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STREET J. OCTOBER 5TH, 1903.

CHAMBERS.

ONTARIO BANK v. STEWART.

Jury Notice—Motion to Strike out—Equitable Issues Raised by Defendant.

Appeal by plaintiffs from order of Master in Chambers, ante 811, refusing to strike out jury notice for irregularity, and motion by plaintiffs to strike out the jury notice as a matter of discretion.

C. A. Moss for plaintiffs.

Grayson Smith, for defendant.

STREET, J., dismissed the appeal and motion, and directed that plaintiffs should go down to trial at Brampton and pay the extra expense.

MCMAHON, J. OCTOBER 5TH, 1903.

WEEKLY COURT.

METALLIC ROOFING CO. OF CANADA v. LOCAL UNION No. 30, AMALGAMATED SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION.

Parties—Representation of Classes—Rule 200—Members of Unincorporated Association—Trades Unions—Local Union—Officers.

Motion by plaintiffs for an order that the individual defendants shall, for the purposes of this action, represent and be authorized to defend this action on behalf of and for the benefit of all other persons constituting the local union and the association, and that all such other persons shall be bound by the judgment and the proceedings herein.

The local union was not an incorporated company or partnership, but was an association bound together for the mutual benefit of its members. The individual members of the local union who were made defendants and served with process were: William Jose, who at the commencement of the action was president; Richard Russell, treasurer; S. Cox, financial secretary; W. C. Brake, recording secretary; J. S. Chapman, corresponding secretary; J. H. Kennedy, the person appointed president in place of Jose, and also first vice-president of the association; and J. S. Annable and James Gow, members of a committee appointed by the local union. The local union held its charter from the association, which had its head office in Kansas City, in the United States.

W. N. Tilley for plaintiffs.

J. G. O'Donoghue, for individual defendants.

MacMahon, J., held, following Small v. Hyttenrauch, 2 O. W. R. 658, that the individual defendants were properly qualified to represent the other members of the local union, under Rule 200. That Rule gives no power to order that the officers of the local union shall represent the other persons constituting the association, which is a foreign body, having its headquarters in Kansas, and under whose jurisdiction the whole of the local unions in the United States and Canada are placed. Order made that the individual defendants shall represent the other members of the local union. Costs in the cause.

Street, J. October 5th, 1903.

TRIAL.

EQUITY FIRE INS. CO. v. MERCHANTS' FIRE INS. CO.

Insurance—Fire—Reinsurance—Condition—Warranty—Breach—Change Material to Risk.

On 30th January, 1901, plaintiffs, by their policy No. 7927, insured the Duncan Lithographic Co. of Hamilton against loss by fire to the extent of $6,000 for one year, divided up as follows: $1,666.65 upon machinery and tools; $2,511.20 upon plates and stones; $1,544.35 upon stock of stationery, colours, etc.; $277.80 on office fixtures, etc. On the same day plaintiffs reinsured the risk with defendants to the extent of $1,000. Attached to the policy of reinsurance was a printed slip, part of which was as follows: "It is warranted by the Equity Fire Insurance Company that it will retain an amount at risk fully equal to that reinsured under this policy." The policy was declared on its face to be subject to the conditions indorsed on it, and they were declared

to be the basis of the contract. Indorsed upon the policy were the usual statutory conditions and some additional conditions printed in red ink, one of which declared that any warranty contained in any slip attached to the policy should be as binding on the assurred as if it had been printed on the policy as one of the conditions thereof. Plaintiffs effected other policies of reinsurance of the risk under policy No. 7927 with other companies to the full amount of $6,000. Later the plaintiffs issued another policy, No. 8202, assuring the same lithographing company against loss by fire to the extent of $2,000 upon the machinery and tools mentioned in their policy No. 7927, but not covering the other property insured under that policy, and afterwards plaintiffs reinsured this latter risk to the extent of $500 with the York Fire Insurance Company. The property insured under these policies was destroyed by fire in December, 1901, and plaintiffs, having paid the loss, brought the present action to recover from defendants their proportion of the loss upon the reinsurance policy.

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

R. C. Levesconte and W. J. O'Neail, for defendants.

STREET, J.—The proper interpretation to be placed upon the warranty is, that plaintiffs would not reinsure more than $5,000 of the $6,000 which they had "at risk," as recited in the slip, and therefore the warranty was broken as soon as they affected reinsurances to the full amount of the policy. The warranty would still have been broken even had the $2,000 policy covered the same property as that insured by the $6,000 one. In any event the warranty was broken, even if the $2,000 policy could be taken into account, because it covered only a portion of the property comprised in the $6,000 policy, and the risk was, therefore, not identical. Plaintiffs, having broken the condition, are disentitled to recover. The condition was a reasonable and a material one, and the breach of it by plaintiffs was a change material to the risk assumed by defendants. Action dismissed with costs.

