

Lobb, it is said, has paid over only about half of this sum, and a real question remains to be determined as to where the loss must fall—Murch denying Lobb's right to draw the money.

To determine the question Murch has brought an action against the city corporation, and the same solicitors, acting for McCowan, bring this action.

The remaining land is admittedly worth much more than enough to satisfy McCowan's claim, and the bringing and prosecution of this action at this time means the incurring of much needless expense, to be ultimately borne by Murch or the city corporation.

In one sense, the city corporation have no defence; McCowan must in the end be paid; but the existence of a "defence" is not the only thing that entitles a defendant to defend an action. It is enough if facts and circumstances are shewn and are deemed sufficient to entitle the defendant to defend.

If Murch is bound by what was done in his name by Lobb, then the city corporation have the right, upon that principle of equity known as the marshalling of assets, to compel McCowan to resort first to that parcel not taken by the city corporation, and to resort only to the part paid for by the city corporation, and now forming part of a city street, when it is ascertained that the parcel retained by Murch is not adequate to satisfy his claim. McCowan must not be put in any peril as to his claim. Murch in this suit has made default in appearance, so judgment may now be pronounced against him.

If McCowan is ready to accept judgment directing a sale of the parcel vested in Murch and not covered by the civic expropriation, reserving his right to apply for sale of the parcel taken by the city corporation (if necessary), such a judgment may now be pronounced; but, if this is not satisfactory, then he must await trial in the ordinary way. In this case the actions should be consolidated.

If McCowan accepts this, he may add the costs of this appeal to his claim. If he refuses, then the appeal is dismissed, with costs to be paid by him to the defendants the city corporation in any event of the action.