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APPELLATE DIVISION. MARCH 13TH, 1913.

GALBRAITH v. McDOUGALL.

4 O. W. N. 919.

Partnership—Dealing in Land—Method of Accounting—Construction of Agreement—"Advance" and "Profits"—Meaning of.

An agreement provided (in substance) that plaintiff should advance one-half the cost of placing certain town lots belonging to defendant upon the market and that in return therefor he should receive one-quarter of the profits arising from the sale of such lots. The lots were readily sold and as a matter of fact neither party had to advance any moneys, the cost of placing such lots upon the market being borne by the payments made thereon.

BRITTON, J., *held*, 22 O. W. R. 928, that the gross expenses should be deducted from the gross receipts and that plaintiff was entitled to receive one-quarter of the balance.

SUP. CT. ONT. (2nd App. Div.) *held*, that plaintiff was only entitled to one-quarter of the gross receipts less one-half of the expenses, as by the method of accounting contended for by the plaintiff the latter would only bear one-quarter of the expenses instead of one-half.

Meaning of terms "advance" and "profits" discussed.

Appeal allowed with costs.

An appeal from the judgment of Britton, J. (22 O. W. R. 928), in favour of plaintiff in an action for a declaration that plaintiff was entitled to one-quarter of the profits arising from the sales of parts of lot 12, 2nd concession of the township of Whitney, and to an undivided quarter interest in the part not sold, and for an account under a certain partnership agreement between plaintiff and defendant, and cross-action by defendant, consolidated by order of the Master-in-Chambers for payment by plaintiff of one-half the cost of surveying, developing, marketing and selling the said lands.

The Appeal to the Supreme Court of Ontario, Second Appellate Division, was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE

RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH.

A. G. Slaght, for defendant McDougall, appellant.

E. D. Armour, K.C., for plaintiff Galbraith, respondent.

HON. MR. JUSTICE CLUTE:—The defendant, being the owner of a lot in the district of Algoma, entered into an agreement with the plaintiff at the city of Montreal, on the 11th of February, 1911, whereby the defendant agreed to transfer and make over to the plaintiff a one-fourth interest, in a certain 160 acres in lot 12, 2nd concession of Whitney, district of Algoma, conditional upon the station being located on said site.

The agreement provides that Galbraith, the plaintiff, "is to provide the funds for surveying and laying out the property in town lots, and other incidental expenses preparatory to offering said property for sale. Said expenses are to be equally shared by each, when the property is disposed of, or when a sufficient sum is realized."

It clearly appears, from the evidence of both parties, that the intention was that this agreement, which was not under seal, should be superseded by a more formal one to be prepared by a solicitor at Montreal. This was not done, but a formal agreement was prepared after the parties had visited the premises, and it is quite clear, from the evidence, that the intention of the parties was that this latter document, bearing date the 28th March, 1911, prepared by a solicitor, should present the final agreement between the parties.

It recites that McDougall (the defendant) is the owner of the lot, that he "intends laying out the whole, or a portion of the said lot as a town site, and to dispose of the lots thereon by private sale or otherwise," that it is necessary to survey the land, open the streets, and in other respects improve the land for the purpose of a townsite, "And whereas the party of the second part has agreed to advance and pay one-half of the total cost of all necessary expenses in connection with the laying out, improvement and development of the said townsite, together with the survey, plan and advertisement of the same in consideration of an undivided one-quarter interest or share in the proceeds of the sale or disposition in the said lots, mining rights or otherwise."

In consideration of the premises, terms, provisions and conditions therein contained, the parties mutually agreed as follows:

"(1) The party of the second part agrees to advance from time to time as may be necessary, or become liable for one-half of all expenses incurred through the expedient laying out of the said lots, or any part thereof into a townsite, the survey filing a plan and advertisement of the same, and of the costs and expenses of clearing, grading and laying out the streets, and of the clearing of timber from the same lots, and all other necessary and expedient expenses or outlays in connection with the development of the said townsite, and the exploration of all mineral rights thereon.

(2) The party of the second part further agrees to devote a reasonable amount of his time and attention to the affairs of the said townsite, and to assist in the laying out, and improvement of the same, and the sale thereof.

(3) In consideration thereof, the party of the first part agrees to, and does hereby grant, assign and give to the party of the second part an undivided one-quarter share, or interest in the proceeds arising from the sale of the said townsite, in lots or otherwise, the timber and mining rights thereon, and in all profits or benefits arising therefrom, in any respects whatsoever.

(4) Proper books of account shall be kept of the receipts and expenditures, in connection with the said townsite, and an audit of the same shall be made at the expiration of every six months from the date thereof, or oftener, if deemed advisable by either party hereto, and the party of the second part, shall have access to the said books at any time.

(5) A division of the profits, if any shall be made, every six months, until the whole of the interests of the parties hereto, are disposed of.

(6) The party of the first part shall devote his time and attention to the requirements of the said townsite, and act in conjunction with the party of the second part.

This agreement shall enure to the benefit of, and be binding upon the parties hereto, their heirs, executors, administrators and assigns, respectively."

This agreement was duly executed under seal and witnessed by the solicitor who drew the same. It will be seen that there is an important difference between the informal agreement, and the document as finally prepared.

Under the former Galbraith is to provide all the funds required for laying out the townsite, and other expenses preparatory to offering the property for sale, which expenses are to be equally shared by each, when the property is disposed of, or when a sufficient sum is realized.

Under the second document Galbraith agrees to advance and pay half of the total cost. The plaintiff contends that the agreement amounts to a partnership, and that an account should be taken, deducting the expenses from the sales and dividing the balance in the proportion of one-quarter to the plaintiff, and three-quarters to defendant. Thus, assuming the sales to amount to $30,000, and the expenses to $12,000, that would leave $18,000, profits of which the plaintiff would be entitled to $4,500, and the defendant to $13,500.

The defendant contends that the specific terms of the agreement should be complied with; that is, that the defendant was bound to advance and pay half the expenses, $6,000, and he was entitled to receive one-quarter share of the proceeds, namely, $7,500, which would leave him $1,500 profits.

Under the first agreement a one-fourth interest in the lot, is to be transferred to Galbraith. Under the second agreement there is no mention of a conveyance of the land. The recital declares that Galbraith is "to advance and pay half of the total cost. . . . In consideration of an undivided one-quarter interest, or share in the proceeds of the sale, or disposition in the said lots, mining rights or otherwise." This is set forth in clauses 1 and 3. Clause one declares that Galbraith is to advance from time to time, as may be necessary, or become liable for one-half of all expenses, etc., and clause three declares that in consideration thereof McDougall grants, assigns and gives to Galbraith "an undivided one-quarter share or interest in the proceeds arising from the sale of the said townsite, in lots or otherwise, the timber and mining rights thereon, and in all profits, or benefits arising therefrom in any respect whatsoever."

