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CARTWRIGHT, MASTER. OCTOBER 7TH, 1907.

CHAMBERS.

WILLIAMS v. CUMMING.

Summary Judgment—Promissory Note— Action on—Defence—Indorsement by Defendants before Payees of Note —Authority of Previous Decisions.

Motion by plaintiffs for summary judgment in an action on a promissory note payable to plaintiffs and indorsed by defendants before delivery to plaintiffs, by whom it was afterwards indorsed without recourse.

W. E. Middleton, for plaintiffs.

Featherston Aylesworth, for defendants.

THE MASTER:—It was not denied that defendants might escape liability if Canadian Bank of Commerce v. Perram, 31 O. R. 116, is still binding. But it was said that this case had been overruled by Robinson v. Mann, 31 S. C. R. 484.

On looking at the report of the latter case in 2 O. L. R. 63, it appears that the doctrine of the earlier case was affirmed there, though the case was not decided on that ground. In the Supreme Court the appeal was dismissed, though the Court pointedly declined to accede to the law as laid down in the Perram case. But the appeal was not dismissed on that ground, as it would probably have been if the indorser G. T. Mann had been seeking to defeat the plaintiff's claim on the authority of the case in 31 O. R. 116. There the assignee of the insolvent plaintiff was seeking to have a chattel mortgage given to the defendant set aside, on the ground

that the defendant had never incurred any liability by his indorsement. The defendant, however, had paid the note, and had never raised any question of the right of the bank to recover from him.

It does not, therefore, seem that this is such an express overruling of the earlier decision as to preclude the defendants from raising the question again, and while the Supreme Court, as at present constituted, would, no doubt, give due consideration to what was said in Robinson v. Mann, they would not be bound to follow the view expressed.

In the head-note nothing is said about Canadian Bank of Commerce v. Perram. At the most, all that could properly be said would be that it was commented on or queried.

The defendants will, therefore, have leave to defend, but they should in every way facilitate as speedy a trial as possible, and on these terms the motion will be dismissed with costs in the cause, and defendants should plead not later than the 12th instant.

[See Slater v. Laboree, 10 O. L. R. 648, 6 O. W. R. 628.]

CARTWRIGHT, MASTER. OCTOBER 7TH, 1907.

CHAMBERS.

MARJORAM v. TORONTO R. W. CO.

RE SOLICITOR.

Costs—Settlement of Action—Payment by Defendants of Plaintiffs' Solicitor's Costs—Practice—Consent—Motion—Praecipe Order for Taxation—Offer to Pay Sum for Costs—Reference to Taxation—Costs of.

Motion by plaintiffs' solicitor for an order directing defendants to pay to him, after taxation, all such costs as plaintiffs would have to pay him, and motion by the same solicitor to set aside a præcipe order, obtained on the application of one of the plaintiffs, for taxation of the bill of costs delivered to the applicant.

J. MacGregor, for the solicitor.

Frank McCarthy, for the plaintiffs and defendants.

THE MASTER:—The action was begun pursuant to instructions and retainer on 14th August. The writ of summons was issued and served on 16th, on which day defendants were notified by plaintiffs' solicitor that he claimed a lien for his costs on any fruits of the action.

The next day defendants' solicitors wrote to plaintiffs' solicitor stating that the action had been settled, and continued: "The company, however, protected you as to your costs, if any, and if you will be good enough to forward us a memorandum of same, we will endeavour to adjust them as between yourself and defendants" (sic).

In reply plaintiffs' solicitor wrote to defendants' solicitors on 20th August, saying: "Inclosed herewith I send you a memo. of my costs as solicitor for the Majorams, amounting to $40.70. Your cheque for this will oblige."

To this no answer was sent, and on 28th August plaintiffs' solicitor wrote again asking for cheque as above.

This was not answered, but, after a third letter to the same effect, defendants' solicitors wrote on 5th September saying that the Marjorams had been in to see about the costs, and offering $15 in full without taxation.

