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HEWSON, ACTING CO. C. J. FEBRUARY 6TH, 1906.

COUNTY COURT OF SIMCOE.

SCOTT v. ORILLIA EXPORT LUMBER CO.

Carriers by Water—Dangers of Navigation—Seaworthiness of Vessel—Loss of Cargo—Right to Freight.

Action for freight, tried before Mr. C. E. Hewson, K.C., acting for the Judge of the County Court.

G. W. Bruce, Collingwood, for plaintiff.

R. D. Gunn, K.C., for defendants.

THE ACTING JUDGE:—The plaintiff is a master mariner, and is the owner of a steam tug and a lighter or barge, and during the season of navigation on the great lakes engages in towing and in the carrying of freight, principally lumber and bark, from and to different ports on the Georgian Bay. His headquarters are at Collingwood, but he does not ply between any two defined ports or on any defined routes.

The defendants are lumber merchants, and carried on business at the town of Orillia, and, having purchased lumber from Holland, Graves, & Co., at Byng Inlet, were desirous of transporting the same to Midland, and accordingly wrote plaintiff on 5th September, 1903, as follows:—"Please tell us by return of mail, or call by 'phone, what is the smallest quantity of lumber you will go to Byng Inlet for. I think we will not have much more than 150 M to 170 M ft. Kindly let us know what your price per M would be for it delivered at Midland."

Plaintiff replied on 9th September, 1903, as follows:—"Yours of the 5th rec. Excuse my not answering sooner, but I was up the lake. I will bring down any quantity that you wish from Byng Inlet, as I can mix it with another lot. I will be pleased to bring down what you may have for $1 per M, you to take it off free. Hoping to be favoured with your work, I remain," etc.

Defendants on 10th September, 1903, called up plaintiff by telephone, when plaintiff informed defendants that he could carry defendants' lumber for them, as he had part of a cargo to bring down for Bryan Bros., of Collingwood; the quantity defendants had would fill or make up a cargo, and the price would be $1 per M, but if he brought defendants' lumber by itself he would have to charge more than $1 per M.

On 10th September defendants wrote plaintiff confirming the telephone conversation as follows:—"In accordance with our conversation by telephone this morning, you will please go to Byng Inlet and get from Messrs. Holland, Graves, Maubert, and George, some 125 M 1 to 2 red pine and 60 to 75,000 2½, 3 & 4 white pine, bring it to Midland, and we will be ready to unload on arrival. Price to be $1 per M free off."

Plaintiff shortly thereafter proceeded with his tug, and barge or lighter in tow, to Byng Inlet, and there took on board the barge or lighter 62,000 ft. of lumber known as shorts, being lumber from 4 to 10 ft. in length, for Bryan Bros., of Collingwood, and 161,914 ft. of defendants' lumber of the kinds specified in defendants' letter of 10th September above referred to.

Plaintiff had previously carried lumber for defendants, and defendants were aware of the character of vessels and mode adopted by plaintiff in carrying lumber. Plaintiff engaged, to load the lumber on vessel, men who usually did that kind of work and were experts at it, and the lumber was properly and carefully loaded on the barge or lighter.

After the loading plaintiff obtained from the manager of Holland, Graves, & Co., W. E. Bigwood, bill of lading as follows:—"Byng Inlet, Sept. 16th, 1903. Shipped, in good order, by M. E. Bigwood, agent, for account and at the risk of whom it may concern, on board the lighter in tow of tug 'Saucy Jim,' whereof Francis Scott is master, now lying at this port and bound for Midland, the following amount

of lumber, to be delivered in like good order at the port of destination, unto the consignee named in the margin, or to their assigns without delay. (Dangers of navigation only excepted.) In witness whereof the master hath affirmed four bills of lading, all of this tenor and date, one of which being accomplished, the other to stand void.

Orillia Export Lbr. Co., Midland. 161,933 ft. Lbr. in Rgh. 26.60

F. Scott.

Loading 29.15/100.

W. E. Bigwood,
Agent."

And thereafter on 16th September left port with the intention of proceeding to Midland, but, after going out a few miles into the lake, finding the weather rough, the master returned to shelter and lay to till the following morning, when the wind having abated and changed, being then N.N.E. off the land and favourable, he proceeded on his way towards Midland. All went well until about 2 o'clock in the afternoon of the 17th, when, as the vessel was about opposite the Western Isles, a very exposed part of the lake, the wind suddenly changed from N.N.E. to N.W., and, as the witnesses describe, blowing a perfect gale, a violent storm raged for several hours. In this storm the captain or master pursued the only course open to him, namely, proceeded onwards towards Hope Island, which was about 13 miles distant. During this storm the sea ran very high, and the waves are described as having rolled over the stern of the scow and piled up on the cargo of lumber 8 feet deep. When off the lee of Hope Island, and after the storm had raged for several hours, it was noticed that the scow had somewhat listed to starboard, and the master, thinking she must have taken in water, endeavoured to get to her for the purpose of pumping her out, but was unable to do so owing to the violence of the storm. The scow immediately after further listed, and then about two-thirds of the deck cargo slid off into the water, and when the cargo moved, the hatches becoming submerged, the hold of the scow at once filled with water. The part of the cargo that slid off drifted, and a large portion of it was blown ashore on the north end of Beckwith Island, and the remainder was lost. In the condition which the vessel then was, with the hold filled with water, there were no means at hand by which the master could in any way rescue the lumber, and

he proceeded with his vessel and remainder of cargo thereon to the nearest dock, Christian Island, from which point he despatched a message to the defendants informing them of the loss (which however did not reach defendants till after plaintiff's arrival at Midland), and plaintiff proceeded to unload and pump out the scow. Having done this, he reloaded and proceeded to Midland, and there delivered about 30,000 ft. of the cargo he had taken on at Byng Inlet. On his arrival at Midland the master at once notified defendants of the loss, and aided them in procuring assistance to collect and rescue the lumber, and at this time plaintiff promised defendants he would deliver the part of the cargo which had slid off when collected, the defendants to load the lumber on the vessel, plaintiff to charge only the freight as per bill of lading, and he then repudiated any liability for the loss.

Plaintiff claims to recover the whole freight, $161.91, being at the rate of $1 per M for 161,914 feet taken on board at Byng Inlet, $15 money paid for unloading and pumping out vessel at Christian Island, $20 money paid for wages of men reloading, and $3 for horse hire, telephones, etc.

Defendants contend that there was an express contract, without any exceptions, to deliver the lumber, and that nothing is due until the whole lumber received is delivered; that the loss was occasioned by the negligence of plaintiff and his servants in not having battened down and covered the hatches of the vessel; and that therefore plaintiff is not entitled to his freight, and defendants are entitled to recover damages by way of counterclaim from plaintiff.

It seems to me that what took place between plaintiff and defendants over the telephone, and what is to be found in the correspondence referred to, only fixed the rate or price for carrying the lumber; there is nothing that would estop plaintiff from afterwards requiring the delivery to him of the usual bill of lading at the port of shipment before clearing with his cargo. This usual bill of lading he did require and obtain, and it contains a provision "excepting dangers of navigation." There was also evidence given tending to shew that it is the custom on these waters to furnish such a bill of lading, and that dangers of navigation are, as such custom, always excepted. Apart from this, I think plaintiff is a carrier by water within the meaning of R. S. C. ch. 82, sec. 2, and that, as to this lumber carried by him, by the terms of the statute, sub-sec. 4 (a) of sec. 2, dangers of

navigation are excepted. Neither this provision of the statute nor the inclusion of it in the bill of lading or contract would protect or relieve plaintiff from liability for damages if his vessel was not seaworthy when it left Byng Inlet, or if the loss arose or was occasioned by the act, default, or negligence of the master or his servants.

