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SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. JANUARY 24TH, 1913.

HAINES v. McKAY.

4 O. W. N. 651.

Trial — No Tender of Evidence — Dismissal of Action — Motion to Adjourn—Absence of Material Witness—Witness in Question Hopelessly Insane and Confined in Asylum — Particulars not Complying with Order—Action of Crim. Con.—Odious Charge—Lack of Bona Fides on Part of Plaintiff—Delay.

Action for criminal conversation. The writ of summons was issued on September 18th, 1911, the statement of claim delivered December 18th, 1911, and on October 9th, 1912, the Master in Chambers, on defendant's application, ordered particulars to be delivered and the action set down for trial on a certain date, failing which, it would be dismissed. At the trial, plaintiff's counsel moved for an adjournment of the trial on account of the absence of plaintiff's wife, whom, he alleged, he had subpœnaed, and who was confined in an insane asylum. Thereupon, the evidence was taken of three medical experts, who pronounced her incurably insane. The trial was then ordered to proceed, and, as plaintiff did not tender any evidence, the action was dismissed by Leitch, J., with costs.

SUPREME COURT (2nd App. Div.), dismissed appeal therefrom without costs, as respondent was unrepresented on the appeal.

An appeal by the plaintiff from a judgment of Hon. Mr. Justice Leitch pronounced at the trial at Milton on 22nd December, 1912.

D. O. Cameron, for motion.

No one contra.

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

Their Lordships' judgment was delivered by

HON. MR. JUSTICE RIDDELL:—An action for criminal conversation.

The statement of claim delivered December 18th, 1911, alleges that "in or about the year 1905 the . . . defendant did seduce, debauch and have illicit connection with the plaintiff's wife . . . " and $50,000 damages are claimed. The defence is a simple denial.

The writ was issued September 18th, 1911, and after the action was at issue for some time nothing was done to bring the action for trial. On October 9th, 1912, a motion was made by the defendant for an order dismissing the action for want of prosecution. The Master in Chambers made an order that particulars should be served within a time limited, certain costs paid and the case set down for trial, or the action should stand dismissed. Particulars were served in time, which alleged the wrongful acts to have taken place in 1908 and 1909.

An examination for discovery of the plaintiff is said to have shewn that the date he must have intended to allege was 1907, and a new set of particulars was served on November 20th, 1912, after the date fixed for serving particulars. No order was procured allowing these particulars *nunc pro tunc*, but the case was set down and the costs already referred to paid.

At the trial before Mr. Justice Leitch at Milton, December 2nd, 1912, counsel for the plaintiff moved to adjourn the hearing. Counsel for the defendant argued that by reason of the non-compliance with the Master's order the case was not properly before the Court, that the action was dead. But he said that he was prepared to go on and fight out the action. Plaintiff's counsel then said (answering the objection of his opponent, that the plaintiff could not amend his particulars):

"Of course, he would have a right to amend; there is no doubt about that. I wanted to move to postpone the case on the ground that we cannot get our witnesses here. Our main witness is undoubtedly the plaintiff's wife, and she is now in the asylum at Toronto, and we think is of a good mind, and we had her served with a subpœna, and this morning my client gets this letter from the asylum authority: (Reads)—We contend she is in good mind, and there are now in the court-room three doctors from the institution. I do not know how they came here. I suppose they are here to

shew cause why this woman should not obey the subpœna that was served on her; two doctors from the asylum and Dr. Bruce Smith. Under the circumstances I do not think we should be forced to go on.

His Lordship: Do you think this charge ought to be held over this defendant for any length of time?

Mr. Cameron: It is a nasty thing, I admit, holding it over, Mr. McKay, but at the same time this plaintiff has a right to have a trial. It is not his fault that his wife is not here.

His Lordship: She may be permanently insane.

Mr. Cameron: No, she is not permanently insane. I do not think she is insane to-day. She is just in there on account of drink and of dope—nothing else. There are three doctors here to-day.

His Lordship: You want to find out from them if she is insane?

Mr. Cameron: Yes, I want to put them in the box and ask if she is insane.

His Lordship: Have you any objection to that?

Mr. McEvoy: None whatever."

Evidence was then given by three medical men that the plaintiff's wife was incurably insane, that she would never be any better, having been in the asylum since May, 1911. This evidence was given, of course, on the motion of the plaintiff to postpone.

Thereupon the following took place, according to the reporter's notes:—

"His Lordship: Well, do you think any good purpose would be served by adjourning this case:

Mr. Cameron: Well, of course this last witness says her memory would be good, and the other two doctors only say she had hallucinations. The last two witnesses both say the only hallucination she had was that about voices.

His Lordship: Well, you cannot go on, can you?

Mr. Cameron: I do not see how we can. I would suggest adjourning to the winter assizes at Toronto. She may be all right by that time.

His Lordship: With reference to your statement that she is a dope fiend and alcohol fiend, what was she like when she made those charges?

Mr. Cameron: She was all right when she made the charges.

His Lordship: In the face of that order that Mr. McEvoy has read, and in the face of the witnesses that you have called —Dr. Bruce Smith and Dr. Foster and Dr. Clair—in the face of all the evidence, I would not keep that charge hanging over any man.

Mr. Cameron: I submit we are entitled to an adjournment.

His Lordship: I will not adjourn it. If you want to try it you must go on and try it.

Mr. Cameron: Then are these particulars of the 20th of November properly delivered, or is the case dead except as to the particulars of 1907?

His Lordship: The particulars in compliance with the order were the particulars of 1907.

Mr. Cameron: Well, the plaintiff abandons those particulars and says that he and his wife were not in Toronto in 1907. I understand that the defence will be confined to the particulars that were delivered properly and in time?

His Lordship: The evidence will be confined to the particulars dated the 7th day of November, 1912. Those were the particulars that were delivered in pursuance of the order, and those are the only particulars that were before the Court.

Mr. McEvoy: Then on the examination for discovery it is admitted there was no wrong-doing at that time; that the plaintiff's wife was in Owen Sound living. 98½ Denison avenue, the place where they resided, was in Toronto.

Mr. Cameron: I admit the particulars we served were one year out, and we served them with amended particulars.

His Lordship: No, I think there has not been a compliance with the order for particulars, and I will dismiss the action.

Mr. Cameron: Had not your Lordship better wait till we give the evidence?

His Lordship: Well, you are not able to give evidence. I will dismiss the action with costs.

Mr. Cameron: I suppose your Lordship will give us a grant of thirty days' stay?"

It will be seen that Mr. Cameron said that he did not see how he could go on, and that when a suggestion was made to hear evidence, and the learned Judge said that the plaintiff was not able to give evidence, Mr. Cameron did not contradict the statement or offer any evidence, or press that evidence should be taken.

Upon the appeal it was urged that my learned brother dismissed the action because there was no compliance with the Master's order; but this is clearly not so. The action was dismissed because the plaintiff's counsel did not produce evidence. What the learned trial Judge said was a challenge to counsel to produce evidence if he had it.

Counsel now says that he had at the trial eight witnesses who could have given evidence which he hoped would prove a case without the evidence of the plaintiff's wife. No such statement or claim was made at the trial.

In view of what seemed to us the imperfect state of the evidence as reported, we have asked the learned trial Judge what took place before him, and he informs us that he asked Mr. Cameron if he had any witnesses who could prove a case, and Mr. Cameron replied in the negative.

It is perfectly plain, even without this statement, that the case was not tried but was dismissed simply because the plaintiff did not tender or pretend to have witnesses who could prove a case.

We are not concerned to determine whether the learned trial Judge was right in his impression that only the charges in the first set of particulars could be gone into. This was not a ruling in the course of a trial. The proper course was for the plaintiff, if he desired a trial on the later charges, to tender his evidence formally and take a ruling thereupon, move to amend the particulars and have an express decision, bring the matter up clearly in some way and have it clearly decided.

The course at the trial was:—Motion for postponement moved for by plaintiff and rightly refused, and the plaintiff then in effect admitting that he had no evidence to prove a case.

The Court is always very loath to decide that a plaintiff is not to be allowed to develop any case he may conceive himself to have, or to punish a litigant for any mistake in practice, date, etc. But here the charge is an odious one. The woman alleged to have been seduced is a maniac on the subject of men having sexual intercourse with her and can never give credible evidence on the subject. The whole course of the plaintiff is indicative of want of good faith, and I cannot but think that the lines must be drawn with some strictness.

I am of opinion that the appeal must be dismissed, but without costs, no counsel appearing to oppose the appeal.

A further fact should be added. Counsel for the plaintiff applied before trial to Mr. Justice Middleton for a *hab. corp ad test.* for the plaintiff's wife. My learned brother did not dismiss the application, but told counsel that he should be furnished with some kind of evidence to shew that the woman could or might give evidence upon which the slightest reliance could be placed, and the application was not further proceeded with. It seems quite clear that the whole proceeding at the trial was a sham on the part of the plaintiff.

Appeal dismissed.

HON. MR. JUSTICE KELLY. JANUARY 24TH, 1913.

INDEPENDENT CASH MUTUAL FIRE INS. CO. v. WINTERBORN.

4 O. W. N. 674.

Principal and Agent — Agent of Insurance Company — Breach of Definite Instructions—Liability for—Evidence—Damages.

KELLY, J., *held*, that an agent of an insurance company, who had effected an insurance on a grain separator in breach of his express instructions, was liable to indemnify the company any loss unavoidably sustained by reason thereof.

Connecticut Fire Ins. Co. v. *Kavanagh*, [1892] A. C. 473, referred to.

Action to recover the sum of $660.64 and interest from a former agent of plaintiff, tried at Belleville without a jury.

E. Gus. Porter, K.C., and W. Carnew, for the plaintiff.

T. A. O'Rourke, for the defendant.

HON. MR. JUSTICE KELLY:—The head office of the plaintiff company is in Toronto. Defendant is an insurance agent residing in Trenton. At the time of the trial he had had twelve years experience as such agent. In May, 1909, he was appointed by plaintiffs their agent at Trenton, and if the statement in their letter of May 12th be correct, they then forwarded to him supplies such as forms, stationery, etc., and also an agency agreement in duplicate, one copy of which was to be signed by the defendant and returned to the plaintiffs, and the other to be retained by him. This agreement was not signed by defendant; he denies that it ever reached him.

From that time, however, he acted as the plaintiffs' agent; and he received from them blank forms of interim receipts—issued in book form—which were to be used by him on his receiving applications for insurance.

In January and February, 1910, some correspondence passed between the parties with regard to the issue of insurance on grain separators, and plaintiffs made it clear to the defendant, not only by this correspondence, but through their superintendent, that they would not entertain proposals for that class of risk.

On August 9th, 1910, Jeffery & Dainard applied to defendant for insurance of $600 on their grain separator and attachments, and defendant then issued to them an interim receipt on the printed form supplied to him by the plaintiffs. The premium for this insurance for one year from August 9th, 1910, was therein stated to be $18. Eight dollars of this amount was at that time paid by the insured to defendant. Defendant says that on that date he took from the insured a written application for the insurance, and that without delay he forwarded it by post to the plaintiffs' head office. This communication, if sent, never reached the plaintiffs. On November 8th, 1910, the insured paid to defendant ten dollars, the balance of the yearly premium, and he endorsed a receipt therefor on the official printed interim receipt.

From the time defendant says he forwarded the application to plaintiffs until May, 1911, no further communications passed between the plaintiffs and the defendant with reference to the insurance.

On May 19th, 1911, the articles insured were destroyed by fire and the insured applied to the plaintiffs, through the defendant, for a settlement of their loss. On being communicated with, plaintiffs for the first time learned that defendant had issued an interim receipt and accepted the premium from the insured. This in fact was the first knowledge they had of this insurance having been effected.

On or about October 11th, 1911, an inspector of the plaintiffs interviewed defendant at Trenton. Defendant says he then had in his possession a copy of the application and that he shewed it to the inspector, but cannot say whether the latter returned it. The inspector, on the other hand, says that he is not aware that he saw this copy in defendant's pos-

session, and that he did not take it with him when parting with defendant. The latter cannot further account for it.

I mention this circumstance to draw attention to the defendant's evidence as to the unaccounted for disappearance of important papers in this transaction—the agency agreement sent him from plaintiffs' office, the application which he says he posted to the plaintiffs and which did not reach them, and the copy of the application which is not accounted for after the time he says he shewed it to the inspector.

About the end of 1911 (date has not been given), the insured brought action against the plaintiffs to recover the amount of insurance ($600), and plaintiffs paid them in settlement that sum, and $17.64 costs of action.

Plaintiffs have brought the present action to recover from the defendant $660.64 (and interest), the $617.64 paid to the insured, $25 plaintiffs' costs of defending the action of the insured against them, and the $18 premium received by the defendant and not accounted for.

With the knowledge that plaintiffs would not issue insurance on the class of property offered by the insured, and being familiar with his duties as agent, defendant accepted the application and the premium, and issued an interim receipt on the form intrusted to him by the plaintiffs. In view of the evident carelessness of the defendant and the plaintiffs' denial of the receipt of the application, I find difficulty in accepting the statement that the application was sent to the plaintiffs.

The evidence of defendant's carelessness in dealing with these important matters (and part of this evidence is given by himself), may well suggest that he overlooked forwarding it. Moreover he sent no further communication to the plaintiffs about this application, and admits that in the usual course of dealing the policy should have reached him within a reasonable time; not receiving it he made no further enquiry and took no further interest in the matter except to receive from the insured in November (three months after the application was made), the balance of the premium for the whole year.

A suggestion was made that the interim receipt was valid for thirty days only from the time of its issue. The blank in the printed form at the foot of the receipt which is intended to limit the time for which it would afford protection to the insured, was not filled in, and the insured may well

have thought that there was no question of limiting the time, especially as defendant treated the insurance as being in force, and accepted the balance of premium months after the application was made.

On June 1st, 1911, defendant wrote to plaintiffs in reply to a letter of theirs of May 30th (not produced), expressing regret that "Carelessness and absence of method on my part, principally owing to the pressure of other and outside business, has caused you so much trouble and me so much anxiety." And later on he says, "as to the premium, that was paid, at least to me, and if it was not paid to you, which I think under the circumstances was quite likely, that was my fault and not that of Jeffery & Dainard, and it is still owing to you by me." He then proceeds to explain that owing to the work and responsibility resting upon him in connection with his other business, "it will not be at all difficult for you to understand how easy it would be for such a matter as an interim receipt, or a premium, or a policy, to slip altogether from the memory." He adds, "please remember that Jeffery & Dainard were certain they were insured, they paid their premium and got their receipt"; and he goes on to say that he is willing to acknowledge that he has acted thoughtlessly and carelessly, and expresses himself as being "quite sure you will deal mercifully and leniently with me and generously to my clients."

Without going more fully into the details, it is clear to me that defendant acted negligently and carelessly and without due regard to the interests of his principals, the plaintiffs, to such an extent as to render him liable.

As to the effect of the issue of the interim receipt, reference may be made to *Stoness* v. *Anglo-American Insc. Co.*, 20 O. W. R. 800, 21 O. W. R. 405.

