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FALCONBRIDGE, C.J. OCTOBER 7TH, 1903.

TRIAL.

KINGSTON v. SALVATION ARMY.

Religious Institutions—Salvation Army—Action against for Tort—Unincorporated Voluntary Association — Property Holders in Ontario—Trustees.

Action to recover damages for injuries sustained through the running away of a horse frightened by the noise occasioned by persons conducting religious services as members of the Salvation Army (the defendants) in a street in the city of Hamilton. The noise was made by the beating of a drum, etc. The owner and driver of the horse were originally parties, but the action was discontinued against them before the trial.

The action came on for trial before FALCONBRIDGE, C.J., and a jury at Hamilton. The defendants moved for a nonsuit.

D'Arcy Tate, Hamilton, for plaintiffs.

A. Hoskin, K.C., and G. Lynch-Staunton, K.C., for defendants.

FALCONBRIDGE, C.J.—The Salvation Army may be aptly described as an unincorporated religious community or society, not seeking any recognition under the law at all, so far at least as concerns property which may be held by the head of the society, or the heads of the community.

There have been filed the declarations of General William Booth, who is the supreme commanding officer, and of the commissioner in this Province, Miss Evangeline Booth. The declaration of General William Booth, which bears date 1884, recites that in 1865 he commenced preaching the Gospel; that a number of people were formed into a community or society by him; that at first this society was known by

certain other names; that other societies were afterwards formed; that divers leases, meeting-houses, lands, etc., were given and conveyed to certain persons upon the trusts therein mentioned; that the labours of the Salvation Army have been extended to the Dominion of Canada; that it is the intention and purpose of the said William Booth to make numerous further purchases of lands in the Dominion of Canada. And then after those recitals William Booth declared, first, that the name and style of the society shall be the Salvation Army. Then follows a creed or confession of faith. Then there is the declaration that the Army is and shall be always under the oversight of some one person under the title of 'General;" that he shall have power to expend on behalf of the Army all moneys contributed for the general purposes thereof; that he shall have power to acquire in any or all of the Provinces of the Dominion of Canada by gift, purchase, etc., buildings and lands; that he may in all cases in which he shall deem it expedient so to do nominate and appoint trustees or a trustee of any part or parts respectively of such property, and draw or make the conveyance or transfer to such trustees, with power to himself or to the General for the time being, to declare the trusts thereof; and full right and power reserved to William Booth to mortgage, lease, let, or hire; that he shall continue to be the General and supreme officer; that he and every General who shall succeed him shall have power to appoint his successor to the office; that it shall be the duty of every General to make a memorandum naming his successor, or giving directions as to the means which may be used to appoint a successor; then reciting again that he is now negotiating for the purchase in the Dominion of certain freehold lands, it is now declared by the said William Booth, that all lands whatsoever purchased or acquired by him and now vested in him shall and will be held by him and the General for the time being of the Army in accordance with the tenor, drift, meaning, and intent of these presents; and then he reserves the right to nominate and appoint such persons as he shall think fit to be officers in the Army, and to make powers of attorney, etc. Now that is the whole declaration of trust contained in that instrument.

Then, by deed bearing date the 7th August, 1896, made between Evangeline Cora Booth and the General, after reciting this deed poll which I have just referred to, and reciting further that Evangline Cora Booth has. on the nomination of the said William Booth, been appointed an officer of the Salvation Army to direct the operations of the Army in Canada, and has, at the instance and with the approval of the said William Booth, purchased and acquired in her

own name by transfer from Robert Henry Booth, her predecessor in said office, and otherwise as may be hereafter purchased and acquired, lands, buildings, etc., and further reciting a request by William Booth to execute a declaration, this indenture witnesseth that the said Evangeline Cora Booth does hereby irrevocably admit and declare that she and her heirs will stand possessed of all lands, buildings, etc., acquired, devised, and bequeathed to her while she was so acting or supposed to be acting as such officer, upon trust for the said William Booth, his heirs, executors, administrators, and assigns, or other the General for the time being of the Salvation Army, and to convey, assign, or surrender or otherwise dispose of the same, as such General shall from time to time direct. She further declares that any real or personal property whatsoever acquired by her shall, until she has conclusively established the contrary to the satisfaction of the said William Booth or other General, be deemed to belong to her as an officer of the said Army, and upon trust for the said William Booth or his successors. Then there is a provision that she shall have the power, so long as he shall not have revoked these powers, to sell, mortgage, and lease, and otherwise deal with the property.

Now, that is the position of the Salvation Army with reference to the holding of property in this country.

Then the only instance in which recognition has at all been sought from or given by Parliament is in R. S. O. 1897 ch. 162, which is an "Act respecting the Solemnization of Marriage," and which provides (sec. 2, clause 3) that, "any duly appointed commissioner or staff officer of the religious society called the Salvation Army, chosen or commissioned by the said society to solemnize marriages," may legally do so.

Both parties have invoked the celebrated Taff Vale case, and both parties have agreed that upon the principles there laid down in that case this judgment must pass. That is a case which was decided by the House of Lords, [1901] A. C. 426, in which the judgment of Mr. Justice Farwell, after an intervening adverse decision, was affirmed, and their Lordships of the House of Lords refer to the judgment of the original trial Judge, Mr. Justice Farwell, with approval.

Now it has been pressed upon me on behalf of the defendants that there are great distinctions between the Taff Vale case and this. The Taff Vale case was what is commonly known as a trades union case, and it is pointed out that there the trades union was registered under the Act, and was given the capacity of owning property and acting by agents. These elements appear to be absent in this case. I refer to the language of Mr. Justice Farwell: "Now, although a cor-

poration and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual, a capacity for owning property and acting by agents, and such capacity, in the absence of express enactment to the contrary, involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents." Further on he says, "The real question is whether, on the true construction of the Trades Union Act, the Legislature has legalized an association which can own property and can act by agents by intervening in labour disputes between employers and employees, but which cannot be sued in tort in respect of such acts." And he goes on to say that, "The Legislature in giving a trades union the capacity to do these things has given it two of the essential qualities of a corporation."

Now, are these defendants, the Army, within the purview of the Act respecting the Property of Religious Institutions? That is, R. S. O. ch. 307, which provides (sec. 1 (1) that "where any religious society or congregation of Christians in Ontario desires to take a conveyance of land for the site of a church, etc., or for any other religious or congregational purposes whatever, such society or congregation may appoint trustees to whom, and their successors, to be appointed in such manner as may be specified in the deed of conveyance, the land requisite for all or any of the purposes aforesaid may be conveyed; and such trustees and their successors in perpetual succession, by the name expressed in the deed, may take, hold, and possess the land, and maintain and defend actions for the protection thereof, and of their property therein."

I have grave doubts whether this community is within the meaning of that Act; but, if it were so, I should find it difficult to hold the whole society or organization liable, as they are sought to be held here. The trustees are the corporation under that Act, not the congregation nor the church at large. It has been argued that the expression of the capacity to do something, namely, to hold and possess land and maintain and defend actions for the protection thereof, means the exclusion of the capacity to sue or be sued for wrongs or torts. However that may be, I do not think that the Act is applicable so as to hold the whole society answerable in tort.

Now, there have been various decisions in our own Courts which, I think, point in the same direction. I refer more particularly to the case of the Metallic Roofing Co. of Canada

v. Local Union No. 30, 5 O. L. R. 424, ante 183, also a trades union case, and I think the spirit and meaning of the judgment of the Divisional Court in that case are in accord with the judgment which I am about to pronounce in this. I do not overlook the fact that my learned brother Britton has, upon an interlocutory application in this case, 5 O. L. R. 585, ante 406, seemed to express a different view; but I am, sitting here, obliged to follow what I consider to be judgments binding upon me. Probably if his judgment be read very closely, it does not go so far as to express an opinion which goes to the root of the matter here.

Now here I do not find, even if there is a recognition by the Legislature, in the way in which I have mentioned, authorizing certain officers to perform the ceremony of marriage, that there is anything analogous to the power which was conferred by the Legislature in England upon trades unions; and, further, I do not find that there is any secondary object; there is no commercial object in this. It is quite true that it has been pointed out that the society, or some one for the Army, owns a farm and a newspaper, but I am not told that these are conducted in any spirit of commercial enterprise, or for any particular commercial purpose.

