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CARTWRIGHT, MASTER. JUNE 22ND, 1903.

CHAMBERS.

McGREGOR v. JOHNSON.

Foreign Commission—Evidence of Important Witness—Grounds for Ordering Commission—Terms—Security for Costs.

Motion by plaintiffs for order for commission to take evidence of Myron R. Johnson at Waupaca, Wisconsin.

W. J. Elliott, for plaintiffs.

R. U. McPherson, for defendants, shewed cause and objected: (1) that the affidavits filed in support of the motion were not sufficient under the cases; (2) that it was not shewn that any attempts had been made to procure the attendance of the witness; (3) that the witness would be at the trial on defendants' behalf, as stated in the affidavit of their solicitor.

THE MASTER.—I consider that the 3rd objection disposes of the first. In addition to this is the fact that in the statement of claim it is alleged that the execution of the will in question in the action "was obtained by the undue influence of one Myron R. Johnson, the son of the defendant Isabella Johnson." . . . It may fairly be inferred that the witness was certainly present at the time of the execution and preparation of the will sought to be set aside.

The relationship of the witness to the principal defendant is a sufficient answer to the second objection.

The third objection cannot prevail. It was stated at the argument that the witness was in delicate health, and had spent the winter in California on that account. No trial can take place until the autumn. The plaintiffs should not be obliged to take the risk of this witness being able to be present at that time. . . . The statement of claim is based upon the alleged undue influence of this witness. If on his examination the fact is not established, the action may probably be dropped; while if his evidence appears to

strengthen defendants case, it may be considered by defendants good policy to make some settlement. . . .

Mr. McPherson asked to have it made a term of granting the commission that plaintiffs should give additional security. . . . This should not be done at present. It will be time enough to consider that point when notice of trial has been served, and the case is ready for hearing.

The order will provide for the execution of the commission during vacation.

Costs of motion in the cause.

JUNE 22ND, 1903.

DIVISIONAL COURT.

VIPOND v. GRIFFIN.

Sale of Goods—Rescission of Contract—Evidence of—Conduct of Parties — Appeal, Right of — Summary Trial of Interpleader Issue.

Appeal by defendant (execution creditor) from judgment of Judge of County Court of Lanark in favour of plaintiff (claimant) upon the summary trial of an interpleader issue as to a car load of apples sold by plaintiff to one Mitchell, and seized by the sheriff under defendant's execution against Mitchell, but claimed by plaintiff, upon the ground that the contract for sale between him and Mitchell had been rescinded.

J. A. Allan, Perth, for defendant.

C. H. Cline, Cornwall, for plaintiff, objected that no appeal lay and opposed the appeal on the merits.

The judgment of the Court (BOYD, C., FERGUSON, J., MACMAHON, J.) was delivered by

BOYD, C.—Having regard to the evidence and the conduct of the parties, there does not appear to be proof of a rescission of the contract to purchase the apples. The apples came to the possession of the purchaser Mitchell, and were advertised for sale by him, and some of them were sold. He was drawn upon for the price by the vendor after the alleged rescission of contract, the vendor saying in letter of 12th December, "we have not yet received notes to cover apples," and again on 17th December, "he (Mitchell) has had a car of apples from us for which we have not received a dollar." Between the writing of these letters the vendor goes to Carleton Place, learns of Mitchell's flight, but makes no claim to the apples then in Mitchell's store house and in part sold.

The only thing against these letters and this conduct is the statement of the vendor that over the telephone Mitchell refused to accept the apples on 6th December.

The brother of the vendor, who heard what was said by the vendor through the telephone to Mitchell, thus reports it . . . my brother answered; "It is very cold; take the car in and examine the fruit, report how many barrels No. 2 in car, and write down your best offer on car;" and on cross-examination this, "Take the car—examine it—see how many No. 2 apples are in car—and make us your best offer." The vendor says that his manager was "to take the apples into store" or "get it stored somewhere." He now interprets this to mean a new bargain and storage on that footing. But the brother does not corroborate about taking into store. What he reports is consistent with the sale going on subject to diminution as to price because of alleged inferior quality of some apples.

The conduct and letters turn the scale against the vendor, and judgment should be reversed, and entered for the appellant with costs.

I think an appeal is open on this interpleader. The order as drawn imports only a consent to a summary disposition of the claim, not a consent to its being tried before the Judge of the County Court as persona designata. The proceedings are all in the High Court, and both parties by their correspondence contemplated and recognized a right of appeal from the Judge's decision, under Rule 1110.

JUNE 22ND, 1903.

REX v. MEYERS.

Municipal Corporations By-law—Transient Traders—Conviction—Residence of less than Three Months—Penalty—Apportionment—Costs—Distress—Imprisonment — Uncertainty — Amendment — "Butcher"—Municipal Act - Divisions and Headings.

Motion by defendant to make absolute a rule nisi to quash his conviction under a transient traders' by-law of the village of Stouffville.