STREET, J. OCTOBER 5TH, 1903.

TRIAL.

McNAB v. FORREST.

Vendor and Purchaser—Written Contract for Sale of Land—Enforcement by Vendor—Parol Variation of Contract—Specific Performance—Description of Land—Statute of Frauds.

Action for specific performance of a contract in writing by which defendants agreed to purchase from plaintiff land

in the city of Stratford described by metes and bounds. Plaintiff was in the service of the Grand Trunk Railway Company at Stratford, and defendants were two sisters, dressmakers, carrying on business there. Defendants had been to see the property in question, which was occupied by plaintiff and his wife. The price asked was $1,600. Defendants were told that plaintiff would reserve the rear ten feet of the lot for a right of way to another part of the same lot. After this defendants went to the house in the evening, when plaintiff was at home, and his son-in-law, a solicitor, was present. Plaintiff said his price was $1,600, but that he would allow defendants $25 off for the ten feet. Defendants said that $25 was not enough. Plaintiff said he would not fence off the ten feet so long as defendants would give him another right of way, which was then actually used, across the parcel defendants were negotiating for—that they might use the buildings upon the ten feet as long as he had the use of the other right of way. The solicitor had drawn up an agreement for the sale of the land, excepting the ten feet, for $1,600, and containing no provision entitling defendants to use the ten feet at all. This agreement was read over to defendants carefully that evening, and was signed by defendants on a subsequent day. Defendants refused to perform it. Plaintiff tendered them a conveyance of the property, deducting the ten feet, the price mentioned being $1,600, but at the time of tendering it informed defendants that he was willing to accept $1,575 in full. Defendants asked reformation of the contract.

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

G. G. McPherson, K.C., for defendants.

STREET, J.—The defendants by executing the agreement in question, must be taken to have done so understanding that they were accepting the offer made to them by plaintiff, viz., that he should allow them $25 off the purchase money in consideration of the reservation of ten feet, and that the ten feet should not be fenced off nor interfered with in any way by plaintiff, so long as defendants were willing to allow him a right of way across the premises they were buying, and that defendants should be at liberty during that period to use the outbuildings upon the ten feet, but that defendants might at any time put an end to the right of way over their land, and that upon their doing so plaintiff should thenceforward have an exclusive right to the ten feet. . . . If plaintiff is willing to accept judgment for specific performance of the agreement with this variation, judgment will go

accordingly, but without costs, because he has asked for performance of the agreement as drawn, and is not entitled to that relief. Should he refuse to take this judgment, the action will be dismissed with costs. The land is sufficiently identified by the description in the agreement to satisfy the Statute of Frauds; it is clear that it fits the lot owned by plaintiff, and it has not been shewn that it would in all respects fit any other lot.

OCTOBER 5TH, 1903.

DIVISIONAL COURT.

RE GLANVILLE v. DOYLE FISH CO.

Prohibition—Division Court—Territorial Jurisdiction—Cause of Action, where Arising—Contract by Telegraph.

Appeal by plaintiffs from order of FERGUSON, J., in Chambers, ante 616, for prohibition to the 3rd Division Court in the district of Algoma.

Grayson Smith, for appellants.

Gideon Grant, for defendants.

THE COURT MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), dismissed the appeal with costs.

OCTOBER 5TH, 1903.

DIVISIONAL COURT.

FARMERS' LOAN AND SAVINGS CO. v. MUNNS.

Summary Judgment—Rule 603—Implied Covenant for Payment—Leave to Defend—Terms.

Appeal by defendant from order of STREET, J., ante 503, reversing order of Master in Chambers (ib.) which dismissed a motion for summary judgment under Rule 603, and allowing plaintiffs to enter judgment.

Gideon Grant, for appellant.

W. M. Douglas, K.C., for plaintiffs.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) made an order that upon the filing by the defendant of a further affidavit, and upon payment of the costs imposed by the order appealed against and the costs of this appeal, the order and judgment be rescinded; the plaintiffs' claim as indorsed on the writ of summons to stand as a statement

of claim; the defendant to file his defence at once and to accept short notice of trial, and the action to be entered for trial and the case put upon the peremptory list, notwithstanding that the time limited by the Rules may not have expired; the plaintiffs' writ of fi. fa. to stand as security for their debt.

