THE

# ONTARIO WEEKLY REPORTER

VOL. X. TORONTO, DECEMBER 26, 1907. NO. 31

DECEMBER 13TH, 1907.

C. A.

## REX v. EDMONDSTONE AND NEW.

### CORRECTION.

Hardy v. Sheriff, ante at p. 1046. Delete the paragraph beginning "Pausing here" and ending "supports it."

as charged in the indictment." Addressing the foreman of the jury, the Chairman said: "What do you mean by that?" And he, speaking for the jury, answered: "We mean, inflicting the blow with the bottle as described, but not guilty of robbery." And, on being further asked, "Which prisoner?" they said, "Both." And the Chairman entered the verdict on the record: "The jury find both prisoners guilty of assault as charged, but not guilty of robbery;" interpreting, as the case stated, the verdict and explanation to mean that the prisoners were guilty of the wounding charged in the indictment. One of them was then sentenced to 30 months in the penitentiary and the other to 18 months in the central prison, a sentence which could not have been legally imposed upon a conviction for an assault.

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## REX v. EDMONDSTONE AND NEW.

*Criminal Law—Indictment for Robbery with Violence and Wounding—Verdict — Assault—Recording — Interpretation—Mistrial—New Trial.*

Case stated by the chairman of the General Sessions of the Peace for the county of Wentworth.

The prisoners were indicted for robbery with violence and wounding. There was no note of the Judge's charge. When the jury returned into Court, and were asked if they had agreed upon a verdict, they replied through their foreman: "We find the prisoner guilty of assault." The Chairman then, addressing the County Attorney, asked: "What does that mean?" The County Attorney replied: "Assault as charged in the indictment." Addressing the foreman of the jury, the Chairman said: "What do you mean by that?" And he, speaking for the jury, answered: "We mean, inflicting the blow with the bottle as described, but not guilty of robbery." And, on being further asked, "Which prisoner?" they said, "Both." And the Chairman entered the verdict on the record: "The jury find both prisoners guilty of assault as charged, but not guilty of robbery;" interpreting, as the case stated, the verdict and explanation to mean that the prisoners were guilty of the wounding charged in the indictment. One of them was then sentenced to 30 months in the penitentiary and the other to 18 months in the central prison, a sentence which could not have been legally imposed upon a conviction for an assault.

There was evidence that the complainant had been struck on the head with a bottle by the prisoner Edmondstone, and severely wounded.

The questions stated for the Court were whether the verdict had been rightly recorded, and whether it had been rightly interpreted.

The case was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

M. J. O'Reilly, Hamilton, for the prisoners.

J. R. Cartwright, K.C., for the Crown.

OSLER, JA.:— . . . Section 951 of the Criminal Code, 1906, enacts that every count shall be deemed divisible, and if the commission of the offence charged as described in the enactment creating the offence, or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved.

This was sec. 713 of the Criminal Code of 1892, of which Taschereau, J., in his annotated edition, p. 819, observes that it is an extension of sec. 191 of ch. 174, R. S. C. 1886, under which, upon the trial of any person for any felony whatever, if the crime charged included an assault against the person, though not charged in terms, the jury might acquit of the felony and find a verdict of guilty of assault against the person indicted. Under corresponding Imperial legislation it was held that upon an indictment for aggravated robbery, i.e., robbery accompanied with violence, as in the case mentioned in sec. 446 of the Code, the person charged, though acquitted of the robbery, might be convicted of a common assault, though not of an assault constituting a substantive felony: Regina v. Burrit, 1 Den. C. C. 185; Regina v. Reid, 2 Den. C. C. 88; and see Regina v. Smith, 34 U. C. R. 552, 560, per Wilson, J.

Under the section as it now stands, there is nothing that I can see to prevent the jury, if they acquit of the robbing, from finding on such an indictment as we have before us, awkwardly framed as it is, a verdict of common assault under sec. 291 of the Code, or of unlawful wounding or inflicting grievous bodily harm under sec. 274, for the prisoners are charged not only with an assault simpliciter in connection

with the robbery, "by means of violence then and there used by them against the person of the said T.," etc., but the indictment concludes with the words, "and that at the time they so robbed the said T. . . as aforesaid they did wound the said T.," etc.

I am not satisfied that a verdict of assault occasioning actual bodily harm, under sec. 295, could have been found upon this indictment. The statutory offence charged—robbery—does not include it, nor is it technically charged in the count, as the offence of wounding is.

The commission of the offence charged includes, as charged, the commission of the other two offences I have mentioned, either of which the jury might have found by their verdict.

If they had simply found the prisoners guilty of assault, which was their verdict as they first announced it, that would, in my opinion, have been a good verdict of common assault, the minor offence, and the least and lowest of that nature for which they could have been convicted; and in favour of supporting the verdict, as well as in favour of the accused, it must have been so interpreted, unreasonable as such verdict would, upon the evidence, appear to have been.

The verdict actually recorded, however, "guilty of assault as charged," introduces an element of uncertainty, as we are obliged to look at the indictment to discover what is meant. The jury may have meant to find a common assault, or they may have meant an unlawful wounding, for, looking at the indictment, "assault as charged," though not the appropriate technical language for describing the offence, might mean either. They should have been required to find expressly one way or other—common assault or unlawful wounding.

The questions reserved by the Chairman must, therefore, both be answered in the negative, viz., that the verdict was not rightly recorded, and was not rightly interpreted.

The result is that the conviction must be quashed, but the case is clearly one in which a new trial should be granted on the whole record, as the assault cannot be inquired into except as connected with an alleged robbery.

The prisoners will thus have an opportunity of being entirely acquitted if they can persuade the jury of their innocence, or of being convicted of the aggravated robbery, involving a possible sentence of imprisonment for life and

whipping, or of unlawful wounding, which I rather infer from what the foreman of the last jury said when interrogated by the Judge, was what that jury really meant to find, and so in the end justice is likely to be done.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

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SCOTT, LOCAL MASTER. DECEMBER 16TH, 1907.

CHAMBERS.

## O'MEARA v. OTTAWA ELECTRIC CO.

*Parties—Joinder of Defendants—Negligence—Joint Liability—Pleading.*

Motion by the defendant company, in an action brought by Catherine O'Meara, administratrix of the estate of Philip O'Meara, deceased, against the company and John Labatt, for an order requiring the plaintiff to elect against which of the defendants she would proceed.

G. F. Henderson, Ottawa, for the defendant company.

W. Greene, Ottawa, for defendant Labatt.

Harold Fisher, Ottawa, for plaintiff.

THE LOCAL MASTER:—This action is brought to recover damages for the death of the plaintiff's husband. Deceased was an employee of defendant Labatt, a brewer, and was killed by an electric shock received while operating a machine for washing bottles, driven by electricity supplied to the premises by the defendant company.

Paragraph 9 of the statement of claim reads as follows: "9. The plaintiff says that the condition of affairs by which electricity reached the said brush and killed the said Philip O'Meara, resulted from the negligence of both defendants, and claims that both defendants are jointly liable for the death of the said Philip O'Meara."

The 10th paragraph alleges, in the alternative, that the death resulted from the negligence of either of the defendants.

By the succeeding paragraphs the mode of supplying electricity to the machine is described, and the following acts of negligence are alleged: (1) that electricity having too high a pressure was supplied to the premises from the street wires; (2) that the transformer was of an antiquated and unreliable make; (3) that the transformer was not properly inspected; (4) that no precautions were taken to guard against a failure on the part of the transformer to do its work, neither its secondary wires nor the interior wiring being grounded, and no other safety device supplied; (5) that the motor was not properly installed, the brush being in direct connection with the motor, instead of being connected with an insulated coupling or by means of a belt; (6) that the frame of the motor was not grounded; (7) that the motor was never inspected, and had in fact been defective for some time prior to the accident.

Then paragraph 18 reads: "The plaintiff claims that both defendants are responsible for all the acts of negligence specified."

And paragraph 19: "The plaintiff . . . says that all the defects and negligence complained of arose from or were not discovered or remedied owing to the negligence of the said defendants . . . ."

So far as the form of the pleading is concerned, a joint liability could not be alleged in clearer terms. It is, however, contended that the acts of negligence specified, which are presumably all that the plaintiff proposes to rely on, are all assignable to either the one or the other of the defendants; that no one of them is a thing for which the two defendants would be jointly responsible; and that it is not sufficient in order to raise a joint liability for the plaintiff to shew that distinct acts of negligence on the part of the two defendants respectively contributed to cause the accident. Even assuming that I could in a proper case go behind the form of the pleading and find that, though a joint liability was in terms set up, no such joint liability could follow from the facts relied on, I could not possibly do so here. To say that for no one of the alleged acts or omissions could both defendants be jointly liable would be to try the case. In Hinds v. Town of Barrie, 6 O. L. R. 656, 2 O. W.

R. 995, Mr. Justice Osler rests his judgment explicitly on the absence of any allegation of joint liability in the pleading, and even suggests that the plaintiff may still amend by setting up a joint cause of action. The two cases of Collins v. Toronto, Hamilton, and Buffalo R. W. Co. and Perkins v. Toronto, Hamilton and Buffalo R. W. Co., ante 84, 115, 263, are very much in point. See also Brown v. Town of Toronto Junction, ante 750.

The motion must be dismissed with costs in the cause to the plaintiff. The defendants will have 5 days to plead.

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MABEE, J. DECEMBER 16TH, 1907.

TRIAL.

## CROWN BANK OF CANADA v. LONDON GUARANTEE AND ACCIDENT CO.

*Guarantee—Fidelity Bond—Security against Dishonesty or Negligence of Bank Clerks—Theft by one Clerk—Negligence of another Permitting Theft—Liability of Guarantor in Respect of Both—Amount Recovered by Bank—Right to Deduct Expenses of Recovery—Construction of Bond.*

Action to recover from the defendants $11,000 on a fidelity bond.

W. Cassels, K.C., and F. Arnoldi, K.C., for plaintiffs.

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

MABEE, J.:—The action arises out of the following facts. On 9th December, 1905, Edwin S. Banwell, paying teller in the plaintiffs' Toronto office, absconded, taking with him $40,350.33, made up as follows: mixed Canadian notes, $515; unsigned Crown Bank notes, $20,000; Crown Bank notes duly signed, $17,785; Dominion notes, $500; Bank of England notes, $72.33; British gold, $643; and American gold, $835.

The defendants had given to the plaintiffs a bond guaranteeing a large number of employees in various amounts appearing in the schedule, Banwell in the sum of $5,000, and

one Francis M. Maunsell in the sum of $6,000. This contract proides that the defendants, to the extent set opposite the name of each employee in the schedule, should make good and reimburse the bank for all and any pecuniary loss sustained by the bank directly occasioned by dishonesty or negligence, or through disobedience of direct and positive instructions, given by an authorized official, on the part of such employee in connection with his duties in the bank's service. Provisions are made putting mere errors of judgment outside the contract, likewise injudicious exercise of discretion. The following clause was said to be material: "This policy and the liability of the company does extend to cover all and only such acts, defaults, or negligence of an employee in the performance of his duties as shall render him legally liable to indemnify the employer, only, however, to the amount of such sums as the employee could be held liable for."

The printed rules of the bank for the guidance of employees were put in, and from these it appears that provision is made for the proper checking of the paying teller's cash each day. I find as a fact that it was Maunsell's duty to check and certify to Banwell's cash at and for some time prior to the defalcation, and that he had been going through the form of so doing. The cash book shews he had gone through the form of checking the cash on the day the money was stolen by Banwell, and the book contains his initial certifying that all the cash was on hand. The mode adopted was at the close of the day's business for Maunsell to enter the teller's cage, inspect, and satisfy himself that all the cash the teller was accountable for was on hand, and initial the account, whereupon the cash box was locked, there being two separate locks and keys, and placed in a compartment in the vault, it also being locked with separate keys. I find that on the day in question Maunsell was guilty of negligence in not properly checking and counting the cash in question; that Banwell must have abstracted the cash either before Maunsell went through the empty form of checking it, or that Maunsell, by his negligence and omission of duty, furnished Banwell with the opportunity of stealing the money after it had been checked over, and under either head Maunsell was guilty of negligence and was disobeying direct and positive instructions, and this negligence and breach of duty resulted in Banwell's defalcation.

The absconder left Toronto on a Saturday afternoon; the theft was not discovered until Monday morning; the bank thereupon took active steps to follow Banwell, and a long time afterwards, and after the expenditure of a great deal of money, located him in Jamaica, from which place he was brought back to Toronto; he pleaded guilty, and was sent to prison. Neither Banwell nor Maunsell was called as a witness upon the trial of this action. The bank recovered from Banwell in money and jewelry $37,968.24; he had expended some of the money stolen in the purchase of jewelry, and this was returned by the bank to the persons from whom Banwell had purchased it, and the money returned, except as to a purchase of $645, which, from the statement filed, appears to be still in the bank's possession. To effect Banwell's capture and recover the stolen property the bank expended $8,163.35, in travelling expenses, constables, detectives, and solicitors' charges. It is said the bank are now $10,545.44 out of pocket, together with interest to be added.

