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BRITTON, J. NOVEMBER 19TH, 1904.

CHAMBERS.

BLACKLEY CO. v. ELITE COSTUME CO.

Writ of Summons—Service out of Jurisdiction—Place where Contract Broken—Sale of Goods—Place of Payment.

Appeal by defendants from order of McAndrew, official referee, sitting for the Master in Chambers, dismissing a motion by defendants to set aside an ex parte order for service of the writ of summons upon defendants out of the jurisdiction, and the writ and service, etc.

Joseph Montgomery, for defendants.

R. W. Eyre, for plaintiffs.

BRITTON, J.—The action is . . . for the price of goods or for damages for non-acceptance of goods ordered by defendants at Montreal.

On 8th March, 1904, defendants wrote upon their own blank form an order on plaintiffs for certain goods. This order, when filled out, was given to an agent or traveller of plaintiffs to be by him delivered to defendants at Toronto. The order states the terms of payment . . . 5 per cent. off for cash if paid within 30 days, or a credit of 4 months from 1st June, and the goods were to be delivered to defendants f.o.b. at Toronto.

Plaintiffs have their head office and chief place of business at Toronto. Defendants knew this, and I think it is a fair inference from the evidence as to this transaction that defendants knew that the order as prepared by them was to be sent to Toronto, and that it was optional with plaintiffs whether they accepted the order in the terms of it or not. Plaintiffs did accept the order. Accepting the order in Toronto, for goods to be delivered in Toronto, made this, as I think, an Ontario contract, and, if so, payment should be made to plaintiffs in Ontario.

There is an entire absence of any agreement, express or implied, that payment should be elsewhere than in Toronto.

No doubt, plaintiffs asked Edelman to draw for amount of this invoice, but defendants did not accept. Defendants stood and now stand by their original agreement, whatever that was; so plaintiffs have not lost any original rights by merely attempting to get a settlement, by the attempted intervention of the persons in Germany who sold the goods to plaintiffs.

Plaintiffs have made out a case for the jurisdiction of the Court in Ontario. They say the contract was to be performed in Ontario, and that there are breaches of that contract in Ontario. . . . So far as now appears, in whatever way plaintiffs seek to recover, they do so by reason of an alleged breach in Ontario of a contract to be performed in Ontario. . . .

[Phillips v. Malone, 3 O. L. R. 492, 1 O. W. R. 200, and Dewie v. Gans, [1904] 2 K. B. 685, referred to.]

Appeal dismissed with costs to plaintiffs in any event.

CARTWRIGHT, MASTER. NOVEMBER 21ST, 1904.

CHAMBERS.

F. T. JAMES CO. v. DOMINION EXPRESS CO.

Discovery—Production of Documents — Privilege — Contemplated Litigation—Affidavit on Production.

Action to recover damages for breach of contract by defendants and resulting injury to fish contained in two cars which were to be sent by express from Selkirk to Toronto, as set out in statement of claim.

At the time when these two carloads were shipped to plaintiffs, two other carloads of fish were shipped to the Wolverine Fish Co., who also sued defendants.

Certain letters had passed between plaintiffs and the Wolverine Fish Co., but these plaintiffs decline to produce, on the ground of privilege, which was set out in the 10th paragraph of plaintiffs' affidavit on production, as follows:

"The letters and documents above referred to marked 'A,' 'B' and 'C' in respect of which privilege is claimed, were all dated on or after the day upon which the fish in question in this action ought to have arrived in Toronto, and relate to the arrival of the two carloads of fish shipped to the Wolverine Fish Co., Limited, as well as to the arrival of the

fish in question in this action and the condition thereof, and were written with a view to obtaining information upon which to base their claim against defendant company and to lay before the solicitors of plaintiffs and the Wolverine Fish Co., Limited, to obtain advice as to the prosecution of this action. Said letters also contain information and advice from the Wolverine Fish Co., Limited, as to the treatment of said fish."

Before this affidavit was filed a motion was launched for a better affidavit, one having been already filed on 26th September.

Shirley Denison, for defendants, contended that the correspondence referred to in the 10th paragraph of the new affidavit on production was not privileged and should be produced.