OCTOBER 5TH, 1903.

DIVISIONAL COURT.

BUCKINDALE v. ROACH.

Security for Costs—Costs of Former Action Unpaid—Instructions Given by Same Plaintiff—Action Brought in Name of Wrong Person.

Appeal by plaintiff from order of FALCONBRIDGE, C.J., ante 788, dismissing plaintiff's appeal from order of Master in Chambers, ante 775, requiring plaintiff to give security for costs, on the ground that the costs of a former action were unpaid. The former action was apparently for the same cause, but was brought, by the mistake of the solicitor, in the name of the plaintiff's father, instead of in the name of the plaintiff, although the instructions were given by plaintiff. The former action came down to trial and was dismissed because the plaintiff therein had no cause of action.

S. B. Woods, for plaintiff.

J. W. McCullough, for defendant.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) held that defendant was not entitled to security for costs, and allowed the appeal with costs here and below.

CARTWRIGHT, MASTER. OCTOBER 6TH, 1903.

CHAMBERS.

PASK v. KINSELLA.

Parties—Joinder of Plaintiffs—Distinct Causes of Action—Husband and Wife—Wages of Wife—Money Expended by Husband.

Motion by defendant for an order requiring plaintiffs to elect which claim is to be proceeded with in this action and to make all amendments necessary thereafter.

The statement of claim set out that the plaintiffs, George and Mary Pask, were married in July, 1901, Mary being the daughter of the defendant; that from July, 1896, until her

marriage, Mary Pask, at the request of the defendant, acted as his housekeeper, on the representation that he would devise to her certain real estate, and that consequently she received no wages; that after their marriage the plaintiffs, at the request of the defendant, continued to live with him on the property mentioned until dispossessed by him in August, 1903, and during that time defendant paid nothing for his board; and that George Pask, at the request of the defendant and with his consent, and on the distinct understanding that the property belonged to the plaintiff Mary Pask, expended in repairs to the defendant's house $771.72.

The prayer for relief was by the plaintiffs jointly for $1,575.72, made up as follows; $600 for wages due Mary Pask, $204 for board of defendant for 17 months, and $771.72 for repairs.

J. M. Ferguson (Denton, Dunn and Boultbee), for defendant.

G. H. Kilmer, for plaintiffs.

THE MASTER.—The claim for wages due Mary Pask before marriage, and the claim of the husband for repairs, are plainly two distinct causes of action vested in different plaintiffs. There is no allegation in the statement of claim as to the charge for defendant's board amounting to $204, shewing which of the plaintiffs make this claim, or whether it is joint.

The terms of Rule 185 are in themselves plain. They have been interpreted by the Courts in England in Stroud v. Lawson [1898] 2 Q. B. 44; Universities v. Gill, [1899] 1 Ch. 55; Wallers v. Green, [1899] 2 Ch. 696; Ellis v. Duke of Bedford, [1899] 1 Ch. 494, [1901] A. C. 1. See Odgers on Pleading, 5th ed., pp. 25, 26.

The Rule is said by Stirling, J., in the second case, p. 60, to be as laid down by Chitty, L.J., in Stroud v. Lawson (p. 52), "that the right to relief alleged to exist in each plaintiff should be in respect of or arise out of the same transaction, and also that there should be a common question of law or fact in order that the case may be within the rule." And in that case Vaughan Williams, L.J., says (at p. 54): "The two conditions (above mentioned) are *not* alternative."

Applying this principle, it seems clear that the claims of Mary Pask for wages and of her husband for repairs, assuming them to be maintainable, cannot properly be joined in the same action. What common question of law or fact has to be determined for the success of these two claims? If the plaintiffs had brought separate actions, could the defendant

have successfully asked for consolidation? The only possible suggestion of a common question of fact is the alleged promise of the defendant to leave the property to his daughter. But does this satisfy the rule? Are the claims really connected otherwise than "historically," as is said in one of the cases? If entitled to wages, the daughter need not, perhaps cannot, rely on the alleged promise as a ground for recovery. It would only be a reason for not having made her claim earlier. So, too, her husband. His claim must be based on the request and consent of the defendant (as set out in para. 6 of the statement of claim). And the alleged promise again is an explanation of the delay in making the present claim, but cannot be put forward as the ground for making it.

