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MEREDITH, C.J. JULY 31ST, 1903.

TRIAL.

CITY OF OTTAWA v. OTTAWA ELECTRIC R. W. CO.

Street Railway—Contract with Municipal Corporation—Removal of Snow—Repairs to Pavements.

Action to recover moneys expended by plaintiffs for the removal of snow and repairs to pavements, under an agreement between the parties. It was conceded at the trial that plaintiffs were entitled to recover in respect of the claim for the cost of the removal of snow, and judgment was given for plaintiffs for $79.42, the amount of that claim.

The other claim was for the cost of repairs made by plaintiffs to the permanent pavements on certain streets of the city of Ottawa on which defendants' railway ran, which, it was alleged, were rendered necessary in consequence of defendants having wrongfully broken up the pavement in order to make repairs to their tracks, and having failed to restore it to its original condition when the repairs were completed, and for the costs of repairs to the asphalt pavement on certain other of such streets, which, it was alleged, were rendered necessary in consequence of defendants having broken up the pavements in order to substitute other rails for those which had been laid down, and having repaired the pavement, not with asphalt, but another kind of paving material of an inferior kind and less durable.

T. McVeity, Ottawa, for plaintiffs.

F. H. Chrysler, K.C., for defendants.

MEREDITH, C.J.:—With regard to the latter branch of the second claim, I find that the material with which the repairs were made was used with the approval and consent of plaintiffs, and plaintiffs are not therefore entitled to re-

cover. Upon the first branch of the second claim, I find that under the agreement between the parties asphalt pavements were laid by plaintiffs on the streets in question from curb to curb, including that part of the streets occupied by the railway; that in constructing these pavements plaintiffs failed to "tamp" the concrete under the rails, as they should have done, in consequence of which, in order to make the rails firm and to prevent their springing, owing to the concrete bed upon which they were laid being improperly and insufficiently made by defendants, it became necessary for the defendants to break up the pavement, in order, by "shimming" the rails, to remedy the defect in the concrete bed. . . . It was not contended that defendants broke up more of the pavements than was necessary to enable them to remedy the condition of the rails, caused by the negligence and breach of duty of plaintiffs, or that what was done by them was done negligently. Had defendants restored the pavements to their original condition at their own cost, they could have recovered from plaintiffs the expense they would have been put to, and it follows that plaintiffs are not entitled to recover from defendants the cost of these repairs. Second claim dismissed. No costs to either party.

MEREDITH, C.J. JULY 31ST, 1903.

TRIAL.

RAMSAY v. REID.

Will—Legacy—Discretion of Executors as to Payment—Vested Interest—Right of Legatee—Payment at Majority—Action against Executors—Adding Parties—Persons Interested in Fund.

Plaintiff sued defendants, who were the executors of his father's will, for a declaration as to his rights under the will and to recover $1,000 and interest. The plaintiff based his claim upon the following paragraph of the will: "I direct that my executors shall sell the north half of lot 22 in the 14th concession of the said township of Sombra to the best advantage possible, and from the proceeds thereof pay over to my son John Grant Ramsay $1,000 at such times and in such amounts as may seem to them expedient, any portion of the said $1,000 not so paid over to remain on deposit with . . . until so required to be paid over."

A. Weir, Sarnia, for plaintiff.

A. B. Aylesworth, K.C., and F. W. Kittermaster, Sarnia, for defendants.

MEREDITH, C.J.:—Defendants, acting in good faith and in the exercise of what they claim to be the discretion vested in them by the will, have thought it expedient to pay to plaintiff, though he is of age, only a small part of the $1,000; and, in my opinion, they have acted wisely if they have the discretion. It was, however, argued that, being of age, the plaintiff is now entitled to payment of the whole $1,000 and interest, and that the direction of the will as to the time and manner of payment is to be disregarded: Saunders v. Vautier, 4 Beav. 115; Wharton v. Masterman, [1895] A. C. 186. . . The persons who would at the death of plaintiff be entitled, if this contention is not upheld, to so much of the fund as the executors do not in the exercise of their discretion pay to plaintiff, should have an opportunity of being heard in opposition to plaintiff's claim, and the case should stand over, with leave to plaintiff to amend by adding the necessary parties. If he desires to amend, he must do so on or before 15th September next; if he elects not to avail himself of the leave, the action will be dismissed with costs. The official guardian to intervene and make inquiry into the mental condition of plaintiff, and report as to his capacity to act for himself, and all proceedings to be stayed on and from 15th September next until further order.

ROSE, J. AUGUST, 23RD, 1898.

WEEKLY COURT.

RE MCQUESTEN AND TORONTO, HAMILTON, AND BUFFALO R. W. CO.

Railway—Lands Injuriously Affected—Right to Compensation—Operation of Railway—Sentimental Grievance.

An appeal by the land owner, under the Railway Act of Canada, from an award of arbitrators in respect of compensation for land injuriously affected.

W. A. Logie, Hamilton, for the appellant.

D'Arcy Tate, Hamilton, for the company.

ROSE, J.—It was apparent upon the argument that I could not interfere with the finding of fact by the majority of the arbitrators to the effect that the property had its greatest value in being used as a whole, without a row of lots being taken off to face on Hunter street, and that taking off such a row of lots would lessen the value far more than any sum which could be obtained from the sale of the lots.

No land was taken by the company; no way of access was interfered with; no evidence of injury to the land itself by vibration or the like, was offered.

The ground of complaint in respect of which damages were sought, is put by Mr. Bell, the dissenting arbitrator, as follows: "Though the owner made no use of the Hunter street front before the railway, she was at liberty to do so at any time, and a high class residence such as the owner's would be depreciated by the disfigurement of any of the three streets. In this case there was a verandah on the Hunter street front for the use of the occupants of the dwelling."

Mr. Snider, Judge of the County Court of the county of Wentworth, one of the arbitrators, states the facts, and says: "It is, therefore, not the cutting they have done that does injury, but the cutting they have not done; the fact that they have left the south side, some eighteen feet of it in width, at or near the old and higher level, makes the street unsightly, though the rise from one level to the other is so well-sloped as to do away with any real danger or inconvenience. If the lots at the rear of the property in question were fronting on Hunter street, the unusual appearance of this structural peculiarity would injure their selling value, in my opinion."

Upon this state of facts, I cannot distinguish the case in question in principle from that of Powell v. Toronto, Hamilton and Buffalo R. W. Co., 25 A. R. 209.