The question of the liability of an insurance agent is considered in 22 Cyc. 1437, where it is stated that the agent must respond in damages for any breach of duty arising out of his relations as agent which has resulted in injury to the company, and in support of that proposition is cited *Connecticut Fire Insc. Co.* v. *Kavanagh* [1892] A. C. 473.

If the agent violates instructions as to the class of risks which he is to insure, and thereby renders the company liable for a loss on a risk which would not have been accepted had the instructions been observed, the agent will be liable to the

company for the amount of loss which it has been compelled to pay on account of such risk (22 Cyc. pp. 1437-38).

But the plaintiffs could have avoided incurring the costs of the action brought by the insured against them.

Judgment will be in favour of plaintiffs for $600 and interest thereon from January 10th, 1912, and also for the $18 premium received by the defendant and not accounted for, and interest thereon from November 8th, 1910, and the costs of this action.

MASTER IN CHAMBERS. JANUARY 24TH, 1913.

MOODIE v. HAWKINS.

4 O. W. N. 683.

Discovery — Further Examination — Relevancy — Information for Solicitor.

MASTER IN CHAMBERS, *held*, on a motion for further discovery, that discovery is only obtainable as to matters relevant to the issues as raised in the pleadings, but that plaintiff should state the knowledge obtained from his solicitor since the commencement of the action, unless it were shewn that such information was obtained by the solicitor on his client's instructions, and for the purposes of this action.

Motion to compel plaintiff to re-attend for examination and answer certain questions which he refused to answer upon his examination for discovery, claiming them to be irrelevant.

The action was begun on March 5th, 1912, by the plaintiff suing on behalf of himself and all other shareholders of the Dominion Power & Transmission Co. except the eleven individual defendants, against them and the company in respect of alleged acts of malfeasance on the part of a present and a former director of the company whereby they are said to have made large profits in breach of their duty as directors and in fraud of the company and without its consent. The plaintiff claims damages, restitution, account, injunction and the usual remedies asked for in such cases.

The statements of defence of the company and some of the other defendants are part of the material before me. They deny all the plaintiff's allegations and also his right and status to maintain this action.

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

A. M. Stewart, for the plaintiff.

CARTWRIGHT, K.C., MASTER:—The first question not answered was Q. 11.

"How did you become a shareholder in that company?

"Mr. Gauld: I object to the question—no issue in regard to that."

This was followed by 13 other questions more or less of the same incidence, all of which plaintiff declined to answer on the advice of counsel.

That discovery is only as to matters relevant to the issues is, of course, elementary, and those issues are the issues raised in the pleadings, which are supposed to be true for the purposes of discovery. Here no ground is given in the statements of defence for the denial of "the plaintiff's right or status to bring or maintain the action." There is only a bald statement in these words.

That being so the plaintiff properly answered questions as to his shares in the defendant company saying that he holds some of them (beneficially, I presume, though that is not so stated) and that these stood in his name at the commencement of the action.

Q. 11—In my opinion he was not bound to answer as the pleadings now stand. If the defendants know or suspect the existence of any fact which disqualifies the plaintiff that should be stated in the pleading. At present it is open to the charge of "fishing" if there is anything in the question at all.

The next question unanswered was question 45.

Plaintiff had been examined as to the ground of his action which he said was improper division of certain shares of stock by the defendant directors among themselves. This he said had been his information. He was then asked:

Question 45. "When did you get that information?"

It does not seem to me very important whether this is answered or not. The real point of the case is whether defendants were guilty of malfeasance or not. It does not, therefore, seem material when the plaintiff obtained the information on which he bases his action (nor perhaps what the details of that information were though I am not speaking positively as to that). That is a case where the defendants must know what they have done, but this "does not take away their right to know what the plaintiff charges them with doing—and discovery should not be extended beyond that. Plaintiff has said what he charges—how or when he got the in-

formation on which he relies for success is not a matter for discovery in this case and on the present pleadings.

Then comes question 51 where plaintiff declined (apart from any advice of his counsel) to state what knowledge he had obtained since the action began because it was got from his solicitor.

Here I think he was wrong unless the information was obtained by the solicitor on his client's instructions and for the purposes of this case. That is not made clear. For all that appears his solicitor may have told him very important matters that he had become aware of long before this action was commenced.

This point would, therefore, seem to be open to further enquiry if defendants so desire.

The next question is No. 68.

Plaintiff had told of an interview with defendant Moodie, president of the defendant company, at which the latter told him question 65: "the amounts of stock which had been given to different parties." He was asked if the president said that "gifts of stock were made." A. "He did not say gifts. He said that so and so got a bunch."

Q. 68. You don't mean to imply from anything that was said that he conveyed to you the idea that stock was given away in fact. Witness declines to answer on advice of counsel."

Q. 69 then followed. "Tell me all the president told you in just the way he told you; be careful not to put your own construction on it."

The latter part of this question 69 does not seem to harmonise with question 68. Had this earlier question been answered one would have expected an affirmative answer as the action is based on that assumption. It is a well known saying that actions speak louder than words. So that in any case whether strictly proper or not there does not seem anything to be gained by requiring a formal answer thereto.

His answer to question 69 is "He simply told me that certain amounts of stock was (*sic*) allotted to certain parties."

What inference, if any, plaintiff drew from that statement does not strike me as in any way material either as establishing the case of the defendants or weakening his own, and discovery must, if relevant, be directed to one of these results.

Q. 100 is the last.

Plaintiff had stated that at the interview already spoken of the president had told him that 100 shares had been allotted to him (the plaintiff). He had said that the president did not tell him where those 100 shares came from or whose it was, or what it was allotted for, and that nothing took place as to the reason why he (plaintiff) has to get that stock.

Q. 100 followed: "Do you know why?" This was objected to by counsel.

Q. 101 followed: "Was it understood by you why you were getting this stock? A. I knew why he was saying so.

Q. 102. "Why was he saying so?"

Witness declines to answer on advice of counsel.

Again I am unable to see the relevancy of this question. There is no issue as to these 100 shares. It does not even appear whether plaintiff ever accepted them or not. If the defendant company sees any ground for a counterclaim against the plaintiff in respect of these shares or of any other matter, then this should appear on the record and the examination be then resumed on that basis.

Q. 112 was not answered on advice of counsel. It is simply a repetition of question 51 so far as it is in any way material.

The conclusion of the whole matter is that defendants, if so advised, can take out another appointment in the usual way and have further examination and pursue question 51 if they desire to do so.

The motion is otherwise dismissed with costs to the plaintiff in the cause.

MASTER IN CHAMBERS. JANUARY 25TH, 1913.

WALL v. DOMINION CANNERS.

4 O. W. N. 684.

Pleading—Statement of Claim — Motion to Strike Out Portions— Irrelevancy — Embarrassment — Re-opening of Order—Acquiescence in—Leave to Appeal.

MASTER IN CHAMBERS, on a motion to re-open the order herein (23 O. W. R. 183), refusing to strike out certain paragraphs of the statement of claim, declined to interfere with the same, both on the merits and on the ground that the order in question had not been appealed against, but on the contrary had been acted on, but granted leave to appeal, costs to be to plaintiff in any event of the appeal.

Canavan v. *Harris*, 8 O. W. R. 325, referred to.

Motion by defendant company to re-open the order herein dated October 30th 1912.

From that order reported in 4 O. W. N. 214 and more fully in 23 O W. R. 183 the defendants did not appeal; but opened negotiations with the other side with a view of having a re-argument. In this they were not successful, and on 11th December last served notice on behalf of the defendant company only, as before, of an application for that purpose.

F. R. Mackelcan for motion.

F. McCarty contra.

CARTWRIGHT, K.C., MASTER:—The motion on the argument was limited to paragraph 6 and confined to so much of that paragraph as is dealt with in the report in 23 O. W. R. at pp. 184 and 185. The company it is said is apprehensive that if this statement remains on the record, it will oblige the company to give details and full discovery of the work in payment of which the large block of common stock is alleged to have been given to Grant & Nesbitt though "mostly all done by the plaintiff herein."

I have reconsidered the matter in the light of what I said in *Canavan* v. *Harris*, 8 O. W. R. 325. That, however, is to be read in connection with the facts of the case as laid down in the judgment in *Quinn* v. *Leathem* [1901] A. C. at p. 506. I see no reason to qualify what I said in the *Canavan Case, supra,* at p. 326: "If any fact is stated as a ground of action or defence which the other side considers irrelevant he should move to strike it out—if not material they should be struck out unless clearly introductory or incapable of affecting the result."

The part of paragraph 6 now in question is not in my view material in the sense of allowing discovery to the extent feared or anticipated by the defendant company. I see no reason to change my opinion on that ground, especially as the defendants have acted on the previous judgment and obtained the particulars of statement of claim thereby directed.

Following the rule of a late eminent C.J. "I always facilitate appeals from my own decisions—If I am wrong I want to be set right." I give leave now to the defendant

company to appeal if desired. But the costs of this motion should in that case be to the plaintiff in any event, and the costs of the appeal to be costs to the plaintiff only in the appeal.

HON. MR. JUSTICE BRITTON. JANUARY 27TH, 1913.

RE ERSKINE.

4 O. W. N. 702.

Will—Construction—Life Estate in Residence Given to Widow—Annuity "as Long as Estate Will Pay Same"—Not Payable out of Funds Derived from Sale or Mortgage of Residence—Costs.

BRITTON, J., *held*, that where a testator gave his widow a life interest in a residence and an annuity of $400 per annum "as long as his estate will pay the same," the annuity could not be raised by a mortgage or sale of the residence, but must come out of the estate, exclusive thereof.

D. C. Ross for applicants.

George Wilkie for the widow.

B. N. Davis for the other beneficiaries.

Motion by executors for construction of the will of John Erskine, who died on or about the 18th day of June, 1906, having made his will on the 2nd December, 1905.

Probate of the will was granted to the Union Trust Company, Limited. The will is as follows:—

"This is the last will and testament of John Erskine of the City of Toronto in the County of York made this twenty-second day of December, in the year of our Lord one thousand nine hundred and five.

I revoke all former wills or other testamentary dispositions by me at any time heretofore made and declare this only to be and contain my last will and testament.

I direct that all my just debts, funeral and testamentary expenses be paid and satisfied by my executors as soon as conveniently may be after my decease.

I hereby nominate and appoint the Union Trust Company Limited to be the executors and trustees of this my will.

I give devise and bequeath all my real and personal estate of which I may die possessed in the manner following, that is to say:—

To my wife Isabella Erskine I give, devise, and bequeath during the term of her natural life the premises known as house number 14 St. Vincent street in the City of Toronto aforesaid free from taxes, together with the contents of same, also the sum of four hundred dollars ($400) yearly, to be paid to her in monthly instalments so long as my estate will pay the same.

To my son John Alexander Erskine I give, devise and bequeath the sum of one hundred dollars ($100) and the south half of lot number five (5) Concession Five (5) in the township of Bryce in the District of Algoma and province aforesaid.

To my sisters Anne Hill and Agnes Erskine I give, devise and bequeath the sum of one hundred and fifty dollars ($150) each.

I direct my executors to pay off the existing mortgage on my above mentioned St. Vincent street property out of the proceeds of my life insurance.

At the decease of my said wife I direct that the proceeds of the residue and remainder of my estate, both real and personal, including my said house and contents, be divided equally between my said sisters Annie Hill and Agnes Erskine and my said son John Alexander Erskine share and share alike or the survivors or survivor thereof.

I hereby empower my executors in their discretion to sell and dispose of any or all of my real estate and to execute conveyance thereof."

The legacies to John Alexander Erskine, Annie Hill and Agnes Erskine, have been paid.

All the debts, including the mortgage on the residence 14 St. Vincent street, have been paid.

The widow has remained in possession and is now by herself or her tenant in possession of the residence. The estate has been administered leaving the widow in possession of the residence and furniture, and John Alexander in possession of what is called the farm, which is a veteran land grant of 100 acres, with no buildings upon it, and not under cultivation. The widow has been paid the annuity down to August, 1909, and the estate is actually indebted to the executors in the sum of $45.66, or thereabouts. The executors are now in doubt, and ask the assistance of the Court, submitting the following questions:—

(1) Whether upon the true intent and meaning of the will of the said testator, the annuity of $400 to the widow is payable out of the corpus of the whole of the estate or only out of that part of the estate which came into the hands of the executor as cash.

"(2) Whether the executor can raise the said annuity by way of mortgage of premises No. 14 St. Vincent street, Toronto, and of the lands devised to John Alexander Erskine in the township of Bryce in the will mentioned.

(3) Whether the said properties shall as between them bear the said annuity in proportion to their respective values."

The will must be construed as a whole. From the words used, what is the real meaning?

The testator intended to dispose of his whole estate. His words are: "I give, devise, and bequeath all my real and personal estate of which I may die possessed in the manner following . . ."

To his wife during her natural life the residence together with the contents of the same. Also the yearly sum of $400, payable monthly, as long as his estate could pay the same—not for life—for the estate might not be able to continue the payment during her entire life. The house and contents the widow would have for life. She might not have it for life if sold or mortgaged to raise money out of which to pay the $400 for life, and even if mortgaged or sold, there might not be sufficient to pay the $400 for life. The widow is now only 68 years old. She may live quite long enough to exhaust at the rate of $400 a year all that the residence would realise so that before death she would have neither residence nor yearly allowance. That was not within the contemplation of the testator. I am of the opinion that the words "my estate" in the clause providing for his wife, mean the estate of testator not otherwise devised or dealt with by his will.

The general words "remainder of my estate both real and personal" cannot be held to include the farm, devised to John Alexander, nor can it include the money legacies paid to Annie Hill and Agnes Erskine. The words are general words, and would include, of course, other property of the testator if any obtained by him subsequent to the making of the will, or owned by him at time of his death.

The last clause of the will, simply empowering the executors to sell, is the general one, and in this case neither adds to, nor detracts from the will—nor does it assist in the interpretation of the will.

My answer to the first question is, that the annuity is payable only out of that part of the estate which the executor had in hand, exclusive of the residence and farm.

My answer to the second question is "no."

The third question is covered by my answers to the first and second.

As the executor will continue to act and deal with the estate after the death of the widow, it will be no hardship to them to make their costs payable out of the estate. No costs to the other parties.

HON. MR. JUSTICE MIDDLETON. JANUARY 29TH 1913.

FALCONER v. JONES.

4 O. W. N. 709.

Negligence—Fatal Accidents Act—Death of Employee—Unexplained Accident—Varying Theories—Nonsuit—Contributory Negligence —Findings of Jury.

Action for damages for the death of one, W. F., while engaged at defendant's factory, operating a machine, through the alleged negligence of defendants. The belt supplying power to the machine at which deceased was working, had parted, and deceased was in the act of assisting the foreman in replacing it upon the pulley, when something struck him violently in the chest, instantly killing him. The evidence went to shew that it was, probably, a piece of wood which struck deceased, but as to its source, different theories were advanced. The jury found negligence on the part of defendants, and negatived contributory negligence on the part of the deceased.

