THE

ONTARIO WEEKLY REPORTER

(TO AND INCLUDING JUNE 22ND, 1907).

VOL. X. TORONTO, JUNE 27, 1907. NO. 6

CLUTE, J. JUNE 14TH, 1907.

WEEKLY COURT.

ERRATA.

Page 130, ante, line 12 from top, strike out the comma after "promoters," and line 14 strike out the last word—"but."

[illegible] for widow.

F. W. Harcourt, for infants.

CLUTE, J.:—The testator died on 10th March, 1895, leaving him surviving Ellen Newbigging, his widow, and several children. The will contains the following clause: "I give, devise, and bequeath all messuages, lands, tenements, and hereditaments, and all my household furniture, ready money, securities for money, goods and chattels, and all other my real and personal estate and effects whatsoever and wheresoever, unto my beloved wife Ellen Newbigging, her heirs, executors, administrators, and assigns, to and for her own absolute use and benefit during her natural life and then to heirs."

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WEEKLY COURT.

RE NEWBIGGING.

Will—Construction—Gift of Real and Personal Property to Widow for Life "and then to Heirs"—Fee Simple—Absolute Interest in Personalty—Rule in Shelley's Case.

Motion by the executor of the will of John Newbigging, deceased, for a summary order determining a question arising upon the construction of the will.

J. C. Elliott, Glencoe, for executor.

C. A. Moss, for David Newbigging.

W. A. McMaster, Toronto Junction, for widow.

F. W. Harcourt, for infants.

CLUTE, J.:—The testator died on 10th March, 1895, leaving him surviving Ellen Newbigging, his widow, and several children. The will contains the following clause: "I give, devise, and bequeath all messuages, lands, tenements, and hereditaments, and all my household furniture, ready money, securities for money, goods and chattels, and all other my real and personal estate and effects whatsoever and wheresoever, unto my beloved wife Ellen Newbigging, her heirs, executors, administrators, and assigns, to and for her own absolute use and benefit during her natural life and then to heirs."

The executor asks for a construction of the will and to ascertain particularly whether the widow takes a life

estate or fee simple in the real estate, and whether an absolute or less interest in the personal estate, devised and bequeathed by the said will.

It was not disputed upon the argument that if the widow took an absolute estate in the realty, she was also entitled to the personal estate absolutely. See 25 Am. & Eng. Encyc. of Law, 2nd ed., p. 649; Butterfield v. Butterfield, 1 Ves. 154; Garth v. Baldwin, 2 Ves. 646; Elton v. Eason, 19 Ves. Jr. 78; Comfort v. Brown, 10 Ch. D. 146.

It was also conceded upon the argument by Mr. Harcourt that if the clause had contained the word "her" before "heirs," reading "then to her heirs," he could not contend that the widow did not take an estate in fee simple.

The point then remaining to be decided is whether the omission of the word "her" alters the construction that ought to be applied to the will as it stands. He contended that the true construction is that "heirs" in the last line refers to the heirs of the testator and not to the heirs of the wife.

I cannot accede to this view. The earlier part of the devise gives all the estate to his wife, "her heirs, executors, administrators, and assigns," and then follow the words, "to and for her own absolute use and benefit during her natural life and then to heirs."

By giving to the word "heirs," at the end of the clause, the meaning that it refers to "her" heirs, all of the words of the devise and bequest are operative, whereas if "heirs," as there used, refers to "his" heirs, no meaning or force can be given to the word "heirs" firstly used.

It may be that the testator thought he was giving a life estate to his wife with the remainder in fee to their children. And he probably intended to use the word "heirs" to represent her children in the earlier part of the clause, and then he provides how his wife and her children (who are also his children) are to take; his wife for life and then "her heirs," that is, her children, so that "heirs" in the last line refers to her heirs.

The rule in Shelley's case then applies. In my view the wife takes an absolute interest in the real and personal property. Costs to all parties out of the estate.

JUNE 17TH, 1907.

DIVISIONAL COURT.

RE WILLIAMS AND ANCIENT ORDER OF UNITED WORKMEN.

Life Insurance—Benefit Society—Change of Beneficiary—Rules of Society—Wife of Member—Foreign Divorce—Validity—Estoppel—Re-marriage—Claim of Second Wife—Claim of Adopted Daughter—Right to Contest.

Appeal by claimant Mary Jane Williams from order of ANGLIN, J., ante 50.

R. McKay and G. Grant, for appellant.

J. E. Jones, for claimant Catherine Williams.

M. C. Cameron, for claimant Jennie Fairbanks.

THE COURT (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), dismissed the appeal with costs.

BRITTON, J. JUNE 18TH, 1907.

TRIAL.

SIMPSON v. T. EATON CO.

Easement—Light—Obstruction of Access of Light to Windows of Dwelling-house—Decreased Amount of Light but no Inconvenience or Discomfort to Occupants of House—Injunction—Delay in Applying—Estoppel—Damages — Decrease in Rental Value.

Action for obstruction of light.

A. H. Marsh, K.C., for plaintiff.

G. F. Shepley, K.C., for defendants.

BRITTON, J.:—On 8th November, 1871, one John N. Lake was the owner of the property in the statement of claim described, being street Nos. 46, 48, and 50 on the north side of Albert street, in the city of Toronto. On that day

Lake sold to Charles Sheppard the premises known as 46, now owned by plaintiff, he having bought it from Josiah Thorley on 14th July, 1906, the title coming in direct line from Lake through Sheppard and others to him.

On 2nd January, 1872, Lake sold the other part of his property, being the premises known as lots 48 and 50 on the north side of Albert street, to one Max Sheppard, and defendants now own these premises, claiming in direct line from Lake through Max Sheppard and others.

Plaintiff claims the right to enjoy free access of light to 46 Albert street, as it was enjoyed on 8th November, 1871, in respect of 2 windows in the main body of the house, one up-stairs and one down-stairs, facing northerly, and 4 windows in an addition by way of extension to the main house, called the "L." of said house, these windows facing westerly and about 5 feet from the easterly limit of 48.

The northerly window of these 4 is not an ancient light, as this L. has been extended and the northerly window put in since 8th November, 1871.

At the trial and for the purpose of the present action it was conceded by defendants that plaintiff had by grant acquired the right to the enjoyment of access of light to his property, and it was contended that the right had not been interfered with to an actionable extent. . . .

Plaintiff purchased No. 46 on 14th July, 1906, for $4,500, paying $1,000 down and giving a mortgage for the balance, paying interest at 5 per cent. per annum. He bought as an investment, not intending to reside upon the premises; he never did reside there, and never intends to reside there. He is a man of means. He bought to hold until there is such an appreciation in price as may induce him to sell. The rent meantime will enable him to carry the property without loss. The result has been quite up to plaintiff's expectations. When plaintiff purchased, the rental was $18 a month; he raised it to $22. This was due, in part, to the general increase in the value of property in Toronto, and in part to the improvement in the immediate locality being made by defendants. Plaintiff is entitled, of course, to the benefit of the rise. . . . The increase in value can not be set off against plaintiff's loss if he has sustained loss by any interference by defendants with plaintiff's easement of light. Plaintiff values the property now at $400 a foot, i.e., $6,000 for the 15 feet, attaching no special value to the house. He quite concedes that the future of that prop-

erty is for the use to which the land can be put, treating the house as something to be torn down or got rid of when the time comes for him to sell or build as the case may be. Meantime plaintiff is not personally suffering any discomfort or inconvenience by reason of the obstruction complained of. He has visited the premises a few times at most. . . He found that the obstruction had darkened to some extent the kitchen, the adjoining room (called "living-room"), and an up-stairs bed-room in the L., and the dining-room and an up-stairs bed-room in the main building, but still suitable for residence for those who occupied the house. Plaintiff said he lost two tenants on that ground, but no tenants said so, and plaintiff did not have the place vacant for any time, as a new tenant came in at once. The house is still suitable for comfortable residence for the persons who are willing to rent that class of house, as it was before defendants' building. There has been no loss of rent. . .