On 6th September plaintiffs' solicitor wrote declining this offer, and asked defendants' solicitors to consent to an order for taxation, which he inclosed or sent later, and to have his bill returned so that he might add his subsequent costs and proceed in the regular way to obtain taxation.

Defendants' solicitors replied on 13th September, in a half-hearted way, speaking of raising their offer to $17.70 (apparently), but ignoring the other two requests.

Nothing further was done until, on 19th September, plaintiffs' solicitor served on defendants' solicitors a notice of motion for an order directing defendants to pay him "forthwith after taxation all such costs as the plaintiffs would have to pay" him.

On the next day defendants' solicitors took out a præcipe order, on the application of one of the plaintiffs, for taxation of the bill delivered to the applicant, and next day obtained an appointment to proceed thereon on 1st October.

Plaintiffs' solicitor thereupon moved to set this præcipe order aside, because: (1) no bill had been rendered to the applicant; and (2) because having elected, at the invitation of defendants' solicitors, to apply for an order for taxation in the cause, the præcipe order was irregular. . . . .

I think that the effect of the letter of 16th August was an admission by defendants' solicitors that defendants had in their hands money to be paid to plaintiffs in settlement of the action, from which plaintiffs' solicitor's costs were first to be satisfied. The parties not being able to agree as to the proper amount, plaintiffs' solicitor as early as 7th September was anxious to have the amount ascertained, and forwarded the necessary order for taxation, with a request that defendants would consent to it, and save the expense of a motion. This was the proper course to take, and should have been agreed to by the other side. The issue of the præcipe order was unnecessary, though not irregular, unless perhaps as made on the application of one only of the plaintiffs: see Port Hope Brewing and Malting Co. v. Cavanagh, 9 O. W. R. 974. But this point was not taken on the argument, and I refrain from any express decision upon it.

It was not necessary to move against the præcipe order, and that motion will be dismissed, but without costs; and an order will be made on the other motion referring it to one of the taxing officers to ascertain the amount due to the solicitor, consolidating with it the præcipe order, and giving the conduct of the matter to plaintiffs' solicitor, as he moved first and is the party on whom the onus lies.

The costs of this motion will be disposed of by the taxing officer in the reference, in view of the offer of defendants' solicitor of $15. The other offer was not sufficiently definite to be taken into consideration on this point.

FALCONBRIDGE, C.J. OCTOBER 7TH, 1907.

TRIAL.

FRICKER v. BORMAN.

Covenant — Restraint of Trade — "Carry on or be Engaged in Business"—Assisting Another in Business—Suspicious Circumstances — Costs.

Action for damages for alleged breaches of a covenant contained in an agreement of sale by defendant to plaintiff of a hotel business in Stratford, and for an injunction.

The covenant was as follows:—

"6. The party of the first part agrees with the party of the second part that he shall not directly or indirectly carry on or be engaged in the hotel business in the said city of Stratford."

E. Sydney Smith, K.C., for plaintiff.

J. C. Makins, Stratford, for defendant.

FALCONBRIDGE, C.J.:—I find upon the evidence that defendant did not directly or indirectly carry on or be engaged in the hotel business in the city of Stratford. He gratuitously assisted one Helm to raise money and otherwise to purchase and carry on such a business, but he neither had nor has any interest in it by way of partnership nor in any other way pecuniarily. Defendant did act as bar-tender for Helm for two months, from about 14th November to about 23rd January, and was paid $100 wages for this service, and there is nothing more due to him.

The writ was not issued until 22nd April last. The circumstances were very suspicious, and I was invited by plaintiff's counsel to find that the whole scheme was a fraudulent and colourable one, but I cannot do so upon the evidence.

Under all the circumstances, while I dismiss the action, I do so without costs.

I refer to Roper v. Hopkins, 29 O. R. 580, and cases there cited; Allen v. Taylor, 19 W. R. 556; Ross v. Anderson, 9 O. W. R. 682. The covenant in the last mentioned case was much more sweeping than the present one.

MABEE, J. OCTOBER 10TH, 1907.

TRIAL.

WILEY v. BLUM.

