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BOYD, C. APRIL 4TH, 1903.

TRIAL.

GRIFFITH v. HOWES.

Will—Construction—Life Insurance Moneys—Attempt to Apply by Will to Debts—Previous "Designation" in Favour of Children—Election—Mortgage—Charge on Land—Failure of Specific Legacy—Devise—Estate—Term—Maintenance.

Action by the infant children of Sarah Elizabeth Lowery, deceased wife of John Lowery, of the township of Hinchinbrooke, in the county of Frontenac, farmer, against her executors, for administration of her estate and construction of her will, etc. In 1889 the testatrix, being then a widow, obtained a benefit certificate of insurance under R. S. O. 1887 ch. 36, payable at her death to her children John and Lizzie. She afterwards married John Lowery, and had a child by him, Lena, in 1891, and in 1892 she surrendered the first certificate and obtained another payable to "her legal heirs as designated by her will." Her will (which was made about a month before the last certificate) referred to all three children in the way of bestowing benefits upon them, but had this specific designation of the insurance moneys: "My life insurance in the Chosen Friends I give and bequeath to my executors for the purpose of paying thereout all debts due by me at my decease, including the mortgage made by me to Warner."

G. M. Macdonnell, K.C., for plaintiffs.

W. H. Sullivan, Kingston, for defendants.

BOYD, C.—The disposition of the insurance moneys by the will is repugnant to the statute under which the insurance arises, by which it is declared that, so long as any object of the trust remains, the money payable under the policy shall not be subject to the control of the creditors or form

part of the estate of the deceased: R. S. O. 1887 ch. 136, sec. 5; and by sec. 10 it is to be paid so as to be "free from the claims of creditors." The disposal of the moneys by the will is inoperative, and the last certificate alone speaks, by which it goes to "her legal heirs," and the three children answering that description are named and referred to in a sufficient "designation" to carry out the wishes of the deceased as expressed in the certificate. In the Oxford Dictionary "designate" is defined as "to point out," "to point out by name or descriptive appellation." The will refers to "my son John Arthur Griffith," "my daughter Lizzie Maud," "my daughter Lena," and "my three children." Therefore the insurance money and its accretions in Court go equally among these three children as "legal heirs designated" in the will pursuant to the certificate: Moffet v. Catherwood, Alc. & Nap. 472; Mearns v. United Order of Workmen, 22 O. R. 34.

It was argued that a case of election arises in respect of this clause in the will disposing of the insurance moneys to pay debts by which the children must choose between the insurance moneys (given away from them by the will) and the other benefits validly given to them by the will. . . . The will does not present a case of election, though the claim to the insurance moneys under the certificate may be contradictory of the direction to pay debts therewith: see Huggins v. Alexander, cited in East v. Cook, 2 Ves. Sen. 31. The question arises only in respect of the mortgage debt due on the farm. But by the terms of the will the payment of that debt is primarily charged on the Parham and Sydenham lots, and these were sold, and the proceeds applied as directed by the will, but a balance of $347 was still left on the mortgage, which was paid by the executor George Howes out of his own moneys. Justice will be done by letting that stand as a charge in his favour on the farm, collectable when the two Griffith children attain 21, without interest.

On the general point as to election, the rule laid down by Pearson, J., in Re Warren, 26 Ch. D. 219, and followed by the Court of Appeal in Re Handcock, 23 L. R. Ir. 34, is applicable. The statute controls and limits the destination of the insurance moneys, and the testatrix must be taken to know the law, that her direction was nugatory, and the will is to be read as if the invalid clause were expunged: Heath v. Greenbank, 1 Ves. Sen. at p. 307.

The bequest to Lena of $300 fails, because it was to be paid out of the proceeds of land, which proved insufficient.

The conveyance of the farm by the executors to George Howes in fee simple is in violation of the will. By the will

the land is given to the son John for his own use and benefit forever, subject to the payment of $500 to the daughter Lizzie when she shall come of age. By the codicil ("in addition to my will") the farm is given to George Howes to hold for his own use and benefit as a maintenance and support for the children John and Lizzie until they come of age. George has the possession till then, and the fee simple, subject to George's limited estate, is in John. Costs of all parties of the contest as regards the insurance moneys to be paid out of that fund. As to the rest of the litigation each party to bear his own costs.

WINCHESTER, MASTER. APRIL 6TH, 1903.

CHAMBERS.

REX EX REL. O'DONNELL v. BROOMFIELD.

Municipal Elections—County Councillor—Disqualification — Membership in School Board for which Rates are Levied — Statutes—Saving Clause—Relator Claiming Seat—Necessity for Notice at Nomination—Costs of Quo Warranto Application.

Application in the nature of a quo warranto to set aside the election of the respondent as a county councillor for division No. 7 of the county of Ontario and to have it declared that the relator was entitled to the office instead of the respondent.

The relator alleged that at the time of the election, and before and after it, the respondent was a member of a school board for which school rates were levied, namely, of the board of school trustees for school section 3 in the township of Mara, and was therefore disqualified.

The respondent admitted that he was a school trustee at the date of the election, but shewed that he had resigned that office before taking the oaths of qualification and office and before taking his seat as a county councillor.

J. A. McGillivray, K.C., for relator.

J. E. Farewell, K.C., for respondent.

THE MASTER.—It appears to me that the object in making this application is not so much to have the election of the respondent set aside as to have the seat awarded to the relator without running the risk of a new election. Under the authorities the relator is not entitled to the seat. To entitle a candidate to the seat claimed by him, on the ground of his opponent's disqualification, it must be shewn that the qualification was objected to at the nomination, so that the electors

might have an opportunity of nominating another candidate: Regina ex rel. Ford v. McRae, 5 P. R. 309, 315; Regina ex rel. Tinning v. Edgar, 4 P. R. 36; Regina ex rel. Adamson v. Boyd, ib. 204. . . .

The statute under which it is contended that the respondent is disqualified is 2 Edw. VII. ch. 29, sec. 5, which amends sec. 80 of the Municipal Act by inserting therein, after the word "trustee" in the 8th line, the words "and no member of a school board for which rates are levied." . . .

The evidence herein shews that the respondent was elected a member of the board of school trustees for school section 3 of the township of Mara on or about the last Wednesday in December, 1900, for a term of three years from that date. On or about the 15th January, 1903, he resigned the office of school trustee, with the consent expressed in writing of his colleagues in office, as provided by sec. 16 of the Public Schools Act, 1 Edw. VII. ch. 39. This was before taking the declarations of property qualification and of office required to be taken by all members of county councils before taking their seats.

It was contended for the respondent:

First, that sec. 76 of the Municipal Act, relating to the qualifications of different members of local municipalities, does not relate to the qualification of a county councillor, and therefore cannot be considered in connection with sec. 80, relating to the disqualification of members of the council of any municipal corporation; and that, under sec. 80, as amended by 2 Edw. VII. ch. 29, sec. 5, the respondent was not disqualified when he became a member of the county council, that is, when he took his seat.

Second, that the amendment refers only to members of a council of the same municipality which levies the rates for the school board of which the councillor is also a member, and therefore, as the county council of which respondent is a member does not levy rates for the school board in question, the respondent is not disqualified

Third, that the saving clause in the amending section, viz., "this amendment shall not apply so as to disqualify any person elected prior to the passing of this Act," enures to the benefit of the respondent, as he was elected a school trustee before the passing of the Act.

