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# Ontario Weekly Notes

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## COURT OF APPEAL.

OCTOBER 11TH, 1909.

### THORNTON-SMITH CO. v. WOODRUFF.

*Contract — Decoration of House — Payment for Work Done — Satisfaction of Architect—Condition Precedent—Discharge of Contractors—Waiver—New Contract — Findings of Fact — Appeal.*

Appeal by the defendant from the order of a Divisional Court, 14 O. W. R. 84, affirming the judgment of BOYD, C., in favour of the plaintiffs for the recovery of $2,100 and costs.

The plaintiffs, a firm of interior decorators, of Toronto, had been employed by the defendant, who resided at St. Catharines, to do the interior decorating of a house in St. Catharines. Disputes arose between the plaintiffs and the defendant as to some of the work which had been done, and, after some negotiations, an agreement of settlement was entered into whereby the plaintiffs agreed that for $2,479.85 they would complete the work "to your architect's satisfaction." It was on this memorandum of settlement that the action was brought.

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

Frank H. McCarthy, for the defendant. The plaintiffs did not do the work to the satisfaction of the architect, who declined to accept the same: Andrews v. Belfield, 2 C. B. N. S. 779; Scott v. Liverpool, 3 DeG. & J. 334, 362; Richardson v. Mahon, L. R. 4 Ir. 486; Milner v. Field, 5 Ex. 829; Grafton v. Eastern Counties R. W. Co., 8 Ex. 699; Clark v. Watson, 18 C. B. N. S. 278; Russell v. Sada Bandeira, 13 C. B. N. S. 149; 36 Am. & Eng. Encyc. of Law, 2nd ed., p. 1244. The respondents abandoned the work: Am. &

Eng. Encyc. of Law, 2nd ed., p. 1254. The appellant is entitled to a reference to ascertain the amount he is entitled to recover from the respondents for making good the defective enamel work mentioned in the settlement, and the defective papering therein mentioned.

Hamilton Cassels, K.C., for the plaintiffs. The plaintiffs carried out their part of the agreement. At any rate, the defendant discharged the plaintiffs: Cyc. of Law and Procedure, vol. 6, p. 88; Early v. O'Brien, 51 N. Y. App. Div. 569, at p. 577; Smith v. Wetmore, 167 N. Y. 234. Owing to the architect's refusing to point out the defects in the work or to formally pass upon the same, the plaintiffs were relieved from any obligation to shew that the work was completed to the architect's satisfaction: Hudson on Buildiing Contracts, 3rd ed., pp. 347, 356 et seq.; Doll v. Noble, 116 N. Y. 230; Pawley v. Turnbull, 3 Giff. 70, at pp. 84, 85. The work was in fact done to the architect's satisfaction.

At the close of the argument the judgment of the Court was delivered (viva voce) by Moss, C.J.O.:—It may be that, as the pleadings were framed, the issue was as to whether or not the plaintiffs had carried out the agreement of the 27th October, 1908, by doing their work to the satisfaction of the architect. But before the Chancellor it got far beyond that. It soon appeared that up to the time of the plaintiffs finishing the work, the architect had not expressed any view with regard to it; and before they had a chance to remedy any defects after he had expressed disapproval, the plaintiffs were summarily discharged. They seemed willing to complete the work, but as early as the 18th November they were told the work had been placed in other hands. The telegram of the 20th November reiterates this. A man who was sent over by the plaintiffs was told that he was on the premises at his own risk. So the plaintiffs were placed in the position that they had never had the defects pointed out to them, nor a chance to make right anything that might have been wrong. In that state of the case it became a question of what course should be taken in order to ascertain the respective rights of the parties; and either by express or tacit consent they entered into the whole matter. The parties proceeded to try the case to find out the value of the work, and to determine what compensation the plaintiffs should make the defendant for what he had spent to have the work completed. The learned Chancellor passed on that, and there was no objection at that time to his doing so. Then the case went to the Divisional Court, where it was again fully discussed, and that Court was satisfied not to disturb the learned Chancellor's finding. We

think that is the position of the case to-day; and, though there may not have been a very excellent job done, yet it is too late now to investigate by way of reference or otherwise. The costs would probably be far beyond the measure of relief that might be awarded the defendant.

The appeal will be dismissed.

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## HIGH COURT OF JUSTICE.

DIVISIONAL COURT. OCTOBER 8TH, 1909.

### TOWNSHEND v. RUMBALL.

*Covenant—Restraint of Trade—Provision for Liquidated Damages Construction as Penalty—Actual Damage for Breach of Covenant—Injunction—Costs.*

Appeal by the defendants from the judgment of the County Court of Essex in favour of the plaintiffs in an action for the recovery of $500 as liquidated damages for breach of a contract.

