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WINCHESTER, MASTER. JANUARY 12TH, 1903.

CHAMBERS.

FARMERS' LOAN AND SAVINGS CO. v. SCOTT.

Discovery—Affidavit on Production — Identification and Description of Documents—Schedules—Mortgages— Discrepancies — Particulars—Striking out or Amending.

Motion by defendants for a further and better affidavit on production from plaintiffs, shewing specifically and in detail the books, papers, and documents relating to each mortgage in respect of which the plaintiff's are suing, and disclosing the books and portions of books which refer to each mortgage, and giving the pages and such other references as may be necessary, and accounting sufficiently for the absence of such papers relating to the mortgages as have been in the custody or control of plaintiffs and are not now produced ; and also for an order striking out some words in the particulars delivered, and for better particulars.

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

W. M. Douglas, K.C., for plaintiffs.

THE MASTER.—A party should not be required to give, in an affidavit on production, such details as are sought in this case. All that is required is a list of the documents, books, etc. They should be clearly identified, and their nature should appear from the description given, but a separate description need not be given of every document. Taylor v. Bullen, 4 Q. B. D. 85, Budden v. Wilkinson, [1893] 2 Q. B. 432, Cook v. Smith, [1891] 1 Ch. 509, and Millbank v. Milbank, [1900] 1 Ch. 376, 384, referred to. It has also been held that if the documents are described at unnecessary length, the party may be ordered to pay the unnecessary costs occasioned thereby, or the affidavit may even be taken off the files as being prolix or oppressive: Hill v. Hart-Davis, 26 Ch. D. 470, 472; Walker v. Poole, 21 Ch. D. 836. See also McDonell v. McKay, 2 Ch. Ch. 141. Therefore, as far as the ledgers are concerned, plaintiffs are not required to give the pages, etc. With reference to the letter books, the solicitor for plaintiffs wrote pointing out that there was nothing in them

which was material, but saying that plaintiffs produced them in order that defendants might satisfy themselves. See Bolton v. Natal Co., [1887] W. N. 143, 178. It is improper for a party to produce a number of letter books in this way. If they are not material, they should not be produced; if any are material, they should be identified. The affidavit should be remedied in this respect. In schedule A to the affidavit there were set forth the names of the mortgagors, together with the dates of the applications for loans in respect of the mortgages. Upon referring to schedule B, where the dates of these mortgages were set out, it appeared as if the applications, in some of the cases, did not refer to the mortgages mentioned in schedule A. The explanation given as to these apparent discrepancies by counsel for plaintiffs was that in the cases referred to, and others, the mortgage, while bearing date as given in schedule B, was not given direct to plaintiffs, but was sold or assigned to them, and the application for a loan on such a mortgage was dated as in schedule A at the time the mortgage was being sold or assigned to the plaintiffs, and that a perusal of the documents produced would have given all the information and discovery necessary. The explanation given shews that the assignments or mortgages of these mortgages should have been produced, and this must now be done. Tipping v. Clarke, 2 Hare 383, 389, referred to. The defendants have a right to have the documents referred to in the particulars and the schedule to the affidavit on production correctly and fully produced. Instead of having two schedules to the affidavit, it would have been better to have made but one, setting out in it the number of the mortgage, the mortgagor's name, date of mortgage, description of property, amount advanced, date of application and of valuation, as also all other documents relating to such mortgage. As this has not been done, the giving of such production as has been omitted must be provided for. With reference to the valuations, a supplementary affidavit was filed, covering all that could be found, until it is shewn by affirmative evidence that valuations other than those produced are in possession of plaintiffs, further production cannot be ordered.

By an order of 9th July, 1902, plaintiff's were directed to deliver particulars under the 14th and 15th paragraphs of their statement of claim, shewing in what respect it is alleged that the investments made for the plaintiffs were improper, and in what respect it is alleged that the moneys of the plaintiffs were improperly advanced, and in what respect it is alleged that James Scott (defendants' testator) was guilty