G. H. D. Lee, for plaintiffs.

THE MASTER.—The cases mainly relied on were Wheeler v. LeMarchant, 17 Ch. D. 675, and Collins v. London General Omnibus Co., 5 R. 355. I think the motion must fail. In the first case Jessel, M.R., says (p. 681), of similar documents, that they "no doubt are protected where they have come into existence after litigation commenced or in contemplation; and when they have been made with a view to such litigation, either for the purpose of obtaining advice as to such litigation, or of obtaining evidence to be used in such litigation."

In the other case Wills, J. (at p. 356) says: "I do not think it makes any difference whether at the time this document came into existence an action had been formally threatened or not. If the circumstances were such that no reasonable person could doubt that an action would follow, they might lay the foundation of privilege for a document such as this." And the case of Southwark Water Co. v. Quick, 3 Q. B. D. 315, is cited as authority for this proposition. See Bray's Digest of the Law of Discovery (1904) at p. 14 (secs. 53, 54) and pp. 32 to 36, where all the important cases are collected and discussed.

The motion will therefore be dismissed. But, as plaintiffs admit that a further affidavit was necessary, the costs may be in the cause.

BRITTON, J. NOVEMBER 21ST, 1904.

CHAMBERS.

RE HALL.

Will—Legacy—Uncertainty as to Legatee Intended — Legacy Paid into Court — Motion for Payment out — Decision on Affidavits instead of Issue Directed—Costs.

Motion by Maria Baxter for payment out of Court to her of a sum of money paid in by the executors of Martha Hall, deceased, being the amount of a legacy claimed by the applicant and also by one Margaret Baxter.

M. R. Gooderham, for Maria Baxter.

R. U. McPherson, for Margaret Baxter.

BRITTON, J.—Both claimants are nieces of Martha Hall, late of the city of Stratford, in this Province. . . .

One clause in the will is as follows: "I give, devise, and bequeath unto my niece Maria Baxter, of Cronyn Cross, county of Farmanagh, Ireland, the sum of $500." . . .

It is not, as a rule, satisfactory to decide between rival claims, upon affidavit evidence, but the circumstances in this case, I think, warrant my disposing of the matter. No useful purpose will be served by my directing an issue between the claimants.

Maria Baxter practically in every respect answers the description of the legatee named in the will.

It, no doubt, is a strong point in favour of Margaret that she was during the lifetime of the liberal testatrix the recipient of gifts from her.

Maria corresponded with her aunt, but she does not say that any money or gift of any kind was received by her from her aunt. The aunt knew Maria, knew where Maria resided. Both claimants are related to the aunt in the same degree. The will explicitly names Maria, and not Margaret. It describes Maria as of "Cronyn Cross." There is no such place, but there is Cooneen Cross, the proper description of Maria's residence when the will was made, and not the place of residence of Margaret at that ime. Margaret left Cooneen Cross in 1891.

It is just possible that by the payment out to Maria the money will go to the person not intended by the testatrix, but, if so, it will be by an accident that cannot be prevented. The letter produced by Margaret is dated 9th February, 1887. Many things may have occurred to call Maria to the remembrance of her aunt between that date and 9th December, 1901, the date of the will.

It is not suggested that any new material facts could be brought out on the trial of an issue. . . . There is no doubt that the testatrix was corresponding with Margaret. Maria says she also received letters from her aunt.

An order must go for payment out to Maria, but it is a case in which, I think, costs of both parties should be paid out of the fund, and I fix the costs of Margaret Baxter at $25.

BRITTON, J. NOVEMBER 21ST, 1904.

CHAMBERS.

RE MAYBEE.

Will—Devise to Stranger and Heirs—Remainder over in Default of Heirs—Devise Voided by Devisee Witnessing Will—Acceleration of Remainder.

Application under Rule 938 by the executor of the will of Angeline E. Maybee, deceased, for the opinion and direction of the Court as to the person or persons entitled to the estate under the will.

J. W. Gordon, Brighton, for executor.

A. R. Clute, for John Heber Fogarty.

BRITTON, J.—The will is dated 16th November, 1899, and the testatrix died on 7th February last, leaving a farm of 100 acres in the township of Murray, but no personal estate so far as appears.