Upon the whole I have a very clear opinion that the objections to the maintenance of this action are well founded and must prevail. It is not necessary for me in that view, to express any opinion upon the merits of the main case.

I am inclined to think, although I do not so expressly decide, that I should have let the case go to the jury to determine whether or not what took place upon the evening in question did or did not constitute a nuisance or act of neglect on the part of some person or persons. It may be that the remedy of these plaintiffs, if they have any, is against the individual members of the immediate circle of people who were conducting the services upon that evening. Upon that, also, it is not necessary now to express an opinion; but upon the whole, without any hesitation, I have to withdraw the case from the jury, and dismiss the action.

BRITTON, J. OCTOBER 16TH, 1903.

CHAMBERS.

RE BOSBRIDGE v. BROWN.

Prohibition—Division Court — Judgment—Notice—Waiver —Acquiescence—Laches—Costs.

Motion by defendant for prohibition to the 1st Division Court in the county of Carleton.

The action in the Division Court was begun on the 19th July, 1894. The trial took place on the 26th September, 1894. At the close of the case the Judge reserved his decision, and made this formal note in writing: "Decision adjourned by consent till after judgment is delivered in Brown v. Gordon now pending in the Court of Appeal, which sits for argument on 13th November, 1894, provided case is argued at that sitting, but if not argued at such sitting of Court of Appeal, then upon notice by me to the parties for argument of this case, case will be disposed of at such time as I may appoint after I hear argument."

The case stood until 25th March, 1896, when the Judge gave judgment for plaintiff against defendant for $89.47.

The defendant now alleged that the judgment was given without any notice to defendant as to hearing argument, and without any further argument.

On 5th May, 1903, an order of revivor was made, for the purpose of issuing an execution on and collecting the judgment.

W. H. Barry, Ottawa, for defendant.

G. McLaurin, Ottawa, for plaintiff.

BRITTON, J.—It appears by the affidavits filed that the case of Brown v.Gordon was not argued at the November, 1894, sittings of the Court of Appeal.

The plaintiff swears that he believes that there was an argument in due course before judgment was given. His attorney does not remember, but swears to a charge for attending on the argument.

The Judge would not be likely to go in the teeth of his own order. The defendant must have known of this judgment very shortly after, as on the 15th May, 1896, an order was made allowing the examination of defendant as a judgment debtor. On or about 16th July, 1896, a judgment summons was issued upon the judgment and was served upon defendant. This summons was adjourned and negotiations were had with defendant for the settlement of the judgment. The affidavit of Mrs. McLaurin is clear as to the knowledge of defendant of the judgment, shortly after it was given.

It was quite competent for defendant to waive the argument. It was within the power and right of the Judge to change his order if circumstances arose which would permit of this being done without prejudice to defendant, and it would be presumed in this case, after so long a time, that all was done regularly.

There was no absence of jurisdiction, and so Re Brazill v. Johns, 24 O. R. 209, does not apply.

I think defendant, by his negotiation for settlement and by his delay in moving and laches, has waived his right to prohibition, even if there was no notice by the Judge and no argument between 13th November, 1894, and 25th March, 1896. See Richardson v. Shaw, 6 P. R. 296; Re Burrowes, 18 C. P. 496.

The motion must be refused. . . . .

I think the balance against defendant should have been only $73.67. I cannot correct the judgment, but I think it right, under the circumstances, as the judgment will stand for the full amount, to dismiss this application without costs.

OSLER, J.A. OCTOBER 16TH, 1903.

TRIAL.

WEBB v. CANADIAN GENERAL ELECTRIC CO.

New Trial — Order Directing — Appeal from—New Trial pending Appeal—No Application to Stay—Judgment.

Action tried with a jury at Peterborough. The jury found a verdict for plaintiff for $700.

R. M. Dennistoun, Peterborough, for plaintiff.

R. McKay, for defendants.

OSLER, J.A.—On the plaintiff's counsel moving for judgment, it was stated by the other side that an appeal was then pending before the Court of Appeal from the judgment of a Divisional Court setting aside a judgment which had been directed for the defendants by Meredith, J., at a former trial before him in October, 1902, and ordering a new trial. This new trial took place before me. Nothing was said by either party of the pending appeal until judgment was moved for on the verdict of the jury. I then thought it would be advisable to defer giving judgment until the appeal should be disposed of; but upon reflection I have arrived at a different conclusion. Being of opinion that upon the evidence at the last trial the plaintiff is entitled to judgment, it is better that such judgment should now be given in order that an appeal therefrom, should defendants determine to appeal, may be brought on together with the appeal now pending, as was done in the case of Blackley v. Toronto Street R. W. Co. My strong impression at present is, that the defendants should have moved to stay the new trial until the appeal from the order directing it was disposed of. Having taken their chances of a new trial without objection, it may be found that they ought to be taken to have abandoned their appeal. But if not, and their appeal should be dismissed, plaintiff ought

not to be delayed in having a second appeal, should there be one, brought on to as early a hearing as possible.

Notice was given to the parties that judgment would be directed unless cause was shewn to the contrary at my Chambers at Osgoode Hall, on the 14th instant, at 10.30 a.m. No counsel appeared before me for either party, and I direct judgment for plaintiff accordingly for the damages assessed by the jury with costs.

MEREDITH, C.J. OCTOBER 16TH, 1903.

TRIAL.

BASTEDO v. SIMMONS.

Sale of Goods—Action for Price—Acceptance of Part—Entire Contract—Statute of Frauds.

Action for price of goods sold, tried without a jury at Toronto.

W. H. Grant, for plaintiff.

T. H. Lennox, Aurora, for defendants.

MEREDITH, C.J., held that the sale was an entire one of the various articles which formed the subject of it, and defendants, having accepted part, were not entitled to return the remainder of the goods, even if they had not been according to the sample; and the acceptance and receipt of part took the contract as to the whole out of the Statute of Frauds.

Judgment for plaintiff for amount of his claim, less the sum paid into Court. The question of the scale of costs to be determined by the taxing officer.

OCTOBER 16TH, 1903.

C.A.

MAJOR v. McGREGOR.

Libel—Post Card—Initials "S. B."—Meaning of—Innuendo—Evidence to Support.

Appeal by plaintiff from judgment of BRITTON, J., 1 O. W. R. 839, 5 O. L. R. 81, dismissing with costs an action for libel.

G. F. Shepley, K.C., for appellant.

D. B. Maclennan, K.C., for defendant.

The judgment of the Court (Moss, C.J.O., Osler, Maclennan, Garrow, Maclaren, JJ.A.), was delivered by

Osler, J.A.:—The alleged libel was upon a post card written and mailed by defendant to plaintiff.

The defendant, a bailiff for the collector of taxes for the township of Charlottenburg, had demanded payment by plaintiff of certain taxes, and had been referred by him to one Sullivan as the person by whom they ought to be paid. The defendant applied to Sullivan, who refused to pay, and some conversation passed between them on the subject. Thereafter the defendant wrote and sent to plaintiff a post card in these words: "I saw Jack Sullivan this morning: he said make the S. B. pay it. . . ."

The card was addressed to Telephore Major, by which name the plaintiff, whose name is also Zehrien, was sometimes called. He is unable to read. His father or his son, who are also illiterate, got the card from the post office, and gave it to plaintiff's wife, who read it to him. This was the libel complained of.

Ambrose Dunn deposed to a conversation with the defendant about the post card, in which the latter said that he had sent a post card to the plaintiff, his words being, "I sent that post card to that son of a bitch."

There was no other evidence of importance.

It is clear that this appeal cannot succeed. Taken literally and in its primary and obvious meaning the language of the post card is harmless. The defendant simply purports to report to plaintiff Sullivan's words referring to him as "the S. B."—assuming that it sufficiently appears from the whole writing and the address that the words do in fact refer to plaintiff.

If the trial Judge could have taken judicial notice that the letters S. B., like the letters A. D., E. & O. E., F. O. B., etc., were a familiar contraction for some common phrase or ordinary expression, and were commonly or even occasionally used as a contraction for the vulgar epithet which by the innuendo they are alleged to mean, it would have been proper to have left the case to the jury to say whether they were so used or intended to be used by the defendant on this occasion.