As to the first objection, I agree that sec. 76 does not apply to county councillors. . . . Section 77 provides for the qualifications of a county councillor. . . . The words "and is not disqualified under this Act," used in sec. 76, are omitted from sec. 77, and it is therefore argued that

the disqualifications mentioned in sec. 80 do not apply to the respondent at the time of the election, as provided for by sec. 76, but only apply to him when he actually takes his seat and acts as a member of the county council. I do not agree with this contention: Regina ex rel. Rollo v. Beard, 3 P. R. 357, 364. . . . This judgment is peculiarily applicable to the case under consideration. At the time of the election —which has been decided again and again to commence on the day of nomination: Regina ex rel. Rollo v. Beard, 3 P. R. 357; Regina ex rel. Adamson v. Boyd, 4 P. R. 204; Regina ex rel. Clancey v. McIntosh, 46 U. C. R. at pp. 105-6; Regina ex rel. Taverner v. Willson, 12 P. R. 546—the respondent was a member of a school board for which rates are levied; and his resigning from that position subsequent to his election as a county councillor, will not relieve him from disqualification, if he were at the time of nomination actually disqualified. . . .

The second objection is as to the interpretation to be placed on the words of the amending statute, "and no member of a school board for which rates are levied." It is contended that these words refer to a school board for which rates are levied by the municipality for which the disqualified member was elected, and not to a member elected to the council of a municipality which does not levy rates; that, had the Legislature desired to disqualify all school trustees, the word "High" would have been struck out of line 7 of the section, or the words "for which rates are levied" would have been omitted from the amending section. . . . Can I place upon these words an interpretation which the Legislature has not seen fit to adopt? [Carroll v. Beard, 27 O. R. 347, 358, referred to, as to the interpretation of statutes, and Regina ex rel. Baynes v. Detlor, 4 P. R. 195, as to the question of disqualification.] . . .

It is not at all clear that a county councillor would not have conflicting duties to perform, and would not represent conflicting interests, if he also held the office of school trustee of a school section within the county for which he had been elected a councillor. As to such duties, I would refer to secs. 424 and 435 (4) of the Municipal Act, R. S. O. ch. 223, and secs. 8 (6), 9, 42, 47, 71, 72 (1), 78, 79, 83, 84 (3), 86 (3), (6), (7), (8), (13), of the Public Schools Act, 1901. There is no dispute that rates are levied for the school board in question. The only question is, by what municipality are such rates levied? With considerable hesitation, I have come to the conclusion that it makes no difference what municipality raises or levies the rates; that the words employed by the Legislature disqualify any member of the council of any

municipal corporation who was at the time of his election a member of a school board for which rates are levied, whether levied by the municipal corporation to the council of which he was elected, or by any other.

As to the third objection, namely, that the respondent having been elected a school trustee before the passing of the amending Act, the saving clause relieves him from disqualification, I do not agree with the argument. The saving clause refers to the election of the member of the council of any municipal corporation, not to the election of a school trustee.

Rex ex rel. Zimmerman v. Steele, ante 242, followed as to all the objections.

The election must be set aside, and there must be a new election.

The costs have been unnecessarily increased by reason of the relator applying to be seated in the place of the respondent. It is true that the respondent might have disclaimed and saved further expense, but that would have given the seat to the relator, who has been found to be not entitled to it, and who does not appear to have had at the time of the election the confidence of a sufficient number of electors to elect him. Under the circumstances, while giving the relator the costs of the proceedings against the respondent so far as he has succeeded, he must pay the respondent his costs of opposing the application to seat the relator; the costs of the one to be set off against the costs of the other pro tanto.

WINCHESTER, MASTER. APRIL 6TH, 1903.

CHAMBERS.

REX EX REL. ROBINSON v. McCARTY.

Municipal Elections—Township Councillor—Disqualification — Membership in School Board for which Rates are Levied—Statutes—Claim to Seat — Objection not Taken at Nomination — Costs — Status of Relator—Nominee of Township Clerk.

Application in the nature of a quo warranto to set aside the election of the respondent as a councillor for the township of East Nissouri, in the county of Oxford, and to have it declared that one Thomas Richardson should be admitted to the office instead, upon the ground that the respondent was disqualified by reason of being at the date of the election a member of the school board for union school section 5 in the township of East Nissouri, a school board for which rates are levied.

J. P. Mabee, K.C., for relator.

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

THE MASTER.—From the nature of the evidence adduced by the relator, I am of opinion that the real intent of the application is to seat Richardson in the place of the respondent. This, however, cannot be done under the circumstances, as it is not even attempted to be shewn that the respondent's qualification was objected to at the nomination, so that the electors might have an opportunity of nominating another candidate: Regina ex rel. Tinning v. Edgar, 4 P. R. 36; Regina ex rel. Adamson v. Boyd, ib. 204; Regina ex rel. Ford v. McRae, 5 P. R. 309, 315; Regina ex rel. Forward v. Detlor, 4 P. R. 198; Rex ex rel. Steele v. Zimmerman, ante 242.

With reference to the grounds of disqualification alleged against the respondent, I have had occasion to consider these fully in Rex ex rel. O'Donnell v. Broomfield, ante 295, in which I followed the decision of the Chief Justice of the King's Bench in the Zimmerman case, and held the respondent to be disqualified for the reasons stated.

In addition to the arguments put forward in Rex ex rel. O'Donnell v. Broomfield, counsel for the respondent in this case contends that the respondent, being a trustee of union school section number 1 and 5 in the townships of North Oxford and East Nissouri, does not come within the disqualifying clause, which states "and no member of a school board for which rates are levied."

It appears to me that it is not material whether the respondent is a member of a corporation called "The Board of Public School Trustees of Union Section," etc., or whether he is a member of "The ——— Public School Board;" he is a member of a "school board" within the provisions of the Act respecting Public Schools, 1 Edw. VII. ch. 39. . . . It is evident from the different sections of this Act that the school section in question has a board of trustees, and also that rates are levied for its use. Even if the word "board" was not used in the Public Schools Act, there being in fact a corporation formed to carry on the educational system of the township at the public expense, I would hold that the disqualifying clause in question would refer to the members of the corporation for the time being.

With reference to the costs of these proceedings, I am of opinion . . . that the relator has been put forward by the clerk of the township, and that he is in reality the relator —his affidavits to my mind indicate that fact. See Regina ex rel. McMullen v. DeLisle, 8 U. C. L. J. 291, and Regina ex rel. Brine v. Booth, 9 P. R. 452. But I do not think that I should apply these decisions in the absence of actual proof

that the clerk of the township is behind the proceedings. The relator has put the respondent to considerable expense with reference to his claim to be seated. These costs should be paid by the relator. Under the circumstances, a proper exercise of discretion as to costs will be that each party pay his own costs.

The seat to be declared vacant and a new election ordered.

MACMAHON, J. APRIL 6TH, 1903.

TRIAL.

BIRNEY v. SCARLETT.

Way—Removal of Sand from Streets Laid out in Plans—No Dedication or Acceptance as Highways — Mortgage — Foreclosure — Extinguishment of Mortgagor's Rights in Streets.

Action for damages for the removal of timber, sand, and gravel from certain streets in the town of Toronto Junction.

Louisa Scarlett died 28th December, 1883, having by her will devised the east half of lot 36 in the 3rd concession from the bay in the township of York, containing 100 acres, to her husband, John A. Scarlett, and her children.

On 26th May, 1887, certain of the devisees executed a quit claim of all their interest in the land to the other devisees. These latter subdivided part of the land into lots, and, as the owners thereof, registered a plan of the subdivision, on 12th April, 1888, as plan 838.

Certain other parts were afterwards subdivided into lots, and a plan thereof was registered by the same persons, as owners, on 26th November, 1889, as plan 969.