It was urged upon me that the decision in that case did not overrule the case of Re Birely and Toronto, Hamilton and Buffalo R. W. Co., 28 O. R. 468. That case is referred to by Mr. Justice Osler as follows: "I do not dwell upon the decision in the case of Birely v. Toronto, Hamilton and Buffalo R. W. Co., 28 O. R. 468, because although damages appear to have been awarded there in respect of the operation of the railway, the nature of such damages is not disclosed by the report."

That learned Judge was apparently of the opinion that damage might arise from the operation of the railway which would cause actual injury or damage to the land, and be the subject of compensation; but the case before him did not call for any decision of that question, nor does this case now before me, the claim, as I have pointed out, for compensation being for injury to the land arising from what may be called a sentimental grievance, namely, an unsightly road or way adjoining the land on Hunter street.

However hard the case may be for the land owner here, I am unable to find any principle of law upon which I can interfere, and the appeal must be dismissed with costs.

ROSE, J. AUGUST 23RD, 1898.

WEEKLY COURT.

RE MACDONALD AND TORONTO, HAMILTON AND BUFFALO R. W. CO.

Railway—Lands Injuriously Affected—Right to Compensation—Operation of Railway—Alterations in Street—Interference with Access—Injury from "Smoke, Noise, Vibration, and Bustle."

An appeal by the company, under the Railway Act of Canada, from an award of compensation for lands injuriously affected by the railway.

D'Arcy Tate, Hamilton, for the appellants.

C. Robinson, Q.C., and James Chisholm, Hamilton, for the land owners.

ROSE, J.—I have already expressed an opinion as to the effect of the decision in the cases of Powell and Birely against this company in the judgment I have delivered in Re McQuesten and this same company (supra). Referring to the opinion I have there expressed, and the grounds for such opinion, I do not see how I can interfere with the finding of the arbitrators on the facts which awarded $500 for damage which the lands were found to have suffered "from alterations and changes made by the said company in and along and adjoining Hunter street," and it is quite possible upon the evidence that this finding is based upon injury to the land from interference with the way of access, and so is supported by the authorities.

The next finding, however, I think may not be sustained in its present form. It is as follows: "And we, the said Colin G. Snider and the said William Bell, do hereby further order, award, and adjudge that the said lands have suffered and may suffer from the said operation of the railway from smoke, noise, vibration, and bustle to the extent of $4,500, which amount we award and adjudge in respect of the matter hereinbefore last mentioned."

As the decision in the Birely case is not interfered with by the decision in the Powell case, for the reasons which I have already pointed out, I think that a finding in the terms of the award for damage from vibration I could not interfere with; but I do not see how an award for damage arising from "smoke," "noise," and "bustle" can be supported.

I think that there must be a reference back to the arbitrators to eliminate from their award any damages arising from any of these three causes, that is smoke, noise or bustle, and that the award must be confined to damage to the land from vibration.

I think that there should be no costs of this motion. Proceedings upon this order will also be stayed for thirty days, to enable the parties to appeal if so advised.

[There was no appeal from this judgment, and the arbitrators upon the reference back reduced the item of $4,500 to $500. From this part of the award, viz., the award of $500 for vibration, the company appealed to the Court of Appeal. The appeal was heard on the 30th May, 1899, by OSLER, MACLENNAN, MOSS, and LISTER, JJ.A. On the 29th June, 1899, the Court dismissed the appeal with costs, holding that, as the matters raised by the appeal were covered by the judgment of ROSE, J., the Court had no right to interfere.]

AUGUST 4TH, 1903.

DIVISIONAL COURT.

HUNTER v. BOYD.

Malicious Prosecution—Reasonable and Probable Cause—Interference in Prosecution—Evidence Shewing.

Motion by plaintiff to set aside nonsuit entered by MEREDITH, C.J., in an action for malicious prosecution, tried at Toronto. The plaintiff alleged that the defendant William Boyd (since deceased) laid an information against plaintiff for obtaining $17.50 by false pretences from one Harkness and caused plaintiff to be tried thereon by the police magistrate, whereupon plaintiff was acquitted, and that the other defendants procured Boyd to lay the information.

G. H. Watson, K.C., for plaintiff.

W. R. Riddell, K.C., for defendants Ewart and Reed.

W. Nesbitt, K.C., and R. McKay, for defendants Gooch, Smith, and Dixon.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J.) was delivered by

I stay proceedings upon this order for thirty days to enable the parties to appeal if so advised.

FALCONBRIDGE, C.J.—The Chief Justice of the Common Pleas was right in holding that there was no absence of reasonable and probable cause shewn as far as the late William Boyd was concerned. As to the other defendants (except defendant Ewart), practically the only evidence of agency or authority was the payment of their respective quotas of the $75 collected by Ewart for Boyd's fees and expenses. But the case against plaintiff was then over—the prosecution had determined — and it is not shewn by plaintiff that these other defendants knew what particular services of Boyd they were paying for or what the items of his account were. Motion as to defendants other than Ewart dismissed with costs. As to Ewart there was a case which ought not to have been withdrawn from the jury. He collected the contributions from the other insurance agents (defendants) and paid Boyd's bill. According to Harkness, Ewart wished him (Harkness) to lay the information for fraud, and said that he (Ewart) would lay it or see that it was laid, that it was the only means of Harkness getting his money, and that plaintiff was a rascal and ought to be in the penitentiary. Ewart admits that he knew the information was being laid, and there is evidence from which a jury could infer that he instructed the laying of it. Order made without costs for a new trial as against Ewart.

FALCONBRIDGE, C. J. AUGUST 5TH, 1903.

CHAMBERS.

RE STECKLEY.

Will—Legacies---Vesting---Assignment by Legatees.

