THE

# ONTARIO WEEKLY REPORTER

(TO AND INCLUDING MARCH 3RD, 1906.)

VOL. VII. TORONTO, MARCH 8, 1906. NO. 8

MORGAN, JUN. J. FEBRUARY 19TH, 1906.

COUNTY COURT, YORK.

## HURWORTH v. CLEMMER.

*Limitation of Actions — Real Property Limitation Act—Tax Sale—Purchase by Owner—New Root of Title—Interruption of Possession — Evidence of Possession — Conflict.*

Action for possession of a strip of land between 4 and 5 feet wide, being part of lot No. 13, plan 805, on the east side of Fairview avenue, Toronto Junction.

W. E. Raney, for plaintiff.

W. H. Lockhart Gordon, for defendant.

MORGAN, JUN. J.:—The plaintiff purchased the lot in question from the liquidator of the Farmers' Loan and Savings Company in October, 1904. The defendant Louisa Clemmer is the registered owner of lots 14, 15, and 16, the premises next adjoining the plaintiff's premises on the south. She is also the registered owner of two lots fronting on Lakeview avenue and abutting the Fairview avenue lots, all the 5 lots being included in one enclosure, and both defendants residing on the property. All the lots referred to are under one plan, and the plan shews a reservation for a lane between the Fairview avenue lots and the Lakeview avenue lots.

The evidence is that the defendants built a wire fence enclosing, or partly enclosing, lot 14 and other lots south, in

the spring of 1894, nearly 2 years before the conveyance of any part of the property to Mrs. Clemmer, having secured permission so to do from the then owners of the property. The wire fence erected by the defendants was, it appears from the evidence, an irregular temporary structure. It did not follow right lines, and that portion of it apparently intended to mark the western boundary of the lot was several feet over the street line and enclosed a portion of the street. Some 3 or 4 years ago, the wire fence having fallen very much into disrepair, the defendants built a permanent board fence, intending, as I find, to enclose lots 14, 15, and 16 with their Lakeview avenue property, but in fact enclosing with these lots the strip of land in question. No survey of the land was made by the defendants before building either the first or second fence, and no survey was made before the purchase of lot 13 by the plaintiff. Shortly after the plaintiff's purchase, however, he caused a survey of the land to be made, when it appeared that the board fence of the defendants enclosed a strip of the plaintiff's property 4 feet 1 inch in width at the rear, and 4 feet 9 inches in width, at a distance of about 3 feet from Fairview avenue, the west side of the board fence being, as appears from the survey, about 2 or 3 feet inside one street line of the lot, so that, although the defendants by their pleading are claiming a strip of lot 13 from front to rear, it is now undisputed that since the board fence was built, at all events, they have not been in possession of about 3 feet in depth of the frontage of this strip on Fairview avenue.

On the discovery, after the survey in November, 1904, that the defendants' fence was upon the property the plaintiff had purchased, the plaintiff approached the defendants, and the defendant Abraham H. Clemmer then, and several times afterwards during the winter and spring, promised to remove the fence. Subsequently he reconsidered these promises, and set up title to the land in question under the Statute of Limitations, claiming to have been in possession for more than 10 years. Thereupon the plaintiff brought this action, and the issue now is as to whether or not the defendants have had such possession of the strip of land as to oust the plaintiff's title.

The point for consideration is one of some nicety, and is in some of its features, as far as I have been able to discover, a case of first instance. It appears from admissions which

have been signed by counsel for the parties that the Farmers' Loan and Savings Company became the mortgagees of lot 13 by mortgage dated 22nd April, 1892, and afterwards acquired the fee by grant from the mortgagor dated 18th February, 1895. The taxes were not paid by the mortgagor for the years 1892, 1893, and 1894, and the lot was sold for these taxes on 11th April, 1896, to George S. C. Bethune and Solomon Demude. After the order for liquidation of the company, Bethune and Demude conveyed the lot without consideration to John W. Langmuir and Edmund A. Meredith. The lot was sold a second time for taxes on 4th May, 1898, being then acquired by Mr. Langmuir. This sale was for taxes for the years 1895 and 1896. The plaintiff, on 19th October, 1904, signed an agreement with the Toronto General Trusts Corporation, the liquidators for the Farmers' Loan Company, for the purchase of the lot, and pursuant to this agreement the lot was conveyed to him on 11th November, 1904. At the same time Mr. Langmuir, Mr. Meredith having died in the meantime, also conveyed the lot to the plaintiff. It was admitted by counsel that Messrs. Bethune, Demude, Langmuir, and Meredith, in these purchases and conveyances, acted as trustees for the Farmers' Loan Company, or the liquidator, and indeed that to all intents and purposes the then owners of the lot, namely, the Farmers' Loan Company, were the purchasers at the tax sale. Both those sales were validated and confirmed by special Act of the Ontario Legislature, 2 Edw. VII. ch. 66, sec. 6. Both the tax sales were within 10 years prior to the commencement of this action, and Mr. Gordon, for the defendants, frankly conceded that, under the language of sec. 4 of the Real Property Limitation Act, R. S. O. 1897 ch. 133, and Smith v. Midland R. W. Co., 4 O. R. 494, if either of these sales had been made to a stranger, the statute would only have begun to run from the date the stranger had acquired the right to make an entry or maintain an action.

The question I have now to determine is, whether the facts of this case take it outside of the principle of the decision in Smith v. Midland R. W. Co. It was argued by Mr. Raney, for the plaintiff, and was not disputed by Mr. Gordon, that there is no legal impediment to purchase at tax sales by the owner in fee, indeed that this is a well known method of curing a defective title, and it is to be noted that these sales to representatives of the Farmers' Loan Company are recog-

nized by the special legislation above referred to. It is further to be noticed that the first tax sale was in respect of taxes which accrued before the Farmers' Loan Company were under any obligation, as owners, to pay the taxes, and that, so far as this purchase was concerned, it cannot be urged that the company were taking advantage of their own neglect of duty. But Mr. Gordon argued, with much plausibility, that the purchaser at the tax sales having had the title in fee previous to the respective sales, the right to make the entry did not first accrue at either of the tax sales, but previous thereto; in other words, that the right of entry by the Farmers' Loan Company was continuous from the spring of 1894, when the defendants claimed to have taken possession, until the spring of 1904. I do not think this contention is entitled to prevail. Had the defendants been in possession of the land for the statutory period, and had the land after the expiry of that period been purchased at a tax sale by the owner in fee, according to the paper title, I think there could be no doubt that his title under the tax sale would oust the possessory title. Can it be that the tax title will be less effective against the inchoate possessory title ? It may be that at any time during the 10 years preceding the spring of 1904, the company or their successors were in a position to bring an action or make an entry, but I think the tax sale of 1896, and in its turn that of 1898, with the special statutory sanction to which I have referred, extinguished the former title and created a new root of title, and that it is with reference to that root of title that sec. 4 of the Real Property Limitation Act must be read. The mere fact that the transition from the former paper title to the new one under the tax title, covered an inappreciable space of time, can, in my judgment, make no difference. I think the effect is, to all intents and purposes, the same as it would have been had the tax sales or either of them been to strangers, and had the company afterwards re-purchased.

In view of the conflict of evidence as to the defendants' possession of the land in question, I would have preferred to base my judgment entirely on the legal grounds. The facts are, however, before me, and however reluctantly, in view of the conflict, I think it my duty to state the conclusions to which I have been forced to come on the evidence.

I find that the original wire fence which was put up in the spring of 1894, ran around 3 sides of lot 14. On the east there was, it appears, no fence separating the lot from

the lane or from the defendants' Lakeview avenue lots. On the south, the fence included several other lots, some of them being in the possession of the defendants, and the others being in possession of and cultivated by a Mr. Wright. On the west the fence was several feet on the street. From a point on Fairview avenue about 100 feet south of the south-westerly angle of lot No. 13, I find that the wire fence angled off in a north-easterly direction to a point probably somewhat north of the boundary line, between lots 13 and 14, and approximately between 20 or 30 feet from the street, and then ran in an easterly direction towards Lakeview avenue for a part of the way, as appears by the evidence, 2 or 3 feet north of the boundary line, thus enclosing some part of lot 13, but not the whole part as now enclosed by the present board fence. The wire fence which, as I have already stated, was of a temporary and irregular character, would, perhaps, along with the cultivation which took place of the land which it enclosed, have been sufficient for the purposes of the statute, had it been maintained in its original position for 10 years, but, unfortunately for the defendants' contention, I am obliged to find on the evidence that the location of the wire fence, and therefore the extent of cultivation, cannot now be accurately ascertained, and that the board fence is not on the original line of the wire fence, but further north. The defendant Abraham H. Clemmer says that the present fence is in the same position on its north line as the former fence. I have no difficulty in finding that he is mistaken as to this. I do not think the new board fence followed the line of the wire fence on any side of the enclosure. On the south there was no wire fence where the present board fence stands; on the west the board fence is 10 or 12 feet inside the telephone pole which marked the west line of the wire fence; and on the north the board fence was built so as to be a continuation of the northerly boundary fence of the Lakeview avenue lots. I have no hesitation in accepting the evidence of the witnesses Richard Cole and Fred. Johnston, that they saw portions of the wire fence still standing south of the board fence when the board fence was in course of erection and afterwards, and also the evidence of these witnesses and of Fred. Edgar and Arthur Edgar (all of these persons being near neighbours of the defendants and so far as it appears entirely disinterested) that the board fence was built further north than the old wire fence had been.