All of the lots included in the subdivisions mentioned in plans 838 and 969, and also the remaining portions of the east half of lot 36, were subsequently acquired by John A. Scarlett, Joseph Birney (the plaintiff), and John L. Birney, as tenants in common, and they gave back to the vendors mortgages thereon to secure the greater part of the purchase money, amounting to about $130,000. The mortgagees covenanted that they would assent to a re-subdivision of the lands, and the mortgagors prepared a plan shewing a re-subdivision of the parts already subdivided, and also a subdivision of the parts not already subdivided, which plan was filed on 12th October, 1890, as plan 1067. Indorsed on the plan was this certificate: "The owners of the property laid out upon this plan, for themselves, their agents, executors, administrators, and assigns, reserve the right to remove all sand, gravel, clay, and timber they may see fit from all roads, streets, lanes,

and commons, laid out thereon, for and during the period of five years from the registration of said plan." The certificate was signed by the mortgagors, mortgagee, and the mayor of the town of Toronto Junction.

On June 29, 1890, an agreement was entered into between the corporation of the town and the mortgagors providing that the land in question should, subject to the approval of the Lieutenant-Governor, be added to the town of Toronto Junction, to be subject to the assessment as therein provided for. One of the provisions in the agreement was that, save and except as to the Weston road south, the streets, avenues, and roads laid out on the plan should not be held to be dedicated as highways by reason of the property being annexed to Toronto Junction, or by reason of the assessment per foot frontage, or by reason of the corporation laying the water main on Mary avenue, and that the corporation should not be bound to adopt or be responsible for the same as highways until dedicated and accepted as such by by-law.

A by-law was passed by the town council on 22nd December, 1890, by which the lands were added to the town, subject to the approval of the Lieutenant-Governor, upon certain terms:—(a) That the lands should not be assessed for more than $3 per foot frontage, until sold, etc. (b) That the owners should have the right to remove all timber, gravel, or clay from off all roads, streets, lanes, or avenues laid out upon the property, according to plan 1067, excepting the Weston road south. (c) That the town corporation should not be held to have adopted or be bound to adopt or accept any of the roads, streets, lanes, or avenues, as highways, except the Weston road south, and should not be responsible for them as highways until dedicated and accepted as such by by-law.

None of the lots on these plans was sold or conveyed by the Birneys and John A. Scarlett.

Their mortgages to the vendors being in arrear, the latter on the 7th January, 1892, began an action for foreclosure, and a final order of foreclosure was issued on the 5th September, 1893.

In the judgment and final order the streets referred to in the plans were, with the exception of the Weston road south and the Albany road, included in the foreclosure.

After the final order the plaintiffs in that action obtained an order from the Judge of the County Court of York dated 15th December, 1897, amending registered plans 839 and 1067 by doing away with certain blocks and lots thereon and by closing up all the streets named upon such plans except

Albany road and the Weston road south, which had been accepted by the town corporation as public highways. The amended plan was filed on 19th October, 1897, as No. 1196.

In November, 1897, the plaintiffs in that action leased to defendant Smith certain portions of the east half of lot 36, containing 70 acres, with the right to remove gravel therefrom for twenty years. The portions leased included the Albany road and other streets and avenue. Smith assigned the lease to defendants the Gravel and Construction Company of Toronto.

Joseph Birney died 15th March, 1901, intestate, leaving plaintiff his sole heir and next of kin.

Plaintiff sued as owner of an undivided two-thirds interest in the gravel on those streets for damages for its removal.

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

E. D. Armour, K.C., and R. B. Henderson, for defendants.

MacMahon, J. (after setting out the facts as above):—The streets laid out on the plans, from which gravel was taken, were not public highways, as no lots had been sold to purchasers: In re Waldie and Burlington, 7 O. R. 192, 13 A.R. 104; Roche v. Ryan, 22 O.R. 107. And even had lots been sold fronting on the streets so as to constitute them public streets within the town, the town corporation would be free from any liability to keep them in repair unless they were established by by-law or assumed for public use by the corporation: R.S.O. ch. 223, sec. 607. The agreement between the town and the Birneys and Scarlett and the passing of the by-law by the town must, therefore, have been regarded in some way as an additional protection to the corporation beyond that afforded by the Act. Until the municipality had in some way, as by the expenditure of public moneys, assumed the streets for public use, the corporation would not own, and therefore would have no power to sell, sand or gravel from these streets under sec. 640, sub-sec. 7, of R.S.O. ch. 223.

The Albany road was a winding road through the east half of lot 36, and a conveyance was made of that part of the lot east of the Albany road, and another conveyance was made of that part to the west of the west side of that road, so that the road (which was never a public road) remained in the grantors, the Scarletts. Afterwards parts of what was known as the Albany road were included in the lots forming the subdivision of lots on plan 969, and a new street called Albany road was laid down on plan 1067. I fail to see how Albany road stood in any different position from the other

streets on the plan, which were included in the judgment and order in the foreclosure action.

Plaintiff asks to have it declared he is the owner and entitled to a two-thirds interest in the soil and freehold of the street known as Symes road. The defendants have not removed any sand or gravel therefrom, and the plaintiff's rights, if any, have not been interfered with.

The interest of plaintiff and the other mortgagors having been foreclosed, as well in the streets as in the other lands included in the mortgages, he cannot maintain an action against defendants for the removal of gravel and sand therefrom.

The action must be dismissed with costs.

APRIL 7TH, 1903.

DIVISIONAL COURT.

CAVANAGH v. CASSIDY.

Security for Costs—Residence of Plaintiff—Ordinary Residence out of Jurisdiction—Temporary Residence in Ontario.

Appeal by defendant from order of BRITTON, J., in Chambers (2 O. W. R. 143) reversing order of Master in Chambers (2 O. W. R. 27), which required plaintiff to give security for costs.

J. E. Cook, for defendant.

S. B. Woods, for plaintiff.

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

BOYD, C.—The decision of the Master ought not to have been disturbed, and should be restored. Rule 1198 governs as to the law, and the affidavits and evidence supply the facts. The plaintiff is a person ordinarily resident out of Ontario. He is 36 years of age, and has for 34 years prior to the end of last September lived in the United States, where he followed business pursuits, and where live his relatives with whom he was accustomed to make his home. For about six months he has been in Ontario, engaged in American stock-broking agencies. He is now, and was when the order was made, in no settled business, but was expecting something that might turn up which would keep him in this city and country. He declines to state under oath how long he will be here, and the conclusion is, that he is merely a transient visitor, who may leave the country at any moment for his place of usual residence. Appeal allowed and order of Master restored. Costs here and below to defendant in the cause.

APRIL 7TH, 1903.

DIVISIONAL COURT.

VOIGT v. ORTH.

Judgment—Default of Defence—Writ of Summons—Service out of Jurisdiction—Order Fixing Time for Delivery of Defence—Informal Defence—Irregular Judgment—Order Dismissing Application to Set aside—Final Order—County Court Appeal.

Appeal by defendant from order of Judge of County Court of Essex in an action in that Court dismissing application by defendant to set aside a judgment against him for default of defence in an action on a foreign judgment.

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

E. S. Wigle, Windsor, for plaintiff.

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

BOYD, C.—Both plaintiff and defendant are foreigners, but upon the plaintiff filing an affidavit that defendant had property in this Province of the value of $200, the County Court Judge made an order allowing a writ of summons to be issued for service by notice on a foreigner out of the jurisdiction, and providing that defendant should have 12 days "within which to appear to notice of the writ and file his defence to the action." The writ was issued as a specially indorsed writ, and so no statement of claim was served with the notice (Rule 166). Within the twelve days defendant entered an appearance and therewith filed a defence in these words: "The defendant admits only $103, but otherwise disputes plaintiff's claim in this action." . . . This step was taken in strict pursuance of the Judge's order, which was served upon defendant. It is a proper pleading according to Division Court standards, and is essentially a defence, though of somewhat novel simplicity. It was disregarded, however, and final judgment was signed for want of delivery of a defence, and execution issued thereon. Under the order defendant was not called on to deliver his defence, but only to file it, and with this defence on the record, the judgment is a nullity. According to proper practice there should be simply an appearance entered, to be followed by a statement of claim, unless defendant notifies plaintiff that he does not require such statement to be delivered: Rules 171, 243, 245. But plaintiff is bound by the terms of his order.

