

TAYLOR, C.J.]

[June 5]

HANBURY v. CHAMBERS.

Pleading—Amendment—Dispute note—Weights and Measures Act.

Appeal from the County Court of Brandon. The plaintiffs recovered a verdict for \$163.69 for the price of a quantity of lime purchased by the defendant.

The only point argued upon the appeal was whether the plaintiffs were bound to show that the lime was measured by a standard measure according to the Dominion Weights and Measures Act, and whether they could recover without having shown that.

The defendant had not, in his dispute note, set up the provisions of this Act or claimed the benefit of it, or alluded to it in any way. His counsel had, however, at the trial, requested the judge to allow an amendment setting up this defence, but the learned judge had refused it.

Held, that the judge had a discretion to allow or to refuse the amendment, and that the court above should not in this case interfere with the exercise of such discretion.

Held, also, that the defendant could not avail himself of the provisions of the Weights and Measures Act, as against the plaintiffs' claim, without having set up such defence in his dispute note.

There are no formal pleadings in the County Courts in Manitoba, but the County Courts Act requires the defendant to state briefly the nature or grounds of his defence, whether statutory or otherwise; and, therefore, the defendant in such a suit, intending to rely on any statutory defence which it would be necessary for him to plead specially in an action in the Superior Court, must set it up by his dispute note.

Illegality, whether it arises on a statute or at common law, must be pleaded: *Potts v. Sparrow*, 1 Bing. N.C. 594; *Martin v. Smith*, 4 Bing. N.C. 436. And it makes no difference whether the illegality appears from the plaintiffs' own proofs or otherwise: *Fenwick v. Laycock*, 1 Q.B. 414.

The onus of proving the illegality rests also upon the defendant: *Forster v. Taylor*, 5 B. & Ad. 887; and as there was no evidence in this case that the measure used was not duly stamped, the appeal was dismissed with costs.

Ewart, Q.C., for the plaintiffs.

The Attorney-General for the defendant.

Personalia.

Mr. Harry Symons retires from the firm with which he has been so long connected, and which will now be known as Kingsmill, Saunders & Torrance. Mr. Symons is following the advice of Horace Greeley by "going west," for he has formed a partnership with Mr. H. W. C. Meyer, under the name of Symons & Meyer, at Calgary, Alberta. The many friends of Mr. Symons will wish him all success in his new home. He will, doubtless, take a place in the front rank of the profession in that thriving city.