of a breach of his duty as vice-president and a director of the plaintiffs, and in what respect he was guilty of a breach of trust with regard to such investments. In the particulars delivered and objected to, the plaintiffs stated that "the investments . . . were improper because they were made upon unimproved, vacant property in the outlying and unsettled districts of Toronto, and of the town of Toronto Junction, and of the township of York . . . and because, as the said James Scott must have been fully aware, the security for the advances was insufficient." The words of the last clause of the particulars quoted are more like a pleading than particulars. Milbank v. Milbank, [1900] 1 Ch. 376, 385, referred to. This statement being in reality an amendment of the pleading, particulars of it must be given, or in default it must be struck out. As to particulars of the losses claimed, the manner in which these losses were made up was explained by plaintiffs' counsel on the argument. This will be sufficient when embodied in the order made on this motion. The particulars as delivered are not very clear in some respects, and should be corrected. When this is done, the particulars may stand, unless on examination for discovery other objections may be found to exist. The affidavit on production and particulars to be amended within ten days.

OSLER, J.A. JANUARY 12TH, 1903.

C.A.—CHAMBERS.

CITY OF HAMILTON v. KRAMER-IRWIN ROCK ASPHALT AND CEMENT PAVING CO.

Appeal—Court of Appeal—Dispensing with Copies of Evidence for Use of Judges—Question of Construction of Contract.

Application by defendants (appellants) for leave to set down the appeal without the usual copies of appeal cases containing the evidence taken at the trial, etc.

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

W. R. Riddell, K.C., for plaintiffs.

OSLER, J.A.—The appeal may be set down for the next session of this Court, the appellants lodging for the present but one copy of the evidence, and delivering one to the respondents. I understand that the appellants limit their appeal to the question of the construction of the contract or contracts between the parties, and, as I do not at present see what bearing the oral evidence is likely to have upon that question, though the respondents are entitled to have such evidence before the Court, and insist upon it, the trial Judge having made it part of the record in appeal, it is not necessary that further copies of the evidence for the use of the

Judges should be lodged at this time or the expense of making them incurred. That may be ordered to be done hereafter, if the course taken in argument of the appeal should make it necessary. As to the conduct of the argument, whether it should be divided, etc., etc., no direction can be given. That will be a matter for the Court. The parties will no doubt agree as to what documents, exhibits, etc., shall be copied in the appeal book, and as to that no direction at present. Costs of application to be costs in the cause.

WINCHESTER, MASTER.

JANUARY 13TH, 1903.

CHAMBERS.

SMALL v. AMERICAN FEDERATION OF MUSICIANS.

Writ of Summons—Service—Unincorporated Foreign Voluntary Association—International Association—Service upon Executive Officer in Ontario—Conditional Appearance.

Application to set aside the writ of summons and service thereof upon D. A. Carey for and on behalf of the American Federation of Musicians (9th District), upon the grounds that there is no provision in the Rules authorizing service upon the defendants by means of service on Carey, and that the defendants, not being an incorporated body or partnership, cannot be so served. The action was against the Federation and Carey for an injunction restraining them from endeavoring to induce or persuade one Creswell and the members of his orchestra engaged by plaintiff at the Grand Opera House, London, Ontario, to refuse to continue in plaintiff's employment. An order was made on the 11th December, 1902, allowing plaintiff to add as defendants a number of persons "on behalf of themselves and all other members of the American Federation of Musicians and of the London Musical Protective Association," etc., and the writ of summons was amended accordingly.

J. G. O'Donoghue, for the motion.

C. A. Moss, for plaintiff.

THE MASTER, after referring at length to the evidence as to the constitution of defendants and their officers, cited and quoted from the cases of Massey v. Woodward (per Meredith, J., 20th March, 1900); Taff Valley R. W. Co. v. Amalgamated Society of Railway Servants, [1901] A. C. 426; and United States v. Coal Dealers' Assn., 85 Fed. Rep. 252; and concluded: In this action the writ of summons has been served upon the executive officer in Ontario of the defendants, the American Federation of Musicians. It is an international association, and exercises jurisdiction in Ontario

just as much as it does in any state of the Union. The Federation has been properly served with the writ. With reference to the objection that the name is improperly used because of its being an unincorporated company or association, the cases cited are sufficient authority for holding that on a summary application the name should not be struck out, represented as the Federation is by the large number of persons added by the order of the 11th December. In order, however, that the Federation may not be prevented from having the question gone into more fully at the trial, a conditional appearance should be permitted.

Motion dismissed. Order made allowing the Federation to enter a conditional appearance. Costs in the cause.