Principal and Agent—Agent's Commission on Sale of Mining Lands—Contract—Condition—Payment of Part of Price—Option—Abandonment.

Action to recover $150,000 as commission payable upon the sale by defendant of some gold mining properties in the Rainy River district.

G. F. Shepley, K.C., and W. J. Elliott, for plaintiffs.

I. F. Hellmuth, K.C., for defendant.

MABEE, J.:— . . . The first step will be to ascertain what the agreement regarding commission really was. There is no dispute between the parties over the fact that in certain events plaintiffs would have been entitled to be paid $150,000 commission. The vendor, Anthony Blum, and the intending purchaser, Dr. Von Hogen, were brought together by plaintiffs, and as a result the following paper was signed:—

"Toronto, 10th November, 1906.

"Mr. Hugo Von Hogen,
500, 5th Avenue, New York.

"Dear Sir: I hereby agree and bind myself, my heirs and my assigns, to sell and transfer to you and your assigns all my rights and interests in the Laurentia Mine, known as mining location H. P. 371, located as Gold Rock, Manitou regions of Rainy River district, Ontario, including about 1,000 acres of mining locations, complete as it stands and exists to-day, with a clear title in every way, for the sum of $8,000,000. Payments to be made as follows: $10,000, which will be forfeited if sale is not made as herein stipulated, upon receipt and signing of this letter, and receipt of which is hereby acknowledged; $500,000 within 5 days after the inspection of the mine by you; $2,490,000 within 30 days from date hereof, after which you can take full possession of the mine; and $5,000,000 within a year from date, or after the sum of $200,000 has been expended by you in underground work upon the property. All necessary papers to be drawn and sealed and signed immediately after the inspection of the mine.

"Very truly yours,
"Anthony Blum.

"Accepted,
"Hugo Von Hogen."

Nothing had been said about commission prior to the execution of this document, and plaintiff Harold A. Wiley says that immediately after the agreement had been made it was arranged between himself and his brother, on the one hand, and defendant and Von Hogen, on the other, that they (the plaintiffs) were to be paid $300,000 as commission,

being $150,000 in cash to be paid by defendant, and $150,000 stock in the company, which was to be arranged by Von Hogen. It is the cash payment of $150,000 that is now in question.

Defendant's version of the arrangement about the payment of commission is, that he told plaintiffs he had given Von Hogen a 30-day option, and had received a $10,000 cheque, which was to be forfeited if the payment were not made as provided for in the option; that he then asked plaintiffs what commission they expected, and was told it should be 10 per cent. on the $3,000,000 when it was paid; that Von Hogen said it might be divided, the defendant paying $150,000 cash, and he, Von Hogen, giving them $150,000 in stock; that the cash payment was not to be made until defendant received the $3,000,000; and that this was agreed to. Defendant says he has not been paid the $3,000,000; that, if he had, he would have paid the $150,000 he had agreed to pay.

So, it seems to me, the case turns upon the single point whether the agreement was for payment of the $150,000 unconditionally, or whether it was to be paid only when the $3,000,000 was received by defendant. Von Hogen was not called, and so we have the evidence of 2 only of the 4 parties to the arrangement. Plaintiffs contend that they bought about a sale of the property, and that it was no fault of theirs if the money was not paid, and that it was the duty of defendant to obtain payment. I do not think the document signed was an agreement that could be enforced against Von Hogen, and, as I read it, it seems to me a mere option for the specified time, for which Von Hogen was paying $10,000; the provision for forfeiting the cash payment if the sale was not completed would be nonsense upon any other construction, as would also be the provisions regarding the inspection of the mine and the drawing and execution of the papers immediately after such inspection.

