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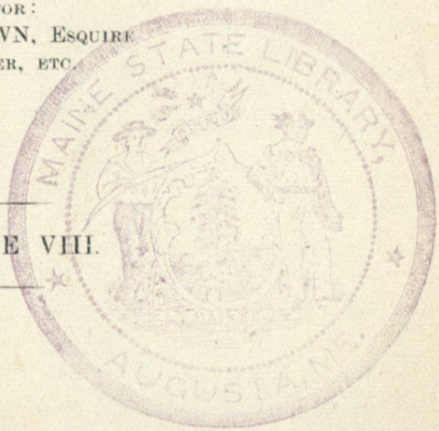

VOLUME VIII.

TORONTO:
THE CARSWELL COMPANY, LIMITED
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THE

ONTARIO WEEKLY REPORTER

(TO AND INCLUDING JUNE 9TH, 1906.)

VOL. VIII. TORONTO, JUNE 14, 1906. NO. 1

JUNE 4TH, 1906.

DIVISIONAL COURT.

RE COUNTY OF VICTORIA AND TOWNSHIP OF CARDEN.

(RE MUD LAKE BRIDGE.)

Municipal Corporations—Bridge — Maintenance and Repair by County — Length of Bridge — Mode of Estimating— Municipal Act, secs. 605, 617 a.

An appeal by the corporation of the county of Victoria from an order of the Judge of the County Court of that county, dated 12th March, 1906, declaring the bridge in question a county bridge to be maintained and kept in repair by the appellants and at their costs.

The order was made upon the application of the respondents, the corporation of the township of Carden, and under the authority of sec. 617a of the Consolidated Municipal Act, 1903, which enables a council of a township in which "a bridge over 300 feet in length, is situate, to declare by resolution that, owing to the bridge being over that length, and "being used by the inhabitants of municipalities other than the township, and being situate on a highway which is an important road affording means of communication to several municipalities, it is unjust that the township should be liable for the maintenance and repair of the bridge, and that it should be main-

tained and repaired by the corporation of the county, and that an application should be made to the Judge of the County Court of the county for an order declaring such bridge a county bridge, to be maintained and kept in repair by the county corporation."

The sole question for determination was whether the structure in question was "a bridge over 300 feet in length," within the meaning of sec. 617a.

G. H. Watson, K.C., and F. D. Moore, Lindsay, for appellants.

R. J. McLaughlin, K.C., for respondents.

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

MEREDITH, C.J.:—The structure is the means provided for crossing the waters of Mud Lake, and its total length is 643 feet; it consists of a wooden section spanning what is called the narrows, with an embankment at each end of it. The wooden section is 243 feet long, and the embankments are of the respective lengths of 140 feet and 260 feet. The wooden section spans the waters of the lake at low water, but at high water they spread out for practically the whole width of 643 feet.

The embankments were constructed in 1889. Previous to that there existed a bridge for the whole distance of 643 feet, and in replacing it by the structure in question the embankments were raised upon the timbers of the old bridge, which were sunk to the bottom of the lake.

It is quite clear that both the wooden section and the embankments were designed to furnish a means of passing over the lake, and that the embankments were as necessary to enable that to be done as was the wooden section.

I agree with the Judge of the County Court that the wooden section and the embankments together form "*a bridge over 300 feet in length*" within the meaning of sec. 617a.

Without the embankments the wooden section would have been useless for the purpose for which it was designed . . .

and the embankments, . . . were as necessary for that purpose as the wooden section. They are artificial structures, and the authorities referred to by the Judge amply warrant the conclusion that they form part of an entire structure which may properly be called a bridge.

I do not think that sec. 617a is to be read as applying only to bridges crossing rivers, streams, ponds, or lakes. There is nothing in the language of the section itself so limiting it, and, as appears to me, no reason why it should be so limited. What the legislature had in view was to relieve township municipalities, upon which that duty is primarily imposed, of the burden of maintaining long, and therefore expensive, bridges, which were were not merely local in their character, but were on important highways affording means of communication to several municipalities, and to cast that burden on the county, and no reason occurs to me why the legislature must be taken to have confined that relief to bridges crossing rivers, streams, lakes, or ponds, and to have therefore excluded bridges crossing ravines. . . .