The evidence shews that the vessel was seaworthy when she left Byng Inlet; that she had been properly and carefully loaded. The hatches were not battened down or covered with tarpaulin, but the short lumber was built up solidly through the hatches, and the hatches were covered over with the lumber. There was also evidence given and not contradicted shewing that on vesesls of this character the hatches were never battened down or covered with tarpaulin, though on much larger vessels loaded with lumber it is the practice to do so.

I find that the loss was occasioned by storm and tempest, during which the water rolling over the vessel and the working of the lumber on the deck let in water that caused the listing and upsetting of the cargo and consequent loss, and I am unable to say that there was any want of skill or any neglect or default on the part of the master or his servants that occasioned the loss.

It is pointed out in Mr. Lewis's Work on Shipping, p. 32, citing Haradon v. Practor, 9 Q. B. 592, that where "loss by dangers of navigation is excepted in a bill of lading and the vessel is lost in a storm, the master must prove the loss by the storm, and it then lies on the merchant's part to prove want of skill or negligence on those in charge of the vessel." This onus defendants have not satisfied.

I find therefore that plaintiff is entitled to recover his freight, but only for the quantity of lumber actually delivered. The evidence shews that there was taken on board 161,914 feet, and of this 4,303 ft. deals and 2,658 ft. of Norway was lost, leaving 155,620 ft. delivered, which includes the lumber collected and gathered, said to be 125,620 ft.: see Lewis on Shipping, p. 52. This at $1 per M amounts to $155.62. Plaintiff is not entitled to the $15 paid out for unloading and reloading scow at Christian Island, but is entitled to $1 expended by him as shewn by his bill as first

rendered for horse hire, etc., and to the sum of $20 paid out to defendants' men for reloading vessel at request of defendants' agent, making a total of $176.62, for which I direct judgment to be entered for plaintiff against defendants with costs of the action. And I dismiss defendants' counterclaim without costs.

MAY 26TH, 1906.

C.A.

MILLOY v. WELLINGTON.

Husband and Wife—Criminal Conversation—Action against Seducer—Defence — Abandonment of Wife—License to Commit Adultery—Damages—New Trial—Miscarriage—Appeal.

Upon the settlement of the minutes of the judgment of the Court of Appeal delivered on 23rd February, 1906 (ante 298), it appeared that there had been some misunderstanding as to the terms of the consent on which the Judges composing the Court supposed they were acting, and the terms of the judgment were discussed by counsel before the Court.

E. B. Ryckman and C. S. MacInnes, for defendant.

W. R. Smyth, for plaintiff by revivor.

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

OSLER, J.A.:—My former judgment is to be considered as withdrawn, and is not to be made use of or referred to by either party in the subsequent proceedings in the case.

We cannot, in my opinion, hold upon the evidence that the deceased plaintiff had lost his right of action. Even if the mere abandonment of the society of the wife or a separation between the husband and wife were a defence in an action of this kind—and it would seem to have been so held on demurrer by a divided court in Patterson v. MacGregor, 28 U. C. R. 280—the evidence, fairly read and without resting on any merely isolated expressions, warranted the jury in

finding that there had been no final abandonment nor any final separation between the parties, though they were, no doubt, and had for a long time been, living apart when defendant, supposing that he had the right to do so, and perhaps even ignorant of their former relations, assumed to intermarry with plaintiff's wife. Plaintiff, therefore, had not forfeited the right, whatever may be its value, to complain of the insult and wrong inflicted upon him by the seduction of his wife and of the loss of the matrimonial consortium, all chance of the renewal of which was certainly put an end to by the conduct of defendant, however venial that, in the circumstances, may be thought to have been. Speaking for myself, I agree with the opinion of the dissenting Judge (Wilson, J.) in Patterson v. MacGregor, and with his view of the authorities, rather than with that of his learned colleagues, and it may be noted that the Chief Justice (Richards, C.J.), though concurring with Morrison, J., in the disposition of the demurrer, added that in a court of appeal he might, on further consideration, arrive at a different conclusion. The express license of the husband to do the wrong complained of is, of course, a defence, but, unless abandonment, taking place before adultery, can be regarded as amounting, in the circumstances, to connivance or general license to the wife to misconduct herself with any one, it is not, in my opinion, an answer to the husband's action, though it may well "be taken into account as a very important element operating in diminution of the damages." . . .

[Reference to cases cited by Wilson, J., in Patterson v. MacGregor, and to Evans v. Evans, [1899] P. 195; King v. Bailey, 27 A. R. 703.]

Defendant's appeal from the judgment of the Divisional Court must, therefore, be dismissed, because the case could not have been withdrawn from the jury on any such ground, sc., abandonment, as is now contended for.

Plaintiff's cross-appeal from that judgment must also be dismissed because there was a plain miscarriage at the trial in more than one respect. . . .

The appeal and cross-appeal are dismissed with costs.

OSLER, J.A. MAY 28TH, 1906.

C.A.-CHAMBERS.

KIRBY v. TOWNSHIP OF PELEE.

Appeal to Court of Appeal—Extending Time for—Excuse for Delay—Importance of Case — Costs — Objectionable Affidavit.

Motion by defendants to extend the time for setting down appeal from the report of the Drainage Referee.

W. D. McPherson, for defendants.

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

OSLER, J.A.:—The motion was launched upon an affidavit of the reeve of defendants, sworn on 2nd May, 1906, in which he states that he "is advised and believes" that the report of the Referee was filed on 2nd December, 1905; that notice of appeal was given on 23rd January, 1906; that on 24th February, 1906, the draft of the appeal was served upon plaintiff's solicitor, but had not been returned; that the evidence and exhibits are now ready for the printer, and he has the same in the hands of the printer, so that the appeal books will be ready in a few days. The excuse for the delay, as stated by the deponent, is that the township is an island in Lake Erie, 16 miles from the mainland, and in the winter time for weeks at a time, and sometimes for over a month, it is impossible to have any communication with the mainland; that the telephone cable between the island and the mainland is most of the time out of order during the winter season, so that no communication can be had in that way, and is out of order at the present time; that some of the exhibits put in at the trial were taken back to the island after the trial, and, owing to the isolated condition of the island, communication could not be had so that the exhibits could be returned "until recently" for the purpose of being printed. In deponent's belief the appellants have a good right of appeal, and the application is made bona fide.

A further affidavit on behalf of the defendants was afterwards filed, made by one Wilkinson, whose firm has the contract for conveying the Pelée Island mail between the post office at Leamington and Point Pelée, where the mail, during the winter months, is landed from Pelée Island. The deponent states that during February last "only" three mails

were received from or despatched to Pelée Island; that there was no mail between 19th February and 1st March last, and none between 7th March and 19th March; and on at least three occasions, on account of the quantity of mail and the condition of the weather, the mail carrier was unable to take all the mail for the island on one trip, and was forced to leave a considerable part of it until he could make another trip, and this would detain that portion of his mail for several days more.