The position taken by the defendants is that they are in no way liable for any neglect of Maunsell; that his omission (if any) was not the direct cause of the loss to the bank, but the intervening crime of Banwell; and as to the loss occasioned by the act of the latter, the defendants say the bank, having recovered from him $37,968.24, and the $645 of jewelry they have on hand, must credit these sums against the total defalcation, and that upon doing so their loss is less than $1,750, and, while denying all liability, they bring into Court $2,500.

Dealing with the first contention as to any liability as to Maunsell, I am of opinion that Maunsell's act created a liability upon the bond. Mr. Shepley contended that the proximate cause of the loss was not the act of Banwell, and relied upon . . . Baxendale v. Bennett, 3 Q. B. D. 525, where the crime of a third person, and not the negligence of the defendant, was said to be the proximate or effective cause of the fraud. This case is cited in a judgment of Lord Alverstone in the late case of De La Bere v. Pearson, [1907] 1 K. B. 483, where the law is defined as follows: "If the defendant's breach of contract or duty is the primary and substantial cause of the damage sustained by the plaintiff, the defendant will be responsible for the whole loss, though it may have been increased by the wrongful conduct of a third person, and although that wrongful conduct may

have contributed to the loss." I think it is clear that the primary and substantial cause of this defalcation was the negligent act or omission of Maunsell; had he performed the duty he owed to the bank, this theft could not have been committed. Had Banwell abstracted the money before Maunsell entered the cage, any reasonable inspection or counting would have disclosed the fact; had the money been placed in the box and locked by Maunsell, after a proper counting, still the money could not have been taken; so, to my mind, it is impossible to escape the conclusion that the primary and moving cause of the fraud was attributable to Maunsell. The defendants are liable to the extent of $11,000 for the negligence of Maunsell and the fraud of Banwell.

Then as to the second point, must the plaintiffs or the defendants bear the expense of recovering the stolen property? The only case I have been able to find anything like the present is that of Hatch, Mansfield, & Co. v. Nenigott, 22 Times L. R. 366, not cited upon the argument. There the defendant had given to the plaintiffs a letter in the following terms: "I am willing to hold myself responsible for my son C. Nenigott's fidelity, whilst he remains in your employment, up to the sum of £250." The son from time to time stole £269 worth of cigars from the plaintiffs; he was arrested and prosecuted to conviction by the plaintiffs, and an order was made for the restitution of £114 worth of cigars; the net costs incurred by the plaintiffs in the prosecution and in tracing the thief amounted to £98; and it was held that this sum could be deducted by the plaintiffs from the £114 before giving the defendant credit for it under the guarantee. The main point considered by the judgment is as to whether the course taken was a reasonable one.

Now, when Banwell fled, the plaintiffs were not bound to take any steps to follow him; they could have left that to the defendants to do, in which event certain expenses would have had to be paid by the defendants. It is true, by reason of the large sum taken over and above the amount of the guarantee, the plaintiffs were greatly interested in locating the absconder, and recovering the booty, but I am unable to see upon what principle of law the defendants are able to say, as against their bond, that they are entitled to the benefit of the plaintiffs' efforts.

If the case depends upon what was reasonable to be done, as apparently did the Hatch case, I think, subject to some-

thing I shall say further on, that the course taken by the plaintiffs was an entirely reasonable one. The defendants were liable for $11,000, and, as is stated in the Hatch case, if they allege that that loss has been diminished, it lies upon them to make that contention good. The defendants do not suggest any other or better course for the plaintiffs to have taken, but insist simply that the gross sum recovered must be applied upon the loss. I do not think so.

So long as what was done was reasonable, I think the plaintiffs have the right to take from the sum recovered the expense of the recovery, and credit the balance upon the total loss.

I have gone through the cases cited by Mr. Shepley; they mostly turn upon the special facts in each one.

Baker v. Garrett, 3 Bing. 60, failed because the plaintiff had given no notice to the sheriff that he intended to sue the pledger. Bardwell v. Lydall, 7 Bing. 489, at the conclusion of the judgment is put upon the ground of a specific appropriation of payment. Colvin v. Buckle, 8 M. & W. 680, and Walker v. Hatton, 10 M. &. W. 249, both turn upon the form of the covenants.

In Rownshay v. Falkland Islands Co., 17 C. B. N. S. 1, the Court thought the costs incurred were not a necessary consequence of the defendants' wrongful act, and that the costs may have been unnecessary.

Tindall v. Bell, 11 M. & W. at p. 232, is stated to be a case turning upon a question of fact and not of law.

Harris v. Eldred, 42 Vermont 39, though not binding, I have looked at, and find the case is put upon the ground that there was no law which governed the costs relating to the process the plaintiff had invoked, and that there was no contract relation between the parties by which there was any express or implied contract for indemnity.

It was contended that the liability of the defendants to the plaintiffs is, under the portion of the contract above extracted, limited to the sum the plaintiffs could recover from Banwell and Maunsell, but I have found no case to the effect that a person robbed cannot deduct from the money he gets back, when the robber is captured, the expense of the capture, and sue for the difference. No case was cited for that proposition. I think that Banwell and Maunsell would be liable to the plaintiffs for the expense properly incurred in making recovery from Banwell.

Evidence was not given at the trial as to the various items that make up the expenditure incurred, and it was said some of them would be entirely improper, but as to this I cannot say. It was therefore arranged that as to the exact amount properly expended there should be a reference if the parties could not agree, if I came to the conclusion that the plaintiffs were entitled to deduct any of the expenses.

The result, in my view, is that the course taken by the plaintiffs having been reasonable, they are entitled to deduct all reasonable and proper sums disbursed from the sum recovered from Banwell, and that the defendants are liable for the shortage up to $11,000. If the parties cannot agree upon the amount, there will be a reference. The defendants will be entitled, upon payment to the plaintiffs of the amount found due, to have the jewelry in the plaintiffs' possession that was taken from Banwell.

The plaintiffs are entitled to their costs down to judgment; and costs of the reference and further directions will be reserved.

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TEETZEL, J. DECEMBER 16TH, 1907.

TRIAL.

## BECHTEL v. ZINKANN.

*Trust and Trustees—Company Shares Held in Trust for Several Persons—Action by one Cestui que Trust to Compel Transfer of his Portion — Parties — Interests of Remaining Cestuis que Trust—Terms of Trust — Discharge of Trustee Piecemeal.*

The defendant was trustee for plaintiff and 6 others (one of them being himself) of 15 shares of the 200 shares of the capital stock of the Silver Spring Creamery Co. These shares were issued in part payment of the purchase money for the assets of another company in which the cestuis que trust held stock amounting in all to $1,060. The plaintiff's holding amounted to $430, so that his interest in the 15 shares was a trifle over 6 shares.

The action was to compel the defendant to tranfer to the plaintiff 6 shares, damages for refusal, and an account

of moneys received by the defendant as such trustee for the plaintiff's use, and not paid over.

A. Millar, K.C., for plaintiff.

C. L. Dunbar, Guelph, for defendant.

TEETZEL, J.:—For the defendant it was contended that one of several cestuis que trust could not compel a trustee to be relieved of his trust in piecemeal or to apportion a part of the trust property and transfer it to the plaintiff.

Snow v. Snow, 3 Mad. 10, is authority for the proposition that where the trust fund is a certain ascertained sum of money of which the plaintiff is entitled to an aliquot part, he may maintain an action against the trustees to recover his aliquot share without making the other beneficiaries parties.

I am unable to apply the principle of that decision to the present case, because, while it is plain that where the subject of the trust in an ascertained sum of money, the payment to one of the cestuis que trust of his share could not affect the rights of the others or the value of their shares, it does not follow that where the subject of the trust is stock, the rights and interests of the others interested may not be affected by transferring a portion to one of the beneficiaries.

The defendant, as holder of the 15 shares, has a voting power in respect of them, and circumstances might easily arise where he would hold the balance of power between rival factions and thus be able to control the election of the directors and the business policy of the company, while he might not be able to do so without the 6 shares. Then there is the fact that 4 of the cestuis que trust would upon a subdivision of the shares be entitled to less than one share each, which would leave them without a voice in the affairs of the company, for there is no provision in law for a holder of less than one share being entitled to vote at meetings of the company. Under the trust arrangement each beneficiary has an interest in the franchise that may be exercised by the trustee with reference to the 15 shares, and no order should be made in their absence which might in any way impair or prejudice the value of their holdings.

Evidence was given at the trial that all the other cestuis que trust object to the transfer being made to the plaintiff.

Independently of the question of the interests of the unrepresented cestuis que trust, I am of the opinion that under the circumstances of this trust the defendant cannot be compelled to discharge his trust in detail. The defendant is simply a trustee for convenience, holding the shares in trust for the plaintiff and others, no provision being made for sale or division, and no time being fixed during which he is to hold. As stakeholder of the property he must hold the scales evenly and see that the rights of the several parties are mutually respected: Underhill, 6th ed., p. 296.

In Goodison v. Ellison, 3 Russ. at p. 594, Lord Chancellor Eldon expressed the view that a trustee could not be called on from time to time to divest himself of different parcels of the trust estate so as to involve himself as a party to a conveyance to many different persons, and he puts this question: "Has not a trustee a right to say, 'If you mean to divest me of my trust, divest me of it altogether, and then make your conveyance as you think proper.' I have been accustomed to think that a trustee has a right to be delivered from his trust if the cestui que trust calls for a conveyance."

This case is cited in Godefroy on Trusts, 3rd ed., p. 583, as an authority for the proposition that a trustee cannot be required to convey the estate piecemeal at various times. See also Lewin on Trusts, 8th ed., p. 860.

The action must be dismissed with costs.

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DECEMBER 16TH, 1907.

DIVISIONAL COURT.

## TINSLEY v. TORONTO R. W. CO.

*Street Railways—Injury to Person Crossing Track—Negligence—Contributory Negligence—Nonsuit.*

Appeal by defendants from judgment of BRITTON, J., in favour of plaintiff on the findings of a jury, for $800 with costs.

The plaintiff on 1st January, 1907, between 12 o'clock midnight and 1 o'clock in the morning, was crossing College

street at the corner of University avenue, in the city of Toronto, for the purpose of boarding a west-bound car, when in attempting to cross in front, believing it would stop, he was run down by the car. Plaintiff sustained a fractured skull and was confined to the hospital for some weeks. The action was brought to recover $5,000 damages. The jury found negligence on the part of the motorman in not stopping when signalled.

The appeal was heard by BOYD, C., MAGEE, J., MABEE, J.

D. L. McCarthy, for defendants.

J. H. Denton, for plaintiff.

BOYD, C.:—The jury have found that the defendants were guilty of negligence: (1) for not stopping when signalled; and (2) for not having the car under control when approaching crossing. They exculpate the plaintiff and give $800 damages.

Upon a consideration of the evidence, it appears to be very plain that the plaintiff walked into a place of danger. Any one who seeks to cross a track directly or diagonally in front of a coming car must use ordinary vigilance. Here this plaintiff saw the car speeding towards the corner of College street and University avenue when it was 300 feet away, as he estimates; he was seen to be stepping off the curb and heading across the street diagonally from the south when the car was about 150 feet off, as Shepherd says; and so both moved on, he across the street, and the car on the track, till he was struck by the foremost end of the car. This occurred at one in the morning, when the view was unobstructed all along College street to Yonge street, and the car was moving rapidly (as all night cars run), with head-light flashing and full of people. The plaintiff admits having an unobstructed view of the car, and indeed says it was in full view as he passed diagonally across the street, getting closer to the track where he was struck. He says he had to go 30 feet and another 30 feet after he saw the car (60 feet), and it was in full view of him all the time. The car he could see and he could hear, as it made a noticeable rumbling noise quite apparent. He makes no point as to the speed of the car; he says he cannot tell whether it was going fast or slow. He could have halted—he could have turned aside, even at the last moment, and avoided the im-

pact. The car coming at the pace it did must keep straight on, and could not slow up instanter, as the man might have done. Why did he act so heedlessly? No excuse given except this, that he saw two people waiting for the car at the street corner, and he thought it was going to stop. It was argued as if the evidence reported him as having himself signalled to stop. That is not in the stenographic report before us: all that appears is that Shepherd at the corner gave a signal to stop (which the motorman says he did not see): plaintiff did not give a signal, and does not say that he saw any signal given by the other. There was no rule, custom, or practice as to slowing down or stopping at crossings in these night-runs, unless on the requirement of persons getting on or getting off the cars. So that the situation comes to this: the plaintiff thought or inferred or supposed that the car was about to slow up or stop at the crossing, but his senses, sight and hearing, would inform him that the car was not slowing; against what he saw and heard or might have seen and heard (for he was in possession, he says, of all his faculties), he acted on an assumption—in other words, he took chances of getting over ahead of the rapidly moving car, and failed. Can he be said to be acting with due care? Was his conduct not (to put it in the mildest way) heedless? Was he not the victim of his own disregard of consequences? Did he not in a very distinct way contribute to his own hurt? It is not needful to say that he was most to blame—if he in fact contributed to the injury he cannot recover.

Such seems to be the proper result of all the evidence given on his behalf—and his case is not bettered by the further evidence given for the defence.

It follows, in my opinion, that the action should have been dismissed.

