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MASTER IN CHAMBERS. MARCH 31ST, 1913.

MORRIS v. CHURCHWARD.

4 O. W. N. 1008.

Pleading—Action for Breach of Promise—Allegation of Seduction—Claim for Support of Child—Pleadable in Aggravation of Damages—As Substantive Claim—Statutory Requirements to be set out—R. S. O. c. 169.

MASTER IN CHAMBERS *held*, that a claim for seduction could be pleaded in a breach of promise action to aggravate the damages, but that if pleaded as a substantive claim, all the facts relied upon to substantiate a cause of action under the statute R. S. O. c. 169, must be set out.

Motion by defendant in an action for breach of promise before pleading for particulars of the alleged promise and of the alleged marriage to another woman—and to strike out paragraph 3 of the statement of claim as not disclosing any right of action in plaintiff.

W. H. Kirkpatrick, for the motion.

M. Wilkins, contra.

CARTWRIGHT, K.C., MASTER:—In this action for breach of promise the statement of claim does not state whether the promise was verbal or in writing. It also (in paragraph 3) alleges seduction of the plaintiff by defendant and birth of a child as a result on 13th May, 1912, with expense to plaintiff for nursing and medical attendance and maintenance of the child.

The statement of claim should be amended so as to shew if the alleged promise was verbal or in writing. If the former is the case then it would be right to give particulars of the time and place as also of the date of the marriage which is relied on as the breach of defendant's promise.

Paragraph 3 seems to have been based on the familiar case of *Millington* v. *Loring*, 6 Q. B. D. 190. This justifies the allegation of seduction, see Odgers on Pleading, 5th ed., pp. 398 and 419. But this paragraph must be amended, if the claim in respect of the child is to stand.

Chapter 169 R. S. O. (1897) gives a right of action to any one who provides necessaries for any child born out of lawful wedlock (sec. 1). But it is provided that the fact of paternity must in such a case as the present be proved by other testimony than that of the mother (sec. 2), and by sec. 3, that no action shall be sustained unless the mother has complied with certain directions therein set out. This paragraph should, therefore, be amended so as to comply with the statute or else limited to the claim for breach of promise as aggravated by the alleged seduction as in Precedent No. 49 in Odgers, p. 398.

Whatever is essential to the cause of action is a material fact and should, therefore, be set out in the statement of claim under C. R. 268. See *Phillips* v. *Phillips* (1878), 4 Q. B. D. 127 at p. 133, where Brett, L.J., said: "If parties were held strictly to their pleadings under the present system they ought not to be allowed to prove at the trial as a fact on which they would have to rely in order to support their case, any fact which is not stated in the pleadings. Therefore, again in their pleadings they ought to state every fact upon which they must rely to make out their right or claim."

The defendant to have 10 days after amendment to plead. Costs of the motion will be in the cause.

MASTER IN CHAMBERS. APRIL 2ND, 1913.

MEREDITH v. SLEMIN.

4 O. W. N. 1038.

Venue—Change—Inflamed Condition of Public Mind—Terms.

MASTER IN CHAMBERS, in an action for wrongful imprisonment and indignities, alleged to have been suffered at the hands of defendants, public officers, ordered the venue to be changed from Brantford to Simcoe on account of the inflamed condition of the public mind against defendants in the former city, upon the terms that defendants should advance plaintiff the necessary moneys to transport her witnesses to the new place of trial.

Baker v. *Weldon*, 2 O. W. R. 432, and *Reg.* v. *Ponton*, 18 P. R. 210 and 429, referred to.

Motion by the defendants to change place of trial on the ground that a fair trial cannot be had at Brantford.

The facts of this case appear in the report of a previous motion in 24 O. W. R. 155.

The plaintiff has given security and served notice of trial for the jury sittings at Brantford, commencing on 8th inst.

F. Aylesworth, for the motion.

T. N. Phelan, for the plaintiff.

CARTWRIGHT, K.C., MASTER:—Similar motions were made in *Oakville* v. *Andrew*, 2 O. W. R. 608; *Brown* v. *Hazell*, *ib.* 784; *Hisey* v. *Hallman*, *ib.* 403; *Baker* v. *Weldon*, ib. 432 in which last case the authorities are cited.

Such an order is not often made though it is well settled that a fair trial is beyond all other considerations.

The affidavits here in support of the motion put it beyond all doubt that there is a very strong opinion among a large class in Brantford extremely hostile to the defendants. This is shewn by the newspaper comments made in a newspaper distributed free in that city, and by the fact that a public subscription has supplied the funds necessary to enable the plaintiff to maintain her action.

The same point arose in the somewhat sensational case of *Reg.* v. *Ponton*, 18 P. R. 210 and 429. There the motion by the Crown to change the venue was at first refused. But such scenes took place at the trial at Napanee that on the second application the order was made and the case was then tried at Cobourg and resulted in an acquittal.

Here, no doubt, it can be said that in all probability no resident of Brantford would appear on the jury after the defendants had exhausted their right to challenge peremptorily. This argument seemed entitled to prevail in the cases above mentioned in 2 O. W. R.

But the condition of affairs is different here. The hostility prevalent in Brantford might not improbably affect the minds of jurors from other parts of the county, either through the newspapers, inflammatory articles (8 in all between 29th November and 24th January), or general conversation on a topic which has acquired such an undesirable notoriety as this has done. As the issue here is one of conflict between the plaintiff and defendant as to what led to the acts complained of, it is not possible to require the plaintiff to agree to have a trial without a jury as was done in some of the previous cases. It is desired by both sides to have a speedy trial. Fortunately this can be had at Simcoe on the 15th inst. This is sufficiently remote to be fair to both sides, and is on that account to be preferred to Woodstock. There can be no fear of any such scenes as are detailed in the report of the *Ponton Case, supra,* pp. 430, 431, 432, being repeated there. The mere possibility of such an outrage is to be guarded against. As the plaintiff is admittedly without means the defendants must supply such sum as is necessary to take her witnesses to Simcoe. At present what that will be has not been stated. This will be accounted for by the plaintiff if successful, on the final taxation.

The costs of the motion will be in the cause.

The notice of trial already given can stand for Simcoe, and the case be entered there without further payment, if it has already been entered at Brantford.

HON. MR. JUSTICE LENNOX. APRIL 2ND, 1913.

WARREN v. WHITBY.

4 O. W. N. 1029.

Municipal Corporation—By-law Appointing Medical Officer of Health —Motion to Quash—Public Health Act, 1912—Right of Council to Dismiss Applicant—Municipal Act, s. 320.

LENNOX, J., dismissed a motion to quash the by-law of a town appointing a Medical Officer of Health made by the former occupant of the office, holding that as the applicant was not appointed under the Public Health Act of 1912, he was dismissable at the will of the Council.

Motion by Frank Warren, a physician and surgeon, to quash By-law No. 832 of town of Whitby, appointing one McGillivray Medical Officer of Health for the town.

E. N. Armour, for the applicant.

J. E. Farewell, K.C., for the respondent municipality.

HON. MR. JUSTICE LENNOX:—Upon the merits this is not a matter inviting judicial action. It does not appear that the appointment made was not a good appointment, or that the council acted in haste, in bad faith, or contrary to the public interest. It is not suggested that the people of Whitby are behind Dr. Warren in his attempt to veto the action of their municipal council.

He is acting solely in his own interest, and for his individual satisfaction or gain.

It could not be pretended that he was harshly treated; for his appointment, as he knew from undeviating practice, terminated at latest in January, 1913; and meantime, under the statute then in force, his tenure of office was always at the will of the council; his engagement was a temporary one, revocable at any time without forfeiture by the municipality and without the obligation of assigning cause.

The Public Health Act of 1912, amongst other things, inaugurates an essentially new policy as regards local medical officers of health. Their qualifications were not defined under the old Act; they are defined now. There might be such an officer under the old Act; there must be such an officer under the new one. If appointed by the council his tenure of office was formerly at the will of the council; but under the Act of 1912, an appointee continues in office dur-

ing residence and good behaviour, can only be removed for cause, and then only with the approval of the Provincial Board. In addition to all this, new duties are assigned to this officer and new powers are vested in him. Many of these provisions involve, outside of ordinary professional attainments, the exercise of important discretionary functions and the possession of financial and administrative capacity. See, for instance, new sections 38, 40, 41, 42, 52, 72, and 87; not to speak of many other amendments throughout the Act.

I cannot therefore accede to the applicant's contention that upon the new Act coming into force, in June, 1912, a new contract was thereby created between him and the municipality, that he ceased to be a temporary and became a permanent officer of the municipality, and that from that day on the council ceased to have any say in the matter. Yet the officer on his part would not be bound to remain in the service of the municipality. The radical nature of the changes introduced, I would take, to be an answer to all this.

However, in any case, though I attach no importance to the verbal change from "Medical Health Officer" to "Medical Officer of Health," the applicant could hardly be said to be the officer described in the 37th and other sections of the Act, under the definition contained in sub-sec. (g) of sub-sec. 2, namely:—

"Medical Officer of Health shall mean the Medical Officer of Health of the municipality appointed under this Act." Dr. Warren's appointment was not under this Act.

On the other hand, Dr. McGillivray has been appointed under it, and can only be dismissed under the terms of sec. 37.

I am satisfied that there was no infraction of sec. 320 of the Consolidated Municipal Act relating to appointment by tender.

The motion is dismissed with costs.

MASTER IN CHAMBERS. APRIL 1ST, 1913.

LUCIANI v. TORONTO CONSTRUCTION CO.

4 O. W. N. 1025.

Negligence—Fatal Accidents Act—Right of Attorney of Parents to Sue—Infant—Power to Act as Attorney—Con. Rules, 259, 261, 298—Amendment—Limitation of Action—Reference to Judge in Court.