The building complained of has its eastern wall of white brick with 4 large windows in that wall immediately facing plaintiff's L., and two more in the third storey, through which light in considerable quantity necessarily gets to plaintiff's windows. A plan or sketch is put in purporting to shew the angle at which light would from defendants' building fall upon plaintiff's. It has been held that the rule of 45 degrees is not a rule of law. There is no rule of law about it; the question is one of fact, namely, to what extent has the light to these rooms been obstructed? And, so far as appears, it has not been to such an extent as to interfere with the comfort of any person. It has not interfered with any business, as none has been carried on in plaintiff's house; it has not caused the loss of a tenant or the reduction of rent, or any structural change in or repairs to this house. So I find upon the evidence that the obstruction does not amount to or constitute a nuisance. I find that neither the plaintiff nor any tenant, so far as appears, has suffered any inconvenience or discomfort in the occupancy of the house by reason of the decreased amount of light. The windows mentioned have not been darkened to such an extent as to render plaintiff's house much less convenient, if any, than before, for a residence or for any business which it is at all probable will be carried on there, or for any use to which it has been or is to be put. . . . Sufficient light now comes through plaintiff's windows for the occupants of his house.

I find that there has not been by reason of any obstruction caused by defendants' building any privation of light so as to render the occupation of plaintiff's house uncomfortable. . . .

Coles v. Home and Colonial Stores, [1904] A. C. 179, decides that "to constitute on actionable obstruction of ancient lights it is not enough that the light is less than before. There must be a substantial privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind, and (in the case of business premises) to prevent the plaintiff from carrying on his business as beneficially as before." That case goes the whole length of warranting my conclusion of law, if right in my finding upon the question of fact. . . .

[Reference to Jolly v. Kine, [1905] 1 Ch. 480, [1907] A. C. 1.]

The action must be dismissed.

Apart from any question of liability for damages, I am of opinion that, by reason of what took place between the parties, plaintiff is not entitled to an injunction. At first plaintiff had not in mind any possible obstruction of light. He bought on 14th July, 1906. At that time there was on the ground building material, and building operations were going on, so that plaintiff knew in a general way what defendants intended. Plaintiff's solicitor on 27th July wrote to defendants about the fence between the properties, and he desired to have plaintiff's rights along his western boundary safeguarded. He also complained that there were iron girders on the street in front of his property which he wanted defendants to remove. This was all amicably attended to.

On 22nd November plaintiff's solicitor wrote to defendants about obstruction of light, stating that he was instructed to bring an action. . . . Defendants placed this letter in the hands of their solicitors, and the solicitors replied to plaintiff's solicitor that they would accept service of process and of notice of any intended or threatened motion for injunction. Mr. Baird (plaintiff's solicitor) and plaintiff visited the property and saw the wall of defendants' building on 22nd November. Mr. Baird replied on 27th November: "Can you assure my client that the wall on the property of the company on Albert street will not be erected higher?" On 28th November defendants' solicitors replied

that the letter of plaintiff's solicitor had been received and forwarded to defendants for instructions.

On 30th November defendants' solicitors wrote to plaintiff's solicitor: "We have received a letter from our clients this morning in which they state that the intention at present is to complete only the storey that they are now at, namely, the third storey."

Nothing further was heard of the matter until 23rd January, 1907, when the statement of claim was filed and served.

Meantime defendants did proceed to complete the third storey, and it is now a finished three-storey building.

The only dispute as to the condition of defendants' eastern wall is as to its height on the day when plaintiff and Mr. Baird visited it. Plaintiff's memory is quite at fault. .. . The difference of opinion is not material. The less there was then done, when the manifest intention of defendants was to complete a three-storey building, the more reason for plaintiff to act promptly if he desired to enforce his right by injunction.

Plaintiff could not at that time have thought that the wall of a three-storey building would be of any serious damage. The fact of plaintiff's purchase at the particular time when made, and of his vendor, Mr. Thorley, as mortgagee, making some complaint, gave some cause for the suspicion that the purchase was made, in part at least, with a view to making something out of defendants.

If I am wrong in the conclusion that plaintiff is not entitled to recover at all, there is still the question of whether he should get an injunction or only damages. He is not entitled in any event to an injunction. It is a case where damages, if any, "are small, capable of being estimated in money, and can be compensated for in money." It is also a case where it would be "oppressive to grant an injunction."

If plaintiff has a right to have light with no sensible diminution, and if that right has been invaded, so that damages must be assessed, even if only small or nominal—in other words, if there are to be damages in law necessarily arising from the obstruction, more or less, although no substantial damages by reason of any discomfort or inconvenience to the occupiers of the house, then such damages would be only in the supposed loss of rent. No evidence was specially directed to this point, but, considering the tenants who

do and who will occupy these premises, it would be a large estimate to say that $1 a month would be required as a reduction by reason of the darkening of the rooms in question by defendants' building, from the rent that would otherwise be obtained. That would be $12 a year, and would represent interest at 4 per cent. on $300 for all time, although the building may not stand for a long time. If damages, $300 would be a very liberal assessment.

Action dismissed.

JUNE 18TH, 1907.

DIVISIONAL COURT.

DONALDSON v. TOWNSHIP OF DEREHAM.

Municipal Corporations—Construction of Road Ditch—Negligence—Flooding Adjoining Lands—Findings of Jury—Depriving Land-owner of Access to Highway—Remedy—Compensation—Rights of Purchaser of Land Affected—Injunction—Statute of Limitations—Undertaking.

Appeal by defendants from judgment of ANGLIN, J., upon the findings of a jury in favour of plaintiff in an action for damages for injuries caused to plaintiff's land by flooding, etc.

M. Wilson, K.C., for defendants.

J. M. Glenn, K.C., for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), was delivered by

RIDDELL, J.:—Plaintiff resides in the township of Bayham, in the county of Elgin; this township adjoins the township of Dereham on the north, and plaintiff's land is in the last concession toward the north in Bayham. The road between the two townships passes to the north of plaintiff's land, and is admittedly a road under the joint jurisdiction of the two townships, within sec. 622 of the Municipal Act.