[See Metallic Roofing Co. v. Local Union No. 30, Amalgamated Sheet Metal Workers' International Assn., 1 O. W. R. 573, 644.]

WINCHESTER, MASTER. JANUARY 18TH, 1903.

CHAMBERS.

CAVANAGH v. CASSIDY.

Security for Costs—Plaintiff Ordinarily Resident out of the Jurisdiction —Temporary Residence in Ontario.

Action for false arrest and malicious prosecution. Motion by defendant for an order for security for costs, on the ground that plaintiff is ordinarily resident out of the jurisdiction of this Court, and only temporarily resident within it.

J. E. Cook, for defendant.

S. B. Woods, for plaintiff.

THE MASTER.—The arrest was made in connection with some transaction in regard to the purchase of shares. The defendant, having lost a considerable sum of money, and accusing plaintiff and one Tucker of having defrauded him, caused the arrest of the former. The plaintiff is a telegraph operator, and has for some years been operating on wires in connection with different brokers' businesses. When about 2 or 3 years of age his family removed from Ontario to the United States, and he has until recently lived in that country. He is now 36 years of age or upwards. His mother and sister still live in the United States, and when out of employment and at other times he makes his home with them. He is unmarried, and has no property other than what he carries about with him from place to place. In July, 1902, he left Kansas City, where his mother and sister reside, and went to New York to take employment with stock-brokers there. In September, 1902, he was sent by them to Toronto

to inspect their branch office, expecting that it would be but a temporary visit, but after a week or two he received instructions to remain in Toronto in their service. They, however, removed their branch office from Toronto, and another person took possession of the wire which they had, and retained the plaintiff as an employee. This person has also now withdrawn, and the plaintiff is at present out of employment.

All the evidence shews that plaintiff is only temporarily resident in Ontario, while ordinarily resident in the United States. His past life seems to have been one of constant change from place to place, although Kansas City, where his mother and sister live, has been his headquarters. His evidence indicates that he will not remain in Toronto unless satisfactorily employed. Allcroft v. Morrison, 19 P. R. 59, 65, referred to.

Order made for security in the usual form. Costs in the cause.

WINCHESTER, MASTER.

JANUARY 16TH, 1903.

CHAMBERS.

RE CLEGHORN AND ASSELIN.

Sale of Goods—Statute of Frauds—Actual Delivery—Samples—Conduct of Parties—Carriers' Interpleader.

Summary trial of an interpleader respecting the ownership of three car-loads of potatoes held by the Canadian Pacific Railway Company, on whose application the matter was brought into Court. The parties consented to a summary disposition of the claims in Chambers.

W. N. Tilley, for Cleghorn & Co.

W. J. Elliott, for Oscar Asselin.

THE MASTER.—The claimants Cleghorn & Co. asserted that they purchased the potatoes from Oscar Asselin, the other claimant, while he denied that there ever was any completed contract respecting them. The contest was as to the conduct of the parties, it being contended on behalf of Cleghorn & Co. that such conduct was sufficient to take the bargain out of the Statute of Frauds, that is, that there was an actual sale by Asselin, accepted by Cleghorn & Co., and delivery made to them. The potatoes were shipped by Asselin from a point in the Province of Quebec to Toronto, consigned by the bills of lading to his own order. Asselin and one Fournier, employed by Asselin, arrived in Toronto last Christmas morning, and met Cleghorn, who went with them to look at the potatoes, when the prices were mentioned. Cleghorn picked up one or five potatoes from each car—he said the latter

quantity, while Asselin and Fournier mentioned the former—and took them to his office, as he said, as samples. This act did not constitute a delivery of the potatoes, bringing the bargain within the provisions of the statute, the evidence being clear that there was no closed bargain at that time, not even the quantities being known by Cleghorn & Co., and there being no intention whatever on the part of Asselin to deliver samples, his consent to taking them not having been asked: Hinde v. Whitehouse, 8 Rev. Rep. 676; Klinitz v. Surry, ib. 833; Gorman v. Body, 2 C. & P. 145; Gardner v. Grout, 2 C. B. N. S. 340. There were subsequent negotiations about the potatoes. The bills of lading were handed to Cleghorn by Asselin, but were not indorsed. The parties disagreed about the price, Asselin wanting a higher price than Cleghorn was willing to give. The carriers refused to let Cleghorn have the potatoes without the bills of lading indorsed by Asselin. I find that at no time did Asselin part with the potatoes; that there was no contract closed by the parties; and that the acts of Cleghorn did not bring the bargain within the provisions of the statute and cases. Taylor v. Smith, [1893] 2 Q. B. 65, and cases therein cited, and Norman v. Phillips, 14 M. & W. 277, 280-282, referred to. There being no contract binding on Asselin he is entitled to the potatoes. Order accordingly and for payment by Cleghorn & Co. of all costs and expenses occasioned by their claim, including the costs before the Master.