It was known by the plaintiffs that Von Hogen was a promotor, and would have to interest capitalists in New York before a transaction of this magnitude could be completed. During the evening of the day the document was signed, Mr. Montgomery, the defendant's solicitor, was called in, and he says that in the presence of all parties, Von Hogen said he was going at once to New York to put the matter before his people, and, if they were satisfied with it, an inspection would follow, and then they would know whether the deal would go through or not. Mr. Montgomery also says

that he saw Mr. A. M. Wiley shortly afterwards, who told him he was getting a commission "on this deal if it goes through;" that it was 5 per cent. in cash upon the $3,000,000, viz., $150,000, and the same amount in stock. Mr. Montgomery saw that the stock payment was left in a manner that might lead to confusion, and saw the defendant and Von Hogen on 28th November, and again saw Mr. A. M. Wiley on the evening of the same day, and informed him that he had seen the defendant and Von Hogen, and that their understanding of the matter was that Mr. Blum was to pay him $150,000 out of the $3,000,000 cash when it was paid to him, and Von Hogen was to give him $150,000 stock in the Manhattan Cobalt Company when some $6,000,000 stock of the Laurentian Company was conveyed to the Manhattan Company. Mr. Montgomery says that he then asked Mr. A. M. Wiley if he agreed to that as being the terms of the agreement for the payment of the commission, Mr. Wiley saying he did, and that that was satisfactory, also that he (Montgomery) told Mr. Harold A. Wiley of this conversation and arrangement with Mr. A. M. Wiley, and he (Harold A.) said that any arrangement his brother made was satisfactory. Mr. Harold A. Wiley does not contradict Mr. Montgomery as to this; nor does he contradict the defendant, who stated that he (the defendant) told him on 10th November that the $150,000 was not to be paid until he got the $3,000,000 cash.

I have no alternative, therefore, but to find that this cash commission was only to be paid if the defendant got the $3,000,000, and, as he has not got it, the action cannot be maintained.

A company was organized in Ontario, and the lands conveyed to that company. Another company was organized in Maine, and the stock of the Canadian company is now held by the Maine company, in which latter company the defendant has $12,000,000 of stock, and this represents the 1,000 acres of mining land covered by the option. Von Hogen holds stock in the Maine company, and is an officer in that corporation, but I find that the defendant made no sale of the lands pursuant to the terms of the option, nor did he refuse at any time to convey according to its terms, or do anything to prevent the sale contemplated by it from being carried out.

Mr. Shepley relied upon Passingham v. Ring, 14 Times L. R. 392, but I am unable to see that it assists the plaintiff. In the Ring case the defendant continued the negotiations

with the purchaser, obtained payment of portions of the purchase money, and took the negotiations out of the hands of the plaintiff. In the present case, the bargain being for payment of commission only upon the purchase money to the extent of the $3,000,000 being received by the defendant, it seems to me he need only shew he did not receive it, and that the sale went off through no fault of his.

The evidence is not at all clear as to why the sale did not go through. The inspection of the mine was said to have been satisfactory, and it was also said the people behind Von Hogen were willing to furnish the money. However, it was not paid or tendered to the defendant, and the defendant having in no way by any conduct of his rendered the efforts of the plaintiffs abortive, the case falls within the principles of Sibbald v. Bethlehem Iron Co., 83 N. Y. 378, referred to in Adamson v. Yeager, 10 A. R. 477.

I think, however, in view of the circumstances and of the fact that the defendant obtained $10,000 by reason of the efforts of the plaintiffs, I shall not offend against the rule by withholding costs in dismissing the action.

Action dismissed without costs.

OCTOBER 10TH, 1907.

DIVISIONAL COURT.

SIMPSON v. T. EATON CO.

Easement — Light — Obstruction of Access of Light to Windows of Dwelling-house — Inconvenience — Injunction — Delay in Applying — Estoppel — Damages — Reference — Costs.

Appeal by plaintiff from judgment of BRITTON, J., ante 215.

The appeal was heard by BOYD, C., MAGEE, J., MABEE, J.