For plaintiff was filed an affidavit made by one Selkirk, the postmaster at Leamington, who operates the telephone cable between Pelée Island and the mainland and handles the winter mail service between the same. Mails were received and despatched on the 9th, 11th, 17th, 24th, and 30th January. In February, received 7th, 13th, and 18th, and despatched 6th, 13th, and 19th of the month. In March received and despatched, 1st, 17th, 19th, 25th, and 28th. In April 8 mails were received and despatched. Mails were often delayed owing to rough weather and moving ice, so that they did not always reach the island on the same days as those on which they were despatched from Leamington, and sometimes were delayed several days before leaving Pelée Island. The same deponent states that the telephone service and connection between Pelée Island and the mainland was maintained in good order and in continuous and uninterrupted service from 23rd January to 23rd April, except from 24th January to 28th January.

An affidavit of plaintiff, who describes himself as a barrister-at-law, states that reasons against appeal were delivered and service admitted on 27th February, and that the appeal bond was filed on 22nd February; that after the time for delivery of the appeal books had expired he "inquired and requested delivery thereof, and was advised that they were not printed for the reason that the defendants had failed to provide funds therefor and to carry on the appeal."

He also states generally that for more than a month before the time for setting down the appeal, steam and sailing boats plied between Pelée Island and the mainland carrying passengers and freight, and the mail carrier would, besides, have brought at any time the exhibits referred to in the reeve's affidavit.

Upon considering the affidavits, I am of opinion that no sufficient excuse has been established for extending the time

for setting down the appeal or for the omission of the appellants to set it down for the sittings which began 23rd April. The absence of any affidavit from the defendants' solicitors is very significant. It ought to have been shewn when the exhibits required were first written for, and when they were received from the island, and it does very clearly appear that, whatever delay and difficulties there may have occasionally been in communication between the island and the mainland, abundant time remained in which to have surmounted them all, and to have procured the necessary papers in time to have got the appeal books ready and to have set the case down for the last session of the Court. No application was made until long after that session began. I do not even know, except from a not very firm statement from one of the counsel who appeared on the motion, what is the nature of the action, and no one could suggest the nature of the defence or the amount of the referee's award. This may be but trifling, and it rested with the appellants to shew that the case was of so important a nature, either from the magnitude of the amount at stake or from the questions of law involved, that justice required that the delay on their part should, on some terms, be overlooked. This has not been shewn, and I must therefore dismiss the motion. I do so without costs because of the language used in plaintiff's affidavit. It serves no purpose, and is especially objectionable in the affidavit of a professional gentleman, to stigmatize statements in the affidavit of another deponent as "absolutely false to his knowledge," or as "cunningly devised and deliberately made to produce innuendoes false to his knowledge and intended to mislead." It is enough to state the facts as the deponent understands them, leaving it to the Judge to determine between opposing statements.

MAY 28TH, 1906.

DIVISIONAL COURT.

YEMEN v. MACKENZIE.

Land Titles Act—Registration of Caution—Application to Vacate—Status of Applicant—Registered Owner Impeaching Mortgage — Determination of Invalidity of Mortgage by Local Master of Titles—Jurisdiction.

Appeal by plaintiff from order of BRITTON, J., ante 201, dismissing plaintiff's appeal from order of local Master

of Titles for Rainy River South Division, upon an application by plaintiff to terminate a caution registered by defendants, finding that a certain mortgage was invalid as against the wife of Alexander Mackenzie, as having been obtained without consideration and executed without independent advice, and ignorantly and under pressure.

W. Proudfoot, K.C., for plaintiff, contended, first, that the local Master was disqualified from hearing the case, he being a partner of defendants' solicitor.

[Counsel agreed that the Court should hear the case, on the evidence adduced before the Master, without regard to the opinions expressed by the Master or Britton, J.]

Proudfoot then contended that the Master had no jurisdiction to determine the validity or invalidity of the mortgage, and that the finding on the evidence should be in his favour.

Frank Ford, for defendants, contra.

THE COURT (FALCONBRIDGE, C.J., MAGEE, J., MABEE, J.), held that under Rule 22 in the schedule to the Land Titles Act, plaintiff had no status to apply to discharge the caution registered by defendants, nor did secs. 75 and 82 of the Act assist plaintiff. Also, that the Master had no authority to deal with the merits of the case as regards the mortgage, and his finding thereon should not prejudice plaintiff in any proceeding hereafter taken in any forum.

Appeal dismissed, with that reservation. No costs here or below.

MAY 29TH, 1906.

DIVISIONAL COURT.

RE FAULDS.

Infant—Custody—Rights of Father—Maternal Grandmother—Religious Faith—Temporal Welfare of Child—Fitness for Custody—Agreement—Habeas Corpus—Terms—Payment of Cost of Maintenance.

Appeal by Isabella Gibbs, the maternal grandmother of the infant Eva McD. Faulds, aged eleven, from order of

ANGLIN, J., ante 759, awarding the custody of the infant to her father, John F. Faulds, upon an application on the return of a habeas corpus directed to the appellant.

W. A. McMaster, Toronto Junction, for appellant.

W. E. Middleton, for J. F. Faulds, respondent.

THE COURT (FALCONBRIDGE, C.J., MAGEE, J., MABEE, J,), held that R. S. O. 1897 ch. 259 had no application to this child, and no terms as to payment of cost of maintenance of child while in custody of her grandmother could be imposed upon the father. Upon the merits the Court failed to find anything to criticize in the judgment of ANGLIN, J., either as to facts or law, and, entirely agreeing with it, dismissed the appeal with costs.

CARTWRIGHT, MASTER. MAY 30TH, 1906.

CHAMBERS.

LEFURGEY v. GREAT WEST LAND CO.

Trial—Postponement—Necessary Witnesses—Members of Parliament—Refusal to Attend during Session.

Motion by defendant to postpone trial.

J. E. Jones, for defendants.

J. W. Bain, for plaintiff.

THE MASTER:—The ground of the motion is that one of the defendants is a member of the House of Commons, which is now in session, and that at least one other member will be required in support of the defence, and that they are unwilling to attend the trial during the session.

It was contended by Mr. Bain that this was no reason for postponing the trial. It was, however, decided otherwise as long ago as Rees v. Attorney-General, 2 Ch. Ch. 386. This I followed in Kidd v. Kidd (20th April, 1906), where the defendant was a member of the Legislative Assembly of Ontario. . . .

[Reference to Cox v. Prior, 18 P. R. 492.]

Order made as asked. Costs in the cause.

MAY 30TH, 1906.

DIVISIONAL COURT.

BLACK v. ELLIS.

Pleading—Statement of Claim—Frivolous or Vexatious Action—Prolixity — Municipal Corporation — Contract for Purchase of Electric Plant—Allegations against Mayor—Alterations in Contract—Ratification by Council—Injunction—Parties—Rule 261—Stay of Action—Amendment —Costs.

Appeal by defendants from order of ANGLIN, J., ante 490.