JANUARY 16TH, 1903.

DIVISIONAL COURT.

RE AMERICAN TIRE CO.

DINGMAN'S CASE.

Company—Winding-up—Preferred Claim—"Clerk or other Person in Employ of Company"—Sales Agent.

Appeal by Archibald W. Dingman from the decision of the Master in Ordinary (in the course of the winding-up of the company), that the appellant was not entitled to rank on the assets of the company as a preferred creditor, by virtue of sec. 56, sub-sec. 2, of the Winding-up Act, R. S. C. ch. 129, and amending Acts, as being a "clerk or other person in the employ of the said company."

A. W. Holmested, for the appellant, contended that, as by the terms of his employment, he had to devote his whole time and attention to the business of the company, as mechanical expert and inspector to the department of the company having charge of the sale of the "New Departure Coaster Brake,"

and as sales agent therefor for the city of Toronto, he was a clerk or other person in the employ of the company.

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

FALCONBRIDGE, C.J.—Having regard to the very curious nature of the evidence relating to the claim, e.g., that the amount of remuneration was fixed about the middle of February, 1902, when the company was in extremis, and that Davis, the company's manager (who was not called), two or more days after the liquidator went into possession, certified this account and instructed the accountant of the company to make an entry in the books relating to it, and to "put it through" as of 1st January, the Master took a lenient view of claimant's position when he allowed claimant to rank on the estate as an ordinary creditor. But I do not suggest that he was wrong, and the liquidator has not appealed. . . . The evidence furnishes abundant ground for holding that the claimant is not entitled to any preference under the statute: Re Ontario Forge and Bolt Co., 27 O. R. 230.

BRITTON, J., gave reasons in writing for the same conclusion.

Appeal dismissed with costs.

BOYD, C.

JANUARY 10TH, 1903.

WEEKLY COURT.

ATTORNEY-GENERAL v. BROWN.

Revenue—Succession Duty—Value of Estate—Deduction to Meet Contractual Obligation—Donatio Mortis Causa—Estoppel by Judgment in Former Action—Survivorship

Special case in action to recover succession duty upon the estate of Benjamin Brown, who died intestate and childless, his estate going to brothers and nephews and nieces.

A. B. Aylesworth, K.C., for the Attorney-General.

F. Arnoldi, K.C., for defendant Amanda Brown.

A. L. Colville, Campbellford, for the other defendants.

BOYD, C.—Succession duties may be recovered by action, and therein the Court has jurisdiction to determine what property is liable to duty under the Act 62 Vict. (2) ch. 9, secs. 1, 2.

In this case it is admitted in the pleadings that the aggregate value of Brown's estate was $12,877, and of this it is admitted $7,540 passed to the hands of the defendant Amanda Brown. The manner of its reception by Miss Brown is, however, in dispute. The contest is whether this sum is "duti-

able," for if it is not and it falls to be deducted from the "aggregate," then the estate is not subject to the Act. By a process of amendments it is now the law that the Act shall not apply to any estate the value of which after the allowances authorized by the Act (are deducted) does not exceed $1,000: R. S. O. ch. 24, sec. 3, sub-sec. 1, as amended by 1 Edw. VII. ch. 8, sec. 4.

"Dutiable value" is defined by the Act as the value of the property after the debts or other allowances or exemptions authorized by the Act are deducted: 1 Edw. VII. ch. 8, sec. 3 (3). And by the same section and by sub-sec. 4, it is said that in determining the dutiable value of the estate of a deceased person for the purpose of the payments of succession duties, the value shall be taken as at the death, and allowances shall be made for reasonable funeral expenses and for his debts and incumbrances.