There are few cases in our own Courts on this Rule. I notice in Liddiard v. Toronto R. W. Co., 2 O. W. R. 145, none are cited by Mr. Winchester. The only one I have seen on the Rule itself is Dixon v. Tracey, 17 C. L. T. Occ. N. 381, where Meredith, J., held that father and daughter could not join as plaintiffs seeking to recover $1,000 on behalf of both plaintiffs for seduction of the daughter and breach of promise.

So far I have not said anything about the $204 claimed for board of defendant after the marriage of the plaintiffs in July, 1901. It should be made clear whether the plaintiffs are suing for this jointly, or if not, by which of them it is claimed. . . .

The order will go that plaintiffs do elect within two weeks which plaintiff's claim will be proceeded with in this action, and do within the same time amend the statement of claim by striking out all parts that refer to the claim of the other plaintiff, and that in default the action be dismissed with costs.

The costs of this motion to be in the cause to defendant.

The plaintiff continuing will be at liberty to join the claim for $204 for board of defendant, if so advised, either as a separate or joint claim.

MacMahon, J. October 6th, 1903.

CHAMBERS.

Re DOMINION OIL COMPANY.

Company—Shares—Transfer—Refusal to Register—Mandamus.

Application by W. B. Whelpley, the holder of a certificate for 50,000 shares of the company, issued under the seal of

the company to the Colonial Securities Company on the 21st March, 1903, and assigned by that company to the applicant on the 20th July, for a mandatory order requiring the secretary of the oil company to transfer the stock on the books of the company to the name of the applicant, and to issue a share certificate therefor. The ground of refusal by the secretary of the oil company to enter the transfer on the books of the company was that the Colonial Securities Company had broken a contract with the oil company, and in consequence the latter had passed a resolution not to put through any more transfers of stock made by the securities company until they had fulfilled their contract. The applicant (who resided in New York) in his affidavit stated that he purchased the 50,000 shares of stock in good faith in the usual way of business from the Colonial Securities Company, to whom he paid a valuable consideration.

C. A. Moss, for the applicant.

W. E. Middleton, for the company.

MacMahon, J., held that the applicant, having purchased in good faith and without notice of any infirmity in the title of his vendors, was entitled to a mandatory order as asked, with costs.

Cartwright, Master. October 7th, 1903.

CHAMBERS.

ATKINSON v. PLIMPTON.

Writ of Summons—Service out of Jurisdiction—Order Permitting—Motion to Set aside—Action for Price of Goods Sold—Sale by Sample — Return of Goods — Copyright—Discretion as to Forum.

Motion by defendants to set aside an order allowing plaintiffs to issue a writ of summons for service on defendants at Liverpool, England, the writ issued pursuant thereto, the service thereof, and all subsequent proceedings.

The action was to recover $2,200, a balance alleged to be due for goods sold and delivered to defendants.

In the spring of 1902 defendant Kirkness was in Toronto, and saw plaintiffs, who were a firm of wholesale dealers in fancy goods. At this interview it was agreed that plaintiffs should send to defendants, who were a firm doing business at Liverpool, samples of their goods. This was done, and after inspection orders were sent by defendants, pursuant to which goods were shipped by plaintiffs. Defendants returned

a part of the goods and refused to pay for them, and this action was brought for the price.

J. T. Small, for defendants.

W. E. Middleton, for plaintiffs.

THE MASTER.—I entirely accede to what was argued by Mr. Small as to the duty of full disclosure of all material facts on applications under Rule 162. [Collins v. North British Co., [1894] 3 Ch. 228, Republic of Peru v. Dreyfus, 55 L. T. 802, 803, and In re Burland, 41 Ch. D. at p. 545, referred to.] . . . I do not see that there was anything here to be complained of. The plaintiffs' affidavit alleged a claim for goods sold and delivered. The fact that the defendants had thought fit to refuse acceptance and had returned them was not a necessary fact to be mentioned. Whether defendants could justify their conduct is the matter to be determined at the trial.

At present the only substantial question is whether . . . an action will lie for goods sold and delivered. And, in my opinion, it will . . .

The orders of defendants to plaintiffs which are in evidence on the motion both bear on their face these words: "Shipment to Liverpool," "Via Leyland line steamer from Boston," "Delivered f.o.b. vessel." The shipping bills are to the same effect. There is no evidence as to whether the goods were insured, or, if so, by whom, in whose name, and for whose benefit.

[Atkinson v. Bell, 8 B. & C. 277, Scott v. Melady, 27 A. R. 193, Fragano v. Long, 4 B. & C. 219, Wait v. Baker, 12 Ex. 1, and In re Wiltshire Iron Co., Ex. p. Pearson, L. R. 3 Ch. 443, Benjamin on Sales, 7th Am. ed., p. 348, and Blackburn on Sales, 2nd ed., p. 130-2, referred to.]