Application by Lydia Steckley, widow of Samuel Steckley, late of the township of Whitchurch, deceased, for an order under Rule 938 declaring whether the legacies in the 5th and 9th clauses of the will are vested in the legatees and whether they can execute valid assignments thereof to the applicant. By clause 3 the testator devised and bequeathed to his wife all his real and personal estate for her own use during the term of her natural life, or so long as she remained his widow. which provision she was to accept in lieu of dower. By clause 4 he directed his executors, after the death of his wife, to collect in his personal estate and sell his real estate. By clause 5 he directed his executors to pay out of the moneys realized certain small legacies to two sons, three daughters,

and a grandson. By clause 6 he provided that in case any of his daughters should die "before the occurrence of any of the above events," the share coming to her should be divided amongst her children, and if she should die without leaving any children, her share should be divided among the surviving daughters. By clause 8 he directed that in case any of the children mentioned in clause 5 should predecease both himself and his wife, the share of such child or children should be divided equally amongst the children of the child or children so dying, and in the event of such child or children dying without leaving any children, the share of such child or children should be divided amongst the survivors of the children mentioned in clause 5. By clause 9 he directed his executors to divide the residue of his estate amongst his six sons, share and share alike. The testator died 31st August, 1896. A son and a daughter had died since the testator, both leaving children. The widow stated that the income of the estate was insufficient for her needs, and that the legatees (her children) were willing that she should have $1,000 of the principal.

S. B. Woods, for the applicant.

C. R. Fitch, Stouffville, for the executors.

F. W. Harcourt, for the infants.

FALCONBRIDGE, C.J., held that the legacies were vested, and the legatees could execute valid assignments. The infants' shares to be paid into Court. Costs of all parties out of the estate.

FALCONBRIDGE, C.J. AUGUST 6TH, 1903.

WEEKLY COURT.

DIXON v. GLOBE PRINTING CO.

Injunction—Interim Injunction—Newspaper—Advertisement—Trade Union—Preponderance of Convenience.

Motion by plaintiff to continue injunction restraining defendants from publishing an advertisement in their daily newspaper warning carriage and waggon makers that a strike was in progress in Toronto.

G. H. Watson, K.C., for plaintiff.

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

FALCONBRIDGE, C.J.—The matters involved in this motion are of great importance to newspapers, to employers of labor, and to others, and were argued with much skill and force. But, as the parties did not agree that the motion should be turned into one for judgment in the action, the judgment upon the motion would be of avail only for the few weeks intervening between to-day and the trial, and would not be at all binding upon the trial Judge, and therefore the motion should be adjourned until the hearing. The preponderance of convenience is in favour of the injunction not being dissolved in the meantime. The plaintiff, employer of labour, alleges that he is seriously injured by the publication of the notice in question. The defendants, conducting a great newspaper, are very little interested in the few cents which they would receive daily for insertion of the notice, but are concerned to know the rights and liabilities of a newspaper under these circumstances. There is no other party before the Court, and therefore no one else whose interests have for the present to be considered. Costs to be costs in the cause unless the Judge at the trial shall otherwise order.

FALCONBRIDGE, C.J. AUGUST 7TH, 1903.

CHAMBERS.

RE RUSSELL AND DOYLE.

Public Schools—Accommodation for Pupils—Formation of New Section—Award—Action to Set Aside—Mandamus — Postponement of Application — Convenience — Terms.

Application by Thomas Russell and others, ratepayers of school section 5 in the township of Drummond, in the county of Lanark, for a mandamus to the trustees of the school section to provide adequate accommodation for the school children resident in the section; and cross-motion by the trustees to postpone the hearing of the application for a mandamus until after the trial of an action to set aside an award, which purported to form school section 5.

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

J. A. Allan, Perth, for the respondents.

FALCONBRIDGE, C.J., held that it was more convenient and a saving of expense to direct that the disposition of this application should be deferred until after the trial of the action. The trustees defendants in that action should, if required, transfer the conduct of the defence to solicitors and counsel named by the present applicants, on receiving indemnity against costs. The motion for a mandamus to come before the Chief Justice after the disposition of the action on the question of costs, and generally.

[Affirmed by a Divisional Court composed of BOYD, O., and FERGUSON, J., 10th September, 1903.]

FALCONBRIDGE, C.J. AUGUST 12TH, 1903.

CHAMBERS.

REX v. FOX.

Criminal Law—Summary Trial—Evidence—Consent—Felony—Misdemeanour.

Application, on return of a habeas corpus, for an order directing the discharge of James Fox and J. N. Moore, who were in custody under a warrant of commitment upon a police magistrate's conviction for robbing one D. Mumby of $100.

D. C. Ross and W. P. McMahon, Belleville, for the prisoners.

Frank Ford, for the Crown.

FALCONBRIDGE, C.J.—At the argument all questions of fact, *e.g.*, as to what took place at the trial, were disposed of adversely to the applicants, and the only question reserved was whether the police magistrate was warranted in acting upon the consent of the prisoners' counsel (given in their presence) that the evidence given on the trial of another prisoner should be read for and against the prisoners applying, their counsel having acted for that other prisoner, and they having been called as witnesses by him and examined and cross-examined on such evidence. It was contended in support of the application, that under Regina v. St. Clair, 27 A. R. 308, in such a case as the present, the old rule that consent could not enable such evidence as was here admitted to be so let in (a rule formerly applicable to cases of felony, as opposed to misdemeanours) still survives. Section 535 of

the Criminal Code, provides that "after the commencement of this Act, the distinction between felony and misdemeanour shall be abolished, and proceedings in respect of all indictable offences (except as they are herein varied) shall be conducted in the same manner." When, as here, a certain practice would have been permissible in case of misdemeanour, and not permissible in case of felony, the practice has been to apply the rule as in cases of misdemeanour, and such is the intention of the Code.

Order made discharging the habeas corpus, and remanding the prisoners to custody under the warrant of commitment.

FALCONBRIDGE, C.J. AUGUST, 17TH, 1903.

TRIAL.

MERCHANTS BANK v. GRIMSHAW.

Promissory Notes—Action against Indorser—Indorsements Procured by Fraud of Maker—Notice to Agent of Holder—Notice to Bank—Property in Notes not Passing.

Action on two promissory notes made by the defendant George H. Grimshaw and indorsed by defendants C. A. Irvine and Robert Evans, for $748 and $715 respectively. The defendant Irvine alone defended.

