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FERGUSON, J. APRIL 17TH, 1903.

CHAMBERS.

RE GIROUX.

Security for Costs—Application for Custody of Infant—Applicant out of Jurisdiction—"Proceeding"—Affidavit on which Habeas Corpus Granted.

Motion by William J. Giroux, father of Helen Mary Giroux, an infant, for an order setting aside on order for security for costs granted on præcipe under Rule 1199. An order for the issue of a writ of habeas corpus had been obtained ex parte, upon an affidavit which shewed that the applicant William J. Giroux lived in Chicago. Nothing appeared upon the order for the writ, nor on the writ itself, to shew that the applicant lived out of the jurisdiction.

A. E. Knox, for the father, contended that the affidavit was not the proceeding by which the matter was commenced, and that Rule 1199 did not apply.

J. E. Jones, for Nellie Marsden, the custodian of the infant, contended that it appears by Rule 318 and other Rules that an affidavit is a proceeding, and by the definition of "plaintiff" in sec. 2 of the Judicature Act, Rule 1199 applies to habeas corpus proceedings.

FERGUSON, J., dismissed the motion and confirmed the order made on præcipe.

CARTWRIGHT, MASTER. APRIL 21ST, 1903.

CHAMBERS.

RATHBUN CO. v. STANDARD CHEMICAL CO.

Pleading—Particulars of Statement of Claim—Facts within Knowledge of Defendants—Evidence in Previous Arbitration.

Motion by defendants for particulars of statement of claim.

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

E. D. Armour, K.C., for plaintiffs.

THE MASTER.—If I rightly understand the facts, this is an action which has already been practically tried out, or at least thoroughly investigated, in an arbitration which became abortive through the death of one of the arbitrators before the making of an award, but after all the evidence had been given and argument heard. The general principle, as is well known, is, that particulars are ordered to prevent the parties from being taken by surprise and to save unnecessary expense (see Holmested & Langton, p. 482). I have read Mr. Webster's affidavit on which the demand for particulars is based. If the particulars therein set out as necessary were given, the whole frame work of the plaintiff's case would have to be set out, leaving nothing to be done at the trial but to fill in the details by the evidence. According to the affidavit of Mr. Rathbun, the president of the plaintiff company, this action in its present form is simply a second trial. . . .

The only new matter now brought forward by the plaintiffs is in respect to the wrongful use of steam by the defendants. Such particulars as are possible are given in par. 4 of Mr. Rathbun's affidavit. Mr. Armour agreed to amend the statement of claim accordingly, if defendants really insist on it.

The motion, in my opinion, should be dismissed. The costs will be to the plaintiffs in the cause.

CARTWRIGHT, MASTER. APRIL 21ST, 1903.

CHAMBERS.

DENISON v. TAYLOR.

Discovery—Production of Documents—Breach of Contract — Correspondence Relating to Similar Contracts.

Motion by plaintiff for a better affidavit in production from defendants.

Shirley Denison, for plaintiff.

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

THE MASTER.—The action is for "damages for misrepresentation, breach of contract, and breach of warranty," arising out of a purchase by plaintiff from defendants of a vault door known as No. 67 for $250.

Examination for discovery has been had by plaintiff, at which defendants produced all the information to which, in my opinion, plaintiff was entitled, or by which he could be in any way assisted.

The plaintiff cannot hope to recover otherwise than as he has himself claimed in his pleading. If there was any "misrepresentation, breach of contract, and breach of warranty," it can be evidenced only by what passed between the parties or by what is set out in the catalogues. Those, as I understand, defendants have produced. . . .

The only thing defendants have not done is to comply with the demand to produce "any correspondence or other documents in their possession shewing the manner in which they usually describe vault door No. 67 and shewing whether in selling to others they describe it as a burglar-proof vault door or not." . . . Such evidence would be wholly irrelevant. . . .

[Ferguson v. Provincial Provident Institution, 15 P. R. 366, considered and distinguished.]

The motion must be dismissed with costs to defendants in any event. The plaintiff must first prove his own contract, and then the breach or breaches on which he grounds his right of action. What other contracts may have been made with other customers, and what representations may have been made by defendants in the negotiations leading up to such contracts have not, in my judgment, the slightest bearing on the question at issue between the parties.

CARTWRIGHT, MASTER. APRIL 21ST, 1903.

CHAMBERS.

CANADA BISCUIT CO. v. SPITTAL.

Pleading—Statement of Defence—Application to Strike out Paragraph—Defence in Bar—Prosecution for Criminal Offence.

Motion by plaintiffs to strike out paragraph 3 of the statement of defence of defendant Smith. The action was brought against defendant Spittal and his sureties to recover moneys alleged to have been received by Spittal for plaintiffs when acting as their agent.

The paragraph complained of was as follows: "The defendant further says that plaintiffs laid a charge of theft to the extent of $442 in or about the month of December, 1902, in respect of the matters alleged in the statement of claim; that the said Spittal was tried; and that the said charge was dismissed by a court of competent jurisdiction."