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

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

BOYD, C.:—Plaintiff has a substantial grievance, and his action should not have been dismissed. The judgment appears to err in applying the rules settled by the Courts in the case of interference with ancient lights by extension to the present case, where plaintiff's rights depend upon conveyance to him from the common owner of this lot and the adjoining lot now owned by defendants. This case is one of modern windows which are to receive such access of light as they had at the time plaintiff's lot was severed from that now owned by the adjoining proprietor. Long, the common owner of both, severed the lots by first granting, under a short form of conveyance, to plaintiff's predecessor his lot. That grant by express terms covered the lights as appurtenant or quasi-appurtenant, and, over and above that, it was subject to the well-established rule that one cannot derogate from his own grant. As applied to the case in hand, that means that Long, having conveyed this lot with house and windows in question thereon, could not, by himself or any one claiming under him, thereafter do anything on the next adjoining lot he retained, which would materially diminish the light coming to the windows. But a change has been made by defendants, who have erected a wall on their lot about twice as high as that which existed at the time of the severance. This structure has the effect of obstructing the passage of light whereby plaintiff's rooms have been darkened and artificial light has to be used early in the evening. The structure complained of occasions perceptible and material detriment to plaintiff's premises and lessens the beneficial enjoyment of them to an easily measurable extent. By this act defendants have derogated from the grant made by Long, and plaintiff has the right to complain of it.

Plaintiff's inertness has been such that defendants have changed their position; so that the proper method of relief is not by way of mandatory injunction, but by way of award of damages.

No evidence was given on this head, and, though the learned Judge has assessed the sum of $300 in case damages are to be given, I do not think plaintiff should be concluded by that, if he chooses to risk a reference. If this sum is not accepted, there will be a reference to the Master, who may then dispose of the costs of reference (having regard to the sum of $300 rejected) when he ascertains the amount

of damage. In any case plaintiff is entitled to the costs of trial and appeal.

I do not think the argument as to an outstanding mortgage at the date of the severance, material, as that mortgage was afterwards discharged. Nor do I think that proper evidence was tendered to shew that the mortgage was continued and embraced in a subsequent mortgage under which a power of sale was exercised.

The result is that the dismissal should be set aside and judgment entered for plaintiffs with costs—subject to reference as already stated.

MAGEE, J.:—I agree.

MABEE, J.:—I agree in the judgment just read, except that I think defendants, in addition to paying damages and costs, should be restrained from building the wall in question higher than it now is, or from doing any other act upon their premises in interference with plaintiff's easement of light. . . . .

BOYD, C. OCTOBER 7TH, 1907.

TRIAL.

BELLEVILLE BRIDGE CO. v. TOWNSHIP OF AMELIASBURG.

Assessment and Taxes—Toll Bridge over Navigable Water—Highway Connecting Municipalities—Interest of Bridge Company Assessable in Township in which one Half Situate.

Action for a declaration that a certain bridge owned by plaintiffs was not liable to assessment by defendants, and for an injunction, etc.

BOYD, C.:— . . . The property owned by plaintiffs is a bridge with its approaches affording a means of passage from the mainland on the Belleville side of the Bay of Quinte on the mainland belonging to the county of Prince

Edward, in the township of Ameliasburg, the defendant municipality. It is a bridge upon which toll is levied, and to which the public has right of access only upon payment of the statutory toll: 62 & 63 Vict. ch. 95, sec. 8 (D.) It is built on and over the marshes, islands, and navigable waters of the Bay of Quinte, but it is to be so used as not to interfere with navigation and other public uses of the bay: ib., sec. 10. This bridge property is, within the meaning of the Ontario Assessment Act, taxable land. By interpretation all structures and fixtures placed upon, in, over, or affixed to any public place or water, e.g., an interprovincial or an international bridge over navigable water, is land: 4 Edw. VII. ch. 23, sec. 7, sub-sec. 7 (e); Niagara Falls Suspension Bridge Co. v. Gardner, 29 U. C. R. 194.

Section 43 (2) warrants the assessment of this bridge, so far as the interest therein of the plaintiffs is concerned, leaving exempt the title and property of the Crown, as provided by sec. 35.