A. E. Fripp, Ottawa, for defendant Ellis and defendants the corporation of the city of Ottawa.

C. A. Moss, for defendant liquidator of the Consumers' Electric Co. of Ottawa.

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

THE COURT (FALCONBRIDGE, C.J., MAGEE, J., MABEE, J.), dismissed the appeal with costs, agreeing with the opinion of ANGLIN, J.

MAY 30TH, 1906.

DIVISIONAL COURT.

BANK OF OTTAWA v. HARTY.

Cheque—Forged Indorsement of Payee—Deposit with Bank by Customer for Collection — Indorsement by Customer after Payee—Payment by Drawee Bank — Refund when Forgery Discovered—Liability of Customer—Bills of Exchange Act—New Trial—Questions for Trial.

Appeal by plaintiffs from judgment of BOYD, C., 6 O. W. R. 925, dismissing action as against defendant Harty with costs. The action was brought to recover from Harty, a

customer of plaintiffs, $573, the amount of an overdrawn account, and to recover from McEwan and Harty the balance due upon a cheque indorsed by McEwan and then by Harty and deposited to credit of the latter. Subsequently it transpired that the indorsement by McEwan was not that of the payee. The trial Judge held that the plaintiffs had not established by evidence that a forgery had been committed. It was not proved against Harty that McEwan was not entitled to the money.

The appeal was heard by MEREDITH, C.J., MACLAREN, J.A., TEETZEL, J.

W. E. Middleton, for plaintiffs.

M. J. O'Connor, Ottawa, for defendant Harty.

TEETZEL, J.:—The Chancellor dismissed the action against defendant Harty because the evidence, which was most imperfectly given, failed to prove that defendant McEwan was not the real McEwan named in the cheque, and that he had no right to indorse if as he did; but upon the main question, as to the liability of defendant Harty, assuming that the indorsement of the cheque in question by defendant McEwan was a forgery, the trial Judge expressed no opinion.

The motion was for a new trial, on the ground of surprise, and upon the argument we expressed the opinion that plaintiff had established a case for a new trial upon terms; but counsel for defendant Harty argued that, assuming that the Court should find that the indorsement was a forgery, defendant Harty could not, upon the evidence, he held liable to plaintiffs, and consequently a new trial in reference to the question of forgery would be fruitless, and we were asked therefore to determine his liability, assuming that the indorsement was a forgery.

For the purpose of considering the question, I adopt the following findings of fact by the trial Judge:

"Defendant McEwan, being in possession of the cheque in question, of which he claimed to be the owner, indorsed and handed it to the other defendant, Harty, to be collected and paid over to him, McEwan. Defendant McEwan appears to be unversed in affairs, and went to the other defendant as one who had done business for him. I find on the

facts, so far as given in evidence, that Harty believed McEwan to be the owner and entitled to receive the money. He handed the cheque to the bank (plaintiffs) to be collected, in order that the money might be obtained for McEwan. The money, being paid in New York, was transmitted in effect to plaintiffs, and by them paid out to the extent of $659.25 on Harty's cheque, which was marked "Re McEwan." He forthwith took the money and paid it to McEwan, and had at the same time and on the same day a settlement of accounts with McEwan (who owed him $90), with the result that the balance of $90 in the bank, proceeds of the McEwan cheque, was left there as the money of Harty. The matter was thus closed on 9th January, 1905; on 18th May plaintiffs advised Harty that the New York bank had revoked the payment of the cheque, on the ground that the payee's name had been forged, and re-claimed the money from Harty.

Additional undisputed facts are that Harty saw defendant McEwan indorse the cheque; that he told the bank manager that he knew McEwan, the indorser; and, when the manager said he would cash the cheque at once if Harty would indorse it, he declined, stating that he knew nothing about the cheque except what McEwan told him, and the cheque might not be paid; whereupon he was told that for the purposes of collection he would have to witness the indorsement. This he did, writing beneath his name the words, "without any recourse to me whatever," whereupon plaintiffs in the usual course of business indorsed the cheque, guaranteeing "all prior indorsements" and forwarded it to New York for collection.

Plaintiffs having repaid the money to the New York bank, the amount of the cheque was charged back to defendant's account, and the action is to recover moneys lent or advanced to defendant by way of overdrafts, and in the alternative plaintiffs allege misrepresentation by both defendants as to the indorsement, relying upon which plaintiffs guaranteed the indorsement, collected the amount, and were afterwards compelled to refund the same, etc.

Defendant Harty, having acted honestly, would not be liable unless his representations and the other facts constitute a contractual responsibility. . . .

[Reference to White v. Sage, 19 A. R. 135; Derry v. Peek, 14 App. Cas. 337.]

In the present case the money was paid by plaintiffs not to the forger, but to defendant Harty, and while he (Harty) would clearly not be liable in an action for deceit, I think the facts constitute a contract of warranty by him that he was entitled as agent for the rightful owner of the cheque to request plaintiffs to collect it and to pay the proceeds to him as such agent when collected, and that, assuming that the indorsement was forged, defendant is liable to repay, under the rule laid down in Collen v. Wright, 8 E. & B. 647, and followed in many subsequent cases. . . .

[Reference to Dickson v. Reuter, 3 C. P. D. at p. 7; Fairbanks v. Humphreys, 18 Q. B. D. 54; Oliver v. Bank of England, [1902] 1 Ch. 610; Starkey v. Bank of England, [1903] A. C. 114; Mayor of Sheffield v. Barclay, [1905] A. C. 392.]

In the present case the defendant, having in his possession the cheque purporting to be properly indorsed, was, if not by express words, by unequivocal conduct, throughout asserting that he was the agent of the lawful holder and authorized by him to employ plaintiffs to make collection and to receive from them the proceeds, and by such conduct also invited plaintiffs to do as they did.

Upon the faith that he had that authority, plaintiffs were induced to take the cheque, guarantee the indorsement, and pay over to defendant the proceeds when collected.

If the indorsement was a forgery defendant's assertion of authority was untrue, and upon the above authorities he must be treated as having undertaken that it was true, and therefore is personally liable to plaintiffs for any loss sustained on account of its falsity.

Upon payment by plaintiffs of the costs of the former trial and of this appeal, there will be a new trial, confined to the two questions, whether the indorsement was a forgery, and if it was, the amount of plaintiffs' loss.

MEREDITH, C.J., gave reasons in writing for the same conclusion.

MACLAREN, J.A., concurred.

CARTWRIGHT, MASTER. MAY 31ST, 1906.

CHAMBERS.

HOGABOOM v. HILL.

Default Judgment—Writ of Summons not Specially Indorsed —Setting aside—Delay in Moving—Issue of Execution.

Motion by defendant Hill to set aside a writ of fi. fa. goods issued pursuant to an order made ex parte on 16th February, 1906, under a judgment of 4th January, 1894, as well as the judgment itself.

G. H. Kilmer, for defendant Hill.

W. N. Ferguson, for plaintiffs.

THE MASTER:—It was contended: (1) that the order should not have been made ex parte; and (2) that the writ of summons was not specially indorsed within the meaning of No. 245 of the Consolidated Rules of 1888.

I agree with the second contention, so that it is not necessary to deal with the first.

The writ not being specially indorsed, the judgment was a nullity (see McVicar v. McLaughlin, 16 P. R. at p. 452), and defendant has not done anything to raise an estoppel against him: see Piggott v. French, ante at p. 784. The defendant denies any knowledge of the entry of judgment. This is to some extent corroborated by the fact that the affidavits of service, though made out, were never sworn to, or, if so, were never signed by the commissioner, and therefore cannot be considered as sworn.