I think it perfectly clear that unless there is something in the subsequent part of the agreement to detract from the effect of this recital and these clauses, the meaning is precisely what it states, that is, that it is a joint venture, in which McDougall owns the land, and that Galbraith shall advance or become liable for half the expenses, and shall

receive one-quarter of the proceeds of the sales, whether of lots, timber, or mining rights.

Clauses 4 and 5 were referred to as supporting the plaintiff's contention. I think they are quite consistent with the earlier part of the instrument, as I have construed it. Clause 4 declares that proper books of account shall be kept of the receipts and expenditures in connection with the townsite, and an audit of the same shall be made at the expiration of every six months. What is here provided for was necessary, whether the construction contended for by the plaintiff or the defendant prevails. It was necessary to keep an account of the sales, and it was equally necessary to keep an account of the expenditures in connection with the townsite, and it was proper that these receipts and expenditures should be audited.

But it is said that the latter part of clause 3 refers to profits, and that profits mean the balance remaining after the expenses are deducted from the receipts. But "profits" is an apt word and quite properly used to represent the gain which each party would be entitled to arising from the joint venture.

The evidence shews that the sales commenced immediately, and that all expenses incident to the placing of the property upon the market, were paid out of the sales of the lots, so that neither the plaintiff nor the defendant had to pay any part of these expenses in the first instance. From the tenor of the agreement this was in whole or in part contemplated, and that being so, it was necessary that accounts should be kept, audits made, in order that what may fairly be called profits might be ascertained.

Clause 5 simply provides that whatever these profits were should be ascertained every six months until the whole of the interests of the parties are disposed of.

The learned trial Judge points out that under certain possible conditions arising out of the transaction, it might have resulted in the plaintiff being the loser. That may well be. The plaintiff did not own the land. It was a joint venture in which one party owned the property and the other agreed to pay half the expense of clearing the land, laying out the site, etc., in consideration of one-quarter of the proceeds of the sale. He took a certain risk for a possible gain.

The chief argument addressed to the Court by Mr. Armour on behalf of the respondent was that this undertaking was a partnership and that under the rule applicable to the taking of accounts in such a case, the advance should be deducted from the gross receipts and the difference divided as profits. It is open to doubt whether the agreement entered into between the parties constituted a partnership.

Stroud, 2nd ed., p. 1415, under the heading "Partnership" II, (2) points out that "the sharing of gross returns does not, in itself, create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived." This question is more fully discussed in Lindley, 7th ed., pp. 38, 39, 55, and 56; 30 Cyc. V. VII; *Heap* v. *Dobson,* 15 C. B. N. S. 460; *Andrews* v. *Pugh,* 24 L. J. Ch. 58.

But whether the agreement amounts to a partnership or not the terms are too clear to leave doubt as to the intention. If the construction claimed for the respondent be the true one, the result will be that instead of the plaintiff advancing and paying one-half of the expenses incident to placing the property upon the market, he would in fact be paying only one-fourth of the expenses. This arises from the fact that if the expenses are paid out of the proceeds of the sales, the defendant is paying three-fourths of the expenses, because under the terms of the agreement he is entitled to three-fourths of the fund out of which such payment is made.

From this fact has arisen, I think, a misapprehension of the plaintiff's case.

Thus: Sales, $30,000, quarter of which is $7,500, is plaintiff's share; deduct plaintiff's share of expenses $6,000, which was paid out of sales, leaves a balance of $1,500, plaintiff's share of profits.

On the other hand, if from quarter of the sales $7,500, there is deducted quarter of the expenses, viz., $3,000, this leaves $4,500, as plaintiff's share, having paid $3,000 instead of $6,000 towards the expenses.

The effect is the same if, as the plaintiff contends, $12,000 expenses should be deducted from sales, $30,000, leaving $18,000 and then one-quarter interest allotted to plaintiff, he would receive $4,500; thus contributing to the expense one-quarter instead of one-half, his one-half having been paid out of a fund of which he is entitled to one-

quarter share. Of course, the transaction must be treated as if the advance which he was bound to make had actually been made. Having made the advance, he is entitled to receive one-fourth of the whole of the proceeds, which is $7,500, but as this would be the total amount which he would have received had he advanced the $6,000, the $6,000 must be deducted from this amount, making his profits in the transaction $1,500.

It ought not to be forgotten that under the peculiar terms of the agreement the defendant puts in his land without receiving any special advantage therefrom, except his three-fourths of the proceeds of the sales. In a word, the plaintiff ought not to be permitted, not having made his advances, to have them paid out of a fund to which he is only entitled to one-fourth and the defendants to three-fourths.

With deference, I think the judgment of the trial Judge should be varied to conform to the construction put upon the agreement as contended for by the defendant. The defendant is entitled to costs in the Court below and of this appeal.

As under the amendment full relief can be given in the first action, the second action is dismissed without costs.

SIR WM. MULOCK, C.J. EX., HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH, agreed.

HON. MR. JUSTICE RIDDELL:—McDougall owned a lot known as the McDougall veteran claim in the Whitney district of Algoma, this he expected to become the site of a town —he agreed with his employer Galbraith for him to "come in"—and an informal agreement was drawn up. It is as follows:—

Montreal, 11 Feby., 1911.

"It is hereby agreed between Hugh Allen McDougall of the City of Montreal, Coml. Traveller and William Galbraith of the City of Westmount, Merchant.

That in consideration of the sum of one dollar rect. of which is hereby acknowledged and for other good and valuable consideration.

The said Hugh Allen McDougall transfers and makes over to the said William Galbraith, one-fourth interest in a certain lot of land containing 160 acres more or less known and designated as lot No. 12 in the second concession of

Whitney District of Algoma, known also as the McDougall veteran claim.

It is understood that this transfer covers all surface mineral and other rights on said property.

This agreement is conditional on the T. & N. O. Rw. Commission locating their station on said lot.

William Galbraith is to provide the funds for surveying and laying out the property in town lots; and other incidental expenses preparatory to offering said property for sale. said expenses are to be equally shared by each, when the property is disposed of or when a sufficient sum is realized.

Witness: (Sgd.) H. A. McDougall.

(Sgd.) G. W. Gardiner. (Sgd.) Wm. Galbraith

The land being in Ontario, it was thought advisable to have the more formal document (which they seem to have contemplated) drawn up by an Ontario solicitor—and the following was the result:—

"Memorandum of agreement made in duplicate this twenty-eighth day of March, A.D. 1911.

Between: Hugh Allan McDougall, of the town of Porcupine, of the first part, and William Galbraith, of the city of Montreal, of the second part.

Whereas the party of the first part is the owner of Lot Number twelve in the Second Concession of the Township of Whitney in the district of Sudbury.