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

G. F. Shepley, K.C., and W. E. Middleton, for defendant Irvine.

FALCONBRIDGE, C.J.—I find that defendant Irvine's indorsements of the notes sued on were procured by the fraud of Grimshaw, who falsely pretended that he was about to receive a sum of money from England, and that he was purchasing a house in Toronto from Evans, and that the notes were to be placed in Evans's hands as security for the payment of part of the purchase money thereof, and should not be negotiated. I find also that one Robson was the agent of Evans in the transaction and that Robson had notice and knowledge of the fraud which was being practised on Irvine, and that Evans is affected by such notice, if indeed he had not express notice and knowledge thereof. Evans was not, therefore, a holder in due course. On the night of the 2nd October, 1902, the property in the notes had not passed to the plaintiffs. I accept the evidence of Mr. Heggie

as to what took place on the nights of the 2nd and 3rd October, his account of the conversations being preferrable both on account of the demeanour of the witnesses and the cogency of the circumstances. I also accept his statement as to the plight and condition of the notes on the 4th October, when he saw them in Brampton. Apart from the admissions made by Mr. Simpson, on the night of the 2nd, the intrinsic written and uncontradicted evidence is abundant, that the transaction was not then complete. On that night the plaintiffs, through Mr. Simpson, had full notice of the position of affairs and of the infirmity and defective title to the notes. Mr. Simpson has not, in my opinion, been guilty of intentional misstatement, but his recollection of events has been coloured and distorted by the extremely positive and masterful suggestions of a subordinate officer. I acquit the latter also of intent to do wrong, but his zeal for the bank and its customer Evans, misdirected by an incorrect view of the bank's position, has manifestly affected the conduct of the acting manager and the memory of both. The application of the law to this state of facts is simple. Action as against Irvine dismissed with costs.

FALCONBRIDGE, C.J. AUGUST 17TH, 1903

TRIAL.

QUINLAN v. CITY OF BRANTFORD.

Assessment and Taxes—Tax Sale—Description of Land—Assessment Roll—No Taxes in Arrears.

Action for trespass to lands in the city of Brantford.

E. Sweet, Brantford, and M. W. McEwen, Brantford, for plaintiffs.

A. J. Wilkes, K.C., and W. T. Henderson, Brantford, for defendants.

FALCONBRIDGE, C.J.—The plaintiffs claimed title under a tax deed given by defendants in pursuance of a sale of land assessed to Caria R. Wilkes. The land was described in the assessment rolls for 1896, 1897, and 1898 (for which years' arrears it was sold) as "S. pt. B. 2 acres 530 feet frontage." The frontage which plaintiffs bid for at the sale and acquired by their deed was 176¼ feet, for which the amount of taxes in arrear was to be paid, and was paid. And the 176¼ feet

plus the 300 feet excepted in the deed plus the small unnumbered lot further to the south and east, make up the 530 feet frontage. Then the area of the land of that frontage, extending to and not beyond the high land, was almost exactly two acres. The result is that no land beyond the high land was assessed to Caria R. Wilkes for these years, and there could be no taxes in arrear therefor and no sale or deed thereof. Evidence, parol or otherwise, was admitted, subject to objection, by which plaintiffs sought to avoid this conclusion, but, if admissible, it failed to do so. Action dismissed without costs.

CARTWRIGHT, MASTER. AUGUST 22ND, 1903.

CHAMBERS.

STANDARD LIFE ASSURANCE CO. v. VILLAGE OF TWEED.

Summary Judgment—Defence to Action—Municipal Debentures—By-law—No Provision for Payment of Principal—Application of Special Statute.

Motion by plaintiffs for summary judgment under Rule 603 in an action to recover the principal due upon certain debentures issued by defendants and purchased by plaintiffs. In April, 1892, the council of the village passed by-law No. 15, reciting that it was necessary to raise $5,000 to assist one George Easterbrook in rebuilding his mills; that for this purpose it would be necessary to issue debentures for that sum payable as therein provided; and providing for an annual special rate to supply the sum necessary for payment of the interest at 5½ per cent., being $275 a year for ten years, but making no provision whatever for payment of the principal, though the reeve was given authority to sign and issue such debentures, and they were made payable as to principal and interest at a private bank in Tweed, and though the principal sum of $5,000 was directed to be paid in 1902. The debentures were bought by plaintiffs in January, 1893. All interest thereon was paid as it fell due, but payment of the principal was refused, although the debentures were duly presented on 25th March, 1902. This action was commenced on the 20th July, 1903, after an amendment to the Municipal Act had been passed by the Ontario Legislature (sec. 432) reading as follows: "Where in the case of any by-law heretofore or hereafter passed by a municipal council, the interest for one year or more on the debentures issued under such

by-law and the principal of the matured debentures (if any) has or shall have been paid by the municipality, the by-law and the debentures issued thereunder remaining unpaid shall be valid and binding upon the corporation and shall not be quashed or set aside on any ground whatever."

D. L. McCarthy, for plaintiffs, relied on this enactment.

C. W. Craig, Tweed, for defendants, contended that the section was not applicable to the present case; if there had been no mention of overdue principal, very different considerations might have arisen; but here no principal of the matured debentures had been paid, payment having been expressly refused.

THE MASTER held, without expressing any opinion as to what might be the ultimate decision in the action, that a substantial defence was set up, and the defendants should have the opportunity of carrying the case as far as they might be advised. Having regard to all the facts, the motion should not have been made, the section of the statute not mentioning these debentures by name. Motion dismissed with costs to defendants in the cause.

FALCONBRIDGE, C.J. AUGUST 26TH, 1903.

TRIAL.

CANADA CO. v. TOWN OF MITCHELL.

Municipal Corporations—Local Improvements—Sidewalk—Assessment for—Action to Restrain—Estoppel—Appeal to Court of Revision and County Court Judge—Irregularities—Costs.

Action for an injunction to restrain the defendants from assessing or levying upon lands of the plaintiffs in the town a tax in respect of the construction of certain cement sidewalks.

By the 8th paragraph of the statement of defence the defendants set up that the plaintiffs, having with a full knowledge of all the facts allowed defendants to construct the sidewalks and incur the expense thereof without any attempt to prevent them from so doing, and having unsuccessfully appealed from the assessment to a Court of Revision, upon the grounds taken in this action, and having further appealed to the County Court Judge, who reduced the assessment, could not now be heard to object to such assessment or to the proceedings upon which it was based.

G. G. McPherson, K.C., for plaintiffs.

F. H. Thompson, Mitchell, for defendants.

FALCONBRIDGE, C.J., held that the matters set up in the 8th paragraph of the defence furnished an answer to the action, but that, as there were irregularities in the proceedings, there should be no costs. Action dismissed without costs.

CARTWRIGHT, MASTER. AUGUST 28TH, 1903.

CHAMBERS.

STATE SAVINGS BANK v. COLUMBIA IRON WORKS.