The County Court Judge's order dismissing the application to set aside the judgment contained a clause that on payment of $5 in ten days defendant might move to set aside

the judgment on the merits. . . . This order was in its nature final, and not interlocutory, within the meaning of R. S. O. ch. 55, sec. 52, and an appeal from it lies. Babcock v. Standish, 19 P.R. 195, and O'Donnell v. Guinane, 28 O. R. 389, considered.

Appeal allowed. Costs of motion and appeal to be taxed to defendant and set off pro tanto against the amount admitted to be due to plaintiff.

BRITTON, J. APRIL 8TH, 1903.

TRIAL.

ALEXANDER v. MILES.

Master and Servant—Injury to Servant—Factory—Defective System—Negligence—Findings of Jury—Workmen's Compensation Act.

Action by the administratrix of the estate of James Alexander to recover damages for his death, which occurred on the 2nd October, 1902, as the result of an accident in defendant's factory. It was proved and admitted that the death of James Alexander resulted from his being accidentally struck by a board pushed from below through the hole in the floor above by one William Miles, a servant and workman then in the employment of defendant; that James Alexander was, at the time and on the occasion of his being so struck, rightfully where he was, and that he was not guilty of any contributory negligence; that the hole in the floor was intended, and for a long time had been used, for the purpose of pushing through it boards from below to the floor above. It was alleged by defendant that she had a sytem of using this hole and of putting the boards up through it, which was a safe one and not dangerous to the workmen on the upper floor, and that this accident occurred through the negligence of William Miles in not following this system and in not obeying instructions, and that for such negligence of a fellow-workman plaintiff could not recover at common law or under the Workmen's Compensation Act. The jury, however, found that there was no system adopted which provided against the danger.

L. V. McBrady, K.C., and T. J. W. O'Connor, for plaintiff.

W. R. Riddell, K.C., and J. H. McGhie, for defendant.

BRITTON, J., held that the findings were not inconsistent, and were warranted by the evidence. The boards were constantly required for use by defendant on the upper floor of the factory. They were moved through this hole in the floor. This was a defective system of putting in place and using

what was constantly required. The using of this hole, placed there as part of the factory, as it was intended to be used, and as it was used, was attended with danger, and it therefore became the duty of defendant to protect the workmen by some plan or system, or at least to warn them when boards were to be pushed up. It is negligence in an employer not to make provision for protection of his workmen, and it is no answer that the workman is willing to assume all responsibility: see Webster v. Foley, 21 S. C. R. 580; Smith v. Baker, [1891] A. C. 348. Upon the answers to questions 4, 5, 6, and 7 there was liability under the Workmen's Compensation Act. Judgment for plaintiff for $1,000 and costs.

BRITTON, J. APRIL 8TH, 1903.

TRIAL.

STONE v. BROOKS.

Landlord and Tenant—Distress for Rent—Seizure when no Rent Due—Damages—Double Value—Property of Tenant in Mortgaged Chattels—Right of Action—Proceeding under Overholding Tenants Act—Estoppel—Chattel Mortgage—Default—Taking Possession—Agreement to Abandon—Breach—Measure of Damages.

On 14th September, 1901, plaintiff purchased the stock of a livery stable from defendant for $2,500, paying $800 cash, and giving a chattel mortgage on the goods purchased and other goods for $1,700. The plaintiff also leased from defendant the livery stable premises for ten years at $900 a year. The mortgage covered after-acquired property, and contained a provision that in case of default in payment, or if the mortgagor should attempt to sell or dispose of or in any way part with the possession of the goods, etc., or in case the mortgagee, for any good reason, should feel unsafe or deem the goods in danger of being sold or removed, the whole mortgage money should become due and the mortgagee should have the right to take possession.

On 13th February, 1902, defendant distrained for $143.38, balance of rent alleged to be due up to 16th January, 1902, and seized all the property covered by the mortgage to realize $1,600, the amount then alleged to be due thereon.

The plaintiff brought this action for illegal distress and seizure, alleging that no rent was due; that the seizure under the chattel mortgage was unnecessary; and that the action of defendant was not to secure himself but to injure plaintiff.

The plaintiff also alleged that after the seizure an agreement was come to by which defendant was, in consideration of getting an assignment of accounts, to abandon the seizure and not to remove or sell the property. The accounts were

assigned, and $15 was paid on 13th and $25 on 17th February, 1902, by plaintiff to defendant.

The jury found:

1. That no rent was due on 13th February, when the seizure was made.

2. That the value of the goods seized and sold for rent was $690.

3. That plaintiff sustained $417 actual damages by reason of the seizure and sale for rent.

4. That defendant on 13th February agreed to entirely abandon both seizures in consideration of the assignment of accounts amounting to $162.

5. That by reason of the breach of that agreement plaintiff had sustained $1,859 damages.

6. That defendant had no good reason for feeling unsafe or deeming the mortgaged goods in danger of being sold or removed.

John MacGregor, for plaintiff, moved for judgment for $1,380, being double the value of the goods seized for rent, and $1,859 damages for sale of mortgaged goods.

E. E. A. DuVernet, for defendant.

Britton, J.—Upon the evidence and the findings of the jury there was no rent due. There was $300 due for rent on 16th January, 1902, but plaintiff was entitled to credits amounting to $309.50, and if all credits were applied on rent, it would be overpaid by $9.50.

Plaintiff is entitled to damages, and he claims double the value of the goods sold for rent. The goods were not sold until 4th March. This action was commenced on 24th February, so the plaintiff cannot recover double value under the statute. The value of the goods seized for rent and afterwards sold was $690, and that is the amount plaintiff should recover on this branch of the case. The jury found $417, but they arrived at the amount by deducting from the actual value of the goods seized the amount which they realized at the sale, $273. As plaintiff did not get the $273, defendant should not get credit.

The chattel mortgage to defendant does not, nor does the chattel mortgage (on plaintiff's equity in the goods) to plaintiff's wife, prevent recovery by plaintiff. Plaintiff was tenant of defendant, and at the least had a special property in the chattels seized. Apart from what defendant did, plaintiff was in uninterrupted enjoyment of the property, and so has a right to maintain the action: see Fell v. Whittaker, L.R. 7 Q. B. 120. Defendant, having treated these goods as the

goods of plaintiff, cannot, if distress is wrongful, rely upon his chattel mortgage as a defence: see Dedrick v. Ashdown, 15 S. C. R. 227.

It is not necessary, in my view, to join plaintiff's wife as a plaintiff, but I give leave to add her if it should be necessary at any future stage.

Defendant contends that by proceedings before a County Court Judge under the Overholding Tenants Act, plaintiff is estopped from saying in this action that there was no rent due at the time of the seizure in February, 1902. I do not think there is any estoppel. This action was commenced on 24th February. Plaintiff is entitled to have his rights determined in this action as they then stood. The proceedings under the Overholding Tenants Act were commenced on the 1st April, when another gale of rent had become due. It was no part of the County Court Judge's duty to determine how the account for rent stood in February, nor could he determine as between the parties what is in question in this action.