It was strenuously argued by counsel for the appellants that, however the law might otherwise have been, the provisions of sec. 605 of the Consolidated Municipal Act, 1903, as interpreted by a Divisional Court in Traversy v. Township of Gloucester, 15 O. R. 214, render it impossible to apply to the construction of sec. 617a the authorities upon which the Judge proceeded.

I am unable to agree with that argument.

Section 605 has no application to this case. Its provisions apply only to cases in which two municipalities are concerned, the one having jurisdiction over the bridge and the other over the highway: Johnston v. Nelson, 17 A. R. 16. In this case it is upon the respondents and upon them alone that by law the duty of keeping in repair both the bridge and the highway rests, and the purpose of the application which they have made is to obtain a transfer of that liability as to the bridge from them to the appellants.

In my opinion, the order of the Judge of the County Court is right and should be affirmed, and the appeal from it dismissed with costs.

MEREDITH, C.J. JUNE 5TH, 1906.

CHAMBERS.

FARMER v. KUNTZ.

Venue—Change — Preponderance of Convenience — Counterclaim.

Appeal by plaintiff from order of Master in Chambers, ante 829, changing the venue from Toronto to Goderich.

C. P. Smith, for plaintiff.

Featherston Aylesworth, for defendant.

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

ANGLIN, J. JUNE 8TH, 1906.

WEEKLY COURT.

BATTLE v. WILLOX.

Contract—Construction—Advances—Share of Profits—Breach—Damages—Measure of—Possible Profits.

Appeal by defendant from report of Master at Welland finding defendant liable for $5,026.75 as damages for breach of contract.

F. W. Griffiths, Niagara Falls, for defendant.

T. F. Battle, Niagara Falls, for plaintiff.

ANGLIN, J.:—Plaintiff agreed to become indorser for defendant upon promissory notes for a sum not exceeding $5,000. In consideration therefor, defendant agreed to pay to plaintiff one-fourth of "all or any profits" arising out of

certain contracts which defendant was then "about to enter into" for the supply to certain persons and companies of sand from a gravel pit owned by defendant. Defendant, in breach of this agreement, sold his gravel pit. Plaintiff sued for damages, claiming an account of profits which defendant might have made had he obtained and carried out the contracts in contemplation when the agreement was entered into. The action came on for trial before Meredith, J., who found that the sale of the gravel pit by defendant was a breach of his contract with plaintiff, because defendant had thereby put it out of his power to perform such contract, and . . . referred it to the Master. . . ." to assess the damages suffered by reason of the said breach of contract by defendant."

. . .

The Master . . . interpreted the judgment pronounced at the trial as entitling plaintiff to damages in respect of the several contracts mentioned in his agreement with defendant, upon the footing that defendant had contracted absolutely and in any event to obtain such contracts and to carry them out, and account for profits to arise therefrom; he declined to receive evidence tendered by defendant to shew that several of such contracts could not have been procured, on the ground that upon this issue the judgment at the trial was conclusive against defendant; . . . and he proceeded, upon this basis, to inquire what profits might have been made by plaintiff had he procured and carried out all the contracts in question. The amount so ascertained he has awarded to plaintiff as damages.

The Master has, I think, wholly misconceived the effect of the judgment at the trial and the scope of the reference to himself. The formal judgment certainly does not determine that plaintiff is entitled to damages upon this basis. Nor does the opinion of the trial Judge support such an interpretation of the judgment as entered. Although . . . he is reported as saying, "The plaintiff now becomes entitled to damages to the extent of what his profits would have been if these contracts had been carried out," upon being asked . . . if he will make any direction as to the method of ascertaining the damages, the Judge replies: "I think I must leave the whole question of damages to be dealt with by the proper officer. The defendant was to enter into contracts. It may very well be that, if he could not enter into

them, there would be no loss. If he could have entered into them, then comes the question of what the loss was." How the Master came to take the view that this was an adjudication that plaintiff was entitled to an account of profits which might have been made out of all the projected contracts, upon the assumption that they could all have been obtained and carried out, though it should be shewn that it was impossible to procure some of them, for causes for which defendant was not responsible, I cannot understand. If anything, it seems rather to be an expression of the Judge's opinion that damages should be assessed only in respect of contracts which defendant might have procured had he retained the gravel pit. But I think the correct view is that upon this point the judgment must be read as requiring the Master, in dealing with the question of damages, to determine the basis upon which they should be allowed.