J. W. McCullough, for defendant.

W. E. Middleton and C. R. Fitch, Stouffville, for the magistrate and prosecutor.

The judgment of the Court (BOYD, C., FERGUSON, J., MACMAHON, J.) was delivered by

BOYD, C.—This conviction is against a transient trader occupying premises in the village, who, not being entered on

the assessment roll, offered his goods for sale without having paid the license fee in that behalf imposed by by-law No. 98 of the village of Stouffville. That by-law was passed in the year 1891, pursuant to the provisions of the Municipal Amendment Act of 1888 (51 Vict. ch. 28, sec. 23), empowering the municipality to fix a license fee to be paid by such transient traders before commencing to trade. That law of 1888 is practically carried into the existing municipal law, as found in R. S. O. ch. 223, sec. 583, clauses 31 and 33; and the by-law of 1891 is well founded thereon. The objections made as to the non-appearance therein of the words "for temporary purposes" and "assessment roll of the then municipal year," are not pertinent, as they relate to the regulation of transient traders under clause 30 of sec. 583. This is under the clause which relates to the payment of a license fee before beginning operations. It does not appear needful to refer to or negative the provision of a later section, 1895, 58 Vict. ch. 92, sec. 22, which gives an extensive meaning to the words "transient trader," and makes the term applicable to one who has resided less than three months in the municipality before beginning business. The evidence in the present case shews a residence less than three months, and in fact but brief visits periodically and regularly to sell meat for a given time at a particular place in the village.

On the broad merits, therefore, the conviction is good.

The objection that the penalty of $100 was not apportioned under sec. 708 fails, because the application is otherwise provided for by the by-law on which the conviction proceeds.

The objection that the conviction and by-law are in excess of the statute because power of distress is given for both penalty and costs, and because of the commitment, in default of payment, to the common gaol, are not well taken. Power is given by sec. 702 (2) to pass by-laws for collecting penalties and costs by distress, and by sub-sec. (3) to punish by imprisonment after no distress or ineffective distress.

The objection as to the uncertainty of the offence in the conviction as to date, place, and meat sold may be amended from the facts in evidence, under the authority of 2 Edw. VII. ch. 12, sec. 15.

The large question is taken in the notice of motion, but was not pressed so much as the other points already dealt with, viz., that this defendant as "butcher" does not come within the province of the "transient traders" section at all; and that the proper section under which this case should be dealt with is sec. 580 or 581 of ch. 223.

Section 580 (5) provides for the regulation of the place and manner of selling meat, and sec. 581 (1) for licensing and regulating the sale of fresh meat by retail. These do, no doubt, refer specifically to meat, but it is under a heading and with a collocation of subjects, in the scheme of the Municipal Act, which betokens making general provision for the disposal of commodities at fairs or in public markets.

The broad classifications under which these sections fall is division XVII., "Fairs and markets," and the municipality may enact laws to localize the sale of all sorts of meat, miscellaneous products and things, in markets and other fixed places. But the section under which this by-law is framed is under a different heading, viz., division XVIII., "Regulation of Trade," which also deals with a strange medley of subjects in the sub-headings, such as bread and bill-posters; bagatelle and ferries; auctioneers and tobacconists; runners and milk dealers; plumbers and hawkers; transient traders and victualling houses. Now, a man may be a hawker of potatoes, fruits, and vegetables (commodities dealt with specifically under division XVII.: Howard v. Lupton, L. R. 10 Q. B. 60); and a "transient trader" may be a person who follows the trade of a butcher: Gaskell v. Spry, 1 B. & Ald. 617; and in Dr. Murray's Oxford Dictionary, sub voce, it is said, "one whose trade is the slaughtering of large tame animals for food; one who kills such animals and sells their flesh; in modern use it sometimes denotes a tradesman who merely deals in meat."

The rule should be discharged with costs.

CARTWRIGHT, MASTER. JUNE 23RD, 1903.

CHAMBERS.

BURNHAM v. HAYS.

Action—Motion to Dismiss as against one Defendant—Negotiations for Settlement with other Defendants.

Motion by defendant Hays to dismiss the action for want of prosecution.

W. A. Skeans, for applicant.

W. E. Middleton, for plaintiff.

THE MASTER.—Jeremiah Amey by his will dated 9th February, 1893, gave all his estate to his four daughters equally, subject to the life estate of his widow.

Mrs. Amey died 27th March, 1902. Probate of her will was granted on the 10th May following to defendant Hays, the sole executor.

On 6th February, 1903, this action was commenced by one of the devisees of Jeremiah Amey against Mr. Hays, as executor of her mother, for alleged waste committed by her mother on the father' real estate. The plaintiff takes nothing under her mother's will. Her sisters are perhaps properly joined with the executor as co-defendants. The substantial claim is against them. A defence by the executor would be in their interest. Since the issue of the writ and service on Mr. Hays, nothing further has been done. Mr. Hays entered an appearance on 17th February, so that, as far as he is concerned, the plaintiff is in default.