MIDDLETON, J., *held*, that the jury's findings as to negligence were warranted by the evidence, though their theory of the accident was not, and entered judgment for the plaintiffs for $1,650 and costs.

Action for damages for the death of William Falconer, killed while operating a machine called a "shaver" at defendant's factory, through the alleged negligence of defendants, tried at Toronto, with jury, on the 13th and 14th January instant.

John Jennings for the plaintiff.

H. H. Dewart, K.C., and B. H. Ardagh for the defendant.

HON. MR. JUSTICE MIDDLETON:—Most of the facts were not in issue. Wiliam Falconer was engaged at the defend-

ants' factory in operating a shaver. This shaver was driven by a belt running from a wooden pulley upon a counter-shaft. The counter-shaft was driven by a belt running from a large pulley upon the main shaft in the basement, and passing through holes in the floor to a small pulley fixed upon the shaft above. When it was not desired to operate the machine this belt was shifted by a "shifter" on to a free pulley upon the counter-shaft between the small fixed pulley and the large wooden pulley. The entire counter-shaft, with its pulleys, was covered by a box or case, so that when in operation there was no danger to any one arising from accidental contact with the rapidly revolving pulleys and belts.

On the 26th January, 1912, the belt connecting the main shaft and counter-shaft parted and fell to the basement. Falconer went to the basement, procured the belt, and took it to Werlich, the millwright having general charge of the machinery in the mill; for the purpose of having the belt repaired and replaced. Werlich went to the machine and took the cover off the box or casing which enclosed the counter-shaft; the belt could not be replaced without his so doing. He then passed the belt over the counter-shaft and down through the openings, and went to the basement to lace it. Falconer assisted him in uncovering the counter-shaft and in passing the belt through.

When the belt was laced, Werlich came upstairs again, placed the belt upon the loose pulley, and went below again in order to put the belt upon the revolving pulley on the main shaft. Werlich states that at this time he told Falconer to stand clear, as it was his intention to start the belt. The jury have found—and I agree in their finding—that no such statement was made. When Werlich reached the basement he immediately placed the belt upon the pulley; and there was no eye-witness of what next happened. By some means something was violently thrown, and struck Falconer upon the breast, breaking three ribs and driving them into his heart, instantly killing him.

The theory put forward by the defendants was that Falconer had taken a piece of wood—produced at the trial—with the view of holding the belt upon the free pulley while it was being placed on the moving pulley below, and that when the belt commenced to move this piece of wood

was jerked from his hand and thrown against him with violence.

The piece of wood produced was found immediately after the accident, broken as if it had received some severe impact; and the sides of the box were broken where they had been hit by some such object as the stick produced.

The jury deliberately reject this theory of the accident, and adopt, instead of it, a theory propounded by the plaintiff's counsel and not founded upon any evidence. It was shewn that a band saw was operated at no great distance from the counter-shaft. What is suggested is that the man operating the band saw may have thrown a piece of waste wood over on to the moving belts and that this may have been thrown in such a way as to bring about the injury.

If this finding were essential to the plaintiff's recovering, I should be much inclined to non-suit; but I think that the defendants cannot complain if the theory propounded by them is accepted and upon that there is liability.

The negligence found by the jury is that the shifter was insufficiently locked and that it allowed the belt to travel on to the fixed pulley, thereby putting the whole of the counter-shaft in motion at high speed; that the engine should have been slowed down during the operation and that Werlich was negligent in leaving the cover off the counter-shaft while the shafting was in motion and putting the belt on the wrong side of the drive wheel. Contributory negligence is negatived.

Accepting the theory propounded by the defendants, all these grounds of negligence are relevant, and are justified by the evidence. On the other hand, if the theory propounded by the plaintiff and accepted by the jury is correct, the only negligence which is applicable is that relating to leaving the cover off the machine by Werlich until he had ascertained that the machine was going to operate properly. Even in that view of the case I think I should accept the findings of the jury, leaving it to an Appellate Court to interfere.

The defendants' counsel pressed strenuously for a nonsuit, upon the ground that the only fair inference from the evidence was that the accident was occasioned by Falconer's own conduct in endeavouring to hold the belt in place upon

the free pulley while it was being replaced by Werlich upon the moving pulley below.

Accepting the principle laid down in *Sims* v. *Grand Trunk*, 10 O. L. R. 330, and in *Jones* v. *The Toronto & York Rly.*, 21 O. L. R. 421, this case cannot be said to fall within any of the exceptions to the general rule that the question of contributory negligence is one for the jury.

For the benefit of any Court dealing with matter, I may say that the impression made upon my mind as to what really happened was this: Falconer probably took the stick produced, and held the belt upon the free pulley. As Werlich had passed the belt down on the wrong side of the moving pulley below, as soon as he placed it upon the moving pulley it would immediately pass over on to the fixed pulley above. The effect of this was to cause the wooden pulley to rotate instead of remaining stationary. This wooden pulley then struck the stick, jerked it out of Falconer's hands, threw it violently upon the box, and it then rebounded and struck Falconer. Falconer would be standing in such a position that the stick, when jerked from his hands, would be thrown away and would only reach him upon a rebound; and the break in the walls of the cover indicated that there had been such a rebound.

I allowed an amendment, by permitting the plaintiff to set up the negligent placing of the belt on the wrong side of the pulley upon the main shaft; as, while this was not set up in the pleadings or particulars, it was developed in the course of the evidence of the defendants' employees and witnesses.

Judgment will therefore go for the amount awarded, $1,650; (apportioned $500 to the infant son, which amount must be paid into Court, and $1,150 to the widow.) and costs.

MASTER IN CHAMBERS. JANUARY 28TH, 1913.

BANK OF HAMILTON v. BALDWIN.

4 O. W. N. 729.

Process—Writ of Summons—Motion to Set Aside—Issued in Name of Deceased Sovereign—Not a Nullity—Con. Rule 1124—Amendment—Costs.

MASTER IN CHAMBERS, *held*, that a writ of summons, issued in the name of a deceased sovereign, is not a nullity, and refused to set aside an *ex parte* order amending the same.

Biggar v. *Kemp*, 12 O. W. R. 863, followed.

This action is brought on a judgment dated 5th December, 1892. The writ was issued only on the 4th December, 1912, barely in time to bar the Statute of Limitations. This may account for the writ issuing as a command from His late Majesty King Edward the Seventh, who departed this life on 6th May, 1910.

The error escaped the notice of the Local Registrar. When it first dawned on the plaintiffs' solicitors does not appear.

But on 14th January inst., after service of the writ in its original form, but before the time for appearance had expired, an *ex parte* order was made by the L. J. to amend by " inserting the words 'George the Fifth' in the place and stead of 'Edward the Seventh.' "

This order was served on defendants on 15th January—and two days later the defendants moved to set aside the writ as a nullity and the amending order as having been made ex parte. It was conceded that unless the writ was a nullity nothing would be gained by setting aside the order to amend.

S. H. Bradford, K.C. for defendants.

M. Lockhart Gordon, for plaintiffs.

The mistake would seem one almost impossible to occur had it not been for the similar instance to be found in *Biggar* v. *Kemp*, 12 O. W. R. 863 and cases there cited. It is pretty safe to say that the case of *Drury* v. *Davenport* (1837), 6 Dowling 162, would not be followed at the present day.

As long ago as 19 Vict. ch. 43, secs. 37 and 38, very wide powers of amendment were given, being found later as secs. 48 and 49 of the C. L. Procedure Act, Con. Stat. of U. C. ch. 22. If the argument in support of the motion was pushed to its extreme limit all writs issued under any other name than that of Queen Victoria would be void unless protected by C. R. 1224 as no doubt they are—the concluding words shew this motion cannot succeed unless the variance from the fact is "matter of substance." The effect of my decision in *Biggar* v. *Kemp, supra,* by which I am bound, is that the amendment was properly made in this case.

These mistakes are not to be condoned always and as a matter of course. But here it will be a sufficient penalty if defendants are left to bear their own costs.

If defendant wishes to carry the matter further the time for that purpose can be extended if necessary.

These cases seem to shew that it would be economy in the long run to destroy old forms.

HON. MR. JUSTICE KELLY. JANUARY 28TH, 1913.

GRAYDON v. GORRIE.

4 O. W. N. 704.

Vendor and Purchaser—Specific Performance—Term of Mortgage—Claim that no Agreement as to—Waiver—Evidence.

KELLY, J., gave judgment for plaintiff in an action for specific performance of an agreement to sell certain lands, finding adversely to defendant's contention that the parties were never "*ad idem*," as to the term of the mortgage.

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

W. Proudfoot, K.C. for plaintiff.

J. A. Rowland for defendant.

HON. MR. JUSTICE KELLY:—The only point in dispute, is as to the length of the term of the mortgage which was to be given to the vendor for part of the purchase-money, and by reason of this the defendant contends a valid contract was not entered into.

Plaintiff signed and delivered to the agents with whom the property had been listed for sale, an offer to defendant to purchase, and McLaren, a clerk from the agents' office, submitted it to the defendant, who returned it on the following day and gave instructions for changes in the price, the amount of cash payment, the amount of the mortgage, and as to making the instalments of principal and interest payable yearly instead of half-yearly.

These alterations were made by McLaren, and the offer was again taken by him to the plaintiff who initialled the alterations. All this took place about April 26th and 27th. Plaintiff and McLaren both say defendant signed

the acceptance after these changes were made and before they were initialled by plaintiff, and McLaren adds that defendant initialled them at the time he signed the acceptance. Plaintiff also says that when the offer was brought back to him to have the alterations initialled, they had been initialled by the defendant. Defendant on the other hand says, that he did not sign the acceptance until after plaintiff had initialled the alterations, and that, just before signing, he himself further altered the offer by making the term of the mortgage three years instead of five years.

His contention now is that at no time did he agree to a five year term, and that not having signed the acceptance until after he made the alteration from 5 years to 3 years, and which he maintained was made after plaintiff had initialled the other changes, he and plaintiff were never agreed upon that term.

In this I think he is mistaken. My view is that the change from 5 to 3 was made after both parties had signed. It may be that defendant afterwards wished to have a three year term and he may have made the alteration in that respect with a view to having plaintiff agree to it; but that under the circumstances could not have assisted him, for the alteration was so indistinctly made as to render it almost, if not altogether impossible, for anyone, on the closest examination of the document, to determine whether in its present condition it reads 5 or 3 years, it can as readily be read one way as the other.

But whatever question there may have been of defendant's right to object on the ground of want of agreement on the term of the mortgage, that was set at rest by what followed the signing.

About April 30th defendant called at the agent's office and stated that a copy of the original offer, supplied to his solicitor, drew his attention to the five year term, to which he objected; and later on he again referred to this and expressed his unwillingness to complete the sale with that term. By that time he appears to have come to the conclusion that the property was worth more than he had sold it for, and he was anxious to be released from the contract. Plaintiff then offered to make the term of the mortgage 3 years, but defendant refused. I have some doubt as to whether he had much faith in his objection, for notwithstanding that he did so object, the usual procedure for

completing te transaction was gone on with by the solicitors for both parties. Requisitions on title was delivered by plaintiff's solicitors, and correspondence passed between them and defendant's solicitor about these requisitions and the inspection of defendant's title deeds. A draft deed was prepared by defendant's solicitor and submitted to plaintiff's solicitors for approval; it was approved and returned, and was then engrossed and signed by defendant and his wife. A draft mortgage was also prepared by the plaintiff's solicitors and sent to defendant's solicitor for approval. The deed was made to plaintiff's wife, and the mortgage was drawn from her. This would indicate that something must have passed between the solicitors by which this change in the parties was brought about, and that there was then no question of not carrying out the agreement. The draft mortgage was returned to plaintiff's solicitors on Saturday, May 11th with the statement that it was neither approved nor disapproved. At the time of its return, a clerk from the office of defendant's solicitor tendered the deed to plaintiff's solicitors, and the mortgage being immediately engrossed and executed, and the plaintiffs' solicitors having with them the mortgage and the money to make the cash payment, again met defendant's representative. Again something was said about the term of the mortgage, defendants 'representative saying his instructions were to close the transaction only on the mortgage being made to mature at 3 years instead of 5. Plaintiff's solicitors then offered to make the term three years if the original contract so stated it, and they and defendant's representative and defendant went to the registry office to examine the original. It was then agreed to defer completing the transaction until the following Monday and there was no question of its not then being carried out, but when that time arrived defendant's solicitor refused to complete it.

My view is that the contract is enforceable and that it should be enforced, but as the purchaser both the day on which the deed was tendered, and before that date, and also at close of the trial, offered to make the term of the mortgage three years, that, instead of five years, will be its term if defendant now so desires it.

Judgment will be that the contract be so enforced, with costs payable by the defendant.

If any question arise as to the adjustment or settling the details it can be referred to the Master in Ordinary; the costs of any such reference being reserved until after the Master has made his report.

DIVISIONAL COURT.

JANUARY 27TH, 1913.

AUTOMOBILE SALES LIMITED v. MOORE.

4 O. W. N. 700.

Sale of Goods—Partial Failure of Consideration—Defective Condition of Motor Car—How far a Defence to Action—Damages—Costs.

Action upon a promissory note given in part payment for a motor car. The defence was the defective condition of the car.

MORGAN, Co.C.J., dismissed the action, upon the finding of the jury that the car was defective.

DIVISIONAL COURT, *held*, that "partial failure of consideration is a defence, *pro tanto*, against an immediate party, when the failure is an ascertained and liquidated amount, but not otherwise."

Georgian Bay Lumber Co. v. *Thompson*, 35 U. C. R. 64, and *Goldie* v. *Harper*, 31 O. R. 284, followed.

Appeal allowed, without costs. Judgment entered for plaintiff, with costs, as of an undefended issue, and for defendants for $200, upon their counterclaim, with costs of such issue.

Appeal from the judgment at the trial of action with a jury before his Honor, Judge Morgan, Junior Judge of the County of York.

In substance, the action was upon a promissory note dated the 25th April, 1912, made by defendant A. H. Moore, payable five days after date.

This note was given in part payment for an automobile purchased by the defendant Ida Moore, under a written contract dated April 18th, 1912, which called for the payment of six hundred dollars cash upon the delivery of the car.

When the note matured on the 3rd of May Ida Moore gave her cheque for the amount. Payment of this cheque was stopped.

The contract is in the words following: "I hereby place my order for one Guy car as seen . . . car to be put in good running order. Price $1,000. Deposit, $100. Date of delivery, when ready. Terms, $600 on delivery of car, balance note for three months, 6 per cent."

When the car was delivered the note was given in lieu of the cash payment. Complaint was made that the car had not been placed in good running order; and upon the evidence it appeared that this complaint was well-founded. The experts called for the defence placed the amount necessary to make the car satisfactory, at various sums, the highest being two hundred dollars.

The appeal to Divisional Court was heard by HON. MR. JUSTICE MIDDLETON, HON. MR. JUSTICE LENNOX and HON. MR. JUSTICE LEITCH.