It was impossible, however, to argue that the letters had acquired in the vernacular any meaning as a customary abbreviation of any particular phrase or expression. As they stand in the writing they are no more than two innocent letters of the alphabet, initials, it may be conjectured, of two words not intended to be complimentary, but of what two

words and whether of a contemptuous or harmless meaning, is unknown, and not capable of being known either from the letters themselves or from anything in the context.

Words in themselves harmless, such, for example, as boycott, dewitt, beecher, have sometimes, historically or from the circumstances of the time, acquired an injurious meaning, or are capable of being used so as to convey one, and it is then for the jury to say whether they have been so used on the particular occasion; but this cannot be said of the letters in question, and therefore plaintiff fails to shew that by themselves they are capable of a defamatory meaning. Their ordinary English meaning is of two letters of the alphabet, and nothing more. . . .

[Reference to Odgers on Libel and Slander, 5th ed., pp. 106, 107, 115, 116.]

The meaning alleged, and that this was the meaning understood by those to whom the libel was published, must be proved by evidence in the usual way.

Here the plaintiff by the innuendo has undertaken to specify the particular defamatory sense in which the words or letters were used, but of that he has given no evidence, and therefore—the words themselves not being defamatory in their ordinary meaning—he has failed to establish any cause of action.

We considered this subject very fully in the recent unreported case of Lossing v. Wrigglesworth (noted 1 O. W. R. 460). See also Capital and Counties Bank v. Henty, 7 App. Cas. 744; Neville v. Fine Arts Association, [1897] A. C. 68; Am. & Eng. Encyc. of Law, 2nd ed., vol. 18. p. 973.

Appeal dismissed with costs.

OCTOBER 16TH, 1903.

C.A.

RE TOBIQUE GYPSUM CO.

Company—Winding-up — Judgment against Company—Sale of Lands of Company under Execution — Lands outside the Province—Jurisdiction to Stay Sale in Winding-up Proceeding — Ex Parte Order — Jurisdiction over Purchaser—Setting aside Sale—Summary Powers of Court.

Appeal by Harriet Costigan and James Tibbets, sheriff of Victoria, New Brunswick, from an order of FALCONBRIDGE, C.J., of the 14th October, 1902, made in the matter of the winding-up of the company.

The company having become insolvent within the meaning of the Winding-up Act, R. S. C. ch. 129, a petition was presented to the High Court on the 29th July, 1902, on behalf of the Toronto General Trusts Corporation, executors and trustees under the will of the late Hugh Ryan, a creditor of the company, under the Act. It came on for hearing before Lount, J., in presence of counsel for the petitioners and the company. From affidavits filed it appeared that one Dunne, the secretary of the company, had obtained a judgment against the company in a New Brunswick Court for an amount exceeding $500, upon which executions were in the hands of the appellant Tibbets, the sheriff, who was proceeding thereunder to expose for sale the lands of the company situated in his bailiwick, and that the sale was advertised to take place on the 1st August. It was sworn that there was reason to believe and apprehend that unless the order declaring the company to be insolvent was made, the sheriff would proceed with the sale on the day named. Lount, J., adjourned the petition for one week, and at the same time made an order that all proceedings in any action, suit, or proceeding against the company be stayed in the meantime. So far as Dunne, the execution creditor, was concerned, this order was ex parte, but the evidence shewed that he had already agreed to a postponement of the sale for one month, and had instructed the sheriff to that effect.

On the 29th July the petitioners' solicitors wrote to the sheriff advising him of the order for stay of proceedings. This letter and a letter from Dunne's solicitor dated 30th July, 1902, advising the sheriff of the pendency of the petition and instructing him to postpone the sale for a month, were received by the sheriff before the sale. On the 30th July the solicitor for the petitioners sent to the sheriff a certified copy of the order staying proceedings. The sheriff, nevertheless, on the 1st August assumed to put the lands up for sale, and after two other bids the property was knocked down to Mr. Costigan. the president of the company, bidding, as he said, on behalf of the appellant Harriet Costigan, his wife, at the sum of $900.

On the 5th August an order was made on the petition declaring the company insolvent and liable to be wound up by the Court under the Winding-up Acts, and a further order was also made appointing James P. Langley provisional liquidator, and referring it to the Master in Ordinary to appoint a permanent liquidator or liquidators, with the usual directions. Copies of these orders were transmitted to the sheriff, who received them on or about the 7th August.

On the 15th August the sheriff executed a deed of the lands to Harriet Costigan, and on the next day she executed a mortgage upon them to one Henry A. Little, of Woodstock, Ontario, to secure an advance of $1,000. These two instruments were registered. The sum of $900 was paid to the sheriff, by whom it was placed on special deposit.

On the 14th October, 1902, the liquidator and the petitioning creditors moved, on notice to Dunne, Costigan, Harriet Costigan, Little, and Tibbets, for an order declaring the sale void. Dunne and Little did not appear. The other three opposed the motion.

FALCONBRIDGE, C.J., pronounced an order declaring the sale void and ordering that the conveyance be set aside, and that Harriet Costigan and Little should execute a deed of quit claim, and that the two Costigans and the sheriff should pay the costs of the application.

The appeal was from this order.

E. D. Armour, K.C., for the appellants.

J. J. Foy, K.C., for the respondents, the liquidator and petitioning creditors.

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

MOSS, C.J.O.:—The appellants contend that the order was made without jurisdiction, because it affects lands in another Province, and because the subject matter was not one proper to be dealt with in a summary manner by a Judge in the winding-up proceedings. It was also contended that the order of the 29th July made by Lount, J., was made without jurisdiction, and that it did not operate as a stay of the proceedings under the execution, and that the sale made on the 1st August was a valid sale and disposition of the property; and further that on the merits the facts did not justify the setting aside of the sale.

The last point was but faintly argued, and we are not called upon to decide it, for we think there was an effective stay of proceedings on the day when the sale took place.

The petition having been presented on the 29th July, there was jurisdiction under sec. 13 of the Act to restrain further proceedings in any action, suit, or proceeding against the company; and the enforcing of an execution is a proceeding within the section: In re Artistic Colour Printing Co., 14 Ch. D. 402.

Further, the jurisdiction to restrain extends to proceedings in actions or suits beyond the ordinary territorial juris-

diction of the Court, more especially when, as in this case, the execution creditor is resident within the jurisdiction: In re International Pulp and Paper Co., 3 Ch. D. 594.

Usually the application is made on notice to the plaintiff in the action or suit, but in a proper case the order may be made on an ex parte application. . . .

[In re London and Suburban Bank, 19 W. R. 950, Lindley on Companies, 6th ed., p. 911, and Masbac v. Anderson, 37 L. T. N. S. 440, referred to.]

There appears to be no good reason why this should not be done in these as in other applications for injunctions, where the circumstances of the case do not permit of delay.

Therefore, Lount, J., had jurisdiction to make an order staying proceedings in the action of Dunne against the company.

The order was not specially directed against Dunne or his action, but was general in its terms, and this is objected to.

The more correct practice, and that which should have been followed, is to specify each action or proceeding, and to restrain the proceedings in it, but the departure in this case did not deprive the order of force. The parties to the action were notified of the order, and Mr. Dunne, who was the person most interested, recognized and submitted to it. No doubt, also, it would have been more in accordance with the ordinary practice if the order had contained the usual undertaking as to damages, but it was for the learned Judge to impose such terms as he thought fit. No motion was made against the order, and even now Mr. Dunne does not complain of it. Notwithstanding the order, the sheriff assumed to proceed with the sale at the instance of Mr. Costigan, the president of the company, whose duty it was to have aided in staying the proceedings. He was aware of the petition and also of the order staying proceedings, and there was no excuse for his and the sheriff's conduct in proceeding in the face of it. The order was operative until successfully moved against or the parties were relieved of the stay and given leave to proceed notwithstanding the winding-up proceedings. The argument that there was no valid stay, and that the sale was therefore good, completely fails.