Writ of Summons—Omission of Addresses of Defendants—Defendant Residing out of the Jurisdiction—Setting aside Writ—Nullity

Motion by defendant Botsford to set aside the writ of summons, the copy served, and the service thereof, because of the omission of the addresses of the defendants. The writ was issued from the office of the local Registrar at Sarnia. An affidavit of a clerk of plaintiffs' solicitors stated that, through a clerical error, the addresses of the several defendants were accidently omitted. The affidavit of the applicant stated that he was personally served at Meaford, though he was not a British subject, but a citizen of the United States residing at Port Huron. This was not contradicted.

C. A. Moss, for applicant.

W. B. Raymond, for plaintiffs.

THE MASTER held, following The W. A. Sholten, 13 P. D. 8, that the address as well as the name of the defendant is a necessary part of the writ. In a proper case relief might be given to plaintiffs under Rule 1224; but no good purpose would be affected by allowing an amendment nunc pro tunc, as such amendment would at once shew that the writ was a nullity as having been issued without an order. The indorsement did not disclose any grounds such as are required under Rule 162, and all such were distinctly negatived by defendant Botsford's uncontradicted affidavit. Sirdar v. Rajah of Faridkote, [1894] A. C. 670, and Connolly v. Dowd, 18 P. R. 38, referred to. The writ was issued per incuriam and was a nullity and should be set aside with costs. If Botsford were moving only on his own behalf, it would be sufficient to direct his name to be struck out of the writ and give leave to plaintiffs to amend as they might be advised.

FALCONBRIDGE, C.J. SEPTEMBER 1ST, 1903.

TRIAL.

IDINGTON v. DOUGLAS.

Landlord and Tenant—Expiry of Lease—Continuance of Possession—Agreement—Tenancy at Will—Death of Tenant—Corroboration of Evidence of Landlord—Notice to Quit—Forfeiture—Fixtures—Costs—Examination for Discovery.

Action to recover possession of land and for mesne profits, etc.

R. S. Robertson, Stratford, for plaintiff.

J. P. Mabee, K.C., and G. G. McPherson, K.C., for defendant.

FALCONBRIDGE, C.J.—In my opinion, the uncontradicted facts establish a tenacy at will since the expiry of the written lease. The reservation or payment of rent in aliquot proportions of a year is, no doubt, the leading circumstance which turns tenancies for uncertain terms into tenancies from year to year. But this payment does not create the tenancy. It is only evidence from which the Court or jury may find the fact. And the circumstances may be shewn to repel the implication: Woodfall, 17th ed., p. 246. The plaintiff swears that before he accepted any rent after the expiry of the lease he explained to Thomson (one of the lessees and partner of Douglas) now deceased, that he (plaintiff) would not consent to any tenancy from year to year so as to require any notice to be given, and that they should remain in the same position as they were, or would be on expiry of the lease. The parties were contemplating a further term, and plaintiff says Thomson did not demur to this arrangement, but wanted a new lease, and finally assented to it. And again he says that about a year after the expiry he again told Thomson he saw nothing for it but to continue under the same arrangement. The rent was to be the same as that reserved by the lease, and it was to go on in every way subject to the above limitation. Douglas, who was not present at these conversations, cannot deny them, but his account of what Thomson reported to him does not contradict but rather corroborates plaintiff's statement. He says that Thomson reported that plaintiff asked to have the matter stand over until he was dealing with Ferguson, an adjoining tenant, and that plaintiff wanted to have the leases running concurrently. Thomson died on 25th March, 1902, and thenceforward plaintiff in his letters always repudiated

any idea of a yearly tenancy. . . . If plaintiff's statement requires corroboration under R. S. O. ch. 73, sec. 10, there is corroboration.

But, apart from the express agreement which plaintiff sets up, defendants are in the position of tenants whose lease has expired, and who are permitted to continue in possession pending a treaty for a further lease, and so they are not tenants from year to year, but strictly tenants at will: Woodfall, p. 253. That tenancy was determined by demand of possession before action brought. The ineffective notice to quit given by plaintiff on 15th September, 1902, was, no doubt, served *ex abundanti cautela*, and furnishes no sound argument against plaintiff's position.

Many matters relating to assignments of the term and alleged forfeitures thereby which were debated are not material, having regard to the above findings.

Plaintiff expressed himself to be content with judgment for possession, and in that event waived his claim for alleged nuisance and under the Factors' Act. There will be judgment for possession after 30 days, with mesne profits, based on the amount hitherto paid, since 1st February, and proportion of the year's taxes. These amounts may be settled by the parties before the local Registrar at Stratford.

As to fixtures: (1) Defendants may remove mirrors, furnace, and office, do no unnecessary damage. (2) The stairway need not be replaced in its former position. (3) Defendants have option to leave all other fixtures in substitution for what they found there and in full satisfaction of all claim for alteration or removal of partitions, etc. (4) Or defendants may remove all fixtures and pay what the Master at Stratford shall find to be a proper sum for what they removed or converted.

Plaintiff to have his costs of action. Taxing officer to tax costs of defendants' examination for discovery (1764 questions) as if it had been limited to 300 questions.

CARTWRIGHT, MASTER. SEPTEMBER 9TH, 1903.

CHAMBERS.

CANADA BISCUIT CO. v. SPITTAL.

Venue—Application to Change—Malicious Prosecution—R. S. C. ch. 185, sec. 1.

Motion by defendants to change the venue from Toronto to Ottawa.

J. R. Code, for defendants.

A. M. Denovan, for plaintiffs.

THE MASTER.—At the argument I held that no such preponderance of convenience as is required by the cases had been shewn here: see Campbell v. Doherty, 18 P. R. 243.

Mr. Code raised a new point which I reserved for consideration. He relied on R. S. C. ch. 185, sec. 1, which provides that "every action—against any person for anything purporting to be done in pursuance of any Act of the Parliament of Canada, relating to criminal law, shall, unless otherwise provided, be laid and tried in the district, etc., where the act was committed, and not elsewhere."

The action is to recover $860 from Spittal and against the other two defendants as his sureties. The defendant Spittal has counterclaimed asking $5,000 for malicious prosecution by the plaintiffs.