As to authorities, the case of Allen v. North Metropolitan Tramway Co., 4 Times L. R. 561, appears to be very close to the facts now in hand. That was acted on by the Court of Appeal in Follett v. Toronto Street R. W. Co., 15 A. R. 346, 353; see also City of Halifax v. Inglis, 30 S. C. R. 280.

. . .

The nearest case relied on by the plaintiff is Cranch v. Brooklyn R. R. Co., 107 App. Div. N. Y. 341 (1905). It is distinguished in two respects: (1) that the plaintiff was going over the track on a private right of way, seeking the station to take a train at a highway crossing, and it

was held that the plaintiff need not in such a place use the same circumspection and care as a traveller crossing a railroad track on a public highway (pp. 342, 343); and (2) that the defendants by their manner of operating the line, i.e., being in the custom of stopping at the station, created a condition of things, known to the plaintiff for 16 years, which justified the belief that the train would not run across the highway without stopping (pp. 343, 350). To counterbalance the New York case I may refer to a New Jersey case, Jewett v. Patterson R. R. Co., 62 N. J. Law 434 (1898).

I follow the principle of decision in the Allen case, and would dismiss the action. It is not a case for costs.

MABEE, J., concurred, for reasons stated in writing.

MAGEE, J., dissented, for reasons also stated in writing.

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Moss, C.J.O. DECEMBER 16TH, 1907.

C. A.—CHAMBERS.

## BELLEVILLE BRIDGE CO. v. TOWNSHIP OF AMELIASBURG.

*Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court — Special Grounds — Assessment of Bridge—Assessment Act—Ultra Vires — Bridge Constructed under Dominion Legislation over Navigable Waters.*

Motion by plaintiffs for leave to appeal to the Court of Appeal from order of a Divisional Court (ante 988) dismissing appeal from judgment of Boyd, C. (ante 571), dismissing action to recover taxes paid (under protest) by plaintiffs to defendants in respect of an assessment of a toll bridge.

E. G. Porter, Belleville, for plaintiffs.

W. S. Morden, Belleville, for defendants.

Moss, C.J.O.:— . . . The motion is made under sec. 76, sub-secs. 1 (g) and 2, of the Judicature Act, as enacted by 4 Edw. VII. ch. 11, sec. 2, and the applicants must shew

that there are special reasons for treating the case as exceptional and allowing a further appeal. In this, I think, they have not succeeded. With the possible exception of the suggested point that the Assessment Act is ultra vires in so far as it assumes to render assessable a bridge such as the one in question, constructed, under the authority of Dominion legislation, over navigable waters, every question raised is settled by decisions. One was rendered as long ago as 1869, the others at comparatively recent dates, but all support the conclusion of the Chancellor and the Divisional Court in this case. If the question of the validity of the Act has been properly raised, an appeal lies to the Court without leave under sub-sec. (d), but I do not observe that the point was touched upon by the Chancellor or the Divisional Court. And in reality the question probably is not whether the Act is or is not ultra vires, but rather whether such an interest or right of property as the plaintiffs own is within its terms. That portion seems to have been dealt with and settled not for the first time in this case.

However, this motion can only be dealt with on the hypothesis that leave is necessary in order to entitle the plaintiffs to prosecute an appeal to this Court. And upon the materials before me, dealing with the case in that view, I am unable to conclude that the case is one in which leave should be given to further review the judgment sought to be appealed from.

Motion dismissed.

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ANGLIN, J. DECEMBER 17TH, 1907.

TRIAL.

## GIBSON v. MACKAY.

*Physician and Surgeons—Services—Operations and Medical Attendance—Quantum Meruit—Poor Patients—Promise of Defendants to Pay for Services—Scale of Remuneration—Payment into Court—Costs.*

Action to recover the value of surgical and medical services rendered to 5 unfortunate sailors, who were terribly

frost-bitten, on the shores of Lake Superior after the wreck of the steamer "Golspie" in December, 1906. The defendants were managing agents for the company which owned the wrecked steamer. The sailors were, by direction of the defendants, brought to Sault Ste. Marie, and were placed in the hospital at that town, in charge of the plaintiff, who was, according to the evidence, in considerable practice and a somewhat distinguished surgeon in Sault Ste. Marie and its neighbourhood.

M. McFadden, Sault Ste. Marie, for plaintiff.

G. T. Blackstock, K.C., for defendants.

ANGLIN, J.:—At the close of the trial I stated that I might find it desirable to avail myself of the services of assessors, under sec. 101 of the Judicature Act. Further consideration, however, has convinced me that this case may be disposed of without such assistance. . . .

The particulars of the plaintiff's claim as delivered are as follows:—.

"1906.

14th December. Thorburn. Amputation through both feet, metatarsal bones of one, tarsal bones of the other leaving the heels, which were thought might be left to granulate. Granulation did occur in one heel, and it was found necessary to amputate for the other on or about the 13th day of February, 1907. This constituted one of what is referred to in the statement of claim as "afterwards through one leg below the knee."

14th December. Green. Amputation through both legs below the knee.

14th December. Downing. Amputation through both feet, carpal bones in one and what is known as "Symes amputation" in the other. Later, on or about the 13th day of January, 1907, a second operation was performed on him, as in the case of Thorburn.

14th December. Keeling. Amputation through tarsal bones below one extremity and through the other leg below the knee.

14th December. McDonald. Amputation through both legs below the knees and through both hands, leaving the thumb in one case.

Time averaged in each operation about 40 minutes. 14 amputations in all.

Paragraph 2.

Daily visits and attendance, the time each day varying with amount to do, from a half to three hours each day. In the cases where the heels were not removed, there were gangrenous ulcers, which needed dressing. McDonald suffered from constitutional troubles and broncho-pneumonia, from which he died on or about the 30th of December, 1906, after the wreck, needed daily medical as well as surgical attendance.

Paragraph 3.

Dr. J. R. McLean assisted at the various operations or amputations as indicated above, and the amount $70 charged is for service for such assistance.

Paragraph 4.

Dr. Shepard gave anæsthetics on 7 occasions, as indicated, viz., once to Green, Keeling, and McDonald, and twice for Thorburn and Downing, charging $5 for each occasion."

For the services mentioned in paragraph numbered 1, the plaintiff demands the sum of $1,400, computed at the rate of $100 for each operation performed. For the services mentioned in paragraph numbered 2, he asks the sum of $500; and for those set out in paragraphs 3 and 4, the sums of $70 and $35 respectively.

The defendants in pleading denied liability; but with their defence they paid into Court the sum of $800 as "sufficient to pay the plaintiff for the services rendered by him."

At the trial, however, they admitted liability, and the sole question for determination now is the proper sum to be allowed to the plaintiff for his professional services.

The defendants also admit that the plaintiff's claim for $70 paid Dr. McLean and $35 paid Dr. Sheppard is correct, maintaining that the sum of $695 is more than the plaintiff is entitled to recover for his own services.

In addition to himself, there were called as witnesses for the plaintiff Dr. Sheppard and Dr. McCabe, of Sault Ste. Marie, Ont., and Dr. Webster, of Sault Ste. Marie, Mich. For the defendants Dr. Cockburn and Dr. Gilray, both of Hamilton, Ont., gave evidence.

The opinions of these professional gentlemen differ markedly as to the nature and proper classification of several of the operations performed by the plaintiff, and still more widely as to the proper basis of remuneration for all the operations.

All these professional gentlemen, however, agree that there is no tariff or legal scale of charges for surgical or medical services, and that it is a recognized and well established custom in the profession, that a person occupying the station in life of a workman or wage-earner, should not be expected to pay the same fees as are expected from a person occupying a higher social position—a person of means—affluent or at least independent. They do not, however, agree as to the extent to which consideration is to be extended to the humbler or poorer class of patients. Indeed, the witnesses for the plaintiff maintain that they make their charges against poorer patients the same as against well-to-do patients, but expect to collect from the former only a portion of the charges made. This practice, if it actually obtains, was, I think, very properly characterized by the learned counsel for the defendants as "a fiction."

In considering the question of quantum meruit upon an implied contract to pay for the services of a physician, the extent of legal liability must, in my opinion, be measured by what the physician would reasonably expect to receive and the patient reasonably expect to pay, rather than by any fictitious entry or making of charges designed perhaps to create a colourable uniformity in scale of fees non-existent in fact. Drs. Cockburn and Gilray frankly state that they charge patients in the humbler walks of life, who are yet able to pay a fair charge, from 25 to 50 per cent. of what would be charged well-to-do patients, and they assert that this is the recognized and established practice of the profession.

The plaintiff and his witnesses maintain that all the 14 operations performed by the plaintiff were major operations, for which the plaintiff is entitled to charge $100 a piece, being the full professional fee, which they say they charge to every patient, rich or poor, for such operations, though from the latter they would expect actually to receive a smaller remuneration. The plaintiff and Drs. Webster and McCabe agree in asserting that where a well-to-do person makes himself liable to a surgeon for his remuneration for services rendered to a patient from whom, if paying out of his own pocket, the surgeon would expect a much smaller fee, the well-off person, so becoming liable, should reasonably and properly be asked and expected, in the absence of any agreement or understanding as to the quantum of the surgeon's

charges, to pay upon the same scale or basis as he would if the like services had been rendered to himself.

The defendants' witnesses, on the other hand, say that it is the recognized custom of the medical profession in such cases to charge against any third person thus rendering himself liable, the same fees which the patient, if able to pay, would himself have been expected to give. Dr. Sheppard's evidence rather supports this view.

Here again, in determining what is the extent of liability upon an implied contract such as that with which I am dealing, I think the Court must ascertain not only what the professional gentlemen would reasonably expect to receive, but also what the intending debtor would reasonably expect to pay. Applying this double test, it seems to me much more reasonable that one who, out of kindness or charity, renders himself liable to pay a surgeon for his services to another—who is himself unable to pay—would expect to pay what the surgeon might fairly ask from the patient if himself paying the bill, rather than a fee based upon what the physician might look for had the service been rendered, not to the indigent patient, but to his wealthy or comparatively wealthy patron. And he would, in my opinion, be a most unreasonable surgeon who, whatever his wishes, would actually look for or expect greater remuneration. In other words, the extent of the liability contemplated by both parties to the implied contract would be what the professional gentleman should fairly charge and expect to obtain for his services from a person in the class and station in life to which the patient belongs.

Then the witnesses for the defendants both say that in the case of Thorburn the two operations on the 14th December were not major operations. For the two amputations through the feet Dr. Cockburn would allow $25 a piece. Dr. Gilray would allow $20 and $25. Both also say that the two operations on Downing on the 14th December were not properly classed as major operations. They would allow for the amputation through the carpal bones $25 and for the "Symes amputation" $30. They agree in these figures. In the case of Keeling they both say the amputation through the tarsal bones was not a major operation, and would allow $25 for it. In the case of McDonald they agree that the operations upon the hands were not major operations. Dr. Cockburn would

allow for these $25 a piece; Dr. Gilray $20 and $25. The other operations, these surgeons say, are properly classified as major, and they would allow for each of them $50. These fees they say are on a liberal scale and are the maximum fees which surgeons in good repute would charge to or expect to obtain from persons comparatively poor or humble, yet more affluent, or of better social position, than were these poor sailors.

Having regard to what I feel constrained to characterize as the extravagant evidence of the professional gentlemen called for the plaintiff—one of them did not hesitate to swear that if offered the sum of $1,000 to perform the surgical work done by the plaintiff within 8 hours on the 14th December, he would have refused, although another would not say that he would have declined to undertake it for $600, and at least two of them pledged their oaths to the statement that, in their opinion, it would be fair, just, and honest, without stipulation therefor, if possible, to exact from a charitably disposed person, who had made himself responsible for the remuneration of a surgeon rendering services to an indigent patient, twice or even 3 or 4 times the fee which could have been reasonably expected from a person occupying the same station in life as the patient, if able to pay what for him would be a fair fee—I must accept as more reliable and entitled to greater credit the testimony of the surgeons called on behalf of the defendants, both as to the character of the operations performed and as to what should be a fair remuneration therefor. For these operations Dr. Gilray would allow $520; Dr. Cockburn, $530. I allow the latter sum. In view of the fact that of this sum of $530, $430 is allowed to the plaintiff for his services rendered between the hours of 11 a.m. and 7 p.m. on the 14th December, the liberality of his remuneration is apparent. For his services rendered during these eight hours the plaintiff's bill was $1,200.

As to the services covered by paragraph 2 of the particulars, the somewhat extraordinary circumstance is admitted that in sending in his first bill in June the plaintiff demanded only $1,505, making no separate charge for these services. Upon the defendants asking for some particulars of this account, he, in August, rendered a bill in which he made an additional charge of $500 for medical treatment for these patients. Excepting McDonald, who died on 30th December,

the sailors appear to have remained in the hospital until 1st June. The plaintiff charges for services up to 1st April.

