

MIDDLETON, J., IN CHAMBERS.

MARCH 22ND, 1918.

McLAREN v. PEUCHEN.

*Judgment—Motion for Summary Judgment under Rule 56—
Action on Promissory Note—Defence—Part Failure of Con-
sideration—Vague Statements in Affidavit—Unascertained and
Indefinite Claim—Leave to Defend Refused—Right of Action
on Cross-claim Reserved.*

An appeal by the plaintiff from an order of the Master in Chambers dismissing the plaintiff's motion for summary judgment under Rule 56.

D. L. McCarthy, K.C., for the plaintiff.

J. W. Bain, K.C., for the defendant.

MIDDLETON, J., in a written judgment, said that the action was on a promissory note for \$141,000, dated the 11th August, 1914, payable 6 months after date, with interest at 10 per cent. Payments had been made on account amounting to \$9,000, and the balance with interest was \$158,385.45.

The defendant, in the affidavit filed with his appearance, said that he bought property in 1911; that the price was \$461,300; that certain payments were made; and "the note sued upon in this action is the balance of the amount due under the terms of the said agreement." He then stated that he had claims against the plaintiff for some shortages and deficiencies and for charges against the property conveyed which he had to pay, and also because of defect in title.

The defendant's right to a trial in the ordinary way must substantially depend upon his own affidavit. The affidavit was most vague and unsatisfactory; and, in the opinion of the learned Judge, did not disclose any defence. All that was hinted at was a part failure of consideration. This did not afford any defence, but might be the basis of a counterclaim.

Partial failure of consideration is a defence pro tanto against an immediate party when the failure is an ascertained and liquidated amount, but not otherwise: Chalmers on Bills of Exchange, 6th ed., p. 99; Halsbury's Laws of England, vol. 2, p. 497; Day v. Nix (1824), 9 Moore (C. P.) 159.

Appeal allowed; judgment to be entered for the plaintiff for the amount claimed and costs; reserving to the defendant the right to sue for any claim he may be advised to assert against the plaintiff.