The formidable objection to the order appealed from is that the mode adopted of impeaching the sale and subsequent proceedings is not warranted by the Act. This case is not one coming within the classes of cases which under the Act may be dealt with in a summary manner by a Judge in the winding-up proceedings. In general the summary powers

cannot be exercised against persons who do not come within some or one of the classes of persons specified in the sections of the Act governing the summary exercise of powers. Mrs. Costigan and Mr. Little are entire strangers in the sense that they are not contributories, creditors, officers, or trustees, but they are the persons whose alleged rights in the land are affected by the order.

Parliament has given the Court or a Judge authority under the Winding-up Act to deal in a specified way with given classes of cases in which persons falling under the above descriptions are concerned, but the fact that it has done so does not justify the Court in extending the jurisdiction to other cases not within the terms of the Act: Felton's Executors' Case, L. R. 1 Eq. 219.

So far, therefore, as Mrs. Costigan and Mr. Little are concerned, the case is not one to be dealt with in a summary proceeding.

Messrs. Dunne and Costigan, and perhaps the sheriff, occupy a different position; but the fact that they might be dealt with in a summary proceeding does not create jurisdiction over the others, who are not in their position.

As against Mrs. Costigan and Mr. Little, the order cannot be supported, more especially as regards that part which directs the execution by them of a conveyance or quit claim of the lands. It should, therefore, be vacated; but the circumstances are such as to warrant us in saying that there should be no costs of the proceedings or of the appeal.

OCTOBER 16TH, 1903.

C.A.

PAREAU v. CANADIAN PACIFIC R. W. CO.

New Trial—Divisional Court Setting aside Nonsuit and Directing New Trial — Appeal—Evidence to go to Jury — Negligent Setting out Fire.

The defendants were sued for negligently setting out fire on their track allowance or permitting fire to remain there without taking proper care that it should not extend into adjacent lands of other proprietors, and for allowing dry grass, weeds, and other combustible material to accumulate on their land, which caught fire from fire set out by defendants, and that fire extended therefrom into plaintiff's land, and there did damage.

At the close of plaintiff's case the trial Judge directed a nonsuit.

A Divisional Court (MEREDITH, C.J., STREET, J.), set aside this judgment and ordered a new trial, being of opinion that there was some evidence proper to be submitted to the jury of negligence on the part of the defendants or their servants, which caused the damage complained of.

The defendants appealed.

W. M. Douglas, K.C., and W. H. Curle, Ottawa, for appellants.

G. F. Shepley, K.C., for plaintiff.

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

OSLER, J.A.— . . . If the trial Judge had been trying the case without a jury, I think no one could confidently say that the view he took of the evidence was wrong. But, if there was any evidence from which the jury could reasonably have inferred negligence, they were the judges of it, and the case could not properly have been withdrawn from them. In a case like the present where there is, in effect, no final judgment in the action, and an appeal from the judgment at another trial cannot be embarrassed by the judgment directing a new trial, an appeal from the latter judgment must and ought always to be exceedingly difficult to maintain.

The question whether, upon the facts as developed at the trial in any given case, there is or is not evidence for a jury, is one which often provokes much diversity of judicial opinion, and where a Divisional Court has after argument come to the conclusion that there was such evidence, it appears to me that, as a general rule, it would be much better that the case should be tried again and the final decision in the action deferred until this has been done, than that another appellate Court should be invited to review the opinion of the first upon the bare question whether the case should or should not have gone to the jury.

In the course of the argument before us it was intimated by several members of the Court in what particulars there seemed to be evidence fit for the consideration of the jury in respect of the facts which go to make up the cause of action in a case of this kind; and, as the judgment of the Divisional Court ought clearly, in my opinion, to be affirmed, it is not necessary for the disposition of the appeal to enter into details.

The appeal should be dismissed.

MEREDITH, C.J. OCTOBER 16TH, 1903.

WEEKLY COURT.

RE MULLIN AND MULLIN.

Arbitration and Award—Time for Making Award—Last Day Falling on Sunday—Application of Judicature Act—Partition—Rights of Co-parcener—Statute of Limitations — Adverse Possession.

Motion to set aside an award made by John R. McKinnon, John Mullin, and Robert Mullin, dated 16th March, 1903, in pursuance of a voluntary submission of the parties dated the 26th February, 1903, by which they referred the differences which had arisen between them as to the partition of certain lands, which were described as being "their property."

A. R. Clute, for the applicant.

C. A. Moss, for the respondent.

MEREDITH, C.J.—It was contended by the applicant that the award was made too late, having been made on the 16th March, 1903, though it was provided by the submission that the award should be made on or before the 15th day of that month.

The 15th March was a Sunday, and if, as Mr. Moss contended, under sec. 49 of the Arbitration Act, the provisions of the Judicature Act are applicable, the objection fails; but if not applicable, the Court has power under sec. 10 to enlarge the time, though an award has been made: Russell on Awards, 8th ed., p. 106; Redman on Awards, 3rd ed., p. 92; and cases cited.

I am inclined to the opinion that Mr. Moss's contention is not well founded; but to avoid any questions as to the applicability of the Judicature Act, as the case is, I think, a proper one for the exercise of the powers conferred by sec. 10, I enlarge the time for making the award until the 1st January next.

The substantial ground of objection to the award is, that the arbitrators made it on the assumption that the applicant was not entitled to the share in the lands which admittedly at one time belonged to his brother Alexander, and which he claimed by conveyance from Alexander.

If the applicant had made a prima facie case in support of his claim, I should probably have remitted the matters referred to the arbitrators in order that they might consider it, but the applicant has not, I think, made such a case.

The right of Alexander is admittedly barred by the Statute of Limitations unless the fact that the mother of Alexander and of the parties to the reference lived upon the land with the parties to the reference down to a period within ten years before the partition proceedings which resulted in the reference being made, were begun, operated to extinguish in her favour the title of Alexander and the other heirs of William Mullin, deceased, in which case the persons entitled would be her heirs at law, of whom Alexander is one.

It is clear, I think, that the possession of the lands from the death of William Mullin was not that of the widow, but of such of the heirs at law as lived upon the lands with her; Fraser v. Fraser, 14 C. P. 70; Wall v. Stanwick, 34 Ch. D. 763; and Kent v. Kent, 20 O. R. 445, affirmed 19 A. R. 352.

Mr. Clute relied upon McArthur v. McArthur, 14 U. C. R. 544, but that case is clearly distinguishable. The persons who claimed had no title, not being the heirs at law of the owner of land, which had passed to the eldest son as heir at law; and what was decided was that the widow, who had been in possession as head of the family, and not they, though they resided with her, had acquired title by the operation of the statute—as the result of that possession.

If I am right in this view, it would serve no good purpose to remit the matters referred to the arbitrators, and the order will therefore be that the time for making the award be enlarged until the 1st day of January next, and that the motion be dismissed and under all the circumstances the dismissal will be without costs.

BRITTON, J. OCTOBER 19TH, 1903.

WEEKLY COURT.

CENTRAL TRUST CO. OF NEW YORK v. ALGOMA STEEL. CO.

District Courts—Jurisdiction—Recovery of Land—Ejectment by Mortgagees — Injunction — Mortgagees Proceeding in District Court—High Court Action also Pending.

Motion by defendants to continue injunction restraining plaintiffs from proceeding with an action in the District Court of Algoma for the recovery of the land covered by certain mortgages in respect of which this action (in the High Court) was brought.

G. F. Shepley, K.C., and W. E. Middleton, for defendants.

C. H. Ritchie, K.C., and J. Bicknell, K.C., for plaintiffs.

BRITTON, J.—The plaintiffs on the 24th September, 1903, commenced proceedings by writ of summons issued out of the District Court of Algoma, specially indorsed as follows: "The plaintiffs' claim is to recover possession of all and singular those certain parcels or tracts of land and premises particularly described as follows . . . And for an order that the defendants, their servants, workmen, and agents, do forthwith deliver up possession of the said lands and premises to the plaintiff Benjamin Franklin Fackenthal junior, receiver appointed by the plaintiffs the Central Trust Company of New York, under and in pursuance to the mortgage or deed of trust dated 1st January, 1903, and made between the defendants and the said plaintiffs the Central Trust Company of New York."