MASTER IN CHAMBERS, *held*, that an infant could take a power of attorney, but that an action under the Fatal Accidents Act must be brought in the name of the parents, and that their attorney could not sue for the death.

Re Wallace, 14 Q. B. D. 22, distinguished.

Motion by defendants to set aside the statement of claim and to dismiss the action or staying all further proceedings or for an order for security for costs.

J. Grayson Smith, for the motion.

D. C. Ross, for the plaintiff, contra.

CARTWRIGHT, K.C., MASTER:—The plaintiff is an infant suing by his next friend for damages for the death of his brother. The statement of claim alleges that he sues on behalf of the parents of his deceased brother, who was killed on 3rd December, 1911, while working for the defendant company. The writ was issued on 22nd November, 1912.

The parents of the deceased reside in Italy. The action is brought under a power of attorney from them to the plaintiff, dated 2nd November, 1912. This authorizes him as follows: "for us and in our behalf and for our use and benefit to sue the said (T. C. Co. Ltd) for damages—the said action to be brought in the name of our said attorney but for our benefit" and he is empowered to give discharges for anything paid in compromise of their claim and to make any settlement as he may think fit.

At the same time the parents executed an absolute assignment of their claim. But this is not mentioned in the statement of claim—no doubt because of the decision in *McCormack* v. *Toronto Railway*, 13 O. L. R. 656—which would be applicable unless both assignor and assignee are parties as in *Powley* v. *Mickleborough*, 21 O. L. R. 556.

It was argued in support of the motion that an infant could not take a power of attorney. But the contrary is

stated to be the law in 31 Cyc. 1212. There it is said: "All the cases are agreed that an infant may in general act as an agent."

But then it was submitted that in any case the action should have been brought in the name of the parents and that there is no power in the attorney to sue unless he could do so as assignee.

This objection seems well taken. The only case on the point I have found is in *Re Wallace,* 14 Q. B. D. 22, also reported in 54 L. J. Q. B. 293; 51 L. T. N. S. 551, and 33 W. R. 66, which seems to shew that it was thought to be a new and important decision. See 31 Cyc. 1394. That was the case of a petition in bankruptcy by a creditor which had to be signed by himself. But the C. A. held that a signature of the creditor by his attorney was sufficient—because it was said "the signature is essential to the doing of the act—the commencement of the proceedings in bankruptcy—which is authorized."

That is a reason which does not apply to the commencement of an action. It was argued by counsel for the plaintiff that I had no power to dismiss the action or to strike out the statement of claim as not shewing any cause of action, *Harris* v. *Elliott,* 4 O. W. N. 939, points out that this can only be done under C. R. 259 or 261, or under the inherent jurisdiction of the Court.

Nor can C. R. 298 be used to strike out the name of the plaintiff. The proper procedure would have been for the plaintiff to have taken out letters of administration, as no doubt he could have done under his power of attorney except for the fact that he will not be of full age until May next. Owing to the slow progress of the case it cannot be tried until next autumn, if a jury is asked for, as no doubt will be the case.

The case could, therefore, be put into the correct form if stayed until administration had been granted with leave to plaintiff to amend the writ and statement of claim accordingly. The right to do this was denied relying on the case of *Blayborough* v. *Brantford Gas Co.,* 18 O. L. R. 243, citing and following *McHugh* v. *G. T. R.,* 2 O. L. R. 600. Here, however, there is no attempt to do what was attempted in those cases. The action is brought on behalf of those entitled, and if the plaintiff had alleged that he was the administrator the action could have proceeded and he could

have obtained the necessary letters of administration before the trial. Under *Dini* v. *Fauquier*, 8 O. L. R. 712, approved on this point in C. A. in *Johnston* v. *Dominion of Canada Guarantee Co.*, 17 O. L. R. 462, this would have been sufficient. Much as I would like to give effect to the principles of C. R. 312, and to those considerations emphasized in *Sharp* v. *G. T. R.*, 1 O. L. R., at p. 206, I am unable to see how the mistake as to the form of action can be remedied —in view of the time limited for bringing action of this kind.

See *Williams* v. *Harrison*, 6 O. L. R. 685, and cases cited there.

Nothing, therefore, remains, but that this motion be referred to a Judge, who will deal with it under C. R. 261, or in such other way as he thinks best.

HON. MR. JUSTICE MIDDLETON. MARCH 31ST, 1913.

RE DAVIES.

4 O. W. N. 1013.

Will—Construction—Division of Surplus—"Between," Meaning of—Possible Meaning of more than two—Intention as Gathered from Whole Instrument.

MIDDLETON, J., *held*, that a direction in a will that a surplus be divided "equally between my wife and my said daughters, share and share alike," where there were three daughters, gave the widow a one-quarter share of such surplus, and not a one-half share.

Motion by the executors for construction of will of the late William Davies, Jr., made upon originating notice under Con. Rule 938.

A. M. Denovan for the executors and widow.

F. W. Harcourt, K.C., for the daughters, now all adults.

HON. MR. JUSTICE MIDDLETON:—The testator died on the 22nd September, 1892. By his will a trust fund is created, from which the income is to be paid to the wife until the youngest of the children attains the age of twenty-one years or marries. Upon the youngest attaining age the wife is to receive an annuity of $800. Certain provisions are made for the creation of a residuary trust fund, to be held

in trust for the testator's children in equal shares; the sons to receive their shares on attaining age; the shares of the daughter are to be invested, and the income paid to them without power of anticipation. The will provides that when the residuary trust fund "yields to each of my daughters an income of not less than $800 per annum all surplus income arising from said residuary trust fund is to be divided equally between my said wife and my said daughters, share and share alike." The fund held to answer the wife's annuity is to be ultimately divided amongst the children.

The question raised is as to the meaning of the clause above quoted, relating to the surplus income from the residuary trust fund. The wife claims that it is to be divided into two shares, one of which is to go to her and the other to her three daughters, share and share alike. The daughters, on the other hand, contend that the income is to be divided into four shares.

I have read many cases, but have failed to find any that throw real light upon the words used; and I have come to the conclusion that the daughters' contention must prevail.

The argument for the widow hinges mainly upon the meaning of the word "between." It is said that this implies a division into two equal parts; but, apart from the fact that the strict etymological meaning of the word "between" is not always observed, and that it is frequently used as equivalent to "among," I find it stated in Murray's dictionary that the word may be used as "expressing division and distribution to two (or more) partakers;" and, after giving many senses in which the word can be properly used, this note follows: "In all senses 'between' has been from its earliest appearance extended to more than two."

In seeking to ascertain the intention of the testator from the words used, I cannot shut my eyes to the general scope of the will. There is first the setting apart of a fund sufficient to produce an income for the widow of $800. Then there is the setting apart of the residuary fund to produce an income for the daughters. As soon as the income of each daughter equals the income of the mother, then the testator naturally and reasonably provides that the surplus income should be divided—as I think—into four shares, so that the mother and daughters shall be put in a position of equality as to income.

The costs of all parties may come out of the estate.

HON. MR. JUSTICE KELLY. APRIL 1ST, 1913.

TORONTO v. STEWART.

4 O. W. N. 1027.

Municipal Corporations — Apartment House By-law — Injunction Against Locating—Actual Work on Ground Prior to By-law—Evidence—Property Fronting or Abutting on Street.

KELLY, J., dismissed plaintiff's application for an injunction restraining defendant from locating an apartment house upon property fronting or abutting upon Oriole road, Toronto, in breach of plaintiff's by-law, upon the ground that actual work of location had commenced upon the ground prior to the passage of the by-law.

Toronto v. *Wheeler*, 22 O. W. R. 326, and *Toronto* v. *Williams*, 27 O. L. R. 186, followed.

Action to restrain defendant from locating an apartment house upon property fronting or abutting on Oriole road, Toronto, in breach of plaintiff's by-law No. 6061.

Irving S. Fairty, for the plaintiff municipality.

Geo. Wilkie, for the defendant.

HON. MR. JUSTICE KELLY:—The defendant is the owner of a parcel of land, situate on the east side of Oriole road in Toronto, having a frontage on Oriole road of about 211 feet, and running easterly about 437 feet; the easterly 250 feet of the property has a width of about 224 feet.

Running easterly and westerly through this property, defendant has laid out a private way, or street, 66 feet wide, the northerly limit of which at Oriole road is distant 72 feet 8 inches from the northerly limit of his property. On the part of the property lying to the north of this private way, by a depth of about 142 feet 6 inches, defendant erected an apartment house fronting on Oriole road and to the east of it a garage.

On the lands on the north side of the private way, and immediately to the east of the parcel on which are the apartment house and garage, defendant contemplated building another apartment house, and on January 30th, 1912, applied to the city architect for a permit for the erection thereof; the permit was granted on February 2nd, 1912.

The site for the location of the building was then staked out, and from that time up to April, 1912, defendant made contracts with some of the contractors for the erection of

this building. Prior to May 13th, when by-law No. 6061 of the city of Toronto was passed prohibiting the location of an apartment or tenement house "upon the property fronting or abutting upon" Oriole road and other streets therein named, the work of excavation, particularly of a trench for the foundation walls, was commenced, but was discontinued for a time owing as defendant says to his having been unable to obtain brick with which to proceed.

Some time after the passing of the by-law, work was again proceeded with, and on the 25th September, 1912, this action was commenced to restrain the defendant from locating or proceeding with the location of the apartment house referred to.

The defendant sets up that before the passing of the by-law, the building had been located, that the by-law is invalid, and that the apartment house is not being located on property fronting or abutting on any of the streets named in the by-law.

On the whole evidence I am satisfied that prior to the passing of the by-law, there was a location of this apartment house, not merely by defining and staking out upon the ground the position the building would occupy, but by the actual doing of some of the excavation work for it.