And whereas, the party of first part intends laying out the whole or a portion of the said lot as a townsite and to dispose of the lots thereon by private sale or otherwise;

And whereas it is necessary to secure a survey of and register a plan of the said townsite and to open streets upon the same and in other respects improve the land for the purpose of a townsite:

And whereas the party of the second part *has agreed to advance and pay one-half of the total cost of all necessary expenses* in connection with the laying out, improvement and development of the said townsite together with the survey, plan and advertisement of the same in consideration of an undivided one-quarter interest or share in the proceeds of the sale or disposition of the said lot, mining rights or otherwise.

Now, therefore, this indenture witnesseth that in consideration of the premises and the terms, provisions, and conditions herein contained, the parties hereto mutually agree with the other as follows:—

(1) The party of the second part agrees to advance from time to time as may be necessary or become liable for one-half of all expenses incurred through the expedient laying out of the said lots or any part thereof into a townsite, the survey, filing a plan and advertisement of the same and of the costs and expenses of clearing, grading, and laying out the streets and of the clearing, cutting of timber from the same lots, and all other necessary and expedient expenses or outlays in connection with the development of the said townsite and the exploration of all mineral rights thereon.

(2) The party of the second part further agrees to devote a reasonable amount of his time and attention to the affairs of the said townsite and to assist in the laying out and improvement of the same, and the sale thereof.

(3) In consideration thereof the party of the first part agrees to and does hereby grant, assign and give to the party of the second part an undivided one-quarter share or interest in the proceeds arising from the sale of the said townsite, in lots or otherwise, the timber and mining rights thereon, and in all profits or benefits arising therefrom in any respects whatsoever.

(4) Proper books of account shall be kept of the receipts and expenditures in connection with the said townsite and an audit of the same shall be made at the expiration of every six months from the date thereof or oftener if deemed advisable by either party hereto, and the party of the second part shall have access to the said books at any time.

(5) A division of the profits, if any, shall be made every six months, until the whole of the interests of the parties hereto are disposed of.

(6) The party of the first part shall devote his time and attention to the requirements of the said townsite and act in conjunction with the party of the second part.

This agreement shall enure to the benefit of and be binding upon the parties hereto, their heirs, executors, administrators and assigns, respectively.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

Signed, sealed & witnessed
in the presence of:
Sgd. T. E. Godson.

Sgd. H. A. McDougall (Seal).
Sgd. Wm. Galbraith (Seal).

It can scarcely be said that the draftsman is to be congratulated on the skill he displayed in this document.

A great demand set in for the town lots into which the land was divided—they were sold rapidly and such part of the money so received as was thought necessary was expended in expenses—the receipts were approximately $30,000, the "expenses" $12,000. McDougall claims that this should be the book-keeping:

McDougall Cr. by ¾ of $30,000	$22,500
Dr. to ½ of $12,000	6,000
Balance due to McDougall	$16,500
Galbraith Cr. by ¼ of $30,000	$ 7,500
Dr. to ½ of $12,000	6,000
	$ 1,500

Galbraith claims:—

McDougall Cr. by ¾ of ($30,000-$12,000)	$13,500
Galbraith Cr. by ¼ of ($30,000-$12,000)	4,500

The trial Judge gave effect to Galbraith's.

McDougall now appeals.

Much argument was advanced to us upon the question whether the two documents should be read together, or whether the latter entirely superseded the former. It does not seem to me that for the purposes of this case it makes any difference which view is taken; and I do not enter into the enquiry. But I am not to be taken as assenting to the conclusion in that regard of my brother Britton.

Much, too, was said as to whether a partnership was formed or not—that it seems to me is also immaterial—a mere matter of terminology—whether in this case one calls the relations between the two a partnership or a joint enterprise or a common venture, their rights and duties *inter se* are governed by the document they have signed—and these are the only rights and duties we here consider.

The main reliance of the respondent was upon the use of the words "advance" and "profits"—and if "advance" always meant "to pay out money which is to be later repaid," and "profits" always meant "gain made on any business when both receipts and disbursements are taken into consideration," there would be foundation for his contention. But "advance" often means "pay" "Words and

Phrases, etc.," *sub voc.*—and that this is its meaning here, is, I think, shewn in the recital No. 4.

Nor is "profit" or "profits" wholly unambiguous—the primary meaning is "benefit or advantage" and that meaning is found very frequently indeed. See Words and Phrases *sub voc.* p. 5661: "There is no single definition of the word "profits" which will fit all cases," per Farwell, J., in *Bond* v. *Borrow, etc.* (1902), 1 Ch. 353, at p. 366.

From the whole document it is to my mind clear that what was intended was this: McDougall owning the land agreed that if Galbraith would pay one-half the "expenses," he should receive one-fourth of the proceeds of the sales. No doubt by a minute analysis of the agreement arguments may be found against this interpretation—but while we are to examine such a business document with care, we are not to scrutinize it microscopically or dissect it as with a scalpel. Taking the document as a whole and in connection with the circumstances of its formation I cannot agree with the learned trial Judge.

A confusion of thought sometimes seems to arise by the use of language somewhat metaphorical—here the land is said to pay the expenses. Strictly the payment is out of money which has been obtained by the sale of land. If I am right in my view——whenever any money was received for the sale of any land, as between the parties one-fourth of that belonged to Galbraith and three-fourths to McDougall—and should have been so credited; whenever any money was paid out for "expenses" one-half should have been debited to Galbraith and one-half to McDougall—then it became a simple matter of book-keeping. The whole effect was that instead of either procuring money from some other source money on the spot to which they were entitled was used.

The method followed by the learned trial Judge makes McDougall pay not one-half, but three-fourths of the expenses.

I think the appeal should be allowed with costs here and below—if the parties cannot agree the reference may proceed, but it seems more convenient to order this to proceed before the M. O. in Toronto.

THE HON. CHANCELLOR BOYD. MARCH 17TH, 1913.

JOHNSON v. FARNEY.

4 O. W. N. 969.

Will—Construction—Precatory Trust—Mere Expression of Desire Does not Create—Absolute Interest not Cut Down—Review of Cases.

A testator by his will left all his real and personal property to his wife, and a later clause of the will read "I also wish if you die soon after me that you will leave all you are possessed of to my people and your people equally divided, that is to say your mother and my mother's families.

BOYD, C., *held*, that the latter clause did not impose a trust and that the widow took absolutely.

Re Hamilton, [1895] 1 Ch. 375; [1895] 2 Ch. 370, followed.

Action for a declaration that the document propounded as the last will and testament of the late Anna Maria Johnson, was not such in fact, upon the ground that she was, when she executed it, incompetent to make a will; and, in the alternative, for construction of her late husband's will, and a declaration as to the estate taken by her under her husband's will.