The clause in the will occasioning the difficulty is the following: "I hereby bequeath to my adopted daughter Elizabeth Leavis the whole of my real and personal estate for her sole and only use absolutely, and in the event of her decease, without heirs, I further direct that whatever may remain of my real and personal estate shall go to my nephew John Heber Fogarty for his sole use and disposal."

Elizabeth Leavis, unfortunately, was one of the witnesses to the will, and so the gift to her is void under sec. 17 of the Wills Act of Ontario.

Under the authority of Aplin v. Stone [1904] 1 Ch. 543, the will must be construed before sec. 17 is applied.

The decease of Elizabeth Leavis does not, in this case, mean her death before the death of testatrix. The will contemplates the entry by Leavis into possession of the property and such user of it as she pleases during her life. "Without heirs" in this case means "without children lawfully begotten" or "without heirs of the body. There is no gift to children or "heirs" if there should be such born to Leavis, but in that case, had the gift to Leavis been good, then the

remainder to John Heber Fogarty would be defective, because it was the expectation and wish of the testatrix that these children should inherit. See Re McDonald, 6 O. L. R. 478.

It was clearly the intention of the testatrix, if there were no such children, that John Heber Fogarty should have the property, or so much of it as would remain after the death of Levis. The question now is, whether the taking away the estate of the adopted daughter by the operation of the Wills Act causes an intestacy or "accelerates the remainder."

I am of opinion that the latter results. The condition under which Fogarty would be deprived of any of the property remaining at the death of Leavis could not exist. The children, if any, not taking under the will, could not possibly take at all. As their mother is not the owner, she takes nothing. To use the language so far as applicable and to apply the reasoning of Malins, V.-C., in Jull v. Jacobs, 3 Ch. D. at p. 703, Fogarty was postponed to Leavis because she was to have the property, and postponed to the children of Leavis if she should die leaving children who would inherit it. But the mother cannot have the property, her children cannot inherit the property, nor can they take under the will. If the mother had known that from any cause neither Leavis nor her children could take, it is quite evident she would not have postponed the gift to Fogarty. It is, of course, by mere accident or ignorance of law that Leavis cannot take, but she must be regarded as dead and with no children, that is, none who can inherit this property, and with all the property remaining on hand.

I think Fogarty is entitled to the property, subject to the payment of debts and costs and expenses. . . .

Declaration that there is an acceleration of the estate to John Heber Fogarty. . . .

It appears from the affidavit of the executor that Elizabeth Leavis is now the wife of John Heber Fogarty. . . .

Costs of all parties out of estate.

BRITTON, J. NOVEMBER 22ND, 1904.

CHAMBERS.

RE TIDEY.

Life Insurance—Benefit Society—Beneficiaries—Executors—Payment into Court.

Petition by the Order of Canadian Home Circles, a benefit society, for leave to pay into Court $1,900 in respect of a beneficiary certificate upon the life of John A. Tidey.

W. A. Dowler, K.C., for petitioners.

W. H. Blake, K.C., for Mary E. Bannon, a daughter of the insured.

BRITTON, J.—The certificate is dated 31st January, 1896, and the money is made payable to Mary E. Tidey or her assigns. This was, by indorsement on 5th April, 1904, revoked, and a direction given to pay to the executors of Mary E. Tidey. On 27th June, 1904, John A. Tidey made his will, giving the money secured by this certificate to his daughter Mary E. Bannon for her own use, but subject to the direction that she should invest the money with his executors, and giving them the right to pay out money for her maintenance and also for the maintenance of her mother. John A. Tidey died on 28th June, 1904.

One Peter Wood sets up some claim to this certificate by virtue of an alleged assignment from Mary A. Tidey.

Mr. Blake opposed the payment into Court, as the only persons who now can be interested in this fund are prepared, upon its being paid over to the daughter, to give a release.

I think the petitioners are entitled to relieve themselves of all responsibility in regard to this money by paying it into Court, and the usual order must go.

If the claimants Mary E. Bannon and Peter Wood and the executors of John A. Tidey agree as to the payment out of this money, there should be no difficulty and comparatively little expense in disposing of the matter satisfactorily.

BRITTON, J. NOVEMBER 22ND, 1904.