The facts of the present case seem clearly to resemble those of Fragano v. Long. . . . I cannot see how it can be seriously disputed that the goods became the property of defendants once they reached Boston: see Benjamin, p. 701. There is no pretence that the goods were not up to sample or as represented by plaintiffs. Indeed, defendant Kirkness . . . was in Toronto in the spring. Plaintiffs had, as requested, sent on samples, and afterwards defendants' order was filled and sent forward and only returned on account of the litigation in England about the copyright. These facts seem to distinguish the case from Bannerman v. White, 10 C. B. N. S. 844, and Varley v. Whipp, [1900] 1 Q. B. 513 . . .

The defendants argue that this is not a case which the Court should in its discretion allow to be tried in Ontario, alleging that the facts to be tried and the principal witnesses are in England, and citing Lopes v. Chavarri, [1901] W. N. 115.

[Postlethwaite v. McWhinney, ante 794, and cases cited at p. 796, referred to.] . . .

In a case in which the facts were similar to those in Lopes v. Chavarri, it would be a most proper, if not a necesary, exercise of discretion to remit the parties to the forum of defendants, being also the forum domicilii of both parties. But here there are no such facts as were before Mr. Justice Farewell, and I think the observations of Halsbury, L.C., in Cunber v. Leyland, [1898] A. C. 527, may properly be invoked by the plaintiffs. . . . In the present case payment was admittedly to be made, as it was partly made, in this country, and not elsewhere.

The only substantial defence here is the English law of copyright. Assuming that this can be successfully set up here, I do not think it is a ground for requiring plaintiffs to prosecute their claim in England, where the expense will be very much greater and where they would have to give security for costs.

Motion dismissed with costs to plaintiffs in any event.

CARTWRIGHT, MASTER. OCTOBER, 7TH, 1903.

CHAMBERS.

FULLER v. APPLETON.

Pleading—Counterclaim—Motion to Compel Amendment—Particulars.

Motion by plaintiff for order requiring defendants to amend paragraph 2 of their counterclaim.

The plaintiff's claim was for return of a deposit paid on an option on mining lands The paragraph of the counterclaim was said to be defective because it alleged only that the plaintiff "has failed to pay to the miners and workmen employed by him their wages, amounting to about $1,000, and mechanics' liens were filed by such miners and workmen against the property, and the plaintiff has also incurred considerable indebtedness for materials and supplies, a considerable portion of the accounts for which he has neglected and refused to pay."

J. B. O'Brian, for plaintiff, contended that some allegation should be made such as that the land had become liable by reason of the acts of the plaintiffs, and that the defendants

as owners would have to pay them, or else that, even if not bound to pay them, they would incur expense in having them removed from the registry office.

Casey Wood, for defendants, contended that the paragraph sufficiently alleged the facts relied on by the defendants as shewing that plaintiff had created clouds on defendants' title, and that other liens might yet be registered; that the plaintiff, having the facts clearly set out, could reply either denying the fact of the existence of the liens, or denying that, if created, under the facts of the case there was liability on defendants' part to pay them.

THE MASTER.—I do not think there is any necessity for amendment. I am not satisfied that without particulars the plaintiff cannot tell what is going to be set up against him at the trial. Unless there are substantial grounds of this character, there is no necessity for amendment of pleadings or for particulars.

So long as a litigant conforms to the spirit of the Rules, he is not to be dictated to as to how he shall frame his pleadings, as was said by Bowen, L.J.

The motion must be dismissed with costs to the defendants in any event.

STREET, J. OCTOBER 8TH, 1903.

WEEKLY COURT.

RE SYDENHAM SCHOOL SECTION No. 5.

Public Schools—Formation of New Section—Petition—Refusal by Township Council—Appeal—Reference to Arbitration—Award—Exceeding Scope of Reference—Invalidity—By-law—Description—Uncertainty.

Application by the board of trustees of school section No. 5 of the township of Sydenham to set aside an award of arbitrators appointed by by-law No. 638 of the county council of Grey.

On 10th December, 1902, the county council by their by-law No. 623, reciting their reasons therefor and the consent of the corporation of the town of Owen Sound, detached a large tract of land from the town of Owen Sound and attached it to the township of Sydenham. The whole area of Sydenham theretofore existing had been divided into certain school sections.