J. H. Rodd, for the plaintiff.

F. A. Hough, for the defendant.

HON. CHANCELLOR BOYD:—At the close of the evidence I held that the will of the testatrix was well made, and that the probate of it granted could not be disturbed. Failing the direct attack, the plaintiff next contended that as to the property coming from her husband, the testatrix had no more than a life estate, or a life estate coupled with a trust for the ultimate benefit of the plaintiff and others. This involves the proper construction of the husband's will upon which I withheld judgment till I had examined the cases cited.

The material clauses of the will are these:—

At the introduction it is said "I leave all my real and personal property to my dear wife." Then towards the end it is said "I also wish if you die soon after me, that you will leave all you are possessed of, to my people, and your people, equally divided—that is to say your mother and my mother's families." Then in a codicil he refers to real estate purchased after the date of the will, and says "Property known as the Wm. McGuire property to go to my wife to do as she see fit with it. If she, my wife, die intestate

divide what is left of it equally among by brother and sisters, and her brothers and sisters."

The husband died in 1907, leaving about $10,000 worth of property: the wife died in 1912, and her property is about $17,000. They had no children. A year or so after her husband's death, the widow spoke of the provisions in his will being just and fair to both families, and she wanted it carried out.

But five years after his death, she apparently changed her mind, and thought fit to give all her property among the members of her own family. I think she had the power and the right to do this, and that no trust is imposed upon the property devised to her by the husband. The codicil implies that she had testamentary power over what came from her husband, and his direction was only if she died intestate, and what would have happened had she died intestate need not be discussed. But in the will, the expression used is that of a wish, not a direction, and according to the present lines of decision, the language is insufficient to create an obligation, i.e. a legal obligation enforceable in the Courts.

As said in one of the later cases, the husband may have thought that the influence of an express wish would be sufficient to induce the wife to apply the property, in the way suggested, but it was not put upon her as a duty, a mandate, or a legal obligation. He did not mean the second stage of the transfer, to be under his will, but to be bestowed under the influence of his expressed wish, and by the testamentary act of the wife. His words taken literally, would cover all the possessions of the wife, however acquired, and this shews that he did not seek to control her free action, but only to give advice, as he does in so many other parts of the will, and codicil which need not be quoted.

The earlier cases on precatory trusts have been departed from, and a stricter rule now obtains, which may be thus expressed: an absolute gift is not to be cut down to a life interest, merely by an expression of the testator's wish, that the donee shall by will, or otherwise, dispose of the property in favour of individuals, or families indicated by the testator.

A wish or desire so expressed, is no more than a suggestion to be accepted, or not, by the donee, but not amounting to a mandate or an obligatory trust. This is the result

of *Re Hamilton*, 1895, 1 Ch. 375, affirmed 1895, 2 Ch. 370. The modern view as thus expounded, is recognised, and acted on by Joyce, J., in a recent case, Re Conelly, 1910, 1 Ch. 220.

The parting of the ways is marked in our Court by the case decided by the Chancery Division, in 1889, of *Bank of Montreal* v. *Bower*, 18 O. R. 230; the whole situation is fully discussed and the cases collected in *Re Andrews*, 80 L. J. Ch. 370 (1911).

I therefore declare, that there is no trust attaching to the provisions of the husband's will, and that the wife held the property absolutely as her own.

The attack upon the will was ill-advised, in view of evidence so easily procurable, but as some benefit accrues from the construction of the will, I am disposed to except this case from the general rule, as to costs being payable by the one who fails in the attack, and to dismiss the action without costs. I am also influenced by the fact, that the wish of the testator was that his family should be equally benefited with the family of his wife, though he did not take effectual steps to secure that result.

HON. SIR G. FALCONBRIDGE, C.J.K.B. FEB. 24TH, 1913.

TOPPER v. BIRNEY.

4 O. W. N. 879.

Trial—Postponement — Granted on Terms — Leave to Sell Land Pendente Lite.

An appeal from an order of the Master in Chambers postponing trial until after 17th March.

W. Proudfoot, K.C., for the plaintiff.

H. H. Shaver, for the defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—Defendant does not ask specific performance, but only damages, plaintiff ought not to lose a sale if he can make one in the meantime. The order will be affirmed with the added limitation that if plaintiff can sell, this sale shall be allowed to proceed, but the net purchase price shall go into Court, subject to the order of the trial Judge.

Any mortgage may be made to the accountant.

Costs in cause.

HON. MR. JUSTICE BRITTON. MARCH 18TH, 1913.

GARRETT ET AL. v. GIBBONS ET AL.

4 O. W. N. 981.

Fraud and Misrepresentation—Sale of Business—Representation as to Renewal of Lease—Findings of Jury—Counterclaim—Evidence.

BRITTON, J., gave plaintiff judgment for $515 damages upon the findings of a jury in an action for rescission of a contract for the purchase of a business and for damages and allowed defendant $111 upon his counterclaim.

Tried with a jury at Toronto.

Action for the rescission of a contract for the purchase by the plaintiffs from the defendant Gibbons, of a garage business formerly carried on by Gibbons, at Nos. 193 and 195 Roncesvalles avenue, Toronto, and damages. This purchase included chattels and good will, and also the tenant right of Gibbons to the premises which he held until 1st January, 1913, under a lease from Geo. H. Waller. The agreement in question, here, was in writing dated 23rd September, 1912, on which day $100 of the purchase price of $1,000 was paid, and the balance of $900 was paid on the 3rd or 5th October following. The agreement permitted the plaintiffs to "take possession of the building now occupied as a garage, on payment to the said Gibbons of one month's rent in advance. The present lease to be assumed on completion of sale, and payment of balance of $900. Such rent and monies received, on closing of same, to be adjusted from October 1st, 1912."

Jno. McGregor and R. H. Holmes, for the plaintiffs.

T. J. W. O'Connor and E. D. Wallace, for the defendants.

HON. MR. JUSTICE BRITTON:—The plaintiffs went into possession, and very soon became dissatisfied, and on the 23rd October, this action was commenced. The plaintiffs allege that they were induced to purchase this garage business by the false and fraudulent representations of the defendants in regard to a building, and the right to remove the same, erected or claimed by the defendant Gibbons, and generally the plaintiffs allege that the defendants made false and fraudulent representations in regard to the prop-

erty, and in regard to the extent of the business which the defendant Gibbons had done on these premises.

The plaintiffs particularly charge, in the 5th paragraph of the statement of claim "that the defendants wrongly and falsely represented to the plaintiffs that the lease of the said garage premises was renewable for a further term of five years, at the same rental as reserved in the lease, and that the defendants knew when they made those representations, that the said lease was not in fact renewable." I withdrew from the jury all, except what is involved in the following questions submitted to them, and in their answers. My reasons appear in my charge to the jury, and in the discussion which took place at the trial.

The questions were as follows: (1) Did the defendants falsely represent to the plaintiffs that the lease of the garage 193 and 195 Roncesvalles avenue, was renewable for a further term of three or five years, from 1st January, 1913, at the same rental as Gibbons was paying, the defendants then well knowing that such lease was not renewable?