CHAMBERS.

RE MILLER.

Life Insurance—Benefit Society—Beneficiaries—Alteration in Certificate—Payment into Court—Issue — Parties—Who to be Plaintiffs.

Petition by the Order of Canadian Home Circles, a benefit society, for leave to pay into Court $1,000, being part of the amount secured by a beneficiary certificate upon the life of John Wesley Miller.

W. A. Dowler, K.C., for petitioners.

J. H. Spence, for Christiana W. Miller.

W. H. Blake, K.C, for William F. Miller.

BRITTON, J.—On 24th June, 1891, a certificate issued for $2,000 payable to Christiana W. Miller, wife of insured. On 27th April, 1894, John W. Miller applied to increase the

amount of his insurance to $3,000, making the additional $1,000 payable to his brother William F. Miller; and on 18th June, 1894, a new certificate was issued for $3,000, payable $2,000 to Christiana W. Miller, wife, and $1,000 to William F. Miller, brother. On 4th August, 1899, the insured applied to reduce the insurance, and he made the indorsement on the certificate that payment was to be made to his wife $1,000, to his brother $1,000, and that he cancelled the remaining $1,000.. On 11th October, 1899, a new certificate issued in favour of John W. Miller, called "reduced certificate," for $2,000, and this amount was made, in the body of the certificate, payable to Christiana W. Miller, wife, $1,000, and to William F. Miller, brother, $1,000.

John Wesley Miller died on 10th July, 1904, not having made any will or changed in any way the certificate of 11th October, 1899.

Mrs. Miller claims under this certificate, and she claims the whole amount, as she says the $1,000 reduced on 4th August, 1899, and as appears in the last certificate, was an unauthorized and unlawful diversion of that $1,000 from her to the brother.

In the proofs of claim put in, the last certificate is referred to, and that is the one on which this claim is based.

In view of sec. 159 of the Ontario Insurance Act, and of possible difficulties in the interpretation of that Act, I think the petitioners are entitled to the usual order for payment in of the $1,000, less the costs of this application.

Apparently there are few, if any, facts in dispute, but the question as to the ownership of this money is mainly one of law.

If Christiana W. Miller desires an issue to determine the question as to who is entitled to the money, I will direct such issue, in which she will be plaintiff, and William F. Miller will be defendant. I so order because upon the face of the new beneficiary certificate the $1,000 is payable to him, and so far as appears this sum is merely the continuation of a new insurance for his benefit. . . . Prima facie it was not a diversion of any insurance effected in favour of the wife.

If Christiana W. Miller does not accept the issue within ten days, the claimant William F. Miller may make an application, upon notice to her, for payment out to him of the money paid in by petitioners.

BRITTON, J. NOVEMBER 22ND, 1904.

CHAMBERS.

RE PARISH.

Life Insurance—Benefit Society — Beneficiary — Conditions Imposed by Will—Notice to Society—Payment into Court —Reduced Amount—Ascertainment.

Petition by the Order of Canadian Home Circles, a benefit society, for leave to pay into Court $789.39 in respect of a benefit certificate upon the life of George Parish, instead of $1,000, for which amount the certificate was issued.

W. A. Dowler, K.C., for petitioners.

H. E. Rose, for Edith Parish, claimant.

BRITTON, J.—The certificate issued on 7th September, 1901, and is on its face payable to Edith Parish, daughter of George Parish; there was no change by any indorsement. On 18th October, 1901, George Parish made his will giving this certificate to his daughter Edith, but . . . attached, or attempted to attach, conditions to the use and investment of the money. Parish died on 12th January, 1904. It does not appear that the executors have obtained probate of the will, and they have not made any formal claim to the money secured by the certificate, but the solicitor for one of the executors has given to the petitioners a copy of the will, and has notified them of the facts which may have induced the testator to make such a will. That having been done, if the petitioners should pay the money to Edith, they would do so at their own risk. Sub-section 7 of sec. 151 of the Ontario Insurance Act, R. S. O. 1897 ch. 203, prevents insurers, except at their own risk, from dealing with and obtaining a valid discharge from a beneficiary after a copy of the will affecting the insurance money or any portion of it has been received.