The evidence is that unless unusual and unexpected complications arise after an operation the surgical and medical services usually incident to the convalescent stages succeeding the operation are not made the subject of a separate charge, but are covered by the fee for the operation. These services, it is said, ordinarily extend over a period of 14 days. In cases where complications arise and where further operations are required, the surgeons agree that a further fee is properly chargeable. In an unusual protracted recovery, where a prolonged course of medical treatment is required, fees for such necessary attendance beyond the usual period are said to be also properly chargeable. In the present case, further operations upon two of the patients were found necessary, and the fees allowed for these operations would cover the usual and ordinary medical attendance which ensued upon them. There is no evidence that in the cases of these patients there was any further serious trouble; and in the cases of the other two patients there is no evidence that there were complications or difficulties at any time other than such as are very often incident to successful and "clean" surgical work. But, owing to the terrible nature of the injuries sustained and their debilitated condition, these unfortunate men, no doubt, did require somewhat protracted medical assistance and attention. Having regard to all the circumstances, including the fact that the plaintiff, when rendering his account in June, apparently thought that the fees for the operations might properly include the charges for subsequent attendance, sitting as a jury I think I shall do what is fair and just between the parties if I allow to the plaintiff for his prolonged medical attendance, beyond what is properly covered by the fees allowed for the operations themselves, the sum of $160.

I therefore award to the plaintiff judgment for the sum of $795 in all, $530 for his surgical work, $160 for his subsequent attendance as a physician and surgeon, and for the amount paid to Dr. McLean $70 and for that paid to Dr. Sheppard $35.

The plaintiff is entitled to his costs of action down to and inclusive of perusal of statement of defence; the defendants to their costs subsequent to delivery of statement of

defence, and payment into Court of the sum of $800. The plaintiff's costs will be added to his claim, and the costs of the defendants will then be set off against the whole. The balance so ascertained will be paid to the plaintiff out of the money in Court, and the remainder of such money will be paid out to the defendants.

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CARTWRIGHT, MASTER DECEMBER 18TH, 1907.

CHAMBERS.

## STONE v. STONE.

*Evidence—Examination of Party as Witness on Motion for Security for Costs — Refusal to Answer Questions — Relevancy—Disclosing Defence.*

Motion by plaintiff for an order requiring defendant to attend for re-examination as a witness upon a pending motion for security for costs and to answer questions which he refused to answer when examined, and other similar questions.

W. N. Ferguson, for plaintiff.

E. W. Boyd, for defendant.

THE MASTER:—In this action plaintiff asks to have it declared that property standing in her husband's name is hers. It is contended by him that she is resident out of the jurisdiction and should give security for costs, and he has moved for an order under Rule 1198 (b). The plaintiff desires to avail herself of the principle of Stock v. Dresden Sugar Co., 2 O. W. R. 896, and cases cited. Both parties have been examined by the opposite side as witnesses on the pending motion for security. When so examined, the defendant said as follows in reference to the purchase of the property in question:—

"Q. Your wife, you admit, paid the $2,300? A. Well, I got $2,300 from her, I think; I don't know the amount exactly—she loaned me the mortgage.

"Q. Did she put up anything more for you? Witness declines to answer on the advice of counsel.

"Q. Have you paid her back that money? A. I have.

"Q. How? Witness declines to answer on advice of counsel." . . .

It was objected that defendant was being asked to disclose his defence. As the statement of claim has been delivered, and the statement of defence must set out the facts on which the defendant relies and he must submit to examination for discovery, I do not understand why it is thought to be so vital to prevent disclosure now. However that may be, I think the plaintiff is entitled to have the questions answered. The defendant admits receipt of $2,300 at least, and he does not sufficiently avoid that confession by saying he has paid it back, unless he states how this was done. He should, therefore, attend for re-examination, unless he prefers to abandon the motion for security.

Marriott v. Chamberlain, 17 Q. B. D. 154, and Milbank v. Milbank, [1900] 1 Ch. 376, shew that where such an application as the present is proper "the information must be given even though it discloses some portion of the evidence on which the other party proposes to rely at the trial, and even where the plaintiff is privileged from producing documents which would disclose such evidence:" Odgers on Pleading, 5th ed. (1903), p. 179.

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ANGLIN, J. DECEMBER 18TH, 1907.

WEEKLY COURT.

## RE CHAMBERS, CHAMBERS v. WOOD.

*Will—Construction—Charitable Bequest — Gift of Income without Limitation of Time — Disposition of Corpus—Intention—Perpetuation of Trust.*

Motion by the executors of the will of Nelson Chambers, deceased, for an order declaring the true construction of the will.

A. E. Haines, Aylmer, for the executors.

W. B. Doherty, St. Thomas, for the Amasa Wood Hospital.

J. M. Glenn, K.C., for the Corporation of the County of Elgin.

ANGLIN, J.:—The will . . . contains the following provisions:—

"Fourth, I hereby further will and direct that the sum of $5,000 be put out at interest in some good and approved security or securities and kept so invested by my executors hereinafter named in this my will, upon trust to pay the interest thereof from year to year, to the Amasa Wood Hospital of St. Thomas, for the benefit of poor patients from the county of Elgin, who may from time to time become inmates of the said hospital, so long as the said Amasa Wood Hospital shall be used for an hospital. And in the event of the said Amasa Wood Hospital ceasing at any time for one year to be used for an hospital, then that the interest of the said $5,000 shall be paid over yearly to the Poor House of the county of Elgin, to be expended therein for the benefit of the poor and infirm therein, from the county of Elgin, until the establishment of some other public hospital in the city of St. Thomas, when the said interest shall be paid to the said hospital, in the same way and for the same purpose as it was formerly paid to the Amasa Wood Hospital.

"Sixth, I further direct that all the above legacies shall be paid by my executors within one year after my decease."

The rule is incontrovertible that a gift of income without limitation of time is tantamount to and operates as a gift of the capital, in the absence of other disposition thereof. But this rule is subject to the qualification that a testator has the power of giving interest without vesting the corpus in the donee of the interest by expressing such an intention: Jarman, 5th ed., p. 805.

In the foregoing bequest the testator clearly manifests an intention to provide for the event of the Amasa Wood Hospital ceasing to carry on its work temporarily or permanently. He plainly intends that, should such a contingency occur, the income theretofore paid to the hospital shall be available for other charitable purposes. This involves the perpetuation of the trust of the fund, and sufficiently expresses an intention that the corpus of the fund shall not vest in or be paid over to the hospital trustees.

Mr. Doherty urges that the covenant of the municipality of the county of Elgin for the perpetual maintenance of the hospital, given as a term of its acquisition of the Amasa Wood property, ensures the perpetuity of that institution, and that its work will never be interrupted. While this

covenant, of which the testator may have been fully apprised, no doubt renders it highly improbable that the work of the hospital shall cease at any time in the future, that contingency cannot, in my opinion, even with such covenant, be deemed beyond the realm of possibilities.

If the gift over were to the municipal corporation for their own use and benefit, this fact would certainly afford a very strong argument in support of Mr. Doherty's contention, because, in that event, the municipal corporation would certainly not be allowed to benefit as a result of failure to observe their covenant to maintain the hospital. But the gift over to the municipal corporation is in trust for defined charitable purposes.

The testator's manifest intention that the gift of income to the Amasa Wood Hospital shall not carry with it the corpus, and the provision that in a certain contingency—however unlikely to arise—the income itself shall be diverted to other charitable purposes, in my opinion preclude the application of the rule above stated as to the effect of unlimited gifts of income. An order will issue containing a declaration in accordance with this view. Costs of all parties of this application will be paid out of the estate.

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RIDDELL, J. DECEMBER 18TH, 1907.

TRIAL.

## BENOR v. CANADIAN MAIL ORDER CO.

*Company—Managing Director—Salary—Claim for—Winding-up—Reference—Costs.*

Motion by defendants to vary the judgment of RIDDELL, J., ante 899.

W. Proudfoot, K.C., and W. H. Grant, for defendants.

R. W. Eyre, for plaintiff.

RIDDELL, J.:—In this case my attention has been called to the report of Birney v. Toronto Milk Co., 5 O. L. R. 1, 1 O. W. R. 736. While it may be that the case does not absolutely overrule Re Ontario Express and Transportation Co.,

25 O. R. 587, at least the authority of the last mentioned case is so shaken that I may give effect to my own view as to the law.

I think that, though Benor was named managing director, he was still a director, and that remuneration cannot be claimed by him, in the circumstances of this case. I follow the judgment of the late Mr. Justice Street in the Birney case. Reference may also be made to Beaudry v. Read, ante 622.

Certain additional facts in reference to the winding-up order has been also laid before me; these would simply affect certain of the statements in my former reasons for judgment, and in no way the result, so I do not further notice them.

The defendants desire a reference as offered them by the judgment.

Judgment will therefore be entered dismissing the plaintiff's claim so far as the $1,800 salary is concerned; and directing a reference to the Master as mentioned in my written reasons, ante at p. 905.

The defendants will pay the costs of the action up to judgment, on the High Court scale, except so far as the same have been increased by the claim made for salary; the defendants to set off their costs solely applicable to the claim for salary. Further directions and costs reserved to be disposed of by myself. The judgment to be entered as of this date, for the purpose of appeal, etc.

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MABEE, J. DECEMBER 18TH, 1907.

TRIAL.

## WATSON v. TOWN OF KINCARDINE.

*Pleading — Amendment at Trial — Compensation for Improvements—Real Property Limitation Act—Additional Evidence.*

Motion by defendants at the trial for leave to amend the defence, as stated in the judgment.

D. Robertson, Walkerton, for plaintiff.

J. H. Moss and W. C. Loscombe, Kincardine, for defendants.

MABEE, J.:—At the opening of the trial at Walkerton, Mr. Moss moved for leave to amend the statement of defence by adding a claim for compensation for improvements to the lands in question. The application was allowed to stand. At the close of the case motion was made for leave to set up the Real Property Limitation Act in answer to the plaintiff's claim. This was opposed by Mr. Robertson, who alleged that there was evidence available in answer to such a defence, but the plaintiff had come unprepared to meet that issue. I think I am bound to grant leave to the defendants to set up the statute: Williams v. Leonard, 16 P. R. 544, 17 P. R. 73, 26 S. C. R. 406; Patterson v. Central Canada Savings and Loan Co., 17 P. R. 470. Leave may also go to add the claim for compensation for improvements, and any other amendment the defendants may desire.

The plaintiff may also reply or make any amendment to the statement of claim that he may be advised to make; in other words, both parties may make any amendments they deem proper. These amendments should be made within one month.

I will hear the additional evidence at the Stratford assizes in March next. The action need not be again entered for trial.

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DECEMBER 18TH, 1907.

DIVISIONAL COURT.

## McLEOD v. LAWSON.

*Contempt of Court — Attachment — Disobedience to Judgment—Service of Judgment—Copy—Non-production of Original—Status of Plaintiffs as Applicants for Attachment—Parting with Interest in Part of Subject Matter of Action—Judgment Attacked by Subsequent Action.*

Appeal by defendant Thomas Crawford from order of MEREDITH, C.J., directing the issue of a writ of attachment against the appellant.

S. R. Clarke, for appellant

J. B. Holden, for plaintiffs.

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

RIDDELL, J.:—By a judgment of the Court of Appeal, 1st October, 1906, it was amongst other things provided as follows:—

"(4b) And this Court doth further order and adjudge that the moneys paid into the branch or agency of the Union Bank of Canada at New Liskeard . . . be paid into Court . . .and that the plaintiffs and the defendants Lawson and Crawford do forthwith sign and deliver cheques upon the said bank for the purpose of the payment of the said money into Court as aforesaid."

There is in the bank a sum of over $20,000, and the plaintiffs and the defendant Lawson have signed a cheque (13th September, 1907). for the amount, pursuant to the judgment. The solicitors for the defendant Crawford were requested by the solicitor for the plaintiffs to have their client also sign this cheque; but this was not done. On 3rd October, 1907, the solicitor for the plaintiffs personally served the defendant Crawford with a true copy of the judgment, and tendered him the cheque for his signature. The defendant Crawford refused to sign, his solicitor, being then present, advising him to so refuse. It does not appear whether the original judgment was shewn to Crawford at the time, but it is not pretended that he did not know perfectly well what the judgment required him to do.

A motion was made for an order of attachment against the defendant Crawford for his refusal to obey the express order of the Court; the motion was granted and the order made by the Chief Justice of the Common Pleas; and Crawford now appeals.

In addition to the grounds taken before the Chief Justice, it was urged before us that it must be proved that the original order had been shewn to the defendant at the time of service of the copy; and Rule 333 was appealed to. I do not think that the provisions of the Rule apply to a case of this kind; but that the service as proved was perfectly good.

The chief ground urged before us was that the plaintiffs had parted with their interest in the subject matter of the action, and therefore they could not take these proceedings, and their assignees were not before the Court or parties to the

action, no order to proceed having been taken out. The learned Chief Justice has pointed out that the assignment referred to is a transfer of a certain parcel of land, and that the money now in question has not been in any way dealt with by the assignment. The examination of McMartin is put in by the defendant, but this does not contain any statement that the money has been assigned or dealt with in any way.

It is urged that an action has been brought calling in question the judgment for the non-compliance with which it is sought to attach the defendant; but such an argument is utterly without weight.

The order appealed from is right, and the appeal will be dismissed with costs—the order for attachment not to issue for one week, to permit the defendant Crawford to comply with the judgment..

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CARTWRIGHT, MASTER. DECEMBER 19TH, 1907.

CHAMBERS.