Upon the other branch of the case, as to the property covered by the chattel mortgage and the sale of it, the Judge, after commenting on the evidence and the findings of the jury, continued:—

We now come to 13th February, 1902. I see no reason why defendant could not waive default and make the agreement which plaintiff alleges was made, and which the jury have found was made, to abandon the seizure. Plaintiff made the assignment of the accounts and the payments of $15 and $25, notwithstanding which defendant entered on the 20th and removed the chattels, breaking up plaintiff's establishment; and all the chattels were sold on or about 4th March. . . . The mortgagee took possession on 20th February in violation of his agreement to entirely abandon the seizure. . . . If defendant sold when he had no right to do so, the measure of damages is the extent of the mortgagor's interest in these goods, and as the mortgagor might have been able to work out the debt, or sell the property as a going concern, if he had not been interfered with, the damages are the difference between the real value of the goods to the mortgagor and the full amount of defendant's claim. . . . On this branch plaintiff is entitled to $1,022.94, against which I allow on defendant's counterclaim $145 for rent and use and occupation.

On the whole case judgment for plaintiff for $1,567.94 and costs.

STREET, J. APRIL 8TH, 1903.

TRIAL.

TRAVISS v. HALES.

Husband and Wife—Liability of Husband for Torts of Wife where Marriage before 1884—Libel.

Action against a husband and wife who were married on 13th May, 1875, to recover damages for a slander uttered by the wife in April, 1901. It was agreed that there should be judgment against the wife for $1 and costs, and for the same against the husband if he should be held liable under the law as it stands for this tort of his wife, and that the parties should be in the same position as if the counsel for the husband had moved to have a nonsuit entered for him at the trial upon the ground that he was not liable for the torts of his wife.

J. W. McCullough, for plaintiff.

F. A. McDiarmid, Lindsay, for defendants.

STREET, J.—The weight of authority is in favour of the view that at common law the husband was liable for the torts of the wife as a matter of principle, and not by reason merely of the fact that he was a necessary party to an action against her: Bacon Abr., tit. Baron et Feme, L.; Head v. Buscoe, 5 C. & P. 484; Wainford v. Heyl, L.R. 20 Eq. 321; Seroka v. Kattenburg, 17 Q. B. D. 177; Lee v. Hopkins, 20 O. R. 666, and cases there cited. But see, to the contrary, Amer v. Rogers, 31 C. P. 195. If a direct liability at common law existed, there is nothing in sub-sec. 2 of sec. 3 of the Married Women's Property Act, R.S.O. ch. 163, sufficient to relieve the husband. The liability of the husband was a necessary part of the common law principle of the identity of husband and wife. The liability to be sued along with his wife and to be made liable in such an action for her torts is still maintained, to a limited extent, by sec. 17 of R.S.O. ch. 163, and is by that section continued without any limitation down to the present time, so far as persons married before 1st July, 1884, are concerned. Judgment for plaintiff for $1 and the costs of the action on the High Court scale against both defendants.

APRIL 8TH, 1903.

DIVISIONAL COURT.

McLAUGHLIN v. RODD.

Security for Costs—Residence of Plaintiff—Ordinary Residence out of Jurisdiction—Temporary Residence in Ontario.

Appeal by defendant from order of MEREDITH, C.J., in Chambers (2nd March, 1903) reversing an order of one of

the local Judges at Windsor requiring plaintiff to give security for costs.

E. S. Wigle, Windsor, for defendant.

R. U. McPherson, for plaintiff.

The COURT (BOYD, C., FERGUSON, J., MACLAREN, J.A.) held that the order of the Chief Justice was well founded. The plaintiff had been in the country nearly three years, and was engaged in an enterprise as to a patent air brake which from the pleadings, it would seem, both parties admitted to be of importance and of financial promise. This was likely to keep him in the country for a long time, and the evidence was all that way, and repugnant to the idea of a mere temporary sojourn. He had no family associations or residence, according to his own evidence, which was not controverted, which would draw him to the States, though he might still be of American domicil. Appeal dismissed. Costs in cause to plaintiff.

APRIL 8TH, 1903.

DIVISIONAL COURT.

SMALL v. AMERICAN FEDERATION OF MUSICIANS.

Writ of Summons—Service—Unincorporated Voluntary Association—International Association—Service upon Executive Officer in Ontario—Service on Members.

Appeal by defendant association from order of MEREDITH, J., in Chambers, ante 199, affirming order of Master in Chambers, ante 26, dismissing a motion to set aside the service of the writ of summons on one Carey for the defendant association.

J. G. O'Donoghue, for defendants.

C. A. Moss, for plaintiff.

THE COURT (BOYD, C., FERGUSON, J., MACLAREN, J.A.) held that service on Carey was not service on the association, but that service on the individual defendants was good service on the members of the association. Order varied. No costs.

APRIL 8TH, 1903.

DIVISIONAL COURT.

COBBAN MFG. CO. v. LAKE SIMCOE HOTEL CO.

Costs—Mechanics' Lien Action—Examination for Discovery—Disbursements—Counsel Fees—Professional Disbursements.

Appeal by defendants from order of FALCONBRIDGE, C. J., in Chambers, dismissing appeal from taxation by the senior taxing officer at Toronto of defendants' costs of a mechanics' lien action.

A. E. H. Creswicke, Barrie, for defendants.

W. D. Gwynne, for plaintiffs.

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

BOYD, C.—The taxing officer disallowed defendants' costs of examining an officer of plaintiffs for discovery. While it is competent to have such examinations in mechanics' lien actions, it is for the taxing officer to say whether the costs of them should be taxed against the opposite party. In this case he ruled that the examination was not a reasonable thing under the circumstances of the case, and from that there is not an appeal (see also sec. 43 of the Mechanics' Lien Act).

A matter of more difficulty is, whether under sec. 42 the defendants can tax counsel fees as actual disbursements. The provision is, that when costs are awarded against the plaintiff, such costs shall not exceed an amount in the aggregate equal to 25 per cent. of the claims, besides actual disbursements. Where, as in this case, the solicitor is also the counsel, no question of actual disbursements can arise. The hand to pay and the hand to receive is the same. Disbursements are contrasted with costs in the section, and "disbursements" is used with reference to the solicitor, and not to the client. The taxing officer was right in holding that counsel fees could not be included in "disbursements." A small sum of $5 was said to have been actually paid by the solicitor to a Toronto counsel on some interlocutory application, and that is, in fact, a disbursement, though not such a disbursement as would be properly payable by the solicitor by virtue of his office, but as agent of his principal: Armour v. Kilmer, 28 O. R. 618. The distinction between payments as agent and professional payments as solicitor is well marked in England as expounded in In re Remnant, 11 Beav. 603, 611; In re Kingdon and Wilson, [1902] 2 Ch. 242; In re Backwell and Berkeley, ib. 596. The "disbursements" of sec. 43 R. S. O. ch. 153, are restricted to professional disbursements, and do not include fees paid to council by the solicitor as agent of his client. The special Act as to liens incorporates by reference the ordinary procedure of the Court except as varied by the Act. Rules 1178 and 1179 provide for costs and for disbursements respectively, and refer to the tariffs in the appendix. Tariff A. is that as to costs, and includes in its provisions the scale allowed as to counsel fees. Tariff B., as to fees and disbursements, provides, among other things, for the allowances to be paid to witnesses, which are strictly professional disbursements. Counsel fees are often the largest item in the bill

of costs, and if they were allowed in full, while other costs are reduced to 25 per cent. of the amount claimed, the purpose of the Act would be greatly frustrated.

Appeal dismissed without costs.

STREET, J. APRIL 9TH, 1903.

CHAMBERS.

REX v. FORSTER.

Criminal Law—Conviction by Special Court under Ontario Liquor Act, 1902—Removal by Certiorari—Commitment after Certiorari Served— Discharge of Prisoner — Amendment of Proceedings — Conviction under Wrong Name—Idem Sonans—Adjudication—Sentence.