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

G. N. Shaver, for the defendants.

HON. MR. JUSTICE MIDDLETON:—The trial was allowed to proceed without any discussion of the law applicable; and apparently the case went to the jury as though the sole issue was whether the car had been placed in good running order.

The learned Judge said at the close of his charge: "If you find as a fact that the machine was defective when it was delivered to the Moores and that they are therefore not bound to take it, then you will find a verdict for the defendants; and you will also find a verdict for them for the hundred dollars they had paid. On the other hand, if you find the machine was in good condition and you think the plaintiff ought to recover, you will give a verdict for $615."

On this, the jury found for the defendants; and judgment has been entered dismissing the action and for the recovery by the defendants of the hundred dollars paid.

We do not think that this can stand. The rule is stated in Chalmers 6th ed. p. 99, thus "Partial failure of consideration is a defence *pro tanto* against an immediate party when the failure is an ascertained and liquidated amount, but not otherwise."

This is in accordance with the law laid down in our own Courts in many cases. See, for example, the *Georgian Bay Lumber Company* v. *Thompson,* 35 U. C. R. 64. That case was a declaration upon a promissory note; plea, that the note was given on the purchase of a timber license and that the contract was based upon the fraudulent assertion on the part of the vendors that they had the right to cut the hardwood timber. Upon demurrer the

plea was held bad, as it shewed "only a partial failure of consideration and not of any definite sum."

Sir Adam Wilson exhaustively reviews the earlier cases. *Goldie* v. *Harper*, 31 O. R. 284, is also in point. Meredith, C.J., says: "It appears to be clear at law, unless there is a total failure of consideration or unless there is a partial failure as to something that is ascertained and liquidated, the partial failure of consideration is no answer to an action upon the note.

We think justice can best be done in this case by directing that the plaintiff recover upon the note and cheque in question, with costs as of an undefended action upon a promissory note, and that the defendants be awarded two hundred dollars, the maximum sum named by the witnesses called, as damages upon the counterclaim, with the costs incident to the issue as to the defective condition of the machine, including therein the costs of the trial; and that there should be no costs of this appeal.

HON. MR. JUSTICE LENNOX and HON. MR. JUSTICE LEITCH agreed.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JAN. 27TH, 1913.

SNELL v. BRICKLES.

4 O. W. N. 707.

Vendor and Purchaser—Specific Performance—Attempted Rescission—Duty to Tender Conveyance—Terms of Contract — General Rule Negatived—Conduct of Parties—Death of Party after Trial and before Judgment—Con. Rule 394.

FALCONBRIDGE, C.J.K.B., *held*, in an action for specific performance of an agreement to sell certain lands, that, upon the reading of the whole contract, it was the vendor's duty to prepare and tender the conveyance, and that, not having done so, he was not justified in assuming to rescind the contract.

Judgment for plaintiff, with costs.

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

J. E. Jones, for defendant.

Action by purchaser for specific performance of an agreement to sell certain lands, tried before me without a jury at Toronto on November 26th, 1912.

I am informed that since the argument in this case the defendant has departed this life. I have not yet been

notified of probate of will or order or revivor, but it appears that in such a case no order to continue proceedings is necessary to enable the Court to give judgment, and the judgment may be pronounced and entered as of the date on which the argument took place. Con. Rule 394, Notes in H. & L. 603, and cases there cited.

It is an action for specific performance, the defence being that time was of essence of the contract, and that plaintiff neglected to close the transaction on the proper date, whereupon the defendant assumed to rescind the contract.

The transaction was not closed on account of the illness of the plaintiff's solicitor and his consequent absence from his office on the date of closing, and the day preceding.

The plaintiff replies that he accepted the title to the lands and that it was the duty of the defendant on or prior to the 15th March to tender to plaintiff a properly executed conveyance thereof with a mortgage drawn on defendant's solicitors' usual form or, at any rate, to have supplied such form as required in and by the terms of the said agreement.

The clause of the contract is as follows:—

. . . "for the price or sum of seven thousand five hundred dollars	$7,500
payable as follows: Five hundred dollars	500
paid to G. W. Ormerod, as deposit accompanying this offer, to be returned to me if offer not accepted, two thousand dollars	2,000
to be paid upon the acceptance of title and delivery of deed, and give you back a first mortgage on the property for the remainder, re-payable in 5 years from the date of closing	5,000
	$7,500

with interest from date of closing at 6 per cent. per annum payable half-yearly, said mortgage to be drawn on the vendor's solicitor's usual form."

The general rule in the absence of other provisions is that the purchaser prepares the conveyance at his own expense. *Foster* v. *Anderson* (1907) 15 O. L. R. at p. 371; *Stephenson* v. *Davies,* (1893) 23 S. C. R. 629, 633. But I think that here, the reading of the whole clause is that it was the duty of the defendant to prepare and tender

to plaintiff the conveyance. And I think defendant's solicitors recognized that duty, because on the 21st February they wrote to plaintiff's solicitors enclosing a draft deed for approval, and on the following day they wrote enclosing a corrected description of the lands to be conveyed.

I am of the opinion, therefore, that the plaintiff is not in default so as to entitle the defendant to invoke against him the clause in question.

The result is that the usual judgment for specific performance will be directed with costs of action, and a reference to the Master to settle the conveyance, if the parties cannot agree. There will be three months' stay from the date of the argument (26th November, 1912.)

HON. MR. JUSTICE LENNOX. FEBRUARY 6TH, 1913.

SINGLE COURT.

JANUARY 30TH, 1913.

RE CAMPBELL.

4 O. W. N. 760.

Will—Construction—Reference to Charge—No Creating Section—Reference Ignored—Direction for Creation of Trust Fund—Amount not Stated—Reference to Other Sections to Ascertain Amount—Insufficiency of Assets—Abatement.

LENNOX, J., *held*, on a motion for construction of a will, that a devise to a devisee, subject to the charge in favour of one, D. B. C., did not create a charge upon the property devised, where no charge in favour of D. B. C. was created elsewhere in the will.

That where a trust fund was directed to be created for a legatee, but the amount was not stated, other sections of the will should be looked at to discover, if possible, what amount the testatrix intended to set aside, in order that effect might be given to her wishes.

Application by executors for construction of certain clauses of the will of one Charlotte Campbell, and advice and direction. They specifically asked:—

(a) Have the trustees before payment of the general legacies to set aside any sum to form a trust fund for the benefit of Donald B. Campbell, or, in the event of the said Donald B. Campbell dying before the 1st day of August, 1920, without having been married, for the benefit of Wycliffe College, and, if so, what amount?

(b) Does Moses Bricker take the property, 265 Jarvis street, charged with the sum of $9,000, or any smaller sum, to be held in trust for Donald B. Campbell, thus exonerating the general estate of the testatrix from providing for same?

D. T. Symons, K.C., for the executors.

A. J. R. Snow, K.C., for Rev. F. Wilkinson and general legatees.

J. A. Scellen, for Moses Bricker.

R. U. McPherson, for Wycliffe College.

Donald B. Campbell although duly served, was unrepresented.

HON. MR. JUSTICE LENNOX:—Reversing the order in which the questions are put, I am clearly of opinion that Moses Bricker, in taking the property 265 Jarvis street, does not take it charged with the sum of $9,000 or any smaller sum to be held in trust for Donald B. Campbell. It is quite clear, I think, from the language of the will, that the testatrix had it in her mind that a sum of money derived in some way from her estate should be paid to Donald B. Campbell on the 1st day of August, 1920, or upon his marriage, if he marries before that date—also the income of this money while thus outstanding—and to be paid to Wycliffe College if Campbell should die unmarried before August, 1920.

Again, whether the language used is or is not sufficient to create a trust, it is reasonably clear that the testatrix proposed that the money to be devoted to this purpose should be as much as $9,000, and that this money should be so employed as to produce an income.

It is also clear upon the will that Moses Bricker was a person standing high in the confidence and regard of the testatrix.

If these conclusions are well founded and are kept in mind, it is easy to understand that a suggestion or direction as to a method of profitably and securely employing the trust funds, with possible benefit or accommodation to Moses Bricker, and not the imposition of a burden upon him, was what prompted the testatrix to insert the provisions: "I hereby authorise my trustees to lend the sum of $9,000 or any smaller sum to the said Moses Bricker on the

security of a first mortgage on my residence, 265 Jarvis street, Toronto, for a period not later than the 1st of August, 1920, the interest upon the mortgage to be at the rate of six per centum per annum, payable quarterly." "And I hereby relieve my trustees from all responsibility in connection with such loan to the said Moses Bricker if the security should for any reason prove insufficient."

But it is not easy to understand that a testatrix who has just used clear, exact, and apt expressions in charging a legacy in favour of Mildred Bell upon the same land would in the next paragraph of her will use the expressions above set out, including the exoneration of her executors from responsibility, and by it intend to charge another and larger sum upon the property of Moses Bricker; and if this property is impressed with a trust at all, it is here and by this clause and nowhere else.

I know, of course, that coupled with the devise of 265 Jarvis street is this clause; "subject, however, to the above mentioned charges on the said lands and premises in favour of Mildred Bell and also in favour of the said trust for Donald B. Campbell."

The fact that there is a definite charge in favour of Mildred Bell and that the Campbell trust is here joined with it, and the same language used is certainly significant. But a reference to a non-existent or assumed charge will not of itself constitute a charge.

There is only one other paragraph in the will referring to the matter of this trust as it affects the estate of Moses Bricker, and I will refer to it in connection with the other question. It, however, goes to emphasize what I think is already abundantly clear; that the only contemplated connection of Moses Bricker with the trust funds was as a possible borrower of the whole or a part of it; and when the testatrix refers to a charge "in favour of the said trust," I read it as reference to a mortgage charge voluntarily assumed by Moses Bricker, if assumed at all, and for which he gets an equivalent in the use of money of the estate for so long as it continues to be a charge.

Additional evidence that the testatrix did not intend to charge the Jarvis street property with this trust fund is found in the fact that the testatrix contemplated the possibility of a deficiency of personal estate for payment of the pecuniary legacies in full; and this could only be possible

if the trust fund is treated as a pecuniary legacy payable out of the general personal estate.

The next consideration is, has there been a trust created at all? I have already stated that undoubtedly the testatrix had it in her mind to establish a trust and after some hesitation I have come distinctly to the conclusion that she has used language sufficiently definite for that purpose.

That the testatrix aimed at the creation of a trust fund, and that its existence or the amount of it was not to be dependent upon whether Moses Bricker borrowed or how much he borrowed, is clear for the testatrix says: "I hereby declare that my trustees shall stand possessed of the income derived from the said investment, including the mortgage from the said Moses Bricker, upon the following trusts, that is to say: Upon trust to pay the income derived therefrom to my grandson Donald B. Campbell, quarterly until the 1st day of August, 1920, then to pay and transfer to the said Donald B. Campbell the said trust fund;" with provisions for contingencies which need not now be referred to.

Here it is clearly stated that there is to be an investment; but the amount of it has to be otherwise or elsewhere ascertained. It is stated, however, that the investment includes "the mortgage from the said Moses Bricker;" that is, that it is a part of the trust fund.

Turning back, then, I find from a clause already quoted that this mortgage, as to the times for payment of interest and the time within which the principal money must be paid, fits in exactly with the provisions in favour of Donald B. Campbell, and that any sum up to $9,000 of the funds so to be invested may be loaned to Moses Bricker.

The result as I understand is that the will shews that the testatrix intended to create a trust fund for the purposes specified; and as the trustees are authorised to loan as much as $9,000 out of this trust to Moses Bricker, the total trust investment must at least be as much as $9,000.

As to the first question, therefore, I am of opinion that the trustees must set aside a fund out of the estate of the testatrix not specifically disposed of, for the benefit of Donald B. Campbell and contingently for the benefit of Wycliffe College; and that, subject to the question of a deficiency of assets the sum to be set apart or set aside as such trust fund is the sum of $9,000.

That if the estate of the deceased not specifically devised or bequeathed after payments of the debts of the deceased and of her funeral and testamentary expenses and of the costs of administering her estate, and after payment of the pecuniary legacy of $3 per month to Bella Doherty as mentioned in the will, and after providing for payment of legacy and succession duties as mentioned in the will, is not sufficient to provide for the setting apart of the whole of this sum of $9,000, and for payment in full of all the pecuniary legacies or bequests set out or provided for in the will—other than the legacy to Bella Dougherty as aforesaid and other than the $4,000 bequeathed to Mildred Bell—which is specifically charged upon and payable out of the real estate—the said trust sum or fund of $9,000 and the said several pecuniary legacies or bequests shall all abate *pro rata*, and the sum to be set aside as a trust fund shall be $9,000, less its said proportionate abatement.

The annuity or annual payments to Sarah McGarven may delay final distribution, but can create no embarrassment, as the principles above stated apply to the fund set apart to produce income for this purpose, when it falls in.

I am not aware that anything further is desired of me. If there is, I may be spoken to before the judgment is entered up.

There will be costs to all parties out of the estate; to the executors as between solicitor and client.

HON. MR. JUSTICE LENNOX. FEBRUARY 4TH, 1913.

PRATT v. ROBERT HYLAND REALTY CO.

MOORE v. ROBERT HYLAND REALTY CO.

4 O. W. N. 771.

Fraud and Misrepresentation — Sale of Lands — Woodland Park, Wainwright, Alberta—Avoidance of Contract—Return of Moneys Paid.

LENNOX, J., set aside agreements entered into by plaintiffs with defendants, for the purchase of certain lands in Woodland Park, Wainwright, Alberta, and ordered the moneys paid thereon to be returned, on the ground that plaintiffs were induced to enter into the said contracts by gross fraud and deceit.

A. E. Fripp, K.C., for the plaintiffs.

W. J. Kidd, for the defendants.

HON. MR. JUSTICE LENNOX:—By agreement of counsel the three actions were tried together. At the conclusion of the argument, I made certain findings of fact and stated that I would deliver a considered judgment later on.

The so-called company is a partnership only. Its members are Robert Hyland and Robert Hamilton, both formerly connected with mining ventures in new Ontario. They are dealers in western lands and their energies have been chiefly directed to disposing of their holdings in a subdivided but wholly unimproved quarter section out in township 45, range 6, west of the 4th meridian, Alberta, which they call "Woodland Park, Wainwright." But this quarter section or park has no connection with Wainwright; it does adjoin it. Its southerly boundary is a half mile north of the northerly boundary of the town site, and a cultivated quarter section of farm land separates them. The lots in question are a mile and a half or two miles from the outskirts of Wainwright as it is actually built.

Yet in the printed agreements which these defendants prepared and induced the plaintiffs to sign the lots in this subdivision are described as being "in Woodland Park, Wainwright, Alberta."

These actions are brought to have the alleged agreements declared null and void, and cancelled; and to recover back the moneys paid by the plaintiffs to the defendants.

The defendants sent their agents, Bergen and Proctor, out into the county of Carleton last summer. These agents worked together as partners, and they swore that in all cases they pursued substantially the same method of introducing their business, describing the lots, defining their location, and obtaining an agreement.