The onus of proving the exact location of the old wire fence was upon the defendants. Their evidence upon this point has been, in my judgment, outweighed by that of the plaintiff, and I cannot now be asked to conjecture just where the wire fence actually did stand, and so find all the elements necessary to make a complete and perfect possessory title. There must, therefore, be judgment for the plaintiff for the possession of the strip of land in question with the costs of this action.

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HODGINS, LOCAL JUDGE. FEBRUARY 19TH, 1906.

EXCHEQUER COURT IN ADMIRALTY.

## UPSON-WALTON CO. v. THE "BRIAN BORU."

*Ship—Supplies—Maritime Lien—Charterparty—Authority of Foreman of Lessees—Supplies Charged to Ship.*

Action to recover the value of certain supplies to the above named ship and others. The statement of claim alleged that "the said supplies were furnished to the said ships at the request and by the direction of the Donnelly Construction Co. at the port of Cleveland, Ohio, United States of America, which company was in charge and full control of the said ships at the time, and said supplies were furnished upon the credit of the said ships, and not merely on the personal credit of the said company, and the said supplies were for the necessary use of said ships."

The owners of the ships intervened and filed a statement of defence alleging that when the said supplies were furnished, "the said ships were owned by the Dunbar and Sullivan Dredging Co., but were under charter to, operated by, and in charge and full control of the Donnelly 'Contracting' Co., to the knowledge of plaintiffs, and if such supplies were furnished at the request of and by the direction of the Donnelly Construction Co., as alleged in the said claim, such supplies were so furnished solely upon the personal credit of the said Donnelly Construction Co."

E. S. Wigle, Windsor, for plaintiffs.

F. A. Hough, Amherstburg, for defendants.

THE LOCAL JUDGE:—By a charterparty bearing date 16th March, 1904, reciting that the ships (except one, the "Paddy Miles") were then in the possession of the Donnelly Contracting Co. . . . under a former lease then expired, the Dunbar Co. leased to the Donnelly Co. the said ships, and the Donnelly Co. agreed to hire the same, at a fixed rental, for a specified term. And the charterparty then provided that "during the life of this agreement the Donnelly Co. promises to immediately replace parts when broken, and make repairs, and do all things necessary to maintain the property in a condition equal to that in which it was actually received by the Donnelly Co." This clause brings the case within Anglin v. Henderson, 21 U. C. R. 27.

A further clause provided that "the Donnelly Company agrees to pay promptly all bills for towing, supplies, wages, dry docking, and repairs whatsoever, incident to the use and maintenance of the property hereby leased, and to do all things necessary to protect this property, or any part of it, from liens or incumbrances."

The evidence shews that the supplies were furnished to the ships on the order of the foreman of the Donnelly Co.; and there is no evidence to shew that this foreman was master of any of the ships or was in any service or employment which would constitute him the master and agent or representative of the Dunbar Co., so as to render them or their ships liable for the supplies furnished; and plaintiffs' statement of claim effectually negatives any agency by alleging that "the said supplies were furnished to the said ships at the request and by the direction of the Donnelly Construction Co." They appear to have been used by that company in the construction of a breakwater in Cleveland harbour, and the order for these supplies seems to have been given by the foreman of the construction works. . . .

[Reference to Mitcheson v. Oliver, 5 E. & B. 419, 1 Jur. N. S. 900; The "Grapeshot," 9 Wall. 129.]

This order of the company's foreman cannot give plaintiffs a maritime lien on defendants' ships.

But another point was argued. . . . Defendants' vessels were under a charterparty to the Donnelly Co., and it appears from the accounts put in that the supplies ordered by the company's foreman were charged against the ships; and plaintiffs contend that being so charged they have a maritime lien on defendants' ships. . . .

[Reference to The "Freeman," 18 How. 182; The "City of New York," 2 Blach. 187; The "Zulu," 10 Wall. 192; Newberry v. Colvin, 7 Bing. at p. 286; Sandeman v. Scurr, L. R. 2 Q. B. 86; Baumvoll v. Gilchrist, [1891] 2 Q. B. 310, [1892] 1 Q. B. 253, [1893] A. C. 8.]

These authorities require me to hold that plaintiffs are not entitled to the maritime lien claimed, and that this action should be dismissed with costs.

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FEBRUARY 23RD, 1906.

C.A.

## REX v. WALTON.

*Constitutional Law—Criminal Procedure—Constitution of Courts—Grand Jury—Criminal Code, sec. 662 (2)—Intra Vires—True Bill by Seven Jurors—Addition of Talesmen from Petit Jury Panel—Jurors Act, sec. 103 (O.)—Adoption of Provincial Law by Dominion Parliament.*

Motion by prisoner for leave to appeal from conviction and for a stated case.

J. B. Mackenzie, for the prisoner.

J. R. Cartwright, K.C., for the Attorney-General for Ontario.

The Minister of Justice for Canada was not represented, though notified.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A.), was deivered by

OSLER, J.A.:—The prisoner was tried at a recent over and terminer and general gaol delivery session of the High Court of Justice on an indictment for obtaining goods by false pretences with intent to defraud. He was convicted and sentenced to 3 months' imprisonment.

His counsel objected to the constitution of the grand jury by whom the bill had been found, and also to their finding, on the grounds afterwards mentioned. A panel of 13 grand jurors had been summoned and returned upon the precept directed to the sheriff, as prescribed by sec. 66 (3) of the

Jurors Act, R. S. O. 1897 ch. 61, and for default of 3 of the jurors so summoned and returned, the names of 3 talesmen were added and annexed to the panel, in the manner prescribed by sec. 103 of that Act, as amended by 5 Edw. VII. ch. 13, sec. 7, one of such talesmen being a person who had been summoned and returned as a juror upon the petit jury panel of jurors for the trial of criminal causes at the said Court; and the indictment upon which the prisoner was so tried and convicted was found, as it was said, by 7 of the grand jury so constituted.

It was contended for the prisoner that sec. 662 (2) of the Criminal Code, in so far as it enacted that a true bill might be found by 7 grand jurors, instead of 12 as heretofore, was ultra vires of the Dominion Parliament, and that sec. 103 of the Jurors Act, as amended, in so far as it authorized the adding of talesmen, or of talesmen taken from the petit jury panel, was ultra vires of the Ontario legislature.

It does not appear at what stage of the proceedings these objections were taken. Britton, J., was asked, but declined, to reserve a case upon them, and now Mr. Mackenzie, on behalf of the prisoner, renews the objections and moves, pursuant to sec. 744 of the Code, for leave to appeal. . . .

I think we ought not, by granting leave, to intimate any doubt of the validity and regularity of the proceedings. The provincial legislature has enacted, by sec. 66 (3) of the Jurors Act, that the number of grand jurors returned to serve at courts of oyer and terminer and general sessions of the peace shall be 13 and no more, and no one will now argue that this is not a matter relating to the constitution of the provincial Courts, and therefore within the purview of the local legislature. On the other hand, ever since the decision of Regina v. O'Rourke, 32 C. P. 388 and 1 O. R. 464, we have in this province consistently held that the selection and summoning of jurors were not matters relating to the constitution of the courts: Regina v. Cox, 2 Can. Crim. Cas. 207; but came within sec. 91 (27) of the B. N. A. Act, as relating to procedure in criminal matters in respect of which Parliament alone had power to legislate. We have, however, also held that Parliament had effectively exercised that power by adopting the provincial law on the subject, and by legislating by relation and reference to that law as it does in sec. 662 of the Criminal Code: Regina v. O'Rourke, supra.

"Every person qualified and summoned as a grand or petit juror according to the laws in force for the time being in any province of Canada, shall be duly qualified to serve as such juror in criminal cases in that province:" sec. 662.

One provision of the local legislature which has to do with the summoning and qualification of grand jurors is sec. 103 of the Jurors Act, which, as now amended by 5 Edw. VII. ch. 13, sec. 7, enacts that where there do not appear as many as 12 of the grand jurors who have been summoned upon the panel returned upon the precept, the Court may command the sheriff to name and appoint so many of such other able men of the county then present, whether on the panel of the petit jury or not, as will make up a grand inquest of 12, and the sheriff shall return such duly qualified men as are present or can be found to serve as such grand inquest.

This is clearly one of the provisions of the local legislature relating to the qualification and summoning of jurors which has been adopted by sec. 662 of the Code, the qualification of the talesman being that of an "able" man then present, whether on the panel of the petit jury or not, and the summoning being the then and there naming and appointing by the sheriff of such person.

The case is much more plainly within sec. 662 than was the case of Re Chantler, 9 O. L. R. 529, 5 O. W. R. 574, in which this Court was able to hold that the restriction imposed by sec. 94 of the Jurors Act as to the non-disclosure of the names on the jury panel fell within the scope of sec. 662 of the Code. If Parliament has power to legislate on the subject by reference to provincial legislation or otherwise, it may authorize the talesman to be taken from the petit jury panel, though without such legislation that might be objectionable, and it was for that reason that leave to appeal was given in Rex v. Noel, in order that the question might be discussed. As against legislation now providing for the exact case, it would serve no purpose to examine decisions which have been cited to shew that talesmen cannot be drawn from the petit jury panel.

Then as to the provision of sec. 662 (2) of the Code. That is clearly matter relating to criminal procedure. The number of persons who are to constitute the grand jury is not affected, but only the action of the jury upon the bill which may be laid before them. Seven may now do so instead of 12, as was formerly the case, and we see no reason to doubt

that Regina v. Cox, 2 Can. Crim. Cas. 207, in which this question was considered, was well decided.

I may add that I am not satisfied that sec. 656 of the Code does not furnish an answer to the motion, though I express no further opinion as to that, as the section was not cited nor relied upon.

Leave is therefore refused.

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FALCONBRIDGE, C.J. FEBRUARY 26TH, 1906.