In these circumstances, the petitioners are entitled to the usual order for leave to pay the money into Court.

It is not admitted that upon the facts set out in the petition $789.39 is the proper amount, even if conceded that there was a difference of age as alleged. The true amount can easily be ascertained under sec. 149 of the Insurance Act, and if it is really in dispute the Clerk in Chambers may determine it, or I will do so upon hearing the parties, so that the correct amount may be inserted in the order.

This is a case in which there are no disputed facts, so the claimant should have leave, on notice to the executors, to apply for payment to her of the said money or a part thereof,

or for such disposition of the money as to the Court may seem meet. . . .

Usual costs of an application to pay in to be deducted from proper amount payable on the certificate, and balance to be paid into Court.

NOVEMBER 23RD, 1904.

DIVISIONAL COURT.

WALKER v. BOWER.

Money Paid—Advance to Protect Stocks—Express or Implied Contract to Repay—Ratification.

Appeal by plaintiff from judgment of MORGAN, Jun. Co.J., dismissing action in County Court of York brought to recover $220 alleged to have been paid by plaintiff to one Smith for the use and benefit of defendant.

The appeal was heard by MEREDITH, C.J., MACMAHON, J., IDINGTON, J.

W. N. Ferguson, for appellant.

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

IDINGTON, J.—Plaintiff and defendant had been friends, but had become so much estranged that, at the time when plaintiff gave his cheque for $220 to one J. C. Smith, a broker, to prevent a re-sale of stock then being carried by the broker for defendant, they were not on speaking terms.

A good deal of doubt . . . has been raised by defendant as to the intention of plaintiff in making the advance, and indeed as to the good faith of both plaintiff and Smith in regard to their dealing in the matter.

I think all that must be set aside when it is found as a fact, as in effect it is, by the trial Judge, and not disputed, that at the time plaintiff gave his $220 cheque to Smith the stocks in question had fallen that much, and were worth and could have been bought in the open market for just that much less than they cost plaintiff by beginning the deal, as he swears, to save an old friend.

I find no other motive than the one assigned by plaintiff for his conduct. I think it was both credible and creditable.

. . .

Defendant clearly recognized Smith's right to advance for defendant's benefit, to carry his stock, the amount in question, and look to him for repayment. He treats himself, as clearly as can be, as indebted to Smith on 1st April. He admits in his evidence that when Smith told him of Walker's payment, he said he would see Walker—not a word breathed

then of repudiation. He saw Walker—indeed he forthwith started in search of him and found him—and in the witness box speaks thus: "Q. Why did you go to see Walker? A. Because I told Mr. Smith I would, and wanted to tell him what I thought about it. Q. And what you did think about it was that you would see Miss Clapp and try and get the money for him? A. When he looked at me he looked so candidly that I thought he was acting honestly."

I think the correct inference to draw from all this writing, conduct, and the evidence of defendant, is, that he intended to adopt plaintiff's generous act and repay him.

I therefore see no reason to doubt Mr. Smith's recollection of what defendant told him when he says that "he (Bower) was going to pay him (Walker) back." If he did say so to Smith, at that moment he became bound by his ratification. Up to that time when Smith accepted this assurance, and Walker immediately afterwards agreed (in the way and upon the doubtful terms defendant says he did) to wait, it was quite competent for Walker to have arranged with Smith to cancel the advance made, and he also could have taken over an assignment from Smith of his rights as against defendant.

The cases of ratification or adoption of payment by a third person, not himself liable as a co-contractor, shew that until ratified the payment cannot be pleaded in defence by the debtor: see Walter v. James, L. R. 6 Ex. 124; that it may be ratified at any time if left open: see Simpson v. Eggington, 10 Ex. 845; and that "an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well established rule of law:" see Wilson v. Turman, 6 M. & G. at p. 242.

It would have been impossible for plaintiff, after what transpired, to have withdrawn his money, as he might have done up to the interview referred to, or for him or Smith to have claimed in law the profits upon these stocks, if any had accrued within the week or ten days defendant says he asked plaintiff to wait to see some one about getting the money to repay plaintiff.

The assent of all parties to their changing their legal relations on the day defendant saw the others, furnishes quite sufficient consideration to support the promise to repay.