As the Master has proceeded upon a misconception of the judgment and of the scope of the reference, these matters might, upon this ground alone, be referred back to him for adjudication. But, to avoid further possible complications and delay, I deem it better now to express my view as to the true interpretation of the contract itself, which counsel for plaintiff contended supports the Master's finding as to the basis upon which damages should be assessed.

After a recital, inter alia, that defendant "is about to enter into certain contracts hereinafter referred to," this document proceeds as follows:

"Now this agreement witnesseth that, in consideration of the hereinbefore mentioned mutual covenants, promises, and conditions, the said parties hereto do hereby mutually covenant, promise, and agree to and with each other in manner and form following, that is to say:—

"The sail Willox is to enter into contracts as follows, with the Niagara Construction Limited for the supply of from 15,000 to 25,000 yards of sand; with M. P. Davis for the supply of about 25,000 yards; with A. C. Douglas for the supply of about 10,000 yards; with H. C. Symmes for the supply of about 10,000 yards; with the Electrical Development Company Limited for the supply of about 15,000 yards; all at a price not less than 85 cents a yard delivered upon their

respective works, unless otherwise agreed to between the parties hereto."

The agreement then provides for the indorsement by plaintiff of defendant's notes to the extent of $5,000, in consideration of his receiving "one-fourth interest in all or any profits arising out of the above mentioned contracts;" gives the plaintiff a lien upon the gravel pit for all moneys which he may have to pay on account of such indorsements; and provides for an accounting of such profits, etc.

After carefully considering all the terms of this agreement, I am of opinion that, upon its true interpretation, defendant did not bind himself absolutely and in any event to obtain and carry out all the contracts mentioned in the paragraphs above quoted. That his being able to procure such contracts was contingent and uncertain, and was so regarded by the parties to this action, is manifest in the provision as to the minimum price of "85 cents a yard delivered upon the respective works, unless otherwise agreed to between the parties hereto. Clear and explicit language should be found expressing such an onerous obligation, when a Court is asked to hold that a party has bound himself in any event to perform that which he can only accomplish, if at all, with the concurrence of third persons, over whom he has no control. Such a bargain can, of course, be made. But I do not find in this agreement enough to warrant a conclusion that defendant bound himself to pay to plaintiff as damages, should he be for any cause unable to procure any of the contemplated contracts, a sum equivalent to the profits which he could have realized by the performance of such contracts if obtained.

The defendant's agreement was, I think, to procure and carry out such of the named contracts as could be obtained, and to account to the plaintiff for the profits to arise therefrom. See Clifford v. Watts, L. R. 5 C. P. 577; Howell v. Coupland, 1 Q. B. D. 258.

The defendant assumed the onus of proving that he could not obtain certain of these contracts. Whether he was bound to prove this negative may be open to question. But the Master, I think, erred in rejecting the evidence which defendant tendered to discharge the burden so assumed.

A number of minor matters were discussed upon the argument as to the quantum of the allowance made by the Master.

These I deem it better to leave open until the damages have been assessed on the basis above indicated. Should defendant be dissatisfied with the new assessment, his right of appeal should be open in respect of all matters argued before me and not now dealt with.

The only other matter upon which it seems desirable now to express an opinion is the question whether plaintiff should be demed entitled to a one-fourth interest in profits, or to a one-third interest as a partner in this business of defendant. There being no evidence that plaintiff elected in any way or at any time to "avail himself of the latter option" (to quote the language of the contract), the Master was, in my opinion, quite right in holding that his interest was one-fourth of those profits in which he should be held entitled to share.

The matters in question will, therefore, be referred back to the Master at Welland to assess plaintiff's damages upon the basis which I have indicated. All costs will be reserved to be disposed of by the Court upon the ultimate motion for further directions, except the costs of this appeal, which must be borne by plaintiff in any event.

CARTWRIGHT, MASTER. JUNE 11th, 1906.

CHAMBERS.

CROWN BANK OF CANADA v. BULL.

Summary Judgment—Rule 603—Defence—Failure to Shew—Refusal of Leave to File Second Affidavit—Conditional Leave to Defend—Payment into Court.

Motion by plaintiffs for summary judgment under Rule 603.