(2) Were the plaintiffs by reason of such fraudulent representation induced to purchase from the defendant Gibbons the property on the premises, 193 and 195 Roncesvalles avenue?

(3) If you answer these questions in the affirmative what damages are the plaintiffs entitled to recover by reason of such false and fraudulent representation?

(4) Were the tools which were included in the purchase, taken away by the defendants from the garage above mentioned?

(5) If you answer the last question in the affirmative, what was the value of these tools?

(6) What was the value of the alcohol, cans, and wooden axles taken by defendant Gibbons.

The jury answered questions 1 and 2 in the affirmative, and assessed the damages at $500.

The jury did not answer 4 in favour of plaintiffs, and they found the value of the alcohol cans and wooden axles to be $15.

The case was not a strong one for the plaintiffs, but I am of opinion that there was some evidence upon the question of the representation of the lease being renewable that I could not withdraw from the jury. The lease did not contain any proviso for renewal on any terms. I think the de-

fendants knew that—and neither lease nor copy of it was produced during the negotiations which resulted in the contract now impeached. The plaintiffs were entitled to rely upon representations made—if they were made—and the jury have found that they were made—and falsely made to the knowledge of the defendants. The cause of action arose when the false and fraudulent representations so made were acted upon by the plaintiffs, by their entering into the contract.

The alcohol cans and wooden axles belonged to the plaintiffs under their purchase of the contents of the garage.

There will be judgment for the plaintiffs for $515 with costs.

The defendants' counterclaim has been established to the amount of $111. The adjustment was to be as of 1st October and that adjustment was made and by it the sum of $196 was found due to defendant Gibbons. For this amount the plaintiff Garrett on the 9th October, 1912, gave his check on the Imperial Bank of Canada, to the American Motor Sales—but the check was not paid.

The amount $196 included one month's rent—the rent being payable in advance the rent for October had been paid by Gibbons or on his behalf—and this was subsequently paid by plaintiffs or one of them. That amount deducted from $196 leaves $111 for which defendant Gibbons is entitled to judgment with costs on his counterclaim.

Judgment for plaintiffs for $515 with costs.

Judgment for defendants on counterclaim for $111 with costs.

Judgment on counterclaim may be deducted from judgment for plaintiffs. Thirty days' stay.

MASTER IN CHAMBERS. MARCH 18TH, 1913.

CHWAYKA v. CANADIAN BRIDGE CO.

4 O. W. N. 980.

Venue—Motion to Change—Delay in Trial—Plaintiff Responsible for —Order Refused—Costs.

MASTER-IN-CHAMBERS refused to make an order changing the venue to expedite the trial of an action where plaintiff by his own want of diligence and forethought had caused the delay in having the action brought to trial.

Brown v. *G. T. R.*, 23 O. W. R. 74 and *Taylor* v. *Toronto Construction Co.*, 21 O. W. R. 508, followed.

Motion by plaintiff to have venue changed to Sarnia or Chatham—and to have inspection of the company's premises.

E. C. Cattanach, for the motion.

F. Aylesworth, contra.

CARTWRIGHT, K.C., MASTER:—The plaintiff was injured while in the service of the defendant company at Walkerville, on 28th November last.

He issued his writ on 28th January and delivered statement of claim on 7th February, naming London as place of trial though the jury sittings were fixed for February 24th, and so case could not be tried there without defendants' consent. The statement of defence was delivered on February 17th.

On 8th February defendants' solicitors wrote to plaintiff's solicitors "we think the action ought to be tried at Sandwich, and it may be necessary for us to move to change the venue."

Apparently this was construed by plaintiff's solicitor as a consent to a trial at Sandwich, and without anything more appearing a letter was sent on 21st February with N. T. for Sandwich sittings on 4th March. This was returned and apparently the plaintiff's solicitor tried to get a change to Chatham or Sarnia, a proposition which defendants' solicitors on 1st March said they must take up with their client. On 4th March they wrote again saying they could not speak as yet as to a change of venue, but thought it unlikely that defendants would consent to any other place than Sandwich. In the similar cases of *Brown* v. *G. T. R.*, 23 O. W. R. 74, and *Taylor* v. *Tor. Construction Co.*, 21 O. W. R. 508—it

was laid down that a motion of this kind could not succeed. Here the action was begun at a time when if the venue was laid at London a trial could not be had at the jury sittings. If the suggestion of defendants' solicitors given in their letter of 8th February, that Sandwich was the proper place, had been adopted then all would have been well, and the trial would have already taken place.

As the case now stands the only relief that plaintiff can have is to be allowed to withdraw his jury notice, if one has been served, and go to trial at the non-jury sittings at London on 21st April—subject to right of defendants to move to change to Sandwich on 27th May. The motion for inspection was not contested, and an order may go for that as may be arranged.

If the plaintiff accepts the offer to go to the non-jury sittings the order will be with costs to defendants in the cause otherwise the motion will be dismissed with costs to defendants in any event.

MASTER IN CHAMBERS. MARCH 18TH, 1913.

SCULLY v. MADIGAN.

4 O. W. N. 981.

Debtor and Creditor—Garnishee — Judgment Recovered by Debtor Against Garnishee — Stay of Execution — No Debt Due in Præsenti—Assignment of Judgment.

MASTER-IN-CHAMBERS *held*, that where judgment has been recovered by a plaintiff, in an action against the defendant, but the entry of judgment has been stayed, there is no debt due and owing from defendant to plaintiff which can be attached by a judgment creditor.

Motion by defendant, a judgment creditor of plaintiff, to have an attaching order made absolute.

A. W. Ballantyne, for the motion.

J. P. MacGregor, for the judgment debtor.

Cook (Ryckman & Co.), for the garnishee.

The defendant in this case is admittedly a judgment creditor of the plaintiff. The plaintiff lately recovered judgment in an action against the garnishee, but a stay of 30 days was granted by the trial Judge which has not yet expired. It was also stated that the garnishee would probably, if not certainly, appeal.

An attaching order was granted ex parte to the judgment creditor and served on the judgment debtor and the garnishee.

It was said in answer to the motion that it must fail because there is not at present nor was there at the time when the attaching order was granted, any debt due by the garnishee to the judgment debtor and also because of an assignment of the claim against the garnishee made before the order. That this first ground is correct seems to be shewn by the judgment of the Chancellor in *Burdett* v. *Fader*, 6 O. L. R. 532—affirmed by Divisional Court, 7 O. L. R. 72. There it was said: "The plaintiff has recovered a verdict in an action in which the entry of judgment has been stayed, so that he is not yet a creditor."

Applying that principle to the present case Scully is not yet a creditor of the garnishee, and, therefore, the garnishee is not yet his debtor. There is, therefore, nothing *debitum in præsenti* and nothing on which the attaching order can operate—and it must be discharged with costs, fixed at $20 to the garnishee, to be paid to him by applicant and to the judgment debtor to the same amount to be set off against the judgment recovered against him by the defendant.