Upon the affidavits filed it is difficult to understand why it was deemed necessary for plaintiffs to take the proceedings in the District Court. . . .

But the only questions for my consideration on the present motion are:

1st. Has the District Court of Algoma jurisdiction in such an action for the recovery of possession of land?

2nd. If it has, as the plaintiffs have brought this action in the High Court, where they are asking for practically all that they claim to be entitled to under the mortgage, and where there is unquestioned jurisdiction to give full relief, including possession, shall they be allowed to continue proceeding in the District Court for possession only?

Plaintiffs claim jurisdiction for the District Court under R. S. O. ch. 109; sec. 9, sub-sec. (1) of which provides that the District Courts shall have the same jurisdiction as is possessed by County Courts; and sub-sec. (2), that the District Court of Algoma shall, in addition to the jurisdiction conferred by sub-sec. (1), have jurisdiction "(d) for the recovery of land situate in the district."

Is an action by a mortgagee for the possession of land included in the mortgage an action for the recovery of land within the meaning of the Act above cited?

If it is, the District Court has jurisdiction.

If the writ had been indorsed under Rule 141 with a claim for foreclosure, that claim would at once have ousted the District Court of jurisdiction, or rather would have shewn that the District Court had no jurisdiction to grant the relief asked upon such a mortgage. If the indorsement

was or ought to have been such as is required by the Rules to be in the form prescribed (Appendix, part ii., sec. vi.), then it would be a suit for sale with a claim for immediate possession pending the sale; it would be more than a suit for the recovery of land, and neither the District Court nor any County Court would have jurisdiction.

The writ was indorsed for an order that the defendants do forthwith deliver up possession. The plaintiffs' claim was simply to recover possession. That, I think, is only "for the recovery of land" within the meaning of the Act cited. "Recovery" may mean more than "recovery of possession." If it does, the greater includes the less.

[Independent Order of Foresters v. Pegg, 19 P. R. 80, distinguished.]

I therefore conclude upon the mere question of jurisdiction: (1) that the indorsement in the case in the District Court was an indorsement under Rule 138; and (2) that it was for "recovery of land" within the meaning of the Act giving jurisdiction to the District Court.

Sub-section 3 of sec. 9 of R. S. O. ch. 109 assists in determining the intention of the Legislature upon the question of jurisdiction. . . . It was evidently intended to open wide the door as to jurisdiction.

I ought not to continue the injunction upon the second ground. It is certainly contrary to the policy of the Courts as law is now administered to permit an action of ejectment and afterwards an action for sale. See Hay v. McArthur, 8 P. R. 321. This suit is not for foreclosure or sale. It is for a declaration as to plaintiffs' rights, and if I am right in deciding that the action in the District Court is only for recovery of land and is within the jurisdiction of that Court, I ought not to restrain further proceedings there, merely because the plaintiffs could have their complete recovery in the present action.

The mere question of immediate possession cannot, under the special and unfortunate circumstances now existing, matter much to either party. The plaintiffs are mortgagees in fact and must account for their dealings with the property if the defendants are able to redeem; and the defendants in the present action have the right to attack the mortgage if open to valid legal objections. If the defendants remain in possession, they so remain under injunction as to dealing with the property, and practically are caretakers for plaintiffs.

The injunction should be dissolved. Costs to be costs in the cause.

OSLER, J.A. OCTOBER 19TH, 1903.

CHAMBERS.

STANDARD TRADING CO. v. SEYBOLD.

Security for Costs—Increase in Amount—Costs Thrown away by Postponement of Trial—Postponement Caused by Defendants' Amendment — Responsibility for Increase in Costs.

Appeal by plaintiffs from order of local Master at Ottawa allowing defendants' application for increased security for costs.

The appeal was heard by OSLER, J.A., holding the Weekly Court and Chambers at Ottawa for a Judge of the High Court.

John T. C. Thompson, Ottawa, for plaintiffs.

C. J. R. Bethune, Ottawa, for defendants.

OSLER, J.A.—The plaintiffs are a foreign corporation, and, under a præcipe order for security for costs, paid into Court the sum of $200. The action was proceeded with, and subsequently an order was made by MacMahon, J. (1 O. W. R. 724 5. O. L. R. 8), affirmed by a Divisional Court (1 O. W. R. 783, 5 O. L. R. 8), for the payment into Court of $300 by way of further security. Afterwards a commission was issued to take evidence in New York, and the Master made an order to pay into Court as additional security $100 more.

The case came down for trial, and the defendant Booth then applied for liberty to amend his pleadings. Leave to amend was granted, and plaintiff not being prepared to proceed on the amended record, the trial was adjourned.

The Master has now made another order staying the proceedings until the plaintiff shall have paid into Court or otherwise given further security to the amount of $600. This is the order complained of.

From my point of view such an order is wholly unreasonable. I am aware that the practice on the subject of granting additional security has been relaxed by the modern rules; but I do not think it admits of a plaintiff being checked at every stage of the action by ordering security, dollar for dollar, for all costs incurred, or which by possibility may be incurred, without regard to the conduct of the party.

Here it is quite plain that the costs of the trial have been thrown away mainly by reason of the defendants having insisted upon being allowed to amend their pleadings, or having deemed it prudent at the last moment to do so, when

plaintiffs were ready to proceed. I think it immaterial that the trial Judge made the costs of the day costs in the cause, unless the Judge at the next trial should otherwise order. The point is that the postponement of the trial was really caused by the defendants' amendment. Then, moreover, was the time when all terms, such as the giving of security, should have been discussed. No trial Judge was in a better position than the Master could be to determine whether the plaintiffs were taking an unreasonable view of the amendment as rendering a postponement necessary; and, if the defendants had urged that, notwithstanding the amendment, the trial ought not to be postponed unless the plaintiffs would give additional security, the latter might have reconsidered their position and have taken the risk of going on, if the Judge thought they were really not prejudiced by the amendment at that stage, and ought not to be allowed to postpone except upon terms. As it was, the defendants obtained an indulgence, and ought not, in my opinion, to be permitted now to embarrass the plaintiffs by obtaining what is practically a fourth order for security for costs.

Appeal allowed and order discharged with costs here and below to plaintiffs in any event.

CARTWRIGHT, MASTER. OCTOBER 20TH, 1903.

CHAMBERS.

DWYER v. GARSTIN.

Venue—Change of—Convenience — Cause of Action—Witnesses—Expense—Undertaking—Security.

Motion by defendant to change venue from London ao Toronto.

John MacGregor, for defendant.

R. S. Smellie, for plaintiff.

THE MASTER.—The plaintiff resides in London, and the defendant in England.

The cause is at issue, and the pleadings shew that the transaction in question arose mainly, if not wholly, in Toronto.

The defendant's solicitor deposes that they will require the evidence of eight witnesses, who all reside in Toronto. He is of opinion that the plaintiff's witnesses (if he has any except himself) will be found in Toronto also.

The plaintiff deposes to 13 witnesses, all resident at London, but does not state what they will prove. He seems to

admit (para. 12) that he will probably have some witnesses resident in Toronto, but does not say how many.

The affidavit in reply filed by plaintiff's solicitor (para. 3) seems to confirm the view that Toronto was the place where the business between the parties was carried on.

On the argument I suggested that the matter might be settled by the plaintiff undertaking to bear any extra expense of the trial at London. But this was not acceded to. On the other hand, the counsel for defendant was willing to do this.

Having regard to the order of the Chancellor in McArthur v. Michigan Central R. W. Co., 15 P. R. 77, with the reasons for same, and referring to what I said in Meiers v. Stern, 2 O. W. R. 392, as to the little weight to be attached to affidavits on motions of this character, I think the order may go; but it is not to issue except on the undertaking of the defendant's solicitor on his client's behalf to bear the extra expense of a trial at Toronto, and on payment into Court of $100 to meet such extra cost.

The costs of the motion will be in the cause.