The affidavit of the plaintiff's solicitor states what is no doubt the fact, that the action has not been proceeded with at the request of one of the defendants, to enable her and her other two sisters to effect a settlement with the plaintiff. And he says very rightly that he was desirous of aiding them in this course.

Mr. Hays in his affidavit in reply submits that the other defendants are not necessary parties; that the action, as properly constituted, would be against him solely, and that he is being delayed in winding up the estate. I do not think I can determine this question at this stage. If the parties are fortunate enough to come to an amicable settlement, it will be unnecessary to decide it.

I think the practice recommended by Mr. Dalton in Foley v. Lee, 12 P. R. 371, should always be observed. In the present case it is clear that the action could not be dismissed. To do so would be to violate the rule laid down also by Mr. Dalton in Sievewright v. Leys, 9 P. R. 200, which the Court of Appeal in Langdon v. Robertson, 12 P. R. 139, said was the proper rule to be acted upon in these cases.

I think that the motion must be dismissed; the plaintiff will be put on terms to go over to trial at the next sittings at Napanee. If this becomes difficult, leave can be asked to postpone. The costs will be in the cause.

MacMahon, J. June 24th, 1903.

TRIAL.

BIRMINGHAM v. LARKIN.

Master and Servant—Injury to Servant—Canal Works—Negligence Dangerous Place—"Way"—Contributory Negligence.

Action for damages for injuries received by plaintiff while at work in the employment of defendants as a carpenter's assistant, assisting Clairmont, a fellow workman, in covering

the top of a retaining wall of a canal which was being constructed by defendants. The plaintiff, in accordance with instructions from the superintendent of the works, went to a part of the canal bed where there were long planks, and brought and delivered three of them to Clairmont, who was on the top of the wall, and who placed them in position. The place where these three planks were required to be delivered was unobstructed and safe. Plaintiff then went and procured the fourth plank, and carried it a portion of the distance back, when, noticing Clairmont on the top of the wall, at about 50 feet from the place where the plank was to be used, he made a step or two in the direction of the wall where Clairmont was, and stepped on a board or plank, and a nail therein went through the sole of his boot and into his foot, causing a severe injury.

G. H. Watson, K.C., and L. V. O'Connor, Lindsay, for plaintiff.

E. E. A. DuVernet, for defendants.

MacMahon, J., held that the course plaintiff took and the ground he traversed with the plank to reach the wall was, according to plaintiff's own evidence, not a "way" at all, as at that point the bottom of the canal was dangerous by reason of the large number of pieces of plank lying about with nails in them. Having made use of a place that was dangerous and in no sense a "way," when his employer had furnished a safe place at the point where the planks were required to be delivered, the employer was not liable. Howe v. Finch, 17 Q. B. D. at p. 190, Pritchard v. Lang, 5 Times L. R. 639, and Bolch v. Smith, 7 H. & N. 737, referred to.

Action dismissed with costs.

Boyd, C. JUNE 24TH, 1903.

TRIAL.

WARREN v. MacKAY.

Ship—Charter—Voyage—Damages for Short Cargo—Demurrage—Delay and Detention—Counterclaim—Inferior Cargo.

This action was brought by the respective owners of three vessels, the Birkhead, the C. H. Burton, and the J. G. Blain, against R. O. & A. B. MacKay. The plaintiffs alleged that defendants chartered the three vessels to carry 2,400 tons of coal from Cleveland to Hamilton; that defendants gave plaintiffs only 2,053 tons to carry; that plaintiffs had to proceed to Hamilton with 2,053 tons only; and they claimed $433.75 damages for short cargoes and $1,575 for demurrage.

The defendants counterclaimed for $2,000 damages by reason of inferior coal alleged to have been wrongfully loaded on the C. H. Burton by plaintiffs.

J. V. Teetzel, K.C., S. F. Washington, K.C., and A. M. Lewis, Hamilton, for plaintiffs.

J. W. Nesbitt, K.C., and J. G. Gauld, Hamilton, for defendants.

BOYD, C.—It appears to me very plain, upon all the evidence, that the contract for shipment of coal was made in the simple form contended for by defendants, and that it was not subject to any special conditions as contended by plaintiffs. The points urged by plaintiffs in evidence are that there were two representations made which influenced the making of the bargain by them: (1) that there was 14 feet of water at the Hamilton dock; and (2) that facilities would be afforded at that dock whereby 500 or 600 tons a day could be unloaded. . . . Defendants' letter of 13th October, confirming the oral contract, shews correctly what it really was, i.e., "charter of steamer 'Birkhead' and consorts 'Burton' and 'Blain' for about 2,400 tons of coal, Cleveland to Hamilton, at $1.25. Application to be made at Cleveland to the agent of the Pennsylvania R. R. Co. for 1,000 to 1,200 tons, and the Gill Kirby Coal Co. for 1,200." . . . The great weight of evidence and circumstances is against there being any such term in the contract as that with regard to the 14 feet of water. . . . The claim made in the pleadings was that defendants refused to load 2,400 tons of coal, and would not give plaintiffs more than 2,053. This is disproved. Plenty of coal was there, but with the necessity of loading to 12 feet they could only carry 2,053. . . . There should be no recovery on account of the alleged shortage in the freight carried.