On 5th May, 1903, the township council refused a petition of a large number of ratepayers for the erection of a new

school section, to be composed of certain of the lots then lately attached to Sydenham along with certain other lots in that township, which had hitherto belonged to the existing school sections Nos. 1, 5, and 12.

On 18th May, 1903, the petitioners appealed to the county council, reciting the refusal of the township council to grant the prayer of their petition, and asking the county council to pass a by-law appointing arbitrators "to consider and adjudicate upon the whole question of the altering of the existing boundary lines of the aforesaid school sections Nos. 1, 5, and 12, and also of the allotting of the territory detached from the town of Owen Sound aforesaid to the proposed new public school section, and the residue of said territory to any of the existing school sections, as said arbitrators may in their wisdom adjudge."

On 19th June, 1903, the county council passed their by-law No. 638, reciting that a large number of ratepayers interested had appealed to the county council against the refusal of the township council to pass a by-law forming a new school section out of parts of school sections 1, 5, and 12, along with parts of the territory recently transferred from Owen Sound and attached to Sydenham, and had asked the county council to appoint arbitrators under the Public Schools Act to consider and determine the matters complained of, and that it appeared right and proper to appoint such arbitrators. The by-law then proceeded to appoint arbitrators "to consider and determine all matters in connexion with the re-arrangement and alteration of the boundaries of said above referred to school sections, or the erection of a new school section, if deemed advisable to do so; and to do all other acts necessary in such case as may be deemed requisite and in accordance with the provisions of the Public Schools Act, and to make their award in this matter."

The arbitrators, on 15th August, 1903, made their award "that there be formed in and for the said township a new school section to be named and numbered school section number 16, the same to be composed of"—here followed a list of lots which included certain lots not mentioned or referred to in the petition to the township council, and omitted certain lots mentioned in that petition. One of the lots mentioned in the award formed part of school section 13, and another formed part of section 2.

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

H. G. Tucker, Owen Sound, for petitioners.

STREET, J. . . . . The county council had no power to authorize the arbitrators to do more than to sit in appeal from the refusal of the township council to grant the prayer of the petition, and either to allow or disallow what the petitioners asked for, and the arbitrators had no power to do more than that. . . . The award is not the determination of an appeal from the township council, but the promulgation of the views of the arbitrators as to the proper boundaries of a new section which they had no authority to create. . . . Re Southwold School Sections, 3 O.L.R. 81, followed.

The power of a township council to deal with portions of the township which have never been attached to any school section seems to be conferred by sec. 12 of the Act; the power to readjust existing boundaries is dealt with by sec. 41. The Sydenham council passed a by-law, No. 10, on 26th May, 1903, pending the appeal to the county council, distributing their new territory amongst certain existing school sections. There is doubt as to the validity of this by-law, but it is not necessary to pronounce upon the question. The by-law is defective in not fully describing certain "parts" of lots mentioned in it, leaving an uncertainty as to what "parts" are intended.

Order made setting aside the award with costs to be paid by the petitioners represented by counsel opposing the motion.

STREET, J. OCTOBER 8TH, 1903.

TRIAL.

FALVEY v. FALVEY.

Husband and Wife—Alimony—Justification of Wife for Leaving Husband—Violence—Adultery—Misconduct of Wife.

Action for alimony, tried at Toronto.

J. M. Godfrey, for plaintiff.

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

STREET, J.—If plaintiff had brought her action for alimony as soon as she left defendant, there would have been no sufficient answer to her claim, because the defendant had been guilty of violence in choking her upon the night before she left him, and this violence was the immediate cause of her leaving him, coupled as it was with the suspicion that he was carrying on improper relations with another woman. It is

true that her own conduct at this time was not irreproachable. Her temper was violent, and she was out a great deal at night, refusing to give her husband any account of her proceedings, and denying in violent language his right to know where she had been. After she left him he assaulted her at the boarding house to which she had gone because she had taken his money when she left him. After this, and while living apart from him, she accepted presents of a watch, a ring, a trunk, underclothing, and money, from a man named Sutherland. These are circumstances leading to strong suspicion of impropriety, but not absolute proof of guilt, in the face of plaintiff's denial. It must be taken to be proved against defendant that he lived in adultery in Toronto for a month with a certain woman, his intimacy with whom in Montreal was one of the causes of his wife's leaving him. The plaintiff was justified in leaving defendant when she did, and defendant by his adultery has deprived himself of the right to say that he is willing to take her back.

Judgment for plaintiff for $12 a month alimony with costs.

CARTWRIGHT, MASTER. OCTOBER 10TH, 1903.