It is not necessary to consider if there was any valid assignment of the plaintiff's claim against the garnishee made before the attaching order was made.

MASTER IN CHAMBERS. MARCH 8TH, 1913.

JACKMAN v. WORTH.

4 O. W. N. 911.

Pleading—Statement of Claim—Motion to Strike Out Paragraph—Claim as Shareholder of Company on Behalf of Company—Personal Claim Against Company—Inconsistency—Order Made.

MASTER-IN-CHAMBERS *held*, that a plaintiff suing on behalf of himself and all other shareholders of a company could not join a claim for his personal benefit against the company and another. *Stroud* v. *Lawson*, 1898, 2 Q. B. 44, followed.

Motion by defendants to strike out a certain paragraph of the statement of claim.

This action is brought by plaintiff on behalf of himself and all other shareholders of the Seneca Superior Silver Mines Ltd. except the individual defendants against such defendants and the company

The plaintiff attacks and seeks to set aside certain dealings with the shares of the company which he says were made in fraud of the company as being sales of treasury stock for "a price infinitely below their proper value" for reasons fully set out.

The relief claimed is in substance to have these sales declared void and to have the certificate in respect thereof cancelled; and to have the directors and shareholders and the company restrained from dealing in any way with these shares or attempting to validate the transfers and pretended sales thereof. At the end the plaintiff claims $500,000 damages against three of the personal defendants for fraud and conspiracy. This is presumably made on behalf of the company though not so stated.

Plaintiff also claims $500,000 damages against the company and Worth, one of the personal defendants for breach of an agreement of 29th February, 1912, to which he and the company and the plaintiff were parties; authorizing a sale to Worth (on certain terms only) of these shares. This later claim is clearly one made by the plaintiff in his personal capacity and for his own benefit as it is made against the company.

The present motion is to strike out this latter claim.

F. Aylesworth, for the defendants.

T. P. Galt, K.C., for the plaintiff.

CARTWRIGHT, K.C., MASTER:—It is clear from *Stroud* v. *Lawson*, [1898] 2 Q. B. 44, that in an action of this character, where different reliefs are sought that there must be two plaintiffs though they may be the same person suing in different capacities. Here the plaintiff at present is only acting in his capacity as shareholder, bringing his action on behalf of the company. In that form he cannot make any claim for his sole personal benefit and certainly as pointed out by Mr. Aylesworth, he cannot be suing on behalf of the company and for relief against it in the same action.

The plaintiff must, therefore, amend by claiming on his own behalf for any damages accruing to himself personally, as well as for the relief he seeks for the benefit of the company. In view of what is said in *Stroud* v. *Lawson, supra*, he will do well to consider whether he can do this under C. RR. 185 and 186.

This will depend (1) upon whether the two actions (for such they are) arise out of the same transaction or series of transactions and involve a common question of law or fact; and (2) whether the defendants are the same in both actions; as it was held they were substantially in the *Stroud Case*—I am not to be understood as expressing any opinion on these points at present. The second claim as noted is only against the company and one of the personal defendants: These questions may come up for discussion later—at present an order will go requiring plaintiff to amend as he may be advised so as to conform to Consolidated Rule 185, and to name a venue, if this was not stated in the copy filed. Defendants to have eight days thereafter to plead. The costs of this motion will be to defendants in any event. In *Stroud* v. *Lawson* the action was properly brought by plaintiff in his two capacities though his statement of claim did not make a case allowing joinder of the two claims.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. FEBRUARY 20TH, 1913.

PALLANDT v. FLYNN.

4 O. W. N. 837.

Interpleader—Issue Directed—Plaintiff therein—Security by Claimant—Practice—Leave to Appeal.

BRITTON, J., refused (23 O. W. R. 964), to interfere with the terms of an order of the Master-in-Chambers, directing an interpleader issue between a claimant and the execution creditor, on the ground that it was no moment which party was plaintiff, and the requirement that the claimant should pay into Court the alleged market value of the stock, $8,000, as security, failing which the stock would be sold, was in accordance with the well-established practice.

MIDDLETON, J., (24 O. W. R. 95) *held*, upon a motion for leave to appeal, that the requirement as to security was unreasonable.

Leave to appeal granted.

"No matter what the form of the issue, the real test is whether or not the stock in question shall be taken in execution."

SUP. CT. ONT. (2ND APP. DIV.), varied above order by directing that, on appellants failing to give security, by their undertaking, within 15 days, a sale of the shares seized might be made by sheriff, through brokers, but not for less than $2,000 net; proceeds of sale to be paid into Court to abide the result of the interpleader issue. Costs reserved.

An appeal by the Canadian Bank of Commerce, from an order of HON. MR. JUSTICE BRITTON, 23 O. W. R. 964, dismissing an appeal by the bank from an interpleader order made by the Master in Chambers.

Leave to appeal was granted by HON. MR. JUSTICE MIDDLETON, 24 O. W. R. 95.

The appeal to the Supreme Court of Ontario, Second Appellate Division, was heard by HON. SIR WM. MULOCK, C.J.Ex.D., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH.

R. C. H. Cassels, for the appellants.

J. Jennings, for the execution creditor.

R. J. Maclennan, for the Sheriff of Toronto.

THEIR LORDSHIPS, by consent of all parties, varied the order by the Master in Chambers by directing that, on the appellants failing to give security, by their undertaking, within fifteen days, a sale of the shares seized might be made by the Sheriff, through brokers, but not for less than $2,000 net; the proceeds of sale to be paid into Court to abide the result of the interpleader issue. Costs reserved.

HON. R. M. MEREDITH, C.J.C.P. MARCH 14TH, 1913.

BROWN v. GRAND TRUNK Rw CO.

4 O. W. N. 942.

Judgment — Consent Judgment — Division Among Beneficiaries— Right of Step-Children to Share under Workmen's Compensation Act—Principle of Division—Pecuniary Loss Sustained— Amount Allowed for Maintenance—Scheme of.

MEREDITH, C.J.C.P., *held*, that, whether under the Fatal Accidents Act or the Workmen's Compensation Act step-children were equally beneficiaries in case of their step-father's death.

That a lump sum awarded as compensation should be divided among the beneficiaries in proportion to the pecuniary loss sustained and not according to the tables of Statute of Distributions, and that the children should take as between themselves in proportion to the length of time before which in the nature of things they can provide for themselves.

Action brought by the plaintiff as administratrix of her deceased husband, and as his widow, for damages caused by his death through, it was alleged, the negligence of the defendants.

R. U. MacPherson, for the plaintiff.

D. L. McCarthy, K.C., for defendants.

F. W. Harcourt, K.C., for the infants.

HON. R. M. MEREDITH, C.J.C.P.:—This action came on for trial at the Hastings Assizes, and, after a jury had been called, but before they were sworn, a compromise was effected between the parties out of Court, and judgment was afterwards directed to be entered, in accordance with its terms, for the plaintiff, and $1,500 damages.