In all these cases the question where the alleged cause of action arose is still of importance. It has not now the same weight as in the days of the Common Law Procedure Act: see Harper v. Smith, 6 P. R. 9. But it is still useful in deciding where the general convenience requires the action to be tried. And this matter of convenience is, in my view, one of the "substantial grounds" spoken of by Mr. Justice Osler in Campbell v. Doherty, 18 P. R. at p. 245, on which there may be a change of venue. This would be more influential in cases like McDonald v. Park, 2 O. W. R. 812, or where the plaintiff is claiming under the Workmen's Compensation Act or otherwise for injury. This principle seems to be recognized by sec. 104 of the Ontario Judicature Act in the case of actions against municipal corporations. It would also seem to be the foundation of present Rule 529 (b).

FALCONBRIDGE, C.J. OCTOBER 20TH, 1903.

TRIAL.

SCOTT v. TOWNSHIP OF ELLICE.

Public Schools — Collection of Rates—Protestant Separate School—School Building — By-law—Petition—Status of Plaintiff.

Action for a declaration that it was and is the duty of the defendant corporation to correct alleged errors or omissions made in the collection of the rate imposed for public school purposes for the year 1902, and for a mandatory order upon defendant corporation to take all necessary steps to correct

such errors or omissions, and to do all things necessary to be done to the end that no property liable shall escape from its proper proportion of the rate, and for a declaration that the by-law passed by defendant corporation to establish a "Protestant separate school" is illegal and invalid, and that no such school has become established thereunder.

J. Idington, K.C. and R. S. Robertson, Stratford, for plaintiff.

G. G. McPherson, K.C., for defendant corporation.

J. P. Mabee, K.C., for individual defendants.

FALCONBRIDGE, C.J.—I find that plaintiff has failed to prove the allegations of fraud and bad faith set up. . . . The trustees state on oath that they intend to provide for the construction of a school building, and the arrangement made about sending the children to Stratford is temporary only.

If by-law 425 is not a valid by-law, it has been amended by by-law 447, which I hold to be good for the purpose of striking out the lots in section 2.

I find that the petition on which the by-law was based was sufficiently signed. It is proved that there was a sufficient number of heads of families signing the petition, although some or one of those signing may not have been heads of families within the meaning of the statute.

It is sworn by Mrs. Drown, the owner of the 20 acres of which plaintiff is tenant, and it is admitted by plaintiff, that he took his lease from her on the understanding and agreement that his taxes on these 20 acres should go to the Protestant separate school. She was a petitioner and party to the formation of the section, and I think that, under these circumstances, plaintiff has no locus standi to ask for the various other declarations of right which he seeks in this action. He asks for a declaration against or affecting many persons who are not parties . . .

Action dismissed with costs.

MACMAHON, J. OCTOBER 22ND, 1903.

CHAMBERS.

RE KINNEY.

Will—Construction—Charitable Devises and Bequests—Sufficiency of Designation of Trusts and Beneficiaries—Mortmain Acts—Testator Dying within Six Months after Making Will.

Application by the executors for an order declaring the construction of the will and codicil of Joseph Kinney.

The material parts of the will were as follows: "I bequathe all that my hevenly father has given me to that Presbyterian congregation where I belong to and had my first communion, Churchtown, or better known by the name of Tamlight O'Crilly, Co. Derry, Ireland. The presiding clergyman, comittee, and elders to have full controll of all after me. They shall have the power to sell or rent to the best advantage while grass grow or water runs. . . . The minister and comittee and ruling elders shall give me a decent funeral monument not to exceed £100 sterling, and then the widow and the orphan and neglected children to be seen after by the minister, comittee, and ruling elders, having suceding authority to remember the poor of the church at Chrismass every year. . . ."

The codicil was as follows: "I will appoint Fredrick Herbert Thompson and Abrem Dent. . . the exeters and trustees of my last will above ritten and I hereby vest all my property in them as trustees for the purposes mentioned in said will."

Two questions were presented: (1) Whether the beneficiaries named in the will and codicil were sufficiently designated or definite. (2) Whether the devises and bequests were invalid under the Mortmain and Charitable Uses Act, 1902—the testator having died less than six months after the making of the said will and codicil.

H. W. Mickle, for the executors.

E. D. Armour, K.C., for the Presbyterian congregation of Tamlight O'Crilly.

A. W. Holmested, for the next of kin of the testator.

MacMahon, J.—The general charitable intent of the testator is manifest from the whole tenor of the will. The devises and bequests in the will are to the members of the Presbyterian congregation, those particularly designated as beneficiaries being "the widows and neglected children and the poor," and the minister, the committee and elders of the church being the almoners named in the will for the purpose of carrying the testator's charitable design into effect.

The Mortmain and Charitable Uses Act, 2 Edw. VII. ch. 2, sec. 6, provides that "the following shall be deemed to be valid charitable uses within the meaning of this Act, viz., the relief of aged, impotent, and poor people . . . the support, aid, and help of persons in poor circumstances . . . and any other purposes similar to those hereinbefore mentioned."

The beneficiaries are, I consider, sufficiently designated and come within the meaning of the above 6th clause of the Act of 1902. And if so, the gifts being charitable gifts, the rule against perpetuities does not apply to them. In Goodman v. Mayor of Saltash, 7 App. Cas. at p. 642, Lord Selborne, L.C., said: "A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or any particular class of such inhabitants (as I understand the law), is a charitable trust; and no charitable trust can be void on the ground of perpetuity." See also Attorney-General v. Comber, 2 S. & S. 93; Attorney-General v. Clarke, Amb. 422.

Then, dealing with the second question submitted, as to whether the devises and bequests are invalid by reason of the provisions of the Mortmain and Charitable Uses Act, 1902, the testator having died less than six months after the making of the said will and codicil.

The Act relating to Mortmain and Charitable Uses, R. S. O. 1897 ch. 112, sec. 4, provides that "land may be devised by will to or for the benefit of any charitable use," etc.

There is nothing in this Act making a devise of land in favour of a charity invalid unless the will was executed not less than six months before the death of the testator.

By the Mortmain Act of 1902 (2 Edw. VII. ch. 2) it is provided (sec. 1) that the Act shall be read as part of the Mortmain and Charitable Uses Act, R. S. O. ch. 112. And by sec. 2, sub-sec. 1, of the former Act "assurance" includes a devise, bequest, and every other assurance by deed, will, or other instrument.

And sec. 7 (1) provides that "subject to the provisions of the Revised Statutes, chapter 112, and to the savings and exceptions contained in this Act. . . . every assurance of land to, or for the benefit of, any charitable uses, and every assurance of personal estate to be laid out in the purchase of land, to, or for the benefit of, any charitable uses, shall be made in accordance with the requirements of this Act, and unless so made shall be void."

Counsel for the heirs at law of the testator relied on sub-sec. 6 as rendering invalid the devises and bequests in favour of the charities by reason of the testator having died within six months of the making of the will. That sub-section reads as follows:

"If the assurance is of land, or of personal estate, not being stock in the public funds, then, unless it is made in good faith for full and valuable consideration, it must be made at least six months before the death of the assurer, in-

cluding in these six months the days of the making of the assurance and of the death."

That section refers to the case of a deed, as the "assurance" there referred to is required to be made "for full and valuable consideration," which cannot have any application to a will.

Section 4 of ch. 112, R. S. O., as to devises of land by will for charitable uses, therefore remains untouched, and a devise under that section in favour of a charity would be good if made on the very day of the testator's death.

There will be a declaration that, according to the true construction of the will and codicil, the trusts created and the beneficiaries named in the will and codicil are sufficiently defined and designated; and that the devise by the testator of his real estate and the bequest of his personal estate by the said will are valid.

The costs of all parties will be paid out of the estate, those of the executors as between solicitor and client.

MEREDITH, C.J. OCTOBER 22ND, 1903.

WEEKLY COURT.

BOULTON v. BOULTON.

Indemnity—Enforcement of Mortgage—Judgment—Damages—Expenses—Loss by Sale of Goods by Sheriff—Costs—Travelling Expenses — Interpleader Order—Approximate Consequences of Acts.

Appeal by defendants from report of local Master at Belleville upon a reference to take an account of the loss, costs, and damages sustained by plaintiff because of a certain mortgage called the Biggar mortgage. This mortgage, though paid off by the defendant Paul A. Boulton, had been assigned by the mortgagees to the defendant Hiram A. Boulton, who claimed to be entitled beneficially, and who at the time the action was begun was endeavouring to enforce the mortgage against the plaintiff and her property.