The evidence in support of the actions, too, is that in bringing about the signing of the agreements in question, at all events—and evidently in other instances as well—these agents followed a regular and definite system or method of procedure; but this evidence, if believed, establishes not the uniformly honest disclosure deposed to by the agents, but a uniform and deliberate system of deceit and misrepresentation. I leave aside, however, the testimony of the two Goods and McNeice, as I find ample evidence to enable me to decide these cases without taking their testimony into account at all.

The plaintiffs in these actions appeared to be exceptionally respectable and trustworthy men. I am satisfied that their evidence was truthful and in all essential particulars accurate. And I can find no reason for doubting the honesty or truthfulness of Samuel Allender. His evidence is important. He heard the agreement with Moore —or the most of it—and, a little later, the whole of the agreement with Bower Pratt. He appeared to be a thoughtful, respectable youth. I think he was truthful. I accept his evidence as substantially accurate. Moore, too, was present throughout the whole of the bargaining with Bower Pratt.

I think the conclusion is irresistible that these agents were dishonest in their method of securing contracts, and dishonest, too, in giving evidence. It was argued, however, in a way which inadvertently suggested a rather sharp contrast, that the defendants at all events were honest. I cannot find much evidence of honesty. If there was fraud in procuring these agreements—and I have no doubt of it—the fraud began right in the "head office" of "the company," in the city of Ottawa. With direct information that the population of Wainwright did not exceed fourteen hundred—and it was not actually more than twelve hundred at the time—they are particular to amend exhibit 1 by pasting their name upon it in various places before they place it in the hands of their agents for distribution; but they leave unchanged the statement that in the fall of 1911 "a census taken shewed nearly 2,500 permanent residents —isn't that a wonderful growth?" They know that their subdivision and the National Park are both separated from Wainwright; but in this pamphlet, while they state that the National Park is just one mile from the town and describe it as "at Wainwright," there is no "one mile from the town" or "at Wainwright" in their own case, but "Woodland Park, Wainwright," whatever that may mean.

The same again with their printed agreement—said to have been always carefully read by intending purchasers—and in the same line is exhibit 8, always placed before purchasers describing Woodland Park as "an addition to the townsite of Wainwright."

I am not able to believe that upon fair construction "Wainwright Alberta" means Wainwright in Alberta, but yet that "Woodland Park, Wainwright" means, and was in-

tended and understood to mean, "Woodland Park outside of Wainwright," the oaths of the agents and of Hamilton to the contrary notwithstanding. And indeed the persistency with which the agents pressed the guarantee feature of the contract, and the financial standing of their company, and the ultimate absence of evidence that either Hyland or Hamilton is worth anything whatever are at least suggestive that the high sounding "Head Office" and the publication of the names of the company's bankers and solicitors were all thought-out elements in a scheme to unload practically worthless lots at fabulous figures, or, alternatively—and possibly as the main idea—to obtain a multitude of loans without valuation of the security and without investigation of any kind.

Some of these circumstances are, of course, not conclusive of dishonesty or fraud. Hamilton did not take so active a part as his partner. Even in Court, Hyland's attempt by signals to direct and control the answers of his chief witness was not the action of an honest man. In short, from first to last the honesty of the defendants or their agents was not much in evidence. On the contrary, I am convinced that the signing of the agreements in question was induced by the deliberate and systematic fraud and misrepresentation of the defendants and their agents; that these misrepresentations were not casual or impulsive, but were the result of a carefully thought-out fraudulent scheme, and that this scheme, although perhaps amplified and detailed by the two agents, originated in the Ottawa office and was initiated and at least broadly outlined when the printed forms were prepared.

As to each of the cases I find as matters of fact:

(a) That the agreement was not read over by the plaintiff nor was it in his hands until given to him for signature.

(b) That there was only one payment mentioned or provided for at the time the agreement was signed.

(c) That the other three payments now appearing on the agreement were not agreed to or discussed or even mentioned.

(d) That there was no agreement to buy land, but on the contrary the agents pretended that they could only sell an option with what they called a "turnover"—with large profits to the plaintiff.

(e) That the agents understood and agreed that the plaintiff could get his money back at any time, with interest thereon at six per cent.

(f) That the agents represented the company to be a financially strong concern.

(g) That the agents represented that the lots included in the option were upon the main street, or "Main street" in Wainwright and within a block and a half of the post office, and that the population of Wainwright was 2,500.

(The evidence as to the location was somewhat different in the case of Wesley Pratt).

(h) That in purporting to read over the agreement to the plaintiff, Bergen read it incorrectly and pretended that the paper, afterwards signed, contained the provisions to which the plaintiff had agreed.

(i) That the appointment of Bergen as plaintiffs' attorney and agent was not mentioned.

(j) That there is no evidence that the land in question is worth more than $25 an acre.

(k) That throughout the whole discussion and in obtaining the agreement, the agents intended to deceive and mislead the plaintiff, did mislead and deceive him, and knew at the time that he was being misled and deceived.

I was urged by defendants to give effect to documentary in preference to verbal evidence. I give effect to it and find in the written agreement the strongest confirmation of plaintiff's contention that the lots were always represented to be in the townsite of Wainwright. The plans, too, may be referred to.

Alternatively, also, the signed agreement is to sell lands in Wainwright. The defendants admittedly have no such lands, and the consideration for the plaintiff's promise wholly fails. That, however, is incidental. This is a case of flagrant and unmitigated fraud.

The contracts will be declared null and void and the money returned. The defendants must pay the costs in each case.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. FEBRUARY 3RD, 1913.

LONG v. TORONTO RAILWAY CO.

4 O. W. N. 741.

Negligence—Fatal Accidents Act—Pedestrian Killed by Street Car—Contributory Negligence—Continuance of—Ultimate Negligence—Jury's Findings—No Evidence to Warrant—Evidence.

Action for damages for the death of plaintiff's husband, killed by a street car belonging to defendants. The jury found deceased to have been negligent in crossing the street without having looked for danger, but found that the motorman could have avoided the accident, in spite of the negligence of deceased, by putting on the brake and having the car under proper control.

FALCONBRIDGE, C.J.K.B., entered judgment for plaintiff for $4,000, upon the findings of the jury.

SUPREME COURT (2nd App. Div.), *held*, that there was no evidence to support the jury's finding of negligence on the part of defendants, and that the cause of the accident was the continuing negligence of deceased.

Appeal allowed and action dismissed, with costs.

Action by Mary Long, widow of Francis Long, for damages because of the death of her husband, who was killed by one of the defendant company's cars on Queen street, in the city of Toronto, on the evening of the third day of April, 1912. The case was tried by Chief Justice Sir Glenholme Falconbridge, with a jury, and on their answers he directed judgment to be entered for the plaintiff for the amount of the verdict, $4,000. From that judgment the defendant company appealed.

There was evidence to the following effect. shortly after eight o'clock in the evening the deceased endeavoured to cross from the south to the north side of Queen street, proceeding in a slightly north-easterly direction, and when he had about reached the north rail of the north track, was struck on the legs by the north-west corner of the car fender of a west-bound car. The effect of the impact was to take his feet from under him, causing his body to fall towards the car to the pavement, he being killed either by striking the car or the pavement.

At the place where the deceased was crossing Queen street there are two lines of railway—one, the southerly one, being used for east-bound, and the northerly one for west-bound cars. Immediately prior to the deceased stepping off the curb, at the south side of the street, an east-bound car had passed him, and a west-bound car was proceeding westerly on the northerly track; and there was nothing to prevent the

deceased, if he had looked, from observing the approaching car from the time of his leaving the curb until he stepped in front of it, but he walked across the street slowly, looking downwards, and finally stepped upon the track within ten feet of the approaching car.

The motorman was examined on behalf of the plaintiff, and testified that when about fifty yards away from the deceased he saw him leave the curb, and that he watched his movements and sounded the gong continuously from that moment until the collision; that he threw off the power shortly after the deceased stepped off the curb, and had his car under control, but did not stop it, not anticipating the deceased stepping in front of it; that when the car was about ten feet away from the deceased he, for the first time, thought the deceased might step in front of it and that he then reversed the power, and had the car under such control that it stopped within less than one-half of its length, which was about thirty feet. The deceased was not thrown forward by the collision, and his body was found lying, feet foremost, alongside the forward trucks of the standing car and slightly under the portion of it which overhung the northerly rail.

The following were the questions submitted to the jury with their answers:—

"1. Was the death of the plaintiff's husband caused by any negligence of the defendants, prior to negligence of plaintiff's husband? A. No.

2. If so, wherein did such negligence consist?

3. Was the plaintiff's husband guilty of negligence which caused the accident, or which so contributed to it that but for his negligence the accident would not have happened? A. 'Yes.'

4. If you answer 'yes' to the last question, wherein did his negligence consist? A. In not looking for a car.

5. Notwithstanding the negligence, if any, of the deceased, could the defendants, by the exercise of reasonable care, have prevented the collision? A. Yes.

6. If so, what should they have done which they did not do, or have left undone which they did do? A. By putting on the brakes and having the car under proper control.

7. Could the motorman and the deceased, each of them, up to the moment of collision, have prevented the accident by the use of reasonable care; in other words, was the negli-

gence of the deceased the contributing act up to the very moment of the accident? A. Ten say no, two say yes.

8. If the Court should, on your answers, think the plaintiff entitled to damages, what sum do you assess as damages, distributing it (2) to the mother of the deceased, aged 71 years; (b) to the wife, aged 32 years; (c) to the daughter, aged 8 years? A. Ten for $4,000."

The learned trial Judge, in explaining question 7 to the jury said: "In other words, was the negligence of the deceased the contributing act up to the very moment of the accident . . . Did, in fact, the deceased's act contribute up to the very moment of the accident . . . Did he become aware that the car was approaching, and was he able to avoid the danger? That is the sense in which that question is put . . . Now you will understand the sense in which the question is launched—that while it is true that physically, as far as his actions went, he did contribute to it up to the last moment, but did he do it in that negligent sense that he was aware that the car was approaching, and was he able to avoid the danger?"

The appeal to the Supreme Court of Ontario (second appellate division) was heard by Hon. Sir Wm. Mulock, C.J.Ex.D., Hon. Mr. Justice Sutherland, Hon. Mr. Justice Middleton and Hon. Mr. Justice Leitch.

H. H. Dewart, K.C., for the defendants (appellants.)

W. E. Raney, K.C., for the plaintiff (respondent.)

Hon. Sir Wm. Mulock, C.J.Ex.D.:—There is, I think, no evidence to support the jury's answer to question 6, to the effect that the accident could have been averted after the deceased's negligence in stepping in front of the car, by the motorman then "putting on the brakes and having the car under proper control." The evidence of the motorman that when the deceased stepped off the curb at the south side of the street he threw off the power, that it remained off from that time until the reverse power was applied, when the car was brought to a stop; that as soon as he supposed the deceased contemplated stepping upon the track he reversed the power, a method more effective in stopping the car than applying the brakes; and that he brought the car to a stop within less than half of its length is uncontradicted and its correctness not challenged, and is in material parts corroborated by witnesses who spoke

as to the movement of the car. Nor was there any attempt to shew that at this stage anything could have been done to prevent the accident happening. The motorman was, I think, justified up to a certain point in assuming that the deceased would exercise reasonable care; and nothing is shewn that would suggest a different conclusion until the deceased actually stepped upon the track.

As to the answers to questions 3 and 4, their evident meaning is that the deceased failed to exercise reasonable care, by not looking for an approaching car, and by negligently stepping upon the track and endeavouring to cross in front of it, thereby causing, or contributing to, the accident. If these answers stood alone, the plaintiff, notwithstanding the answer to question 6 even if supported by evidence, must fail, the rule being that where damages is the direct, immediate result of two operating causes, viz., the negligence of the plaintiff and that of the defendant, the plaintiff cannot recover. It was, however, argued that the answer to question 7 relieved the plaintiff of the consequences of the deceased's negligence. But there is, I think, no evidence to support the answer to question 7. The deceased was guilty of but one act of negligence, viz., endeavouring under the circumstances of this case, to cross the track almost immediately in front of the car, and its negligent character was continuous. From the time of his stepping upon the track until the accident, he in fact undertook to clear the track before the car, which was within ten feet of him, would strike him.

The evidence shews that under the circumstances the motorman used all reasonable means to avert the accident, but that it was not preventable. I, therefore, think there is no evidence to justify reasonable persons in finding, as the jury in their answer to question 7 have found, that the negligence of the deceased did not contribute to the accident up to the very moment of its happening. Thus eliminating the answers to questions 6 and 7, there remains the finding (which cannot be successfully attacked) that the deceased's negligence caused the accident.

I, therefore, think the appeal must be allowed, with costs, and the action dismissed with costs.

HON. MR. JUSTICE SUTHERLAND, HON. MR. JUSTICE MIDDLETON, and HON. MR. JUSTICE LEITCH, agreed.

HON. MR. JUSTICE BRITTON. FEBRUARY 11TH, 1913.

CHAMBERS.

RE GRAND TRUNK RW. CO. AND ASH, AND RE GRAND TRUNK RW. CO. AND ANDERSON.

4 O. W. N. 810.

Arbitration and Award—Railway Act (Dom.)—Costs of Arbitration —Offer of Damages and a Right of Way—Award not Exceeding Offer—Contestants not Entitled to Costs—Jurisdiction of Arbitrators as to Costs—Award not Appealed from—No Waiver.

Application on behalf of the Grand Trunk Rw. Co. for an order directing the taxation of their costs of certain arbitrations. The company had offered the claimants the sums of $20 and $40 damages, and a right of way over certain lands, in exchange for the lands taken. The arbitrators found that the claimants were entitled to no more than had been offered them, and assumed to award the company costs. Claimants did not appeal.

BRITTON, J., *held*, that the arbitrators exceeded their powers in awarding costs, and that, as the offer of the company was not of a definite sum of money, they were not entitled to costs under the statute, and, further, that claimants had not waived their rights to oppose the payment of costs to the company by their acquiescence in the award.

Nolin v. *Great West Rw. Co.*, [1910] 2 K. B. 252, referred to.

Application on behalf of the railway company in these two cases for orders directing the taxation of the costs of the railway company in arbitration proceedings, etc.

M. Lockhart Gordon, for the company.

J. Grayson Smith, for the land owners.

HON. MR. JUSTICE BRITTON:—The offer of the railway company, pursuant to which the arbitration was held, was not a mere declaration of willingness to pay a certain sum of money as compensation for the land the company wanted, but it was an offer to pay $40 in cash to Ash, and $20 to Anderson together with something else, in each case. The notice is set out in the award, as follows:—The railway company offered to pay the owner of said land the sum of $ and to dedicate to, and permit the use of, by the land owners, owning lands abutting upon the lane, shewn upon plan No. 135, the use of and right of way over those parts of 10 and 11, colored green, as shewn upon a plan of said lands prepared by J. W. Fitzgerald, O.L.S., dated March 22nd, 1912 . . . . in addition to the use of and the right of way over said lane on plan 135 by the adjacent land owners.

And in addition to all other rights enjoyed by them, the said adjacent land owners in respect to the said lane and for all purposes for which and to the same extent as the said lane may be used by the said adjacent land owners from time to time as full compensation for all damages, etc. . . .