F. Arnoldi, K.C., for plaintiffs.

J. F. Hollis, for defendant.

THE MASTER:—The action is on an acceptance of defendant which was due on 8th October, but no proceedings were taken until 15th May. This acceptance was a renewal of one

given on 31st May, 1905. The defendant has filed an affidavit which proceeds on the theory that the action is brought on the first acceptance. He alleges certain transactions and agreements which all occurred before the renewal was given, and there is, therefore, strictly speaking, no answer to this motion. Counsel for defendant stated that this is a mistake, and asked leave to withdraw this affidavit and file another.

Defendant has full knowledge of all the facts, and, as a solicitor, is well aware of what would constitute a sufficient answer to this motion. And it was not unreasonably argued that this mistake, if mistake it was, is a matter to raise doubts as to there being any real defence. Such doubt is to be quieted not by filing another and different affidavit, but by paying into Court, on or before 13th June, $400, upon which the motion will be dismissed with costs in the cause. In default, judgment with costs.

HODGINS, MASTER IN ORDINARY. JUNE 23RD, 1898.

MASTER'S OFFICE.

RE UNION FIRE INS. CO.

Company—Winding-up—Interest on Creditors' Claims—Right to, after Winding-up Proceedings Begun.

In the winding-up payment was made to the liquidator's solicitors of a sum for costs, which, when deducted from the moneys in Court, left a shortage in respect to interest on the claims of creditors who had been by order scheduled as against the company's deposit with the Receiver-General.

An application was made by certain of these creditors to compel the liquidator to replace so much of the amount so paid for costs as would provide for interest on the scheduled claims.

THE MASTER:—On 19th November, 1888, an order was made for the payment out of $1,047.49 for costs to Bain & Co., solicitors for the liquidator, on an affidavit which, among other matters, stated that there was then in Court to the credit of the action of Clarke v. Union Fire Insurance

Co. the sum of $1,249.37, as shewn by the certificate of the accountant.

This sum was part of a fund in Court which by the Master's report made on 26th March, 1884, was specially appropriated for the payment of a dividend of 27½ cents on the dollar to the creditors whose names, together with the amounts of their claims, appeared in the schedule to the report. The original fund with a small addition was the amount of the deposit made by the company with the Dominion government pursuant to the Insurance Acts, which declared that on the insolvency of the insurance company it should be applied pro rata towards the discharge of all claims of policy-holders in Canada as set out in a schedule of claims prepared under the authority of the Court. Some of these scheduled creditors had been paid their dividend prior to this order of 1888, some subsequent to the order, while some have neglected or been unable to draw the dividends to which they were entitled.

An application is now made to declare a final dividend, with a direction to the liquidator to pay into Court out of the moneys collected by him under the Winding-up Act the sum of $682.55, to make good the shortage caused by the taking of this sum of $1,047.49 from the specially charged funds on government deposit account of these unpaid creditors, but practically to make good the interest on those moneys that ought to have been in Court for the scheduled creditors who have not received their dividends.

Under the Winding-up Act, and the decisions interpreting it, it has been held that creditors whose debts carry interest are only entitled to dividends on the amount due for principal debt and the interest thereon computed up to the date of the winding-up order, unless when there is a surplus after paying the creditors 100 cents on the dollar.

In the Warrant Finance Co.'s Case, L. R. 4 Ch. at p. 646, Sir C. J. Selwyn, L.J., said: "Justice requires that no person should be prejudiced by the accidental delay which, in consequence of the necessary forms and proceedings of the Court, actually takes place in realizing the assets; but that in the case of an insolvent estate all the money being realized as speedily as possible should be applied equally and ratably in the payment of the debts as they existed at the date of

the winding-up order. I therefore think that nothing should be allowed for interest after that date." Sir G. M. Giffard, L.J., concurred, and added that convenience was in favour of stopping all computations of interest at the date of the winding-up.

So in Hughes's Claim, L. R. 13 Eq. at p. 630, Wickens, V.-C., in commenting on the rule laid down by the Lords Justices, which he held to be absolutely binding on him, said: "The rule is this, that the winding-up order shall nullify as between the creditors all contracts for the payment of interest. But after all the creditors are paid their principal debts, it leaves the claim for interest to operate on any surplus." And he disallowed a claim for interest on payments made by a surety after the date of the winding-up order.