Doubts as to this were raised by the evidence of witnesses for the plaintiffs, some of them, however, frankly admitted that work might have been done without their having observed it. As against this there is the positive testimony of defendant and other witnesses, which I have no reason for rejecting, that the excavation work referred to was done prior to the passing of the by-law, it being specially mentioned that on May 6th, workmen were engaged in doing this very work. There was, therefore, more than a design or intention on the part of defendant to erect this building on this land; there was the actual use of the land for the purposes of the building and work of excavation actually done in furtherance of that purpose.

Following the decision in *Toronto* v. *Wheeler*, 22 O. W. R. 326, and of the Divisional Court in *Toronto* v. *Williams*, 27 O. L. R. 186, I am of opinion that defendant had located the apartment house within the meaning of these decisions prior to the passing of the by-law.

I have not dealt with the other objections raised by the defendant; a consideration of these may lead to the conclu-

sion that the property on which this apartment house is being built does not front or abut on any of the streets named in the by-law.

The judgment in *Dinnick* v. *McCallum*, 4 O. W. N. 687, (in appeal) helps to that conclusion.

Finding as I do for the defendant on the ground of location of the building prior to the passing of the by-law, I express no view on defendant's other objections.

The action is dismissed with costs.

HON. R. M. MEREDITH, C.J.C.P. MARCH 26TH, 1913.

SCOTT v. GOVERNORS OF UNIVERSITY OF TORONTO.

4 O. W. N. 994.

Corporations — University of Toronto — Liability of Governors to Action—Legal Position as Body Corporate—Not Crown Officers —Fiat of Attorney-General—Effect of—Action for Negligence—Workmen's Compensation for Injuries Act—Evidence—Damages.

MEREDITH, C.J.C.P., *held*, that the Governors of the University of Toronto were a body corporate, liable to be sued as such and were in no sense Crown officers, even though appointed by the Lieutenant-Governor in Council, and that therefore the maxim that "the King can do no wrong" had no application to them.

Action by plaintiff, an assistant pressman for damages for the loss of three fingers in a press by reason of the alleged negligence of defendants, their servants or agents.

H. H. Dewart, K.C., for the plaintiff.

J. A. Paterson, K.C., for the defendants.

HON. R. M. MEREDITH, C.J.C.P.:—I retained this case yesterday afternoon for the purposes of further consideration of one or two of the points respecting the legal character of the defendants and of the university, urged very fully, and with much force, by Mr. Paterson in the interests of the defendants.

Under the later legislation affecting the university and creating "The Governors of the University of Toronto"—called "The Board" in such legislation—they are made a legal entity—a corporate body; differing in that respect from the council of a municipal corporation and from any ordin-

ary board of directors of any ordinary corporation; and being so incorporated, and having expressly conferred upon them capacity to sue and be sued; and admitting, as they do, that the work in which the plaintiff was injured was their work, and was under their control; and that the persons engaged in it were their servants; this action is I think quite properly brought against them, in their corporate capacity, instead of against the university.

The contention that the rule that the King can do no wrong applies to the wrongs of "The Governors of the University of Toronto" was ruled against upon the argument. The mere fact that the Lieutenant-Governor in council of the province appoints most—not all—of the governors does not confer upon them the character of Crown officers. Such an appointment, in itself, has no such extraordinary effect; and indeed is not even extremely unusual. I mentioned, during the argument, two other instances; one being the appointment of a member of a municipal hospital board; and the King in council, I believe, appoints the members of a university board in England. There is no reason why the Lieutenant-Governor in council might not appoint members of a board of directors, or of management, of any concern; I mean there is no legal reason; and if that were done the effect in law would be none other than the effect of a like appointment made in any other valid manner.

Nor do the other powers, respecting the university, which the Lieutenant Governor in council has, under the enactments mentioned, bring to the governors the character of Crown officers governing Crown property for the use or benefit of the Crown. They are but officers of the university having power to deal with the property under their control for the uses and benefit of the university only.

The case of the Niagara Falls Parks Commission is quite different; there the commissioners are Crown officers dealing with Crown lands in the right of the Crown and in the public interests only. The University of Toronto is a body having its own separate and independent rights and interests, upon which the Crown cannot infringe; and the university press, in the carrying on of the work in which the accident, which is the subject-matter of this litigation, happened, is one of those things.

The fiat of the Attorney-General of the province, giving leave to bring this action, does not confer any right of action; it merely removes the legislative bar to the commencement of any action without such leave. But such legislation shews plainly that the Legislature deemed that actions at law would be against the governors, as a corporate body and individually; though that will not help the plaintiff if the Legislature were mistaken in that respect. A like legislative bar applies to the Hydro-Electric Commissioners; and, though there is more reason for contending that the rule, that the King can do no wrong, applies to them than to the governors, I have never heard of it being contended that there is no remedy in law, applicable to them, for their misdeeds; and they have been, and at one time not infrequently, sued.

Upon the merits of the case I can but repeat that which I said during the argument.

There is no liability at common law. There was no failure on the part of "The Board" to supply proper machinery, or to take any other reasonable precaution to insure the safety from injury, in their employment, of their servants. A foot-board was not a usual, or indeed a proper, part of a small machine such as that in which the plaintiff was hurt; nor would it have prevented such an accident as that in which he was injured. Nor was a switch, to cut off the electric power; the controller was all that was needed for putting, and keeping, the machine in, and out of, operation; nor, if there had been such a switch, would it have availed at all in preventing the accident. These two things really have nothing to do with the case.

But, under the Workmen's Compensation for Injuries enactments, the plaintiff has, as I find, a good cause of action against the defendants, as such corporate body.

The witness Edwards was a person, employed by the defendants, to whose orders the plaintiff, in the same employment, was bound to conform: the plaintiff was ordered, by Edwards, to oil the tympan of the press, and while conforming to that order, and by reason of conforming to it, was injured through the negligence of Edwards in setting the machine in motion without first giving the plaintiff some warning of his intention to do so. Both sub-secs. 1 and 2 of sec. 3 of the Workmen's Compensation for Injuries Act seem to me to apply to the case.

I cannot accept the statement of Edwards that his order was not to oil the machine but was only to get ready to oil it. Such an order is improbable; and it is also improbable that if it, and not the order to do the work, had been given, the plaintiff would have gone at once to do the work without waiting for a later order to do that for which Edwards now asserts he should have awaited another order.

The one difficulty on this branch of the case affects only the question of contributory negligence; and that is a very substantial difficulty; but upon the whole evidence my conclusion is that the defendants have not proved contributory negligence.

I have no doubt the plaintiff knew that the machine had to be put in motion, in order to turn the tympan so that that part of it to be oiled would be towards him, before he could do the oiling; and that there was no need for him to put his hand over the end of the air chamber, which was the only place of danger; but the question is not could he have avoided the accident; it is could he, exercising ordinary care, have avoided it; not the care of the skilled and careful, for he is yet but a youth, and but a pressman's assistant. My conclusion is that exercising such care as such persons ordinarily would, he might have done as he did depending upon a warning from the pressman to him before any danger from the machine in motion could arise.

Then what is, in money, reasonable compensation, under all the circumstances of the case, for the injury which the plaintiff sustained. In all substantial things that injury was the cutting off of three fingers of the left hand—the little finger and the next two. It was a painful injury; it disabled him for three months; and he must always remain maimed in that way. It prevents him doing the finer work of the trade he was learning; but there are of course many other callings and trades in which it would not be any such drawback; and in his work of assistant pressman it has not yet caused any reduction in wages, and but little, if any, loss of time after the three months.

Under all the circumstances of the case I assess the damages at $600; being satisfied that that is reasonable compensation under all the circumstances of the case.

There will be judgment for the plaintiff and $600 damages with costs on the High Court scale, and without any

set-off of costs. The action was commenced in the County Court, and was brought up to this Court by the defendants; and so as against them should be treated as if properly a High Court case.

HON. MR. JUSTICE LENNOX. MARCH 27TH, 1913.

PROWD v. SPENCE.

4 O. W. N. 998.

Husband and Wife—Marriage—Declaration of Invalidity of—Jurisdiction of Supreme Court of Ontario.

LENNOX, J., *held*, that the Supreme Court of Ontario has no power to make a declaration annulling an alleged marriage. *A.* v. *B.*, L. R. 1 P. & D. 559, and *May* v. *May*, 22 O. L. R. 559, referred to.

W. H. Wright, for the plaintiff.

Defendant was not represented at the trial although duly served.

HON. MR. JUSTICE LENNOX:—The plaintiff, Wilson Prowd, asks the Court to declare that what purported to be a marriage, celebrated between him and the defendant, Margaret Spence, on the 19th day of November, 1908, was not in law a marriage—was "null and void." The plaintiff also asks that "the said alleged marriage be set aside."