The action was brought to restrain proceedings on a judgment recovered on the Biggar mortgage, for a declaration that that mortgage was, as against plaintiff, paid off and satis-

fied, and for an account and payment of the loss, costs, and damages sustained or paid by plaintiff by reason of the Biggar mortgage.

An interim injunction was granted by the local Judge at Belleville restraining the sale of the plaintiff's goods under the execution issued upon the Biggar judgment; and upon a motion to continue the injunction coming on to be heard, an order was made on the 14th April, 1896, directing that the parties should proceed to the trial of an issue for the determination of the matters in question between them, and providing for staying the sale of the goods seized under the execution on condition that the plaintiff should deposit with the sheriff by a time named $400, " to represent the value of the goods seized," with liberty to her within a week to substitute a sufficient bond for $400, upon the doing of which she was to be at liberty to " withdraw from the custody of the sheriff " the $400, and it was by the order further provided that the plaintiff should pay the sheriff's expenses in connection with the seizure.

The plaintiff paid $400 to the sheriff or into Court, and paid the expenses of the sheriff, as directed by the order.

Instead of proceeding to the trial of an issue, as directed by the order, by arrangement between the parties pleadings were delivered and the action proceeded to trial and was tried before Rose, J., on the 5th November, 1896.

A further question was raised by the pleadings, as to whether the goods seized by the sheriff were the property of the plaintiff or of her husband, against whom the Biggar judgment had been recovered, and who, it was not disputed, was liable to pay it.

By the judgment pronounced at the trial it was adjudged that the goods seized were the property of the plaintiff's husband, and it was ordered that the sheriff should proceed to sell them under the execution on the Biggar judgment, and that the $400 paid into Court by the respondent under the order of the 14th April, 1896, should be retained by the sheriff " to answer any depreciation in the value of the goods seized or other loss by reason of the postponement of the sale," on the application of the plaintiff.

The goods seized were sold pursuant to the directions contained in the judgment, and realized $274.76.

Upon appeal from the judgment pronounced at the trial, it was reversed as to the adjudication against the claim of the plaintiff to the goods seized, and it was adjudged that they were the property of the plaintiff as against the defendants, and it was ordered that the proceeds of the sale of the goods, as well as the $400 paid into Court, should be paid out to the plaintiff.

Upon the reference before the local Master, the plaintiff brought in her claim under four heads:—

1. The expenses which she was put to in raising the $400 paid into Court.

2. The loss sustained by the sale of the goods by the sheriff, the goods not having brought, as she alleged, their full value, owing to the sale being a forced one.

3. The costs between solicitor and client of the action.

4. Her travelling expenses disbursed in connection with the litigation.

All of these claims were allowed, though considerably less than the plaintiff sought to recover was allowed by the learned local Master.

R. C. Clute, K.C., for the defendants, contended that none of the claims should have been allowed; that the costs awarded to the plaintiff in the various Courts were the only indemnity to which she was entitled in respect of the costs of the litigation; and that in respect of the seizure and sale of the goods under the execution, the case was to be dealt with on the footing of a seizure at the instance of the defendants of the goods as being the goods of the plaintiff's husband; and that whatever liability they may have incurred for the wrongful seizure and sale, the loss to the plaintiff was not one coming within the terms of the contract of indemnity and therefore not within those of the reference.

F. E. O'Flynn, Belleville, for plaintiff.

MEREDITH, C.J.—I am of opinion that plaintiff was not entitled to the amounts allowed to her for loss and damage in respect of the seizure and sale of the goods.

If the goods had been seized as being the goods of plaintiff's husband, the contention of the appellants would, I think, have been entitled to prevail. They were, however, seized under an execution against the goods of plaintiff, as

well as of her husband, and the question of the ownership of them was unimportant unless the plaintiff should establish that the judgment debt was as against her satisfied. That, however, does not assist plaintiff, as everything that was done after the seizure (for which nothing has been allowed) was done under the authority of the order of the 14th April, 1896, and the judgment pronounced at the trial; and if (as is well settled) an execution creditor is not liable for any loss which is sustained by one whose goods are wrongfully seized as being the property of the execution debtor, which happens after the making of an interpleader order, I am unable to see how the defendant, Paul A. Boulton, is liable for any damage which plaintiff suffered owing to anything that was done under the order and judgment. . . .

[Walker v. Odling, 1 H. & C. 621, and Mayne on Damages, 7th ed., p. 439, referred to.]

What in this case was done under the order of 14th April, 1896, and the judgment pronounced at the trial, was not, I think, the approximate consequence of the efforts of defendants to enforce the Biggar judgment against the plaintiff, and the seizure of her goods under the execution issued upon that judgment.

What was paid to the sheriff for his expenses is, to the extent of what was incurred before the date of the order, properly allowable, as that was the direct consequence of the wrongful enforcing of the execution against plaintiff's goods.

. . . .

I am unable to agree with the argument of defendants' counsel as to classes 1 and 2.

Had the act which caused the damage to plaintiff been that of some one other than the defendants, for which defendant Paul A. Boulton was liable on the contract of indemnity, it is not open to doubt that he would have been liable to indemnify the plaintiff against the costs properly incurred, between solicitor and client as well as between party and party: Mayne on Damages, 7th ed., p. 94: and I see no reason why, where the act is that of the very person who has agreed to indemnify her, the plaintiff should be in a worse position.

All the costs of the action were not, however, incurred in resisting the attempt to enforce the Biggar mortgage against plaintiff and in obtaining relief against it. The action was brought also to recover damages for breach of the contract to indemnify, and to the costs of such action the contract of indemnity does not, of course, extend.

The learned Master, therefore, I think, erred in allowing all the costs between solicitor and client incurred in the action. They should have been apportioned so as not to charge the defendants with so much of them as were properly referable to enforcing the claim for indemnity. . . .

The amount to be allowed to plaintiff for journeys in connection with the litigation must be dealt with in the same way, and of course all journeys in connection with the payment of the $400 into Court or the sale of the goods must be disallowed, applying the same principle upon which I have held that the items forming classes 1 and 2 are to be dealt with.

There will be no costs of the appeal to either party.

TEETZEL, J. OCTOBER 23RD, 1903.

RE BAILEY.

CHAMBERS.

Will—Construction — "Money" — Residuary Personal Property — Pecuniary Legacies — Insufficiency of Personal Estate for—Resort to Residuary Real Estate—Devise of Land—Mortgage—Execution.

Application by executors for order declaring construction of will of John Bailey and giving directions as to the distribution of his estate; also on application by John Sidney Bailey, one of the devisees, for an administration order. The testator had four sons and five daughters. To each son he devised a farm with specific description, and also bequeathed them legacies, viz.; to Edward, $1,000 either in money or stock; to Henry, $2,000 either in money or stock; to Robert, $1,000 either in money or stock, and sufficient seed and feed; to John Sidney, all the chattels and implements upon the farm devised to him. To each daughter he bequeathed $2,000. He then made the following provisions as to the residue: "6. I give to my wife all the money that remains after paying my former bequests, debts, and funeral expenses, and a family monument to cost not less than $500. . . . and all that may accrue from the farm during her term of management to dispose as she pleases, but if she should die without disposing, then I order that the undisposed part be equally divided amongst my sons and daughters

then living. 7. I order my executors to sell my undisposed real estate and divide equally amongst my children then living."

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

D. W. Dumble, K.C., for the pecuniary legatees.

G. Wilkie, for John Sidney Bailey.

TEETZEL, J., held that the term money in clause 6 was intended by the testator to embrace his entire residuary personal property. See Jarman on Wills, 5th ed., p. 725; Am. & Eng. Encyc. of Law, 1st ed., vol. 15, p. 702.

The personal estate not being sufficient, after payment of debts, to satisfy the pecuniary legacies; the residuary real estate should not be used to supplement the personal estate in satisfying the pecuniary legacies; the testator did not intend that his real and personal estates should be regarded as one mass, but he treated them as two distinct masses. Greville v. Brown, 7 H. L. C. 689, distinguished. Wells v. Row, 48 L. J. Ch. 476, James v. Jones, L. R. 9 Ir. 489, Gyett v. Williams, 2 J. & H. 429, Re Bailey, 12 Ch. D. 268, and Totten v. Totten, 20 O. R. 505, referred to.