I need only refer further to the observations of Lord Chancellor Selborne in Black and Co.'s Case, L. R. 8 Ch. at p. 262, where he says that the hand (liquidator) which receives the money under the Act necessarily receives them as a statutory trustee for the equal and ratable payment of all the creditors.

In view of these decisions of the English Court of Appeal on an analogous statute, it is not competent, I think, for this Court to appropriate any part of the funds recovered by its process and under its jurisdiction to pay interest asked for on behalf of a few of the creditors of this company by the certificates of the accountant—practically to make the large body of creditors contribute of their money sufficient to pay to the few creditors named in the certificate a certain sum for interest on their respective dividends.

The funds at the credit of "Clarke v. Union Fire Insurance Company general assets account" may be transferred to the creditors' government deposit account, and the total amount of the combined funds with accrued Court interest will then be about sufficient to pay these creditors in full without interest.

HODGINS, MASTER IN ORDINARY. APRIL 12TH, 1898.

MASTER'S OFFICE.

RE FARMERS' LOAN AND SAVINGS CO.

EX PARTE TOOGOOD.

Company—Winding-up—Application for Leave to Add Company as a Party to an Action against Directors for Misfeasance in Office.

An application by a shareholder in this company, under sec. 16 of the Dominion Winding-up Act, for leave to add the company as a party to an action on behalf of herself and other shareholders for indemnity and damages against the directors, trustees, managing agents, and auditors of the company, for issuing false reports and statements to the plaintiff and the other shareholders, the public, and the government, concerning the concerns and affairs of the said company, and for improperly paying dividends out of the capital of the company, when in insolvent circumstances, and for malfeasance, neglect of duty, breach of trust, and maladministration in their offices, and misapplication of funds, whereby the company became insolvent and the shares of the shareholders became worthless, and for an account, etc.

THE MASTER:—Section 16 is practically a statutory injunction prohibiting actions against a company in liquidation.

The action is one to which the creditors cannot be made parties; and to any moneys recovered therein for the breaches of trust charged the creditors have no claim.

In Bank of Toronto v. Cobourg, Peterborough, and Marmora R. W. Co. (affirmed on appeal, 10 O. R. 376), I held that the creditors of a company had no fiduciary right against its directors for certain breaches of trust. Such right is now extended to creditors by the Winding-up Act, and can only be enforced under sec. 83 of the Act.

In the jurisdiction conferred upon this Court for the winding-up of insolvent companies, some special features may

be noted: (1) The Court initiating the winding-up proceedings becomes a Dominion Court ad hoc, whose order is enforceable in each provincial Court on the production of an office copy of such order to the proper officer of the Court required to enforce the same (sec. 85). See Re Dominion Cold Storage Co. (Lowry's Case), 34 C. L. J. 164. And can restrain actions in the Courts of the other provinces which may affect the assets of the company. See Baxter v. Central Bank, 20 O. R. 214, and In re International Pulp Co., 3 Ch. D. 594. (2) In winding up the financial affairs of an insolvent company, it has, in addition to its ordinary powers, a more comprehensive jurisdiction than the ordinary Courts, particularly in respect of the liabilities of shareholders on their shares and loans (secs. 42-55), the claims of creditors, and the assessment of damages (secs. 56-67), preferential liens (secs. 30, 56, and 66), fraudulent preferences (secs. 68-73), the rights of set-off (secs. 57 and 63), discovery (secs. 81, 82), compromises (secs. 33 and 61), sale of assets (secs. 30 and 31), dividends to creditors (secs. 65-67), the adjustment of the rights of shareholders inter se (sec. 51), and also the liability of past and present directors, managers, receivers, employees, or officers, under the following sec. 83:—

"When, in the course of the winding-up of a company under this Act, it appears that any past or present director, manager, liquidator, receiver, employee, or officer of such company, has misapplied or retained in his own hands, or become liable or accountable for, any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of any liquidator, or of any creditor or contributor of the company, notwithstanding that the offence is one for which the offender is criminally liable, examine into the conduct of such director, manager, liquidator, receiver, officer, or employee, and compel him to repay any moneys so misapplied or retained, or for which he has become liable or accountable, together with interest, at such rate as the Court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retention, misfeasance, or breach of trust, as the Court thinks fit."