I have power in a proper case to pronounce a declaratory judgment and to make binding declarations of right whether consequential relief is or could be claimed or not O. J. A. sec. 57, sub-sec. 5. But this power should be exercised cautiously and sparingly. *Austin* v. *Collins*, 54 L. T. R. 903; *Toronto Rw. Co.* v. *Toronto*, 13 O. L. R. 532; *Bunnell* v. *Gordon*, 20 O. R. 281. The further question, as to whether the statute in effect creates a new jurisdiction, that is whether the power to declare extends to a class of cases "in which whether before or after the Judicature Act no relief could be given by the Court," was raised in the *Grand Junction Waterworks Co.* v. *Hampton Urban District Council*, [1898] 2 Ch. 331, and *A.* v. *B.*, 23 O. L. R. 261, but not

determined. But for the doubt entertained by the eminent Judges who disposed of these actions I would have considered it clear that the field of jurisdiction is not extended. But at all events here the plaintiff asks me to "set aside" the marriage, and the other prayer is for immediate relief too; for a declaration that the marriage "was and is null and void" is a doing away with the contract of marriage just as effectively, if it has any effect, as a like declaration as to a contract to purchase land. When I heard the evidence at Owen Sound on the 18th instant I had great doubt, as I then stated, as to having jurisdiction at all. Reflection and a re-perusal of the authorities confirm me in the opinion that the Judges of the Supreme Court of Ontario have no power in civil actions, except incidentally or collaterally, to pronounce judgments purporting to affect the conjugal relations or legal status as regards each other of persons who have entered a *de facto* or *de jure* marriage contract. Matters directly pertaining to the status of husband and wife and *de facto* marriage, had been relegated to the ecclesiastical Courts before our adoption of English law, and the contention sometimes set up that a concurrent jurisdiction may have been retained by the English Chancery Court, although *not exercised*, down to and beyond 1837, is not *supported* by any clear English authority and appears to be in direct conflict with the opinion of Sir John P. Wilde who said in *A.* v. *B.* (1868), L. R. 1 P. & D. 559, at p. 561;—"The gradual declension of spiritual authority in matters temporal has brought it about that all questions as to the intrinsic validity of a marriage, if arising collaterally in a suit instituted for other objects, are determined in any of the temporal Courts in which they may chance to arise. Though at the same time a suit for the purpose of obtaining a definitive decree declaring a marriage void which shall be universally binding, and which shall ascertain and determine the status of the parties once for all, has, from all time up to the present, been maintainable in the ecclesiastical Courts or the Divorce Court alone." In our own Courts, *May* v. *May*, 22 O. L. R. 559; *Hodgins* v. *McNeil*, 9 Grant 305; *Lawless* v. *Chamberlain*, 18 O. R. 296; *T.* v. *B.*, 15 O. L. R. 225; and *A.* v. *B.*, 23 O. L. R. 261, may be referred to.

And holding the opinion expressed I make no order herein.

HON. MR. JUSTICE CLUTE. MARCH 29TH, 1913.

CANADA CO. v. GOLDTHORPE.

4 O. W. N. 1003.

Landlord and Tenant—Action for Cancellation of Lease and for Arrears of Rent—Judgment in Default of Appearance.

CLUTE, J., gave judgment for plaintiff, a lessor, in an action against the lessee for cancellation of the lease and for arrears of rent, the pleadings having been noted closed by the plaintiff, and no appearance having been entered by defendant.

Motion by plaintiff for judgment in terms of the statement of claim, no appearance having been entered or defence filed. Pleadings were noted in default of statement of defence on the 12th of March, 1913.

S. S. Mills, for the plaintiff.

HON. MR. JUSTICE CLUTE:—It appears from the statement of claim that on the 3rd of January, 1906, the plaintiff leased to the defendant Goldthorpe the lands in question. On the 2nd of January, 1909, defendant Moyes, claiming to hold an assignment of the said lease, paid the plaintiffs $2,000 which paid the rent reserved to the 1st of February, 1909, and also taxes, and left a balance of $304.40, which, with interest, was credited on the rent due for the year running from the 1st of February, 1909, to the 1st of February, 1910, leaving a balance of $204.85 for rent due on the 1st of February, 1910.

There has since accrued due for rent $560 on the 1st of February, 1911, $560 on the 1st of February, 1912, and $560 on the 1st of February, 1913. Defendant Moyes has been in occupation of the lands, as assignee of the defendant Goldthorpe, since the payment of $2,000 in January, 1909.

Defendant Moyes has since sub-let the said lands to one Andrews and collected rent therefor, from Andrews, and appropriated the same to his own use.

Under the lease the defendant, Goldthorpe, covenanted to the plaintiff to pay rent and interest on arrears of rent at 6 per cent. per annum until paid, and to pay all other rates, taxes and charges which might be imposed on the said lands.

The defendant, Goldthorpe, further covenanted with the plaintiff that he would, on the date of the expiration of the term granted by said lease, pay to the plaintiff $14,000 in addition to all rents due or accruing due under said lease, with interest; and upon such payment and reasonable demand in writing with the costs and charges of the plaintiff, the plaintiff agreed to convey the land in fee simple to the defendant, Goldthorpe, free of encumbrances made by the plaintiffs or any claimant under them, subject to the reservations in the grant from the Crown.

By mutual covenant and agreement all the covenants, conditions and provisos and agreements set forth in the lease are binding and inure to the benefit of their respective assignees.

Prior to the 2nd of January, 1909, defendant, Goldthorpe, assigned said indenture of lease to the defendant Moyes. Except as to the sum of $204.85, the defendants have not, nor have either of them, paid the balance of the rent which matured on the 1st day of February, 1910, or any part thereof, and have not paid the rents which matured on the 1st day of February in the years 1911, 1912 and 1913, or any part thereof, or the interest thereon.

The plaintiff claims that by such default the defendants have forfeited the right to purchase the said lands granted by said indenture of lease, and asks to have it so declared.

The plaintiff further claims judgment against the defendants for the amount of rent due under the said lease, together with the 6 per cent., from maturity.

The pleadings having been noted, the plaintiff is entitled to judgment as asked in their statement of claim.

MASTER IN CHAMBERS. MARCH 26TH, 1913.

GRIP LIMITED v. DRAKE.

4 O. W. N. 1000.

Pleading—Motion to Strike Out—Action for Conspiracy—Former Employees — Breach of Contracts of Employment — Right of Plaintiff to Present his Case in Most Effective Manner—Separate Trials Refused.

MASTER IN CHAMBERS refused to order separate trials of actions against eight former employees of plaintiff for breach of contracts of service and conspiracy, holding that the conspiracy charge necessitated a joint trial, and that plaintiff was entitled to plead such overt acts in pursuance thereof as it chose.

Walters v. *Green*, [1899] 2 Ch. 696, followed.

Motion by defendants before pleading for an order directing separate trials of the actions against the several defendants and that writ and statement of claim be amended or to strike out paragraphs 4 to 12 inclusive as embarrassing.

J. G. O'Donoghue, for the defendants.

Geo. Wilkie, for the plaintiff.

CARTWRIGHT, K.C., MASTER:—Plaintiff company claimed $5,000 damages from the eight defendants who in paragraphs 3 to 10 inclusive of the statement of claim were said to have agreed in writing to serve the plaintiff company for terms, none of which had expired.

In paragraphs 11 and 12 it was stated that the above agreements were observed by the several defendants until on or about 27th January, 1913; when the defendants induced each other and conspired together to refuse to continue to work for plaintiff and accordingly absented themselves from the plaintiff's premises.

The real issue as stated on the argument is that of conspiracy. The allegations as to the separate engagements of the defendants state material facts which are relevant to the conspiracy charged and in respect of which the plaintiff claims damages. If the plaintiff is content to limit the claim to the alleged conspiracy there could be no possible objection to the statement of claim as it now stands—as was conceded on the argument.

Unless the conspiracy is proved the action must fail. But the plaintiff is entitled to have the case laid before the

Court in the shape which the company's advisers think most beneficial unless there is something in the rules which prevents this being done. Here there does not seem to be any bar of that kind. Paragraph 12 concludes with these words: "By reason of the premises the plaintiff has sustained great loss and damages and has been put to heavy charges and expenses." The judgment in *Walters* v. *Green*, [1899] 2 Ch. 696, at p. 701, seems to shew that the whole matter must be left to the trial Judge when the evidence is given on both sides. This was allowed in *Devanney* v. *The World*, 18 O. W. R. 921, in reliance on *Walters* v. *Green supra*, which went very much further than the present statement of claim.

Here the plaintiff alleges the conspiracy complained of to commit a breach of the several agreements and those breaches are alleged as acts done as part of the conspiracy and in pursuance thereof—and very likely are relied on by plaintiff as being the most cogent evidence of the conspiracy.

In view of the authorities the motion must be dismissed with costs to the plaintiff in the cause.

HON. MR. JUSTICE MIDDLETON. MARCH 31ST, 1913.

BASHFORTH v. PROVINCIAL STEEL CO. LTD.

4 O. W. N. 1019.

Master and Servant—Action for Arrears of Salary—Defence of Dismissal—Validity of Notice of Same—Dual Position as Manager and Director—Validity of—Circumstances Justifying Dismissal—Incompetence—Evidence—Counterclaim—Costs.

Action by an engineer for moneys alleged to be due him as arrears of salary, etc., as works manager of defendants. Defendants had purported to discharge him from this post for cause, but plaintiff had refused to treat the alleged dismissal as legal and claimed for salary as if the employment had continued.

MIDDLETON, J., *held*, that the notice of discharge had been legally given, and that the circumstances of the case justified the discharge, the employment being an important one and the result of the same being a heavy financial loss due chiefly to the incompetence of plaintiff.

Held, further, that there was no legal reason why a man should not occupy the dual position of a works manager and of a director of the company.

King v. *Trizzard*, 9 B. & C. 418, distinguished.

Action dismissed with costs.

Action by plaintiff to recover $290.94, alleged to be due to him on 31st August, 1912; $1,003.85, salary due on the 30th November, 1912; with some small sums for fuel and

light; and $300 for profits claimed under the terms of the agreement for employment; tried at Cobourg on the 4th, 5th, and 6th March, 1913.

F. M. Field, K.C., and W. F. Kerr, K.C., for the plaintiff.

E. F. B. Johnston, K.C., A. C. MacMaster, and Keith, for the defendants.

HON. MR. JUSTICE MIDDLETON:—The Provincial Steel Company Limited is an Ontario Corporation owning and operating a re-rolling mill at Cobourg. Robert Heath, an English gentleman of means, holds by far the greater portion of the stock in the company. His son-in-law, Rev. William Beattie, is the only other holder of a substantial number of shares; the other stockholders holding nominal amounts only.

