SECOND DIVISIONAL COURT. JUNE 22ND, 1917.

CHILLINGWORTH v. GRANT.

Contract—Sale of Mining Property—Covenant of Purchaser to Expend Money on Improvements—Breach—Penalty—Exclusive Remedy—Damages—Measure of—Reference—Costs—Order of Revivor—Regularity—Rule 303.

Appeal by the defendant from the judgment of MIDDLETON, J., in favour of the plaintiff for the recovery of $7,500 damages for non-performance by the defendant of a covenant to expend not less than $15,000 in improving a talc mining property in Vermont.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

J. W. Bain, K.C., and M. L. Gordon, for the appellant.

S. F. Washington, K.C., for the plaintiff by revivor, one Main, respondent.

RIDDELL, J., read a judgment in which, after setting out the facts, he said that it was objected that the plaintiff by revivor was not shewn to have any status; but, the order to continue proceedings not having been moved against under Rule 303, it was prima facie regular: Ardagh v. County of York (1896), 17 P.R. 184.

If Chillingworth, the original plaintiff, had the right to bring an action for the breach of the agreement to expend $15,000, even if he failed to prove substantial damage, he might recover nominal damages, and, if the Court saw fit, his costs: Village of Brighton v. Auston (1892), 19 A.R. 305.

It was argued that the plaintiff had no cause of action because para. 3 of the agreement (14th May, 1912) which contained the covenant provided for a penalty, which was exclusive. But an examination of the whole agreement afforded an answer to this contention. The covenant in para. 2 was not affected by the provisions of para. 3.

It was contended, also, that, the measure of damages being, not the amount unexpended of the $15,000, but the amount of actual damage from such non-expenditure, the plaintiff suffered no damage.

Chillingworth, by an agreement of the 10th July, 1909, was to execute deeds of all the property to Taylor, to be placed in escrow