In 1893 representatives of the councils of the two townships met and found that a piece of this road was almost impassable. They made up their minds that they should dig a drain along the south side of the road and take certain sand from a knoll in the road and place it on a part of the

road which they thought required it. This was done. The jury have not found but have negatived negligence in digging the drain. The usual flow of the water along this drain has widened and in some parts perhaps deepened it, but there has been no act by either township since 1893 of active interference with the drain. It is alleged, and found by the jury, that the drain has not been kept open, and that this has the effect of flooding plaintiff's land, but does no damage.

Plaintiff acquired this land in 1897 from the former proprietor, Moss, who had laid by and seen the work done without objection, thinking that it would do more good than harm.

Plaintiff brings his action against the township of Dereham alone: though it was objected at the trial that Bayham should have been made a party as being in joint occupation of the road. The complaint is two-fold: first, that the access of plaintiff to the highway is cut off by the ditch, which has now become in places very wide and deep; and second, that his land is flooded by the water brought down by this ditch.

The jury found on the first branch of the case that there was an undue interference by the construction of the ditch with plaintiff's right of access to the town line road, and assessed the damages at $50.

The trial Judge laid down the law to the jury in terms to which, as at present advised, I cannot accede, in view of such cases as McCarthy v. Village of Oshawa, 19 U. C. R. 245, and Williams v. City of Portland, 19 S. C. R. 159. Nor can I agree that a photograph offered to shew the general appearance of the work cannot be admitted without the production of the photographer who took the negative.

But, in the view I take of the case, it is not necessary to consider these matters. The work done by defendants was clearly work within the authority given them by the statute; the township corporation were not tort-feasors; no negligence is proved; the right, if any, of plaintiff is for compensation under sec. 437; and the Court has no jurisdiction. I had occasion to consider many of the cases in Smith v. Township of Eldon, 9 O. W. R. 963, and many others are referred to in Biggar's Municipal Manual under secs. 437 et seq.

Moreover, no right of action or for compensation is found in this plaintiff. Everything done by defendants was done years before he became owner of the property, and the

right, if any, is in the previous owner: Partridge v. Great Western R. W. Co., 9 C. P. 97; Re Prittie and City of Toronto, 19 A. R. 503, 522; Regina v. McCurdy, 2 Ex. C. R. 311.

Somewhat different considerations apply to the other branch of the case. Certain water is brought down by the work, for which defendants are at least in part responsible. This, through the drain being allowed to be partly filled with sand, goes in part upon the plaintiff's land. Had any damage been proved or found, as at present advised I think an injunction might well be granted against the continuance of this state of affairs; and the fact of Bayham being jointly charged with the road would not prevent such injunction being granted against the present defendants. But the jury have negatived damage; and practically the only reason why an injunction could be asked for under such circumstances is that the continuance of the wrong might ultimately turn it into a right, through the operation of the Statutes of Limitations.

Counsel for defendants undertakes that the plea of the Statute of Limitations will not be set up in any action or other proceeding to be taken at any time hereafter; such undertaking may be inserted in the judgment, and with this undertaking the appeal should be allowed with costs, and the action dismissed with costs, without prejudice to any action or other proceeding to be taken against either township or both for any future wrong.

JUNE 18TH, 1907.

DIVISIONAL COURT.

RUETHEL MINING CO v. THORPE.

Company—Directors—Sale of Mining Properties to Company—Acquisition by Director—Agent or Trustee for Company—Secret Profits—Affirmance of Contract by Company—Return of Notes and Shares—Costs.

Appeal by plaintiffs from judgment of ANGLIN, J., 9 O. W. R. 942, dismissing the action as against defendant Thorpe.

A. St. G. Ellis, Windsor, for plaintiffs.

A. H. Clarke, K.C., for defendant Thorpe.

THE COURT (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), dismissed the appeal with costs.

BOYD, C. JUNE 19TH, 1907.

TRIAL.

BRADLEY v. BRADLEY.

Vendor and Purchaser—Option to Purchase Land—Person Holding Option Offering Land for Sale by Auction—Vendors Notifying Auctioneer not to Proceed—Refusal of Auctioneer to Sell—Loss of Resale—Action for Damages—Loss of Option by Effluxion of Time—Right to Chattels.

Action by Arthur B. Bradley against Thomas P. Bradley, Isabella Bradley, and W. A. F. Campbell, to recover damages for certain wrongs, etc.

Plaintiff alleged that in an action for the administration of the estate of James Bradley, deceased, in which action defendant Thomas P. Bradley was plaintiff and defendant Isabella Bradley and others were defendants, an agreement dated 22nd September, 1906, was arrived at between the parties, in settlement of that action, whereby, inter alia, plaintiff received an option to purchase a farm there in question, for $12,000, less his share in the estate, fixed at $1,200, and was to have two weeks from the date of the agreement to carry out his purchase; that plaintiff, relying on the option, entered into an agreement on 22nd September, 1906, to sell the farm to one Luxton for $13,500, but on the understanding that plaintiff was to have the privilege of advertising and offering the farm for sale by public auction in order to ascertain if a better price could be obtained therefor; that plaintiff advertised the farm for sale by public auction on 5th October, 1906; that on 1st October, 1906, defendant Campbell, a solicitor, on instructions from his co-defendants, sent a letter to the auctioneer notifying him that plaintiff had no right to offer the farm for sale; that in consequence of this letter the auctioneer refused to offer the property for sale, and Luxton refused to carry out his agreement; that plaintiff was unable to obtain another purchaser, and lost his option to purchase; that defendants wrote or caused

the letter to be written and delivered purposely to do plaintiff damage and cause him loss; and that defendants had agreed to deliver to plaintiff certain goods upon the farm (describing them) but had refused to do so. Plaintiff claimed $6,000 damages for the wrongs complained of, and $500 damages for the detention of the chattels.

The action was tried without a jury at Brampton and Toronto.

W. S. Morphy, Brampton, for plaintiff.

W. J. Hanna, Sarnia, for defendants Thomas P. Bradley and Isabella Bradley.

E. G. Graham, Brampton, for defendant Campbell.

BOYD, C.:—There appears to be no actionable wrong in the matter of the complaint preferred by plaintiff. His duty was plain under the terms of settlement, by which former litigation was ended. He was given the privilege of purchasing the homestead for the cash price of $12,000, less his share of the estate, fixed at $1,200, and was to carry out the purchase within two weeks from the date. Therein he failed; he had not the money in hand, and he failed to raise it, so that default in payment happened, and his right to get the property ended.

The only excuse for this failure to observe the strict letter of the offer was that he proposed to make a sale of property, which was frustrated by a letter from the solicitor defendant to the auctioneer. Upon the receipt of the letter the auctioneer declined to go on, and this failure to hold the auction was made the occasion of the withdrawal of one Luxton, who proposed to buy at plaintiff's right to the property for $13,500. This proposed sale appears to me a matter altgether collateral to the transaction between plaintiff and the estate. What scheme he might try in order to raise the money is foreign to the purpose, so long as he failed to make the payment in time. He was not prevented from paying the money on the day, and he could then, had he wished, subsequently have proceeded with the sale to make profit out of his bargain. But till he paid his money there was no contract between the parties, and nothing out of which a right to damages would arise from the breach of it: Ranelagh v. Miller, 2 Dr. & Sm. 278; Dawson v. Dawson,

8 Sim. 346; Winton v. Collins, 5 N. R. 345; Brock v. Garrod, 2 De. G. & J. 62.

I may say that I think the solicitor rightly objected to the attempt of plaintiff to sell the homestead as if he were the owner, and that the utmost he could properly offer for competition was his "option."