The mills have been operated for some years at a heavy loss. Several managers have come and gone. Mr. Heath has been called upon to make large advances, in order that the operations might be continued.

Prior to the plaintiff's employment, Mr. Heath had arranged with Mr. Joseph Sheldon, a mechanical engineer of high standing and much experience in works of this class, to visit Canada and inspect the works, for the purpose of enabling Mr. Heath to determine upon his future course. Mr. Sheldon visited the works in September, 1911, and, after looking into the whole situation, reported to Mr. Heath, giving it as his opinion that under competent and careful management the works could be made to pay.

Mr. Sheldon, at Mr. Heath's request, made inquiry for a man qualified to take charge of the works. In the result, the plaintiff was communicated with and negotiations took place between Mr. Heath, Mr. Sheldon and the plaintiff, looking to the making of an agreement under which the plaintiff should give up his then employment as chief engineer in some English iron works and come to Canada. During the course of this negotiation the situation at Cobourg was placed before Mr. Bashforth, and he was informed that it was Mr. Heath's desire that the works should be made to redeem themselves, without the necessity of sinking much further capital. I think Mr. Bashforth fully understood the situation and knew the necessity for economical management. This becomes important in view of what took place later on.

The negotiations resulted in an agreement, dated the 22nd November, 1911, between the company, by Robert Heath as one of its directors, said to be authorized as agent in that behalf by a resolution of the directors, and Mr. Bashforth. By the agreement Mr. Bashforth was employed for four years from the 1st December, 1911, as general works manager; engaging to devote his whole time and attention to the business of the company and to use his best endeavours to improve the same, and to diligently and faithfully obey all lawful orders and instructions of the company in relation to the conduct of the said business. The company on its part agreed to pay a salary of £800 per annum, in quarterly payments, and five per cent. of the net profit over and above £1,500 per annum, with an allowance of £750 for depreciation of the plant, etc. Mr. Bashforth was also to be provided with the works residence set apart for the manager at Cobourg, rent free, and sufficient supply of fuel and light.

Mr. Heath personally guaranteed the due performance by the company of its obligations.

At the time of the making of this agreement, Mr. Heath had not received the necessary authority from the directorate; but on the 14th December, a resolution was passed adopting the agreement.

In pursuance of this employment Mr. Bashforth came to Cobourg, and, after inspecting the works, entered upon his duties as works manager. After remaining at the works until the end of January, he returned to England to consult with Mr. Heath and to bring his family to Canada; arriving again in Canada upon the 16th of March, and remaining in charge of the works until about the end of August, when, as will presently be more fully explained, he was suspended by the directorate. Finally, on the 25th October, a letter was sent, which it is said amounted to a dismissal.

In the meantime—on April 23rd—one share had been transferred to Mr. Bashforth, and he had been elected a director and vice-president of the company, and as such attended most, if not all of the directors' meetings.

The plaintiff denies the fact of his discharge and its validity, and, therefore, sues in this action for the salary due to him upon the theory that the agreement is still in force. The defendants allege that on the 22nd October, the

plaintiff was for good cause dismissed from the employment of the company; and they bring into Court the amount which they think was due to him for salary up to that date, together with the costs of the suit up to the date of payment in.

There is a minor controversy which need not now be discussed, as to the sufficiency of the amount paid.

At the opening of the case some discussion took place concerning the frame of the action, and the effect of the dismissal upon any claim that Mr. Bashforth might have for wrongful dismissal. I suggested to the plaintiff's counsel the desirability of amending by claiming, in the alternative, damages for wrongful dismissal. He declined to amend; and it may well be that confusion will result from his taking this course.

The defendants on the other hand have not pleaded simply dismissal, but dismissal for sufficient cause; and both sides have given evidence upon the assumption that the propriety of the dismissal, if there was a dismissal in fast, was in issue upon this record. The defendants also contend that the legal effect of the acceptance by Bashforth of the position of vice-president and director was to vacate his employment as works manager.

Before dealing with the question as to whether Bashforth was rightfully discharged, I think it is expedient to deal with the question as to whether there was a discharge and with the legal question suggested.

Mr. Bashforth's colleagues on the Board of Directors were Mr. William Beattie and Mr. Alexander Q. C. O'Brien, the secretary-treasurer of the company. Some difficulty had arisen, which will hereafter have to be discussed at greater length, by reason of Mr. Bashforth's taking the position that he was the general manager of the company, instead of the "general works manager," as stated in his agreement. This had brought him into conflict with Mr. O'Brien, and for some time their relations had been strained.

At the meeting of the Board of Directors on August 20th, Messrs. Bashforth, Beattie, and O'Brien being present, Mr. O'Brien made a statement that he had received information which could not be ignored, and demanded careful investigation, embodying charges of flagrant misconduct and incapacity on the part of Mr. Bashforth. He then moved a resolution calling for an investigation by two members of the Board, and that in the meantime Mr. Bashforth

be requested to refrain from active participation in the company's business, pending the report of the board. This was seconded by Mr. Beattie, and is said to have been carried.

Following this a copy of the resolution, attested by the seal of the company and by the signature of Mr. Beattie as second vice-president, and of Mr. O'Brien as secretary-treasurer, was mailed by Mr. O'Brien to Mr. Bashforth, with a letter signed by Mr. O'Brien as secretary for the company, requesting Mr. Bashforth to govern himself in accordance therewith. Contemporaneously, a notice, dated August 21st, was posted at the works, signed by Mr. O'Brien, to the effect that "until further orders Mr. Davis will take charge of the mill, in the absence of the general works manager."

On the same day Mr. Bashforth consulted his solicitor, who wrote to the company stating that he had advised Mr. Bashforth "when he is legally suspended . . . to rest from his labours as general works manager until he is legally reinstated. In the meantime he is continuing in the discharge of his duties." The solicitor also expressed Mr. Bashforth's readiness to cease working "if the company discharge him by such a method as will relieve him from the imputation of any breach of the contract of engagement on his part."

No formal investigation seems to have been held, but the matters alleged were fully investigated. The directors attempted to meet; but as it was necessary to have three present in order to form a quorum, Mr. Beattie and Mr. O'Brien could not get along without the co-operation of Mr. Bashforth. Mr. Heath was communicated with, and such steps were taken to qualify others for directors and to transfer shares that a special meeting of shareholders was held on October 4th, when the directorate was reconstituted. Mr. Sheldon, who had again came to Canada, was elected to the directorate.

On October 22nd, a resolution was passed by the directors as follows: "Whereas under date of August 30th, 1912, the general works manager. Mr. Andrew Bashforth, was suspended by resolution of the Board of Directors pending investigation into his conduct, and whereas investigation has been made, resulting in confirmation of the allegations, be it resolved to notify Mr. Bashforth that his services will be immediately dispensed with, and the solicitor of the company be instructed to take the necessary steps to carry out the re-

quirements of the board and to notify Mr. Bashforth forthwith."

On October 25th, a letter was sent to Mr. Bashforth, signed "The Provincial Steel Company Limited, A. Q. C. O'Brien, Secretary," stating, "We beg to advise you that the Board of Directors, at their meeting on August 30th, 1912, passed a resolution that your services be immediately dispensed with. The grounds of this resolution you are aware of, as you have been on suspension for some time while the directors were investigating your conduct. You will please take this letter as notice accordingly."

It will be observed that there are two errors apparent on the face of these proceedings. The resolution of suspension was the 20th of August, not the 30th; and the resolution of dismissal was the 22nd October, not the 30th August.

Mr. Bashforth placed the letter above quoted in the hands of his solicitor, who wrote to Mr. O'Brien a long letter on the 26th October, complaining of the unfairness of the alleged investigation, which he describes as "a farce" and evidence of bad faith and appropriate only to the ulterior motives prompting it;" and he makes a demand for the "grounds of the alleged action of the Board of Directors."

Nothing more seems to have been done until November 11th, when the solicitor again wrote, this time to the company, asking for a certified copy of the resolution therein mentioned.

On the 21st November, the solicitor for the company wrote furnishing a copy of the resolution, and drawing attention to the fact that in it the date "August 30" should have read "August 20"—another error, for the true date was October 22nd—and furnishing this without prejudice to the company's rights to allege any other or further reasons for their course of action.

To this Mr. Bashforth's solicitor replied on November 23rd, pointing out that the date of the resolution had not been given nor the names of the mover or seconder, and adding—what is rather surprising in view of the letters of October 25th and 26th—"Mr. Bashforth has never been given the slightest intimation of such a resolution" . . . "No authentic communication has been made by the company to Mr. Bashforth as yet, altering or affecting his status, since his receipt of the resolution of 30th August, 1912,

temporarily suspending him. I want to impress this upon you, as I do not propose that the company should avoid liability to Mr. Bashforth by equivocation, evasion or allegations of clerical errors."

It could hardly be supposed that this letter would have a pacific effect.

Several other letters were exchanged, which made it perfectly plain that the company was ready to defend any action Mr. Bashforth might bring for wrongful dismissal, and would in such action attempt to justify the dismissal.

Mr. Bashforth himself was not troubled by the difficulties which were present to the mind of his solicitor. He says that when he got the letter of October 25th, he knew he was dismissed. I agree with him, and, and think there can be no question that the letter of October 25th was an adequate notice of dismissal. It bears the signature of the company, by its secretary, and I think would have been ample justification for Mr. Bashforth then instituting an action for wrongful dismissal if so advised.

Turning now to the legal question argued, it is said that the positions of director and general works manager are so inconsistent as to make it impossible for the same individual to hold both. This is based upon *King* v. *Tizzard*, 9 B. & C. 418; where it is held that the offices of alderman and town clerk were incompatible, and where Lord Tenterden based his finding upon the statement "he would fill the two incompatible situations of master and servant."