CHAMBERS.

CONNER v. DEMPSTER.

Venue—Rule 529 (b)—Cause of Action, where Arising—Declaration of Right of Way—Execution of Deed.

Motion by defendant to change venue from Kingston to Brockville, on the ground that the case comes within Rule 592 (b). Action for a declaration of plaintiff's right of way over defendant's land in the town of Gananoque, in the county of Leeds, and for an injunction restraining defendant from interfering with plaintiff's use of that way. The parties both reside in Gananoque.

Rule 529 (b) provides that where the cause of action arose and the parties reside in the same county the place of trial to be named by plaintiff shall be the county town of that county.

H. W. Mickle, for defendant.

A. H. F. Lefroy, for plaintiff.

THE MASTER held that the Rule requires that the *whole* cause of action should have arisen in the county: Bertram v. Pursley, 2 O. W. R. 264. Here the whole cause of action did

not arise in Leeds. The execution by the common grantor of the deed to defendant was the beginning, if not the whole, of the alleged cause of action; and this deed was executed at Toronto, and presumably delivered there also. The execution of the deed would properly be considered the causa causans of the action: Orford v. Bresse, 16 P. R. 332; Cherry v. Thompson, L. R. 7 Q. B. 573; Holland v. Bennett, [1902] 1 K. B. 867.

Motion dismissed. Costs in the cause.

TEETZEL J. OCTOBER 10TH, 1903.

CHAMBERS.

RE STRATHY WIRE FENCE CO.

Company—Petition for Winding-up Order—Previous Assignment for Benefit of Creditors—Refusal of Petition—Discretion—Merits—Leave to Appeal.

Petition by Robert L. F. Strathy, for an order for the winding-up of the company under the Dominion Act. The petitioner had organized the company and was its secretary-treasurer. He petitioned as a creditor for $466 and also as a shareholder with $5,900 paid up on his shares. The subscribed capital stock of the company was $20,450, on which $19,591 had been paid. The company carried on business for two years, and suffered considerable loss during each year. At a meeting of shareholders held on 16th March, 1903, the insolvency of the company being apparent, a resolution to assign was unanimously passed, and on the 17th March an assignment to G. S. Kilbourn, of Owen Sound, was executed on behalf of the company by its president and by Strathy as secretary-treasurer. A meeting of creditors and shareholders was held on the 26th March, at which Strathy was present, and the assignment was ratified and confirmed, and three inspectors were appointed, one of them being Mr. Creasor, a solicitor who represented Johnson & Nephew, the largest creditors, whose claim was about $11,000. The total liabilities of the company were about $20,000. On 30th March Strathy submitted to the assignee an offer of $16,000 for the entire assets of the company, the payment of the purchase money to be spread over a year. On 9th April he amended his offer by providing for a cash payment of $2,000, the

balance to be spread over a year. On 11 April an offer by James E. Keenan of $14,500 in cash was made and submitted to a meeting of assignee and inspectors on that day. Mr. Creasor, assuming to represent Strathy, offered $15,000 in cash, whereupon Keenan raised his offer to $16,000 in cash, and it was unanimously accepted by the assignee and inspectors, Mr. Creasor seconding the motion. Before doing so, however, he communicated with Strathy, who said he would not be able to make a further offer before the evening of that day. A bill of sale to Keenan and his associates of all the assets of the company was executed by the assignee and the inspectors on the 15th April, but the money was not paid until 13th May. The petition was filed on the 18th May. The petition was chiefly based upon the contention that the sale to Keenan and his associates should not be allowed to stand, chiefly because of the alleged inadequate price realized, and also because the purchasers were directors of the company, and because the assignee acted improvidently in making the sale without advertising.

R. C. Levesconte, for petitioner.

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

C. A. Moss, for Johnson & Nephew.

TEETZEL, J.—Even if the contentions of the petitioner were well founded, he would be able to obtain redress, notwithstanding the assignment, by an action: see Hargrave v. Elliott, 28 O. R. 152; and these questions would be more satisfactorily disposed of in an action than in the Master's office at the instance of a liquidator. . . . . The preponderance of evidence supports the view that the sale was in the interests of the creditors, and that more would not have been realized by delaying the sale and having it conducted by public auction or by tender. . . . Under all the circumstances, a winding-up order should not be made, but the assignee should be allowed to complete the administration of the estate. Any creditor who considers himself aggrieved may take such action to impeach the sale as he may be advised. Having regard to the conflicting views as to the absolute right of a creditor to a winding-up order, upon shewing the insolvency of the company, as expressed in Re Lamb Manufacturing Co., 32 O. R. 243, and Re Maple Leaf Dairy Co., 2 O. L. R. 590, the petitioner should have leave to appeal from this order both as to the right to exercise a discretion and upon the merits.