The writ and judgment should therefore be set aside as against Hill, with costs to him in any event. He should appear forthwith and facilitate trial if he intends to defend the claim.

CARTWRIGHT, MASTER. MAY 31ST, 1906.

CHAMBERS.

McCONNELL v. ERDMAN.

Costs — Set-off — Interlocutory Costs — Appeal to Court of Appeal—Jurisdiction of Master in Chambers.

Motion by plaintiff for an order setting off costs, etc.

C. J. Holman, K.C., for plaintiff.

J. H. Spence, for defendant.

THE MASTER:—The facts of this case are set out in the judgment of the Court of Appeal in 6 O. W. R. 451.

Pursuant to that judgment, plaintiff's costs of setting aside the award have been taxed at $96.04. This makes due to plaintiff for costs $333.13, besides his verdict for $140.60. Defendant's costs in the Court of Appeal have been taxed at $131.05. Plaintiff asked defendant's solicitor to allow that to be set off and to consent to the $200 paid in as security for the appeal being repaid to plaintiff. But this was not done, and the present motion became necessary for an order allowing a set-off.

It was conceded that defendant was financially worthless. But it was contended that these were not interlocutory costs within the meaning of Rule 1165. The contrary, however, has been decided by Mr. Justice Osler in Young v. Hobson, 8 P. R. 253, as to costs of an appeal to a Divisional Court. The further appeal to the Court of Appeal is only a step in the cause or action, but a still further appeal is not so, whether to the Supreme Court or the Privy Council: Centaur Cycle Co. v. Hill, 7 O. L. R. at p. 412, 3 O. W. R. 255, per Maclennan, J.A.

It is plain from Clarke v. Creighton, 14 P. R. 34, that the motion can be made to the Master in Chambers. But defendant's solicitor should have consented to what was asked without any motion.

The order will go with costs.

CARTWRIGHT, MASTER. JUNE 1ST, 1906.

CHAMBERS.

KENNEDY v. HILL.

Particulars—Statement of Defence—Action to Establish Will—Defences of Want of Testamentary Capacity and Revocation.

Motion by plaintiff for particulars.

L. V. McBrady, K.C., for plaintiff.

W. Proudfoot, K.C., for defendant.

THE MASTER:—This is an action to establish a will the validity of which is disputed. The statement of defence, amongst other grounds, alleges in paragraph 3 that the testator was not of sound testamentary capacity at the time of signing the will. In paragraph 5 it is alleged that if the will propounded was a proper will at the time of making, it was afterwards revoked by the testator.

Plaintiff has moved for particulars of the 3rd paragraph, as to the grounds relied upon by defendant as shewing want of testamentary capacity at the time when deceased became of unsound mind, etc., also for particulars of the statement in the 5th paragraph shewing when and how the revocation was effected.

So far as the 3rd paragraph is concerned, I do not think the motion can succeed. The grounds on which it will be sought to shew want of testamentary capacity are matters of evidence, and as such cannot be required to be given at this stage. Nor does it seem to be necessary for plaintiff to know the time when the testator is alleged to have lost any testamentary capacity. The material fact on which defendant will rely and must establish is that on 4th July, 1903, when the will in question was executed, the testator was not compos mentis. How soon before that date his mind was affected is not material, though his prior mental condition will no doubt be gone into at the trial.

As to paragraph 5, I think the motion should succeed. The plaintiff is entitled to know now on what facts defendant

relies as shewing a revocation, so that if necessary he may reply thereto.

Though not perhaps conceivable in the present case, yet in other cases it might be intended to rely on a subsequent marriage. If this were so, then the fact should be stated so that plaintiff might set up, e.g., that though a ceremony was gone through there was, for good reasons, no actual and valid marriage. The defendant should give a definite statement of the acts of the testator which are relied on as shewing revocation.

In the 4th paragraph it was alleged that the execution of the will in question had been obtained "by fraud and undue influence." Particulars of these were also moved for. On the argument it was conceded that particulars of undue influence could not be required, and defendant agreed to strike out the allegation of fraud.

The order will go as above, with costs in the cause, as success has been divided.

ANGLIN, J. JUNE 1ST, 1906.

TRIAL.

MACOOMB v. TOWN OF WELLAND.

Highway—Dedication—User—Evidence of — Parties—Attorney-General—Municipal By-law—Plans—Registration.

Action for a declaration that the portion of the River road leading from Port Robinson to Welland along the bank of the Chippewa creek, or Welland river, lying between Burgar street and Dorothy street, in the town of Welland, was not a highway, but was the private property of plaintiffs. The plaintiffs owned the lands which lay along the eastern boundary of this portion of the River road, and maintained that their respective properties extended to the water's edge of the river, and included the strip of land in question. The defendants contended that this portion of the River road was a highway.

G. Lynch-Staunton, K.C., and T. D. Cowper, Welland, for plaintiffs.

E. D. Armour, K.C., and G. H. Pettit, Welland, for defendants.

ANGLIN, J.:—This road has been continuously travelled by the public since the district was first settled. To the south of plaintiffs' properties it enters Hellems avenue, by which it affords direct access to the main street of the town of Welland.

Prior to 1855 this River road appears to have been the main avenue of communication between Port Robinson and Welland. In that year one Thomas Burgar, who then owned the properties now held by plaintiffs and other adjacent lands, agreed with the municipal corporation of the township of Crowland, in which these properties were then situate, to dedicate to the public as highways and to open up for traffic the streets now known as Burgar street and Dorothy street, and, in consideration of his doing so, the municipality agreed to close up and convey to him the portion of the River road now in uestion. For this purpose a by-law was passed, the legality and sufficiency of which defendants expressly admit, and a conveyance to Burgar was duly executed by the reeve, which, the defendants admit, vested the title to the strip of land in question in Thomas Burgar. Whatever rights, if any, to the soil and freehold may have remained outstanding in the Crown, I shall not deal with. Their admission estops the defendants from questioning that the fee of the land in dispute was by the conveyance of 1855 from the reeve of the township of Crowland vested in Thomas Burgar. Upon that admission the disposition of this action will proceed.

As, therefore, this land must, for the purposes of this action, be deemed to have become private property in 1855, if a highway now exists upon it, it must be by virtue of an express or implied dedication thereof by the owner for the purpose of a highway since that date. Because such private dedication would vest in the municipality not merely the surface, but also the soil and freehold of the highway (Roche v. Ryan, 22 O. R. 107, 109, and Mytton v. Duck, 26 U. C. R. 61) it is unnecessary, for the purposes of the present action, that the Attorney-General should be added as a party.

The by-law, pursuant to which the conveyance to Thomas Burgar was made, contains the following clause:—"And be it further enacted that the said Thomas Burgar shall have the right to close up the said road as soon as the above mentioned streets are opened for public use and travel. And that the said road allowance and the said Welland river road shall, from and after the day the said Thomas Burgar shall open

for public travel the said Main street and Burgar street, given in lieu thereof, cease to be public roads or highways, and shall be and remain for ever closed up, and the right of the public to travel thereon shall cease and determine."