## SCHLUND v. FOSTER.

*Discontinuance of Action—Rule 430—Proceedings after Delivery of Defence — Leave to Discontinue — Terms—Costs—Stay of Action in Foreign Court.*

Motion by defendant to set aside a notice of discontinuance given under Rule 430 (1), and cross-motion by plaintiff for order under Rule 430 (4), if necessary.

C. W. Kerr, for defendant.

W. N. Ferguson, for plaintiff.

THE MASTER:—Since the delivery of the statement of defence to the amended statement of claim on 27th March, 1907, the plaintiff has taken several other proceedings, viz., delivery of further amended statement of claim, filing and serving jury notice, issuing order to produce, moving to strike out statement of defence, and changing his solicitor.

It is too plain for argument that plaintiff cannot avail himself of Rule 430 (1).

The plaintiff's jury notice was set aside on 25th October, and the defendant thereupon set the case down for trial at the non-jury sittings. But on 5th November the jury notice was restored by a Divisional Court, and on 12th November defendant gave notice of trial for the jury sittings commencing on 6th January prox. On 12th December instant the notice of discontinuance was served.

It was strongly argued that the notice of trial given by the defendant was of as great effect as if given by plaintiff, and that, therefore, the only power to allow a discontinuance was to be found in Rule 543.

The cases are collected in Snow's Annual Practice (1908), vol. 1, p. 330. There does not seem to be any case similar in its facts to the present. The language of Rule 430 (4) could not be wider than it is.

The only question, therefore, is, what terms should be imposed on making the order asked for by plaintiff? It appears that the plaintiff is a citizen of the United States, and, as such, has given security for costs and paid into Court $200.

While the defendant in October was journeying to California, he was served with process in an action begun for this same claim by the plaintiff in the Court at Chicago. The defendant insists, as a term of the order, that plaintiff should undertake to abandon that action.

The reason given by plaintiff for wishing to discontinue this action and proceed with that at Chicago, is his inability to secure the services of solicitors and counsel or to give further security, owing to a change in his financial position. This, it is contended, is not an adequate reason, and reference is made to the case of Sirdar Gurdyal Singh v. Rajah of Faridkote, [1894] A. C. 670, where it was said by the Judicial Committee that in all personal actions the Courts of the country in which the defendant resides, not the Courts of the country where the action arose, ought to be resorted to. It was contended that the plaintiff adopted this course of taking action against defendant in the country of his residence properly, and should not be allowed now to abandon the forum which he had rightly chosen, and resort to one to which the defendant is not subject, and which only acquired jurisdiction by the fact of his having to pass through on his

way to California (scee per Osler, J.A., in Murphy v. Phœnix Bridge Co., 19 P. R. at p. 497).

On the other hand, it was urged that plaintiff is willing to pay all costs of this action, and that, as there is no power directly to prevent him from proceeding with his Chicago action, this Court ought not to do this indirectly by requiring him to desist from any other action as a term of allowing him to discontinue. It was said that costs are in all cases considered sufficient indemnity to a party who has been unsuccessfully attacked (see per Bowen, L.J., in Quartz Hill Gold Mining Co. v. Eyre, 11 Q. B. D. at p. 690). The plaintiff here is ready and willing to pay all costs which defendant is entitled to recover, and this is all that the Court can call on him to do. He never gave notice of trial, and so Rule 543 has no application unless he is bound by the act of the defendant, and, to use the language of the late Mr. Justice Kekewich in a similar case of De Jong v. United Motor Co., 20 R. P. C. 472 (at p. 473), unless "the Court will hold that by deliberately doing nothing the plaintiff must be understood to have done something."

It seems to be sufficiently plain that the term asked for should not be granted. "The right to resort to the Courts for the redress of wrongs and injuries ought not to be interfered with or denied except in very clear cases and with the greatest caution:" per Maclennan, J.A., in Great North West Central R. W. Co. v. Stevens, 18 P. R. 392, at p. 393. This principle, as applied to an attempt to close the doors of a foreign Court to a citizen of that country, seems a fortiori.

The plaintiff may therefore have leave to discontinue, on payment in 10 days after taxation of all costs, including those of this motion, and consenting at once, on the certificate of the taxing officer being issued, to payment out of Court of the money paid in as security, or so much thereof as may be necessary to satisfy the certificate. The costs of getting the money out of Court to be costs in the action.

CLUTE, J. DECEMBER 19TH, 1907.

TRIAL.

## WELLS v. CITY OF PORT ARTHUR.

*Street Railways—Injury to Person Falling from Car—Fare Not Demanded by Conductor—Willingness to Pay Fare if Demanded—Status as Passenger—Duty of Conductor—Misconduct—Proximate Cause of Fall—Avoidance of Kick Aimed by Conductor at Passenger—Responsibility of Owners of Railway—Negligence—Contributory Negligence.*

Action for damages for personal injuries sustained by plaintiff, owing, as he alleged, to the negligence or misconduct of the conductor of a tram-car operated by defendants, in causing him to fall from the car.

F. R. Morris, Fort William, for plaintiff.

F. H. Keefer, Port Arthur, for defendants.

CLUTE, J.:—The jury was struck out by consent of parties.

On 13th April, 1907, the plaintiff was injured while riding on the defendants' railway under the following circumstances.

The plaintiff was a lineman on the telephone line owned by the city of Fort William, and was returning from his work. It would appear that an arrangement had been made whereby workmen in the employ of Fort William were furnished tickets at reduced rates, and such tickets had previously in fact been furnished to the plaintiff. On the occasion in question, however, he had no ticket. He got on the car in Fort William that afternoon, with the intention of riding home in the car, which passed his place. He stated that he had been allowed by conductors on previous occasions to ride free; that he knew the conductor well; that on the present occasion his fare was not demanded; that if it had been demanded he would have paid it. As the car approached his home, he went from the centre of the car to the rear platform, or vestibule, as it is called, and while there he and the conductor got into a friendly scuffle. It is

uncertain who commenced the scuffle, as the plaintiff and the conductor contradict each other on this point, but I do not think it material—it was of very little importance, and no harm was done. This occurred before the car reached Prichard street, which was the nearest point where the car stopped before reaching the plaintiff's home, and where he should have got off unless he intended to leave the car while in motion, which, however, he admitted he did. He had moved out to the steps as the car approached Prichard street, and stepped down off the car to allow a lady to alight, but not with the intention of leaving the car. He then stepped on the lower step of the car, holding on by both hands—the one on the brass rod across the window bar, and the other on the back of the platform. As the car was approaching his house, the conductor said to him, "Here is where you get off," and made a motion to kick the plaintiff. It was done in fun and with no intention of touching the plaintiff. The plaintiff naturally threw his body back to avoid the kick, and in so doing his feet slipped from the step, he still having hold of the rear of the car, his other hand having loosened from the brass rod across the window; he was flung backwards and inwards and was hit by the trailer and received serious injuries. The wheel of the trailer does not appear to have passed across his arm; otherwise, it was said, it would have crushed the bone, and the bone was not broken. It did, however, cut the large muscles of the right arm, and also made an ugly wound near the rectum about 1½ inches wide and 2 inches deep, and he received other bruises of a less serious character. He was knocked senseless and taken to the hospital.

The only medical evidence as to the effect and extent of these injuries was that of the doctor called by the plaintiff, who stated that his arm at present was of very little use, and he did not think he would recover the full use of it; that he received serious injuries in his back; that the principal nerve of the right leg was injured so that he would not have full control of his leg, nor would it be strong; that he did not think the plaintiff would again be able to do heavy work, and that he was wholly unfit to do the work of his former position as lineman. The plaintiff was receiving at that time $3 a day.

I find the following facts: that there was no authority from the defendants to carry the plaintiff free; that he did

not have, on the occasion in question, a reduced rate ticket or any ticket; that he intended to ride as a passenger on the car, and did not intend to pay for his ride unless he was asked, but to pay if he was asked; that the conductor did not demand his ticket or pay for his ride; that the first scuffle had ceased before the car reached Prichard street; that the kick was made thoughtlessly, in fun, and without any intention of doing the plaintiff harm; that the effect of the conductor kicking at the plaintiff, while he was in the position in which he was, was the immediate cause of the accident which resulted in the injuries to the plaintiff complained of, by causing the plaintiff to try to avoid the kick by throwing back his body, thereby causing his foot to slip from the step of the platform before he was ready to alight. I find further that the plaintiff had intended to alight from the car while it was in motion, as he had frequently done before; that the car was going slowly; that he fell from the steps before he had intended to alight; and that the accident was not caused by the plaintiff attempting to alight while the car was in motion, but the immediate cause was that while the car was in motion he slipped from the steps by endeavouring to avoid the conductor's kick.

A nonsuit was moved for by Mr. Keefer, upon the grounds: (1) that the injury was caused by an act of the conductor not within the scope of his employment; (2) that in any event the plaintiff was guilty of contributory negligence.

The first question is, what was the duty which the defendants owed to the plaintiff under the circumstances in this case? As carriers of passengers the defendants are only responsible for negligence or breach of duty; and in this respect they occupy no different position from that of a railway company: Canadian Pacific R. W. Co. v. Chalifoux, 22 S. C. R. p. 731; Readhead v. Midland R. W. Co., L. R. 2 Q. B. 412; in appeal, L. R. 4 Q. B. 379. . .

[Reference to 6 Cyc. 357, 536; Beven on Negligence, 2nd ed., pp. 1154, 1155, 1158, 1159; Great Northern R. W. Co. v. Harrison, 10 Ex. 376; Austin v. Great Western R. W. Co., L. R. 2 Q. B. 442; Foulkes v. Metropolitan District R. W. Co., 5 C. P. D. 157, 168.]

In the present case I do not think the plaintiff can be treated as a trespasser, for, although he was quite willing to ride without paying, he was willing to pay if pay were demanded.

In McCann v. Sixth Avenue R. W. Co., 117 N. Y. 505, the Court of Appeals . . . held that where a conductor of a street car, kicking at a boy trespassing on the platform of a car, caused him to jump off the car and fall before another car, whereby he was injured, the company were liable.

The plaintiff undoubtedly intended to become a passenger on this car and to pay for his right to ride, if demanded, but not otherwise. It was the duty of the conductor to demand his fare in the usual way. He was not asked why he did not do so. It may have been forgetfulness; it may have been with the intention of allowing the plaintiff to ride free of charge. There was no evidence of collusion or fraud in the matter. Taking the view I do, that the plaintiff was willing to pay if his fare was demanded, I think he was a passenger on the car, with all the rights of one who had in fact paid his fare, and he was entitled, therefore, to the utmost care and diligence on the part of the defendants' servants to carry him safely. . . . .

[Reference to Coll v. Toronto R. W. Co., 25 A. R. 55; Smith v. North Metropolitan Tramways Co., 7 Times L. R. 459.]

In the present case it was proved that it was part of the duty of conductors to see people get on or off the car safely. What was meant by this, I presume, was that it was their duty to take due care in respect of passengers getting on or off the cars. . . .

[Reference to Coll v. Toronto R. W. Co., supra; Bayley v. Manchester R. W. Co., L. R. 7 C. P. 415.]

The defendants . . . urge that the kick given by the conductor was given in mere caprice, and not in the course of his employment. . . .

If the conductor had demanded the plaintiff's ticket, and he had refused to give it, or to pay for his passage, he would not have been entitled, even then, to have kicked the plaintiff off the car while in motion; but, if he desired to put him off the car, his duty would have been to stop the car, and, without using more force than was necessary, to remove the plaintiff. He would have had no right to kick him while acting in the course of his duty in putting him off the car. The act here of kicking the plaintiff while he was standing on the steps was, I think, a direct breach of duty, which was to use reasonable care when passengers were alighting. It

does not appear to me to be any answer to say that the plaintiff had no business to attempt to get off the car while in motion. While that is true, it still remains that at the moment the accident occurred he was not getting off, and he did not voluntarily get off. It was the wrongful act of the defendants' servant which caused him to slip. . . .

[Reference to Boyle & Waghorn's Railways and Canals, vol. 1, p. 23; Willis v. Belle Ewart Ice Co., 12 O. L. R. 526, 8 O. W. R. 331; Cunningham v. Grand Trunk R. W. Co., 31 U. C. R. 350; Blain v. Canadian Pacific R. W. Co., 5 O. L. R. 334, 2 O. W. R. 76; Pounder v. North Eastern R. W. Co., [1892] 1 Q. B. 385, [1894] A. C. 419; Daniel v. Metropolitan R. W. Co., L. R. 5 H. L. at p. 55; Readhead v. Midland R. W. Co., L. R. 2 Q. B. at p. 421; Austin v. Great North Western R. W. Co., L. R. 2 Q. B. at p. 445; Beven on Negligence, 2nd ed., pp. 1211, 1212, and note.]

Suppose in the present case the conductor had been aware that another person was about to assault the plaintiff as he was alighting, or had seen him in the act of so doing, it cannot be doubted, I think, that it would have been his duty to intervene and to prevent the assault. The question then is: can the defendants' servant do that which it is his duty as a servant of the defendants to prevent another from doing, and not render the defendants liable? It was strictly within the course of his employment to take due care in respect of passengers getting on and off the car. In the present case it, indeed, was not his duty to assist the plaintiff off, but it was his duty, I think, as an officer of the company, to refrain from doing that which was likely to cause an accident. Was, then, his act of kicking the plaintiff, in the circumstances, likely to cause an accident in his alighting. I think it was, and for this breach of duty in the course of his employment the defendants should be held liable. . . .