The defendants sold out part of the stock-in-trade of a business carried on by them in a village, to the plaintiffs. The defendants retained some of their stock. They covenanted not to carry on a similar business within five miles of the village for a period of ten years, and also that they would not sell the stock retained to any one except those engaged in the same business in the village, and that they would "close their doors." For any breach the defendants agreed to pay the plaintiffs $500 as liquidated damages.

The County Court Judge found that the defendants had made two sales of hardware in breach of the agreement, and that the plaintiffs were entitled to recover the $500 as liquidated damages.

The appeal was heard by FALCONBRIDGE, C.J.K.B., TEETZEL and RIDDELL, JJ.

A. H. Clarke, K.C., for the defendants.

E. S. Wigle, for the plaintiffs.

THE COURT held that, notwithstanding the use of the words "liquidated damages" in the agreement, the $500 was a penalty, referring to the Encyclopædia of the Laws of England, vol. 4, p. 325, and the cases there cited. They were of opinion, however, that an action lay for the actual damage sustained, and that the plaintiffs had proved damages, which they assessed at $5, and directed judgment to be entered for the plaintiffs for that amount, with an

injunction against further breaches of the agreement, and with costs of the action on the County Court scale, the action being to establish a right. The defendants to have the costs of appeal, to be set off against the plaintiffs' damages and costs. The pleadings to be amended, if necessary.

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FALCONBRIDGE, C.J., IN CHAMBERS. OCTOBER 11TH, 1909.

## KELLY v. ROSS.

*Security for Costs—Libel—Newspaper—Criminal Charge—Action Trivial or Frivolous—Typographical Error — Retractation — Order of Master in Chambers—Appeal to Judge in Chambers—Further Appeal—9 Edw. VII. ch. 40, secs. 8, 12.*

Appeal by the defendants from an order of the Master in Chambers dismissing a motion by the defendants for security for costs in an action for libel.

The libel complained of was published in an Ottawa newspaper in January, 1909, and was as follows: "Comments of Mr. Justice Grantham in England on Kelly's conduct and *conviction* with Ernest Terah Hooley, the notorious London promoter, were also given." Innuendo, that the plaintiff had been tried before Mr. Justice Grantham in England and convicted of a criminal offence. It was alleged by the defendants that "conviction" was a misprint for "connection."

THE MASTER quoted from the judgment in Smyth v. Stephenson, 17 P. R. 374, at p. 376: "If the words which a plaintiff charges to have been used in a sense which involves the making by the person using them of a criminal charge against him, may have that meaning, the case is brought within the exception:" that is, the exception in R. S. O. 1897 ch. 68, sec. 10 (a).

The Master also thought the action was clearly not trivial or frivolous; and that a sufficiently conspicuous retractation was not published at first, and it might be that the second was too late.

By sec. 12 (1) of the Libel and Slander Act, 9 Edw. VII. ch. 40 (O.): "In an action for libel contained in a newspaper, the defendant may, at any time after the delivery of the statement of claim, or the expiry of the time within which it should have been delivered, apply to the Court or a Judge for security for costs, upon notice and an affidavit by the defendant or his agent, shewing the nature of the action and of the defence, that the plaintiff is not possessed of property sufficient to answer the costs of the action in

case a judgment is given in favour of the defendant, that the defendant has a good defence upon the merits, and that the statements complained of were published in good faith, or that the grounds of action are trivial or frivolous, and the Court or Judge may make an order that the plaintiff shall give security for costs. . .

"(2) Where the alleged libel involves a criminal charge, the defendant shall not be entitled to security for costs under this Act, unless he satisfies the Court or Judge that the action is trivial or frivolous, or that the circumstances which under section 8 entitled the defendant at the trial to have the damages restricted to actual damages appear to exist, except the circumstance that the article complained of involves a criminal charge."

Section 8(2): "The plaintiff shall recover only actual damage if it appears on the trial

"(*a*) That the alleged libel was published in good faith,

"(*b*) That there was reasonable ground to believe that the publication thereof was for the public benefit,

"(*c*) That it did not involve a criminal charge,

"(*d*) That the publication took place in mistake or misapprehension of the facts, and

"(*e*) That a full and fair retractation of any statement therein alleged to be erroneous was published. . . ."