The claim for damages for delay and detention can not be based on any term in the contract as to the capacity of the dock to unload 500 or 600 tons per day, or that each of the boats was to be unloaded immediately on arrival at destination. There was no unreasonable delay in beginning to unload. . . . There was no room for all three to unload at the same time, they had to be taken seriatim, and the question of damage depends upon whether the work was duly prosecuted, having regard to the facilities as they existed at defendants' dock. . . . There appears to have been unusual despatch and no obstruction interposed by or attributable to defendants which interfered with the efficient and timely prosecution of the work. That the stuff on part of

the dock blocked the work is disproved. Wright v. New Zealand, 4 Ex. D. 165, is no longer law. See Leigh Shipping Co. v. Cardiff, [1900] 2 Q. B. 638. . . . . The cargoes, upon the evidence, were discharged in a reasonable time, having regard to the appliances ordinarly at use at Hamilton and under existing circumstances, and it is not made to appear that any delay was caused or substantially contributed to by defendants. In the absence of any stipulation, this is now the limit of implied obligation upon the consignee as to the discharge of a vessel. Action dismissed with costs. Counterclaim for damages dismissed with costs. Costs to be set off pro tanto.

BOYD, C. JUNE 24TH, 1903.

TRIAL.

ATTORNEY-GENERAL v. CITY OF TORONTO.

Municipal Corporation—Public Park—Dedication by By-law—Subsequent Conduct—Revocation — Building Leases — Injunction — Parties—Attorney-General—Plaintiff—Interest—Costs.

Action and information for an injuction restraining defendant city corporation from making a lease to defendant Lemon of certain land on "the Island," a part of the city of Toronto, upon the ground that the land proposed to be leased is part of the Island Park as set apart by the corporation.

J. T. Small, for the plaintiffs.

J. S. Fullerton, K. C., and W. C. Chisholm, for defendant corporation.

F. Denton, K.C., for defendant Lemon.

BOYD, C.—I am not able to see my way clearly to order an injunction as sought by plaintiffs. A by-law was passed in November, 1880, No. 1028, purporting to establish a park on the Island, and certain lots were designated therein, including those now in question, and it was enacted that these "together with such other lands as may hereafter be obtained from lessees or otherwise, shall be set aside, devoted to, and form, a park." Other lands were afterwards by by-law in May, 1887, and November, 1887, directed to be taken and expropriated in order to enlarge the Island Park. Yet the action of the city authorities was contemporaneously and for years at variance with the conclusion that these lots now in question were regarded or treated as actually forming parts of an existing park. A special committee was appointed in

1901, called the Island Committee, who are elaborating a plan of park improvement, which will for the first time supply a definite policy to work upon from year to year. The city has treated the leases existing at the date of the first by-law in November, 1880, though then liable to forfeiture, as existing and valid leases, under which rent has been paid on the whole lots down to 1883 or 1884, or perhaps later, and after that on parts of the lots on which buildings or improvements have been made, down to 1895, if not to the present time. Taxes have also been levied upon these lots during the terms of the leases, and have been paid to the city as an annual charge. Some 50 houses or structures including a church building, have been erected upon the lots in question since 1880 till the present time. Plans have also been made, with the sanction of the city, and registered, of certain of the lots, on which streets are laid out, with reference to which trees have been planted and houses built. The term used in intituling the by-law, to "establish" a park, does not denote the idea of permanency or unchangeableness. It indicates that much would be required in the particular locality to be done before the park could take a fixed form and definite area. As said by the Court in Osborne v. S. D. Co., 178 U. S. 38, it is manifest that to construe the word "establish" to mean, to fix unalterably, would throw the powers of the board into confusion and contradiction. See also Dundee v. Morris, 3 Macq. 166. The defendants acted in the belief that there was power to deal with the land designated as park land by leasing it, imposing and collecting rents and taxes, approving of the laying out of new streets on registered plans, and otherwise exercising the control of owners, though some regard for the enjoyment and benefit of the public has been always kept in view. The park scheme has not been abandoned, but the details and the area of its occupation on the island have been modified from time to time by successive councils. If the city has the power to exercise such control, it is not for the Court to interfere, nor can the wishes of the residents on the Island control the situation as against the legislative and dedicating powers of the corporation. In the absence of any distinct authority, the conclusion is, that the city has not exceeded its corporate or legislative powers in dealing as has been done with this Island Park. The doctrine of irrevocable dedication is not applicable to the case of a park which is established by by-law out of land belonging to the corporation as owners in fee simple. Having enacted a by-law to establish a park, the same body or its successors may repeal, alter, or amend

as it deems proper, so long as no vested right is disturbed: R. S. O. ch. 1, sec. 8 (37); ch. 223, sec. 326. Attorney-General v. Toronto, 10 Gr. 439, and Re Peck and Town of Galt, 46 U. C. R. 219, referred to.