Motion by defendant for an order for his discharge from custody, on the return of a writ of habeas corpus. The defendant was convicted by the Judge of the County Court of Kent, at St. Thomas, under sec. 91 of the Ontario Liquor Act, 1902, of an illegal act within the meaning of that section, and was sentenced to be imprisoned for one year and to pay a penalty of $400. On the 3rd February, 1903, a warrant was issued under the hand and seal of the Judge for committing defendant to gaol pursuant to the conviction, and he was arrested and taken to gaol. On the 30th January, 1902, a writ of certiorari was issued directed to the Judge and the Crown County Attorney for Elgin, to return certain papers into the High Court, and was served on them on the 2nd February, 1903.

J. W. McCullough, for defendant.

J. R. Cartwright, K. C., for the Crown.

STREET, J., held that the proceedings against defendant were removed from the Court below by the certiorari, and the subsequent proceedings were void. The statute 2 Edw. VII. ch. 12, sec. 15, making the provisions of the Code respecting the amendment of proceedings before justices of the peace applicable to all cases of prosecutions under Provincial Acts, is intended to apply only to summary proceedings before justices, and not to proceedings under the Liquor Act of 1902. But, even if it applied here it would not help the matter. Proceedings under that act are not of the same character as those before justices, whose convictions during centuries of decisions have become subject to highly technical rules founded upon considerations no longer in many cases existing. The name of the informant appears on the present proceedings and defendant has been prosecuted under a name (Foster) so nearly identical in sound with that which he

now claims as his(Forster), that effect should not be given to an objection based on the omission of the letter "r" in his name in the conviction and other proceedings, especially as he appeared by counsel before the County Court Judge, and defended, under the name in which he was prosecuted. There was a sufficient sentence and adjudication, although the particular language which might have been necessary in a conviction by a magistrate was not made use of in the record of the proceedings. There is no reason why the sentence of imprisonment should not stand good, even if the adjudication of the fine were objectionable. This would not be so in a conviction before a magistrate, because of a long established rule to that effect, but it is so in the order of a magistrate; see Paley on Convictions, 7th ed., 170. The Court is not,in this case bound by decisions relating to magistrates' convictions, but is at liberty to apply a reasonable interpretation to the proceedings. See Lindsay v. Leigh, 11 Q. B. 456. But, as there was no authority in the Judge below to issue the commitment under which the prisoner is held, after the proceedings had been removed by certiorari, the defendant should be discharged. Order accordingly. No costs.

BRITTON, J. APRIL 9TH, 1903.

TRIAL.

CAREW v. GRAND TRUNK R. W. CO.

Railway—Farm Crossing—Duty to Provide—Railway Act of 1888—*Retroactivity—Special Statutes.*

Plaintiff was the owner of the south half of lot 15 in the 3rd concession of the township of Emily, except the right of way of defendants, who had purchased land for their road in 1882. Plaintiff, owning the land on both sides of the railway, brought this action to compel defendants to construct a crossing so that plaintiff can properly work his farm.

R. Ruddy, Millbrook, for plaintiff.

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

BRITTON, J., held that the undisputed material facts brought the case within Ontario Lands and Oil Co. v. Canada Southern R.W.Co., 1 O.L.R. 215, and there was nothing in the different statutes affecting the Midland Railway Company, by whom the portion of defendants' road in question was constructed, to render that decision inapplicable. Plaintiff could not merely as proprietor of lands along the railway invoke the aid of the original sec. 13, made part of the Act of incorporation of the Peterborough and Port Hope Railway Company, to compel defendants to construct a farm

crossing across the railway from one part to another of his land. Action dismissed without costs and without prejudice to any question affecting a claim to a way of necessity.

APRIL 9TH, 1903.

DIVISIONAL COURT.

NORTHMORE v. ABBOTT.

Will—Action to Set Aside—Burden of Proof—Want of Testamentary Capacity.

Appeal by defendant from judgment of FALCONBRIDGE, C.J., 1 O. W. R. 231, in favour of plaintiff in an action to set aside, for undue influence and want of testamentary capacity, the will of Hannah E. Fenwick, deceased.

T. D. Delamere, K.C., for defendant.

A. B. Cunningham, Kingston, for plaintiff.

THE COURT (BOYD, C., FERGUSON, J., MACLAREN, J.A.) dismissed the appeal with costs.

WINCHESTER, MASTER. APRIL 11TH, 1903.

CHAMBERS.

KINGSTON v. SALVATION ARMY.

Parties—Unincorporated Voluntary Association—Service of Process on—Religious Body Holding Property in Ontario.

Motion by defendants "The Salvation Army" to strike out their name as defendants, on the grounds that they are not an incorporated body or a partnership; that they are under the sole control of William Booth, in whom (or in trustees for whom) all their property is vested; and that D. F. McAmmond is not a proper person to be served on their behalf, and William Booth has no agent in Canada upon whom process can be served. The action was brought to recover damages for injuries sustained by reason of a runaway horse frightened by the noise made by defendants McQuarrie and Austin while conducting religious services as members of the Salvation Army in the streets of the city of Hamilton. The noise was made by the beating of a drum. It appeared that D. F. McAmmond was a staff-captain having charge of the Army's work in Hamilton.

A. E. Hoskin, for applicants.

D. L. McCarthy, for plaintiff.

THE MASTER.—The Salvation Army is a religious body, acknowledged to be so by R.S.O. ch. 162, sec. 2 (3), provid-

ing that certain officers may solemnize marriages. The army is also entitled to hold property under the Religious Institutions Act, R.S.O. ch. 307. The property purchased by the army is first taken in the name of the Commissioner in Ontario for the time being, and subsequently conveyed to William Booth. As the Salvation Army are entitled to hold and do hold property of various kinds in this Province, they may be sued and service may be effected upon them. Decision of Divisional Court in Metallic Roofing Co. of Canada v. Local Union No. 30, Amalgamated Sheet Metal Workers' International Assn., 2 O. W. R. 183, distinguished. Motion dismissed. Leave given to defendants to enter a conditional appearance. Costs in the cause.

WINCHESTER, MASTER. APRIL 11TH, 1903.

CHAMBERS.

OSHAWA CANNING CO. v. DOMINION SYNDICATE.

Parties—Third Parties—Indemnity or Relief over—Sale of Goods—Guarantee.

Motion by defendants the syndicate for third party directions against defendants the Strathroy Company, opposed by the latter on the ground that no case for indemnity arises under the circumstances shewn on the pleadings. Action to have it declared that the corn delivered by defendants to plaintiffs is not the corn which was the subject of the contract made between defendants the Dominion Syndicate and plaintiffs, and for repayment of $9,564.92 improperly received by these defendants, and damages for loss sustained by reason of the non-delivery of the corn contracted for, and damages occasioned by the collusive, improper, fraudulent and wrongful acts of defendants.

H. L. Drayton, for applicants.

W. E. Middleton, for defendants the Strathroy Co.

R. W. Eyre, for plaintiffs.

THE MASTER.—The question in issue between plaintiffs and defendants is the quality of the corn sold to and purchased by plaintiffs from the Dominion Syndicate. These defendants admit that the quality was inferior when they sold, and say that plaintiffs, knowing the fact, bought it at a lower price than would have been paid if it were of standard quality. It may be that the quantity of inferior corn was much greater than plaintiffs supposed from the inspection made by them, and in consequence they have suffered loss through the representations of the Strathroy Company. The

Dominion Syndicate allege a guarantee by the Strathroy Company to them as to quality. Under this guarantee defendants the Dominion Syndicate would have a right of indemnity or relief over in respect of any recovery plaintiffs may have as to the quality. Such indemnity or relief over may not arise, but, as the parties will have the same witnesses at the trial as they will require in the case of the third party trial, the usual order as to third party directions should be made.

WINCHESTER, MASTER. APRIL 11TH, 1903.

CHAMBERS.