The conveyance to Burgar was absolute in form, however, and it is not contended by defendants that the paragraphs above quoted from the by-law derogated in any way from his rights under his deed.

The evidence establishes that until about the year 1873 Burgar street was unfit for use as a public highway. Indeed to travel upon it was so dangerous that a fence was erected across it and maintained by Thomas Burgar. Meantime the public continued to use the River road as it had been used prior to 1855. The precise date at which Burgar street was opened for use as a road is, upon the evidence, somewhat uncertain. But I accept the statement of George H. Burgar, a witness called by plaintiffs, that this street was so opened in 1873 or 1874. I regard his testimony as more reliable upon this point than that of David Ross, a witness called in rebuttal. Until Burgar street was opened, all the traffic which came from the north upon the River road continued along that road past plaintiffs' properties. Since Burgar street was opened, this traffic has been divided. But no attempt has been made at any time to close the portion of the River road in question, and the public have continuously used it without let or hindrance. From time to time some public money has been spent upon this portion of the road in scraping and ditching it, and some years ago the municipal corporation laid a narrow plank sidewalk on its east side, running north from Dorothy street for a short distance.

The paper title of plaintiffs to the strip of land in dispute is clearly made out, except that some of the mesne conveyances affecting the title of plaintiff Wells contain in the habendum the following clause: "Subject, etc., and to any right which the public may have in that portion of said lot now used as a highway across said lands." The conveyances in the chain of title of plaintiff Macoomb do not appear to contain any such reservation.

In 1875 two plans were registered, which are indorsed with certificates of approval by the municipal corporation of the village of Welland. Upon these plans the lines of lot "A.W.," one of the lots comprised in the property of the plaintiff Wells, extend across the River road and to the water's edge

of the river. A plan prepared for the trial of this action, and admitted by defendants to be correct, shews the same lines carried in like manner to the water's edge. But all three plans shew the River road as a continuous highway crossing the properties of plaintiffs.

These plans seem to make little or nothing for the contention of either party.

A predecessor in title of plaintiff Wells, one McGlashan, in the year 1886 planted a hedge along the west limit of the River road, thus separating the lands which he occupied from the roadway. This hedge is still upon the border of the travelled road. Miss Helen McGlashan, a witness for plaintiffs, says that her father planted this hedge because "he did not wish to fence off the place from the road." He also had a wire strung upon posts outside of the hedge "to protect it." This hedge is said to have been planted upon what had theretofore been the via trita of the River road, and to have compelled people using this road to drive closer to the edge of the river bank. Miss Maggie McGlashen says that the reason her father planted the hedge was that "he did not want to make any marked line; he did not wish to distinguish this portion of the property from any other portion. The hedge was just there for a shield." These statements by the Misses McGlashan of their father's intentions are, I think, inadmissible as evidence. It is notable, moreover, that in the conveyance to McGlashan in 1884 occurs the reservation of "any right which the public may have in that portion of said lot now used as a highway across said lands." This conveyance is from Alexander J. McAlpine, who owned this part of the property from 1871 to 1884. He gave evidence at the trial that during his ownership he never objected to the public going across; he put up a fence to confine the traffic to the roadway proper; and he supposed that belonged to the public. The same reservation is found in the deed of another portion of the property from Alexander J. McAlpine to Adolphus Williams, in 1873.

"In all these cases of right of way," says Buckley, J., in Attorney-General v. Esher Linoleum Co., [1901] 2 Ch. 647, at p. 649, "it is necessary to remember that the thing to be established is dedication, not user. A highway is not acquired by user. You cannot acquire a right of public way under the Prescription Act. If you want to acquire a right by prescription you must go back to the time of Richard

I., to a time before legal memory. In most of these cases dedication, it is true, is proved by user. But user is but the evidence to prove dedication; it is not user, but dedication, which constitutes the highway; therefore what always has to be investigated is whether the owner of the sail did or did not dedicate certain land to the use of the public."

The clear distinction between the assumption by the municipality which is requisite to render it liable for non-repair, and the dedication by the land-owner which is essential to extinguish his title to the land, must be always borne in mind. It is the latter and not the former which must here be looked for.

The conduct of the predecessors in title of plaintiffs in permitting the user of the River road, between Burgar street and Dorothy street, as a highway for some 18 years subsequent to 1855, might perhaps be ascribed to their recognition of the clause above extracted from the township by-law, as an unfulfilled condition, which prevented their exercising full rights of ownership over the strip of land in question. But no such explanation of their allowing its uninterrupted user as a highway, since 1873 or 1874, can be suggested. The right to close it up, if theretofore incomplete, then became absolute.

"Enjoyment for a great length of time ought to be sufficient evidence of dedication, unless the state of the property has been such as to make dedication impossible:" The Queen v. The Inhabitants of East Mark, 11 Q. B. 877, 883. Here the enjoyment of this strip of land as a highway has been uninterrupted for over 50 years since the grant to Burgar and for over 30 years since the right to prevent such user was, upon the evidence adduced by plaintiffs, fully established.

Plaintiffs' predecessors in title were aware of this user, and took no steps to interfere with or interrupt it. Apart altogether from the reservations in the deeds, and the planting of the hedge, which seem to affect only plaintiff Wells, the evidence of dedication seems irresistible: Frank v. Corporation of Harwich, 18 O. R. 344; Fraser v. Diamond, 10 O. L. R. 90, 5 O. W. R. 436.

I am unable to distinguish this case in principle from Mytton v. Duck, 26 U. C. R. 61, not cited at bar. In that case a road, of which the origin was obscure, but which had

been travelled for 40 years across a lot patented to plaintiff in 1836, was held to be a highway, because "the user for 30 years after the patent would be conclusive evidence of a dedication as against the owner, and such dedication was equivalent to a laying out by him, so that the road, under C. S. U. C. ch. 54, sec. 336 (now sec. 601 of the Con. Municipal Act, 1903), was vested in the municipality." . . .

Here there has been a user by the public of the strip of land in question for 53 years since the grant to plaintiffs' predecessors, which, upon the admissions, vested the title to such land in plaintiffs. Even if this user for the first 20 years should not be taken into account, because of the special clause in the by-law of 1855 above quoted, there has been, since the right to close up this portion of the River road became absolute, in 1873 or 1874, 32 or 33 years of uninterrupted user before the bringing of this action, sufficient, upon the authority of Mytton v. Duck, "to establish conclusively a dedication."

This action therefore fails and must be dismissed with costs.

JUNE 1ST, 1906.

DIVISIONAL COURT.

WOODWARD v. OKE.

Patent for Invention — Improvement in Automatic Drill Turners — Patentability — Use of Friction as a Motive Power—Novelty—Anticipation—New Combination of Old Elements—Infringement—Colourable Imitation.

Appeal by defendant from judgment of ANGLIN, J., in favour of plaintiff in action to restrain defendant from infringing plaintiff's patent for improvements in automatic drill turners, dated 3rd June, 1902, and for damages for past infringement.

Defendant denied the infringement and alleged that the article manufactured by him was from his own device, patented on 9th August, 1904.

The trial Judge found that defendant had infringed plaintiff's patent, granted an injunction, and assessed the damages for past infringement at $289.