These references indicate that the Court is constituted a forum domesticum for all matters affecting the financial affairs of the insolvent company; and this is borne out by the

following observations of Sir G. M. Giffard, L.J., in Stringer's Case, L. R. 4 Ch. 493: "I think these clauses (sec. 165, amended by 53 & 54 Vict. ch. 63, sec. 10, to include 'promoters') were introduced in order that by means of proceedings under the Act, without any double process or double set of proceedings, complete justice might be done between the parties, and a complete winding-up effected; and I think the instances are rare in which the jurisdiction ought not to be exercised. No doubt there are some cases (as where you have parties some of which are not amenable to the jurisdiction of winding-up, and it is not right and just to have piece-meal litigation), when it is proper that a bill should be filed. There may be also some very rare instances where it may be necessary to have the facts stated upon the record; but wherever upon notice of motion, and upon affidavit, and upon due examination of witnesses, you can properly arrive at a conclusion, I can see no reason whatever why a bill should be filed. It only adds to the expense; for upon notice of motion and affidavits and examination of witnesses, complete justice can be done, the evidence can be taken under the winding-up just in as many ways as it can be taken upon bill filed; and, what is more important, there are the same means of hearing in the Court below, and the same means of appeal to this Court and to the House of Lords. Therefore I see no reason why any narrow construction should be put upon the Act, and I think it would be to the disadvantage of the public that a narrow construction should be put upon it."

In Rance's Case, L. R. 6 Ch. at p. 114, the Lords Justices held that in the above the law had been laid down clearly, distinctly, and, in their judgment, decisively. In Cardiff Coal and Coke Co. v. Norton, L. R. 2 Ch. 405, it was held that when a company is being wound up under the Companies Act, the proper mode of recovering its assets is by a proceeding under the winding-up, and not by an action. And in Re Kingston Cotton Mill Co., [1896] 2 Ch. 279, it was held that where an officer of a company committed a breach of his duty for which he could be made responsible in an action, he should be proceeded against under the Act, and not in an action.

And the present Master of the Rolls (Lindley) in his work on Joint Stock Companies, says that if the claim sought to be enforced in an action is capable of being satisfactorily

disposed of in the winding-up proceedings, such action will be stayed (p. 674). For liquidation proceedings are analogous to administration proceedings: Re Life Association, 10 L. T. N. S. 833, 34 L. J. Ch. 64.

In prosecutions for offences the Crown does not allow the private prosecutor to assume its responsibility in such prosecutions. Nor should this Court except for cause allow a private prosecutor to relieve its officer who has given security as liquidator, of his statutory responsibility under the section referred to, and intrust the collection of a portion of the trust funds to a private litigant.

If it would be proper to relax the statutory injunction in favour of this shareholder, on what grounds could it be refused to each of the several hundred shareholders of this insolvent company? For each of them may claim a similar right and may prosecute his action as he thinks proper, until a plaintiff in one of these class actions, on behalf of shareholders, obtains a judgment. See Handford v. Storie, 2 S. & S. 196.

Lord Romilly, M.R., has graphically pictured the spectre of a legal Briareus hurling (not rocks, but) 200 or 300 law suits on a liquidator to the damage of the assets of the estate: see 20 L. T. N. S. 840. And he might have added as a legend Lord Coke's maxim, "The law will sooner tolerate a private loss than a public evil."

In the Central Bank case (Ex p. Henderson), after the claims of creditors had been practically paid in full, I allowed,—the liquidator not opposing,—more as a matter of caution, than as a right, a shareholder to join the bank as a formal party to an action, intimating however that actions against directors for personal wrongs did not require the leave of the Court. For it is a doctrine of equity that no one ought to be a party to an action merely as a witness for discovery, who has no other apparent interest in it. See Calvert on Parties, pp. 90-91; Re New Zealand Banking Corporation, 21 L. T. N. S. 481, 39 L. J. Ch. 128; and Hall v. Old Talargoch Mining Co., 3 Ch. D. 749.

As the liquidator has intimated his intention of proceeding against the directors and officers under sec. 83, and as the general practice of the English Court under a similar Act is

as stated by the present Master of the Rolls, I see no ground for relaxing the statutory injunction, and allowing this shareholder to bring an action against the directors and officers for misfeasance and breach of trust—claims which are capable of being more satisfactorily disposed of by the Court here; and therefore so much of her present application must be refused. And as to any action she may bring for a personal wrong, no leave is necessary, for the assets of this insolvent company would not be benefited or affected by the financial results of such litigation.