I do not think it necessary to review the cases bearing upon this topic, because I am convinced that they do not apply here; for there is in my view no incompatibility between the two offices. The directors are not the master; they are the servants. The company is the master; and Bashforth was made a director at a shareholders' meeting of the company, after he had been appointed works manager. Nothin practice is more common than to have those charged with the administration of the affairs of the company as managers also upon the board of directors, who are themselves managers; so as to insure harmony in the working of the company. Whether this is wise in a particular case must be left to the judgment of the shareholders.

As pointed out in *Re Matthew Guy Carriage Company*, 22 O. W. R. 34, the Privy Council took the view in *Earle* v.

Burland that a director was entitled to remuneration payable under an agreement made with him before he became director.

So that on all these grounds the objection fails.

The question whether the company rightfully dismissed Bashforth has given me much anxiety. I realize the serious affect to the parties of any finding; yet I cannot feel doubt as to the result. I think the company were justified in what they did. As is usually the case in actions of this type, when the master seeks to justify the discharge of an employee the whole career of the employee during the course of the employment is gone into in painful detail, and much is sought to be made of minor matters.

In this case I base my finding upon broad grounds. Before Mr. Bashforth's employment with the company he had been employed as an engineer; and I have no reason to doubt his ability as an engineer. He was here employed not merely as engineer, but as general works manager, which involved his taking charge of the operative end of the company's business, and required, if his efforts were to be successful, executive ability of a somewhat high order. This, unfortunately, Mr. Bashforth does not possess. Under the supervision and guidance of a competent executive officer, he no doubt had been a great success in his employment in England; but when he came to Canada, and had to face the very difficult situation existing in Cobourg, he did not prove equal to the task. Besides this negative reason for his failure, other serious defects developed. Instead of being content to fill the position he was entitled to by his employment, that of general works manager, he at once assumed the role of general manager, and, as a natural consequence, found himself in conflict with Mr. O'Brien, the secretary-treasurer of the company. Being unused to the conditions prevailing in Canada between employer and employee, Mr. Bashforth also fell foul of the men employed, unless these men had been previously trained in England and were, therefore, prepared for his methods.

In the result, time and energy that ought to have been spent in bringing the factory into satisfactory and economical operation were wasted in useless bickering. This, combined with the lack of executive ability already referred to, resulted in the work of the mill being continued, it is true with some improvement, yet at an enormous loss. As I have

already stated, Bashforth knew when he was employed that it was the desire of Mr. Heath that the works should redeem themselves out of their own earnings. Yet the first thing he did was to spend some $3,000 in fixing up the residence. He also spent $4,000 in the purchase of some new rolls, without having taken any adequate steps to see that they could be used to advantage.

Without going into details, the figures given by Mr. Bashforth in his letter to Mr. Sheldon of June 10th, indicating the result of five months operation under Mr. Bashforth's management, are eloquent. These shew payments on expense account, including interest, salaries, and general expenses, $12,303; the profit on trading $3,470; a loss on rails and bars manufactured of $9,259; or a net loss of $18,093 in five months, without anything being included for interest on capital invested or depreciation of plant or any reference being made to the large sums spent for the rolls and upon the residence.

The correspondence produced at the trial between Mr. Sheldon and Mr. Bashforth, I think, illuminates the whole situation. Bashforth seems to be incapable of dealing with the situation as it is presented to him by Mr. Sheldon. His letters are full of his guarrel with O'Brien. He has an exaggerated sense of his own importance; and instead of answering the pointed and forcible letters of Mr. Sheldon, his replies are a deluge of words without detail, evading the real issue.

Mr. O'Brien, it may be said, did not seek to interfere with Mr. Bashforth in the discharge of his duties as general works manager. The friction between these two men is all attributable to Mr. Bashforth's assuming a position which he did not possess, and attempting to interfere with the office management. The expedient of making both Bashforth and O'Brien directors, there being only three in the province, seems to have rather accentuated the difficulty than to have produced harmony.

It is impossible to lay down in any satisfactory way, in general terms, what will justify a discharge. Every case must to some extent depend upon its own circumstances. Where, as here, the employment is that of the manager of an important branch of an undertaking, such as this, and where the failure results in a heavy financial loss, as was the case here, the unfitness here existing would, to my mind

justify the discharge. In addition to this there was in this case, I think, such misconduct in reference to the matters alluded to as warrants dismissal.

With reference to what I regard as minor matters—which were gone into at great length at the hearing—the situation would be more difficult. Br. Bashforth's use of strong language, and of liquor impaired to some extent his usefulness. This, standing alone, would probably be found insufficient to justify dismissal. One instance of treating in the factory was also proved, but I do not think that this would be sufficient. It was not shewn that treating was in any way habitual.

The way the contract for raw material was dealt with is also an indication of the absence of business ability and tact.

The defendants counterclaim for the damage sustained by reason of the improper expenditure. I gathered from the attitude taken by counsel that the counterclaim was put forward rather as a shield than as a sword. Some minor claims were made by the plaintiff with the respect to a balance deducted from his salary cheque in August and with respect to small sums claimed for fuel and lighting. On some of these items he is probably entitled to recover; but these are not the real subject matter of the litigation. I think I shall be doing the plaintiff no injustice if I set off anything that may be due to him in respect of these items against the damages which he would be liable to pay upon the counterclaim. The loss in respect of the unauthorized expenditure on the residence building alone would more than counterbalance anything coming to him on this head. If I have mistaken defendants' attitude I may be spoken to.

In the result, the action fails, and should be dismissed with costs, if demanded.

The plaintiff has remained in possession of the works house up to the present time. That matter is not before me in any way; and I would suggest to the defendants that they could well afford to be generous, and to forego costs and any claim in respect of occupation rent of the premises in view of the hardship upon the plaintiff by now having to begin again in England or elsewhere.

HON. MR. JUSTICE KELLY. MARCH 31ST, 1913.

OTTAWA & GLOUCESTER ROAD CO. v. CITY OF OTTAWA ET AL.

4 O. W. N. 1015.

Municipal Corporations — Liability for Repair of Bridge — Bridge between Township and City—Ownership in Road Company—Notice of Abandonment by—Validity of—General Road Companies Act—R. S. O. 1897, c. 193, ss. 8, 50-103—Municipal Act, 3 Edw. VII., c. 19, s. 613, s.-s. 2—Devolution of Liability—Costs.

Action by a road company to determine the liability for the maintenance and repair of a bridge crossing the Rideau river in the county of Carleton, and connecting the city of Ottawa and the township of Gloucester. Plaintiff had given the statutory notices of abandonment of the bridge section of the road, but the county refused to admit their validity and claimed plaintiffs were still liable for the maintenance of the same. The portion of the road within the city had been purchased from plaintiffs some time before, and this portion included part of the bridge.

KELLY, J., *held*, that the notices of abandonment given by plaintiffs were valid, and that the responsibility for the maintenance of the bridge devolved upon the county and the city and not upon the township, under the Municipal Act.

Reg v. *Haldimand*, 38 U. C. Q. B. 396, distinguished.

Action by a road company against the city of Ottawa, the county of Carleton and the township of Gloucester to determine which was liable for the repair and maintenance of a bridge, known as Billings bridge, which crosses the Rideau river at the present southerly boundary of the city of Ottawa.

G. F. Henderson, K.C., and W. S. Herridge, for the plaintiffs.

T. McVeity, for the city of Ottawa.

D. H. Maclean, for county of Carleton.

G. McLaurin, for the township of Gloucester.

HON. MR. JUSTICE KELLY:—In January, 1865, the plaintiff company was incorporated under the provisions of the Act respecting Joint Stock Companies for the construction of roads and other works in Upper Canada (Con. Stat. U. C. 1859, ch. 49), for the purpose, as set out in the declaration of incorporation, of constructing a macadamized road with the necessary bridges and other structures from the city of Ottawa, to and into, the township of Gloucester, etc., and crossing the Rideau river "by and upon said bridge, known as Billings bridge."

In February, 1865, the plaintiffs made provision for the extension southerly of the projected road, immediately following which the township of Gloucester passed a by-law that plaintiffs be given possession of the road from the bridge southerly to the township line between the township of Gloucester and Osgoode so soon as a guarantee were given that that part of the road would be carried to completion.

The Rideau river, where this road crosses it, then formed the boundary line between the township of Nepean (on the north) and the township of Gloucester (on the south), and the bridge was the connecting link between the parts of the road to the north and south of the river respectively.

Prior to February 4th, 1878, the bridge having fallen into disrepair, an indictment was found at the instance of the county of Carleton against the plaintiffs, charging them with neglect of their duty to uphold, rebuild, maintain, amend, and repair the bridge. On the last mentioned date an agreement of settlement was entered into between the county and the plaintiffs, wherein it was recited that the plaintiffs had constructed a road commencing at the city of Ottawa and extending through a portion of the township of Nepean and thence several miles into the township of Gloucester, that "a certain bridge from an island within the township of Nepean and thence across the main stream of the Rideau river to the shore of the township of Gloucester and commonly known as Billings bridge, doth intervene and form part of the line of the said road," and that the rights and obligations of the parties to the agreement were doubtful both as to rebuilding and reinstating and keeping in repair.

The agreement then provided for the bridge being rebuilt, reinstated and put in proper and complete repair at the joint expense of the parties thereto, upon the completion of which the county should grant and convey absolutely to the plaintiffs the bridge "with all rights, privileges and appurtenances thereunto belonging, subject to all the duties and obligations which the law may give or impose in reference thereto," and the plaintiffs covenanted to assume these duties and obligations and to indemnify the county against them. The agreement also contained a provision that nothing therein contained should extend any liability to the plaintiffs beyond the period of time they should be the owners of and

control the road. In pursuance of this agreement, when the bridge had been rebuilt, the county made a conveyance thereof to the plaintiffs on September 21st, 1878; and an Act of the Legislature was passed on the 11th March, 1879 (42 Vict. ch. 48), validating the deed and declaring that from and after the passing of the Act, it should be the duty of the plaintiffs to keep and maintain the bridge in good and proper repair. The preamble of the Act referred to the agreement of February 4th, 1878.