A. M. Denovan, for plaintiffs.

A. E. Hoskin, for defendant Smith.

THE MASTER.—Mr. Hoskin was not able to refer me to any authority for such a plea. He invoked the assistance of

the usual authorities on these motions, Stratford Gas Co. v. Gordon, 14 P. R. 407, and Glass v. Grant, 12 P. R. 480. . . .

Now, I consider myself bound to exercise my judgment in such a case as the present; and, doing so, I cannot see any way in which the fact of the acquittal would constitute any defence to the action, nor can I truthfully say that there is either obscurity or difficulty on this point. If there was a section of the Criminal Code directly applicable, it is doubtful whether it would not be ultra vires as an interference on the part of the Federal Parliament with property and civil rights. But that may be left for consideration when any such Act has been passed.

The motion will be granted. Costs to plaintiffs in any event.

CARTWRIGHT, MASTER. APRIL 21ST, 1903.

CHAMBERS.

PREET v. MALANEY.

Pleading—Statement of Defence—Application to Strike out Irrelevant Matter.

Motion by plaintiff to strike out the 6th and all following paragraphs of the statement of defence of defendant Annie Malaney.

F. A. Anglin, K.C., for plaintiff.

W. J. Clark, for defendant Annie Malaney.

THE MASTER.—I have carefully perused the pleadings, and I am of opinion that the motion must be granted. The plaintiff's claim is to have a contract cancelled on the ground of misrepresentation and undue influence. This is denied, in the first paragraph of the statement of defence, by the defendant, who gives her account of the matter in the next four paragraphs, which are not objected to. Those which follow are clearly irrelevant and embarrassing. They consist of allegations of the attempts made since the commencement of the action by defendants' solicitors to reach some settlement. For this attempt they are much to be commended, but I fail to see how it can form any ground of defence to plaintiff's claim. Stratford Gas Co. v. Gordon, 14 P. R. 407, only decides that nothing should be struck out that may possibly be useful to defendant. But it does not decide that defendant can plead anything that he thinks may assist his defence. The statement of defence should be struck out, either in whole or as asked by plaintiff, with leave to defendant to amend or file new defence in 10 days. Costs of motion to plaintiff in any event.

I trust that for the sake of the comparatively small amount of costs involved, this case will not be a repetition of Lee v. Lang, 17 P. R. 203, 18 P. R. 1.

CARTWRIGHT, MASTER. APRIL 21ST, 1903.

CHAMBERS.

DEVER v. FAIRWEATHER.

Security for Costs—Application for Increased Security—Inadequacy of Amount Fixed by Rules.

Motion by defendant for increased security for costs.

W. N. Ferguson, for defendant.

R. W. Eyre, for plaintiff.

THE MASTER.—The usual præcipe order for security for costs was issued on the 29th October last. This was complied with by plaintiff, who paid $200 into Court. I think he cannot, therefore, now set up that he is possessed of property within the jurisdiction so as to absolve him from the necessity of giving further security. I think I must deal with the question, how much, if any, additional security should be given under the facts disclosed in the material.

The foundation of the practice of ordering security for costs would seem to be the right of a defendant to call upon a non-resident plaintiff for indemnity. In such a case the actor is seeking to use the Court to enforce some claim against the opposite party, while he keeps himself out of the jurisdiction. The defendant, then, being entitled to indemnity, is within his rights in asking to have a substantial and not an illusory security.

When the present sum of $200 was settled as adequate, it was really so. Those were the days in which an eminent Toronto counsel was content with a fee of $20 on a brief for a trial out of Toronto for a defendant railway corporation. . . . If counsel to-day of equal eminence were to be content with such charges, I fear that doubts would be entertained of their sanity. In view, then, of the great increase in the cost of litigation, it is right that a corresponding increase should be made in the amount fixed for security, where such security should properly be given.

Having regard to the affidavit filed by defendant in support of the application, which is not contradicted in any way, and in view of the case being ready for trial, I direct that plaintiffs do furnish additional security by paying into Court $300 within ten days, with a stay of proceedings until this has been done.

CARTWRIGHT, MASTER. APRIL 23RD, 1903.

CHAMBERS.

LEMOINE v. MACKAY.

Evidence — Foreign Commission — Postponement of Trial — Delay — Security for Costs.

Motion by defendant for a commission to examine witnesses in England and Ireland, and to postpone the trial in the meantime. The action was at issue, and the plaintiffs had given notice of trial for the jury sittings at Ottawa commencing on the 30th April. The action was brought to establish the will of defendant's father.

R. McKay, for defendant.

A. B. Aylesworth, K.C., for plaintiffs.

THE MASTER.—The action is really one by the defendant to set aside the will of his father, who died on 1st December last, leaving an estate of between $1,200,000 and $1,300,000. The testator left seven children. To six of them the whole of this estate was left, with the exception of a comparatively trifling amount to defendant. The testator in his lifetime had given each of the seven children $100,000 by way of advancement. The allegations in the statement of defence are the usual charges of want of testamentary capacity, undue influence on the part of the other beneficiaries, etc. The usual affidavit is made by the solicitor for defendant, stating that the evidence of the witnesses sought to be examined under the commission is "absolutely necessary in the interests of the defendant." . . . Affidavits were filed in answer alleging that the evidence sought for by defendant would be immaterial and of no assistance, and asserting that there were strong reasons why the trial should not be postponed. These, however, are fully met by the powers given to the executors under the orders of 4th February and 14th March appointing them administrators ad litem, and empowering them to invest the funds of the estate pending the result of this action. They need have no hesitation in making any necessary advances to any of the six substantial beneficiaries, as counsel for the defendant undertakes not to dispute any of the payments so made.