This notice was accompanied by the certificate of J. W. Fitzgerald, O.L.S., that the said sum of $ and the aforesaid dedication of the land colored green was a fair compensation . . .

The offer was, in substance, the same except the amount, in each case, and was refused by each land owner. Apart from agreeing to give crossings under or over railway lands, or to make culverts and work of that kind, I know of no authority to permit a railway company or its surveyor or engineer to compel, or bind a land owner to accept some other land, or the use of some other land by way of compensation for land taken, or injured by the railway.

Arbitration followed—and an award was made by two—one dissenting and declining to sign.

The award recites, that the railway company have agreed, and by their counsel undertaken to dedicate said lands colored green on the plan of the 22nd March, 1912, and to register said plan, and if necessary to further sufficiently assure to the owners of the land abutting on the lane, shewn on said registered plan No. 135 and their assigns the use of said land colored green as a lane or right of way for the intents and purposes and to the full extent and in the manner set forth in its partly recited offer of compensation.

Then in the award itself the arbitrators say in part as follows:—"And the said railway company having agreed and undertaken with regard to the lands coloured green as is hereinbefore more fully set out, we have in making our award fully considered and given weight to such undertaking and agreement." Then the award concludes that the sum of ($40 and $20) under the circumstances set forth in the notice of offer is sufficient compensation.

I am of opinion that the present application must be refused, upon 2 grounds: (1) that the offer itself is not such an offer as contemplated by the statute. It embraces things which the landowner may not want, and which may or may not reduce the compensation the owner of the land is entitled to. Such an offer introduces into an arbitration things in the future which may never be carried out.

Section 198 compels the arbitrators to take into consideration the increased value, beyond the increased value common to all lands in the locality, that will be given to any lands of the opposite party through or over which the railway will pass, by reason of the passage of the railway . . . or by reason of the construction of the railway, and shall set off such increased value. . . . See *Nolin* v. *Great Western Rw. Co.*, [1910] 2 K. B. 252.

(2) Then I think the agreement of counsel to do something not in the original offer, and which agreement the arbitrators specially considered and on which they relied, brings this case within the authority of *Ontario & Quebec Rw. Co.* v. *Philbrick*, 5 O. R. 674, affirmed by S. C. 12 S. C. R. 288.

The arbitrators assumed to deal with the costs. That was in excess of their jurisdiction.

I am of opinion that the fact that the landowners have not appealed or moved to set aside the award does not preclude them from objecting to the payment of the company's costs of arbitration.

Motion will be dismissed, but without costs.

HON. MR. JUSTICE LATCHFORD. FEBRUARY 10TH, 1913.

ST. CLAIR v. STAIR.

4 O. W. N. 808.

Contempt of Court—Motion to Commit—Undertaking of Counsel—Breach of—Publication of Defamatory Matter Concerning Plaintiff—Payment of Costs Forthwith—Warning.

LATCHFORD, J., on a motion to commit the editor and sequestrate the assets of the publishing company, both defendants herein, of a publication which had published material defamatory of plaintiff, in breach of counsel's undertaking that such would not be done, refused to make the order sought, but warned defendants and ordered them to pay forthwith the costs of the motion.

Motion to commit defendant Rogers and to sequestrate the property of the Jack Canuck Publishing Company Limited, for contempt of Court in publishing statements defamatory of plaintiff in breach of their undertaking to refrain from such publication.

W. E. Raney, K.C., for the plaintiff.

A. R. Hassard, for the defendants, the Jack Canuck Publishing Co.

Rogers, defendant, in person.

HON. MR. JUSTICE LATCHFORD:—The defendants moved against, formally undertook by their counsel, as is stated in the orders of the 19th December, that until the trial of this action nothing would be published in their newspaper "in any way defamatory of the plaintiff or tending to prejudice the minds of the public against him."

The undertaking was given with the knowledge of Rogers, and may therefore be enforced against him by process of contempt, and against the publishing company by sequestration; the remedies invoked upon this motion. Cozens-Hardy, J., in *D.* v. *A. & Co.* (1900), 1 Ch. 484; *Milburn* v. *Newton Colliery* (1898), 52 Sol. J. 317.

The statements made by counsel for the accused at the trial of the case of *The King* v. *Stair*, as published in the newspaper of the defendants, now before me, are grossly defamatory of the plaintiff. I express no opinion as to whether the counsel who made such statements are or are not protected by the rule expressed in *Munster* v. *Lamb* (1883), 11 Q. B. D. 588. What is material is that the defendants published the language used by counsel, with other defamatory statements regarding the plaintiff, and at least one reference to the present action which could not but tend to his prejudice at the trial.

In *Rex* v. *Parke* (1903), 2 K. B. 432, Mr. Justice Wills, in delivering the judgment of the Court says:

"The reason why the publication of articles like those with which we have to deal is treated as a contempt of Court is because their tendency, and sometimes their object, is to deprive the Court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency is to reduce the Court which is to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned."

There can be no doubt upon the facts, unquestioned before me, that the defendants have acted in breach of their undertaking, and in contempt of Court. Mr. Rogers

is liable to committal, and the publishing company to a writ or order of sequestration.

On behalf of the defendants, affidavits are filed disclaiming any intention of acting in contempt of Court or in breach of the orders of December 19th. I should be the more readily disposed to credit these asseverations but for the conduct of Mr. Rogers in giving out for publication after the hearing of these motions on the 8th inst., of a summary of that part of his argument before me devoted to the denunciation of the plaintiff and his counsel.

As Mr. Rogers was a layman, I allowed him the widest latitude in opposing the motion, and did not interfere with him when his language exceeded the bounds of propriety, as it frequently did. Had I imagined that he would upon leaving my chambers have published any part of his intemperate argument, I should have restricted him closely to the issue, and not have afforded him any opportunity, under cover of a report of the proceedings, to repeat with addenda the defamatory statements he had published in his newspaper.

He has, however, expressed once more his regret, and apologised for what he considers his inadvertence.

I am a little sceptical as to his good faith; but, giving him and the defendant company credit for their professions, I do not at present make any order further than that the defendants Rogers and the publishing company pay forthwith to the plaintiff the costs of and incidental to these motions.

It is perhaps needless to express the hope that no occasion will be given for a renewal of the present applications.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. FEBRUARY 4TH, 1913.

ELLIS v. ZILLIAX.

4 O. W. N. 744.

Vendor and Purchaser—Specific Performance—Verbal Condition not Inserted in Agreement—Refusal of Plaintiff to Perform—Action Dismissed.

MIDDLETON, J., dismissed, without costs, an action by a purchaser for specific performance of an agreement to purchase certain lands, upon the ground that defendants had been persuaded to sign the agreement upon the promise by plaintiff that he would not build closer to the street than the verandah line and plaintiff was unwilling to carry out this understanding.

SUPREME COURT (2nd App. Div.), dismissed appeal, with costs.

Appeal by plaintiff from a judgment of HON. MR. JUSTICE MIDDLETON, dismissing without costs an action for specific performance of an agreement in writing dated 15th of July, 1911, for the purchase from the defendant of lot No. 14, plan No. 382, on the south side of College street in the city of Toronto, for the price of $2,600.

The appeal to the Supreme Court of Ontario (second appellate division) was heard by HON. SIR WM. MULOCK, C.J.Ex.D., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH.

John King, K.C., for the plaintiff.

E. D. Armour, K.C., for the defendant.

HON. MR. JUSTICE LEITCH:—N. B. McKibbin, a real estate agent, was authorised by the defendant to sell the property. By the terms of his written offer, the plaintiff was to take the property, subject to any covenants that ran with the land.

The deed from Elizabeth Stewart to the defendant contained a covenant that the grantee and his assigns would not erect or maintain upon the land, during a period of ten years from the 8th of June, 1908, any building or erection except one dwelling house and the usual necessary outbuildings.

The plaintiff refused to take the property with this restriction. He wanted to build stores. The defendant

objected to stores; and, after some negotiation, the agent, McKibbin, got the defendant to consent to the plaintiff building an apartment house if it was built out to the verandah line instead of to the street. The agent reported to the defendant that the plaintiff had agreed to build to the verandah line.

The agent obtained from Mrs. Stewart a consent to the building of an apartment house instead of a single dwelling. The defendant then signed a document in writing consenting to the erection of an apartment house by the plaintiff. This document was signed by the defendant, on condition that the plaintiff was to build to the verandah line only instead of the street line.

The learned trial Judge found as a fact that the plaintiff had agreed to keep his building back to the verandah line, and that the agreement was signed by the defendant on this condition.

A perusal of the evidence satisfies us of the correctness of the view taken by the learned trial Judge. The reason for building to the verandah line instead of to the street line was that this was a residential neighborhood and that to build out to the street line would injure other property in which the defendant and others were interested.

The agent, through neglect, omitted to include the condition as to building to the verandah line, in the document containing the defendant's consent to the erection of an apartment house.

When the plaintiff learned from the agent that the defendant had signed a consent to the erection of an apartment house, he proceeded to stake out lines of the excavation for the foundation, to the street line instead of to the verandah line.

The defendant prevented the plaintiff from proceeding with the work. The plaintiff is not willing to carry out the condition that he was to build to the verandah line.

The plaintiff has no right to have the part of the agreement that was reduced to writing performed, unless the condition upon which it was obtained is carried out. The learned Judge at the close of the trial so held; and, as the plaintiff was not prepared to carry out the verbal condition, the action was dismissed without costs. The laxity of the parties in connection with the transaction was in

the opinion of the learned Judge a sufficient reason for withholding costs.

The appeal should be dismissed with costs.

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

HON. MR. JUSTICE MIDDLETON. FEBRUARY 4TH, 1913.

CANADIAN PACIFIC RW. CO. v. WALKERTON.

4 O. W. N. 756.

Costs — Taxation — "Costs of and Incidental to the Reference"— Inclusion of Costs of Motion for Appointment of Referee.

MIDDLETON, J., *held*, that where an agreement provided that in case of damage claims being made, they should be determined by a Referee, to be appointed by the Dom. Ry. Board, the "costs of and incidental to the reference," included the costs of the motion for appointment of the Referee.

Re Bronson v. *Can. Atl. Rw. Co.*, 13 P. R. 440, referred to.

Appeal from taxation of costs, by the junior taxing officer, at Toronto.

A. MacMurchy, K.C. for the Can. Pac. Rw. Co.

G. H. Kilmer, K.C., for the town.

HON. MR. JUSTICE MIDDLETON:—The question raised is a narrow one, of some difficulty but of no great practical importance.

The Dominion Railway Board, in *Curry* v. *C. P. Rw. Co.*, 13 Can. Ry. Cas. 31, has determined that as a matter of general policy it will not award costs of any proceedings taken before it.

I am not concerned with the wisdom of this decision, opposed as it is to the principles laid down in other high places, see for example, the statement of Sir George Jessel, in *Cooper* v. *Whittingham* (1880), 15 C. D. 501, and in *Johnston* v. *Cox* (1881), 19 C. D. 17, and of Lord Esher in *Re Monkseaton* (1889), 14 P. D. 51.

By an agreement made the 30th day of December, 1908, the railway agreed with the town to pay the town and all persons who might be injured by the construction of a railway bridge and embankment through the town all

damages sustained from flooding which it was anticipated might be occasioned thereby; the damages to be ascertained in a summary manner by a referee to be appointed by the Board, for the purpose, upon the application of the company or the town or of any person injured.

Pursuant to this agreement an application was made to the Board and on the second of May, 1912, the County Judge was appointed referee. It was provided "that the costs of and incidental to the reference, including those of the referee, shall be in the discretion of the said referee." The referee has found damages and has awarded to the town against the railway all the costs over which he has power.

It may be that unintentionally the Board has departed from the general principle laid down in the case of *Curry* v. *C. P. R.* My function is simply to determine the meaning of the words used quite apart from any presumption arising from the general policy of the Board; and I think that the Taxing Officer was right in giving to these words a wide meaning and that they are sufficient to include the costs of the application to the Board for the appointment of the referee.

There was an agreement for a reference. The only thing to be done when a claim was made was to apply to have the referee named. It seems to me clear that the costs of this application fall within the general expression "the costs of and incidental to the reference."

In *Re Bronson and the Canada Atlantic Railway*, 13 P. R. 440, the Chancellor indicates the general principles which here apply. Upon the taxation held under his order in that case the costs of the appointment of the arbitrators were allowed as falling within the expression "all costs incidental to the arbitration."

The appeal will therefore be dismissed with costs, which I fix at $10.

G. S. HOLMESTED, K.C., FOR THE MASTER IN CHAMBERS.

FEBRUARY 8TH, 1913.

MURRAY v. THAMES VALLEY GARDEN LAND CO.

4 O. W. N. 773.

Pleading—Particulars—Rescission of Contract—Fraudulent Misrepresentations Alleged—Specific Particulars to be Pleaded.

MASTER IN CHAMBERS, *held*, that in an action for rescission of an agreement because of alleged fraudulent representations, plaintiff must give, in his statement of claim, specific particulars of the misrepresentations relied on, specifying the time, person making the same, and persons to whom the same were made.

Motion for further particulars of certain paragraphs of statement of claim.

W. J. Elliott, for the defendants.

N. F. Davidson, K.C., for the plaintiff.

G. S. HOLMESTED, K.C.:—This is an action to set aside an agreement made by the plaintiff to purchase 20 acres of land from the defendant company and to recover the purchase money paid on account, on the ground that the plaintiff was induced to enter into the contract by fraudulent misrepresentations.

In such an action a defendant is entitled to specific information as to the representations on which the plaintiff relies, a general statement that the defendant made false statements is insufficient. In the statement of claim in this case the alleged misrepresentations are stated to have been made in two ways (a) by printed pamphlets issued by the defendants and (b) by verbal statements made by the individual defendants. The plaintiff has in his statement of claim set out "certain" representations which he alleges were made verbally or in certain pamphlets which he mentions, but he does not specify which of them were made in the pamphlets and which were made verbally, or which were made by both means—neither does he specify any date when the alleged misrepresentations were made or specify the person or persons by whom the verbal misrepresentations were made. The action is also brought to recover damages for the breach of an alleged contract to take back the land and reimburse the plaintiff his outlay.

The defendants' solicitor demanded particulars of the matters referred to in paragraphs 8, 9, 10, and 17 of the statement of claim—and in answer to this demand the plaintiff has delivered particulars but the defendants' solicitor being dissatisfied therewith he now moves for an order for the delivery of particulars as required by his demand.

After a careful perusal of the particulars delivered by the plaintiff I am of the opinion that they are not a reasonable or sufficient compliance with the defendants' demand and that the defendants are entitled to particulars as demanded.

Paragraph 1 gives no information as to the person making the representation or the time when it was made, nor does it indicate what the particular representation was which induced the belief referred to in that paragraph.

Paragraph 2. This does not supply what is lacking in the particulars given in the statement of claim paragraph 11. It does not give the time the representations were made, it does not specify which of these were printed, or which were verbal, or which of these were both printed and verbal.