Laying aside the question how far this would be within the powers of the Parliament, if it assumed to annex this condition to actions for malicious prosecution, I am clearly of opinion that it has no such application. This is made clear at least in two ways. First, the title is "An Act respecting actions against persons administering the criminal law." Second, the 2nd section of the Act itself provides for one month's notice in writing before action brought, which action by sec. 1 is required to be brought within six months after the act committed. No one ever heard of any such preliminaries being necessary to enable an action for malicious prosecution to be successfully launched.

It seems plain that this Act is for the protection of officers of the Courts exercising criminal jurisdiction—and is to be so interpreted.

Similar provisions are to be found in the Customs Act, R. S. C. ch. 32, sec. 145, and following.

The motion should be dismissed with costs to the plaintiffs in any event.

SEPTEMBER 8TH, 1903.

DIVISIONAL COURT.

ALLEN v. CROZIER.

Security for Costs—Motion to Set aside Praecipe Order—Plaintiff out of the Jurisdiction—Moneys in Hands of Defendant—Action for Account.

Appeal by defendant from order of STREET, J., in Chambers (8th June, 1903), reversing order of Master in Chambers

(ante 485) which dismissed plaintiff's motion to set aside a præcipe order for security for costs. Action for an account brought by a resident out of the jurisdiction against his former solicitor.

J. W. McCullough, for defendant.

T. H. Lloyd, Newmarket, for plaintiff.

THE COURT (BOYD, C., FERGUSON, J.), held that under the circumstances of the case (as reported ante 485), the defendant's solicitor was not entitled to security for costs. Appeal dismissed. Costs in the cause.

CARTWRIGHT, MASTER. SEPTEMBER 9TH, 1903.

CHAMBERS.

O'CONNOR v. O'CONNOR.

Jury Notice—Leave to File—Delay—Short Notice of Trial.

Motion by the plaintiff for leave to file a jury notice and give short notice of trial.

T. F. Slattery, for plaintiff.

W. B. Raymond, for defendant.

THE MASTER.—This is an interpleader issue to determine whether the defendant holds a certain beneficiary certificate absolutely or only as security for moneys lent by him to the deceased.

The case of Qua v. Woodmen of the World, 5 O. L. R. 51, ante 8, would indicate that in a proper case it would be a proper exercise of judicial discretion to allow either party to file a jury notice when this has been done.

But the same case shews that "there is no power to abridge the time allowed the defendant unless he is in such a position that terms may be imposed on him."

Then the effect of allowing a jury notice to be filed would be to throw the case over these present sittings. The result would be delay in winding up the estate of the deceased and delaying the other parties concerned in the matter.

It was also argued by Mr. Raymond that the issue was equitable, and that the question to be determined was one within the jurisdiction of the Court of Chancery. In this he is probably correct. But I have not fully considered that point, as I think the motion should be refused on the other ground.

The costs will be in the cause.

FERGUSON, J. SEPTEMBER 9TH, 1903.

TRIAL.

BRIDGE v. JOHNSTON.

Indian Lands—Assignment of Right to Cut Timber—Subsequent Conveyance of Land—Regisiration in Department of Indian Affairs—Priorities— Actual Notice—Document Incapable of Registration—Conditional Assignment.

Action for damages for cutting and removing timber from land and for an injunction to restrain defendant from further cutting and removing.

David Robertson, Walkerton, for plaintiff,

C. S. Cameron, Owen Sound, for defendant.

FERGUSON, J.—The lands in question are lot 8 in the 8th concession east of the Bury road in the township of Eastnor in the county of Bruce, and are lands originally surrendered by and set apart for the use of the Chippewas of Saugeen, Owen Sound Indians, and held, sold, and administered by the Department of Indian Affairs for Canada, under the provisions of the Indian Act, R. S. C. ch. 43. The lands are unpatented. It was freely admitted by counsel at the trial that on the 27th November, 1899, James W. Freckleton was the owner of and had a good title to these lands. On that day the said James W. Freckleton made a sale of certain timber on these lands to one Jamieson Johnston, and duly executed an assignment or transfer of this timber. The operative parts of the assignment are in the words and figures following, that is to say:—

"The party of the first part (Freckleton) agrees to sell, and the party of the second part (Jamieson Johnston) agrees to purchase all the timber 10 inches and over in size on lot 8,

concession 8, township of Eastnor, E.B.R., for the price or sum of $350, payable as follows." (The times and mode of payment of the purchase money are then stated.) "The party of the second part is to have five years from the date hereof to cut and remove said timber, having the right to make roads and go in and out of the said property during the said term."

Jamieson Johnston did not register this assignment in the office of the Superintendent-General, nor has it, nor have any of the assignments made under it hereafter referred to, been so registered.

On the 2nd March, 1902, Jamieson Johnston assigned and transferred all his interest in respect of the said timber and land to his brother Robert James Johnston, and on the 16th December, 1902, the said Robert James Johnston assigned and transferred all his right and interest to another brother, Samuel Johnston, the defendant.

A part of the timber mentioned in the assignment to Jamieson Johnston has been cut and removed, but there is a substantial part of it remaining uncut upon the land.

On the 15th November, 1900, the said James W. Freckleton sold, assigned, and transferred the land, this lot No. 8, to the plaintiff, Thomas John Bridge, his heirs and assigns forever, and at the trial it was admitted that this conveyance had been duly registered in the office of the Department of Indian Affairs, with the Superintendent-General on the 29th November, 1900. Freckleton had contracted to sell the land to one Bosley, who had contracted to sell it to the plaintiff. It was agreed that Freckleton should convey and assign to the plaintiff, instead of having two conveyances, and the conveyance was accordingly made directly to the plaintiff. At the time this was done, and of course before the plaintiff registered his conveyance, both Bosley and Freckleton told him that Jamieson Johnston had the right to cut timber on the land until the spring of 1902, but there was not anything said about any assignment or transfer from Freckleton to him, and it is not shewn that the plaintiff had notice or knowledge of such an assignment or transfer till long after the registration by him of the transfer to himself.

The defendant was proceeding to cut and take away timber from the lot in the spring of 1903, when the plaintiff brought this action.

Section 43 of the Act provides for the keeping of a book by the Superintendent-General for registering, at the option

of the party interested, the particulars of any assignment, and provides that every assignment registered shall be valid against any assignment previously executed which is subsequently registered or is unregistered, and that every assignment when registered shall be unconditional in its terms. The original Act, 43 Vict. ch. 28, sec. 43, provides, amongst other things, that any assignment to be registered must be unconditional in its terms.