CHAMBERS.

## ONTARIO BANK v. FARLINGER.

*Summary Judgment—Motion for, after Delivery of Pleadings—Delay—Onus—Defence.*

Motion by plaintiffs for summary judgment under Rule 603.

C. W. Kerr, for plaintiffs.

A. H. Marsh, K.C., for defendant.

FALCONBRIDGE, C.J.:—The proceedings in this case have been of most leisurely character. The action was commenced on 3rd November; defendant appeared on the 16th of the same month. The statement of claim was delivered on 16th January; and the statement of defence on 1st February. This application for judgment was launched on the 8th February instant. The rule in this province is that motions after statement of claim is delivered are not to be encouraged, though in cases of necessity allowable: Woodruff v. McLennan, 11 P. R. 22. In McLardy v. Slateum, 24 Q. B. D. 504, it was held that a plaintiff is not necessarily too late in making his application because the defence has been delivered; but that if he makes his application after the ordinary time the onus is on him to shew that the delay is justifiable in the special circumstances of the case. There is nothing in the material here to shew any case of necessity, nor any reason for the delay. The jury sittings at Kingston are not far off and the non-jury sittings come on a few weeks later.

Even without considering the unexplained delay, it might be difficult to hold that there is no plausible defence disclosed, although I shall be surprised if there is any serious contest at the trial.

In all the circumstances of the case, I shall dismiss this motion; costs to be costs in the cause to the successful party.

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BOYD, C. FEBRUARY 26TH, 1906.

CHAMBERS.

## RE LOCAL OFFICES OF HIGH COURT.

*Municipal Corporations — Public Offices — Local Master — County Council—"Furniture"—Necessary Book on Practice.*

An informal application by the local Master at Ottawa for a direction as to whether it was the duty of the county council of Carleton to furnish the Master's office with a copy of a well known legal work as a necessary part of the equipment of the office. The Master and the solicitor for the county corporation agreed to abide by the direction of the Chancellor.

The Master, in person.

D. H. McLean, Ottawa, for the county corporation.

BOYD, C.:—By the Municipal Act, 3 Edw. VII. ch. 19, sec. 506, the county council is to provide proper offices (together with fuel, light, stationery, and furniture) for all offices connected with courts of justice. Under this class will fall the office of the local Master in Chancery. The question is raised whether under this clause of the statute there is any obligation resting on the municipality to provide for the use of the Master and as part of the furnishing of his office a copy of Holmested and Langton's Judicature Act and Rules. It is intended, I suppose, that the last edition should be furnished, and it is put on the ground that this book of reference is a "practical necessity," in connection with the administration of justice, for the local officer. It does not fall within the words of the Act, but some latitude of construction is invoked, such as appears in Newsome

v. County of Oxford, 28 O. R. 442. I had occasion to refer to that case in Mitchell v. Town of Pembroke, 31 O. R. 348, 357. The word "furniture" was held to cover writing and blotting paper, envelopes, printed forms, and other articles of stationery. These are, no doubt, required physically for the use of the office and the discharge of business therein.

But I have difficulty in extending any of the terms used to law books or text books. Whatever may be said in favour of supplying the current statutes and Rules of Court to the Master's offices, as to volumes of commentaries on them, that is another question. The same reason for supplying annotated treatises to the Master's office would carry the necessity to the supply of the reports also which are referred to in the notes, and would therefore practically include "a law library" in the furniture of the office.

Books, no doubt, are for the furnishing or entertainment of the mind, but are thus contrasted with the furniture of an office, which is for use, though it may not be for ornament. And this distinction has obtained in the cases under wills and other instruments between books and furniture: see Bridgman v. Dove, 3 Atk. 202, followed in Kelly v. Powhitt, Amb. 605. If, besides the word "furniture," the word "effects" is used, it has been held that books will then be included: Cole v. Fitzgerald, 3 Russ. 303. See Cremorne v. Antrobus, 5 Russ., at p. 321, last paragraph.

While I hold, therefore, that the Masters must furnish themselves with their own copies of "Holmested and Langton," I do not question that the volume is a very necessary part of official equipment.

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TEETZEL, J. FEBRUARY 26TH, 1906.

WEEKLY COURT.

## RE O'BRIEN AND TRICK.

*Arbitration and Award—Motion to Set aside Award—Mistake of Arbitrators—Refusal to Hear Evidence—Agreement of Parties.*

Motion by O'Brien to set aside an award made by two arbitrators appointed by the parties and an umpire chosen by the arbitrators.

C. A. Moss, for O'Brien.

F. A. McDiarmid, Fenelon Falls, for Trick.

TEETZEL, J.:—The affidavits of the arbitrator M. Greer and the umpire make it quite clear that so far as they are concerned no mistake was made, and in view of all the evidence and the contradictory statements of the arbitrator E. T. Greer, I am not satisfied that he made any mistake.

As to the objection that the arbitrators refused to hear evidence, I find that the two arbitrators were appointed by reason of their experience and local knowledge, and that subsequently to the submission it was agreed between the parties and the arbitrators that no evidence of facts not already known to the arbitrators should be given by either party, and that the arbitrators were to make a personal inspection of the premises from which the timber in question had been taken, and also that the true boundary line should be run by a surveyor, which line was run in presence of the parties. While their agreements were verbal, they were subsequent to the submission and not inconsistent with it.

The material filed does not satisfy me that there has been any mistake or misconduct by the arbitrators or that there has been any miscarriage of justice as a result of the award.

The motion is dismissed with costs to be paid by the applicant.

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FALCONBRIDGE, C.J. FEBRUARY 26TH, 1906.

WEEKLY COURT.

## RE MACKAY.

*Will—Construction — Period of Ascertainment of Class—Period of Distribution—Validity of Bequest.*

Motion by the executors of the will of the Reverend William A. Mackay for an order determining certain questions arising under clauses 3 and 11, which were as follows:

3. I direct my executors to pay to each of my grandsons who may study for the Presbyterian ministry the sum of $500 to assist them during their course of study, such sum to be paid at such time or times and in such amounts as to my executors seem for the best interests of such legatees, but to be during the time when he or they are so studying.

11. I direct that the whole of the rest, residue, and remainder of my property (except as hereinafter mentioned) be divided equally among my children, the shares of my daughter Emma and of my two sons Robert and William to

be paid by my executors as provided in clause 5 of this my will, the shares of my other children within one year of my decease.

N. W. Rowell, K.C., for executors.

J. R. Meredith, for infants and unborn grandsons.

Casey Wood, for a legatee.

FALCONBRIDGE, C.J.:—The class of grandsons is fixed at the death of the testator: Ringrose v. Bramham, 2 Cox Eq. 384.

No grandson, except Roswell MacTavish, will, having regard to their respective ages and expressed intentions, "study for the Presbyterian ministry" within the year assigned by clause 11 as the period of distribution.

Clause 3 operates as a good and valid bequest limited to Roswell MacTavish, and the executors will set apart the sum of $500 to assist him, and will further dispose of the estate as the will directs.

I was referred also to Festing v. Allen, 12 M. & W. 279; Re Archer, 7 O. L. R. 491, 3 O. W. R. 510.

Costs to all parties out of the estate.

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MAGEE, J. FEBRUARY 27TH, 1906.

WEEKLY COURT.

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

*Contempt of Court—Motion to Commit—Attempt to Procure Destruction of Letter—Excuse—Punishment—Payment of Costs—Jurisdiction—Person in Possession of Letter out of Province—Notice of Motion—Other Relief—Examination of Defendants—Costs.*

Motion by plaintiffs to commit defendants Archibald and King for contempt of Court, and for other relief as mentioned in the judgment. At the hearing of the motion it was dismissed as against defendants Archibald and King, but the question of costs was reserved.

W. E. Raney, for plaintiffs.

G. H. Kilmer, for defendants.

MAGEE, J.:—The defendant Archibald was admittedly a party to the sending of the telegram of 1st August, 1905, in defendant King's name, to A. G. Randall, of Winnipeg, to destroy King's letter of 29th May, 1905, to Randall. This telegram was sent on the evening of the same day on which King had, in presence of Archibald, been examined as to that letter, and had denied having kept, or at least being able to find, any copy of it. It was a material letter for plaintiffs to have in evidence, not only for the pending motion for interim injunction, but also for the trial, as in it defendant King had in effect asked Randall to leave plaintiffs' service and join defendants in their new business. To destroy it would be to destroy evidence. Although Randall had not then been subpœnaed, and defendants had only been subpœnaed to produce on their examination, inter alia, all letters, copies of letters, and other documents, in their custody, possession, or power, and particularly all correspondence between them and any servants of plaintiff company during the past year—yet, none the less, these defendants had every reason to suppose that Randall would be called upon to produce the letter and give evidence with regard to it. The very fact of the request for its destruction being sent by telegraph, and on that particular evening, shews the fear entertained by the sender that it would be available for plaintiffs.

I accepted defendant King's denial of any knowledge of the telegram or of the use of his name until some days after it was sent, and I also gave Archibald the benefit of his explanation of his reason for sending it, as being his fear of plaintiffs getting from the letter other information contained in it as to defendants' business, and his excuse that he acted with the concurrence and advice of a member of the legal profession from the province of Quebec, who was connected with defendant company, though the concealment from King of the use they were making of his name, while getting from him the money with which the telegram was paid for, hardly accorded with innocent intentions.

Before the telegram reached Randall he had sent the letter itself to plaintiffs, but this was not known to defendants, and their action must be construed as if he still held it, in so far as their interest is to be arrived at from their action, though in fact no failure of justice resulted.

It may be that Archibald was chiefly solicitous to keep from plaintiffs the other information, but he must have

known that in doing so he was also keeping from them what would be very material evidence in the pending action.