Section 37 of the Act has no application to this case, for here the property, though over a mile in length, is nothing in its totality but a bridge. That section applies only to a long bridge forming part of a toll road. It matters not that the Bay of Quinte, over which the bridge passes, is navigable water, forming in law a public highway; this bridge gives another right of way of legalized character, obtainable upon payment, over that water, without interfering with the absolute further rights of passage and navigation. The law on this head is all covered by Niagara Falls Park and River R. W. Co. v. Town of Niagara, 31 O. R. 29.

The situation is analogous to the conjunction of a public highway on land with a street railway running thereon or the pipes of a private gas company laid thereunder. In both cases, notwithstanding the property of the Crown in the road, taxes are levied in respect of its beneficial user by the private proprietors.

The bridge is assessable as to the half within defendants' area on its taxable value as a whole with the proper proportionment of the amount referable to the structure on the Ameliasburg side.

The action should stand dismissed with costs.

ANGLIN, J. OCTOBER 8TH, 1907.

CHAMBERS.

PETTYPIECE v. TOWN OF SAULT STE. MARIE.

Venue—Motion to Change—Convenience—Witnesses—View —Costs—Postponement of Trial.

Appeal by defendants from order of Master in Chambers, ante 536, dismissing defendants' motion to change the venue from Sandwich to Sault Ste. Marie.

Grayson Smith, for defendants.

H. E. Rose, for plaintiff.

ANGLIN, J., dismissed the appeal with costs to plaintiff in the cause.

OCTOBER 9TH, 1907.

DIVISIONAL COURT.

MILLOY v. WELLINGTON.

Husband and Wife—Criminal Conversation—Death of Plaintiff—Survival of Cause of Action—Nominal Damages—Excessive Damages—Evidence—Rule 785.

Appeal by defendant from judgment of BRITTON, J., 9 O. W. R. 749, in favour of plaintiff, upon the findings of a special jury, at a second trial, for the recovery of $500 damages in an action for criminal conversation. At the first trial plaintiff obtained a verdict for $5,000: 3 O. W. R. 561. A new trial was ordered by a Divisional Court: 4 O. W. R. 82, 8 O. L. R. 308; and this was affirmed by the Court of Appeal: 7 O. W. R. 862, 12 O. L. R. 24. The original plaintiff died on 27th April, 1905, and an order was made reviving the action in the name of the administrator of his estate, which order the Master in Chambers refused to set aside: 6 O. W. R. 437, 10 O. L. R. 641.

I. F. Hellmuth, K.C., and C. C. Robinson, for defendant.

W. R. Smyth, for plaintiff.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—This case was sent down for a new trial by the Court of Appeal in order to remedy a miscarriage of justice which arose from a verdict given for excessive damages by the jury. This disposition was made of the action at a time when the record shewed that the plaintiff had died pending action, and that it was being carried on by his personal representative under an order of revivor. Practically this settles as res judicata the question as to the right to revive this action for criminal conversation, and it also practically settles the question that more than nominal damages may be recoverable. Had there not been a right to some substantial damage as contrasted with nominal damages, for what reason was the burden of another trial thrown upon the litigants? The Court of Appeal was then in a position to say that nominal damages should be awarded, and so end the strife. But it was left open for the jury to give such damages as they might deem reasonable, having regard to all the circumstances, so long as the amount was not excessive. The first verdict of $5,000 has been reduced by the last verdict to $500, and this (after consulting the later cases) I do not think open to any objection on the ground of excess.

One salient head of substantial damages appears, viz., that the defendant, after he was aware that Mrs. Milloy was a married woman who had gone through a form of divorce, assumed the risk of going through a form of marriage, and so entered (in law) upon a course of adultery: Lord v. Lord, [1900] P. 297, 300. This was not connived at or condoned by the rightful husband—nor had there been any such abandonment of marital relations as precluded a chance or a likelihood of restoration. This view, at all events, was open to the jury, and there was no misdirection. In Keyse v. Keyse, 11 P. D. 109, an unmeritorious husband who neglected his wife, and took no care to look after her welfare, was allowed to recover £150 as solatium in this kind of action—a larger sum than that here given. I refer also to such cases as Tyard v. Tyard, 14 P. D. 45, Evans v. Evans, [1899] P. 195, and Lord v. Lord, supra, to shew that considerable latitute is given in arriving at damages in respect of matrimonial offences of this grave character.