Plaintiff Mrs. Smith claims under a lease made in 1874, which was renewed in 1897, though made to date back as from 1895, for which the term is 21 years; the house originally built is occupied by her family now, and is about a quarter of a mile from the house being put up by defendant Lemon.

. . .

The evidence does not satisfy me that she has any such interest as to give her the right to appear as a private plaintiff. No special grievance, personal or proprietary, attaches to her as owner . . . which is injured by the erection of the Lemon house. Besides, the original lease under which she took was made in 1874, prior to the park scheme, and the renewal in 1895 or 1897 was after registration of the plans made in 1883 and 1890, shewing that the city had sanctioned the subdivision of lots 56, 57, and 59, into lesser lots for the purpose of being leased, and so incompatible with that locality possessing or being likely to possess the character of a park.

The joint information and action fails and should stand dismissed, but, as the motives of the relators and plaintiff are most commendable, I do not give costs if this ends the litigation. Should an appeal be lodged, however, then I think costs should be paid to the city as a proof of good faith in prolonging the controversy.

CARTWRIGHT, MASTER. JUNE 26TH, 1903.

CHAMBERS.

WILKINSON PLOUGH CO. v. Perrin.

Attachment of Debts—Equitable Assignment of Fund Attached—Disputed Facts—Order Directing Trial of Issue.

On the 11th February, 1903, an order issued in this case, on motion of the plaintiffs, as judgment creditors of defendant, attaching certain moneys in the hands of one Hourigan.

Hourigan, through mistake, allowed this order to be made absolute, on 19th February, 1903, but on payment of costs he was allowed by Mr. Winchester to have the order rescinded; and the motion was renewed, on notice to Hunter and others, who claimed the moneys in question, by virtue of an alleged equitable assignment to them by Perrin, during an arbitration in respect of certain claims and cross-claims made between them respectively.

The proof of the alleged assignment depended largely upon the force of a memorandum made by the arbitrator, and upon the precise facts and dealings of the parties at the time and subsequent thereto. The arbitrator made an affidavit setting out exactly the terms of his memorandum, and was cross-examined thereon by the plaintiffs and the defendant.

After several adjournments the motion was finally argued on the 25th June, 1903.

R. B. Henderson, for plaintiffs.

W. M. Boultbee, for Hunter et al.

C. A. Moss, for Hourigan, the garnishee.

The Master.—Mr. Henderson made a full and elaborate argument to prove that there was no equitable assignment in fact. He contended that, even assuming the truth of what was alleged by the claimants, Hourigan had never been informed by Perrin of the assignment. He cited and commented on many cases, which need not be noticed here at present. Those cases and arguments were met by Mr. Boultbee with other cases. But the point on which he relied was that an issue should be directed, in which his clients were quite willing to be made plaintiffs, and thereby assume the burden of proving their alleged assignment.

Mr. Henderson conceded that such was the proper course to adopt, unless on the undisputed facts I could find in his favour.

This I think I cannot do. The garnishee Hourigan was a co-defendant with Perrin in one of the actions which was referred to the arbitrator. The agreement of Perrin is positively asserted by the arbitrator, who has no interest in the matter one way or the other. He is corroborated by Mr. Sparham and three other persons who were present on the occasion of the memorandum made by the arbitrator. Hourigan himself states that he was made aware of the agreement so made. Even if not in fact communicated by Perrin to Hourigan, it may be successfully contended that the agreement as to the balance in Hourigan's hands, if proved, would of itself be sufficient, as being a representation made to the claimants whereby they were induced to alter their position so as to allow the arbitration to proceed. On that point I do not desire to be understood as expressing any opinion. I only put it forward as showing, amongst other things in the evidence, that there is a substantial question at issue between the plaintiffs and the claimants, and that they are widely

apart as to the facts. I cannot see anything culpable in the conduct of the garnishee to deprive him of his costs.

An order will issue, in the usual form, directing payment into Court, less the taxed costs of the garnishee, of the amount in his hands. There will be an issue directed between Hunter et. al. as plaintiffs and the Wilkinson Plough Co. as defendants. The question will be whether the plaintiffs in that issue are entitled to the moneys by reason of their alleged assignment or not.

The costs of this motion, as between the parties to the issue, will abide the result.

STREET J. JUNE 26TH, 1903.

CHAMBERS.

CONMEE v. LAKE SUPERIOR PRINTING CO.