The Courts are very solicitous that there shall be no interference with the even and impartial course of justice in proceedings pending before them—and they have visited with punishment, not only attempts at such interference, but acts which would tend to prejudice the fair trial of causes, where actual intent to do so may not have existed. . . .

It is, perhaps, not necessary in this case to dwell upon the question whether a suggestion to destroy a letter may not also be a suggestion not to remember its contents when giving evidence as to it. But the destruction of the letter itself falls within the mischief which the Courts desire to guard against.

. . .

[Reference to Re Dwight and Macklam, 15 O. R. 148; Wellby v. Still, 8 Times L. R. 202; Regina v. Castro, Onslow's Case, L. R. 9 Q. B. 219.]

Then the fact that Randall was outside this province does not, I think, make the sending of the telegram from the province less an attempt to obstruct the course of justice here. That defendant Archibald feared that plaintiffs would, in the ordinary course of the suit, obtain Randall's evidence and the production of the letter, is shewn by the desire to suppress it. The right of plaintiffs to be untrammelled by any act of defendants in obtaining the evidence in the usual way, is clear. The pending litigation was here, defendant Archibald's act towards a wrongful end was here, and that end was the obstruction of justice in the Court here. It was an act in contempt of this Court, and for which, while I relieved him of other punishment, he must pay plaintiffs' costs of the motion.

It was objected, however, that plaintiffs had given two notices of motion, and only one was set down, and it was impossible to say which one. Both motions, though given 4 days apart, were for the one day. It is true they made no reference to each other, but the second embodied all the objects of the first, and the second notice served on defendants' solicitors was accompanied by a letter informing them that plaintiffs' solicitors had amended their notice of motion, and giving the reason for it. Defendants have not been in any way misled, and the application must, I think, be taken to be on the second notice.

As defendant King was not shewn to be a party to the sending of the telegram, plaintiffs fail as against him on that branch of their motion; but his answers in regard to the telegram upon his examination were not satisfactory, and plaintiffs should not be called upon to pay him any costs in respect of it.

The second notice of motion asked for the committal of defendant King for not answering some 25 questions on his examination on the motion for injunction. That latter motion was disposed of, without his answers, before this motion came on. In so far as the costs of the present motion have been increased by that branch of the motion, the costs should be deemed part of the costs of plaintiffs' motion for injunction, and disposed of therewith.

The third branch of the second notice of motion was for an order for the examination of 5 defendants, Archibald, King, Baird, Harcourt, and Trout, and such other witnesses as plaintiffs might subpœna in support of the motion. The notice was addressed to . . . Archibald, King, Baird, and Trout. As Baird and Trout were, as regards the application for committal of Archibald and King, in the same position as any other witnesses, there was no necessity for serving them with notice any more than serving other witnesses. As regards that branch of the motion, plaintiffs should pay the costs of defendants Baird and Trout, and they will be costs to these defendants in any event of the cause. The costs of that branch of the motion as between plaintiffs and defendants Archibald and King will be deemed part of the motion for committal of these defendants for attempting to procure the destruction of the letter.

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CARTWRIGHT, MASTER. FEBRUARY 28TH, 1906.

CHAMBERS.

## GARLAND v. YORK MUTUAL FIRE INS. CO.

*Venue—Motion by Plaintiff to Change — Mistake in Laying Venue—Solicitor's Slip—Costs—Speedy Trial.*

Motion by plaintiff to change venue from Toronto to St. Thomas.

Grayson Smith, for plaintiff.

A. Fasken, for defendants.

THE MASTER:—The venue was always intended to be at St. Thomas, where the cause of action occurred, and where plaintiff and his witnesses reside. Plaintiff's solicitor makes affidavit that it was only by an oversight that Toronto was named as the place of trial, and this is not questioned by the other side.

The prima facie right of plaintiff to lay the venue where he resides, in the circumstances of this case, is beyond dispute; and if St. Thomas had been so named in the first instance, defendants could not have had it changed to Toronto.

This being so, and the mistake being admittedly that of the solicitor, plaintiff is entitled to have the order made, following my decision in Muir v. Guinane, 10 O. L. R. at p. 369, 6 O. W. R. 64.

The costs must be to defendants in any event, which will be a sufficient penalty for the mistake.

This is only one of several actions in respect of the same fire. In one of them the defendants have agreed to the change. There is also the fact that these being jury actions they will be tried at St. Thomas at least 6 months earlier than they could now be tried at Toronto, and a speedy trial is in the interest of the parties, as well as of the state itself, according to the familiar maxim.

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CARTWRIGHT, MASTER. FEBRUARY 28TH, 1906.

CHAMBERS.

## PARADIS v. NATIONAL TRUST CO.

*Trial—Postponement—Grounds for—Mistake of Plaintiff—Proposed Amendment—Award.*

Motion by plaintiff for an order postponing the trial.

C. A. Moss, for plaintiff.

W. H. Blake, K.C., for defendants.

THE MASTER:—This action was commenced on 31st October, 1904, and was at issue more than a year ago. Plaintiff was examined for discovery on 3rd May last. The trial

was delayed owing to illness of plaintiff's solicitor. He has since died. The new solicitors now move to postpone the trial, in the following circumstances.

The action is against executors to recover: (1) $2,000 for plaintiff's share of the proceeds of sale of a railway charter made by the testator; and (2) $2,000 for his time, services, etc., in and about the charter. This latter sum, it is said in the statement of claim, was, by agreement with testator, to be fixed by one Armstrong, and he on 8th October, 1904, settled the amount at $2,000. But, as defendants' testator died in June, 1903, and no notice of such award, prior to its being made, was given to defendants, it is clearly bad.

Plaintiff now wishes to be allowed to postpone the trial so as to have a valid award made, and then to be allowed to amend his writ (if necessary) and statement of claim so as to set up such award.

There was here, undoubtedly, a mistake on the part of plaintiff or of his solicitor; but I do not think it is such a mistake as can be dealt with under Rule 312. To allow the amendment, assuming that a second award was made, would be to go in direct violation of the decision in McLean v. McLean, 17 P. R. 440; and, so far as that branch of the claim is concerned, it would be necessary really to commence a new action.

Another ground of objection to the motion is the long delay, for which defendants are not in any way to blame. The pendency of this claim prevents the winding-up of the estate, and interferes with the rights of those entitled in distribution.

I think the motion must be dismissed with costs to defendants in any event.

There is nothing to prevent plaintiff from proceeding on the first branch of his claim and abandoning the other. In view of his own evidence, it does not look as if he had a very strong case, and delay will certainly not make it stronger.

BRITTON, J. FEBRUARY 28TH, 1906.

TRIAL.

## BALDOCCHI v. SPADA.

*Bankruptcy and Insolvency—Transfer of Goods by Insolvent to Creditor — Preference — Presumption — Rebuttal— Absence of Fraudulent Intent—Actual Advance of Money —Judgment—Defendant not Appearing.*

Action by creditors of defendant Spada to set aside a transfer of goods alleged to have been made by defendant Spada when in insolvent circumstances to defendant Garborino, also a creditor.

R. McKay and G. Grant, for plaintiffs.

J. Tytler and R. G. Smyth, for defendant Garborino.

BRITTON, J.:—Plaintiffs are wholesale merchants carrying on business in the city of Lucca, Italy, and defendant Garborino is a fruit merchant carrying on business in Toronto.

At the time of the transaction which is attacked in the present action, defendant Spada was carrying on business in Toronto, on a large scale, as a general dealer in Italian products. . . .

Garborino lent to Spada in and prior to 1901, $2,500. . . . In December, 1904, Garborino became surety for Spada to the Dominion Bank in Toronto to secure, to the extent of $3,000, advances by the bank to Spada.

Garborino is apparently a man of considerable means—in easy circumstances—and during these years from 1900 to 1905 he was content to let his money rest. . . . In 1905 Garborino arranged to make a loan to one Loftus, and gave a cheque for the amount of the loan upon his savings bank deposit account with the Dominion Bank. The manager of the bank at the branch where Spada had his account prevented the payment of Garborino's cheque. The manager evidently thought Garborino as surety only good when his money was where the bank could hold it. No doubt at this time the manager had lost or was losing faith in Spada. . . . Garborino saw Spada, and Spada said he had drawn money

from the bank for which Garborino was surety, but that he would in a month settle everything. . . . Taking all Garborino's evidence and his conduct, it shews that he was satisfied with the explanation and promise of Spada. . . .

On 7th or 8th June, 1905, Spada told Garborino that he (Spada) was going to New York, and that it would be all right when he returned. . . . When he returned from New York Garborino saw him, and he (Spada) said he would be all right. Garborino saw Spada again on 9th July and again on 10th July, and on one of these days said that if Garborino would lend him $1,900 he would make it all right, that is, with the bank, and give Garborino security for his debt. Garborino agreed to this, and Spada gave to Garborino an invoice of goods then said to be in Carrie's store. This invoice is dated 3rd July, 1905, and is . . . for $4,140 in all, and is receipted by Spada.

Together on 10th July Spada and Garborino went to the Imperial Bank branch at the corner of York and King streets. This bank had a warehouse receipt for the same goods, or for a part of them, upon which advances had been made to the amount of $1,000, which Spada then paid to that bank. It does not appear that Garborino knew exactly what amount Spada then owed and was paying to the Imperial Bank, but he knew that Spada then made a deposit and had some money transaction. Then Spada and Garborino went to Carrie's warehouse, where Spada turned over the property to Garborino, and Carrie gave to Garborino a warehouse receipt dated 10th July, 1905. . . . The transfer at the warehouse was in the afternoon of 10th July. Spada at once informed Mr. Ross of the Dominion Bank of it, and on that day . . . Mr. Ross wrote to Garborino. That was the first intimation, according to the evidence, that Garborino had that the bank did not care to continue the advances to Spada upon the security of Garborino's bond. . . .