H. M. Mowat, K.C., for the defendants.

W. E. Middleton, K.C., for the plaintiff.

FALCONBRIDGE, C.J.:—My brother Riddell has disposed of the objection that the decision of the Master in Chambers is final, in Robinson v. Mills, 19 O. L. R. at p. 170. I would come to the same conclusion if his judgment were not binding on me.

I disposed of the first branch of the case at the argument. It is quite covered by the judgment in Smyth v. Stephenson, 17 P. R. at p. 376.

Then it is argued that all the circumstances referred to in 9 Edw. VII. ch. 40, sec. 8, except (*c*), exist here.

The action is certainly not trivial or frivolous, if the alleged libel may involve the charge of conviction for a crime, and there is too much doubt as to some of the other circumstances, e.g., whether a typographical error is equivalent to mistake or misapprehension of the facts, and whether the retractation was sufficient.

On the whole, I think that the learned Master was right, and that this appeal must be dismissed, with costs to the plaintiff in any event.

My brother Riddell's judgment in the case mentioned above seems to imply some doubt whether this order is non-appealable.

If it is appealable, the matter certainly should be dealt with by a higher Court.

In any event there is great hardship in the case. The plaintiff is said to owe the defendants $1,200 for taxed costs of a former action for libel. The present one not being for the same cause of action, this fact does not afford ground for an application for security.

If such a condition of affairs is likely to recur, it would seem to call for a further amendment of the law.

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MASTER IN CHAMBERS. OCTOBER 13TH, 1909.

## ROBINSON v. CANADIAN PACIFIC R. W. CO.

*Third Parties—Claim for Indemnity—Trial of Issue.*

Motion by the defendants for an order for directions for trial of the issue between the defendants and third parties.

The plaintiff was admittedly injured on the defendants' line, but was travelling on a pass as being in charge of horses shipped by Burns & Sheppard, the third parties.

G. A. Walker, for the defendants.

G. R. Geary, K.C., for the plaintiff.

W. R. Smyth, K.C., for the third parties, submitted that the order should be discharged.

THE MASTER:—The order was granted on account of the usual clause in the contract between the defendants and the shippers that if the shipper or any nominee was allowed to travel at less than full fare, this should free the defendants from any liability for death or injury to any one so travelling, even in case of negligence of the company's servants. The defendants submit that this condition frees them for liability to the plaintiff, and that the third parties are liable to indemnify the company as against such claim by their nominee, even if he is held entitled to recover.

This seems a case for the matter to be tried out. It is not like Mahoney v. Canada Foundry Co., 12 O. L. R. 514, or Donn v. Toronto Ferry Co., 7 O. W. R. 154, but arises under an express contract. If the shippers were agents for others, they can bring them in as fourth parties, if so desired.

The usual order will go for trial. Costs of this motion to the plaintiff in any event, and in the third party issue as between the parties thereto.

MASTER IN CHAMBERS. OCTOBER 14TH, 1909.

## STIDWELL v. TOWNSHIP OF NORTH DORCHESTER.

*Pleading—Statement of Claim—Late Delivery—Validating Order—Parties—Addition of Assignee of Original Plaintiff—Rules 394, 395, 396.*

Motion by the defendants to set aside the statement of claim as filed too late, and also to set aside a præcipe order to continue the action at the suit of the assignee of the original plaintiff.

W. E. Middleton, K.C., for the defendants.

J. F. Lash, for the plaintiff.

THE MASTER:—The first branch of the motion succeeds, as of course the statement of claim was not delivered until more than two years after service of the writ. This is explained by the plaintiff trying to effect a settlement, but does not wholly excuse it.

As to the other branch, it does not seem that it should be granted. It is clear that once a plaintiff assigns his cause of action, he is no longer entitled to prosecute it. It may well happen that a plaintiff is compelled to assign by way of security and against his own will. For all that appears this may be the case here. Then, unless the assignee can get the conduct of the suit, it might be settled or dismissed without his consent. Rules 394, 395, and 396 seem exactly to provide for such cases.

There is no greater hardship to a defendant in having a cause of action assigned after a writ has issued than if this had been done earlier. The defendants' rights and remedies as against the assignor are unimpaired in either case. Indeed, it may be that both plaintiffs will be responsible for all the costs if the action fails. No doubt, the Judge will see to this if the action goes to trial.

The order will therefore be that the statement of claim be validated as of this date, and that otherwise the motion is dismissed. Success being divided, the costs will be in the cause.

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DIVISIONAL COURT. OCTOBER 14TH, 1909.

