and claims wages at $40 a week, from 25th May, being $1,000, or in the alternative, damages for wrongful dismissal.

The statement of defence admits the agreement, which is produced on this motion, but says, that for many months prior to 18th May, 1912, plaintiff was by reason of illness, not able to do the work of cutter, as agreed, and that by reason of this inability, defendant was compelled in self defence to dismiss him—he "being still wholly incapable of performing his duties under the said agreement."

The plaintiff delivered a reply, the purport of which, was explained on the argument, when the defendant moved as above,

What the plaintiff wishes to bring before the Court, is, that in his view of the agreement, it was primarily, and chiefly for the purchase by defendant of the business of Regan & McConkey, and the right to use the firm's name, and have the advantage of the good will; that the defendant has had full enjoyment of these benefits; and that this was the consideration for the employment by the plaintiff of the defendant—and that therefore, the plaintiff is still entitled to the $40 a week in the present circumstances, whatever might be the case if he refused to work when able to do so. This is the only point in dispute in this case, so far as appears—and the true construction of the agreement on this point, will be determined at the trial, or by the Court at some later stage.

The only question at present is whether the reply is properly pleaded. It is not open to the objection of being a departure from the statement of claim. What is now set up, could not have been properly pleaded, until it was seen on what ground the defendant would justify his dismissal of the plaintiff, which the statement of claim had alleged "was wholly unwarranted, unjustified, a breach of the terms of the said agreement, and without any effect in law."

As soon as it appeared from the statement of defence, that defendant relied on the plaintiff's physical incapacity it was time enough to contest this view by setting up what plaintiff asserts, are his rights under the agreement, as he understands it.

Defendant treats the action as one for wrongful dismissal. The plaintiff now rather puts his claim on the ground of a breach of contract, as in *Caulfield* v. *National Sanitarium*, 4 O. W. N. 592, 732; 23 O. W. R. 761. Had the plaintiff