The action fails and should be dismissed with costs.

There are some chattels (not those mentioned in the pleadings) claimed by plaintiff, which defendants do not object to his taking off the farm. The list of these can be settled by the registrar after hearing the parties, and order made permitting plaintiff to possess himself of them within a reasonable time.

BRITTON, J. JUNE 10TH, 1907.

CHAMBERS.

FLORENCE MINING CO. v. COBALT LAKE MINING CO.

Trial—Postponement—Action to Recover Possession of Mining Lands—Act of Provincial Legislature Passed Pendente Lite Validating Title of Defendants—Petition for Disallowance—Grounds for Postponement.

Appeal by plaintiffs from order of Master in Chambers, ante 38, dismissing a motion to postpone or stay the trial of the action.

The appeal first came before MULOCK, C.J., who adjourned it to come before the trial Judge.

It was then heard by BRITTON, J., at the Toronto non-jury Sittings, but before the case was reached upon the list, and virtually as a Chambers appeal.

J. M. Clark, K.C., for plaintiffs.

Britton Osler, for defendants.

BRITTON, J., allowed the appeal, and postponed the trial until the Toronto non-jury sittings, beginning in September, 1907. Costs to defendants in any event.

BOYD, C. JUNE 21ST, 1907.

WEEKLY COURT.

RE SOLICITOR.

Solicitor — Contract with Client — Share in Fruits of Litigation — Illegal Bargain — Champerty—Contract to Pay Further Sum if Verdict Sustained on Appeal—Taxation of Bill—Deduction of Sums in Addition to Costs from Amount Recovered — Unprofessional Conduct — Intervention of Law Society.

Appeal by client from report of local registrar at Picton upon the taxation of a bill of costs rendered by the solicitor to the client.

M. Wright, Belleville, for appellant.

W. E. Middleton, for solicitor.

BOYD, C.:—I now consider the two main items in appeal: the first, $625, being an amount equal to 25 per cent. of judgment in an action by the client against the Standard Ideal Co. for damages for a personal injury sustained by him; the second being $200 which the client was to pay the solicitor if the verdict was sustained on appeal.

The client signed agreements of December, 1905, and May, 1906, touching these amounts. An action was successfully brought and judgment obtained for $2,600, and the appeal was decided in favour of the client. The solicitor obtained his taxed costs from the other side, and has also rendered a bill for solicitor and client costs, claiming over $200 of additional costs which have been allowed by the local registrar at Picton. The officer allowed the two large items on the ground that they had been paid and the matter was not further examinable. Had the client made the payments, I do not think it would have mattered, but in fact there was no payment by the client. The solicitor received all the fruits of the judgment, and retained those amounts in satisfaction of his claims. Both items must be disallowed, but on different grounds.

The confidential relation between lawyer and client forbids any bargain being made by which the practitioner shall draw a larger return out of litigation than is sanctioned by

the tariff and the practice of the Courts. Especially does the law forbid any agreement for the lawyer to share in the proceeds of a litigated claim, as compensation for his services. Such a transaction is in contravention of the statute relating to champerty, and it is also a violation of the solemn engagement entered into by the barrister upon his call to the Bar.

The effect of the agreement first made is that the solicitor and client embark in a joint speculation to be prosecuted in the Court for their joint advantage—the client bringing in his claim for injuries and the lawyer contributing his skill and services. When the professional man becomes a covert co-litigant, instead of an independent adviser, many are the temptations to secure success by unworthy means. But I need not dwell on the ethical aspect; enough that the solicitor's action is contrary to the law and in violation of his oath of office.

There may be some laxity of opinion, and perhaps of practice, in the careful observance of a high standard of honour in the stress and struggle of modern life, but while the profession is constituted as it is practitioners must not be allowed to violate with impunity the safeguards which exist for the well-being of society. True it is that in some, or perhaps many, of the neighbouring States it is permissible to drive such bargains and to conduct cases on the footing of contingent fees, but many eminent lawyers lament the professional degradation which it involves. One who was ambassador at the British Court spoke at a recent bar association meeting of the fatal and pernicious change made several generations ago by statute by which lawyers and clients are permitted to make any agreement they please as to compensation—so that contingent fees, contracts for shares, and even contracts to pay all the expenses and take half the results, are permissible. . . . And at an earlier day the point was more tersely put by Webster: "I never engage on contingencies merely, for that would make me a mere party to a lawsuit."

Things have gone from bad to worse on the downward grade, for now the American "ambulance-chaser" has become a visible factor of so-called professional life. His function is to hustle after injured sufferers, with shameless solicitation, to coach witnesses, interview jurymen, compass in some way a favourable verdict, and enjoy some generous share of the spoils. Already in more than one State statutes

have been passed to put an end, if possible, to such disgraceful practices. It is well then in Ontario to repress the beginnings of anything savouring of this kind of illicit procedure. To this end, I think that the circumstances of the case should be investigated and dealt with by the Law Society upon notice to the solicitor.

The plea is put forward that this client was badly injured and without means or friends to conduct litigation in the usual way. Granted that it was a case of charity and one proper to be brought into Court. The solicitor might well have undertaken the case as a matter of professional benefaction and have acted honourably and creditably. . . If he could only intervene on the terms of sharing in the verdict, then, so far, from being of charitable import, he would implicate his client in a criminal transaction.

The true method of dealing with impoverished clients is laid down by Lord Russell of Killowen in a charge to the jury in Ladd v. London, etc., R. Co. (March, 1900), 110 L. T. Jo. 80, . . . approved by the Court of Appeal in Rich v. Cork, ib. 94.

With a view of inviting professional or legislative action which might tend to meet the recognized difficulty of injuries and wrong suffered by poor and helpless people, I may refer to a suggestion long ago made by Mr. Joseph Chitty, which has not, I think, as yet fully fructified in any practical outcome. He says: "Perhaps a power, by leave of a Judge, to permit an attorney to stipulate for remuneration in difficult and doubtful cases might safely be introduced; such a stipulation would prevent the hard bargains which are secretly made in consequence of the risk incurred, and constitute a protection to needy persons who have claims which they wish to assert, and yet are not so impoverished as to be able to sue in forma pauperis. Such a power might be so qualified as to prevent any risk of maintenance or champerty:" Chitty's Practice of the Law, vol. 2, p. 28.

The second item, $200, is disposed of on the principle enunciated by the late Vice-Chancellor Mowat in Re Geddes and Wilson, 2 Ch. Ch. 477. It is not open for a solicitor during the progress of a case to call upon his client to pay a round sum or any sum (other than for costs) before he will go on. It is a sort of stand-and-deliver outrage which the Court will not sanction or allow to stand, when once attention is called to it. The solicitor must account for

this and the other sum to his client, after the payment of all taxable costs.

The other items objected to, for journeys and extra fees and the like, will be considered and taxed by Mr. Thom.

The solicitor should pay the costs of appeal up to this point; the other costs of reference reserved.

BRITTON, J. JUNE 21ST, 1907.