On 11th July, whether before or after the receipt by Garborino of the letter from Ross does not appear to me to be material, Garborino went to Spada's; together they went to the Dominion Bank . . . saw Mr. Ross, and Garborino handed over to Spada $1,906.25, that being the amount Spada required to borrow to enable him to pay his indebtedness to the bank.

There was an actual cash advance by Garborino of the $1,906.25; there was the payment by him of the further sum

of $835 or thereabouts to get the 75 baskets of cheese out of bond; and there is the further fact that these identical goods or part of them were up to 10th July held by the Imperial Bank as security for $1,000. . . .

These are circumstances which go to shew absence of fraudulent intent on the part of Garborino.

I find that Spada was in fact insolvent at the time of making to Garborino the transfer which is now impeached, but, in my opinion, Garborino did not know of that insolvency, did not know of Spada's intention to give up business or to abscond.

An agreement to give security, made in good faith, though indefinite in terms, may rebut the presumption of intent to prefer, but pressure is not now admissible to rebut the presumption of intent to give a preference: Webster v. Crickmore, 25 A. R. 97.

The prior agreement of 8th or 9th June in this case, whether the promise by Spada was a voluntary one or under pressure, is not material further than it is a factor in shewing Garborino's confidence in Spada, and that there was, so far as appears in evidence before me, no suspicion then of Spada being in financial difficulty, or that he meditated mischief. . . .

This action was commenced on 8th August, 1905, so the transfer to Garborino must be presumed "prima facie to have been made with the intent of giving Garborino a preference over the other creditors" of Spada. This presumption is a rebuttable one: see Davis v. McLean, 2 O. L. R. 466. It is rebutted by the evidence which satisfies me that the transaction was entered into by the transferee in good faith without knowing and without having reason to believe that the transferor was insolvent. This was not a transfer of substantially the whole of the debtor's estate. . . .

The facts do not bring this case within In re Jukes, [1902] 1 K. B. 55, as was contended. The evidence does not disclose that Garborino had knowledge of any other creditor of Spada than the Dominion Bank and the Imperial Bank. . . .

If Garborino has satisfied the onus cast upon him of establishing that he had no intent to defraud or defeat the creditors of Spada, that he had no knowledge of the insol-

vency of Spada—in short that, so far as Garborino is concerned, there was no fraudulent intent at all in reference to Spada's creditors, then this case is wholly within and governed by the latest decision, viz., Benallack v. Bank of British North America, 36 S. C. R. 120. See also Molsons Bank v. Halter, 18 S. C. R. 88; Gibbons v. McDonald, 20 S. C. R. 587; Stephens v. McArthur, 19 S. C. R. 446.

I am of opinion that Garborino has fully met the presumption raised against him by the immediate failure and absconding of Spada.

I do not at all regard as immaterial or unimportant the point raised by counsel for defendant that in any event this transfer is good within sec. 3 of the Act, as it was a bona fide transfer of goods by way of security for a present actual advance of money. . . . It is true that as to this sum of $1,906 Garborino was already a creditor as defined by R. S. O. 1897 ch. 147, sec. 2, sub-sec. 5, but, even if a creditor and so relieved in part by the money he lent to Spada, still it was an actual advance of money to Spada. . . . I do not, however, decide the case upon this point. . . .

My decision is that there was no fraudulent conduct or intent on the part of Garborino.

I think the action should be dismissed, as to Garborino with costs, and as to Spada without costs. Spada put in no defence, but, as the action fails, is entitled to judgment: see McDermott v. McDermott, 3 Ch. Ch. 38.

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MARCH 1ST, 1906.

DIVISIONAL COURT.

## CASSELMAN v. BARRY.

*Master and Servant — Injury to Servant — Negligence — Dangerous Work—Absence of Inspection — Findings of Jury—Common Law Liability — Joint Tort-Feasors—Death of One—Action against Survivor and Executors of Deceased—Damages—Motion for New Trial on Affidavits —Charge of Unprofessional Conduct against Solicitor—Affidavits—Contradiction.*

Motion by defendants to set aside the judgment for $6,500 directed to be entered for plaintiff after the trial before

CLUTE, J., and a jury at Welland, in an action for damages for injuries sustained by plaintiff while in the employment of a firm of Barry & McMurdie, contractors, by reason of the negligence of the employers, as alleged. Barry, one of the partners, died before action, and the defendants were McMurdie and the executors of Barry.

Plaintiff was injured by the explosion of some dynamite while engaged in the construction of a sewer which the contractors were blasting at Niagara Falls, while working as helper to one Forsyth, a driller, also in the employ of defendants. The drill struck some dynamite mining in a hole formerly drilled, which failed to explode along with other charges, but did explode when struck by the drill. Plaintiff alleged that defendants were liable by reason of a defective and unsafe system adopted by them, subjecting their workmen to unnecessary peril, and in placing defective and dangerous explosives at their disposal for prosecuting the work. Plaintiff was injured in the afternoon of the first day he commenced to work, and had been given no particular instructions or warning, but said he knew there was danger in the work he was entering upon.

The jury found that defendants were guilty of negligence that caused the accident, and that such negligence consisted in having no organized system of inspection of the work and appliances in general; that the battery was defective, and no care had been taken to make sure that the charge in every hole had been exploded; and that plaintiff had been guilty of no contributory negligence.

The motion was heard by BOYD, C., STREET, J., MABEE, J.

E. E. A. DuVernet and F. W. Hill, Niagara Falls, for defendants.

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

BOYD, C.:—There appears to be a very logical connection in the various sentences used by the jury in answering the questions submitted. They find on the evidence that "the battery was defective." That defect manifested itself by the battery usually shooting off 2 or 3 holes instead of 4. . . . Then the jury find that there was "no care taken to make sure that the charge in every hole had been exploded." This

is because the apparent explanation of the accident given by defendants and accepted generally is that a piece of frozen dynamite had been left unexploded in the old hole, which was reached in drilling the new hole on the day of the accident. Plaintiff's evidence is that if the débris had been removed after each explosion, the partly unexploded hole could have been detected and remedied either by extracting the rest of the charge or making a new and further explosion of it per se. Defendants admit that it might be discovered by the removal forthwith of the loose material, but think that the removal might be equally useful if done later. In this view plaintiff's witnesses do not agree. Contemporaneous removal is, in their opinion, the best and surest way of making the discovery. And then, last of all, the jury say, in view of the diverging views as to what was done and what might have been done, and in affirmation of what the witnesses say, that there was really no method or system of inspection—that defendants were "negligent in that there was no organized system of inspection of the work and the appliances in general."

I think the verdict at common law could be sustained on the first answer given by the jury, that the negligence consisted in there being no system of inspection. It was a dangerous piece of work in rock excavation, carried on by the extensive and constant use of a most powerful explosive—without any apparent safeguards being adopted after every compound discharge to see whether it was reasonably safe to proceed to the next discharge. Defendants admit the danger, but say "there is no practical way of finding out these sources of danger." . . .

For plaintiff it is pointed out that it is possible after each blast to know if the charges have all exploded, by examination . . . and still better that only one shot should be set off at a time, and then its failure would be detected before the next. Plaintiff was told to work at this place, and a message from defendants was given to him that it was all safe in the neighbourhood where he was about to drill; and no blame can be cast on him. . . .

[Reference to two "noteworthy dynamite cases," Hopkins v. Osler, 176 Mass. 258, and Hove v. Boston, 187 Mass. 68, as to the duty of the employer to make an inspection after every blast.]

I perceive no miscarriage in the trial or frame of the record on the other points argued, and no case is made for a new trial on the ground of surprise.

As to the statute R. S. O. 1897 ch. 129, sec. 11, Hunter v. Boyd, 3 O. L. R. 183, is an example of a so-called "joint tort," where the action was against surviving tort-feasors and the representatives of the deceased.

The judgment is affirmed with costs.

A collateral matter of no small importance has been brought to the notice of the Court incidentally in reading the affidavits filed upon the application for a new trial.

The notice of motion was dated 21st December, 1905, and served on the next day, and referred to no affidavits.

We find on the files of the Court two affidavits of Robert Forsyth, sworn on 23rd December, 1905, and two by William Forsyth, sworn on the same day, and another made by defendants' solicitor, sworn on 29th January, 1906. The 4 Forsyth affidavits were filed on 27th January, 1906, and that by the solicitor was filed on 30th January. So far as related to matters involving a new trial and the manner of getting evidence, these were answered by affidavits of plaintiff and his solicitor, sworn on 7th and 8th February and filed on 10th February.

One of the affidavits of William Forsyth was not then answered by the solicitor, upon whom serious imputations were thereby cast as to the terms on which he was to conduct the litigation for plaintiff. This phase of the controversy was not brought to our attention on the argument.

The solicitor, upon being notified by the registrar of his unanswered affidavit, sent in his answer under oath by affidavits sworn 22nd February, in which he says that this particular affidavit of Forsyth was not served upon him nor was his attention called to it until he read the letter of the registrar.

It is highly undesirable that litigation should be conducted in this way; if the affidavit impeaching the conduct of plaintiff's solicitor was to be availed of, the point should have been brought emphatically before the Divisional Court and discussion had in open court. But, finding the affidavit on the files of the Court, we gave the solicitor an opportunity

of making response to it—which he has done, so that both affidavits are now of record on the files of the Court. So far as the Divisional Court is concerned, the charge and its contradiction will remain as it is, but without prejudice to the alleged breach of professional duty being brought before the Benchers for further investigation, if either party so desires. Brought up in this irregular way, the inculpating affidavits should not be allowed to interfere with the action of the Court in disposing of the appeal on its merits.

