, driving south on Main street with a team and double waggon, had seen the train passing east from a distance variously estimated at from 50 to 80 feet north from the siding; he had looked east but had not seen any train approaching. He then looked west towards the passenger train which by this time was standing at the station a distance of about 150 feet west of Main street. The engine of that train, as deposed by plaintiff, was blowing off steam and making considerable noise. He continued to watch the engine, looking towards the west, until he, having passed over the north siding and the main line, was just approaching the south siding when he looked east and found a freight train a few feet away. His waggon was struck by this train, and he was thrown out and injured.

The reason given by plaintiff for not looking to the east was that his mind was taken up with the train to the west and he was watching that closely. Evidence was given that there was no flagman on the rear of the backing train, and that there were no signals given by whistling or ringing the bell. The trial Judge refused a nonsuit, and defendants gave evidence that the conductor of the freight train was standing on the rear end of the train and that he called to and waved

his arms at plaintiff as he was approaching. Plaintiff and other witnesses denied this.

The jury found that plaintiff's injury was caused by defendants' negligence, that the negligence consisted in not using sufficient signals to attract the injured man's attention, and that the conductor was not on the rear end of the train; and they further found that plaintiff could not by the exercise of ordinary care have avoided the injury.

W. R. Riddell, K.C., for defendants, contended that the evidence established that the conductor was upon the rear end of the freight train, as required by the statute, and that, even if defendants were negligent, the cause of the accident was not such negligence but the negligence of the plaintiff himself: Cotton v. Wood, 8 C. B. N. S. 568; Stubley v. London and North Western R. W. Co., L. R. 1 Ex. 13; Skelton v. London and North Western R. W. Co., L. R. 2 C. P. 531; Ellis v. Great Western R. W. Co., L. R. 9 C. P. 551; Dublin, etc., R. W. Co. v. Slattery, 3 App. Cas. 1155; Nicholls v. Great Western R. W. Co., 27 U. C. R. 382; Winckler v. Great Western R. W. Co., 18 C. P. 250, 269; Johnston v. Northern R. W. Co., 34 U. C. R. 432; Miller v. Grand Trunk R. W. Co., 25 C. P. 389; Railroad Co. v. Houston, 95 U. S. R. 697, 701; Gorton v. Erie R. R. Co., 45 N. Y. 600; Coyle v. Great Northern R. W. Co., 20 L. R. Ir. 409, 418; Grand Trunk R. W. Co. v. Hainer, Supreme Court of Canada, not reported. On the admitted facts of this case, if plaintiff had looked as he was approaching the track, he must have seen the train, and he is in the same position as though he had looked. It is admitted that if he had seen the train he could and would have stopped his horses, and therefore it is not a case of contributory negligence properly speaking, but a case where the efficient cause of the accident is the negligence of plaintiff himself: Cohen v. Hamilton Street R. W. Co., 4 O. W. R. 19; Gosnell v. Toronto R. W. Co., 4 O. W. R. 213; Gallinger v. Toronto R. W. Co., 4 O. W. R. 522, 8 O. L. R. 698. A new trial should not be ordered. The judgment should be entered for the defendants. The case of Champagne v. Grand Trunk R. W. Co., ante 218, turned upon the fact that the plaintiff did not know that he was near a railway track, as he was travelling on a very dark night and the railway not in view. [Boyd. C.—It was that fact which gave the plaintiff his new trial in the Champagne case.]

W. Proudfoot, K.C., for plaintiff, contended that the jury having found negligence on the part of the railway company upon conflicting evidence their finding should not be interfered with: Solomon v. Bilton, 8 Q. B. D. 176; Metropolitan R. W. Co. v. Wright, 11 App. Cas. 152. The duties of railway companies are laid down in such cases as Lake Erie and Detroit River R. W. Co. v. Barclay, 30 S. C. R. 360, and the question as to whether a plaintiff exercised due care is one entirely for the jury where it has been proved that the statutory signals were not given: Vallée v. Grand Trunk R. W. Co., 1 O. L. R. 224; Peart v. Grand Trunk R. W. Co., 10 A. R. 191; Grand Trunk R. W. Co. v. Rosenburger, 9 S. C. R. 311; Rowan v. Toronto R. W. Co., 29 S. C. R. 717. The latest case is Sims v. Grand Trunk R. W. Co., ante 664, where Street, J., considers the previous cases and lays down the rule clearly that it is for the jury to determine whether the plaintiff used reasonable care and that the plaintiff's not looking when he approaches a railway track is a question of contributory negligence.

Riddell was not called on to reply.

THE COURT (BOYD, C., MACMAHON, J., TEETZEL, J.), allowed the appeal, holding that it was the duty of the plaintiff to have looked towards the east as well as towards the west when he was approaching the railway track, and that the fact that there was an engine and a train which might approach from the west was not a sufficient reason for not looking to the east. That had he looked he must have seen the train and so avoided the accident. His not looking was therefore not a matter of contributory negligence, but the real cause of the accident. In view, however, of the authorities, the appeal was allowed without costs.

END OF VOLUME V.

CORRECTION.

MEREDITH, J. APRIL 5TH, 1905.

TRIAL.

FLEMING v. CANADIAN PACIFIC R. W. CO.

Evidence—Action under Fatal Injuries Act—Depositions of Witness at Inquest.

This case is incorrectly reported ante 589.

The evidence was finally admitted, subject to objection, to prevent a new trial for rejection of it merely, after a non-suit had become inevitable, and with an expression of opinion by the trial Judge that it was *not* strictly admissible.

CORRECTION.

MEREDITH, J. APRIL 3RD, 1905.

TRIAL.

REX v. BEARDSLEY.

Criminal Law—Intent to Defraud Insurance Company—Evidence.

This case is incorrectly reported ante 584.

The indictment was not for arson; but for wilfully setting fire to some substance so situated that the accused knew that the building in which it was was likely to catch fire therefrom, with intent to defraud an insurance company. No objection was made to the form of the indictment.

The ruling as to evidence of a previous fire and claim upon an insurance company and compromise of it, was that—whether admissible in a case of arson or not—it was admissible upon this indictment upon the question of intent; and the lapse of time (9 years) did not destroy its admissibility, however much it might affect its weight, which was a question entirely for the jury; and in the charge the jury's attention was particularly called to the number of years which had elapsed, and they were told that, although the evidence could not be rejected, it was entirely for them to say, under all the circumstances, what weight, if any, it should have upon any question of intent on the accused's part in setting fire to the substance, if they found that he did set fire to it.

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