In the pleadings it was stated that there were no children, the claim being made altogether in the widow's interests. But after judgment had been directed to be entered in accordance with consent, minutes filed, it was stated that there really were four step-children—children of the plaintiff by a former husband—whose right to damages should be taken into consideration.

The plaintiff was thereupon called, and heard at length on the subject of the disposition of the damages; and it was thereafter directed that all such questions should stand over for further consideration before me at Chambers, together with an application to be made for an allowance to the mother, out of any part of the damages that might be awarded to the children, for their maintenance, after notice to the official guardian, who should represent them; and that has now been done.

The widow is 32 years of age, and the children, 6, 8, 9 and 11, and they all reside with, and are supported by her at Belleville. Neither she nor any of them has any other means, or any property.

There is nothing to indicate whether the liability of the defendants was a liability directly under The Fatal Accidents Act: 1 Geo. V., ch. 33: or only under the Workmen's Compensation for Injuries enactments, and so there would not be sufficient ground for restricting the rights of the parties to those conferred by the latter enactments, if they be more restricted than the other, as to the persons who may recover damages; but I cannot think that they are. Under the Workmen's Compensation for Injuries enactments "any person entitled in case of death shall have the same right of compensation as if the workman had not been a workman." The same right of compensation must mean that which The Fatal Accidents Act alone confers; and therefore the provision that the amount recovered "may be divided between the wife, husband, parent and child" must mean the wife, husband, parent and child provided

for in that enactment; and child there includes step-son and step-daughter.

There is no doubt of my power to apportion the damages; that is expressly provided for in The Fatal Accidents Act; sec. 9; but the difficulty of so doing is increased by the fact that the amount recovered is an arbitrary sum.

Different methods have been adopted in dividing money thus recovered; in some cases statutes of distributions of deceased's estates have been taken as the guide, and indeed in some states seem to have been made, by legislation, to govern; but, except where they are made by legislation to rule, they cannot be the best guide; and they would be helpless in this case. That which the law says ought to be done with the property of an intestate is obviously no very strong evidence of that which he would have done with his means, if he had not been killed. The true guide must be the actual pecuniary loss of each of the claimants.

The only damages which can be recovered in such an action as this are, reasonable damages, for pecuniary loss only, sustained by persons coming within the provisions of the Acts, giving such a right of action, limited, in some cases, to a maximum fixed amount.

Accordingly there seems to me to be but two ways in which an apportionment can rightly be made in cases such as this: first, by finding the amount of pecuniary damages which each of the claimants has really sustained; and, if the whole be more or less than the fixed sums, awarding to each his proper proportion; or, second, by finding the proportion, which the right of each bears to the others, and dividing the amount available accordingly; and the latter method is better applicable than the former to the circumstances of this case.

The case would be quite different, in the apportionment of the damages, if the children were the deceased's own. It is improbable that, had he lived, they would have fared, in a pecuniary sense, from his bounty, as they would, by reason of his duty as well as his bounty, had they been his own; and it is quite probable that any of such benefits as they might have received through his earnings would largely have been only indirectly through his wife, their mother.

There is, I think, enough evidence now before me to warrant a finding that the pecuniary losses of the children

altogether are equal to no more than one half of that of the widow.

The children's share of the damages, I apportion among them as follows: the youngest six, the next eight, the next nine, and the oldest eleven, all thirty-third parts of the fund. The method I adopt in such apportionment, in the circumstances of this case is: a fixed age applicable to the four when forisfamiliation is probably, and when at all events, each should be able, and, if the step-father had lived, would probably be obliged to fare for himself and herself; then allow to each an equal share each year, from the death of the step-father until the fixed age is reached. Taking $500 as the amount available the shares in money would be about $162, $140, $106 and $92.

Then, in regard to the application for payments to the mother out of the children's shares: the best plan that I can suggest in the interests of mother and children, is that the whole amount recovered in the action be paid into Court to their credit, and that half yearly sums of say $75, be paid out to the widow for their joint support, benefit, and welfare until the fund is exhausted, or until other order shall be made; the mother to satisfy the official guardian that all money so received, has been so applied before each half yearly payment, shall be made; with liberty to anyone interested to apply to vary the order at any time, should circumstances change in any material way.

If the widow be unwilling to accept this plan, her two-thirds of the net proceeds must of course be paid to her when demanded; but the infants' share must be paid into Court to their credit in the proportions I have mentioned; and no order will be made at present for payment out of any part of it; it will be better to wait for six months or so to test such method, as the mother may see fit to adopt for their and her maintenance and welfare.

HON. MR. JUSTICE BRITTON. MARCH 15TH, 1913.

EAGLE v. MEADE.

4 O. W. N. 948.

Negligence—Injury to Hostler—Horse Stepping on—Negligence Not Proven—Pure Accident—Action Dismissed.

BRITTON, J., dismissed an action for damages to plaintiff, an hostler, in the employ of defendant by reason of a horse belonging to defendant stepping upon him and breaking his leg, on the ground that plaintiff had failed to establish any negligence on the part of defendant, the occurrence being a pure accident.

Action for damages for personal injuries sustained by reason of the alleged negligence of defendant and his servant, Wm. H. Meade.

J. M. Godfrey, for the plaintiff.

G. C. Campbell, for the defendant.

The plaintiff and one Wm. H. Meade, were both in the employ of the defendant, who carries on a livery and cartage business in Toronto.

On Sunday afternoon, the 8th September, 1912, Wm. H. Meade told the plaintiff to go into the stable, and start bedding down the horses. Wm. Meade says this direction was as to the west stable.

I do not see that any point can be made in defendant's favour because of that.

After the plaintiff got through in the west stable, he went to the east stable, and William Meade knew before the accident, that the plaintiff was in the east stable.

The plaintiff was at work in rear of a stall, next to the one occupied by one of defendant's horses.

William Meade went into the last mentioned stall, intending to unloose the horse, and take him to water. While he was in the act of doing this, and had the knot partly, or wholly untied, the horse stepped back, pulling his halter-rope completely away from the hitching place, thus allowing him to back far enough to step against, or upon the plaintiff —which he did—breaking the latter's leg.

The trial commenced with a jury.

At the close of plaintiff's case, defendant's counsel moved for a non-suit.

I was of opinion that the plaintiff could not succeed, but reserved my decision.

The defendant called witnesses.

At the close of the evidence, the counsel for defendant again asked for a dismissal of the action, but I again reserved, leaving it to the jury, in case there was any evidence, and the jury failed to agree.

I am of opinion that there was no evidence of negligence to submit to the jury.

The horse was a quiet animal. There was no reason to suppose that the plaintiff would be in a position where he could be hurt by the horse backing out of his stall.