STREET, J., concurred.

MABEE, J., also concurred, giving reasons in writing, in which he referred, upon the question of the liability of masters, to Canada Woollen Mills Co. v. Traplin, 35 S. C. R. 424; Grant v. Acadia Coal Co., 32 S. C. R. 427; McArthur v. Dominion Cartage Co., 21 Times L. R. 47; McKelvey v. Le Roi Mining Co., 32 S. C. R. 664; and upon the question of the quantum of damages—which the Court refused to interfere with—to Sornberger v. Canadian Pacific R. W. Co., 24 A. R. 263.

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CARTWRIGHT, MASTER. MARCH 2ND, 1906.

CHAMBERS.

## PLAYFAIR v. TURNER.

*Discovery—Production of Documents—Breach of Contract—Damages—Loss of Profits in Business—Books and Documents Pertaining to Business—Postponement of Trial.*

Motion by defendants for an order requiring plaintiff to file a further affidavit on production, and postponing the trial.

R. McKay, for defendants.

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

THE MASTER:—Plaintiff claims from defendants damages for their failure to supply logs according to their written agreement during the season of 1905, to be sawn by him for defendants. He alleges that his mill could have sawn nearly

8 million feet if defendants had performed their contract instead of supplying only logs enough to produce one million and a half.

The contract price for sawing was $2.50 per M. Plaintiff in his examination for discovery (qu. 74) estimates his loss of profits at from $8,000 to $9,000. He was then naturally asked as to the cost of sawing, and this he puts at $1.29 per M. If these figures are correct, the loss would be about $7,500.

He was questioned on this at some length, and said (in answer to qu. 94) that he had documents shewing his expenses and how the $1.29 was arrived at, and in answer to qu. 95, "You can let us see these?" he said, "I have got them all." That question was then dropped, and at the conclusion defendants' counsel said: "That is all I wish to ask the witness at present except that when we see the books shewing the cost of sawing we may want to ask further questions."

No objection was made to this, and on the principle of the well-known case of Weideman v. Walpole, [1895] 2 Q. B. 534, plaintiff's counsel must be held to have agreed to those books being produced and further examination being had if defendants' counsel thought it necessary after inspection of such books and documents.

This examination of plaintiff for discovery took place on 15th February. At that time plaintiff had not complied with the usual order for production, which was served on 27th January. But the parties had been practising on easy terms, and plaintiff's solicitor expected that when the affidavit *was* filed the necessary books would be included. On 21st February he wrote stating that he would go to Midland on the 24th and inspect the books, and enclosed copy of letter from defendants' manager stating what books and records they thought would be required.

On the same day and after the previous letter had been sent, a letter was received with plaintiff's affidavit on production. In reply as requested the affidavit on production of defendants' manager was sent, and the letter further said that plaintiff's affidavit was, in the writer's opinion, clearly defective, but that, if the proposals of the first letter were accepted, plaintiff's solicitor would be satisfied. To this no answer was received, but on 23rd February plaintiff's solicitor had a conversation with defendants' solicitor in Toronto and said he would have to consider about producing the docu-

ments asked for and would advise defendants next day what he would do.

The answer when it came was in the negative, and this motion was at once made to require plaintiff to file a further affidavit on production and to have the trial postponed, for which notice had been given for the Barrie Assizes on Monday next. . .

It was contended for plaintiff that at most nothing more should be produced than what is mentioned in the answer to qu. 95; that plaintiff could not be required to produce his books, as he could prove his damages any way he chose and might do so in some other manner.

With this I am not prepared to agree, though it is not necessary to decide this as an abstract proposition.

Plaintiff's action is one for damages solely. He claims, as it would seem, between $7,000 and $8,000. In such a case all possible discovery as to damages is surely relevant: see Bray's Digest, 1904, pp. 4, 47. Such damages will be assessed at the trial, and will not be the subject of a reference. Surely it is most important for defendants to see if plaintiff's books bear out his estimate of the cost of sawing as being only $1.29 per M.; and, in my opinion, plaintiff has agreed to this being done. I think it is beyond question that the fullest discovery should be made on this point, and that plaintiff must file a further affidavit on production and submit to further examination if defendants so desire: see Barwick v. Radford, ante 237.

This will necessitate a postponement of the trial to the non-jury sittings in May. The costs of this motion and incidental thereto must be to defendants in any event.

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FALCONBRIDGE, C.J. MARCH 2ND, 1906.

WEEKLY COURT.

## RE TOWN OF SOUTHAMPTON AND TOWNSHIP OF SAUGEEN.

*Municipal Corporations—Territorial Re-adjustment — Valuation of Assets—Award—Evidence of Dissenting Arbitrator —Principle of Valuation—Sidewalks—School Buildings—Waterworks—Appeal—Costs.*

Motion by town corporation to set aside an award of 2 out of 3 arbitrators under by-law 512 of the county of Bruce,

upon the township taking over part of the territory of the town: Municipal Act, 1903, sec. 18, sub-secs. (3), (4), and (6).

D. Robertson, Walkerton, for applicants.

W. H. Wright, Owen Sound, for respondents.

FALCONBRIDGE, C.J.:—The motion was launched on several grounds set forth in the notice of motion, but upon the argument it was agreed that the matter should not be referred back in any event, but that the motion should be treated as an appeal in regard to the amount directed by the two arbitrators to be paid by the township corporation to the town corporation. Mr. Wright appeared only for the individual respondents, who were the petitioners, the township corporation having considered it unnecessary to be represented by counsel.

The argument narrowed itself down to the complaint on the part of Southampton that the arbitrators allowed and included as assets of Southampton the value of the public schools and granolithic sidewalks; and also that an allowance should have been made in favour of Southampton of about $1,000, because it was alleged that mistakes were made in construction which had the effect of reducing the value of the waterworks as an asset by about that amount.

In order to determine these questions it is necessary to decide whether or not the evidence of the dissenting arbitrator is admissible. He did not make any objection to giving evidence, and he was asked and answered certain questions as follows:—

"Q. 87. Will you tell me, from memory, whether in the amount mentioned in the award the arbitrators included in the assets of Southampton of which Saugeen was entitled to a share the value of the school house, the granolithic sidewalks, and street crossings? A. They did include them. . . .

"Q. 88. Do you remember what the arbitrators fixed the value of the schools at? A. Yes, $7,000.

"Q. 89. Do you remember how they ascertained or arrived at the value of the granolithic sidewalks and crossings? A. The total amount was taken, less 40 per cent. that the property owners would have to pay; I am not sure whether it was 40 or 60 per cent. . . .

"Q. 90. At the time of the arbitration was it not admitted that, in ascertaining the liabilities on account of granolithic sidewalks and crossings, the amount the property owners were to pay should be deducted? A. Yes.

"Q. 91. Then, in fixing the liabilities, the value of the granolithic sidewalks was put at the amount of the liabilities on account of the same? A. Yes.

"Q. 92. In ascertaining the value of the waterworks as one of the assets, was there any deduction made for cost of errors or mistakes in putting them down? A. No.

"Q. 93. In ascertaining the amount of the liabilities, you say that whatever proportion the property owners were to pay for granolithic sidewalks was deducted from total liabilities for same; was anything else deducted? A. No." . . .

[Reference to Duke of Buccleuch v. Metropolitan Board of Works, L. R. 5 H. L. 418, 462; In re Christie and Town of Toronto Junction, 22 A. R. 21.]

The questions put here seem to be well within the rule; and to prevent the town corporation from putting these questions would have been to deprive them of information to which they were entitled, and on which alone they could base any appeal or application for relief. It is a very different proposition from asking questions relating to the intention or state of mind of an arbitrator.

The information being thus properly before me, . . . I hold that the two arbitrators should not have included in the assets of Southampton of which Saugeen was entitled to a share the value of the school houses. The school houses are vested in a separate board, and the limits of control by the school board may be the same limits or different limits from that of the municipal corporation.

To a certain extent the sidewalks are in a like position, inasmuch as (sec. 599 of the Municipal Act, 1903), the soil and freehold thereof are vested in His Majesty. But the possession and control of and liability for sidewalks are immediately attached to the municipal corporation and to no other body. I therefore find against the contention of Southampton as to the sidewalks.

The alleged mistakes in construction may reduce the value of the waterworks as an asset, but these mistakes are

common incidents of such construction, and have been a misfortune alike of Southampton and of these petitioners, and I do not see that Southampton can claim any relief in this regard.

The result is that the amount awarded by the two arbitrators should be increased by $368, being one-nineteenth of $7,000, the value of the schools; i.e., that Saugeen shall pay Southampton $1,098. The credit of Saugeen is, no doubt, perfectly good, and I see no reason why this sum should not be paid in præsenti.

I do not think it is a case for costs, inasmuch as the appeal has failed in part and succeeded in part.

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TEETZEL, J. MARCH 2ND, 1906.

TRIAL.

## LIFE PUBLISHING CO. v. ROSE PUBLISHING CO.

*Copyright—Infringement—Drawings in Serial Publication—British Registration—First Publication—Imperial Copyright Acts—Employment of Author by Publisher—Foreign Author Resident outside of British Dominions — Title to Copyright—Assignment—Contract—Publication by Author under License—Infringement by Copying.*

Action by New York publishers to restrain defendants, Toronto publishers, from printing, publishing, and selling 8 cartoon drawings and the accompanying titles and letter-press prepared by the celebrated artist Charles Dana Gibson.