In December, 1907, that part of the township of Nepean between the south limit of the city of Ottawa and the Rideau river, through which the plaintiffs' road ran, was, by order of the Ontario Railway and Municipal Board, annexed to the city of Ottawa, and on 19th October, 1908, by-law 2806 of the city of Ottawa was passed authorizing the taking possession of toll roads brought within the boundaries of the city and providing for arbitration, under the Consolidated Municipal Act, 1903, to fix the value of the roads so taken, in the event of the parties not agreeing, and in pursuance of this, an arbitration was proceeded with between the plaintiffs and the city.

At that time it seems to have been established that the centre of the Rideau river was the actual boundary line between the city of Ottawa (as so extended) and the township of Gloucester, and the arbitrator found that the bridge now in question was then worn out and practically useless, and that the only part thereof of any value was the stone used in the piers and abutments, and he allowed the plaintiffs what he found to be the value of the piers and abutments at the north end of the bridge. The amount so allowed was included in the sum which the city paid the plaintiffs for the part of the road within the city limits as so extended.

On July 24th, 1909, plaintiffs conveyed to the city certain parts of their toll roads which fell within the new limits of the city. In December, 1911, the bridge still being out of repair, both the county of Carleton and the township of Gloucester passed resolutions calling upon the plaintiffs to repair it. Prior to the passing of these resolutions, however, plaintiffs had intimated to the city and township the probability of their taking steps to abandon the remaining part of the bridge unless the municipalities took some action towards making repairs.

On March 21st, 1912, some ineffectual negotiations for compromise having taken place in the meantime, plaintiffs passed a by-law under the provisions of the General Road Companies Act "that so much of Billings bridge as still remains the property of the road company be and is hereby abandoned, etc." Notice of the passing of this by-law was immediately given to each of the defendants.

The city then took the position that the plaintiffs were liable for the maintenance and repair of the entire bridge and that the city was not the owner of it and not liable for its maintenance or any part of it. The county, through its solicitor, refused to recognise plaintiffs' right to transfer by abandonment any responsibility which they had for the bridge and refused to accept responsibility therefor "until such time as the said bridge has been retransferred to the county by the proper authorities and on such terms and conditions as would be acceptable to the county." The city and plaintiffs appear to have been disposed to enter into some compromise but failed to accomplish that purpose.

The city in its defence sets up that before the commencement of action it offered, without prejudice, to construct a new steel and concrete bridge, provided plaintiffs and the other defendants or some of them, would contribute towards the cost, which offer it repeats, and it claims that the construction of a new bridge should be ordered and the cost of construction apportioned amongst the parties to the action.

The county sets up as a defence that the bridge is the property either of the plaintiffs solely, or of the plaintiffs and the city, and that the maintenance should fall on these bodies accordingly; while the defendants, the township, plead that they are not liable either for repair or maintenance, and that the plaintiffs are solely liable.

On the argument stress was laid on what was then stated to be the fact, that when in 1907 and 1908 the city extended its limits, and during the arbitration proceedings to fix the value of the plaintiffs' roads then taken over by the city, the existence of the agreement of February 4th, 1878, and of the deed and Act of the Legislature which followed it was overlooked, and that these documents were therefore not then taken into consideration; and it was argued that notwithstanding the terms of the General Road Companies Act the plaintiffs were and are bound to repair and main-

tain the bridge, and in effect that plaintiffs had not and have not the right of abandonment which the Statute provides.

I do not agree that in the circumstances under which the settlement of February 7th, 1878, was made, the plaintiffs' rights in that respect are to be determined only by the agreement and deed and Act of the Legislature, or that the settlement excludes the application of the terms of the General Road Companies Act.

The county must be taken to have had knowledge of the purposes for which the plaintiffs were incorporated, and of the application to companies so incorporated of the Statute then in force relating to their duties and rights.

The necessity for the agreement arose from the doubts that existed as to the liability for repairs to the bridge which the agreement admitted was deemed part of the plaintiffs' road and which was in existence before the plaintiffs were incorporated or took over the road.

The terms of the agreement of settlement as to the liability of the plaintiffs for repairs, etc., must be taken to apply to repairs and maintenance such as plaintiffs were liable for in respect of other parts of the road, and subject to whatever rights the Statute gave them to abandon and relieve themselves from liability on such abandonment.

The agreement of settlement in that respect could not have been intended to do more than make it clear that the plaintiffs from the time the bridge was rebuilt and reinstated were to be subject to the obligation of keeping it in repair as provided in sec. 98 of the General Road Companies Act then in force (R. S. O. 1877, ch. 152), and under which Act the road company, notwithstanding the obligation for repair imposed upon it by sec. 98, had the right to abandon and so be relieved from further responsibility.

This view is strengthened when one takes into consideration the provision of the agreement by which the plaintiffs' liability is limited to the time durng which they are the owners of and control the road, a provision which to my mind indicates that the intention of the parties to the agreement was to make the plaintiffs liable in respect of the bridge in the same manner as for other parts of the road and subject to the terms of the statute.

The following statutory provisions have particular application to this case. Sub-sec. 2 of sec. 613 of the Con-

solidated Municipal Act 1903, (3 Edw. VII. ch. 19), provided that "Every county council shall have exclusive jurisdiction over all roads and bridges across streams, rivers, ponds or lakes, separating two townships in the county." The statute in force at the time plaintiffs were incorporated and took over this road (22 Vict. ch. 54, sec. 339), declared that the "county council shall have exclusive jurisdiction . . . over all bridges across streams separating two townships in the county."

Section 8, of the General Road Companies Act, R. S. O. (1897), ch. 193, is as follows:—"All bridges in the line of road between the termini of any road, which are not within the limits of any city, incorporated town or village, shall be deemed part of such road, unless specially excepted in the instrument of association of the company."

By sec. 50, of that Act, a company may, by by-law, abandon the whole or any portion of their road, and (sub-sec. 2) after the abandonment of a portion of such road the municipal council of any municipality, within which the road or any part of it lies, may assume such abandoned portion as lies within the municipality and have and exercise the same jurisdiction over the same and be liable to the same duties as such council has or is subject to in respect to the public roads within its jurisdiction.

Sub-section 3 provides for notice of abandonment of the whole road being given to the municipal council of the county wherein the road or any part thereof lies, and that after the abandonment such municipal council may assume such abandoned portion of the road as lies within the county, and have and enjoy all the rights and be subject to all the responsibilities and liabilities as provided in sec. 102; sub-sec. 4 provides that: "Failing such action on the part of the county council, the road shall then be subject to the same jurisdiction for the control and repair thereof as further provided in sec. 103 of this Act; but no such company shall be entitled to abandon any intermediate portion of their road without the consent of the municipal council of the county within which the portion of the road lies, etc."

Section 103 as to "jurisdiction for the control and repair" applies to cases where the municipal council of the county does not think fit and proper . . . to assume by by-law the road for the purposes of repairing the same and

levying tolls thereunder, and provides that under such conditions "the municipal council of any municipality which would, under the provisions of the Municipal Acts at the time in force, be required to maintain and keep the road in repair as a common and public highway, shall be liable to the same duties as the municipal council has, or is subject to, in respect to the public roads within its jurisdiction."

The exclusive jurisdiction over Billings bridge, at and prior to the time plaintiffs were incorporated and aquired the road, was in the county. The part of the bridge which was not taken by the city continued until plaintiffs abandoned it, to be a part of their road, and, it not being an intermediate part of the road, was subject to abandonment without the consent of the municipal council of the county.

It was stated in *Regina* v. *Corporation of the County of Haldimand*, 38 U. C. Q. B. 396 (at p. 408), that where part of the road is abandoned the statutory provision relating thereto (29 Vict. ch. 36, sec. 9) would have to be construed so as to correspond with the general provisions referred to in that judgment, and which included the provisions applying to cases of abandonment of the whole road. R. S. O. (1897), ch. 193, sec. 50, sub-sec. 2, which was in force at the time plaintiffs passed the by-law of abandonment, is in effect the same as 29 Vict. ch. 36, sec. 9.

The case above cited was in many respects like the present one, but differed from it in two important particulars. There the abandonment was not, as required by the statute, made by by-law; and, secondly, prior to the company assuming control, no bridge existed over which the county had the exclusive jurisdiction referred to in the Act; and as said by Wilson, J., who delivered the judgment (at p. 409) "there was nothing for the county council to *resume*," and also (p. 408) "if the municipal body does not *assume* the road or work, they *resume*, that is there is cast upon them again by 35 Vict. ch. 33, sec. 12," (afterwards R. S. O. 1897, ch. 193, sec. 51), "only their own original roads."

Moreover there is to be found in sec. 617, sub-sec. 1, of the Consolidated Municipal Act, 1903, the following: "In case of a bridge over a river, stream, pond or lake, forming or crossing a boundary line between two or more counties or a county, city or separated town, such bridge shall be erected and maintained by the councils of the counties or county, city and separated town."

My conclusion is, therefore, that the plaintiffs had the right to abandon the part of the bridge which they purported to abandon by their by-law of March 21st, 1912; and that on passing that by-law and giving the required notices thereof, they were relieved from further liability in respect of the bridge.

As to the other question, namely, on whom the responsibility rests since the abandonment, I am of opinion, having regard to the various statutory enactments in force at that time, that the jurisdiction over the part of the bridge abandoned by the plaintiffs and their responsibility in respect thereof, have fallen back upon the county. In reaching this conclusion I have not overlooked the fact of the annexation to the city of the lands immediately to the north of the bridge.