This law of registration seems to apply to an assignment made as well by the original purchaser or lessee of Indian lands or his heirs or legal representatives, as by any subsequent assignee or the heirs or legal representatives of such assignee. The section of the Act respecting registration would, according to its terms, seem to be absolutely decisive as to priority. There does not seem to be any provision (as in our Registry Act) as to "actual notice" had by the subsequent assignee who first registers his assignment, but I think the law so clearly laid down by Lord Cairns in the case Agra Bank v. Barry, L. R. 7 H. L. 147, 148, must apply, and that, although the plaintiff's assignment was registered as aforesaid, yet, if he had at the time actual notice of the assignment to Jamieson Johnston, he cannot have the priority he seeks. Such actual notice has not, I think, been proved. There are other cases to the same effect as the Agra Bank case.

A question may arise as to whether the law of registration has any application. This rests upon the contention that the interest purchased by Jamieson Johnston from Freckleton was a chattel interest, and not an interest in land. The cases in our own Courts relating to this subject are somewhat numerous and not all in accord. I have perused a large number of these cases, among them being Johnston v. Shortreed, 12 O. R. 663; Corbett v. Harper, 5 O. R. 93; Summers v. Cook, 18 Gr. 179; McNeill v. Haines, 17 O. R. 479; Steinhoff v. McRae, 13 O. R. 546; Handy v. Carruthers, 25 O. R. 279; Ford v. Hodgson, 3 O. L. R. 526; and I cannot avoid being of the opinion that the interest assigned by Freckleton to Jamieson Johnston was an interest in land, and not a mere chattel interest. To this opinion I think I am bound by the cases Summers v. Cook and Ford v. Hodgson above. It would appear, as I think, if there were no further or other controlling elements in the case, that the priority is in favour of the plaintiff. See the cases McLean v. Burton, 24 Gr. 134, and Ferguson v. Hill, 11 U. C. R. 53.

I am, however, after the best consideration I have been able to give the subject, of opinion that the assignment from Freckleton to Jamieson Johnston was a conditional

document, that is to say, that it was not an unconditional assignment, within the meaning of the Act. It was not, as I think, unconditional in its terms, and, according to the words, and, as I think, the spirit of the Act, it was incapable of being registered in the manner prescribed by the Act. The local agent of the Department was called as a witness, and he was of the opinion that the document was incapable of registration, and said that, had it been offered to him to forward for registration, he would have rejected it, on the grounds stated above.

Then, according to the doctrine of the case Harrison v. Armour, 11 Gr. 303, and the cases and authorities referred to in it, this document (the assignment from Freckleton to Johnston) did not require registration to preserve its priority.

This assignment was first in time. It was not, as I think, affected by the registration of the assignment to the plaintiff. I am of the opinion that the title of the defendant is superior to that of the plaintiff, and that the plaintiff's action should be dismissed, and I see no good reason for withholding costs. The interim injunction is also dissolved with costs, including the costs of the motion for it

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SEPTEMBER 9TH, 1903.

DIVISIONAL COURT.

BERRIDGE v. HAWES.

Action—Summary Dismissal—No Reasonable Cause of Action Alleged—Claim for Wrongful Dismissal—Claim to Enforce Mechanic's Lien—Company—Agreement with.

An appeal by plaintiff from order of MACMAHON, J., in Chambers (ante 619), setting aside statement of claim and vacating registration of mechanic's lien.

W. E. Raney, for plaintiff.

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

THE COURT (BOYD, C., FERGUSON, J.) dismissed the appeal with costs, but varied the order by discharging the part which directed the vacating of the lien. This order to be without prejudice to plaintiff filing a new statement of claim (if so advised) claiming damages for wrongful dismissal only, after payment of the costs here and below.

TRIAL.

BROWN v. VANDERVOORT.

Contract—Work and Labour—Proof of Contract—Servant or Contractor—Burden of Proof—Damages for Defective Work—Trade Discounts—Right of Master to Credit for—Counterclaim—Costs.

Action brought in the High Court by Alexander Brown and the Alexander Brown Milling and Elevator Company, against Manley Bird Vandervoort to recover damages for breach of contract in the construction of certain grain bins and an elevator in connection with the flour mill and grain elevator of plaintiffs. They alleged that defendant, representing himself to be an expert bin and elevator builder, entered into a contract with them to construct bins and an elevator, in a first-class workmanlike and proper manner, at a cost not to exceed $2,300, and that defendant was to furnish his own plans and specifications for such work, which was to be of the most modern and improved type, with sufficient strength and durability for the purpose for which it was intended; that, after defendant had done a considerable portion of the work, plaintiffs found that the work was defective, unworkmanlike, and wholly unfit for the purpose for which it was designated, and terminated the agreement, and a short time afterwards plaintiffs placed a small quantity of grain in the bins, whereupon the foundation collapsed, and plaintiffs were obliged to tear down and replace a portion of the work. They claimed $6,861.06.

Defendant denied making the contract as alleged by the plaintiffs, and stated that he was engaged by plaintiffs to hire and furnish labor, at the prevailing rates of wages, necessary for the construction of certain grain bins and elevator equipment and to take charge of the men, etc. Defendant counterclaimed for $496.33, balance due for moneys expended in wages and material.

The action was tried before WINCHESTER, Co.J., sitting for MEREDITH, C.J.

W. Proudfoot, K.C., and A.A. Miller, for plaintiffs.

R.C. Clute, K.C., and A.R. Clute, for defendant.

WINCHESTER, Co. J.—The agreement between the parties not having been reduced to writing, the onus of proving the contract alleged by plaintiffs was on them, and they failed in the proof. I must find that the defendant was engaged by

plaintiffs to construct the bins, etc., and was to receive wages for doing so, and not a specified sum. . . . Defendant was dismissed from the work on 17th June, 1902, and the collapse took place about 22nd July, 1902, more than a month after plaintiffs had taken possession of the premises and employed skilled men to complete the work. . . Plaintiffs' men were aware that the foundation was not sufficiently strong to support any heavy weight, and they placed grain in the bins after being warned by the men in charge of completing the building, that it was dangerous to do so. . . . The defendant is not liable for damages caused by the collapse of the building. But portions of the work of defendant were so performed as to cause greater expense in finishing than it would have cost had the work been finished and completed in a workmanlike manner. Defendant failed to exercise the amount of care and skill which was necessary and which he undertook to exercise, and for which he was charging, and plaintiffs suffered damage by reason of having to make changes and remedy defects. These damages should be assessed at $100. Farnsworth v. Garrard, 1 Camp. 38, referred to.