And any debt or incumbrance for which an allowance is made shall be deducted from the value of the land or other subjects of property.

But no allowance shall be made for debts incurred by the deceased, or incumbrances created by the deceased, unless such debts or incumbrances were incurred or created bona fide for full consideration in money or money's worth, wholly for the deceased own use and benefit, and take effect out of his interest. These provisions are all found in 1 Edw. VII. ch. 8, sec. 3 (4).

These clauses may apply to this transaction between the deceased and his neice Miss Brown if it be taken that the $7,500 was not transferred before death to the defendant. If it be the better view that there was such a transfer, the other clauses of the Act have to be considered, which, however, lead to the same legal issue. By R. S. O. ch. 24. sec. 4 (b), all property . . . which shall be voluntarily transferred . . . by gift made in contemplation of the death of the donor or intended to take effect in possession or enjoyment after such death, and (c) property taken as a donatio mortis causa or other disposition by way of gift, etc., etc., shall be subject to succession duty. The essential point to be observed in these sub-sections (b) and (c) is that the transaction is a voluntary one, *i.e.*, for which there is no consideration. It may be that the extent of consideration is intended to be defined by sec. 4 (10), which enacts that nothing herein contained shall render liable for duty any property bona fide transferred for a consideration that is of a value substantially equivalent to the property transferred. But, assuming that this supplies the test to ascertain whether a transaction is or

is not "voluntary," the transfer in question will answer the test abundantly.

The nature of the transaction was investigated in Brown v. Toronto General Trusts Corporation, 32 O. R. 319.

Upon the trial of that case, and upon the same evidence as is now relied on, I found as a fact that there was well proved an agreement between the deceased and his neice Amanda Brown whereby they were to combine their chattel property and their personal energies in the working of the farm used by the deceased, and its belongings, upon a mutual obligation that the survivor should become possessed of the whole personalty resulting from this co-operation of goods and labour.

In pursuance of this agreement, which had existed and been acted on in good faith for over 30 years, the deceased handed over to her just before his death the indicia of title to moneys and other property such as might be the subject of a donatio mortis causa. And I found that what was done was sufficient to establish her right to that property in the aspect of a mere gift, but beyond that I gave effect to the agreement by declaring her entitled to other chattel property falling under the above agreement to the amount of several hundred dollars. The moneys bestowed amounted to over $6,000. As against the claim of the Crown for succession duty, it is competent for Amanda Brown to avail herself of every ground of exemption afforded by the law. She is not, in other words, as to the present claim estopped by the form of the judgment in the case of Brown v. Toronto General Trusts Corporation, but may rely on other aspects of the real liability which existed between her and the deceased.

Now, while the handing over of the $6,000 moneys, &c., may be rested on the mere donatio mortis causa, it is in truth much more than this; the bestowment was not a matter of bounty—it was, as I have declared in giving reasons for the judgment in Brown v. Toronto General Trusts Corporation, a matter of obligation binding upon the deceased and his estate. If it happened, as it did, that the uncle should predecease her, then this personal estate did not pass beneficially to his next of kin or legal representatives; it became in that event potentially the property of his neice, and her right to it has been vindicated by the Court as against the administratrix. She did not succeed to his personal estate by any testate or intestate right—by no voluntary disposition on the part of the deceased and by no legal transmission as upon an intestacy—but by virtue of a valid and long standing contractual obligation, which made her more than a general creditor in respect to this personalty.

Taking this basis of fact as well established, it appears evident that the bestowment of this property before the death was not such a voluntary disposition or transfer by the intestate as is specified in the Act. Full value of money's worth was given for all that was received. The whole country-side knew of the agreement, and the neighbours proved that her work and services were worth more than all she got under the arrangement.

Therefore on the facts I find that the property was transferred for a consideration substantially equivalent in money's worth to its value. And on the other aspect of the case I find that there was at the death of the intestate a debt due by him to his niece in respect of work and services in the house and on the farm as a nurse exceeding $6,000 bona fide incurred.

This sum, say $6,000, should be deducted from the aggregate value of the estate, and so it results that Brown's estate is not within the Act.