METALLIC ROOFING CO. v. JAMIESON.

Mechanics' Liens—Interest on Claim—Right of Lienholder to Recover—Computation.

A question as to interest arose upon the summary trial of a mechanic's lien action. Plaintiffs claimed interest on the amount found due from 8th September, 1902. This was objected to by defendants Mackenzie and Mann, on the ground that plaintiffs were, by virtue of the Mechanics Lien Act, limited to the sum justly due to the person entitled to the lien.

W. N. Tilley, for plaintiffs.

A. W. Anglin, for defendants Mackenzie and Mann.

THE MASTER held, following Johnson v. Boudry, 116 Mass. 196, Casey v. Weaver, 141 Mass. 280, and Trustees of Lutheran Church v. Heise, 44 Md. 454, that interest, being an incident of the principal sum found due, and withheld by unreasonable delay in payment, is properly allowed and secured by the lien, but that the amount should be computed from the date of the commencement of the action.

WINCHESTER, MASTER. APRIL 11TH, 1903.

CHAMBERS.

SMITH v. McDEARMOTT.

Discovery—Examination of Party—Action for Equitable Execution of Judgment—Questioning Plaintiff as to Matters Settled by Judgment—Absence of Defence Attacking Judgment.

Motion by defendant Lee to compel plaintiff's husband, one J.C. Smith, to attend at his own expense and submit to be examined and answer all questions relating to the account of the dealings between plaintiffs and defendants McDearmott, Evans, & Co., and to the settlement referred to in the

examination of plaintiff, and produce books, etc. Action by a judgment creditor of defendants McDearmott, Evans, & Lee for equitable execution. Plaintiff's husband was by consent examined for discovery. He was asked to tell about the transactions out of which the indebtedness represented by the judgment arose, and refused to answer on the ground that there was no plea of fraud or collusion in recovering the judgment.

W. D. Gwynne, for defendant.

W. N. Ferguson, for plaintiff and her husband.

THE MASTER held, following Allan v. McTavish, 28 Gr. 539, 8 A. R. 440, that, as all that the plaintiff would have to establish against all the defendants in respect of the judgment was that the former action had been brought, the recovery on it, and the date of its recovery, without attacking the judgment defendants were not in a position to inquire into the facts on which the recovery proceeded, and J. C. Smith was within his rights in refusing to answer the questions asked. Motion dismissed. Costs to plaintiff in the cause.

WINCHESTER, MASTER. APRIL 11TH, 1903.

CHAMBERS.

RE PENDRITH MACHINERY CO. AND FARQUHAR.

Sale of Goods—Claim of Stranger to Purchase Money—Interpleader—Ownership of Goods—Trial of Issue—Costs.

Application by one Logan for an order for leave to pay into Court $250, being the purchase money of a boiler sold to him by the company, and claimed by Agnes Farquhar as belonging to her. The parties consented to a summary trial in Chambers of the issue between the claimants as to the right to the purchase money.

John Greer, for Logan.

C. A. Moss, for the company.

W. C. McKay, for Agnes Farquhar.

THE MASTER found the facts in favour of the company's claim. Order made that Logan pay over the $250 to the company, less his costs of his application to pay in (to be fixed), and that the claimant Agnes Farquhar pay to the company the sum deducted by Logan for costs, and the company's costs of the trial of the issue.

STREET, J. APRIL 11TH, 1903.

CHAMBERS.

RE SHORTREED.

Will—Bequest to Widow—Maintenance of Children—Absence of Trust in Favour of—Rights of Children in Respect of Fund—Rights of Child Born after Will Made.

Motion by the widow and executrix of John Shortreed for an order under Rule 938 construing clauses in the will of the testator. The testator (1) appointed his wife and two brothers Robert and Gideon executors; (2) bequeathed to Robert and Gideon $300 to be divided equally between them for their trouble as executors; (3) bequeathed to his wife all his household furniture, etc., and all moneys to be received from any insurance upon the testator's life, "my said wife to support and maintain during their minority my children living at my decease," and the bequest to be in lieu of dower and of compensation for her trouble as executrix; (4) devised and bequeathed all the residue of his estate to his executors in trust to convert into money and to divide it among his three children, four-tenths to his son, and three-tenths to each of his two daughters, such share to become vested upon his decease, but to be payable to each child at 21; (5) directed that until each child should attain 21 his executors should invest the share of each and pay the income, so far as might be necessary, to his wife from time to time for the educational advancement in life of his "said children;" (6) directed that, in the event of the life insurance moneys not being paid to his wife, she should receive from his other estate such sum as should be necessary to make the whole of the bequest to her $5,000, or such less sum as shall make the bequest equal to the shares of each of my daughters, "and the shares and proportions herein bequeathed to my said sons and daughters shall for this purpose be abated proportionately to that extent."

A. H. Marsh, K.C., for the applicant.

H. Guthrie, K.C., for the co-executors.

F. W. Harcourt, for the infant Ruth Shortreed.

W. R. P. Parker, for the other infants.

STREET, J.—The position of the widow and children under this will is the same as that which was under consideration in Allen v. Furness, 20 A. R. 34. That case and those referred to there seem to establish that no trust in favour of the children is created, although the children are

not without rights against the fund under certain circumstances.

The testator received all insurances upon his life during his lifetime; there was, therefore, nothing for the bequest to his wife of insurance moneys to take effect upon. The event, however, which happened has been provided for by a later part of the will.

The testator had only three children born at the date of the will; one more was born in his lifetime after the date of the will. Under the terms of the will, the three only take the residuary estate, and the fourth takes no share in either principal or income: Re Emery's Estate, 3 Ch. D. 300; Re Stephenson, [1897] 1 Ch. 75, 81.

Order accordingly. Costs of all parties out of the estate.

APRIL 11TH, 1903.

DIVISIONAL COURT.

McARTHUR v. CLARK.

Trover—Conversion and Sale of Goods—Recovery of Judgment against Vendor — Failure to Realize on Execution — Subsequent Action against Vendee—Levy of Small Part—Application as Part Payment.

Appeal by defendant from judgment of Judge of County Court of Bruce in favour of plaintiff in an action in that Court. In January, 1896, plaintiff made a bill of sale to her daughter Charlotte McPhail of certain cattle, and on 2nd September, 1901, the daughter sold the cattle to defendant, who paid her for them. After this sale, and with knowledge thereof, plaintiff recovered judgment against her daughter and the daughter's husband for the value of the cattle in an action of trover. Execution was issued upon this judgment, and was returned nulla bona, except as to $33, a small portion of it. Plaintiff then demanded the cattle from defendant, who refused to give them up. Plaintiff then brought this action for damages against the defendant as purchaser.

J. Idington, K.C., for defendant.

C. H. Ritchie, K.C., for plaintiff.

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

STREET, J.—A recovery in trover without satisfaction does not vest the property in defendant. It merely ascertains the price upon payment of which to plaintiff the property will be held to have vested in defendant from the time of the conversion. The levy of $33 of the damages was merely a part

payment, which may be taken into account in reduction of damages upon a further action. Defendant's refusal to deliver up the cattle was a new wrong, for which plaintiff is entitled to damages. Brinsmead v. Harrison, L. R. C. C. P. 584, L. R. 7 C. P. 547, and Ex p. Drake, 5 Ch. D. 866, followed. Appeal dismissed with costs.

APRIL 11TH, 1903.

DIVISIONAL COURT.

ONTARIO PAVING BRICK CO. v. BISHOP.

Mechanics' Liens—Claim of Owner against Contractor—Abandonment of or Discharge from Work—Mistrial—Reference back.