G. H. Watson, K.C., and F. W. Wilson, Petrolia, for defendant.

W. E. Middleton and I. Greenizen, Petrolia, for plaintiff.

The judgment of the Court (MEREDITH, C.J., TEETZEL, J., CLUTE, J.), was delivered by

CLUTE, J.:—Plaintiff's automatic drill turner is described in the patent as being composed of 3 parts: A., a solid metal collar attached to end of cable, with cone-shaped shoulder; parts B. and C. consist of a metal collar made in two parts joined by a thread, as shewn in the drawings, surrounding part A., and fitting it sufficiently loosely to permit part A. to move freely when weight is removed from the friction cone bearing G., upon which the weight of the drilling stem, jars, and bit, rest when being raised. . . .

It is said that heretofore, in drilling by the ordinary method, it has always been necessary for a man to stand and turn the drill by hand at each stroke in order to keep the hole round and straight, and this result, it is alleged, is secured by this invention automatically by utilizing the twist in the rope and the force of gravitation applied to this invention to do the work. When the weight of this machine, which varies from 1 to 3 tons, is attached to the suspended wire cable, the weight will cause the said cable to partly untwist, and, when the drill descends and for a moment the weight is taken off, the rope or cable, being attached to the inner shell or cylinder, will twist back again as it was before the weight was applied. The effect of this is, that the drill, instead of striking in the same place, turns automatically with each stroke, thus striking another part of the rock with each turn and cutting an even and round hole. The result is obtained by the weight of the outside shell or cylinder resting on the shoulder of the inner shell, and thus, when the machine is raised, the mere weight is sufficient to make the whole machine, for the purpose of movement, one solid piece. Its weight untwists the rope, and so causes it to slightly turn. When the stroke is complete, the drill rests for a moment,

the weight is taken off, the rope resumes its former condition, and is so made ready, by its renewed strength in the twist, to give the next turn.

The invention is undoubtedly useful, and supplies a long-felt want. Its mechanism is so simple that it is almost impossible for it to get out of order, and it is most effective to do the work required, saving the work of a man and doing the work more truly than before.

But it is asserted by defendant that the invention is not new; that it was anticipated by an American patent, dated 26th June, 1894, and called "Ball bearing drilling swivel," issued to W. Swan. . . .

On a careful comparison of the specifications, drawings, and model of plaintiff's patent with the Swan patent, it will be seen that the Swan patent includes substantially the same parts as are contained in plaintiff's patent, but they are not utilized to the same purpose. In the Woodward patent plaintiff has utilized the friction of the shell or outer casing resting upon the shoulder of the inner cylinder, so that, when the machine is raised, the weight is applied and the cable untwists, thus turning the drill. In the Swan patent this object is attained by an entirely different method. As pointed out by the trial Judge, it is produced by the pin and socket or clutch, and the friction on the bearing is done away with and destroyed, as much as it could be destroyed, by the application of ball bearings.

The object sought to be attained in both was the same, but the inventor of the Swan patent failed apparently to observe that the result could be obtained by mere friction. This plaintiff discovered, and applied his combination of parts to that end. He was thus enabled to do away with the ball bearings and the ratchet or clutch, and so to simplify the machine that its manufacture would not cost half that of the Swan patent; and, what is still more important, to produce a machine that was effective in its work, which, it is said, the Swan patent was not.

The contention of defendant's counsel as to this branch of the case was, that plaintiff's patent was the mere application of the well known mechanism, the swivel to turn the wheel, and its use for this purpose was anticipated by the Swan drill. In short, that there was nothing new in the

patent, and what was claimed as an invention was anticipated by the American patent. No authorities were cited by either side during the argument.

I am of opinion that this discovery and its application in the manner described in plaintiff's patent was a real improvement in a turning drill, and had all the elements which entitled it to be patented.

It seems almost incredible that an invention so simple should not have been discovered before. The simplicity of the invention is no reason why it should not be patented, if it be new and useful: Powell v. Begley, 13 Gr. 381; Yates v. Great North Western R. W. Co., 24 Gr. 495.

It is true that a mere aggregation of parts, not in themselves patentable and producing no new result due to a combination, is not a subject of a patent: Hunter v. Carrick, 11 S. C. R. 300. But a new combination is good if only an improvement is claimed: Emery v. Iredale, 11 C. P. 106.

In the present case there is undoubtedly contained in the Swan patent a suggestion of plaintiff's patent, but from the evidence and also from the specifications of the two patents, I am satisfied that plaintiff did not hit upon his invention from having read a description of the Swan patent and specifications. . . .

[Reference to General Engineering Co. of Ontario v. Dominion Cotton Mills Co., 6 Ex. C. R. 309.]

No doubt, the swivel is an old mechanical device, but the application to a new purpose of an old mechanical device is patentable, when the new application lies so much out of the track of the former use as not naturally to suggest itself to a person turning his mind to the subject, but requires thought and study: Bicknell v. Peterson, 24 A. R. 427; Penn v. Bibby, L. R. 2 Ch. 127. . . .

It cannot be doubted, I think, that although, when discovered, the method of applying the swivel to its present use, by utilizing the twist of the cable with friction to produce the result, seemed simple and manifest, yet the discovery was new, and its use filled a long-felt want, and produced a machine of great mercantile value at half the cost of the Swan patent and of very great utility. . . .

[Reference to Fulton's Patents, Trade Marks, and Designs, 3rd ed., pp. 35, 56, 58; Taylor v. Scott, 18 R. P. C. 53; Henderson v. Anderson's Foundry Co., 1 App. Cas. 574; Blakey v. Latham, 6 R. P. C. 184; Rickman v. Thierry, 14 R. P. C. 105; Patent Exploitation Limited v. Siemens, 21 R. P. C. 549; Hinks v. Safety Lighting Co., 4 Ch. D. 607; Wallington v. Dale, 7 Ex. 888; Ehrlich v. Ihlee, 5 R. P. C. 437; American Braided Wire Co. v. Thomson, 6 R. P. C. 518; Moser v. Marsden, 10 R. P. C. 350.]

The Swan patent failed to do what was done in the present patent and that which made the latter a perfect success. Instead of using friction as a means for uniting the cylindrical swivel with the shell, so as to form the weight, it provided means by the ball bearing appliances and stuffing box to get rid of the friction, which rendered it necessary to supply another means of uniting the cylindrical swivel with the casing or shell, namely, the ratchet or clutch device. It is further to be noted that, at all events in this country, the twist in the steel cable was never before utilized to provide the power for automatically turning the drill; and, although in the Swan patent this is distinctly referred to and utilized, it is so utilized not by friction induced as above described, but by means of the clutch.

I am of opinion, therefore, that the invention was new and useful, and that it was not anticipated by the American patent.

Coming now to defendant's patent, his specifications state: "The objects of my improvements are to insure the continuous and uninterrupted turning or rotating of such drill-sinker during the working of the line or cable, such improvements being:—1st, to prevent the entrance of small particles or drill cuttings into the bearings of the drill turner; 2nd, to provide continuously lubricated bearings for the drill turner; 3rd, to provide two bearings or surfaces with square (instead of bevel) faces; 4th, to insure by means of a ratchet face or teeth the continuous turning or rotating of the drill sinker. . ."