[Reference to Wood on Railroads, vol. 2, secs. 313, 315; Spohn v. Missouri Pacific R. R. Co., 87 Mo. 74; Chicago, etc., R. R. Co. v. Flexman, 103 Ill. 546; Stewart v. Brooklyn R. R. Co., 90 N. Y. 580; Pennsylvania R. R. Co. v. Vandiver, 42 Penn. St. 365; Weed v. Panama, 17 N. Y. 362; Chamberlain v. Chandler, 3 Mason (U. S.) 242.]

In Nightingale v. Union Colliery Co., 35 S. C. R. 65, it was held that in the absence of evidence of gross negligence a carrier is not liable for injuries sustained by a gratuitous passenger. This case is referred to by Osler, J.A., in Ryck-

man v. Hamilton, Grimsby, and Beamsville Electric R. W. Co., 10 O. L. R. 419, 425, 6 O. W. R. 271, 275, where he points out that high authority is not wanting to the contrary of this view, and where numerous cases bearing upon the question of a carrier's liability are reviewed.

In the present case, if the view be taken that he was a gratuitous passenger, I think the act of the conductor was at least that of gross negligence. It was more. It was wilful, in the sense of being intentional, and was an act which, I think, from its nature, was likely to cause injury.

Then with reference to the question of contributory negligence. It may be said that it was carelessness on the part of the plaintiff to stand on the steps, or to attempt to get off while the car was in motion. To this it seems to me to be sufficient to say that the plaintiff was not injured by standing on the steps: see Simpson v. Toronto and York Radial R. W. Co., 10 O. W. R. 33; nor was he in the act of getting off the car while in motion. That did not cause the accident. The proximate cause of the accident, as I have already found, was the act of the conductor.

On the question of damages the defence offered no evidence. I find that the plaintiff was permanently injured, and that the injury materially affects his earnings. He was in receipt of $3 a day; he was a young man of 23. Having regard to all the circumstances of the case, I assess damages at $2,000, for which I direct judgment, with costs of the action.

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BRITTON, J. DECEMBER 19TH, 1907.

TRIAL.

## CADIEUX v. ROULEAU.

*Husband and Wife—Pre-nuptial Contract in Quebec—Law of Quebec—Community of Property—Land Situate in Ontario—Will—Distribution of Proceeds of Sale—Heirs of Wife—Heirs of Husband—Judgment—Petition to Set aside—Reference—Costs.*

Petition by Amable Pilon and others to set aside a judgment and to establish community as to the estates of the late Barnabe Cadieux and his wife Marguerite.

H. W. Lawlor, Hawkesbury, for the petitioners.

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

J. Maxwell, L'Orignal, for infants.

E. Proulx, L'Orignal, for Sophie Rouleau.

BRITTON, J.:—On 11th February, 1850, Barnabe Cadieux and Marguerite Lacombe, then both of the county of Vaudreuil, in the province of Quebec, and engaged to be married each to the other, entered into a pre-nuptial contract in notarial form, in said county. This contract was made in the French language. . . . The part material . . . is, in the translation, in the following words: "In consideration of their mutual love and affection, the future consorts hereby equally and mutually donate each to the other, and to the survivor of them, accepting, all the movables and immovables which they actually possess and will acquire during said intended marriage, even as propres, which shall be found to belong to the one who shall die first, and to compose his or her succession at time of his or her death, whatever said property may amount to, and wherever it may be situated, said gifts to be enjoyed by the survivor in usufruct only during his or her life, and the said survivor shall not be bound to give security therefor, but will be obliged to cause an inventory therefor to be made, and at the extinction of the said usufruct the said property, movable and immovable, to return and to become the property of heirs and legal representatives of the said future consorts according to the side and line of which they will proceed. . . . The present donation is made on condition that at the death of the predeceased there be none of their children living, or to be born, from the said marriage; nevertheless if, there being children, they happen to all die in minority or before being emancipated by marriage, this donation shall resume its force and effect."

Soon after the contract was made, the intended marriage was duly solemnized, and the parties went to the township of Alfred, in the province of Ontario, and there made their home and continued there to reside. Barnabe Cadieux purchased the east quarter of the south half of 13 in the 6th concession and the east quarter of the north half of 13 in the 7th concession of Alfred, 50 acres in all.

On 26th September, 1876, Barnabe Cadieux, being ill and in a hospital in Montreal for treatment, attended before notaries in that city and made a will, a translation of which was produced. In it the testator calls his wife "Edwidge." She was married by the name of Marguerite. So far as material, the will is as follows: "And as to all the property, whether movable or immovable, which I may leave at the time of my death, I give and bequeath the enjoyment and use of it to Dame Edwidge Lacombe, my dearly beloved wife, and that during her life and so long as she shall remain my widow, and without her being liable to make any inventory of it, or to give security, willing and intending that such enjoyment shall be inalienable and unseizable for any cause or reason whatsoever, the said enjoyment being bequeathed to her by way of alimentary allowance. . . . And as to the corpus of my said property, I give and bequeath the same to my nephew Francois Xavier Cadieux, son of Jean Marie, farmer, residing in the said township of Alfred. . . . In order that the said F. X. Cadieux may sell and realize the property of my succession at the expiration of the said usufruct, and employ the proceeds (excepting always the sum of $400, which he may keep for himself as his property) in pious works according to my intention and that of my said wife, and more specially for the work or the propagation of the faith in the distant missions of America."

Barnabe Cadieux died at the township of Alfred on 13th April, 1881, the owner of the land above mentioned, leaving his wife him surviving, but no children as the issue of said marriage.

The widow remained in possession and enjoyment of said lands until her death, which occurred on 15th July, 1905. She did not marry again, and she died intestate, leaving no children, but she left brothers and sisters and the descendants of other brothers and sisters.

On 2nd February, 1906, Francis Xavier Cadieux commenced an action in the High Court of Justice, asking: (1) that the will above mentioned of Barnabe Cadieux be interpreted and the trusts declared; (2) that the land be sold; and (3) that the rights and interests of all parties entitled to the said lands be ascertained and declared.

That action came on for trial at L'Orignal on 4th April, 1906, before Teetzel, J., and judgment was then and there

given as follows: (1) that the gift of the proceeds of the sale of lands or real property in Ontario for pious works or for the benefit of the distant missions of America is void; (2) that the plaintiff F. X. Cadieux was entitled to the sum of $400 out of the proceeds of the sale of the lands in the pleadings mentioned, but that he should not be allowed any remuneration as trustee under the said will; (3) that except as to the $400 Barnabe Cadieux died intestate; (4) that there be a sale of the lands, and the usual reference . . .; (5) that Sophie Rouleau continue to represent the adult heirs-at-law of Barnabe Cadieux, deceased, throughout the proceedings in the Master's office, and that the official guardian do continue to represent the infant heirs-at-law; and (6) that costs of all the parties up to and including the trial of the action be taxed and paid out of the proceeds of the land, and that further directions and costs of the reference be reserved.

The judgment was carried into the Master's office, the lands were sold, and the Master made his report on 8th May, 1906, shewing that the lands were sold at auction on 28th April, 1906, to one Xavier Leduc for $2,500, and that the sale was properly conducted.

On 6th March, 1907, Amable Pilon and 6 others, heirs-at-law of Edwidge Cadieux, filed in the Court a petition praying that the judgment be set aside, and that the parties to the petition might be declared entitled to share in the distribution of the estate, etc.

On 16th May, 1907, the matter of this petition came up in Court at Toronto before Teetzel, J., when the following order was made: (1) that the petition be set down to be heard at the next sittings of the Court at L'Orignal; (2) that Amable Pilon be appointed to represent the heirs-at-law and next of kin of Edwin Cadieux for the purposes of the petition, and that the heirs-at-law and next of kin should be bound by any order made on the hearing of the petition; (3) that upon the hearing of the petition Amable Pilon and the parties to this action be at liberty to adduce such evidence as they may be advised in support of and in answer to the petition; (4) that the plaintiff and defendants be at liberty to file and serve a special answer to the petition . . .; (5) that the cost of the hearing of the petition and of that application should be disposed of by the Judge hearing the petition.

On 28th June, 1907, the plaintiff F. X. Cadieux filed a special answer to the petition, denying the charge of wrongful concealment, alleging good faith, etc., and setting up, amongst other things: (1) that at the most the ante-nuptial contract referred to rendered the consorts liable to account to each other for the proceeds of any real estate they or either of them may have acquired in this province; (2) that Barnabe Cadieux was not incapable of making a will, and under the alleged contract his share in the assets of the community would be governed and determined by his will; (3) that to carry out the contract as to property in this province it is necessary that the estate of the consorts should both be administered; (4) that the petitioners' proceedings are defective by reason of no personal representative of either Barnabe Cadieux or Edwidge Cadieux having been appointed; (5) that in 1873 Barnabe Cadieux became the owner of the easterly 33⅓ acres of the north half of lot 13 in the 6th concession of Alfred, and entered into possession of that land; (6) that on 14th June, 1880, Marguerite Cadieux obtained what purported to be a conveyance of said last mentioned land or of some interest therein from one John Whyte, an assignee in insolvency of one of the grantors named in the conveyance to Barnabe Cadieux; (7) that after the death of Barnabe Cadieux, to wit, on 29th August, 1899, Edwidge Cadieux conveyed the 33⅓ acres to her grand-nephew, one Wilfrid Pressault, for the expressed consideration of $200, and that Pressault is now in possession of said land; (8) that the value of said 33⅓ acres is about $2,000, and that in taking the accounts on the footing of the pre-nuptial contract Edwidge Cadieux should be charged with the real value of the said parcel of land so taken by her out of the assets of the community; and finally Francois Xavier Cadieux asks the direction of the Court as to bringing an action against Wilfrid Pressault for the recovery of the 33⅓ acres of which he is now in possession. . . .

I find the facts as to the pre-nuptial contract to be as above set forth. The parties then had their domicile in the province of Quebec, and in that province, as stated, and on 11th February, 1850, the contract was duly entered into; but their removal to Ontario, their deaths at the respective dates mentioned and without issue, are all correctly stated.

I find that Barnabe Cadieux made his last will and testa-

ment in the province of Quebec on 26th September, 1876, and that Marguerite Cadieux died intestate.

The pre-nuptial contract is valid between the heirs and legal representatives of Barnabe Cadieux and Marguerite Cadieux, and enforceable as to all the property, real and personal, owned by them during their marriage, whether such property be situate in Ontario or Quebec.

Taillifer v. Taillifer, 21 O. R. 337, is express authority upon this point. In the present case, as in the one cited, the contract was entered into before two notaries for the province of Quebec. "The evidence respecting the law of that country shews that it is a good and valid contract according to such laws." . . .

Upon the facts, the case cited is entirely in point. There was no wrongful concealment on the part of F. X. Cadieux, no fraudulent attempt to get the better of the heirs of Marguerite Cadieux.

There was no fraud on the part of Marguerite Cadieux in making the conveyance of the 33⅓ acres to Wilfrid Pressault. So far as can be determined from the mere fact of the form of the conveyance and Pressault going into possession and continuing to hold the land, I am of opinion that Marguerite Cadieux supposed she owned the property, having purchased it from Whyte . . . and that for some reason she sold it or sold some interest in it for $200. There certainly is no evidence of any moral fraud, and legal fraud cannot be imputed from the mere fact of her selling whatever interest in the land she did sell to Pressault for $200. The evidence establishes that these 33⅓ acres are now worth $1,200. It is not shewn with any certainty that they were worth so much in 1899, but they were in fact worth more than $200. Marguerite Cadieux received the $200, and as against her heirs this sum must be brought in, and they must be charged with the amount.

Pressault is not a party to this action, nor has he been brought in by the petitioners.

I give no direction to F. X. Cadieux as to any action or other proceeding against Pressault. By the abstract of title to the 33⅓ acres, which was proved without objection, it appears that Pressault has given two mortgages upon the property, which mortgages appear to stand against any interest he has in it.

I do not assume to deal in any way with the 33⅓ acres of land, but simply with the $200 which came to the hands of Marguerite Cadieux.

The judgment of Teetzel, J., in regard to the will of Barnabe Cadieux stands, and subject to that, and subject to the $400 in favour of the plaintiff F. X. Cadieux, mentioned in that judgment, the heirs-at-law of Barnabe Cadieux are entitled to one-half of $2,500, being the proceeds of Barnabe Cadieux's lands under the judgment, and also to one-half of the amount of the interest in the 33⅓ acres sold by Marguerite Cadieux, and the heirs of Marguerite are entitled to the remaining half, less the $200. . . . The petitioners' costs and the costs of all parties on the application for the order for trial and of the trial and hearing of the petition and of the reference to be taxed and paid out of the money in Court.

The action and the petition must now be referred to the local Master at L'Orignal to ascertain the names and residences of the parties who are entitled to claim as heirs-at-law of Barnabe Cadieux and Marguerite Cadieux, otherwise called Edwidge Cadieux, respectively, and to tax costs.