TRIAL.

BOWERMAN v. FRASER.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Undertaking of Purchaser to Build—Condition—Representation—Acts of Agent of Vendor—Waiver—Acceptance and Retention of Cheque for Part of Purchase Money—Time for Making Payments—Time of the Essence of the Contract—Tender of Formal Agreement for Execution by Vendor.

Action for specific performance of an agreement for sale of land by defendant to plaintiff.

S. H. Bradford, for plaintiff.

J. W. McCullough, for defendant.

BRITTON, J.:—The agreement in question in this action is made by an offer on the part of plaintiff to purchase from defendant lot 3, plan 352, on the south side of Bloor street, Toronto, as particularly described in the offer dated 2nd February, 1907, for the sum of $2,775, which offer was accepted by defendant on 4th February, 1907. The offer was made through W. O. McTaggart & Co., as agents for the sale of this lot, and the acceptance by defendant is in these words: "I hereby accept the above offer and its terms, and covenant, promise, and agree to and with the said F. D. Bowerman to duly carry out the same, on the terms and conditions above mentioned, and I also agree with the said agents to pay them the usual commission."

Plaintiff seemed willing and anxious all along to carry out his part of this agreement. Defendant resists, upon the following grounds . . . :—

1. Plaintiff was to give defendant a written undertaking that he, plaintiff, would commence to build houses on this land before 15th April, 1907, and that without that defendant would not have entered into the contract.

2. The payments of $25 and $275 mentioned in the offer were not made within the time limited.

3. Time of the essence, and plaintiff did not do his part within the time.

4. No formal agreement tendered within the time limited.

I am of opinion that the written undertaking which it is alleged was to be given by plaintiff as to when he would commence building on the lot in question was no part of the agreement for sale, and that the agreement for sale is in no way affected by it. It was not made a part of the agreement for sale. The handing over the offer and acceptance to plaintiff must be considered as the act of defendant.

In the beginning of this transaction Douglas Ponton was acting as agent of defendant for sale of this property, and McTaggart was a sub-agent. He was in the real estate business, looking for buyers and sellers and acting wherever he could get a commission. He received plaintiff's offer, using his own carefully prepared office form for the purpose. That offer was in terms an agreement with defendant, through W. O. McTaggart & Co., as agents, to purchase the property in question. Having received the offer, McTaggart and Ponton went together . . to defendant on 4th February, when defendant accepted in writing plaintiff's offer, accepting it upon the same document as the offer, and agreed to pay the commission of the agent McTaggart. Defendant then told Ponton and McTaggart that he would not sell unless he got an agreement from plaintiff that he, plaintiff, would commence to build on the property not later than 15th April. Apparently, upon his own statement, defendant would have been satisfied with a letter from plaintiff to that effect. Ponton says that McTaggart was not to hand to plaintiff the agreement to sell until he (McTaggart) got plaintiff's letter. On 5th February McTaggart saw plaintiff, obtained a letter (exhibit 3) from him, and handed the agreement to him. This letter is not in terms such as defendant says he required, but McTaggart accepted it, de-

livered the agreement, received $25 from plaintiff, and then handed his own cheque for $25 to Ponton, the general or chief agent for defendant for carrying out this transaction. The cheque of McTaggart was duly indorsed by Ponton and handed to defendant, and was retained by defendant until 16th February, when it was returned under the circumstances I shall mention later.

With the agreement in his possession, I must hold that McTaggart was the agent of defendant, and not the agent of plaintiff. It was argued that this is against plaintiff's evidence as given on examination for discovery. I do not think so. Of course, McTaggart, as coming from defendant, was authorized by plaintiff to put in the offer, and plaintiff did expect that the transaction would be carried out by McTaggart, and in that sense McTaggart was acting for plaintiff. What plaintiff said cannot alter the facts of how McTaggart came into the transaction and as to what defendant authorized him to do. Then McTaggart says he was in fact acting for defendant in this sale by defendant. McTaggart could not have bound defendant by any change in the written agreement as to title, price, or terms of payment, or otherwise, but he held the actual agreement of defendant, he received such a letter from plaintiff as he, McTaggart, thought would be satisfactory, and then delivered the agreement. I think defendant is bound by this, even if McTaggart be deemed only a special or particular agent for the occasion. . . .

Defendant seeks to bring this case within the rule that "where a contract has been entered into upon the representation of one party that he will do something material to the other party's interest under it, and he does not make good that representation, he cannot enforce specific performance of the contract." I do not think his case is within that rule. There were no representations by plaintiff that he would do anything. His letter (exhibit 3) is what plaintiff said outside of the agreement. If McTaggart represented that plaintiff would give such a letter as plaintiff speaks of, that was not binding upon plaintiff, and further I fail to see how a letter so worded as plaintiff asked for could be any more material to defendant's interest than the letter exhibit 3. And again, I am of the opinion that defendant by his keeping McTaggart's cheque indorsed to him by Ponton waived any condition as to letter, if any such condition was imposed.

The other objections may be considered together. It appears plain upon the evidence that defendant regretted the bargain and desired to get out of it. He could get, as I think, and as he ascertained, a larger sum for this property than plaintiff was to pay, and so not from any fear that plaintiff would not be able to pay, or would not pay, but to get rid of plaintiff, defendant has attempted to create difficulties and sought for reasons for not carrying out the sale. . . .

[Reference to Green v. Sevin, 13 Ch. D. 601, 602.]

In this case, as I view the evidence, the Court ought not to lend its assistance to defendant so that upon any mere technicality or legal refinement plaintiff will not get the benefit of a purchase he made, and has fairly and honestly attempted to carry out.

If upon settled principles of law the facts entitle defendant to succeed, of course he must do so, no matter how great the hardship upon plaintiff or how much the pecuniary advantage may be to defendant. . . .

The offer itself provides that it must be accepted by 4th February, 1907, or otherwise be void. The sale was to be completed on or before 15th February, on which date possession of the premises was to be given to plaintiff. And then the agreement provides that "time shall be the essence of this offer." If the offer was not accepted by 4th February plaintiff was not to be bound, but it was accepted by 4th February. By defendant's acceptance of that offer, the clause of time being of the essence was not brought into it in favour of defendant. It made the agreement just an agreement for a sale by him to plaintiff, if plaintiff ready on his part to complete on or before 15th February, 1907. Before 15th February the matter was placed by plaintiff in the hands of E. G. Morris, as his solicitor, to complete the purchase.

I accept the evidence as establishing that on 14th February defendant said to Morris that he, defendant, had heard that plaintiff had sold part of the property, and that he, defendant, would not close until he had seen the agreement; that on 15th February defendant saw the agreement, and made no objection to it, but said he would not pay agent's commission, and that he wanted to see agent, and further that plaintiff would not suffer loss, as he would make it right with him, or words to that effect. Defendant also said to plaintiff's solicitor on 15th February that he

would see the solicitor that evening. Defendant did not on 14th or 15th February complain of plaintiff's not giving such a letter as above mentioned, or refer to that letter or its absence.