I am, therefore, clearly of opinion that my discretion can only be exercised by allowing the motion as asked. The usual time for the Ottawa autumn assizes is early in September, so that no great delay will result from the postponement of the trial. . . .

The hardship of delay was the main argument urged by the counsel for the plaintiffs. . . . But fully recognizing the hardship, I will say that, looking at the facts of the

present case, it is difficult to imagine one in which a delay of perhaps at the outside five months imposes less hardship or inconvenience of any kind on the plaintiffs. . . . I have only to add as an additional argument in favour of defendant having all reasonable facilities for presenting his case, that his share under the will is abundant security (at least tenfold) for any costs that may hereafter be given against him, if he should fail in his contention.

APRIL 24TH, 1903.

C.A.

CAVANAGH v. CASSIDY.

Leave to Appeal—Security for Costs—Residence of Plaintiff.

Motion by plaintiff for leave to appeal from order of a Divisional Court (ante 303) reversing order of BRITTON, J. (ante 143) and restoring order of Master in Chambers (ante 27), which required plaintiff to give security for costs, and to dispense with security.

S. B. Woods, for plaintiff.

J. E. Cook, for defendant.

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

MOSS, C.J.O.—We think no special circumstances are shewn to justify a further appeal in this case. We are unable to see that the Divisional Court has laid down any rule of practice or adopted any construction of Rule 1198 not in accord with Allcroft v. Morrison, 19 P. R. 59. The utmost that can be said is that the Court erred in its view of the facts of the case. But error of that description, even if shewn, cannot be accepted as a sufficient ground, by itself, for the exercise by the Court of the discretion vested in it.

We do not, however, disagree with the view of the Divisional Court. A perusal of the voluminous material put in upon this application leads towards the same conclusion. Before October, 1902, the plaintiff was undoubtedly ordinarily resident out of Ontario, and he seems to have failed to establish that he is now more than temporarily resident here.

Even if we had thought the case a proper one for giving leave to appeal, no ground is made for dispensing with the ordinary security. In order to deprive the respondent of the right to security, which is given him by Rule 826, circumstances of an exceptional nature must be shewn. These existed in Fahey v. Jephcott, 1 O. L. R. 198. But the want of means or resources has not been deemed a sufficient circumstance: Thuresson v. Thuresson, 18 P. R. 414. And there is nothing else in this case.

Motion dismissed with costs.

CARTWRIGHT, MASTER. APRIL 25TH, 1903.

CHAMBERS.

MEIERS v. STERN.

Venue—Omission to Lay—Amendment—Change of Venue—Convenience—Affidavits—Jury Notice.

Motion by defendant Stern for an order striking out the plaintiff's jury notice and directing that the action be tried at Toronto.

Grayson Smith, for applicant.

Blackwood (Blake, Lash and Cassels), for plaintiff.

THE MASTER.—The statement of claim was irregular in this, that no place of trial was named therein. Plaintiff now wishes to amend by inserting Bracebridge, while the defendant urges that the trial ought to be at Toronto. . . . . Bracebridge was named in the writ of summons as the place of trial, but through some mistake it was omitted in the statement of claim. Under these circumstances the plaintiff should be allowed to amend.

The only question is, whether the trial should be at Bracebridge or Toronto. As to any preponderance of convenience, little, if any, weight can be attached to affidavits. [Reference to Frawley v. Town of Parkdale, unreported; McArthur v. Michigan Central R. W. Co., 15 P. R. at p. 78; Greey v. Siddall, 12 P. R. at p. 559.]

In this case I am of opinion that it would be a greater inconvenience to plaintiff and his witnesses to go from Uffington to Toronto than for the defendant and his witnesses to go to Bracebridge. The assizes there are not usually lengthy, and the greater expense should not be thrown on plaintiff without good cause.

[Reference to Standard Drain Pipe Co. v. Town of Fort William, 16 P. R. 404, and Halliday v. Township of Stanley, ib. 493.]

The writ of summons is not before me; but in the affidavit of plaintiff's solicitor it is stated that there Bracebridge was given as the place of trial. This is not denied. I think, therefore, that plaintiff can derive some assistance from the principle of the decision in Segsworth v. McKinnon, 19 P. R. 178.

I am, therefore, of opinion that the affidavits in this case, taking them for what they are worth on both sides, do not make out a case for change of venue. The omission of the place of trial was, no doubt, a mere slip on the part of plaintiff's solicitor, which defendant might well have consented to have remedied, though not in any way obliged to do so.

The plaintiff will, therefore, have leave to amend as he desires, the jury notice will be struck out, and the costs of this motion will be to defendant Stern in the cause.