A question was raised as to certain allowances made to defendant by persons supplying material for the work, which defendant termed "trade discounts." On settling certain of the accounts for material defendant claimed a trade discount, and having received it applied it to his own use, refusing to give plaintiffs the benefit thereof. He received in this way $131.70. The plaintiffs contend that the defendant acted as plaintiffs' servant and agent in purchasing the material, and that they are entitled to have this sum applied in reduction of his claim. I agree with that contention . . . Jones v. Linde British Refrigeration Co., 2 O. L. R. 428, and cases there cited.

As to the correctness of defendant's counterclaim there was no serious dispute.

Judgment for defendant for $264.63 with costs on the County Court scale without set-off.

SEPTEMBER, 10TH, 1903.

DIVISIONAL COURT.

CONMEE v. LAKE SUPERIOR PRINTING CO.

Libel—Pleading — Defence—Fair Comment—Untrue Statements of Fact—Embarrasing Pleading—Amendment.

Appeal by defendants from order of STREET, J. (ante 543), reversing order of Master in Chambers (ante 509),

and directing that certain paragraphs of the defence in an action for libel should be struck out or amended.

C. A. Moss, for defendants.

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

THE COURT (BOYD, C., FERGUSON, J.), dismissed the appeal with costs to plaintiff in the cause, agreeing with the opinion of Street, J.

CARTWRIGHT, MASTER. SEPTEMBER 12TH, 1903.

CHAMBERS.

TOPPING v. EVEREST.

Security for Costs—Infant Plaintiff—Injury to—Action for—Joinder of Parent—Next Friend—Both Plaintiffs out of Jurisdiction.

Motion by defendant for security for costs.

Action for damages for an injury caused to the infant plaintiff and for loss occasioned thereby to the co-plaintiff, the infant's father, by whom also as next friend the infant sued.

After the issue of the writ of summons the whole family removed to the United States, and the father sold all the property he had in Ontario.

C. A. Moss, for defendant.

J. R. Meredith, for plaintiffs.

THE MASTER.—It was admitted that the father must give security if he intends to proceed with his claim; but it was argued that in no case could the next friend of an infant be required to give security for costs.

This was distinctily held in Moran v. Kellogg, 10 C. L. T. Occ. N. 184. . . . To the same effect are Roberts v. Coughlin, 28 P. R. 94. . . . Scott v. Niagara Navigation Co., 15 P. R. 409. . . . In the latter place the Chancellor said: "The primary object in requiring that an infant shall sue by next friend is not that the defendants may have security for costs, but that there must be some one before the Court to answer for the propriety of the action, and through whom the Court may compel obedience to its orders."

How far this requirement is met by a next friend permanently resident out of the jurisdiction, I have not previously had to consider. . . . The point has never been raised or decided.

If the principle of Scott v. Niagara Navigation Co. is to be followed, it would seem that the next friend if out of the jurisdiction, should in some way be made amenable to the orders of the Court. This could be to some extent accomplished by requiring him to give security like any other absent litigant.

On consideration, I think it will be best to order that the plaintiff John Topping (the father) do give the usual security. In default of this being done, so much of the statement of claim as asks for $2,000 for himself must be struck out. The usual security would enable the whole action to proceed, and, if this is done, no more need be said. But, failing this, I would give leave to the defendant to renew the motion, so that the point, which is new, so far as I am aware, may be further considered, if the parties so desire.

The remarks . . . in Taylor v. Wood, 14 P.R. at p. 456, as to the power to appoint—in cases of commendable litigation—the official guardian as next friend, may be of assistance in the matter.

CARTWRIGHT, MASTER. SEPTEMBER 12TH, 1903.

CHAMBERS.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. LEADLEY.

Writ of Summons — Service — Irregularities — Jurisdiction—Action respecting Foreign Lands—Confirming Proceedings—Conditional Appearance.

The action was brought to set aside a mortgage made by the plaintiffs of certain lands in the North-West Territories, for a declaration that defendants the Leadleys held the lands as trustees for plaintiffs, for an injunction restraining those defendants from dealing with the lands, and for an account.

After the issue of the writ of summons, an order was made by a local Judge adding the Moores as defendants, and allowing service on them out of the jurisdiction of a concurrent writ. This order was applied for by plaintiffs in consequence of their solicitor having been told by the solicitor for the original defendants, the Leadleys, that (as was the fact) they had entered into an agreement with defendant J. T.

Moore in respect of these lands, which agreement he had afterwards assigned to his wife, the other added defendant.

The added defendants moved to set aside the service of the concurrent writ and the order allowing the same.

A. J. Russell Snow, for the applicants, took various technical objections to the order and service. He also contended that no cause of action was disclosed by plaintiffs, even as against the Leadleys.

J. W. St. John, for defendants the Leadleys, asked to be allowed to withdraw their appearance and enter a conditional appearance disputing the jurisdiction of the Court.

J. J. Maclennan, for plaintiffs, shewed cause.

THE MASTER.—It is not necessary for the protection of defendants the Leadleys to allow them to enter a conditional appearance. . . . All objections to the jurisdiction can be taken effectually in the statement of defence. Even if not taken, they can be raised at the hearing, as was done in Gunn v. Harper, 2 O. L. R. 611 (see p. 621) . . .

It would be improper for me to assume to decide the action. The utmost I could do would be to refuse any amendment of the proceedings if convinced that plaintiffs' case was hopeless.

But, after a consideration of Gunn v. Harper, 30 O. R. 650, 2 O. L. R. 611, I should hesitate to say that plaintiffs may not shew themselves entitled to some part of the relief sought for. (Pavey v. Davidson, 23 A. R. 9, and Purdam v. Pavey, 26 S. C. R. 412, also referred to.) . . .

It may well be held that in the present action the title to land outside this Province is not involved in such a sense as would leave the whole jurisdiction in the Courts of the North-West Territories, and render nugatory any decree in personam that could be made by the Courts of this Province.

I am, therefore, of the opinion that plaintiffs cannot be interfered with at this stage of the proceedings. The only order I can make is one confirming the proceedings, but with costs to the Moores in any event. Defendants may enter conditional appearances, if so advised.