## RE SOLICITOR.

*Solicitor—Bill of Costs—Præcipe Order for Taxation—Disputed Retainer—Special Circumstances—Mode of Trial.*

Appeal by the solicitor from an order of MEREDITH, C.J.C.P., in Chambers, dismissing an appeal by the solicitor from an order

of the Master in Chambers setting aside a præcipe order obtained by the solicitor for taxation of a bill of costs rendered by him to two persons.

The appeal was heard by FALCONBRIDGE, C.J.K.B., TEETZEL and RIDDELL, JJ.

W. N. Ferguson, K.C., for the solicitor.

R. S. Robertson, for the respondents.

The judgment of the Court was delivered by RIDDELL, J. (after setting out the facts) :—I do not think that there is anything in the frame of the bill which would preclude a reference to taxation: but the retainer is denied, and all the circumstances of the case are unusual. Without expressing any opinion as to the merits, which must be tried in some forum, it seems to me that the question of retainer in this case is one which should be tried in the ordinary way rather than by a taxing officer. The Court before whom this question is tried may, as was done in a very recent case, assess the proper amount, or refer for taxation, as seems best.

Were I myself trying the case, I should follow the former practice and determine the amount, but we should not limit the discretion of the trial tribunal.

It is argued that this is a hardship upon the solicitor, but I cannot agree. No doubt it is disagreeable for a solicitor, as for any one else, or at least most persons else, to have any litigation. But this litigation might have been saved had the solicitor followed the well established practice of taking a written retainer from those he is now claiming as his clients: Allen v. Bone (1841), 4 Beav. 493. And, if he relied upon a "gentlemen's agreement," he cannot, I think, complain if he is required to prove his cause of action in the same way as the rest of humanity.

The appeal should be dismissed; but it is not a case for costs.

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DIVISIONAL COURT. OCTOBER 14TH, 1909.

## TRUSTS AND GUARANTEE CO. v. MUNRO.

*Company—Winding-up—Moneys Paid to Creditor after Service of Notice of Motion for Winding-up Order—Action by Liquidator to Recover—Dominion Winding-up Act, sec. 99—Trust Moneys—Breach of Trust—Commencement of Winding-up—Sections 20, 21, 31, of Act.*

Appeal by the defendants from the judgment of BOYD, C., 13 O. W. R. 539, in favour of the plaintiffs in an action to recover

$1,969.61 which William Hamilton, the president of the William Hamilton Manufacturing Co. Limited, of Peterborough, on the 6th December, 1906, withdrew from the assets of that company for the defendants, giving a receipt therefor as trustee for the defendants, the children of the late George Munro.

A petition for an order for the winding-up of the company was served on the same day, 6th December, and a winding-up order was made under the Dominion statute on the 11th December, 1906

The plaintiffs were the liquidators of the company under the winding-up order.

The sum of $1,969.61 withdrawn was debited to an account in the books of the company headed "William Hamilton in trust for Hamilton Munro" (and the others, naming them), at the credit of which there was at the time of the withdrawal a balance of $6,967.06, made up of moneys received and interest upon them.

Included in this amount was a sum of $1,340.57, which on the 14th October, 1905, was deposited in the bank to the credit of William Hamilton, executor, and was on that day withdrawn by him and placed to the credit of the company in their account with the same bank.

The placing of the money by Hamilton to the credit of the company was a breach of trust.

When the $1,969.61 was withdrawn, the company were admittedly insolvent, and the purpose of the withdrawal was admittedly to protect the cestuis que trust and to give them a preference.

The Chancellor held that sec. 99 of the Winding-up Act applied, and that the plaintiffs were entitled to recover from the defendants the amount withdrawn.

The appeal was limited to the $1,340.57 and interest on it.

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

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

J. Bicknell, K.C., for the plaintiffs.

The judgment of the Court was delivered by MEREDITH, C.J., who said that the money handed over by the trustee to the company was, at the time of the withdrawal, no longer capable of being earmarked, and it was impossible for the cestuis que trust to follow it, and the company were, therefore, simply debtors to the trust estate for the amount which they had received from the trustee, and the withdrawal was in substance and effect a payment by the company to their creditors of so much of what they owed.

[Re Stubbins, 17 Ch. D. 58, and Ex p. Taylor, 18 Q. B. D. 295, distinguished; Ernest v. Cdoydell, 2 De G. F. & J. at p. 198, and Molsons Bank v. Halter, 18 S. C. R. 88, referred to.]

Whatever might be the rights of the cestuis que trust as against the bank—as to which Foxton v. Manchester and Liverpool District Building Co., 44 L. T. N. S. 406, might be referred to—the payment to Hamilton was such a payment as sec. 99 of the Winding-up Act declares to be void.