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

Appeal by plaintiff from order of Master in Chambers (ante 509) dismissing application by plaintiff to strike out paragraphs 4 and 5 of the amended statement of defence of defendant Russell and the 3rd paragraph of the statement of defence of defendant company, or in the alternative for a better statement of the nature of the defences, or for particulars. The plaintiff had been a member of the Provincial Legislature, and was again a candidate for re-election at the time of the publication of the alleged libel.

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

C. A. Moss, for defendants.

STREET, J.—Even a public man engaged in a Parliamentary election has certain rights, and one of them is that he may bring an action for libel in case statements are published asserting that he has been guilty of improper acts, unless those statements are true. All acts of his, bearing upon his public position in any way, or as to his fitness or unfitness for it, are public property, and may be commented upon within the limits of what is known as fair comment; but there is a distinction between commenting upon acts which he has actually committed, and commenting upon acts which he is alleged, untruly, to have committed. To invent statements of facts, or to adopt as true the untrue statements of facts made by others, and then to comment upon them as being true is not fair comment, and is not protected. The result is that where an alleged libel upon a

public man consists of statements of fact and comment upon them, it is not permissible to a defendant to plead as a blanket defence, covering all that he has alleged, that it is all fair comment. He must plead that the facts stated are true, and that the rest is fair comment. There is no such thing as a defence of privilege attaching to untrue statements with regard to the acts of a public man, even though the publisher believes his statements to be true, or has been, as he believes, credibly informed by others that they are true: Davis v. Shenstone, 11 App. Cas. 187; Bryce v. Rusden, 2 Times L. R. 435; Crow's Nest Pass Coal Co. v. Bell, 4 O. L. R. 660, 1 O. W. R. 679.

In the present case defendants appear to have adopted and published, as true, statements of fact as to certain transactions in which plaintiff has been concerned, and to have introduced them in certain remarks upon a speech made by plaintiff, to shew that parts of his speech were at variance with the truth. Defendants are not entitled to plead, as they are attempting to do, that these statements of alleged facts, as well as the comments they made upon them, are all fair comment. The paragraphs attached must be struck out, unless defendants elect to amend in the manner pointed out in the last case cited, by setting out the facts upon which they allege the article complained of was a fair comment, and alleging the truth thereof, and by setting up as to the expressions of opinion that they are fair comment upon such matters of fact.

Appeal allowed with costs here and below.

BRITTON, J. JUNE 26TH, 1903.

TRIAL.

O'BRIEN v. CORNELL.

Deed—Conveyance of Land—Cutting down to Mortgage—Evidence —Appreciation of—Redemption—Costs.

An action to set aside a conveyance absolute in form and have it declared to be a mortgage and for redemption, tried at North Bay on the 22nd May, 1903, without a jury, before BRITTON, J.

J. M. Macnamara, North Bay, for plaintiff.

H. E. McKee, Sturgeon Falls, for defendant.

BRITTON, J.—The plaintiff, being the owner of lots 6 and 7 on the east side of Pembroke street, in the village of Sturgeon Falls, borrowed from the defendant $200, and in security for that amount, on the 14th July, 1900, executed a mortgage on these lots to the defendant. The proviso was

for repayment in one year, with interest at 10 per cent. payable half-yearly.

The plaintiff alleges that he paid the interest, which fell due on the 14th January, 1901. On the 16th March, and before the mortgage fell due, the plaintiff gave to the defendant a quit claim deed of this property. The consideration stated in it is $100. There is no reference in this instrument, by way of recital or otherwise, to the mortgage. Neither mortgage nor quit claim deed is executed by the wife of the plaintiff, although he is a married man. The plaintiff says that this quit claim was given merely at defendant's request to correct something which defendant alleged was wrong about the mortgage. Plaintiff's short account of the transaction is, that the defendant "said there was something not right in the mortgage, and he wanted me to give him another paper." Plaintiff denies that he got any further advance.

The defendant says he advanced to plaintiff, 20th August, 1900, $25; 24th December, $10; 10th February, 1901, $3; 3rd February, 1901, $25; and 1st March, 1901, $20; in all $83. And that on or about the 16th March, 1901, the amount of these advances made since the date of the mortgage was called $100, and plaintiff gave this quit claim deed as a release of his equity of redemption, and intended to release and did release to the defendant any claim that plaintiff had on the property.

The defendant's statement of defence put this somewhat differently. There is no voucher for any advance.

The plaintiff is illiterate, he had no independent advice, and, as the quit claim was drawn by the gentleman who was then and is now defendant's solicitor, I think the transaction should not stand. The defendant does not put his case very strongly. Mr. McKee does not go further than to say that a Mr. Hartman, who was in Mr. McKee's office, said in plaintiff's presence that plaintiff agreed to sell for $100, and upon this Mr. McKee instructed the drawing of the quit claim, explaining to plaintiff what it was. It is not pretended that the quit claim was executed then, or that any money was paid over then, or when the quit claim was executed.

Mr. Hartman was not called.