The amounts to go to the heirs-at-law of Barnabe Cadieux and Marguerite Cadieux respectively are to be found as follows: the proceeds of the farm sold under the judgment in the action.....$2,500
The sum charged against Marguerite Cadieux ..... 200

$2,700

Deduct the costs, and divide balance into two equal parts. From Barnabe's part deduct $400 payable to F. X. Cadieux under the judgment, and distribute the balance amongst the heirs of Barnabe Cadieux. From the part payable to the heirs of Marguerite Cadieux deduct the $200 received by her in her lifetime, and distribute the balance amongst the heirs of Marguerite Cadieux.

The money in Court to be paid out in accordance with the report of the local Master.

RIDDELL, J. DECEMBER 20TH, 1907.

TRIAL.

## TEMISKAMING AND NORTHERN ONTARIO RAILWAY COMMISSION v. ALPHA MINING CO.

## RIGHT OF WAY MINING CO. v. LA ROSE MINING CO.

*Mines and Minerals—Railway—Right of Way—Encroachment—Statutes—Trespass—Damages.*

Actions for damages for encroaching upon and taking away valuable mineral from under the land occupied by the plaintiffs' railway as "right of way."

The facts out of which the litigation arose are set out in La Rose Mining Co. v. Temiskaming and Northern Ontario Railway Commission, 9 O. W. R. 513, 10 O. W. R. 516.

D. E. Thomson, K.C., and A. W. Fraser, K.C., for plaintiffs.

G. H. Watson, K.C., and J. B. Holden, for defendants.

RIDDELL, J.: . . . It is admitted that the case above cited concludes the defendants from claiming any right to act in the way complained of (as it is admitted they have done), and the only question is as to the right of the plaintiffs. My brother Mabee expressed an opinion that the Act 6 Edw. VII. ch. 12 was conclusive, and I agree with him.

There can be no question upon the evidence that before any discovery of mineral by La Rose or McMartin, the location of the railway and 90-foot "right of way" had been fixed at precisely the present position, and that the Commission was then and continuously thereafter in open, public, and notorious possession.

The Act referred to, 6 Edw. VII. ch. 12, sec. 2, provides that the order in council of 24th January, 1906, did at and from the passing of the Act 2 Edw. VII. ch. 9, i.e., the 17th March, 1902, vest in the Commission the fee simple in these lands "and all mines and minerals being or lying in or under the said lands and all mining rights therein and thereto absolutely, freed from all claims and demands of every nature whatsoever in respect of or arising from any lease or

patent of any mining lands or mining location at any time granted." In the face of this express statutory provision, it is quite useless to advance arguments, however ingenious (and those of counsel were ingenious), based upon the provisions of general Acts such as the Railway Act, Mines Act, etc. All technical difficulties urged are got rid of by the present shape of the record.

The plaintiffs have made out their case, and are entitled to judgment, with costs, for the amount agreed upon.

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CLUTE, J. DECEMBER 20TH, 1907.

TRIAL.

## ROBERTS v. TOWN OF PORT ARTHUR.

*Municipal Corporation — Sewer — Overflow—Flooding Premises of Householder—Construction of Sewer—Insufficiency—Heavy Rainfall—Responsibility of Municipality —Damages.*

Action for damages for injury done to plaintiffs' premises by flooding.

W. D. B. Turville, Port Arthur, for plaintiffs.

F. H. Keefer, Port Arthur, for defendants.

CLUTE, J.:—The plaintiffs are lessees of part of lot No. 11 situate at the north-east corner of Wilson and Cumberland streets in the city of Port Arthur, and carry on the business of wholesale fruit merchants therein.

On 15th July, 1907, the plaintiffs' cellar was flooded from the defendants' sewer drain, causing damage to the plaintiffs. It is charged that this damage was owing to the defendants' negligence: (1) in constructing a number of catch basins for surface water and turning it into the sanitary sewer; (2) in the negligent construction of their sewerage system, inasmuch as they failed to provide a storm sewer for the surface water, and in emptying two drain pipes of larger dimensions into an outlet of a smaller size, thereby overtaxing the capacity of the sewer, and causing

the sewerage and other commodities thus accumulated to find an outlet into the plaintiffs' cellar; (3) in not properly flushing the sewer; (4) in not furnishing traps or flaps at the connection of the plaintiffs' cellar with the city sewer, which, it is alleged, it was their duty to do, inasmuch as they attempted to drain a larger pipe into the smaller, an insufficient outlet with a minimum fall.

The plaintiffs' allegations are denied by the defendants, and they further plead that the storm which caused the injury was practically a cloud burst, being unusually heavy and lasting about 10 hours without interruption; that the defendants passed a by-law, which was enforced on 15th July, which required that all "private sewers and drains, stable yards, timber, or wood drains, may be connected with the storm sewers, and cellar drains may be connected with the sanitary sewers, but all such connections shall be made according to the rules and regulations prescribed and according to the direction of the engineer, and all such connections shall be made at the owner's risk in case of water backing up;" . . . that the drain in question was one in which no requisition was made to the city for sewerage connection; that the plaintiffs had not provided the back pressure valve, as required by by-law No. 705, passed on 16th May, 1904, paragraph 84, which provides that "proper check valves or mechanical back water traps shall be placed on all cellar drains, in addition to the water seal trap, where there is any possible danger of flooding from the sewer or from the rain water leaders. It is recommended that they be placed on all drains where the bottom of the cellar or basement is less than two feet above the top of the street sewer."

The defendants further charge that the plaintiffs neglected to comply with this by-law or have such protection, and that it was by their own negligence that damage was caused.

I find the facts to be as follows. The building on premises in question was removed from the lake-front and placed at the south-east corner of Cumberland and Wilson streets in 1900, and at the same time a connection was made with the city sewer or drain, which at that time commenced at Cumberland street and continued down Wilson street into the bay. I find that at the time this connection was made there existed a resolution of the council that "in future no

sewer be tapped in the town without a resolution of this council, and all connections must be made under the direction of the town engineer, at the parties' expense." I find further that, as a matter of fact, this resolution was never acted upon; that there never was a resolution of the council in regard to connections made with the drain down, at all events, to 1903; that the practice was that the property owners desiring connections had the drains dug; and that the city had an oversight of what was done by their engineer. There was no direct evidence as to what took place in connecting the premises in question with the Wilson street drain, but from the general practice, and from the evidence, I infer, and find, that the usual practice was followed, and that the connection was made with the assent and approval of the city authorities.

It does not appear that the by-laws above mentioned ever came to the notice or knowledge of the plaintiffs or their landlord. After 1903 the sewerage system of the city was considerably extended, and drains were constructed connecting with the 14-inch drain on Wilson street, at the corner of Wilson and Cumberland, of much greater capacity than the 14-inch drain. One expert said that the drains thus emptying into the 14-inch drain were more than 7 times the capacity of the 14-inch drain. At all events, the drains so connected were more than double its capacity. It was explained by the city engineer that the system of storm drains had been put in since 1903, largely covering the area of the sanitary drains. He admitted, however, that when these became stopped up, the catch basins would overflow and so increase the drain on Wilson street. The Wilson street drain had originally been constructed 15 inches, but in the year 1904, 250 feet of drain in the water being the outlet of the Wilson street drain was taken up, and the 14-inch drain put down in its place, with a grade of one to 500 feet. The grade of the drains emptying into Wilson street was very much higher.

It was established beyond all doubt that the Wilson street drain was not sufficient to carry off the water which emptied into it, in case of heavy rains, and, on the occasion in question, it was shewn that one Benson, a witness, having occasion to go into the man-hole of this drain, saw that it was flooded and incapable of carrying away the water and that it flooded another cellar on the same occasion.

The evidence satisfied me, and I find as a fact, that the overflow into the plaintiffs' cellar was from the Wilson street drain, and that it was caused by the increased quantity of water emptying into it from the other drains, which had been constructed by the defendants since 1904, and which it was incapable of discharging.

Part of the cost of the Wilson street drain was levied upon the property in question by a frontage tax.

It is further shewn in evidence that the traps directed to be put in by the city did not prevent the overflow of the drain in case of storms, as it was shewn that on the same occasion another cellar was flooded where the trap had been put in. The fall from the premises in question to the city drain was 3½ feet, so that by-law No. 705 would not apply, as they were recommended only where the bottom of the cellar or basement is less than 2 feet from the top street sewer.

On the day in question the rainfall to 7 o'clock was 67-100 of an inch and from 7 to 10 was 1 80-100. The evidence shewed that while the rain on the occasion in question was a heavy rainfall, it was not unusual, as in 1903 and 1905 there had been heavier rainfalls within the same length of time.

I think this case is distinguishable from Faulkner v. City of Ottawa, 10 O. W. R. 807, both as to the quantity of the rainfall and in the fact that after the construction of the 15-inch drain on Wilson street, the outlet of that drain was reduced to 14 inches, and there were other sewers or subsidiary drains led into it, and that, owing to the additional quantity of water led into it by these drains, the discharge was insufficient.

I find the defendants guilty of negligence in thus conducting into their drain a quantity of water which it was incapable of discharging, and that this negligence was the direct cause of flooding the plaintiffs' cellar, causing the damage complained of.

I direct judgment for the plaintiffs, with a reference to ascertain the amount of damages, and that judgment be entered for the amount so found, with costs of action and of the reference. Counsel having agreed to name a referee, if this is not done before the judgment issues, I will name a referee on application.

MEREDITH, C.J. MAY 2ND, 1907.

DIVISIONAL COURT. JUNE 11TH, 1907.

WEEKLY COURT.

DIVISIONAL COURT.

## RE WYNN AND VILLAGE OF WESTON.

*Municipal Corporations—Local Option By-law—Approval of Electors—Voters' Lists — Persons Entitled to Vote—Polling Places — Statutory Declarations of Secrecy—Municipal Act, 1903, secs. 348, 368.*

Motion to quash a local option by-law.

J. Haverson, K.C., for the applicant.

H. E. Irwin, K.C., for the village corporation.

MEREDITH, C.J., held that, on a proper interpretation of sec. 348 of the Consolidated Municipal Act, 1903, the clerk of the municipality was justified in treating as included in the list of voters therein referred to, persons found by the County Court Judge, upon revising the voters' list of the municipality, to be entitled to vote.

Also, that the provisions of sec. 36 of the Act, requiring a statutory declaration of secrecy to be made by every officer and clerk authorized to attend at a polling place, is directory only, and that the failure of the officers to comply with its requirements does not invalidate the election.

Also, that it is competent for the council not to hold a poll in each subdivision of the municipality, if thought expedient.

An appeal from this decision was dismissed by a Divisional Court (MULOCK, C.J., ANGLIN, J., RIDDELL, J.)

MEREDITH, C.J. DECEMBER 20TH, 1907.

CHAMBERS.

## SWITZER v. SWITZER.

*Particulars—Statement of Defence—Action for Alimony—Defence Alleging Adultery of Wife—Times and Places.*

Appeal by plaintiff from order of Master in Chambers, ante 949.

G. H. Kilmer, for plaintiff.

W. E. Middleton, for defendant.

MEREDITH, C.J., dismissed the appeal with costs to defendant in any event.

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RIDDELL, J. DECEMBER 21ST, 1907.

CHAMBERS.

## MULLIN v. PROVINCIAL CONSTRUCTION CO.

*Execution—Stay pending Appeal to Divisional Court—Rule 827—"Judge of Court Appealed to"—Trial Judge—High Court — Counterclaim—Grounds of Appeal—Removal of Stay as to Part—Costs.*

Motion by the plaintiff under Rule 827 (2) for an order directing that execution upon his judgment against the defendants should not be stayed, notwithstanding the setting down of an appeal by the defendants from that judgment to a Divisional Court.

J. H. Denton, for plaintiff.

H. D. Gamble, for defendants.

RIDDELL, J.:—This was an action tried before me at the non-jury sittings at Toronto. The plaintiff claimed the price of a quantity of sand delivered from his pit and received by the defendants. The defendants alleged that the sand delivered was inferior to what the plaintiff had represented

it would be, and also by counterclaim alleged "that . . the plaintiff entered the office of the defendants . . and upset and threw the office into confusion, throwing on the floor the office books of account of the defendant company, and abusing and otherwise annoying the employees and servants of the company;" and for this they claimed $200.

At the trial I found the facts against the defendants . . and directed judgment to be entered for the plaintiff upon his claim for $738.75. The defendants were not ready to go on with the trial of their counterclaim, by reason of the absence of a material witness, and I gave them the option of withdrawing the counterclaim and bringing a new action or of adjourning the trial of the counterclaim: they accepted the latter alternative. The counterclaim has not yet been tried, neither party being at fault respecting the delay.

I refused to stay the issue of the judgment until the trial of the counterclaim. Upon the same day judgment was entered and execution issued and placed in the hands of the sheriff of Toronto. The defendants served notice of motion to a Divisional Court, claiming $214.50 for damages for breach by the plaintiff of his contract as to the quality of the sand; and thereupon applied for a fiat on 12th December. A fiat was granted to set down the appeal, and (no doubt per incuriam) also to stay the execution. Rule 828 provides that upon an appellant becoming entitled, by setting down an appeal to the Divisional Court, to a stay of execution, a fiat may issue staying the execution in the hands of the sheriff. This fiat cannot, however, issue under this Rule unless and until the appellant has become entitled to a stay, which at the time of the application he was not. The appeal is set down.