Appeal by defendant Singer from judgment of Neil McLean, an official referee, in a case under the Mechanics' Lien Act. Defendant Singer was the owner; defendant Bishop the contractor; plaintiffs and others had furnished work and material which had gone into the buildings under contract. Singer set up in his statement of defence that Bishop had abandoned the work, and in the alternative that he had been discharged from it, and that the completion of the work had cost much more than the contract price. The referee confined the parties to evidence as to the amount of the work done and the payments made upon it, and refused to receive evidence as to damage sustained by Singer. Under the terms of the contract, in the event of the contractor abandoning the work or being discharged from it by the architect, the cost of completing it was to be charged to the contractor, and he was to pay any deficiency to the owner.

W. E. Middleton, for defendant Singer.

F. C. Cooke, for defendant Bishop.

W. H. Irving, for plaintiffs.

F. E. Hodgins, K.C., for the Rathbun Company, lienholders.

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

STREET, J.—The claim of the owner against the contractor for the additional cost, after first setting aside twenty per cent. of the value of the work done, is one upon which he should succeed, provided he can establish that the contractor either abandoned the work or was properly discharged from it. The other parties set up that the work was improperly taken out of the contractor's hands against his will. The question was one to be tried before the referee, upon the

pleadings. He, however, considered that it was not before him. There was a misunderstanding between him and the counsel as to what was intended to be admitted. Order made setting aside judgment and referring the case back to the referee to be tried out. Costs of appeal and reference back to be dealt with as part of the costs of the cause by the referee, and paid by the unsuccessful party upon the reference back.

APRIL 11TH, 1903.

DIVISIONAL COURT.

PRING v. WYATT.

Malicious Prosecution — Reasonable and Probable Cause—Nonsuit—Search Warrant — Theft — Information not Charging Crime—Amendment.

Re-argument of case reported ante 22.

Appeal by defendant from a judgment of nonsuit by the junior Judge of the County Court of Middlesex in an action for malicious prosecution.

On 20th February, 1902, defendant, having with him a collie dog, was passing plaintiff's house, when plaintiff and his son claimed the dog as theirs and took possession of it. Defendant went to a magistrate and stated the facts, whereupon the magistrate drew an information stating that plaintiff did on that day "unlawfully have and keep in his possession and take away a black collie dog, the property of the complainant," which was sworn to by defendant, and upon it the magistrate issued a search warrant and delivered it to a constable, who took the dog out of plaintiff's possession, plaintiff insisting that the dog was his. The constable then laid an information against plaintiff, charging that on the 20th February, 1902, he "unlawfully did have and keep in his possession a black collie dog, the property of" defendant. A summons was issued by the magistrate, and both parties appeared before him. There was evidence to shew that at the request of defendant and his counsel the information was amended by inserting the words "steal and take away." The trial then proceeded, and the magistrate dismissed the charge, making a note that "the charge of theft" was dismissed. Plaintiff then brought this action for malicious prosecution.

J. H. Moss, for plaintiff.

J. R. Meredith, for defendant.

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

STREET, J.—The defendant, having merely stated the facts of the case to the magistrate, and having stated them fairly, was not liable for the erroneous view of the magistrate that he had jurisdiction to issue a search warrant, nor for the subsequent action of the magistrate in summoning plaintiff before him in order apparently to dispose of the question as to the property in the dog. But when the proceedings began before the magistrate the plaintiff's counsel pointed out that no criminal offence was charged, and that the magistrate had therefore no jurisdiction; and there is evidence that defendant assented to the alteration in the information which then distinctly charged plaintiff with theft, and to the prosecution of plaintiff upon that charge. The real question in the action was not whether defendant believed that the dog was his, but whether he believed that plaintiff had stolen him, that is to say, had taken him without any belief that he had a right to take him. The trial Judge should have left the case to the jury, telling them that, if they found that defendant had authorized the charge of theft, and if he honestly believed, at the time of the hearing before the magistrate when the information was amended, that plaintiff had stolen the dog, they should find for defendant; otherwise, they should find for plaintiff. The case should not have been taken from the jury, under the circumstances, upon the ground that reasonable and probable cause for a criminal prosecution had been shewn: Brown v. Hawkes, [1901] 2 Q. B. 718; Munroe v. Abbott, 39 U. C. R. 83; Macdonald v. Henwood, 32 C. P. 433; Patterson v. Scott, 38 U. C. R. 642; Grimes v. Miller, 23 A. R. 764.

Appeal allowed with costs and new trial ordered. Costs of former trial to plaintiff in any event.

APRIL 11TH, 1903.

DIVISIONAL COURT.

WEBB v. CANADIAN GENERAL ELECTRIC CO.

Master and Servant—Injury to Servant—Workmen's Compensation Act — Negligence of Fellow Servant — Person Intrusted with Superintendence—Evidence for Jury.

Motion by plaintiff to set aside the nonsuit by MEREDITH, J., at the trial at Peterborough, and for a new trial, in an action under the Workmen's Compensation Act. According to plaintiff's evidence, he was working in a narrow trench, with a wall on one side and a line of rails on the other, in a building of defendants. The line of rails passed through the building from east to west, and connected a building to the east, in which material was kept, with other buildings to

the west, and the line of rails was used for the purpose of running truck loads of material from one building to the others. Plaintiff was working in the trench with his back to the door and about 15 feet from it, when a man who was working with him passed between him and the wall, and he leaned over with his arm on the track to steady himself. At this moment a heavy truck, laden with wire, pushed by four men, which had come through the door behind him, without his knowledge and without any warning to him, passed over his arm and injured it. He said that he had looked to the east a few minutes before, and that the door was closed. There was evidence that a man named Rome had the duty of superintending the transfer of the wire from one part of the works to the other, and that he, in turn, was under the general control of one Drew; that just before the accident Rome went up to Drew and spoke to him and then pulled out the peg over the latch and opened the east door, and directed some men to push the car through it; that Rome and Drew were both in a position to see the plaintiff at work, and that no warning was given to him.

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

R. M. Dennistoun, Peterborough, for defendants.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) held that there was evidence to go to the jury that the accident was caused by negligence on the part of Rome, and that Rome was a person in the service of defendants who had superintendence intrusted to him, and that his negligence took place whilst he was in the exercise of such superintendence. Order made setting aside nonsuit and directing a new trial with costs of former trial and this motion to be paid by defendants.

APRIL 11TH, 1903.

DIVISIONAL COURT.

McGHIE v. RABBITS.

Principal and Agent — Work Done by Order of Supposed Agent — Action for Price of—Failure to Prove Authority of Agent.

Appeal by defendants from judgment of Judge of County Court of Hastings in favour of plaintiff upon the findings of the jury in an action to recover the price of some repairs made by plaintiff upon certain buildings upon the order of one Thompson, whom plaintiff alleged to be defendants' agent.

W. B. Northrup, K.C., for defendants.

E. G. Porter, Belleville, for plaintiff.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) held that there should have been a nonsuit. Sarah McAnnany, the widow, was the sole trustee of her deceased husband's estate, and was charged with the duty of collecting the rents, and, after first paying for necessary repairs out of them, of dividing them between herself and her daughter, the defendant Frances Rabbits. These duties she delegated to Thompson by a power of attorney, and Frances Rabbits did not object to her doing so, but there is no evidence that she gave him any authority to pledge her credit. Thompson incurred debts for repairs, instead of paying for them out of the rents, as he should have done, and gave notes for the debts signed by him as attorney for Sarah McAnnany. The $77.71 claimed by plaintiff is the balance of this debt, and it was all incurred before her death. The $141.05 forming the remainder of the claim was incurred by Thompson after the death of the widow, after he had been notified by Frances Rabbits that his authority under the power of attorney had come to an end on the death of the widow, and without the pretence of any authority to bind either the Union Trust Company or the infants, the other defendants. Appeal allowed with costs and action dismissed with costs.