I have not overlooked the argument that this case falls within sec. 4 (d) of the Revised Statutes, ch. 24, but that provision is addressed to another sort of property which passes by survivorship, i.e., joint tenancies created by the deceased when absolutely entitled to the whole. That does not fit this case. It is also to be distinguished from this when the property in question does not pass or accrue by survivorship, i.e., by operation of law, having regard to the nature of the estate or interest in the property, but is the subject of an express agreement which takes effect at the death as part of the contract. The right does not arise because of the death, but by virtue of the prior agreement between the parties, upon which their whole course of action was based for 36 years.

The action should be dismissed with costs.

BOYD, C. JANUARY 12TH, 1903.

WEEKLY COURT.

SMALL v. AMERICAN FEDERATION OF MUSICIANS.

Trade Union—Interference between Master and Servant—Interim Injunction—Balance of Convenience

Motion by plaintiff to continue interim injunction restraining defendants from persuading the members of the orchestra of plaintiff's theatre at London to refuse to play for plaintiff. The defendants were a large organization with headquarters in the United States. London was included in their 9th district, of which one Carey, of Toronto, was the chief executive officer. He informed plaintiff that unless

one Evans, who was the leader of plaintiff's orchestra last season, was reinstated, the defendants would order the members of the orchestra to refuse to play.

W. Barwick, K.C., and C. A. Moss, for plaintiff.

J. G. O'Donoghue, for defendants.

Boyd, C., held that the machinery of defendants' organization having been brought to bear against plaintiff in his management of the business at London, on assumptions of fact and law which are disputed, weighing the advantages against the disadvantages, it is more convenient in the interests of the plaintiff to have the present orchestra continued in his employment till the trial than to have any interruption or discontinuance by the active intervention of defendants; and this course will be in no wise detrimental to defendants, even if they are found to be in the right on the merits. Relevant issues of fact present themselves for determination. The language of Darling, J., in Read v. Friendly Society of Operative Stonemasons of England, Ireland, and Wales, [1902] 2 K. B. 88, 96, is pertinent.

Injunction continued till the trial. Action to be tried at the earliest opportunity. Costs reserved to be disposed of by the trial Judge or upon further order.

Meredith, C. J.

January 16th, 1903.

TRIAL.

LONDON LIFE INS. CO. v. MOLSONS BANK.

Bills and Notes—Cheques—Forged Indorsements—Payment by Bank—Conduct of Agent of Drawers—Estoppel.

Action tried without a jury at Ottawa. The plaintiffs sued to recover from defendants, who were their bankers, moneys which were paid, as plaintiffs alleged, without their authority, and improperly charged to their account, having been made upon cheques drawn by plaintiffs on defendants, payable to various persons or their order, the indorsements of which by those persons were, as plaintiffs alleged, not genuine, but forged. The defendants defended on the grounds: (1) that the cheques were payable to fictitious or non-existent persons within sec. 7, sub-sec. 3, of the Bills of Exchange Act, 1890, and were therefore payable to bearer; and (2) that if they were to be treated as payable to the order of real payees, the defendants were justified, under the

circumstances, in paying them and debiting them to plaintiffs' account. The proceeds of all the cheques came into the hands of a man named Niblock, who was the plaintiffs' assistant-superintendent at Ottawa, and were appropriated by him to his own use by means of a system of fraud and forgery on his part. The cheques were issued for the purpose of paying supposed claims of the several persons in whose favour they were drawn, under policies of insurance made by plaintiffs, and in the belief by plaintiffs that the persons upon whose lives the policies had been granted had died; but in fact none of them had died, and there was no real claim by any of the beneficiaries against plaintiffs. In all of the cases but five the applications on which the policies were issued were entirely fictitious, the names of the supposed applicants and of the supposed signers of the documents which accompanied them being forged. In all of the cases the signatures to the proofs of loss were also forged, as were the indorsements purporting to be those of the payees of the cheques.

A. B. Aylesworth, K.C., and Edgar Jeffery, London, for defendants.

I. F. Hellmuth, K.C., and C. H. Ivey, London, for defendants.

Meredith, C.J., reviewed the evidence at length, and held that all the cheques were paid by defendants in good faith, and upon the representation of Niblock, acting for plaintiffs, that the persons to whom payment was made were the persons named in the cheques as payees; and, that being so, that the plaintiffs were affected by what was done by Niblock so as to preclude them from disputing the right of defendants to pay the cheques and charge the amount paid to plaintiffs' account. The other question, as to the payees of the cheques being fictitious persons, was not considered. Action dismissed with costs.