The executors were not called upon to pay out of the personal estate, as part of the debts of the deceased, a mortgage of $900 on the farm devised to John Sidney Bailey, there being nothing in the will to shew an intention of the testator to relieve the devise from the mortgage.

Usual administration order to go unless the parties otherwise agree. Costs of all parties of the executors' application to be paid out of the estate.

MEREDITH, J. OCTOBER 23RD, 1903.

THORP v. WALKERTON BINDER TWINE CO.

Venue—Change of—County Court Action — Witnesses—Expense.

Appeal by plaintiff from order of Master in Chambers, ante 845, changing the venue from Guelph to Walkerton,

upon defendants undertaking to pay all the additional expense properly arising from the change to the plaintiff.

J. J. Drew, Guelph, for plaintiff.

G. H. Kilmer, for defendants.

MEREDITH, J., allowed the appeal and restored the venue to Guelph. Costs in the cause.

CARTWRIGHT, MASTER. OCTOBER 24TH, 1903.

CHAMBERS.

BOLSTER v. BOOTH.

Judgment — Amendment — Ex parte Application — Changing Personal into Proprietary Judgment — Rescission of Order Giving Leave to Amend.

Motion by the defendants to rescind an order made by the Master in Chambers, on the ex parte application of plaintiff, on 19th March, 1903, allowing plaintiff to amend the writ of summons and statement of claim nunc pro tunc, and without service upon defendants, by alleging thereon that one of the defendants was a married woman and had separate estate at the time she entered into the covenant sued on, and by claiming judgment against her separate estate, and also allowing plaintiff to amend the judgment so as to make it a judgment against her separate estate.

The covenant was contained in a mortgage deed dated on the 1st June, 1892. The action was begun on 10th November, 1902. Defendants filed a statement of defence on 5th December, 1902. Shortly afterwards an order was made striking out the defence and permitting plaintiff to sign judgment against defendants for the amount due upon the covenant. There was no reference in any of the proceedings to separate estate. Defendants were husband and wife.

The order for amendment first came to the knowledge of defendants on 27th April, 1903, and this motion was launched on 6th May, 1903.

A. W. Ballantyne for defendants.

W. R. Smyth, for plaintiff.

THE MASTER.—. . . Gordon v. Warren, 24 A. R. 44, and other cases cited, would be very instructive in a discussion as to whether Mrs. Booth had or had not separate estate on 1st June, 1892. At present, however, the only point for decision is whether the ex parte order was rightly made. I am obliged to hold that it was not. From the writ itself it appears that service was accepted by the solicitors for the defendants. Upon them, therefore, service of the amended writ and statement of claim could easily have been made. Very possibly no opposition would have been made to the judgment being amended as has been done. But, however that may be, I think that the defendant Mrs. Booth should have had an opportunity of deciding what course she would take in the matter. In Howland v. Dominion Bank, 15 P. R. 56 (approved and followed in Cairns v. Airth, 16 P. R. 100, at p. 104), it is laid down that on such applications as the present the existing state of things may be looked at and new evidence adduced to support or repel the motion. On the present motion the new material is the affidavit of Mrs. Booth negativing the possession of separate estate at the time of the execution of the mortgage and the affidavit of defendants' solicitor. . . . The order must be set aside with costs, to be set off against the costs payable by defendant Mrs. Booth under the judgment in the action.

I cannot but think that an ex parte order to amend a judgment should only be made in respect of a clerical error or some defect of that character. . . .

CARTWRIGHT, MASTER. OCTOBER 24TH, 1903.

CHAMBERS.

ROBINSON v. TRUSTEES OF TORONTO GENERAL BURYING GROUNDS.

Pleading—Statement of Claim—Damages — Breach of Covenant—Necessary Allegations—Particulars.

The statement of claim set out that plaintiff purchased from defendants and defendants conveyed to her a plot in a cemetery, wherein she buried her husband; that the rules, by-laws, and regulations of defendants were taken to be incorporated in their deeds; that by the rules of defendants it was enacted that no grave should be opened nearer than six inches from the boundary line of a plot; that plaintiff,

with permission of defendants, interred her husband's body in the said plot; (para. 6) that defendants, wrongfully and in breach of the terms and provisions of their deeds, opened the grave within six inches from the boundary line. By the 3rd paragraph of the prayer for relief plaintiff asked damages for breach of the provisions and covenants in said indentures of conveyance of said plot, etc.

The defendants moved to strike out the 4th, 5th, and 6th paragraphs and the 3rd paragraph of the prayer, upon the ground that there was no allegation of any covenant by defendants to comply with the regulations, or for particulars of such paragraphs.

W. Davidson, for defendants.

J. H. Milne, for plaintiff.

THE MASTER.—I think the motion should prevail, and that defendants are entitled to know what are the covenants, if any, which they are charged with violating and in respect of which damages are claimed.

If plaintiff so elect, the claim for damages might be abandoned, and that might suffice. But the plaintiff must be left to amend as advised. . . .

[Phillips v. Phillips, 4 Q. B. D. 131, referred to.]

If the plaintiff intends to pursue the claim for damages for breach of the provisions and covenants, as set forth in the 6th paragraph, such covenant should have been stated in that paragraph, and would have to be proved at the trial. But that paragraph is defective in not stating any such covenants, or by not containing an allegation that defendants were bound to conform to their own regulations and had covenanted so to be bound. . . . In the present state of the claim they cannot say what is the ground of the attack. . . .

Order requiring plaintiff to amend. Costs to defendants in the cause.

TEETZEL, J. OCTOBER 24TH, 1903.

TRIAL.

KILLENS v. WAFFLE.

Deed—Action to Set aside Conveyance of Land—Undue Influence—Mental Incapacity — Improvidence — Delay in Bringing Action—Costs.

Action by one of the next of kin of Eliza Hunt, deceased, to set aside a conveyance made by her on 14th June, 1895,

conveying all her property to defendant Waffle, in consideration of an agreement by Waffle to maintain her during her life, and providing that in case of refusal or neglect on his part to carry out the agreement he should pay her $25 per annum. The agreement was made a charge upon other property of defendant.

At the time she executed the conveyance deceased was about seventy. Some months before that the house upon her farm had been burned, leaving her without a home. Her children, who lived a long distance away, were communicated with, but did not seem disposed to put themselves about to look after their mother.

The defendant Waffle was a nephew of the deceased, and lived a few miles from her farm. From the time of the execution of the deed and agreement she continued to live with Waffle until she died in March, 1897; and the defendant paid her debts, comfortably maintained her during her life, and provided her with decent burial.

R. T. Walkem, K.C., for plaintiff.

J. L. Whiting, K.C., for defendants Waffle and Noonan.

W. A. Lewis, Brockville, for defendants the Foleys.

J. B. Walkem, Kingston, for the infant defendant.

TEETZEL, J.—I find as a fact that the property conveyed by the deceased to the defendant Waffle, which consisted of some chattel property of trifling value and an equity in the farm in question, did not exceed in net value the sum of $800, after payment of the debts and incumbrances.

I also find that the agreement and conveyance were brought about at the solicitation of the deceased; that she was not unduly influenced in any way by defendant Waffle; that there was no fiduciary relationship existing between them; that a solicitor . . . was called in by defendant Waffle to prepare the agreement; and that he was in conference with the deceased for at least half an hour before the agreement was prepared.

I also find that, while the memory of the deceased had been somewhat impaired by age and disease, she was possessed of sufficient mind, memory, and understanding to appreciate the transaction.

I also find that . . . the transaction was not improvident.

The action was not brought until 30th September, 1902, over seven years from the date of the deed, and, while the delay may not be in itself an absolute bar, I think it is a fact proper to be considered in determining the case; but in view of my findings on the merits of the case, it is not necessary to determine whether plaintiff is estopped by delay and acquiescence.

The action will be dismissed with costs as against the defendant Waffle, and without costs as against the defendant Noonan, a purchaser of the farm in question from his co-defendant, but who unnecessarily encouraged plaintiff to bring the action.