On 15th February the solicitor sent to defendant an accepted cheque on Dominion Bank for $275 enclosed in a letter. This letter was returned unopened, and the solicitor then mailed it. It was addressed to defendant, and is as follows: "Re Sale Bloor Street Property to Bowerman:—I beg to enclose herewith my marked cheque for $275, being amount payable to day on property on Bloor street purchased by F. D. Bowerman from you. I further beg to say that Mr. Bowerman called at my office after you had left this morning and advised me that he had sold a portion of this property, and he expected to be able to pay you the balance in full within the next 30 days. Under the circumstances, I would suggest that the deed be prepared, instead of any interim agreement, and I shall advise you at once when the balance of the money will be paid over."

On the morning of 16th February defendant wrote to plaintiff's solicitor as follows: "Re Sale Bloor Street Property to Bowerman:—Your letter received this morning enclosing cheque for $275, being part of the money payable under agreement yesterday. This cheque I refuse to receive for various reasons, not being a legal tender, and the time having elapsed for payment under the agreement. I therefore rescind the agreement for sale and return the said cheque herewith and also cheque for $25 which was handed to me by Mr. Ponton in the presence of W. O. McTaggart, the agent for Mr. Bowermon, your client."

This letter does not complain of the absence of a letter from Bowerman about building or commencing to build.

. . .

The 16th February was Saturday. On the Monday following, on plaintiff's behalf, the solicitor formally tendered to defendant the $300 in cash and an agreement such as is provided for in offer and acceptance, but defendant refused to accept the money or execute the agreement. He said he had rescinded the agreement, and would fight it out. This action was then commenced; the writ issued on 18th February.

As stated, I do not think time was made of the essence of this agreement after the offer was accepted and the agreement a completed one. If the offer was not accepted by the

4th it was to be void, but, once accepted in time, it became an agreement for sale to be completed as a formal binding agreement for sale on or before 15th February, on which date, plaintiff doing his part, he was to get possession. If this agreement does not do more than give defendant the right to rescind by fixing a reasonable time to bring the bargain to an end, then that need not be considered. No such time was given. As a matter of fact plaintiff was prompt in the performance of the obligation devolving upon him, never declared his inability or unwillingness, and did not ask for any indulgence or extension of time. There was not, in my opinion, any suspicion on the part of defendant of plaintiff's inability to carry out his purchase. I find that plaintiff was able and willing to carry out his agreement.

If time was expressly made of the essence of this agreement, I think that was waived, and that defendant, by reason of his dealing with plaintiff's solicitor on 14th and 15th February, should not be allowed to set it up as a defence in this action.

As to tender, the objection to the form of it, apart from the time when made, which I have dealt with, ought not to prevail. It was apparent from the facts and circumstances that the money would be refused—that was defendant's attitude. He positively refused to carry out his agreement, said it was rescinded, and announced his determination to fight it out, so tender before bringing the action was not necessary.

Judgment for plaintiff for specific performance as prayed in case defendant can make a good title. Reference to Master in Ordinary to inquire and state whether a good title can be made, and in case a good title can be made to take an account of the purchase money, and tax plaintiff his costs and deduct from amount bound due for purchase money, and appoint time and place for payment of balance one month after making his report, and defendant upon such payment to convey to plaintiff, or to whom he may appoint, in accordance with conveyance to be settled by Master in case parties differ. But in case plaintiff shall make default in payment of balance of purchase money as the Master shall appoint, the contract will be rescinded and the action dismissed, and in that event defendant to pay plaintiff's costs of action up to judgment, and plaintiff to pay defendant's subsequent costs, the same to be set off pro

tanto, and the balance paid by the party found liable therefor to the other. In case the Master finds that defendant cannot make a good title, the Master is to inquire and state what damages plaintiff has sustained by reason of the breach of contract by defendant, and defendant is to pay to plaintiff what shall be found due with costs of action and reference.

MACMAHON, J. JUNE 21ST, 1907.

TRIAL.

GARSIDE v. WEBB.

Arbitration and Award—Voluntary Submission to Arbitration —Subsequent Agreement Varying Submission not Equivalent to New Submission—Arbitration Act — Award made after Time Expired—Failure of Arbitrators to Extend—Invalidity of Award—Dismissal of Action to Enforce.

Action upon an award made on 26th July, 1906.

A. C. McMaster, for plaintiffs.

W. N. Tilley, for defendant.

MACMAHON, J.:—The plaintiffs are wholesale merchants in Toronto, and the defendant is a builder and contractor in Toronto.

The defendant had contracted to build for the plaintiffs a warehouse on York street, in the city of Toronto, which was erected according to the terms of the contract.

The plaintiffs alleged that the defendant had been overpaid, while the defendant alleged that the plaintiffs still remained indebted to him.

On 11th November, 1905, the parties entered into an agreement to refer to C. Acton Bond and Charles J. Gibson, architects, all matters involved in the erection of the warehouse, who were by the submission "to find the exact cash cost of everything entering into the construction of the above mentioned building, both as to material and labour, it being understood that the actual cash cost is to be the basis of calculation, with no profit whatever included, and upon that actual cash an addition of 10 per cent. is to be made, as the agreed contractor's profit, the said 10 per cent.

to include architect's and draughtsman's fees to be paid out of the said 10 per cent. by the said John E. Webb."

The submission also provides that the said Bond and Gibson shall, before entering on their duties, mutually agree upon a third person who will, in the event of a failure on the part of said Bond and Gibson to agree, "act as umpire to decide any or all of such matters."

Webb, by the terms of the submission, agreed to furnish all necessary information in regard to the actual cash cost of all material or labour entering into the cost of the building.

H. B. Gordon, an architect, was duly appointed umpire.

The plaintiffs evidently thought that Mr. Bond was not aware of his appointment as arbitrator, for on 4th December they wrote him enclosing a copy of the submission, and urging him to fix a time for proceeding with the arbitration, as Mr. Garside was desirous of leaving the city.

Mr. Bond was nominated as an arbitrator by the defendant.

On 30th December Garside wrote Bond stating that he had just learned that nothing had been done by the arbitrators, and asking Bond as a personal favour to see that the arbitration be proceeded with the first few days of the new year. Mr. Garside mentioned that he was writing Mr. Gibson to co-operate in this.

Gibson was written to on the same day in like terms . . .

The arbitrators considered the requests in the letters to them to take up the work of the arbitration as "notices calling upon them to act," and they did act, for on 9th January, 1906, Gibson wrote the plaintiffs: "I telephoned Mr. Bond this morning, re closing up our valuation, and he informed me that since our last meeting he has had other communications which throw a new light on the agreement to him. He has apparently consulted his solicitor as to the meaning of the agreement, and his solicitor has written him a letter, which he sent to me to-day, and of which I enclose you a copy. As I understand it, Webb's claim under the agreement is for the exact cash cost of his work, and not a valuation. Of course we understand from the agreement that Mr. Bond and myself are to ascertain the cash cost, but, in the absence of any accounts, vouchers, or papers from Webb, we assume that the cash cost is not ascertain-

able, as I understood from Mr. Bond this morning that he has not got any of these vouchers or papers from Webb."