H. Cassels, K.C., and R. S. Cassels, for plaintiffs.

J. H. Denton and T. H. Lennox, for defendants.

TEETZEL, J.:—Plaintiffs claim copyright in the drawings under the following circumstances.

Plaintiffs publish a periodical known as "Life;" and one James Henderson, a resident of London, England, was the publisher of a similar periodical known as the "Comic Pictorial Sheet."

On 29th September, 1891, Henderson made due entry in the book of registry of copyright kept at the Hall of the Stationers' Company in the city of London, pursuant to the Imperial Copyright Act, 5 & 6 Vict. ch. 45, of his proprietorship in the copyright of the said periodical.

For some years prior to 15th January, 1900, under agreements with plaintiffs and the prior publishers of "Life," who were the employers of Gibson, and with his authority, Henderson had acquired all rights of publication or reproduction throughout the British Dominions in the drawings and letter-press as published in "Life," for the purpose, as expressed in an agreement of 1st July, 1898, "of enabling the said James Henderson to secure British copyright by first or simultaneous publication of the said drawings or letter-press in the United Kingdom in a serial publication entitled 'Comic Pictorial Sheet.'"

By an agreement of 15th January, 1900, between James Henderson, Charles Dana Gibson, Mitchell and Millar, chief shareholders in plaintiff company and former publishers of "Life"), and the "Life" Publishing Company, James Henderson is acknowledged to be the owner of the British copyright in the drawings of Gibson "heretofore contributed or hereafter to be contributed to 'Life'," and by the said agreement Henderson grants an exclusive and irrevocable license, during the continuance of the British copyright, to Gibson to publish in book form or as portfolios or collections of drawings in the United Kingdom, the drawings theretofore contributed or thereafter to be contributed to "Life" by him. The agreement between Henderson and paintiffs also provides that "the circulation of copies of the publication 'Life' containing such drawings and letter-press within the British dominions should not be deemed an infringement of Henderson's British copyrights."

All the original drawings and letter-press in question were prepared by Gibson as an employee of plaintiffs, and were paid for by plaintiffs, and they were each first published in London in the "Comic Pictorial Sheet" contemporaneously with their publication from time to time in "Life," and this privilege was paid for by Henderson at schedule rates set forth in the agreements.

On 1st September, 1900, there was duly registered at the Hall of the Stationers' Company, pursuant to the said Copy-

right Act, an assignment by James Henderson to James Henderson & Sons of the former's copyright in the "Comic Pictorial Sheet."

On 8th September, 1905, James Henderson & Sons duly registered at said Hall, pursuant to said Act, 8 copies of the "Comic Pictorial Sheet," which contained the 8 drawings and letter-press in question, and on the same day they also registered at said Hall assignments to plaintiffs of their copyright in the 8 publications; and plaintiffs put in evidence duly certified copies of the entries of registrations, which copies, by sec. 11 of the Act, "shall be received in evidence in all Courts . . . and shall be prima facie proof of the proprietorship or assignment of copyright or license as therein expressed, but subject to be rebutted by other evidence."

Two of the drawings and letter-press in question occupy 2 full pages each, and the other 6 occupy only one page each in the respective 8 issues of "Comic Pictorial Sheet."

Prior to 8th December, 1905, defendants printed for the purposes of sale a quantity of pictorial post cards on which were reproduced copies of said cartoon drawings on a reduced scale, and have in their possession unsold copies of the same, also the plates from which the copies were made, and they dispute plaintiffs' copyright, and state that, unless plaintiffs establish their copyright, they (defendants) will sell the copies still on hand and make and sell other copies.

By a memorandum filed at the trial the following facts are admitted: that the post cards complained of were made at Toronto from drawings in 2 books or collections published by Charles Dana Gibson or his assigns, pursuant to the rights reserved to him in the agreement above recited; that defendants did not first obtain the consent of plaintiffs or their predecessors in title; that the 2 books referred to were not registered for copyright at Stationers' Hall; that Gibson was, at the time when the material in which copyright is claimel was prepared by him, a citizen of the United States, and not a British subject, and that he was not, at the time of the preparation of that material or any of it, or at the time of the publication of it in the "Comic Pictorial Sheet, within any part of the British dominions; that none of the material has been protected by a Canadian as distinguishel from a British copyright; that defendants did not make the reproductions in question from the "Comic Pictorial Sheet;" that they

had no knowledge of its existence until after action; that it has little or no circulation in Canada; and that defendants made no inquiries as to existence of copyright in said drawings except at Ottawa for the purpose of ascertaining whether Canadian copyright as such had been registered. . . .

(1) I think the serial the "Comic Pictorial Sheet" is clearly a "book" within sec. 2 of the Copyright Act, 5 & 6 Vict. . . .

[Reference to Walter v. Howe, 17 Ch. D. 208; Trade Auxiliary v. Middleborough, 40 Ch. D. 425; Scrutton's Law of Copyright, 4th ed., p. 111.]

Assuming then, for the pressent, that by registering the 8 numbers of said publication the proprietor secured a copyright therein as so many books or sheets of letter-press, several authorities establish that the proprietor would be entitled to recover for an infringement of any substantial part thereof. . . .

[Reference to Bogue v. Houlston, 5 DeG. & Sm. 267; Bradbury v. Howe, L. R. 8 Ex. 1.]

At p. 7 of the last mentioned case Pigott, B., says: "The pictures are a vital part of 'Punch.' They are the result of labour, originality, and expenditure, and from their great merit are of permanent value."

The great reputation of Mr. Gibson, the merit of his drawings, and their constituent importance to the publication in which they appear, make the remark just quoted singularly applicable to this case. See also Grace v. Newman, L. R. 19 Eq. 623; Maple v. Junior, 21 Ch. D. 369; Bradbury v. Sharp, [1891] W. N. 143; Marshall v. Bull, 85 L. T. 77.

Without determining whether the registration of the first publication in 1891 was sufficient, I am of opinion that the registrations of the 8 separate publications on 8th December, 1905, conferred upon the owners of the publication copyright in the drawings in question, assuming for the present that they were a subject for copyright.

(2) The contracts produced cannot, I think, be construed as creating the relationship of employer and employee between Henderson and Gibson, within the meaning of sec. 18 of the Copyright Act, and if plaintiffs were driven to rely

upon that section only and the first registration of the periodical by Henderson in 1891, great difficulty might be in their way: see Brown v. Cook, 16 L. J. N. S. 140. . . .

The agreements between Henderson, Gibson, and plaintiffs were intended to vest in Henderson the sole right to obtain British copyright in the drawings, etc., subject to the reservations therein contained, and I think, subject thereto, Henderson became an "assign" of all rights of the author to copyright within sec. 3 of the Act, as defined in sec. 2, and was, after publication, entitled to register as proprietor under sec. 13 of the Act. See Scrutton, 4th ed., p. 154; Copinger, 4th ed., p. 142; and MacGillivray, pp. 74-77.

(3) Does the Act protect the works of a foreign author assumed to be copyrighted with his authority by a British publisher, such author being at the time of production and publication outside of the British dominions?

As to this question I have, with some hesitation, in view of the state of the authorities, come to the conclusion that the drawings in question are entitled to the protection of the Act.

. . .

[Reference to Jefferys v. Boosey, 4 H. L. C. 815; Routledge v. Low, L. R. 5 H. L. 100.]

The reasoning in the judgments in the latter case convinces me, after a careful perusal of the two Acts (8 Anne ch. 19 and 5 & 6 Vict. ch. 45), that the present Copyright Act does extend protection to the productions of foreign authors, wheresoever resident, assuming that there is a first or contemporaneous publication within the Empire, and I therefore adopt the view that Jefferys v. Boosey is not a binding authority on this point under the present Act.

This question, so far as I can discover, has not been presented to any Court for decision since Routledge v. Low, probably for the reason that foreign authors have preferred to adopt the simple expedient of sojourning for a few days in some part of His Majesty's dominions during publication of their works to the risk of expensive and possibly uncertain litigation in defence of their copyrights. . . .

[Reference to Copinger (1904), pp. 91, 92, 97; Scrutton (1903), p. 129; MacGillivray (1902), p. 45; Slater (1884), p. 137.]

As respects citizens of the United States of America, it should be noted that in 1891 there came into force, as part of the law of that country, an enactment known as the Chace Act, under which it is possible for authors not citizens of or resident in that country to obtain copyright therein for their literary or artistic works. . . .

[Reference to Copinger, p. 96.]

Mr. Scrutton, at p. 231, states that the English law officers gave an opinion that the judgments of Lord Cairns and Lord Westbury in Routledge v. Low represent the present law of England.

As indicating the tendency of modern judicial decisions to extend the operation of Imperial statutes to aliens, reference may be had to Davidson v. Hill, [1901] 2 K. B. 606. . . . This decision overruled . . . Adam v. British and Foreign Steamship Co., [1898] 2 Q. B. 430, which adopted the reasoning in Jefferys v. Boosey and other cases in support of the restricted interpretation.

(4) I am also of opinion that, by the documents put in, the title to the British copyright is vested in plaintiffs. It was argued that, in the absence of an assignment of the agreements referred to from James Henderson to James Henderson & Sons, the copyright in the 8 drawings was not vested in James Henderson & Sons when they purported to assign it to plaintiffs.

This objection was not expressly taken by defendants either in their statement of defence or in the notice required to be given in writing under sec. 16 of the Act; consequently I am of the opinion that it is not available to defendants against the prima facie title established under sec. 11 of the Act by the certified copies which were put in of the registrations of copyright and assignments on 8th December, 1905. . . .

