

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

Per BOYD, C.—B. undertook to hold the notes, not for safe custody as a deposit, nor for investment as a scrivener, but as an attorney or agent to collect and remit. This establishes a fiduciary relationship, but not that of a trustee and *cestui que trust*, to all intents. A breach of trust arose on B.'s part, when he failed to remit and kept the money an unreasonable time, which indicated his intention to convert it to his own use. From the time plaintiff knew, or might have known, that, they were at arms' length, the retention was an adverse possession. Plaintiff's duty then was to make him pay as a debtor, and if she failed to resort to the usual remedy within six years he had the right to plead the statute. Substantially, B.'s position was not different from that of a solicitor who received notes and securities to collect for his client. The moneys he collects are recoverable by a legal action to which, if not prosecuted within six years, the statute is a bar. *Cook v. Grant*, 32 C. P. 511, distinguished.

Per PROUDFOOT, J.—A trust attached upon the notes given to B. They were not to become his property; a special confidence was reposed in him to secure their payment out of an entirely distinct transaction, and "to save them for the widow and orphans." The trust continued until the completion of the transaction by the money being placed in the widow's hands. The notes were not due when confided to B. He was not a mere agent to collect, but he was to use an influence to get better security or anticipated payment. *Cook v. Grant*, *supra*, considered.

Bain, Q.C., for plaintiff.

J. H. McDonald, Q.C., for defendants.

Divisional Court.]

[January 8.]

MCMULLEN V. FREE.

Damages to present crops—To farm permanently—Evidence of—Improper rejection—Action by mortgagor—Joinder of mortgagee.

Plaintiff bought seed barley from defendant guaranteed to be clean. The seed was sown, and it was afterwards discovered that it was mixed with a weed called wild vetches, or wild peas, which took root and grew up with the barley.

In an action to recover damages for depreciation in the value of the farm the evidence showed that the plaintiff had not sustained any damage to his

crop, but he tendered evidence to show depreciation in the value of the farm, which the learned Judge refused to receive.

On motion to the Divisional Court for a new trial,

Held (reversing Galt, J.) that the plaintiff should have been allowed to substantiate, if he could, that the necessary consequence of sowing the foul seed was to lower appreciably the value of the farm.

On the argument it was contended that as the farm was mortgaged the plaintiff (mortgagor) could not maintain the action.

Held, that in equity the mortgagor is the owner in a case like this, where the land is worth considerably more than the mortgage, and it is for the Judge to direct the mortgagee to be added or to direct the sum recovered to be paid into court for his protection, if it appears that his interests are being affected prejudicially by the litigation; but it is no reason for dismissing the action, and a new trial was ordered.

Riddell, for the plaintiff.

Clute, for the defendant.

Divisional Court.]

[January 8.]

ST. DENIS V. BAXTER.

Findings of jury in answer to questions—Recommendation of verdict—Entry of verdict by judge on findings.

In an action for wrongful dismissal the jury found (1) That there was a final bargain made between the parties: (2) That the plaintiff was to get \$900 a year, and in answer to the question: "It being a condition of the bargain that the plaintiff's term of service should end if he were not fit to do the duties of a captain, was the plaintiff fit to do the duties of a captain?" Ans. (3) It has not been satisfactorily shown by the evidence, and (4) The plaintiff was dismissed, and added as a rider the following: "Your jury, believing that the plaintiff did not receive proper aid in the discharge of his duty, would recommend a verdict for plaintiff of \$100."

The judge entered a verdict for the defendant, and the plaintiff moved to set it aside.

Held, as the Court being evenly divided that the verdict should not be disturbed, and leave to appeal was granted.