After the above mentioned valuation had been made, it appears Mr. Bond became aware that it was not made in accordance with the terms of the submission, but, in order to satisfy himself on the point, he wrote Messrs. DuVernet, Jones, & Co., for an opinion, which was sent Bond on 8th January, and is as follows: "We have considered the enclosed copy of agreement which you handed us. We understand that Mr. Webb contends that you and the other arbitrator are to find the amount that it cost Mr. Webb to erect the building, whereas Messrs. Garside & White contend that you are to value the material and labour, regardless of what Mr. Webb may have paid for it. We do not think the agreement bears out the contention of Messrs. Garside & White. You will notice especially that the clause at the top of the second page provides that Mr. Webb will give information in regard to the cost of material and labour. There would be no object in inserting this provision if the intention of the agreement had been to merely make a valuation, which could and should have been done without any intervention by Mr. Webb."

In consequence of this opinion, on 18th January, 1906, another agreement under seal was executed by the parties, which is indorsed on the former submission, and is as follows: "It is agreed that when J. E. Webb furnishes evidence satisfactory to the arbitrators as to the actual cash cost referred to in within agreement, the finding of the arbitrators shall be based thereon, and that the arbitrators may use their own judgment and make a valuation in all cases where evidence such as satisfies them is not produced; and so as to avoid delay it is agreed that all evidence which J. E. Webb intends to give or produce to the arbitrators on the question of actual cash cost must be given by 31st January, 1906, and on that date the arbitrators may proceed on the assumption that J. E. Webb is not able to give any further evidence and give their decision accordingly, and after the said date no further evidence shall be received by the arbitrators. The within agreement is to be read as though it contained all the above provisions."

Mr. Gordon was re-appointed third arbitrator on 30th July.

Prior to the execution of this supplemental agreement and on 15th January Mr. Bond wrote defendant saying:

"As joint arbitrators, Mr. Gibson and myself would like you to send us a detailed statement giving your cash outlay on the Garside & White building. Please send this in such a form that we can check it with all necessary vouchers," etc.

The plaintiffs' contention is that the supplemental agreement of 18th January forms a new submission.

As early as 1804, in Evans v. Thompson, 5 East 189, where the parties, by an indorsement, in general terms, on a submission to arbitration, had agreed that the time for making the award should be enlarged, Lord Ellenborough C.J., after consultation with all the Judges, said that such agreement virtually included all the terms of the original submission to which it had reference. . . . [Watkins v. Phillpotts, McClel. & Y. 393, and Bullock v. Koon, 4 Wendell 53, also referred to.]

In the case in hand proceedings had commenced under the first agreement prior to 9th January, 1906, and in the supplemental agreement the time for making the award was not enlarged. It, however, provides for the furnishing to the arbitrators by Webb of evidence of the actual cash cost of all material and labour, etc. This is included in the first agreement, and Mr. Bond, on being advised by Messrs. DuVernet, Jones, & Co. of its existence in the original agreement, wrote Webb, three days before the second agreement was executed, to furnish the required information. The only provision in the second agreement which is new is the limitation of the time within which the defendant is to furnish the arbitrators with the evidence of the cash cost of materials, etc., failing which they are empowered to proceed and exercise their own judgment in making a valuation. It then provides that "the within agreement" (the one of 11th November, 1905) "is to be read as though it contained all the above provisions." That is, the second agreement is to be read into and form part of the first agreement.

I am, therefore, of the opinion that the agreement of 18th January did not constitute a new submission.

It follows, if my view is correct, that it was not necessary to re-appoint the umpire after the execution of the supplemental agreement.

No provision is made in the submission as to the time within which the arbitrators are to make their award, so that, by the provisions of the Arbitration Act, R. S. O. 1897 ch. 62, sec. 4, clause C. to schedule A., shall be deemed to be included therein, under which the arbitrators are to

make their award within three months "after entering on the reference, or after being called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators by writing may enlarge the time for making the award."

The arbitrators did not extend the time for making their award. Had they done so, this litigation would have been avoided.

The award was made on 30th July, 1906, by which the arbitrators found the actual cash cost of the warehouse was $15,135, to which they added 10 per cent., as provided by the submission, making a total of $16,648.50.

And, as there had been paid to the defendant $20,813.33, there would, if the award were to stand, be $4,164.83 coming to the plaintiffs.

As the award was not made until 6 months after the arbitrators had commenced to proceed with the reference, the award is invalid.

There must be judgment for the defendant dismissing the action with costs.

FALCONBRIDGE, C.J. JUNE 21ST, 1907.

TRIAL.

COUNTY OF DUFFERIN v. COUNTY OF WELLINGTON.

Municipal Corporations — Liability for Maintenance of Bridge over Stream—Bridge or Culvert—Definition of Culvert.

Action brought under sec. 617 of the Municipal Act, 1903, for a declaration that the two counties were liable for the building and maintenance of what was alleged to be a bridge over a stream crossing the boundary line between two townships—one in Dufferin and the other in Wellington.

J. N. Fish, Orangeville, for plaintiffs.

H. Guthrie, K.C., for defendants.

FALCONBRIDGE, C.J.:—It is not a case for a declaratory judgment as affecting any other structure, as each particu-

lar one would have to depend upon its own conditions, and I am dealing only with the particular case which has been brought before me.

It is contended by defendants that the structure is not a bridge, but only a culvert. It is a circular concrete pipe with an inside diameter of 3 feet. The concrete is 6 inches thick, and there is about a foot of gravel on the top of the pipe. It replaced an old bridge about 8 or 10 feet in span, which had fallen into disrepair.

The dernier cri of dictionary-making in our language is being issued from the Clarendon Press, Oxford, and edited by Dr. James A. H. Murray. From it I take the following article:—

"Culvert—a recent word of obscure origin. It has been conjectured to be a corruption of F. couloir, ... a channel, gutter, or any such hollow, along which melted things are to run, f. couler to flow. But points of connexion between the Fr. and Eng. words, in form and sense, are wanting. On the other hand, some think 'culvert' an Eng. dialect word, taken into technical use at the epoch of canal-making. No connexion with covert has been traced.

"A channel, conduit, or tunnelled drain of masonry or brick-work conveying a stream of water across beneath a canal, railway embankment, or road; also applied to an arched or barrel-shaped drain or sewer.

"Used from c. 1770 in connexion with canal construction; thence extended to railways, highways, town-drainage, etc. In connexion with railways and highways, it is sometimes disputed whether a particular structure is a 'culvert' or a 'bridge.' The essential purpose of a bridge, however, is to carry a road at a desired height over a river, and its channel, a chasm, or the like; that of a culvert to afford a passage for a small crossing stream under the embankment of a railway or highway, or beneath a road where the configuration of the surface does not require a bridge. Locally, the term 'culvert' is often limited to a barrel drain, bricks shaped for which are known as culvert-bricks."

When the above is read in connection with the case of Township of North Dorchester v. County of Middlesex, 16 O. R. 658, it is manifest that this particular structure is a "culvert" and not a "bridge." That case was decided in 1889, and since that time the section of the Act (then sec. 535 of ch. 184, R. S. O. 1887) has been amended by the insertion, after "rivers," of the words "streams, ponds, or

lakes," but I cannot see that this advances the case at all in favour of the plaintiffs. The most particular evidence as to the nature of the water which the culvert carries is that given by Herbert J. Bowman, C.E., who visited the place on the Thursday before the trial. There were then about three inches of water, about two feet wide, running through. He says he followed up the ditch, and it is an artificial channel through a swamp. Some of the water came from a spring through a ditch to the swamp, and he says it is continued as a ditch in the county of Wellington. The spring water had not then all gone through, and he would not be surprised if it would be dry in July and August.