The defendant is entitled to a specific statement of the representations, when and by whom and how made, which the plaintiff claims to have been false. Paragraph 3 is also too indefinite and fails to supply what is lacking, in paragraph 2.

Paragraph 4 is insufficient, it does not appear whether the agreement referred to was in writing, or verbal, whether under seal, or parol; and moreover it departs from the statement of claim which sets up an individual agreement with the defendants other than the company; whereas the particulars set up an agreement with the company also.

The order for particulars as demanded must therefore go and as I think the plaintiff should have delivered the particulars when demanded—the costs must be in the cause to the defendants.

There is no affidavit shewing that the defendants' solicitors are unable to file the defence without first communicating with the defendant in England. I do not therefore think it is a case for granting any further time than a week after the particulars are delivered.

HON. MR. JUSTICE MIDDLETON. FEBRUARY 11TH, 1913.

RE UPTON.

4 O. W. N. 815.

Will — Construction — Gift to Foreign Missions of Roman Catholic Church in Canada—No Separate Canadian Church—Gift to General Church.

MIDDLETON, J., *held*, that a bequest to "foreign missions in connection with the Roman Catholic Church in Canada," should be paid to the general Roman Catholic Church, to be used for foreign missions in connection with that branch of the church which is in Canada, there being no Roman Catholic Church in Canada as a separate entity.

Motion for construction of the will of Johanna Upton, deceased.

M. K. Cowan, K.C., for the executors.

T. L. Monahan for the Roman Catholic Church.

F. McCarthy for the next of kin and heirs at law.

HON. MR. JUSTICE MIDDLETON:—Johanna Upton, in her lifetime a member of the Roman Catholic Church, by her last will, after some specific legacies, gave all the residue of her estate, real and personal "unto and for the use and benefit of foreign missions in connection with the Roman Catholic Church in Canada", and further directed her executors "to use and apply all such rest and residue of my estate in and towards the support of such foreign missions as aforesaid."

The Roman Catholic Church is a world wide body and has no separate organization for Canada. The Church in Canada is part of the parent body having its headquarters at Rome. There are not at the present time any foreign missions carried on by that portion of the Catholic Church which is in Canada. Contributions for the purpose of foreign missions are remitted to the principal officers of the Church; and the missions in all countries are carried on, as the Church in Canada itself is carried on, under the directions of the authorities at Rome.

From this it is clear that the devise in question is not aptly expressed. I think, however, that there is a sufficiently clear expression of the general charitable intention to prevent the failure of the gift.

Upon the argument both counsel seemed to assume that it was necessary that there should be foreign missions at present in existence. I do not at all agree with this. It may well be sufficient if such missions are hereafter established in connection with the Roman Catholic Church in Canada. Counsel for the Roman Catholic Church intimated a readiness to do everything necessary to carry the intention of the testatrix into effect, but desired that the money should be paid to the Catholic Church Extension Society of Canada, incorporated by 8 & 9 Edw. VII. ch. 70, Dominion.

I do not see my way clear to assent to this. As I read the will, the desire of the testatrix was that the money should be spent on foreign missions, that is to say, missions presumably to heathen lands; certainly outside of Canada; and the Church Extension Society is incorporated for the purpose of supporting Christian Missions and missionary schools throughout Canada.

I see no reason why the executors should not pay the money over to the proper authorities of the Roman Catholic Church; the Church undertaking on its part to apply the moneys in and towards the support of foreign missions in connection with that branch of the Roman Catholic Church which is in Canada.

It may have been the desire of the testatrix to induce the Church to connect some particular mission with the membership in Canada, and so encourage and quicken missionary zeal. No doubt that end can be brought about by the action of the Church authorities, which their counsel has said they are ready to take.

Costs of all parties may come out of the fund.

HON. MR. JUSTICE MIDDLETON. FEBRUARY 12TH, 1913.

PLAYFAIR v. CORMACK.

4 O. W. N. 817.

Discovery—Examination of Defendant—Shares in Mining Company—Dealings in—Collateral Dealings—Questions as to—Order for Re-attendance—Appeal.

MASTER IN CHAMBERS, *held* (23 O. W. R. 783), that a party must, on his examination for discovery, answer questions which may, not which must, assist the examining party, and that, consequently, where an action was brought in certain mining stock questions relative to dealings between the same parties in respect of other mining stock of the same company, were permissible.

MIDDLETON, J., *held*, that discovery was limited by the pleadings, and that the questions sought to be put were irrelevant.

Hennessy v. *Wright*, 24 Q. B. D. 445, followed.

Appeal allowed, costs to defendant Steele, appellant, in any event.

Appeal by defendant Steele from an order of the Master in Chambers, 23 O. W. R. 783, directing this defendant to attend and be further examined for discovery.

W. D. McPherson, K.C., for the defendant Steele.

H. Ferguson, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—It is a cardinal rule that discovery is limited by the pleadings. Discovery must be relevant to the issues as they appear on the record. The party examining has no right to go beyond the case as pleaded and to interrogate for the purpose "of finding out something of which he knows nothing now which might enable him to make a case of which he has no knowledge at present." *Hennessy* v. *Wright*, 24 Q. B. D. 445. Much less is it the function of discovery to extract from the opponent admissions concerning a case which he has not attempted to make by his pleadings.

Upon the record here the issues are simple. The plaintiffs say they sold to the defendants Cormack and Steele certain stocks, and that there is a balance of purchase price due to them. Cormack sets up as a defence that the purchase of stock, if made at all, was made by him upon the faith of some promise made by the plaintiffs by which they agreed to carry the stock for him without any liability on his part, and that the stock purchased was sold by the plaintiffs without authority.

Steele confines his defence within narrow limits. He was not the purchaser, and was a mere go-between, carrying certain communications from the plaintiffs to Cormack and from Cormack to the plaintiff. In this he was agent for his co-defendant, and known to the plaintiffs as agent only; and credit was given to Cormack alone. He further alleges that the suit was originally brought against Cormack alone, and that in that suit the plaintiffs, on a motion for judgment, swore that the indebtedness was the indebtedness of Cormack. He further says that he had some transactions with the plaintiffs other than those giving rise to this action, and that for these he settled and received a full discharge.

Upon the examination it appears that Steele was an officer of the mining company whose shares form the subject-matter of the action. The counsel seek to interrogate him as to his agreements with the mining company and his transactions with stock in that company. This I think is irrelevant.

The appeal should be allowed, with costs to the appellant in any event.

MASTER IN CHAMBERS. FEBRUARY 11TH, 1913.

YOUELL v. TORONTO RAILWAY CO.

4 O. W. N. 830.

Pleading—Statement of Claim—Delivery Nine Months Late—Motion to Set Aside—Action for Personal Injuries—Alleged Incompetence of Plaintiff to Instruct Solicitor—Con. Rules 312, 353—Pleading Validated—Terms.

MASTER IN CHAMBERS validated a statement of claim in an action brought for damages for personal injuries sustained in a street car accident, where the said pleading was delivered some nine months late, the excuse being that plaintiff was too nervous to give adequate instructions prior to that date.

Costs to defendants in any event of the cause.

Motion to set aside a statement of claim as being irregular, it being delivered some nine months late.

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

A. J. Thomson, for the plaintiff.

CARTWRIGHT, K.C., MASTER:—On 27th December, 1911, the plaintiff was admittedly struck and seriously injured by a car of the defendant company. On 25th January,

1912, an action was brought to recover damages for such injury, and writ served same day.

The company appeared in due course; but no statement of claim was delivered until 22nd January, 1913. This the defendant company moves to set aside, it being admittedly irregular.

The motion is supported on the ground that plaintiff has been apparently able to go about the city and visit his friends and should therefore be considered competent to give any necessary facts to his solicitors. It is further said that at the time of the accident the company had a note of a number of witnesses of the accident which occurred at 6.40 p.m. on the corner of Grace and Harbord streets; but that owing to the long delay in proceeding with the action " some of the said witnesses who are necessary and material for the proper conduct of the defence to this action have been lost track of "—a result which is almost inevitable.

The delay is explained by the affidavit of a member of the firm of the plaintiff's solicitors who says that the plaintiff is even now in such " a highly nervous condition that it is still improper to discuss the action with him to any extent."

The principle of C. R. 312 in conjunction with C. R. 353 makes it proper to validate the statement of claim even at this date giving the costs of the motion to defendant in any event. If the defendant company is now unable to find the witnesses above referred to—and if (as was stated) the conductor and motorman of the car in question are no longer in the company's service or cannot be found—the plaintiff may have to consent to a postponement of the trial until the September sittings—if the defendant company is unable to procure its witnesses in time for the coming Assizes.

HON. MR. JUSTICE LENNOX. FEBRUARY 4TH, 1913.

ROSENBERG v. BOCHLER.

4 O. W. N. 757.

Vendor and Purchaser—Objection to Title—Agreement Authorizing Agents to Sell Registered—Registry Act, 10 Edw. VII., c. 60—Cloud on Title—Removal of.

LENNOX, J., *held*, that an agreement between an owner of land and estate agents giving the latter an authority to sell on commission if registered against the land forms a cloud on the title which the vendor must remove at the instance of a purchaser.

Application under sec. 4 of the Vendor and Purchasers Act to have it declared that a certain agreement dated the 5th day of November, 1912, made between the vendor and the Queen City Realty Company, registered as No. 118685 is not a cloud upon and does not constitute a valid objection to the title to land agreed to be sold by Rosenberg to Bochler.

L. M. Singer, for the vendor.

R. S. Robertson, for the purchaser.

G. E. Newman, for the Queen City Realty Co.

HON. MR. JUSTICE LENNOX:—I cannot so declare. On the contrary I am clearly of opinion that, whatever may be the questions to be settled between the vendor and the realty company, the registered instrument referred to is a cloud upon and constitutes a valid objection to the title of the property in question. The wording of the instrument itself and sub-secs. (d) and (e) of sec. 2, and secs. 33, 35, 50, 70, 71, 72, 74 and 75 of the Registry Act, 10 Edw. VII. ch. 60, completely answer the argument of counsel for the vendor that this is not an instrument capable of being registered. And the *Ontario Industrial* v. *Lindsay*, 3 O. R. 66, cited in support of this is clearly against the vendor as it shews that an instrument improperly registered must be removed from the registry. Neither does *Re Eagin* v. *Dawson*, help the vendor. This case is more like *Baker* v. *Trusts & Guarantee Co.*, 29 O. R. 456, but clearer than the *Baker Case*. Even if the instrument in question is only a bare authority to sell upon commission, it is expressly provided for by sec. 75 and is effective for a year at all events,

and in any case, take it that it was improperly registered, still it is registered, and the company is asserting a claim, and the purchaser has actual notice of it. I have hesitated on account of the pending action for specific performance. As, however, this results from the vendor's improper threat of rescission, as the present motion is made by the vendor after action and as the disposal of this question may prevent further litigation I have decided to deal with the matters submitted in this application.

I find and declare that the instrument above referred to is a cloud and incumbrance upon and objection to the title of the lands in question and a release or discharge thereof must be procured and registered by and at the expense of the vendor.

The costs of all parties shall be paid by the vendor.

There are questions between the realty company and the vendor which the parties should have an opportunity of having inquired into before final adjustment of the account as between them. If these parties do not otherwise arrange before the order is issued the order will provide that payment of the $125 commission—undisputed—and upon payment of $200 into Court the Queen City Realty Co. will execute and deliver a release, capable of being registered, of all their claims upon the land in question.

HON. SIR G. FALCONBRIDGE, C.J.K.B. FEB. 5TH, 1913.

BARCLAY v. TOWNSHIP OF ANCASTER.

4 O. W. N. 764.

Negligence—Municipal Corporations—Non-repair of Highway—Lack of Guard-rail—Dangerous Place in Road—Evidence.

FALCONBRIDGE, C.J.K.B., gave judgment for plaintiffs, husband and wife, for $100 and $500 respectively for injuries sustained by female plaintiff by reason of the absence of a guard-rail at a dangerous spot in the highway, the carriage in which plaintiff was driving having rolled down a bank after meeting with an accident on the highway.

Kelley v. *Carrick*, 19 O. W. R. 796, referred to.

Action against a municipal corporation for damages for personal injuries, tried at Hamilton.

G. Lynch-Staunton, K.C., for the plaintiff.

J. L. Counsell, for the defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The question as to the necessity of guard rails or barriers at dangerous places along township roads has been the subject of many decisions both in the United States and in Ontario. The leading authorities up to 1906 are collected by Judge Denton in his valuable book on Municipal Negligence, pp. 113 to 120. On p. 119 he gives a summary of the test to be applied in cases of this character. I refer further to my brother Teetzel's careful judgment in *Kelly* v. *Carrick* (1911), 19 O. W. R. 796.

Every case of this kind must depend on its own particular circumstances. The defendants here urge that it is not reasonable to ask them to supply guard rails here or at like places in the township. Officials of the municipality admit that it is a rich and well-settled township, as well able, perhaps, as any township in Ontario to take care of its highways.

The photographs filed as exhibits shew that a guard rail had been erected on one side of the road a long time before this accident, and had been allowed to fall into decay.

I am of opinion, therefore, that the township is liable unless there is any defence on the ground of contributory negligence, which by the way is not specifically pleaded. I do not think that the doctrine *res ipsa loquitur* is applicable. The accident was caused by the whippletree of the buggy parting from the plate or cross-bar. The connecting link between these two objects was a bolt, and the accident was caused by the bolt giving way or coming out. The buggy was an old one, but it is sworn by both plaintiffs to have been in good condition. The horse ran off and left the female plaintiff in the buggy which at once began to move backwards down the slope of the hill until it went over the bank. It was moving back so slowly that a trifling obstruction would have arrested its course. She was alone in the conveyance and had no means of stopping or checking its backward career. She made some effort to get out but at her time of life she could not do so and if she had succeeded she might have suffered severer injuries.

I find, therefore, that the direct cause of the injury was the want of a guard rail at that point.

The road foreman swore that he called the reeve's attention to the necessity of a guard rail at that point at every meeting of the council; he said further, that this point and

another 150 yards further on, were the two worst places in the township, or at any rate on his beat.

I assess the damages to the male plaintiff at $100, and to the female plaintiff at $500, with costs of suit on the High Court scale. Thirty days' stay.

MASTER IN CHAMBERS. FEBRUARY 5TH, 1913.

BROOM v. DOMINION COUNCIL ROYAL TEMPLARS.

4 O. W. N. 773.

Pleading—Statement of Claim—Claim to Set Aside Release—Other Claims Which Release Would Bar—Con. Rules 298, 531—Motion to Strike Out Dismissed.

MASTER IN CHAMBERS *held* that a claim in a statement of claim to set aside a release did not bar plaintiff from also claiming relief in respect of matters to which the said release would be a bar.

Motion by defendants to restrict the statement of claim to an action to set aside a release given by plaintiff which as they allege is a bar to any action in respect of the other matters set out in the statement of claim, and that therefore they should not be litigated until the release has been set aside.

Lyman Lee, for the defendants.

Plaintiff in person.