The case made by the plaintiff, considering that he is not a business man, nor a careful or prudent one, has not been met by defendant, and as stated above, it seems to me of considerable importance that the evidence of defendant at the trial does not support what is alleged in his statement of defence.

There was no tender of any amount to defendant before action.

The quit claim deed must operate as a mortgage only, and the plaintiff be allowed to redeem.

Defendant must pay costs of action down to and inclusive of trial, these costs to be deducted from plaintiff's claim.

Reference to the Master to ascertain amount due on mortgage of 14th July, 1900, and amount of subsequent advances, if any, and defendant to be charged with rents, and to be allowed for all proper disbursements. Defendant to be allowed costs of redemption, from trial, to be added to his claim.

Plaintiff to redeem by paying within six months after amount ascertained or to be absolutely foreclosed.

CARTWRIGHT, MASTER. —— JUNE 27TH, 1903.

CHAMBERS.

PINE v. McCANN.

Solicitor—Bringing Action without Authority of Plaintiff—Daughter giving Instructions for Mother—Alleged Imprisonment of Mother by Defendant—Dismissal of Action—Costs.

One Robert Reid, by deed dated in 1901, conveyed to defendant certain land with all the chattels thereon. At the same time defendant gave a bond to Reid by which he agreed to support Reid and his sister (plaintiff) during their lives, pay their funeral expenses, etc. The deed was registered, but not the bond. In February, 1903, a daughter of plaintiff instructed a solicitor to begin an action on behalf of her mother to set aside the deed or have the bond recorded. It was not known at that time where the bond was.

Plaintiff was at this time nearly 80. She resided with defendant, her son-in-law. The daughter stated to the solicitor that the mother had fully authorized her to take such steps as she thought proper to protect her interests. But the solicitor never saw the plaintiff, nor sent anyone to see her. The daughter represented to the solicitor that the mother was entirely under the control and in close custody of defendant, who prevented her being seen by anyone of whom he was suspicious. The action was begun on the 26th February. The solicitor wrote to defendant informing him that a writ had been issued, and asking him to name a solicitor on whom it could be served. On 6th March a Mr. G. answered this letter on behalf of defendant. A week later the solicitor wrote to Mr. G. that he had received instructions from a relative of plaintiff's, and adding, "We shall certainly go on." Mr. G. replied next day saying that plaintiff was satisfied as things were, and advising the solicitor to get his costs secured before making any. The solicitor wrote

to Mr. G. again on 25th March, and there was some further correspondence.

On 28th April the bond was sent to plaintiff's daughter by the widow of the person who drew it and in whose custody it had remained. It was not stated whether she communicated this fact to the solicitor. The writ was served on defendant on 5th May.

On 13th May defendant gave notice of motion to stay proceedings and dismiss action with costs to be paid by the solicitor.

The motion was heard on 25th June.

A. Mills for motion.

D. L. McCarthy, contra.

THE MASTER.—Mr. Mills relied on Scribner v. Parcells, 20 O. R. 554, where the judgment of Armour, C.J., leaves nothing more to be said, and is decisive of the motion, unless the present case is rightly distinguishable . . . "No bill ought to be filed without a written retainer, but unquestionably, if it is not a written retainer, there must be an authority to institute the suit, communicated expressly by the client to the solicitor, without any intermediate agency." . .

Mr. McCarthy endeavored to distinguish this case from Scribner v. Parcells by submitting that the present came under that class of cases where action had to be brought on behalf of some one who was being virtually imprisoned. . . . In all such cases it would, no doubt, be made to appear that the proceedings were really in the interest of the supposed plaintiff. So that they would not furnish any guide in the present case. Even then the solicitor in any such matter would have to see that he was made safe by an indemnity from the person on whose instructions he was assuming to proceed.

I trust that security has been obtained by the solicitor in the present case, which seems in its facts to be much stronger than Scribner v. Parcells. The presumption of authority of a husband living with his wife to institute an action on her behalf is much greater than that of a daughter to act for her mother, with whom she is not living at the time. Moreover, Mr. G.'s letters should have put the solicitor on his guard, and led him to make full inquiry before eventually serving the writ, nearly three months after its issue, and after the letters of Mr. G. stating that plaintiff repudiated the whole proceeding.

The order must be made as asked. The form is given in 20 O. R. at p. 563.

MACMAHON, J. JUNE 27TH, 1903.

WEEKLY COURT.

LUCAS v. TEGART.

Bankruptcy and Insolvency—Assignment for Creditors—Action by Creditors against Assignee—Distribution of Money—Costs Lien.

Motion by plaintiffs for judgment on further directions and costs after report of Master in an action brought by creditors of one Schaffer against defendant, as assignee of Schaffer for benefit of creditors, under R. S. O. ch. 124, alleging that they had been paid no dividend, charging defendant with having converted the assets of the estate to his own use, and asking for an account and administration of the estate.

The master reported that 26 creditors of the estate had not been paid a dividend, and that defendant had $472.64 in his hands for distribution among the creditors.