[Reference to Black v. Imperial Book Co., 5 O. L. R. 187, 2 O. W. R. 117, 8 O. L. R. 9, 3 O. W. R. 467, 35 S. C. R. 488.]

It was admitted that all payments under the agreements had been made, and I think, in view of this and the fact that in 1900, after the last agreement with plaintiffs and Gibson, James Henderson registered an assignment of copyright in

his periodical to James Henderson & Sons, it should be assumed, as against defendants, that James Henderson & Sons, in registering the copyright in their own name and assigning it to plaintiffs, acted as and were in fact assignees of all rights of James Henderson under the agreements.

(5) I am also of opinion that the fact that defendants copied from the collection of drawings published by Gibson under the license reserved in the Henderson agreement, and not from the "Comic Pictorial Sheet," does not justify defendants in contending that such copying was not an infringement upon plaintiffs' copyright. . . .

[Reference to Marshall v. Bull, supra; Cooper v. Stephen, [1895] 1 Ch. 567; Black v. Imperial Book Co., supra; Cate v. Devon, 40 Ch. D. 500.]

In the result, therefore, judgment must be for plaintiffs for an injunction and costs.

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MARCH 2ND, 1906.

DIVISIONAL COURT.

## CRADDOCK v. BULL.

*Writ of Summons—Service out of Jurisdiction—Cause of Action—Contract—Services—Place of Payment—Conditional Appearance—Motion to Set aside Writ and Service—Material upon—Action against Member of Foreign Partnership—Non-joinder of Partners—Foreign Co-debtor—Costs.*

Appeal by plaintiff from order of FALCONBRIDGE, C.J., 6 O. W. R. 838, dismissing plaintiff's appeal from order of Master in Chambers, 6 O. W. R. 715, setting aside the writ of summons in this action and the service thereof upon defendant in England, where he resided.

F. J. Roche, for plaintiff.

D. W. Saunders, for defendant.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

ANGLIN, J.:—The action is to recover salary or wages for services rendered by plaintiff under a contract made with him by one Singleton, an agent for an alleged English firm, Messrs. Bullwell, Currie, & Co. The contract, as stated by defendant, appears to contemplate performance in this province, within the meaning of clause (e) of Rule 162 (1), as interpreted by familiar authorities of recent date, of which it is sufficient to refer to Blackley v. Elite Costume Co., 9 O. L. R. 382, 5 O. W. R. 57.

The contract was made in New Brunswick. The greater part of the work under it was performed in Ontario, and, when the moneys for which action is brought accrued due, plaintiff resided in this province. The contract appears to be silent as to the place of payment. There are no facts in evidence indicative of any intention of the parties to vary the place of payment which the law would fix, and no evidence is given that the law of New Brunswick in this respect differs from that of Ontario.

The Master (6 O. W. R. 715) set aside plaintiff's proceedings chiefly on account of his failure to produce documentary evidence of defendant's liability, which he seemed to regard as a requisite because of a dictum of Halsbury, L.C., in Comber v. Leyland, [1898] A. C. at p. 527. I find nothing in that case to sustain such a view. . . .

The decision in Baxter v. Faulkner, 6 O. W. R. 198, . . . rests upon the inference drawn from the facts there in evidence that it was not the intention of the parties that the contract should be performed within Ontario.

Upon a motion to set aside a writ served out of the jurisdiction, all that plaintiff is called upon to shew is a prima facie case of something triable in Ontario—some case in fact on which a verdict might result for plaintiff: Hardingham v. Rowan, 24 Sol. J. 309. Evidence upon affidavit that the contract was to be performed in the province is sufficient, and an issue raised by counter-affidavit upon this point should not be determined in a summary way on affidavits, but the defendant raising it should have reserved to him, by permitting the entry of a conditional appearance, the right to have this defence tried in due course, as well as any other defences he

may have to plaintiff's claim: Canadian Radiator Co. v. Cuthbertson, 9 O. L. R. 126, 5 O. W. R. 66.

The material filed when plaintiff obtained leave to issue and serve his writ is, no doubt, to a very great extent, displaced by the affidavits filed by defendant in support of the motion to set aside the writ. The original affidavits on behalf of plaintiff in answer upon this latter motion, which were before the Master in Chambers, are perhaps inadequate to meet the case for setting aside the writ and service made upon the material put in by defendant. Further affidavits, which plaintiff sought to use upon his appeal from the Master's order, the Chief Justice of the King's Bench declined to receive. With the discretion so exercised the Divisional Court most reluctantly interfered. But, in view of the fact that upon the present appeal being dismissed plaintiff may issue and serve a new writ, if the additional material now produced would warrant his being allowed to do so, it was thought better to allow him to file the additional affidavits which he seeks to use, and leave was accordingly given, defendant being allowed from 15th December, 1905, to 23rd February, 1906, to answer such affidavits and to produce an agreement said to be in his possession, which, it seemed to the Court, would be likely to shed much light upon the transactions involved in this litigation, and upon the connection of defendant therewith, and his liability to plaintiff. Defendant has declined to avail himself of the opportunity thus afforded him to controvert the supplemental affidavits filed on behalf of plaintiff, or to produce the agreement which the Court desired to see. . . .

The material filed alleges that defendant had stated himself to be "a member of the firm of Bullwell, Currie, & Co., and that Singleton had been his (defendant's) agent; that defendant was and is the chief moneyed man in the firm of Bullwell, Currie, & Co.; that his business name is Bullwell; and that he had employed Singleton as his agent, and was fully responsible for all Singleton's acts.

The affidavits fall short of establishing, even prima facie, that defendant is the sole principal in the business of Bullwell, Currie, & Co., though there is enough in them to found a suspicion that such is the fact. Although the statement of claim served with the writ alleges that defendant carries on business in the name of "Bullwell, Currie, & Co.," it also refers to Singleton as his "agent or partner."

In these circumstances, if plaintiff were obliged, in order to maintain this action against defendant alone, to shew, at least prima facie, that he is the sole debtor, the action could not be allowed to proceed. But where the joint debtor not sued is a foreigner, this is not requisite.

If the joint debtor were a resident in this province, in the absence of special circumstances (Robinson v. Geisel, [1894] 2 Q. B. 685), defendant might, as of right, demand that the action should not proceed in the absence of such co-debtor: Pilley v. Robinson, 20 Q. B. D. 155. But where the alleged joint debtor resides out of the jurisdiction, the defendant has not this right: Wilson v. Belcarres Brook S. S. Co., [1893] 1 Q. B. 422. In City of Toronto v. Shields, 8 U. C. R. 133, the Court of Queen's Bench held that the Upper Canada statutes 59 Geo. III. ch. 25 and 7 Wm. IV. ch. 3, sec. 6, required that a plea in abatement for non-joinder should shew that the party non-joined was within the jurisdiction. The right conferred upon a plaintiff to proceed in the absence of a foreign co-debtor of the defendant, by the English statute, 3 & 4 Wm. IV. ch. 42, sec. 8, corresponding to the Upper Canada statutes cited, was held to be substantive in character, and as such not to be affected by the abolition of pleas in abatement by the Judicature Act. The decision in Wilson v. Belcarres Brook S. S. Co. is, therefore, directly applicable in Ontario, and would appear to entitle plaintiff to succeed in an action against the present defendant, sued alone, upon establishing his liability, though in conjunction with other non-residents who may be jointly liable with him. The fact that in the English case the defendants were resident within the jurisdiction, whereas the present defendant is not resident in Ontario, does not affect the applicability of the English decision, which proceeds entirely upon the statutory bar to a plea in abatement for non-joinder of a non-resident co-debtor. The reason for this statutory bar is given in the preamble to 59 Geo. III. ch. 25, viz., a possible great delay of justice where a joint obligor resides out of the jurisdiction and cannot be served with process.

This reason for the relief given to plaintiffs by the statute applies whether the defendant be a resident or non-resident. This is the more apparent when it is remembered that Rule 223, enabling a plaintiff to sue members of a partnership in their firm name, and to effect service on the partnership by

serving one member of the firm, does not apply to partnerships not carrying on business within the jurisdiction. Such partners must be sued in their individual names, and each member of the firm so sued must be personally served with process: Western National Bank v. Percy, [1891] 1 Q. B. 304.

Moreover, the statutes in terms extend, the one to "any joint obligor, contractor, or partner," and the other to "any person" non-resident.

The appeal will be therefore allowed. Defendant will have leave to enter a conditional appearance. Inasmuch as plaintiff's want of candour upon his original application would abundantly justify a dismissal of this appeal (Plaskitt v. Eddis, 79 L. T. 136), and because he succeeds, not at all as of right, but solely by the indulgence of the Court, the costs of this appeal and of the motions in Chambers will be to defendant in the cause. Substantial justice will, I think, be thus best accomplished.

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MARCH 2ND, 1906.

DIVISIONAL COURT.

## McALISTER v. BRIGHAM.

*Timber—Agreement for Sale of Standing Timber—Construction—Quantity of Timber—Measurements—Estimates—Conflicting Evidence.*

Appeal by plaintiff from judgment of BRITTON, J., 6 O. W. R. 812.

G. C. Gibbons, K.C., for plaintiff.

A. G. MacKay, K.C., for defendant.

The Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), dismissed the appeal with costs.

BRITTON, J. MARCH 2ND, 1906.

CHAMBERS.

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

*Particulars—Statement of Claim—Infringement of Patents—Other Claims—Postponement till after Discovery.*

Appeal by defendants from order of Master in Chambers dismissing in part an application for particulars of the amended statement of claim.

G. H. Kilmer, for defendants.

W. E. Raney, for plaintiffs.

BRITTON, J., dismissed the appeal and disposed of the costs in the same way as the costs of the motion below were disposed of.