The effect of the various statutes does not, in my view, bear out the contention that this jurisdiction and this responsibility have devolved upon the township.

The northerly portion of the bridge became the property of the city on the extension of the city limits and the various happenings which followed, and the city and county are together now liable for the erection, repair and maintenance of the whole bridge.

There will, therefore, be judgment according to these conclusions.

Plaintiffs' costs will be payable by the county.

There will be no costs of the other parties.

HON. R. M. MEREDITH, C.J.C.P. MARCH, 28TH, 1913.

CITY OF TORONTO v. FORD.

Municipal Corporations — Apartment Houses — By-law to Restrain Location of—2 Geo. V., c. 40, s. 10—Meaning of "Location"—Effect of Building Permit—Terms—Costs.

MEREDITH, C.J.C.P., *held*, that "location" with reference to an apartment house meant more than the choosing of the site, and covered the erection of the structure.

Toronto v. *Williams*, 27 O. L. R. 186, discussed.

That the issuance of a building permit to defendant under another by-law did not affect the right of the plaintiff to restrain defendant from infringing the by-law in question.

[See *Toronto* v. *Garfunkel*, 23 O. W. R. 374.—*Ed.*]

Action by the corporation of the city of Toronto to restrain the defendant from locating an apartment house upon Laburnam avenue, Toronto, contrary to the provisions of

By-law No. 6061 of the plaintiff passed under the authority of 2 Geo. V., ch. 40, sec. 10. The defendant had obtained from the plaintiff a building permit for the erection of the apartment house in question on the 6th of May, 1912, prior to the passage of the by-law on the 13th of May, 1912, but had done no active work on the ground in pursuance thereof.

Irving S. Fairty, for the plaintiff.

W. C. Chisholm, K.C., for the defendant.

HON. R. M. MEREDITH, C.J.C.P. (V.V.) :—The defendant is violating a provision of a by-law based upon legislation prohibiting the location of an apartment house where she intends to erect the apartment house in question. It is argued with much force on the part of Mr. Chisholm for the defendant that "location" means merely the choosing of the place. The decision of the Divisional Court to the contrary in *Toronto* v. *Williams*, 27 O. L. R. 186 is binding on me; but, apart from it, I would have held in this case, and in every other case of the same kind, that "location" meant the placing—the bringing into existence of a completed house of this character in the prescribed district.

No person or thing is located where he or it is not. One may choose, and buy, a place to locate, but there can be no location until occupation; there can be no location of that which does not exist. The purpose of the by-law, based upon legislation warranting it, was to exclude apartment houses from the locality in question; and though the word used is assuredly not the aptest, it would be interpreted so as, as far as possible, to give effect to the legislative intention. If Mr. Chisholm's contention were right, the intention of the legislation could be defeated, very largely, in the way mentioned during the argument.

I cannot think that the "permit," the license, which had been given to the defendant, under another by-law, affects this question; and it is not contended by Mr. Chisholm that it does. That license merely freed the licensee from the provisions of the by-law under which it was given; it did not affect the other by-law in any way. It was in no sense an insurance, or warranty in any way, of any right to build at that particular place or in that particular manner. If the defendant built contrary to law in any other respect that permission would not wipe out the offence. In this case

the plaintiffs—very fairly, it seems to me and must seem to everyone—have offered to pay all such damages as the defendant has sustained by reason of the prevention of the erection of the house in question. The injunction must go; and, if the defendant desires to take advantage of that offer, there will be a reference to ascertain what the damages are; and an order for payment of them when they are ascertained.

The plaintiff should have its costs, fixed at $60, to be set off against the amount of damages ascertained in the reference; but, as to the reference, I think there should be no costs of it to either party. The reference will be, and be expressed to be, by consent.

HON. SIR G. FALCONBRIDGE, C.J.K.B. MARCH 22ND, 1913.

TORONTO SITTINGS.

SINGER v. PROSKY.

4 O. W. N. 1000.

Trespass to Lands—Mandatory Injunction—Damages—Costs.

FALCONBRIDGE, C.J.K.B., in an action for trespass brought by the trustees of a synagogue against an adjoining landowner, gave judgment for $2 without costs.

Action by the trustees of a synagogue for a mandatory injunction compelling defendant to remove from plaintiffs' property a portion of a brick building and for damages for trespass and an injunction against further trespasses.

R. J. McLaughlin, K.C., for the plaintiffs.

Wm. Proudfoot, K.C., for the defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—It is not necessary for me to wait for the extension of Mrs. Cooper's cross-examination, because the evidence produced by defendant is overwhelmingly preponderating as to the distance between the church and the old buildings and fences.

The encroachment is quite negligible, both as to value of land and alleged deprivation of light. I visited the premises and saw that the latter alleged element of damage was inappreciable and it was not even mentioned in argument.

I give judgment for plaintiffs for $2 without costs. I would have given defendant at least a set off of High Court costs, but that he could have avoided all this trouble by giving notice to plaintiffs when he was going to take his measurements and make his excavations which destroyed or covered up the ancient landmarks.

Thirty days' stay.

HON. R. M. MEREDITH, C.J.C.P. MARCH 25TH, 1913.

HANEY v. MILLER.

4 O. W. N. 992.

Partnership — Taking of Accounts — Mode of Procedure — Simplest Methods to be Adopted.

MEREDITH, C.J.C.P., set aside an order of the Master in Ordinary requiring the plaintiff, in a partnership action, to furnish further accounts upon a reference, holding that the method adopted by the Master upon the reference was not the simplest or most speedy method of proceeding.

Appeal by plaintiff from an order of the Master in Ordinary requiring plaintiff to bring in further accounts.

H. A. Burbidge, for the appeal.

G. A. Kilmer, K.C., contra.

This is a partnership action, in which the plaintiff on 19th September, 1912, recovered a judgment against the defendant for the taking of the partnership accounts, and the winding up of the partnership affairs.

Bp this time it might, not unreasonably, have been expected that all that would have been done, and the purposes of the litigation attained; but, instead of that, the parties are yet little, if any, further advanced than they were when the judgment was signed; the months between have been given over to fruitless contention as to the bringing into the master's office of partnership accounts, the character of such accounts, and by whom they should be prepared and brought in.

In their general outlines the accounts are quite simple: the parties were co-partners in three public works' contracts only; each had other things to attend to and so a manager—

under the name of "controller," was appointed to carry on this business in their places; and that was done.

So that the mere taking of the accounts seems to involve the amount of profit or loss in each of these three contracts, and the amount paid into the concern by each of the partners, and the amount paid out, if any, to each of them. With these items in mind it seems to me that progress might well be made, and perhaps the end well reached without any elaborated accounts. At all events it would be quite safe to get under way, and to proceed until some real obstacle should arise, if it ever should.

A rule which we ought all to bear in mind, and which perhaps ought to be written in more conspicuous letters, requires that "the Master shall devise and adopt the simplest, most speedy, and least expensive method of prosecuting the reference."

Every partner is, of course, bound to account to his co-partner for his dealings and transactions in partnership matters; and the Master has, of course, power to require any party to bring in any account that should be brought in by him. But in this case there do not yet appear to have been any such dealings or transactions; the business was done through a manager appointed by the parties to do it for them. So that it seems to me to have been erroneous to treat the case as one of accounting by the plaintiff and surcharging and falsifying by the defendant.

It was the manager's duty to have had proper accounts kept, and balance sheets, and other information as to such accounts, and the business generally, rendered to each partner; and it was equally the right and duty of each partner to see that this was done; and there is no good reason for assuming that it was not. How then can the plaintiff be treated as if he alone had managed the whole business of the co-partnership, and were chargeable and accountable as if he were a sole trustee; even if there were need for accounting in the manner in which the Master, from the first, seems to have thought to be, in form at all events, imperative? It further accounts be needed why should not the manager yet prepare them, and prepare them at the cost of the firm. But I cannot think anything of the sort is really necessary.

It is said that the plaintiff has already gone to an outlay of $1,000 in having the partnership books and accounts examined and audited, and a comprehensive balance sheet

made, by accountants. But that may be necessary, on both sides, if there really be substantial differences between the parties as to all or any of the few general items I have mentioned. The plaintiff must prove his case, if it be not admitted; and having proved it *prima facie* the defendant must meet it with like or other evidence.

The balance sheet is in the Master's office on file, and if the plaintiff's witnesses prove that, according to the partnership books, it is correct, then the plaintiff's case is established *prima facie;* and surely that is enough without further waste of time and money in accounts which would be only transcriptions of the books in whole or in part; enough at all events until some real difficulty arises. So too, I cannot but think, would be a simple account of the amount of loss on each of the three contracts and of the amounts paid in by, and paid out to, each of the partners, proved by the manager, by the books and in fact, or by competent accountants, from the books. If any question really arises as to improper entries in the books, that too, of course, is a matter of evidence easily dealt with.

It is not made quite plaint just what accounts the plaintiff was directed to bring in. If they were to be merely, or substantially, a copy of the manager's books, that would be a very costly and quite unnecessary undertaking; and quite unnecessary too, if it were a somewhat condensed rendering of the same accounts. The books themselves are available and competent witnesses ought to be able to make plain to the Master, in not many words, whether they shew a profit or loss in each of the three contracts.

I cannot, but think, that the better way to deal with the matter now is to discharge the order now standing against the plaintiff as to furnishing further accounts; and direct the Master to proceed with the hearing of the matters referred; without in any way restricting his power to direct such further accounts to be brought in as he may find necessary, if any, as the reference proceeds.

I shall not make any order as to the costs of this appeal or as to the proceedings which have given rise to it.