CARTWRIGHT, K.C., MASTER:—The motion is based on what occurred before Hon. Mr. Justice Riddell, on 2nd October last, when plaintiff moved for an order to be allowed to proceed in an action begun on 25th October, 1899. No order has ever been issued on that application and as I understand from enquiry in the proper quarter no order was made but it was pointed out to the plaintiff as one "*inops consilii*" that it was no use to proceed with the first action in view of the release given by him on 2nd November, 1902, which must first be set aside.

This did not in any way prevent the plaintiff from bringing the present action to set aside that release and joining with it a claim to such relief as he thinks himself entitled to; if he succeeds in having the release declared void. In the very recent case of *Bristol* v. *Kennedy,* 23 O. W. R. 685,

4 O. W. N. 537, it was said: "Under our present system of pleading it is difficult to maintain an order striking out a part of a pleading." Here there is no ground for making such an order, there is nothing here calling for the application of C. R. 298.

To leave it open to plaintiff to bring another action if the release is set aside would be contrary to the very beneficial directions of the concluding part of clause 12 of sec. 57 of the Judicature Act.

The motion will be dismissed with costs to plaintiff in any event.

The defendants can still move under C. R. 531 to have the validity of the release tried out first if so advised, but I am not to be understood as recommending that course: see *Stow* v. *Currie,* 14 O. W. R. 62, 154, 248.

The defendants may have until 13th inst. to plead.

MASTER IN CHAMBERS. FEBRUARY 6TH, 1913.

RE RANKIN AND WINYARD.

4 O. W. N. 772.

Interpleader—Application for—Commission on Sale of Lands—Rival Real Estate Firms—Possible Double Liability—Dismissal of Motion.

MASTER IN CHAMBERS dismissed an application by an owner of land for an interpleader order as to a commission upon the sale of certain lands claimed by two real estate firms on the ground that there was nothing to shew that applicant was not liable to both.

Barber v. *Royal Trust*, 23 O. W. R. 31, followed.

Application for an interpleader order in respect of an agent's commission upon the sale of certain lands claimed by two firms.

K. F. Mackenzie, for the applicant.

J. Grayson Smith, for Winyard Cooch & Co.

R. H. Greer, for J. B. Levy & Co.

CARTWRIGHT, K.C., MASTER:—The affidavit of the applicant in support of a motion for an interpleader order states that on 3rd December last he agreed to sell some land in Toronto for $38,000; that this agreement was brought to him by Winyard & Co., to whom he agreed to

pay a commission of $2\frac{1}{2}\%$ if and when the sale was completed; but that subsequently and before the sale was completed the Levy Co. notified him that they were the agents who had really brought about the sale and were therefore entitled to the commission of $950.

The applicant admits that he had some conversation in September with the Levy Co. at their office in reference to a proposed buyer. Sometime before the Winyard Co. came into the matter—on the 11th January last the sale was completed. The applicant now finds two claimants for the commission and asks to be allowed interplead as to this.

The judgment in *Barber* v. *Royal Trust Co.*, 23 O. W. R. 31; 4 O. W. N. 91, (which was affirmed by Riddell, J., on 11th October last), shews that the application must be refused on applicant's admission of his promise to pay Winyard & Co. It may possibly be open to him to defeat their claim on the ground of misrepresentation as to their services, or that of the Levy Co. on the ground of no retainer by him. But it may be, as pointed out in the *Barber Case* and authorities there cited, that he is liable to both. Before committing himself to Winyard & Co. applicant should have taken an indemnity from them against any claim from Levy & Co. as was done in a case recently before me in Chambers.

The motion is dismissed with costs to Winyard & Co. fixed at $20 unless applicant wishes a taxation. The Levy Co. does not ask for costs.

HON. MR. JUSTICE KELLY. FEBRUARY 7TH, 1913.

RE SNELL AND DYMENT.

4 O. W. N. 759.

Deed—Assignment for Benefit of Creditors—Deed by Assignee—Knowledge and Assent of Creditors—Revocability—Limitations Act, 10 Edw. VII., c. 34—Vendor and Purchaser Application.

KELLY, J., *held*, upon a Vendor and Purchaser application that the creditors of one H. were not necessary parties to a deed made by H. and his assignee for creditors to one W.

An application under the Vendors' and Purchasers' Act.

The objection raised by the purchaser was that the creditors of William Hewitt were necessary parties to a convey-

ance made by him and William Thomson to one Wellstead on November 2nd, 1880. Hewitt on June 8th, 1880, granted and assigned to Thomson all his assets and effects for the benefit of his creditors, so that they should "rank thereon for their respective claims rateably and proportionally, and without preference or priority." It is contended by the vendor that Thomson had power to make the conveyance of November 2nd, with the assent or concurrence of the creditors; that from the nature of the assets assigned to him, and the purposes for which the assignment was made, a power of sale was implied.

W. A. McMaster, for the vendor.

A. C. Heighington, for the purchaser.

Hon. Mr. Justice Kelly:—The effect of the decision in *Flux* v. *Bell*, 31 L. T. n. s. 645, is that a power of sale will be implied wherever duties are imposed on the trustee, which cannot be performed without it. That may well be considered the case here. But I do not find it necessary to rest my conclusions upon that ground, for there are other reasons from which I conclude the objection to title is not well taken.

It has not been shewn that Thomson, who also executed the deed from Hewitt to him, was a creditor of Hewitt's; or that any knowledge of the deed was communicated to Hewitt's creditors, or that they assented to it. That being so that deed was revocable: *Andrew* v. *Stuart*, 6 A. R. 495; 10 A. R. 50 (referred to in *Ball* v. *Tennant*, 25 O. R., at 55).

Moreover, the purchaser is entitled to the protection given by sec. 48 of The Limitations Act, 10 Edw. VII., ch. 34.

I declare that the objection raised by the purchaser is not such as entitles her to reject the title; and, in so far as it is concerned, the vendor has shewn a good title.

There will be no costs to either party.

HON. MR. JUSTICE MIDDLETON. FEBRUARY 12TH, 1913.

YOLLES v. COHEN.

4 O. W. N. 819.

Attachment—Order for—Setting Aside—No Corroborative Affidavits —9 Edw. VII., c. 49, s. 4—Irregularity.

MIDDLETON, J., set aside an attachment order issued by the Master in Chambers upon the ground that the requirements of the Statute 9, Ed. VII., c. 49, s. 4, had not been complied with as no affidavits corroborative of that of the applicants had been filed.

Motion by defendant to set aside an attachment order issued on the 5th February, 1913, by the Master in Chambers.

Cohen, for the motion.

MacGregor, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—Upon the argument of this motion it clearly appeared that the plaintiff's proceedings were very faulty. The defendant is not in a position to avail himself of the defects appearing, as his own practice is not above reproach. His notice of motion does not comply with rule 362, in that it does not point out or mention any of the irregularities complained of.

I deal with the motion upon one ground only. The statute 9 Edw. VII., ch. 49, sec. 4, provides that the order may be made upon an affidavit by the plaintiff and upon the further affidavit of two other persons that they are well acquainted with the defendant, and have good reason to believe, and do believe, that he has departed from Ontario with intent to defraud, etc.

The application was here granted by the Master upon the plaintiff's own affidavit, without the necessary corroborative affidavits. There are, I think, made by the statute a condition precedent to the making of the order. The plaintiff now files affidavits, but I do not think this can help him. As the applicant is himself irregular, and has made no affidavit of merits, I think this affords justification for setting aside the order, as I do, without costs. This will be without prejudice to any application that the plaintiff may make for a similar order; but as counsel for the defendant stated that his client was returning to the city to-day, the order should not be made upon stale material.

HON. SIR. G. FALCONBRIDGE, C.J.K.B. FEB. 11TH, 1913.

HOODLESS v. SMITH.

4 O. W. N. 816.

Vendor and Purchaser—Covenant—Running with Land—Purchaser from Covenantor—No Right to Enforce Covenant.

FALCONBRIDGE, C.J.K.B., *held*, that where plaintiff and defendants were common purchasers from a covenantor who covenanted against building a shop on the lands in question, the covenant did not run with the land and plaintiffs could not enforce same.

Action for breach of an alleged covenant as to building running with the land, tried at Hamilton.

M. Malone, for the plaintiffs.

O'Reilly, K.C., and Hope Gibson, for the defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—At the hearing I dismissed that part of the plaintiffs' claim, which alleged that their building or property had been injured by reason of the defendants' excavation for their cellar.

As to the claim for breach of an alleged covenant running with the land in erecting a shop and flats, I fail to see how defendants' position is at all improved by Mrs. Markle procuring the conveyance to her of the 25th April, 1912, from the Cumberland Land Company, which had no longer any interest in the lands in question.

But I also am unable to find that there is here any covenant running with the land in favour of plaintiffs. They are not purchasers from the Cumberland Land Company, to whom the covenant was given, but they and defendants are purchasers from Mrs. Markle, who gave the covenant.

No case cited seems to me to have any application to the point. *Pearson* v. *Adams*, 27 O. L. R. 87, cited by plaintiffs, has just been reversed by the Appellate Division.

The merits are with the defendants. The district is not residential, and they bought without knowledge of the alleged covenant.

Action dismissed with costs. Thirty days' stay.

MASTER IN CHAMBERS. FEBRUARY 10TH, 1913.

FERGUSON v. ANDERSON.

4 O. W. N. 830.

Trial—Venue—County Court Action—Con. Rule 529 (b)—Order Made.

MASTER IN CHAMBERS changed the venue for the trial of an action from the County Court of Carleton to the County Court of the United Counties of Stormont, Dundas and Glengarry, holding that the action should have been brought in the latter Court under the provisions of Con. Rule 529 (b).

Motion by defendants to transfer action from County Court Carleton to County Court of united counties of Stormont, Dundas, and Glengarry.

J. Grayson Smith, for the motion.

J. F. Boland, contra.

CARTWRIGHT, K.C., MASTER:—The case is clearly within C. R. 529 (b). It should, therefore, have been brought in the County Court of the united counties of Stormont, Dundas, and Glengarry. See *Corneil* v. *Irwin,* 2 O. W. R. 466.

There is some inconvenience in going from Maxville, where all the parties live, either to Ottawa or Cornwall. The distance to the first by rail is 44 miles. To reach Cornwall by rail is 70 miles, as you must change to another line at Coteau Junction.

An easy solution of the matter is to grant the motion. Then the parties can drive to Cornwall, which is only 25 miles away. No doubt the Judge will accede to an application under 10 Edw. VII., ch. 30, sec. 18, to fix the trial at some time when the roads are in good condition. If there is anything like good sleighing a drive of that distance can have no terrors for farmers or other persons who live in the country.

The order must be made with costs to defendants in any event for reasons given in *Murphy* v. *Tp. Oxford,* some 16 years ago—not reported, but cited in *Brown* v. *Hazell,* 2 O. W. R. 784.

DIVISIONAL COURT.

NOVEMBER 7TH, 1912.

FEBRUARY 8TH, 1913.

WILEY v. TRUSTS AND GUARANTEE CO.

4 O. W. N. 829.

Judgment—Minutes of Settling.

DIVISIONAL COURT settled order as drafted by registrar upon judgment herein, 22 O. W. R. 625.

Motion to vary and settle minutes, of judgment, the reasons for judgment in this case being found in 22 O. W. R. 625 *sqq.*

The motion in Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON and HON. MR. JUSTICE RIDDELL.

M. Lockhart Gordon, for the motion.

W. J. Elliott, contra.

HON. MR. JUSTICE RIDDELL (7th November, 1912) :—In settling the judgment the Registrar provided for cancelling the registration of the conveyances—and that was proper. But complaint is made as to two points, one material, the other of trifling importance.

It must be obvious that if the registration were to be annulled with nothing further, the vendor might effectively dispose of the land, leaving the trustees without any but a personal remedy. This would not do. The only reason for cancelling the registration is the agreement on the part of the trustees to hold the transfers unregistered unexplained and to me inexplicable to my mind as the agreement was—and it may be added perilously near to a breach of trust as well.

But the trustees are not to be put in further peril through their ill advised act.

The second point is equally plain—the transfers must be handed to the trustees.

The form of judgment submitted by the defendants is the correct one. No costs.

The application was renewed to Divisional Court, the same counsel appearing.

HON. MR. JUSTICE RIDDELL (8th February, 1913):—There will be no change made in the direction heretofore given. "The form of judgment submitted by the defendants is the correct one."

Costs of this motion to the defendants.

DIVISIONAL COURT.

FEBRUARY 3RD, 1913.

GRAY v. BUCHAN.

4 O. W. N. 770.

Judgment—Refused to Vary—Evidence.

DIVISIONAL COURT upon further evidence refused to vary judgment herein, 23 O. W. R. 210.

Motion to vary minutes of judgment of Divisional Court.

J. J. Gray, plaintiff in person.

H. S. White, for defendants.

HON. MR. JUSTICE RIDDELL:—We give leave to the defendants to prove by affidavits an actual sale which the plaintiff says he disputes; the defendants decline the offer—and when an opportunity is once more offered them they again decline.

We did not think that under the circumstances at the trial, more proof was needed—the defendants refuse to give further proof, now and plainttiff will have full advantage of this refusal upon the appeal. But we cannot change our judgment. No costs.

HON. MR. JUSTICE MIDDLETON. FEBRUARY 6TH, 1913.

RE GILBERT.

4 O. W. N. 771.

Will — Construction — "Foundling Children" — Charitable Bequest.

MIDDLETON, J., determined whom should share in a bequest to institutions for the care of foundling children in the city of Toronto.

Motion by executors for an order determining who should take under a bequest to institutions for foundling children in the city of Toronto.

J. E. Jones, for executors.

W. B. Raymond, F. C. L. Jones, J. M. Ferguson, T. L. Monahan and S. S. Mills, for various claimants.

HON. MR. JUSTICE MIDDLETON:—On the notice of motion I have marked the names of those institutions which appear to come within the terms of the bequest. Let the money be divided among these after payment of the executors costs.

The charities so taking can pay their own costs.

Editor's Note.—The institutions declared to take under this bequest were the Infants' Home and Infirmary, the St. Vincent's Infants' Home, the Children's Home (Salvation Army), the Children's Aid Society, the Children's Aid Society of St. Vincent de Paul, the Boys' Home, the Protestant Orphans' Home, the Sacred Heart Orphanage, and the Home for Incurable Children.

HON. SIR G. FALCONBRIDGE, C.J.K.B. FEB. 8TH, 1913.

PARKS v. SIMPSON.
SIMPSON v. PARKS.

4 O. W. N. 829.

Judgment—Refusal to Vary—Costs.

DIVISIONAL COURT refused to vary judgment reported 23 O. W. R. 837.

Motion by Simpson to vary the minutes of the judgment of Divisional Court, 23 O. W. R. 837.

The motion in Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON and HON. MR. JUSTICE SUTHERLAND.

Eric N. Armour, for Simpson.

H. E. Rose, K.C., for Parks

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—Having regard to all the circumstances, and the fact that there was no appeal by Simpson from the judgment in the County Court, we do not consider it a mattter in which we should now interfere.

No costs of this application.