C. A. Moss, for plaintiffs.

L. F. Heyd, K.C., for defendant.

MACMAHON, J.—Plaintiffs are entitled to judgment against defendant for the amount in his hands. And I follow Randall v. Burrows, 11 Gr. 364, and allow plaintiffs the costs of the action and reference and of this motion.

The amount of the judgment is to be paid into Court, and if plaintiff's are unable to recover the costs from defendant, plaintiffs' solicitors are to have a first lien on the fund in Court for their costs.

JUNE 27TH, 1903.

DIVISIONAL COURT.

COLBOURNE v. HAMILTON STEEL AND IRON CO.

Master and Servant—Injury to Servant—Rolling Mills—Dangerous Place—Absence of Guard—Factories Act—Defect in Ways and Premises—Workmen's Compensation Act—Evidence for Jury.

Plaintiff was employed by defendants in their rolling mills at Hamilton, and this action was brought by him to recover damages for injuries sustained by him. He had been working at a machine for punching holes in steel plates; something went wrong with the punch; plaintiff stepped back four or five feet while it was being set right; and almost immediately he was struck by the end of a long bar of red hot steel which was being run down to where he stopped. The

bar was of unusual length. Bars of the ordinary length were being constantly run down in the same direction, but none had been known before to reach the point where plaintiff was struck. He was not ordered to move to where he did, but he said that he stepped there to get out of the way, because there was no room to go any other way, on account of a number of iron bars which were lying on the floor.

A nonsuit was ordered by BOYD, C., at the trial.

Plaintiff moved to set aside the nonsuit and for a new trial.

The motion was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

J. W. Nesbitt, K.C., for plaintiff.

E. E. A. DuVernet and B. H. Ardagh, for defendants.

STREET, J.—. . . There was evidence here which should have been submitted to the jury.

The red hot steel bars, after being put though the rollers, were run out from them upon the straightening bed. There is evidence that plaintiff, stepping away from the punching machine . . . was obliged to step back towards the straightening bed, because all other places were blocked by iron bars lying on the floor. The straightening bed, he says, was only some four to six feet away from where he was working, and was unguarded, and he stepped back upon it just at the moment that a hot bar of iron was run down it so far that it struck him, and he was injured.

It appears to me that there was evidence here to go to the jury that the straightening bed was a dangerous place which should have been guarded, under the Factories Act, and also that there was evidence of a defect in the condition of the ways, works, plant, buildings, or premises of defendants, under the Workmen's Compensation Act, which should have been submitted to the jury. The arrangement of the premises by which bars of hot iron were run down the straightening bed, unguarded, and in close proximity to men working at other machines, would be evidence of a defect in the ways and premises of defendants, in my opinion.

New trial ordered. Costs of former trial and of this motion to be paid by defendants.

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

FALCONBRIDGE, C.J., concurred.

JUNE 27TH, 1903.

DIVISIONAL COURT.

LINTS v. LINTS.

Life Insurance—Benefit Certificate—Beneficiary—Designation—Substitution—"Dependent"—Statute—By-laws of Society.

Appeal by defendant from judgment of FERGUSON, J., in favour of plaintiff, Serena Lints, in action brought by her against Fanny Lints to determine the ownership of moneys paid into Court by the Independent Order of Foresters, being the amount due under a benefit certificate issued by them on 27th February, 1899, being in fact a policy of insurance upon the life of John Henry Lints for $2,000. In the application for the insurance Lints designated his mother as his beneficiary, adding, however, the following qualification, "reserving to myself the power of revocation and substitution of other beneficiaries in accordance with the constitution and laws of the Order." By the terms of the certificate the benefit was payable at the death of Lints "to the widow or other beneficiary or trustee duly designated" by the insured. When this certificate was issued, the insured was married to plaintiff, but was not living with her. On 23rd August, 1899, he went through a form of marriage with defendant (Fanny Hawn), who was not aware that he was a married man, and he lived with her until his death in March, 1902. On 26th November, 1900, he applied to the society to change the beneficiary from his mother to his "wife, Fanny Lints," and the change was made by the proper officers. After the death the mother assigned to plaintiff all her rights under the certificate.

R. U. McPherson, for defendant.

J. J. Warren, for plaintiff.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) held that the attempt of the assured to divert the benefit from his mother to defendant, who was not his wife, but merely a "dependent," not within the privileged class, being contrary to the statute, availed nothing, and the mother was at the time of the death the only beneficiary. The reservation on the face of the instrument by which the original designation was made, of the right to revoke the designation, and divert the benefit to another, is no stronger as a matter of legal construction than where the original designation is declared on its face to be subject to by-laws which give the same rights. The statute has been declared to override the by-laws in the latter case, and it must therefore override the reservation in the former. Mingeaud v. Packer, 21 O. R. 267, 19 A. R. 290, and Re Harrison, 31 O. R. 314, followed.

Appeal dismissed with costs.