A motion is now made by the plaintiff, under Rule 827 (2), for an order that the execution shall not be stayed, notwithstanding the setting down of the appeal. This motion is in no way an appeal from the fiat; but is a motion rendered necessary, as it is contended, by the stay automatically effected by the setting down of the appeal.

It is objected that I am not "a Judge" of "the Court appealed to"—it being contended that the appeal is to a Divisional Court, and that under sec. 70 (2) of the Ontario Judicature Act I am precluded from sitting in a Divisional Court upon this appeal. I have had the opportunity of con-

sulting with a number of my brethren, and I am clear that the objection is without foundation. Section 68 of the Act provides that the King's Bench, Chancery, Common Pleas, and Exchequer Divisions shall not sit as such Divisions; and there shall be no Divisional Courts of any of these Divisions; but the Divisional Courts shall be Divisional Courts of the High Court. An appeal is taken to "a Divisional Court of the High Court or to the Court of Appeal:" Rules 782, 783: and where to a Divisional Court, it is really to the High Court. When Rule 827 (1) or (2) speaks of "the Court appealed to," the distinction is indicated between the Court of Appeal and the High Court—not between certain members of the High Court and other members of the same Court. The objection is overruled. In my judgment, motions of this kind are generally best made before the Judge who tried the action, and who should be most conversant with the facts. As to that, however, much may be said on both sides.

As to the merits, I should not think of staying the execution until the trial of the counterclaim, even if it be seriously intended to proceed with a claim that cannot be expected to result in a substantial verdict. The counterclaim is, in my view, in any event, one which should not have been joined with the action. Many cases are cited in Holmested and Langton, pp. 459-461, where just such counterclaims were held not capable of being conveniently tried in the action. There is no suggestion that the plaintiff is not a man of substance, or that, if a verdict were obtained upon the counterclaim, there would be any danger of its not being paid.

As to the claim, it will be noted that the sole ground of appeal is that the defendants should have been allowed damages (which they fix at $214.50) for breach of warranty. There is no appeal against the remainder ($738.75, less $214.50, equals $524.25), and no ground is alleged why this should not be paid. The execution should not be stayed as respects . . . $524.25.

In respect of the $214.50, it must be kept in mind that "the general rule and the right of the appellant is that, save in the excepted cases, proceedings below are stayed upon the appeal being perfected; . . . a proper case must be made out for allowing the respondent to enforce what has not yet become a final judgment, the appeal being a step in the cause: Centaur Cycle Co. v. Hill, 4 O. L. R. at p. 95, 1 O. W. R. 377, 401. All that is shewn here is the belief

by the plaintiff that the defendants have no defence to the action, and that their present appeal is merely for the purpose of delay, added to the affidavit of the plaintiff's solicitor that the plaintiff has expressed considerable anxiety as to the financial ability of the defendants to pay the claim, and the solicitor's own belief that the defendants' appeal is to delay the plaintiff and obtain some time to raise the money. There is no suggestion that by staying the execution the plaintiff will probably lose his claim; and no facts are set out from which such an inference can be drawn. On the present material, I do not think that the motion can succeed to the full extent; but I reserve leave to the plaintiff to move again in case facts come to his notice indicating danger to his claim.

As to the costs to which the plaintiff is entitled under the judgment, I understand that the execution does not cover them; so that there will be a sum against which to draw for costs which may be awarded to the defendants by an appellate Court.

The order will be that the stay effected by the setting down of the appeal be removed, to the amount of $524.25, unless the defendants pay that sum to the plaintiff's solicitor upon the judgment on or before 26th December, 1907.

Costs of this motion, if the pending appeal be proceeded with, to the plaintiff in the appeal; if the appeal be not proceeded with, to the plaintiff in any event. The principle upon which I proceed is that, as the plaintiff has succeeded in part, he should not pay costs in any event; and if the appeal is simply for time, or if it turn out to be ineffectual, the plaintiff should be paid his costs.

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TEETZEL, J. DECEMBER 21ST, 1907.

WEEKLY COURT.

## RE CAFFERTY.

*Will — Construction—Devise—Determination of Nature of Estate—Summary Application—Rule 938—Scope of.*

Motion by Cecilia Cafferty, a daughter and devisee under the will of Michael Cafferty, who died in 1873, for an order under Rule 938 declaring the true construction of the will.

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

J. E. Jones, for the respondents.

TEETZEL, J.:—The applicant is a devisee under the will, and the question is whether she takes a fee simple or a fee tail or a fee simple with an executory devise over, or whether in any case, under the terms of the will, she has during her lifetime an absolute power to sell.

The executors made a conveyance of the lands to her, so far as they had power to do under the will.

The will, inter alia, provided that if the applicant should die without lawful issue, any of the devised property then remaining should go to her sister Mary Ann Cafferty, if she survived, or to her lawful issue, and that if both daughters should die without issue, the property should go to the Roman Catholic Episcopal Corporation of the Diocese of Toronto.

Mary Ann Cafferty has since died, leaving a husband and one daughter.

The only parties served with notice of the application are John and Mattie Tobin (the husband and daughter of Mary Ann Cafferty) and the Roman Catholic Episcopal Corporation, and they and the applicant are the only persons interested in the application.

Objection was taken by counsel for the Tobins that the question cannot be disposed of under Rule 938, citing In re Davies, 38 Ch. D. 210; Re Martin, 8 O. L. R. 638, 4 O. W. R. 429; In re Newman's Trusts, 29 L. R. Ir. 9.

I am of opinion that the objection must prevail. Adopting the language of Street, J., in Re Martin, supra, the question propounded is one with which the executors have nothing to do, and does not in any way relate to the administration of the estate.

In re Davies, supra, decided that under the English Rules (which, so far as affects an application like this, are, I think, as comprehensive as our own Rules 938 and 939) there is jurisdiction to determine such questions only as before the existence of the Rules could have been determined under a judgment for the administration of an estate or execution of a trust, and consequently that there is no jurisdiction upon an originating summons to decide a question arising between legal devisees under a will.

See also In re Royle, 43 Ch. D. 18; Re McDougall, 8 O. L. R. 640, 4 O. W. R. 428.

The costs of the respondents will be costs in the cause, to them only, in any other proceeding which the applicant may be advised to adopt.

RIDDELL, J. DECEMBER 21ST, 1907.

TRIAL.

## McKIM v. COBALT-NEPIGON SYNDICATE.

*Contract — Advertising—Construction of Contract—Moneys Expended by Advertising Agent—Breach of Contract—Loss of Profit—Damages—Services — Remuneration—Quantum Meruit—Evidence—Credibility of Witnesses—Evasion in Taking Oath—Entire Contract—Failure in Part—Termination of Contract—Refusal to Pay.*

Action to recover money paid out by plaintiff for defendants in pursuance of an advertising contract, and profits which plaintiff would have made if defendants had carried out the contract. Counterclaim by defendants against plaintiff for damages.

C. P. Smith, for plaintiff.

J. Bicknell, K.C., for defendants.

RIDDELL, J.:—While there are several questions of law involved, the chief question is one of fact, depending upon the relative credit to be given to the witnesses. The chief witness for the defence was detected by the clerk of the Court kissing his thumb instead of the book, and was by him required to take the oath properly. Sometimes there is an objection taken by witnesses on sanitary grounds to kissing the book, and such objections are deserving of all attention and respect. But the present was not a case of that kind. This witness, upon being detected and challenged, kissed the book with alacrity. This is not the only reason for preferring to the evidence of this witness that of those called for the plaintiff. From their conduct and demeanour I am convinced that the facts of the case, where in dispute, are substantially as given by the employees of the plaintiff.

On 14th December, 1906, the manager of the defendants (the witness Campbell) and Somerset, Toronto manager for the plaintiff, met at Campbell's room at a hotel. Campbell handed Somerset a copy of an advertisement and a list of papers in which he wished the advertisement inserted. The plaintiff's business is that of advertising agent. And then and there it was agreed that the plaintiff should at once proceed to have this advertisement inserted in the papers

named, receiving a down payment of $1,000, and be paid from time to time further sums as he might require them. The $1,000 was paid over, and Somerset at once set to work to carry out his contract. Some of the papers could not be reached, owing to the defendants not giving orders in time to reach them by mail. But Somerset found that it would require a very large sum to have the advertisements inserted, and on 15th December he required the defendants to advance $7,100 more to enable the plaintiff to take advantage of all cash discounts; and said that the defendants would be asked to settle for the balance only when all accounts were got in. This was on Saturday. On the same day the plaintiff received a letter from the defendants saying that the request for $7,100 was not in accordance with the agreement, but that the plaintiff would receive a cheque in full on Wednesday. The plaintiff at once replied, saying that he understood the arrangement was that the defendants "were willing to pay any further amount needed," and asked for a cheque for $7,100 on Monday before 3 p.m. Somerset on the same day saw Campbell and told him what the agreement had been according to his view. Campbell controverted this, but finally promised to send a cheque before 3 p.m. on Monday. No answer to the plaintiff's letter was sent till Monday, when the defendants informed the plaintiff that they were going to transfer their account to another firm, and on the same day a letter was sent to the plaintiff by the solicitors for the defendants threatening to hold the plaintiff responsible for damages for omitting to insert the advertisement in certain papers. The letter further insisted that the contract was for the defendants to pay $1,000 in advance and the remainder when proof was furnished of the insertion of the advertisements. Upon the receipt of this letter Somerset again saw Campbell and told him that he could not go on with the contract unless payments were made as had been agreed upon. Campbell refused, and accordingly Somerset cancelled all advertisements.

The plaintiff now sues for the amount of money paid out and to be paid out by him, as well as loss of the profits he would have made if the defendants had carried out their agreement; the defendants counterclaim for damages.

Upon the facts set out, I am of opinion that the plaintiff is entitled to recover.

It is contended for the defendants that their story of the real agreement should be accepted—but I am unable to give credence to the evidence, and I am satisfied that the agreement was as set out by the witnesses for the plaintiff, coming to this conclusion largely upon the demeanour of the witnesses.

Then it is said that this is an entire contract, and that if the plaintiff failed to procure the insertion of the advertisement in even one newspaper, he must fail, citing Appleby v. Myers, L. R. 2 C. P. 651, and King v. Low, 3 O. L. R. 234. I do not think that the contract was that the plaintiff was necessarily to procure the insertion of the advertisement in all the papers named; but I think that he had fulfilled all his part of the contract when he had done all that was reasonably possible, in the usual course of business, toward having the advertisements so inserted. Any other construction would be, in my view, quite contrary to what the parties intended, and would be absurd from a business point of view.

Then it is said that the refusal by Campbell to pay as agreed was not such an act as to authorize the plaintiff to put an end to the contract. Mersey Steel and Iron Co. v. Naylor, 9 App. Cas. 434, and Midland R. W. Co. v. Ontario Rolling Mills, 10 A. R. 677, were relied upon. These were cases in which a purchaser had refused to pay for an instalment of goods, and, as is pointed out in Midland R. W. Co. v. Ontario Rolling Mills, at p. 685: "The rule of law is stated by Lord Coleridge in his judgment in Freeth v. Burr, L. R. 9 C. P. 208. 'In cases of this sort,' he said, 'when the question is, whether the one party is set free by the action of the other, the real matter for consideration is, whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse the performance of the contract.' This statement of the law has been expressly adopted as correct by the Court of Appeal in Mersey Steel and Iron Co. v. Naylor, 9 Q. B. D. 648, and by the House of Lords in the same case, 9 App. Cas. 434, while both of those appellate Courts differed from Lord Coleridge, before whom the action had been tried, in the application of the rule to the facts." The whole difficulty is in determining whether the acts amount to an intimation of an intention to abandon the contract, or, as it is put by Patterson, J.A., at p. 686: "Did the de-

fendants intimate an intention to abandon and altogether refuse performance of their part of the contract?" No such difficulty arises here. The defendants expressly refused to do that which they had promised to do; in such a case the law seems to be clear. "Whenever one of the parties to a special contract not under seal has in an unqualified manner refused to perform his side of the contract . . . the other party has thereupon a right to elect to treat it as rescinded, and may, on so electing, immediately sue on a quantum meruit for anything which he has done under it before the rescission:" Sm. L.C., vol. 2, p. 19. And that the refusal to pay money as agreed is such a refusal is shewn by many cases. It will be necessary to refer only to the judgment of Lord Blackburn in Mersey Steel and Iron Co. v. Naylor, 9 App. Cas. at p. 442.

The plaintiff is entitled to the amount of money paid or to be paid by him, and also to a reasonable sum for services rendered. The amount paid and to be paid is $3,231.22, and, deducting the amount paid by defendants, $1,000, the balance is $2,231.22. A reasonable sum by way of quantum meruit for services rendered would be $500, in all $2,731.22, for which sum and interest judgment will be directed to be entered with costs. The counterclaim will be dismissed with costs. It is not a case for a stay.

If it be considered that the plaintiff is entitled to the amount of profit he would have made, the amount would be much larger than $500.