

HON. MR. JUSTICE BRITTON.

FEBRUARY 14TH, 1914.

BARNETT v. MONTGOMERY.

5 O. W. N. 884.

Division Court—Motion for Prohibition—Action for Return of Deposit on Purchase of Land — Rescission of Contract—Title to Land not in Question—Dismissal of Motion.

BRITTON, J., dismissed a motion for prohibition to the First Division Court of the County of York in an application for the return of moneys paid as a deposit on the purchase of certain lands, holding that no question as to the title to land arose.
Crawford v. Sevey, 17 O. R. 74, referred to.

Application by defendant for order for prohibition to the First Division Court of the County of York.

M. Lockhart Gordon, for defendant.

R. G. Hunter, for plaintiff.

HON. MR. JUSTICE BRITTON:—The plaintiff agreed with the defendant to purchase property, and paid as a deposit \$100. The sale was not carried out, but no question of title arose in the negotiations for purchase. There was delay and plaintiff assumed to cancel the agreement, or withdraw his offer, and he demanded a return of the sum of \$100 which he had paid when he made the offer to purchase. As defendant refused to return the deposit the plaintiff sues for it in the Division Court, and defendant disputes jurisdiction, alleging that the title to land will come in question. Upon the facts disclosed upon this application the title to land does not, nor is there any reason why it should come in question.

The plaintiff did not refuse to accept the property by reason of any defect in title.

Crawford v. Seney, 17 O. R. 74 seems in point. In an application for prohibition it is not what the ingenuity of counsel can suggest as a defence in order to succeed at the trial, but, as was said by Armour, C.J., in the case cited: "In prohibition we have to be satisfied that the title really comes in question, before we can prohibit." See also *Waring v. Picton*, 2 O. W. R. 92, and *Moberly v. Collingwood*, 25 O. R. 615.

As counsel for defendant produced a decision of the learned County Judge at variance with his decision in the present case there should be no costs in present application. Motion dismissed without costs.