But I think plaintiff's case can well be rested upon defendant's adoption of plaintiff's act, and defendant as a result be held liable for money paid at his request or as for

money lent. See the cases referred to in Story on Agency, 9th ed., secs. 239 to 260; Broom's Legal Maxims, 7th ed., p. 356 et seq.; Lyell v. Kennedy, 14 App. Cas. 437.

Defendant pleads that the transaction in respect of which the advance was made was an illegal one. He seems to have abstained from proving it to be so, if in truth it were an illegal dealing. The law presumes in favour of legality, and the transactions in question here are, on the evidence before us, fully covered by the presumption.

MEREDITH, C.J.—I agree that the judgment appealed from is erroneous and must be reversed.

In my opinion, plaintiff's right to recover may be supported upon the express agreement of defendant, upon which plaintiff relies, to repay the money which plaintiff paid to Smith on 1st April to prevent defendant's stock being sold out; and, independently of the express agreement, on the implied promise to repay plaintiff the money which he had paid as money paid by him for the use of defendant. . . .

Appeal allowed with costs, and judgment to be entered for plaintiff for $200 with costs.

MACMAHON, J., concurred.

STREET, J. NOVEMBER 24TH, 1904.

CHAMBERS.

RE MCDOUGALL.

Will—Construction—Bequest to Wife—Limited Power of Disposal—Summary Application under Rule 938—Scope of.

Motion by Ellen McDougall, administratrix with the will annexed, for an order declaring construction of the will of her deceased husband, and whether she alone was entitled under the will to the estate of the testator, or whether her children were entitled to share in it.

The will was dated 23rd August, 1903, and the testator died on 21st September, 1903.

The will was as follows: "This is my last will and testament. I bequeath to my wife all that I possess with full power to dispose of part or the whole as she and the children may think wisest and best at any time."

He appointed no executor, and letters of administration with the will annexed were granted to his widow on 29th December, 1903.

He left real estate of the value of $6,000, and personalty about $1,150, and six children, five of whom are infants.

The question submitted was whether the children took any estate or interest in the estate under the will.

W. H. Blake, K.C., for the applicant.

F. W. Harcourt, for the five infant children.

No one appeared for the adult child.

STREET, J.—I think it is clear that the widow takes the absolute ownership of the real and personal estate of the testator, and that her children take no interest in it under the will. This is all that could come up in administration proceedings, and it is as far as Rule 938 permits me to go in interpreting the will: Re Sherlock, 18 P. R. 6; Re Whitty, 30 O. R. 300.

The administratrix has the ordinary power, without regard to the will, of selling so much of the estate as may be necessary for payment of debts. The question as to whether, having paid the debts, she could sell the rest of the property without the consent of the children, is one which will arise if she desires to sell it under those circumstances: but I have no authority to determine it under Rule 938.

The costs of the application should be paid out of the estate.

STREET, J. NOVEMBER 24TH, 1904.

CHAMBERS.

RE MARTIN.

Will—Construction—Devise — Restraint upon Alienation — Summary Application under Rule 938—Scope of.

Application by devisees under Rule 938 for a construction of certain clauses of the will of Moses Martin, deceased.

J. M. Ferguson, for the devisees, the applicants.

J. E. Day, for the executors.

J. A. Walker, K.C., for the Chatham Loan Co.

STREET, J.—The testator devised to each of his five sons fifty acres of land in Dover East, subject to the payment of certain charges to other members of the family. At the conclusion of these devises he declared in his will as follows: "None of my sons will have the privilege of mortgaging or selling their lot or farm aforesaid described, but if one or more of these lots have to be sold on account of mismanagement the executors will see that same will remain in the Martin's estate."

The five sons are desirous of mortgaging their shares for the purpose of raising money to pay off the charges which have matured and certain debts of the testator which are charged upon the land, and the object of the present application, which is made by them, is to obtain the opinion of the Court as to whether the restraint upon alienation which the testator has attempted to create is valid.

I cannot find that Rule 938 gives me any authority to determine this question. The question propounded is one with which the executors have nothing to do, and it does not in any way relate to the administration of the estate. The rights or interests of the devisees inter se or as between them and the executors, or as between them and their brother and sisters, are not in question at all: Re Sherlock, 18 P. R. 6; Re Whitty, 30 O. R. 300.