There was no reason to suppose that the horse, if loose, by accident or design, would do any injury to anyone working in the stable.

The plaintiff cannot recover at common law.

The negligence, if any, was that of William Meade, a fellow-servant of plaintiff.

Nor can the plaintiff recover under the "Workmen's Compensation for Injuries Act," for, even if William had any superintendence entrusted to him, it cannot be said that his negligence was, or that the accident happened, whilst in the exercise of such superintendence.

It cannot be said, I think, that the injury resulted from the plaintiff's having conformed to the orders, or directions of any person, to whose orders the plaintiff was bound to conform.

The injury to the plaintiff was a mere accident, for which, under the circumstances, no one is answerable in damages.

The action should be dismissed without costs.

I did not understand that defendant asked for costs.

Thirty days' stay.

MASTER IN CHAMBERS. MARCH 14TH, 1913.

BISHOP CONSTRUCTION CO. v. PETERBOROUGH.

4 O. W. N. 946.

Costs—Security for—Foreign Company in Liquidation—Amount of.

MASTER-IN-CHAMBERS where the plaintiff company whose head office was in Montreal had gone into liquidation in the Province of Quebec made an order for $1,000 security for costs by bond or by the payment of $500 into Court within four weeks in an action for $23,524.94, alleged balance due under a contract with defendants a municipality.

Toronto Cream & Butter Co. v. *Crown Bank*, 9 O. W. R. 718, followed.

Motion for an order for security for costs.

J. Grayson Smith, for the motion.

Tisdall (C. & H. D. Gamble), for the plaintiff company.

This action was commenced on 10th April, 1912, to recover $23,524.94 from the city of Peterborough, for extra work done on a dam, under a contract with the defendant.

On 30th May, the city delivered its statement of defence, alleging therein, among other things, that the Water Commissioners of the city were necessary parties.

On motion, an order to that effect was made on 24th September, and 3rd October, 1912, their statement of defence was delivered.

The plaintiff company has its head offices at Montreal—and on 30th September last, went into liquidation. About the same time, the liquidators appointed a new solicitor, as the former solicitor had retired from practice. An order to that effect was taken out on 12th February, 1913. The present solicitor then wrote to defendants' solicitors. From those letters, they learnt for the first time, that the plaintiff company was in liquidation. Thereupon they made this motion for an order for security for costs, if the action was allowed to proceed.

The facts of the present case are, at least, as favourable to the motion, as were those in the case of *Toronto Cream and Butter Co.* v. *Crown Bank*, 9 O. W. R. 718.

Here, the liquidation is proceeding in another province, and the defendants are not creditors of the company, nor

have the Courts of this province any control over the liquidators, or the assets.

The only case cited in answer to the motion, was that of *Provincial Assce. Co.* v. *Gooderham*, 7 P. R. 283. But the facts of that case were very different. As all the assets of a provincial company were being collected by a receiver, appointed by the Court of Chancery, there was no necessity for directing security, when the matter was entirely under the direction of the Court. It was pointed out that the application should have been made to the Court, in the suit pending therein.

As I understand the judgment in the *Toronto Cream and Butter Case, supra,* the defendants are certainly entitled to security. What the amount of this should be, is not so clear.

In *Stow* v. *Currie*, 13 O. W. R. 997, an order was made on 3rd November, 1908, at the commencement of the action, and a bond given for $2,000. This was due in part to there being three separate sets of defendants, appearing by different solicitors. After the trial, additional security in $1,000 was ordered. See 15 O. W. R. 383.

Here, the claim is in respect of a contract, on which has been paid over $80,000, and in respect of which the plaintiff asks for over $23,000 more. It is reasonably clear that this is not an ordinary action. Counsel are as usual, widely apart in their views of the probable party, and party costs of the defendants (who appear by the same solicitors), up to, and inclusive of the trial. After a second (informal) discussion on this point, justice will, I think, be done if plaintiff gives a bond for $1,000, or payment into Court of half that sum, within four weeks. This should render a further order for security unnecessary.

The costs of this motion will be in the cause to defendants, owing to delay in prosecution of the action.

HON. SIR G. FALCONBRIDGE, C.J.K.B. MARCH 15TH, 1913.

BECKMAN v. WALLACE.

4 O. W. N. 949.

Vendor and Purchaser—Specific Performance—Inequitable Conduct by Plaintiff—Refusal of Relief.

FALCONBRIDGE, C.J.K.B., dismissed action for specific performance where the plaintiff's conduct had been so inequitable as to deprive her of her right to that remedy.

Action for specific performance of an agreement for the sale of a house on Major street, Toronto, tried at the Toronto Non-Jury Sittings.

Geo. Wilkie, for the plaintiff.

C. S. MacInnes, K.C., for the defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The admitted circumstances of the case, are such as to deprive plaintiff of the equitable right to specific performance.

But there are faults, both of temper and of judgment on both sides, and some of defendant's difficulties are of her own invention. I think she said she was still satisfied with the price, and I do not see why the parties might not now agree, with the kind assistance of the respective solicitors, to carry out the contract.

Therefore, while I dismiss the action, I do so without costs.

HON. SIR G. FALCONBRIDGE, C.J.K.B. MARCH 14TH, 1913.

TAYLOR v. GAGE.

4 O. W. N. 947.

Injunction—Excavating Earth from Roadway — No Authorisation therefor—Injury to Plaintiff's Access—Damages—Reference.

FALCONBRIDGE, C.J.K.B., gave judgment for plaintiff for an injunction with a reference to the Master as to damages in an action to restrain defendant from excavating and taking away earth upon the road between plaintiff's and defendant's farms and thereby injuring plaintiff's access to his farm and the soil thereof.

Action by a farmer, for $2,000 damages against defendant for excavating and carrying away the earth on the road betwen plaintiff's and defendants' farms, and for an injunction, tried at Hamilton.

G. S. Kerr, K.C., and G. C. Thompson, for the plaintiff.

W. T. Evans, and S. H. Slater, for the defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—No by-law was passed by the township authorizing defendant to do the work complained of. There was not even an agreement duly signed, or executed between defendant and the township. There was only what was termed a meeting of council, on the ground when a verbal resolution was put, and declared to be carried.

The action is not against the township, and the arbitration clauses of the Municipal Act, have no application.

Plaintiff has suffered, and will suffer damage by deprivation of access, and injury to fruit trees by excessive drainage.

But (especially in view of the fact that plaintiff's fence seems to be 23 or more feet on the road allowance) I think the question of damage, if any, should form the subject of a reference to the Master.

Some witnesses swore that the value of plaintiff's property, has been enhanced by what defendant has done.

Judgment for plaintiff with an injunction restraining defendant from further excavating, or removing earth.

All questions of costs, and further directions, reserved until after Master's Report.

Thirty days' stay.