An examination of defendant's specifications, drawings, and model, shews that defendant's patent corresponds substantially with that of plaintiff as to parts A., B., and C. in plaintiff's patent. To these are added, a stuffing box, or lubricating apparatus, a ratchet, and a square (instead of

bevel) bearing. There is also a washer, making a double square bearing surface, but which, so far as I can see, serves no useful purpose, unless it be to suggest a further difference from plaintiff's patent. It will be seen that the stuffing box is not an essential part of plaintiff's patent. . . .

Here, as in the American patent, the object of the ratchet is to unite the parts the moment the drill is at rest so as to enable the cable to resume its normal twist and be ready for the next turn. Now, this is precisely the result which plaintiff obtains without the ratchet by merely utilizing the friction of the inner and outer shell to effect that object. Why then was the ratchet used? That it was not required defendant well knew. He had plaintiff's patent before him, and the working machines which he sent out for use, and one of defendant's models put in at the trial is without the ratchet. The evidence seems to be pretty plain that it was a hindrance rather than a benefit — more expensive to make and more liable to get out of repair. Indeed, the evidence is that defendant's machine would not work with the ratchet, and that it was only when this part was discarded and the machine was in all respects substantially like plaintiff's, that it would work. But it is said that defendant's patent was a square (instead of a bevel) bearing, and that in this particular it is sufficiently distinguishable from plaintiff's patent. I do not think so. If there is any advantage, it is, I think, with plaintiff's patent, but in this regard the difference is not appreciable. The principle applied is the same, and the means is only colourably different. I am satisfied that defendant's patent is and was intended to be a colourable imitation of plaintiff's.

If plaintiff desires, he may amend the form of the judgment appealed from, as indicated on the argument. In other respects this appeal is dismissed with costs.

FALCONBRIDGE, C.J. JUNE 2ND, 1906

WEEKLY COURT.

RE TOTTEN.

Will—Construction—Distribution of Estate—Shares—Income—Corpus—Survivorship—Period of Distribution.

Motion by the Toronto General Trusts Corporation, trustees of the will of Daniel Totten, under Rule 938, for an

order declaring the construction of the will, as to the distribution of $12,500, part of the estate, the income from which had been enjoyed by the late Henry Totten, who died childless, in conveyance of which a question arose as to when and among whom the sum was distributable.

J. B. Holden, for the applicants.

N. Somerville, for children of Norman and Warren Totten and unborn grandchildren.

C. A. Moss, for Osborne Totten and his adult children.

M. C. Cameron, for infant and unborn children of Osborne Totten.

FALCONBRIDGE, C.J.:—The testator's scheme of distribution was, roughly, to provide an income for his 4 sons during their lives, and on the death of each to hand over the principal to the children of the deceased son, on their attaining the age of 21. Two sons died, leaving children who are now of full age. One son, Henry Totten, died recently without leaving children. The question therefore arises whether the part of the principal representing Henry's share should go to the remaining son and his children, or to them and the children of full age of the sons who predeceased Henry. None of the beneficaries died in the lifetime of the testator, and consequently there has been no lapse.

The testator provided that "all portions of my estate of which but for this provision I might die intestate shall become part of my residuary estate and shall be payable and devisable as near as the then existing circumstances will permit in like manner as hereinbefore directed with respect to such residuary estate, and this provision shall apply as well to lapsing and accruing legacies and shares as to original legacies and shares, and until my estate is finally distributed, my will and intention being that all legacies or shares lapsing or failing of effect shall revert to and be divided among my remaining sons and their issue, in the manner, shares, and proportions hereinbefore directed, as far as may be possible."

It is evident from this that the testator intended the survivors of the sons and their issue to obtain the benefit of the failure of the gift to any one of them and his children. The meaning of the provision as to the "manner, shares, and proportions" is that the share of a deceased son shall go to

swell the principal, but that the remaining sons shall only receive the benefit of the income therefrom for life, and at the death of one of them a then aliquot part of the principal shall be divided among the children if they attain the age of 21. Accordingly, in the present instance, upon Henry's death the income of the principal producing his income will go to the remaining son for his life, and the principal itself will go to his children if they fulfil the conditions, as to attaining 21. The surviving son is the only "remaining" one. And he cannot get the principal because under the scheme of the will he is not to receive more than his share of the income. Costs to all parties out of the estate.

STREET, J. FEBRUARY 4TH, 1902.

TRIAL.

TRUSTS AND GUARANTEE CO. v. ABBOTT MITCHELL IRON AND STEEL CO. OF ONTARIO.

Company—Mortgage to Secure Bondholders—Liberty to Carry on Business—Pledge of Material and Debts to Secure Advances—Powers of Directors—Approval of Shareholders—Ontario Joint Stock Companies Act.

Action on behalf of the bondholders of defendants the Abbott Mitchell Co. against the company and the Bank of Montreal and Camp, Buxton, and Mitchell, to recover certain material, manufactured and unmanufactured, pledged, and certain debts due the defendant company, transferred, to the bank, for advances made.

All the assets of the defendant company had been transferred to the plaintiffs by mortgage to secure the bondholders, "upon trust that the trustees shall permit the company to continue and carry on the undertaking and business of the company at or upon the said works and premises and elsewhere in connection therewith, as the directors may deem expedient;" and the mortgage deed contained a provision that the company might pledge or mortgage the stock-in-trade, finished or unfinished, and the raw material therefor, but might not pledge the real property, fixtures, machinery, or plant, or any part thereof.

A. B. Aylesworth, K.C., and W. J. Boland, for plaintiffs.

A. R. Clute, for defendants the Abbott Mitchell Co.

J. A. Worrell, K.C., and W. D. Gwynne, for defendants the Bank of Montreal.

D. E. Thomson, K.C., and W. N. Tilley, for defendants Camp, Buxton, and Mitchell.

STREET, J., held, in the circumstances of the case, that the directors of the defendant company, notwithstanding the mortgage, had the right to pledge the material to the bank, without a two-thirds vote of the shareholders of the company, as required by the Ontario Joint Stock Companies

Act, sec. 49; and that the directors had power to transfer the debts to the bank, that being a necessary power under sec. 46, in order to carry on the business; and that both securities were valid in the bands of the bank.

Reference to Merchants Bank of Canada v. Hancock, 6 O. R. 285; Macdougall v. Gardiner, 1 Ch. D. 13; Burland v. Earle, 18 Times L. R. 41.

Action dismissed with costs.

MARCH 20TH, 1906.

DIVISIONAL COURT.

RE MEDBURY, LOTHROP v. MEDBURY.

Executors and Administrators—Foreign Grant of Letters of Administration—Ancillary Probate in Ontario—Persons to be Appointed.

Appeal by plaintiffs from order of Judge of Surrogate Court of Essex granting letters of administration with the will and codicil annexed of the estate of Lucetta R. Medbury, to the nominee of the Union Trust Company of Detroit, the administrators in the country of domicil of the deceased.

A. St. George Ellis, Windsor, for plaintiffs.

R. F. Sutherland, K.C., for defendants.

THE COURT (MULOCK, C.J., MACLAREN, J.A., CLUTE, J.), held that it was proper to follow the foreign grant, and dismissed the appeal with costs.

Reference to In re Goods of Smith, 16 W. R. 1130; Enohin v. Wylie, 10 H. L. C. 1; Re O'Brien, 3 O. R. 326.

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