In this view it was unnecessary to decide the other question raised, viz., whether the impeached transaction took place after the commencement of the winding-up, and, if it did, whether, by reason of that, the transaction, though not open to attack under the provisions of sec. 99, ought to be set aside.

The Chief Justice, however, pointed out the difference between sec. 153 of the English Act and sec. 21 of the Dominion Act, as to transactions entered into after the commencement of the winding-up; and also that by sec. 20 of the Dominion Act it is only from the time of the making of the winding-up order that the company are to cease to carry on their business, except for the purposes which the section mentions; and that by sec. 31 it is only upon the appointment of the liquidator that the powers of the directors cease.

Appeal dismissed with costs.

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DIVISIONAL COURT. OCTOBER 14TH, 1909.

## CLUFF v. NORRIS.

*Partnership — Dissolution — Liabilities — Discharge of Retiring Partner—Acceptance of New Firm as Debtors—Conduct of Creditors—Novation—Findings of Fact—Appeal.*

Appeal by the defendant Norris from the judgment of RIDDELL, J., in favour of the plaintiffs, in an action brought against the appellant and one Lockhart, against whom the plaintiffs had obtained judgment by default, to recover $608.44 for goods sold and delivered by the plaintiffs to the appellant and Lockhart, who carried on business in partnership as plumbers, and $13.90 for interest, less $193.10, for which credit was given, made up of $50 paid on account on the 10th July, 1906, and two dividends received from the assignee of the estate of Norris & Lockhart, a partnership consisting of the defendant Lockhart and E. J. K. Norris, a brother of the appellant, who executed an assignment for the benefit of creditors on the 14th August, 1906.

After this debt was contracted, and on the 1st March, 1906, the partnership between the appellant and Lockhart was dissolved and a new partnership was formed under the same name, consisting of Lockhart and E. J. K. Norris, which took over the business of the former partnership and assumed and agreed to pay its liabilities.

Notice of the dissolution was given to the plaintiffs early in March, 1906, and by it they were informed that the appellant had sold out his interest in the business to his brother, who with Lockhart would carry on the business under the name of Norris & Lockhart, and by it the plaintiffs were also informed that the new firm had assumed and would pay all debts, liabilities, and obligations of the old firm.

Notice of the assignment was given to the plaintiffs, and was published in the Ontario Gazette and in a Galt newspaper, and in it the assignment was stated to have been made by "Edgar J. K. Norris and Thomas D. Lockhart, . . . carrying on business as plumbers . . . under the name . . . of Norris & Lockhart."

At a meeting of the creditors of the new firm, R. J. Cluff, one of the plaintiffs, was appointed one of the inspectors of the estate.

The plaintiffs filed against the estate of the insolvent firm the claim for which they now sued, and received from the assignee the two dividends referred to, one on the 22nd October, 1906, and the other on the 28th May, 1907. They also received from the new firm the payment of $50 for which credit was given.

The deefence of the appellant was that the plaintiffs accepted the new firm as their debtors in discharge of their claim against him and the old firm.

The plaintiffs met this defence by saying that, if they had ever seen the notice of dissolution, it had escaped their recollection when the acts relied on by the appellant were done; that they proved their claim against the insolvent estate under the belief that they were proving it against the estate of the old firm; and that until shortly before the trial they believed that the appellant was still a member of the partnership at the time of the assignment.

The trial Judge gave credit to the testimony of the plaintiffs, saying that he believed them to be honest men, and held that no novation had taken place, gave the plaintiffs, on their undertaking to repay them to the assignee, leave to amend by striking out the credit of the two dividends they had received, and gave judgment for the plaintiffs for $572.44 and interest from the teste of the writ with costs.

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

H. D. Gamble, K.C., and F. Erichsen Brown, for the appellant.

G. M. Clark, for plaintiffs.

The judgment of the Court was delivered by MEREDITH, C.J., who said that, in order to entitle the appellant to succeed it was incumbent on him to establish that a novation had taken place in respect of the indebtedness of the old firm.

He referred to sec. 17 (3) of the English Partnership Act, 1890—"A retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted"—and said there was in this case no such express agreement, and the question was whether such an agreement was to be be inferred as a fact from the acts of the parties.

[Reference to Harris v. Farwell, 15 Beav. 31, and Scarfe v. Jardine, 7 App. Cas. 345, distinguishing the latter.]

Being of opinion that upon the facts as found by the learned trial Judge a case of novation was not made out by the appellant, and being also of opinion that the findings of fact ought not to be disturbed, it followed that the judgment should, in his opinion, be affirmed and the appeal dismissed with costs.