Britton, J. January 17th, 1903

CHAMBERS.

WOODRUFF v. ECLIPSE OFFICE FURNITURE CO. OF OTTAWA.

Security for Costs—Application for Increased Security—Trial Practically concluded.

Appeal (heard at Ottawa) by plaintiff from so much of an order of the local Master at Ottawa as directed that plain-

tiff should give further and additional security for the costs of defendant company, by a bond for $600 or by paying into Court $300.

F. A. Magee, Ottawa, for plaintiff.

H. A. Burbidge, Ottawa, for defendant company.

BRITTON, J.—The trial of the action had come on, the case had been argued, and it was directed that if plaintiff did not elect to amend within the time allowed, the case was to stand for judgment. The plaintiff did amend. Security for the costs of defendants added by the amendment has been ordered. No application was made at the trial for additional security to the defendant company. It was open to the defendant company to ask that in the event of an amendment additional security should be given. If the trial Judge had made any such condition, it may be that plaintiff would not have accepted. The case is practically closed as to defendant company. If it so happens that the costs of the defendant company will be substantially increased, it will be by reason of what occurred at the trial, and the view the trial Judge took of the case; and the plaintiff ought not at this stage to have the additional burden put upon him. Bell v. Landon, 9 P. R. 100, and Simon v. La Banque Nationale, 7 P. R. 22, referred to.

Appeal allowed with costs to plaintiff in an event.

MEREDITH, C.J.

JANUARY 16TH, 1903.

WEEKLY COURT.

RE RATHBUN CO. AND STANDARD CHEMICAL CO. OF TORONTO.

Arbitration and award—Application to Court to Direct Arbitrators to State Case—Questions of Law—Questions Specifically Referred—Conduct of Applicants Alleged to Bar Them from Applying—Discretion of Court—Special Competence of Arbitrators—Doubt as to Rulings—Construction of Contract—Form of Case—Costs.

Application under sec. 41 of the Arbitration Act, R. S. O. ch. 62, by the Standard Chemical Company of Toronto, one of the parties to a voluntary reference to arbitration, for a direction to the arbitrators to state in the form of a special case for the opinion of the Court certain questions of law arising in the course of the reference.

W. Laidlaw, K.C., and J. Bicknell, K.C., for the applicants.

E. D. Armour, K.C., and C. A. Masten, for the Rathbun Company.

MEREDITH, C.J., (after stating the facts) :—Upon the argument I expressed the opinion that as to certain of the questions no directions should be given, and as to others I reserved my decision.

The questions reserved for decision were: (1) Whether upon the true construction of the contract the applicants were, for the 66 cords of wood delivered daily (Sundays excepted), bound to deliver 85,000 bushels of charcoal per month, or whether delivery of what was or might have been, with proper care and skill and without waste, produced from the wood, though less than 85,000 bushels per month, was a compliance with the terms of the contract. (2) Whether there had been a breach of the agreement on the part of the applicants which entitled the Rathbun Company to take possession of the works. (3) Whether the claim of the Rathbun Company for the use of more than 66 cords per day was properly the subject of a reference to arbitration under paragraph 22 of the agreement.

It was objected by counsel for the Rathbun Company: (1) That the dispute as to the construction of the contract was a question specifically referred, and that sec. 46 was inapplicable, because the question was not one "arising in the course of the reference." (2) That the applicants were precluded by the course taken by them on the reference from invoking the aid of the Court under sec. 41. (3) That at all events, as a matter of discretion, the direction asked for ought not to be made. . . .

I have come to the conclusion that the first objection is not well founded. Owing to the way in which the reference to the arbitrators has been effected, it is necessary to spell out from the various documents by which it was completed the subject-matter of the reference, and, as I understand the effect of these documents, one of the claims of the Rathbun Company, and the principal one, is that the applicants have not delivered the quantity of charcoal which, under the terms of their agreement, it was their duty to deliver, and to recover damages for that breach. The Rathbun Company do not rest this claim solely upon the construction of the contract for which they contend, but, while taking the position that that construction is the right one, they also assert that, even if the contention of the applicants as to the meaning of the

contract is right, there has been a shortage in the delivery of charcoal for which they are entitled to recover damages. The claim which is by the notice of the applicants of 17th April, 1901, referred to arbitration is the claim of the Rathbun Company "for alleged shortage of the delivery of charcoal produced or which ought to have been produced from the said wood." The claim as to this branch of the case which is by the Rathbun Company's notice of the 10th July, 1091, referred, is that the Rathbun Company were entitled to receive, and that the applicants were bound to deliver, 85,000 bushels of charcoal per month, and compensation or damages for the shortage in delivery of charcoal.