The only question is whether these five devisees who make the application, and who undoubtedly take under the will a fee simple in the lands devised to them, are restrained from afterwards dealing with their lands in the usual manner.

The question is a highly important one, and has been the subject of great differences of judicial opinion, and I must not assume to deal with it without jurisdiction to determine it.

The motion must be dismissed, but, as objection was not taken to my power to deal with the question, there will be no costs.

NOVEMBER 25TH, 1904.

DIVISIONAL COURT.

BELL v. LOTT.

Trespass—Searching Private Dwelling House without Warrant—Liquor License Act—House of Public Entertainment—Honest Belief—Leave and License—Questions for Jury—Pleading.

Appeal by plaintiff from judgment of senior Judge of County Court of Hastings, withdrawing the case from the jury and dismissing the action at the conclusion of the trial.

The action was brought to recover damages for an alleged trespass to land and searching the dwelling-house of plaintiff.

E. G. Porter, Belleville, for plaintiff.

J. H. Moss, for defendant.

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

MACMAHON, J.—Defendant was on 12th April, 1904, appointed a constable for the county of Hastings for the period of 30 days, by the police magistrate for the city of Belleville, before whom he on the same day took the oath of office, which was filed with the clerk of the peace for the county of Hastings, and a notification of the appointment was also on the same day mailed by the magistrate to the Lieutenant-Governor.

When defendant applied to be appointed a constable he said his object was to prosecute those accused of violations of the Liquor License Act. . . .

On 14th April defendant went to plaintiff's private residence . . . and, according to plaintiff's evidence, stated that Mr. Faulkner, the license inspector, had appointed him to make searches, and he was there to search for persons violating the law, and that he intended searching the cellar under plaintiff's house for liquor which he supposed was stored there for the purpose of sale. He also told plaintiff he was a constable for the county, and any one preventing him making the search was liable to a fine of $100. Plaintiff procured a lantern which he gave to defendant, but stated that when doing so he told him he had no right to search the premises. Defendant made a thorough search of the cellar, but found no liquor therein; and plaintiff said he never sold liquor or kept any for sale. . . .

[Reference to sec. 130 (1) of the Liquor License Act, R. S. O. 1897 ch. 245; Rex v. Cretelli, 3 O. W. R. 176.]

Defendant had known plaintiff for many years, and said he knew it was against the law to search a private house, and had he known it was plaintiff's house, he would not have searched it without a warrant, and that he never had any reason to apply for a warrant. . . .

There was no evidence whatever that the premises occupied by plaintiff was a house of public entertainment, or that liquor had at any time been sold or kept upon the premises.

The trial Judge directed a nonsuit to be entered because defendant was a constable acting in the discharge of his duty in making the search, and, there being no evidence of malice, he came within the protection of R. S. O. 1897 ch. 88, sec. 1 (1), and was entitled to a notice of action, without which plaintiff could not succeed.

The question whether defendant was acting bona fide in the discharge of his duty as a constable in searching a private house, as being a house of public entertainment, for liquor, was a question for the jury; and, in view of defendant's admission that he knew he had no right to search a private house, it is difficult to see how he can have made the search in discharge of his powers as a constable; indeed the real defence is that the search was made by leave of plaintiff. Honest belief is always a question for the jury: McKay v. Cummings, 6 O. R. 400.

During the argument counsel for defendant urged that the procuring by plaintiff of a lantern and giving it to defendant when entering the cellar was conclusive of leave having been given by plaintiff to make the search. But plaintiff says he told defendant when handing him the lantern that he had no right to search the cellar, and plaintiff's housekeeper said that while defendant was descending the cellar stairs she heard plaintiff tell him he had no right to search the cellar, and defendant himself admits that, as plaintiff handed him the lantern, he told him he had no right to search the house.

There is no plea of leave and license on the record, and without an amendment that question cannot properly be, as if the amendment had been made it must have been submitted to the jury.

Appeal allowed, nonsuit set aside, and new trial ordered, with liberty to defendant to amend by adding a plea of leave and license.

Costs of the former trial and of the appeal to plaintiff in any event.