It is unnecessary, in view of my opinion upon this part of the case, to consider whether the plaintiffs' remedy, if any, ought not to have been by arbitration. There was a very small amount involved in this case ($47.50), but the plaintiffs' reason for bringing the action in the High Court was, as stated before, to try and get the affirmation of some principle that would govern in like cases.

The action will be dismissed with costs.

JUNE 21ST, 1907.

DIVISIONAL COURT.

OSTERHOUT v. FOX.

Costs—Scale of—Amount Recovered—Ascertainment—Covenant—Amount Due under — Annuity—Deduction—Payment or Set-off—Division Court Jurisdiction.

Appeal by plaintiff from order of TEETZEL, J., ante 157, allowing an appeal by defendants from a ruling of a local taxing officer, and directing that plaintiff's costs of the action should be taxed on the Division Court scale.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

J. H. Spence, for plaintiff.

T. L. Monahan, for defendants.

RIDDELL, J.:—The action was to recover arrears of certain fixed annual sums payable by defendants to plaintiff "annually during the time of his actual life."

The defence set up satisfaction by way of novation and payment. The trial Judge (Anglin) held that the defence of novation had not been made out, and that there was due and payable to plaintiff from defendants, as arrears of the annuity, $37.50 a year for 7 years, a total of $262.50. The amount of annual payment was fixed at $100 in the deed, but defendants contended that of this $100 plaintiff had agreed to look to another person for $37.50—defendants admittedly paying the balance, $62.50 per annum. It appeared that defendants had paid to one Dunnett, a creditor of plaintiff, "whom they had not in any way undertaken to pay as part of the bargain," the sum of $69, at the request of plaintiff; and the trial Judge said: "But against that"—i.e., the sum of $262.50—"must be offset the sum of $69, which I find was paid by defendants. . . . to one Dunnett. . . . Deducting this sum leaves a balance of $193.50, for which judgment must be awarded for plaintiff with costs."

No direction was given as to the scale of costs. The taxing officer at Belleville held that the costs should be taxed on the County Court scale; my brother Teetzel reversed the officer's ruling and held that the action could have been brought in the Division Court. . . .

The governing statute is the Division Courts Act, R. S. O. 1897 ch. 60, sec. 72 (1) (d), as amended by 4 Edw. VII. ch. 12, sec. 1:—"The Division Courts shall have jurisdiction in the following cases . . . (d) All claims for the recovery of a debt or money demand the amount or balance of which does not exceed $200, where the amount or the original amount of the claim is ascertained by the signature of the defendant. . . ."

"72 (a). The amount or original amount of the claim shall not be deemed to be ascertained by the signature of the defendant . . . when in order to establish the claim of the plaintiff, or the amount which he is entitled to recover, it is necessary for him to give other and extrinsic evidence beyond the mere production of a document and the proof of the signature to it."

The objections to the jurisdiction of the Division Courts are two, one based on the original section, viz., that the amount or balance recoverable is more than $200, and the

other upon the amendment of 1904 (putting an end as it does to the conflict which existed in the Courts as to the true meaning of the words of the original section), i.e., that more evidence would be required by plaintiff to establish his case than is mentioned in the amending section.

The position taken by defendants that the agreement between the parties was that defendants should pay only $67.50 per annum, and that they had actually paid all they had agreed or were liable to pay, makes it clear that the $69 paid to Dunnett cannot be and was not considered a payment on account of the annuity.

In many cases a doubt may occur whether a particular transaction amounts to a payment or a set-off, but in general "the distinction between the two is quite plain. A payment is a sum expressly applicable in reduction of the particular demand on which it is made; that demand is therefore reduced by the extent of the payment. To constitute a payment, the transaction must have the assent of both parties, and for such payment no action is maintainable; while a set-off is a separate and independent demand which one party has against the other, and in respect of which he is as much a creditor of the other as that other is of him, and for which he can as well maintain a separate action as his creditor can for his demand:" In re Miron v. McCabe, 4 P.R. 171, 174, per Wilson, J. In that case plaintiff sued on an account originally for $236.55, giving credit for $169.07½, leaving $67.47½. In the $169.07½ was included the sum of $155.15 paid him by defendant on account. A sum of $42 had been paid by defendant to one G. upon the written order of the plaintiff, and the plaintiff swore at the trial that had he known of the payment of this sum his claim would have been reduced to $25.47½. The learned Judge held that the $155.15 was a payment: he does not hold that the $42 was a payment or that another account the defendant had against the plaintiff of $13.92 was a payment. He does not in so many words say that either is not a payment, but he goes on: "This latter sum ($13.92) is, I presume, a set-off, but, leaving that out of consideration, there is the full claim of $236.55 reduced by payments amounting to $155.15, leaving a balance claimed of debt or account of $81.40 and so not exceeding $100. The Division Court had, therefore, clearly jurisdiction in the matter."

The distinction between a payment and a set-off is, I think, well shewn in the definition of Wilson, J.

The decision in this case was overruled in In re Hall v. Curtain, 28 U. C. R. 533, and In re Judge of the County Court of Northumberland and Durham, 19 C. P. 299; the effect of these decisions, however, is not at all to question the accuracy of the definition by the learned Judge, but to make it even more clear that a claim cannot be reduced by allowing a set-off to the defendant, unless there has been an agreement between the parties to set off one claim against the other in whole or pro tanto. See also Furnival v. Saunders, 26 U. C. R. 119; Re Jenkins v. Miller, 10 P. R. 95.

In this case the payment to Dunnett entitled the defendant to a set-off or counterclaim — it is immaterial to consider which — and the plaintiff was not entitled by giving credit for this sum to bring his action in the Division Court. In this view it is unnecessary to consider the second ground taken (for the first time before us), viz., that the plaintiff's claim being for an annuity during his life, the fact that he was alive must be proved. As at present advised, I do not think that there is any presumption that, because an action is brought in the name of a person who under a deed is said to be entitled to a life annuity, that person is or was at any particular time alive. I am not, of course, speaking of a case in which the action is brought shortly after the making of the deed. There, there may be a presumption that the annuitant was alive, or at least believed to be alive at the time the deed was made, and it may probably be presumed that he continues to live. But here the deed is made in 1892, and the action brought 13½ years later. I fail to see that there is any presumption that the grantee was alive, say, in the year 1905, unless the fact that an action is brought in his name raises such a presumption, and that, I think, it does not. It is not without precedent that an action should be brought in the name of a person long dead. And it is no answer that in the defence it is admitted that "the plaintiff is a retired farmer residing in the township of Murray." The plaintiff was not bound to anticipate that this would be admitted.

I am of opinion that the appeal should be allowed with costs both in this Court and below, and that the ruling of the of the taxing officer at Belleville should be restored.

BRITTON, J., gave reasons in writing for the same conclusion.

FALCONBRIDGE, C.J., also concurred.