I do not read this as meaning that the question of the obligation of the applicants to deliver 85,000 bushels of charcoal, irrespective of what they had or might have produced from the daily supply of 66 cords of wood, was specially referred, but as bearing a reference of the claim of the Rathbun Company for damages for short delivery of the charcoal, a shortage being claimed whatever view might be taken as to the meaning of the agreement.

I think, therefore, that this question was one arising in the course of the reference, within the meaning of sec. 41.

It is, in this view, unnecessary to express an opinion as to whether or not the meaning of the words "arising in the course of the reference" is that for which counsel for the Rathbun Company contended.

As to the second question . . . much was done by counsel for the applicants in the course of the proceedings before the arbitrators to lead to the conclusion that the applicants did not desire that a case should be stated by the arbitrators. . . . It does appear, however, that counsel for the applicants before the arbitrators, at a comparatively early stage of the proceedings; gave notice that after the evidence had been taken he would apply to the arbitrators to state a case for the opinion of the Court, and that application he did make later. . . .

I have come to the conclusion that, having regard to the very large amount at stake, and the fact that the agreement has several years yet to run, and that the construction which the arbitrators put upon it will conclude the applicants not only as to the damages now claimed, but as to future operations under the agreement in the years for which it has to run, and also to what I cannot help thinking is a serious question as to the correctness of the interpretation which the

arbitrators have put upon the contract, I ought not to refuse the application if it is otherwise well founded.

In re Hansloh and Reinhold, 1 Com. Cas. 215, followed.

Mr. Armour also relied upon the fact that actions had been brought by the Rathbun Company to restrain the applicants from proceeding under their notices to arbitrate, and that the motions for injunctions to that end were resisted by the applicants. The object of these actions, it was said, was to have the construction of the contract determined by the Court, and it was urged that, having prevented that being done, and having insisted upon the method of determining the questions in dispute being by arbitration, the applicants ought not now to be allowed to avail themselves of the provisions of sec. 41.

The answer is, that one of the incidents of an arbitration is or may be the stating of questions of law for the opinion of the Court . . . and it may well be that the applicants preferred, as they had a right to do, to have their disputes settled by arbitration, with the opportunity . . . of having the arbitrators advised the Court . . . to having the disputes, including questions of fact and assessment of damages, dealt with in an action. . . .

That a party to a reference is not entitled ex debito justitiæ to have the direction given whenever a question of law arises in the course of the reference is, I think, clear. The matter is one resting in the discretion of the Court. . . .

Re Nuttall and Lynton, 82 L. T. 17, was referred to as authority for the proposition that where the arbitrators are specially qualified to decide the question of law, the discretion should not be exercised in favour of giving the direction, but I do not understand that any such general proposition is laid down. . . .

The fact that an arbitrator is specially qualified to decide the question of law is a circumstance which, taken in connection with other circumstances, may affect the exercise of the discretion. . . . I can see no reason why such a rule should be applied where the arbitrator has ruled upon the question of law, or is about to do so, and it is open to serious question whether his actual or intended ruling is right. . . .

In re Tabernacle and Knight, [1892] A. C. 298, 301, 302, referred to. James v. James, 23 Q. B. D. 12, distinguished. In re Palmer and Hosken, [1897] 1 Q. B. 131, also referred to.

Under all the circumstances, I have come to the conclusion that my discretion should be exercised in favour of granting the application as respects the questions as to which I reserved judgment.

An order will, therefore, issue directing the arbitrators to state in the form of a special case the three questions.

I refer to In re Richmond Gas Co., 62 L. J. Q. B. 172, as to the form of a case stated under sec. 19 of the English Act.

I make no order as to costs, but leave them to be dealt with by the arbitrators: In re Knight and Tabernacle, [1893] 2 Q. B. 613.