Petition dismissed without costs.

TEETZEL, J. OCTOBER 10TH, 1903.

WEEKLY COURT.

RE FIELDING and TOWN OF GRAVENHURST.

Arbitration and Award—Interest on Amount Awarded—Date of Commencement—Publication—Confirmation—Judgment.

Motion by the corporation of the town of Gravenhurst for an order to amend a writ of fi. fa. by limiting the amount of interest directed to be levied, to interest from the date of entering judgment upon on award. The award was published on the 26th September, 1902, under the Municipal Act, fixing the price to be paid by the corporation to Robert Fielding for an electric plant at $18,012. By sub-sec. 4 of sec. 566 of the Municipal Act, as amended by 63 Vict. ch. 33, sec. 30, the municipality had three months from the publication of the award within which to accept or reject it. No appeal having been launched and no notice of refusal to accept given, the award became absolute and enforceable against the town on the 26th December, 1902, but the town had not raised sufficient money to pay the price, and it was not until May, 1903, that a by-law for that purpose was carried, and further delays followed from the town not having been able to make a sale of its debentures, and in the meantime Fielding remained in possession of the plant at the request of the town, and he benefited by whatever profits may have been made out of operating it. Shortly after the award became absolute Fielding commenced and continued to urge the town to raise the money and take over the property. On 5th May, 1903, as a term for his continued indulgence, he obtained from the corporation a consent that the award might be enforced in the High Court in the same manner as a judgment. Under sec. 466 of the Municipal Act, and pursuant to the consent, an order was obtained on 3rd September, 1903, directing that judgment for the amount of the award might be entered in favour of Fielding. Neither in the award nor in the order was any provision made for payment of interest. Fielding, relying on sec. 116 of the Judicature Act and Rules 866, 869, issued a fi. fa. for the amount of the award and interest from the date of publication.

R. D. Gunn, K.C., for the corporation.

R. McKay, for Fielding.

TEETZEL, J. . . . In my opinion interest upon the amount of the award is recoverable only from the 26th December, 1902, at which date the award became absolute and

might have been enforced by summary application under sec. 466, or by action for specific performance. . . . The amendment to the statute and the award must be read together to determine the date when the moneys are payable, and the effect of the statutory provision is the same in postponing the right to enter judgment upon the award as if the date for entering judgment was set forth in the award itself. Order made directing that execution be amended by providing that interest be computed from the 26th December, instead of the 26th September, 1902.

It was also argued that no interest should be payable by the town before judgment was entered, because the owner remained in possession. This question cannot be determined upon this application, but this order should not prejuice the corporation in taking steps to compel Fielding to account for rents and profits.

No order as to costs.

OCTOBER 10TH, 1903.

DIVISIONAL COURT.

BANFIELD v. HAMILTON BRASS MFG. CO.

Principal and Agent — Agent's Commissions — Territory — Contract.

Appeal by defendants and cross-appeal by plaintiff from report of Master in Ordinary upon a reference to ascertain the amount due to plaintiff for commissions upon the sale of cash registers for the defendants.

G. Lynch-Staunton, K.C., for defendants.

C. Millar, for plaintiff.

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

FALCONBRIDGE, C.J.:—The Master was clearly right in holding that the city of Vancouver and the towns of Macleod, Calgary, and Edmonton, were "on the C. P. R. west," and therefore within the limits of the territory assigned to plaintiff by the contract and sued on. Plaintiff's territory extended to Montreal inclusive, which shewed that it was not confined to the Province of Ontario.

The agreement is not technically, but colloquially, phrased, and no one concerned would have in mind that Macleod and Edmonton were situated on lines which were not part of the system of "the C. P. R. west." As a matter of fact those lines are part of that system, operated by the Canadian Pacific Railway Company, and shewn on the official maps of their line. Defendant's appeal therefore fails.

As to plaintiff's 3rd item of appeal, the Master has come to the proper conclusion: (1) As to the sales made by Hossack, on the ground on which the Master bases his judgment, and on the further ground that Hossack was appointed with the concurrence of plaintiff and received the full commission. (2) Victoria, B.C., is not in plaintiff's territory. He might as well claim Yokohama or Hong Kong. (3) The Hanaman sale was not made in plaintiffs territory.

Both appeals dismissed. No costs.