Altogether I do not see my way clearly to intervene in the result arrived at by the jury. I perceive no error, or at least none of moment, in the rulings upon the various matters of dispute that occurred in the course of the trial—nothing that would not be covered and cured by the saving clause in Rule 785.

The judgment is affirmed with costs.

OCTOBER 11TH, 1907.

DIVISIONAL COURT.

SEGSWORTH v. DECEW.

Limitation of Actions—Claim for Payment for Services—Contract—Quantum Meruit—Solicitor—Acknowledgment—Correspondence—Costs.

Appeal by defendant from judgment of TEETZEL, J., in favour of plaintiff, a solicitor, for the recovery of $800 in an action upon an alleged contract to pay plaintiff for services rendered in connection with some property of defendants in British Columbia, plaintiff having travelled there to negotiate a sale.

The appeal was heard by BOYD, C., MAGEE, J., MABEE, J.

G. H. Watson, K.C., for defendant.

R. S. Robertson, Stratford, for plaintiff.

BOYD, C.:—Were this case before me in the first instance, I doubt whether I should hold plaintiff entitled to more than a quantum meruit for his services. The evidence is very conflicting, and it is not made clearer by the various expressions used in the correspondence which cast much ambiguity upon the method of compensation. Plaintiff claims a stated sum of $1,000 agreed upon at the outset—the whole confusion has arisen from his want of care as a solicitor in putting the bargain into writing, and in the great delay which has arisen in the prosecution of his claim. But I do not find it needful to weigh the evidence and documents

more minutely, for I think the case fails because of the defence set up under the Statute of Limitations.

To my mind there is no sufficient promise or acknowledgment in writing to take the case out of the statute. What is relied on for that purpose is the letter written by defendant to plaintiff of date 7th April, 1900. That was written in response to two earlier letters from the plaintiff to the defendant (29th March and 6th April, 1900). But the whole correspondence is to be looked at before and after, and I think the result is that the letter relied on does not refer in any way—or, if in any way, in the most ambiguous way—to the fee claimed by the plaintiff. I think the subsequent letters written by the plaintiff, particularly that of 22nd May, 1900, and that of 2nd June, 1900, shew that he did not regard the letter of 7th April as containing any allusion, much less any distinct reference, to the claim now sued upon. There were several other matters of account and claim open between the parties, and these were the things referred to in this particular letter. It appears to be altogether silent in reference to the mill property and the fee claimed in connection therewith. The word "account" which the plaintiff points to in the letter of April, as being the reference to his "fee,"" has not that meaning, as I read the letter, but refers to his account or bill for services of about $88, for the payment of which he was making insistent and repeated claims.

Apart from this main difficulty as to the acknowledgment, I doubt whether the words used, "We would like as well as you to have this account paid," amount to a plain admission of liability. (Query: Paid out of and by sale of the land?)

Altogether there seems to be no right now to bring action; but, in view of what may yet be recoverable by the plaintiff for his services, I would dismiss the action without costs.

MAGEE, J.:—I agree.

MABEE, J., for reasons stated in writing, also agreed that the appeal should be allowed and the action dismissed, and that there should be no costs.

OCTOBER 11TH, 1907.

DIVISIONAL COURT.

DEACON v. KEMP MANURE SPREADER CO.

Company — Winding-up — Ontario Joint Stock Companies Winding-up Act—Order under—County Court Judge—Jurisdiction of—Action to Set aside Order—Fraud—Collusion—Jurisdiction of High Court—Appeal to Court of Appeal.

Appeal by plaintiff from judgment of ANGLIN, J., 9 O. W. R. 965, dismissing with costs an action by a shareholder in the defendant company for a declaration that an order for the winding-up of the company, granted by the Judge of the County Court of Perth, was made without jurisdiction, and was obtained by fraud, collusion, and improper concealment of facts, and for an injunction restraining defendants from acting under the order, and especially restraining defendant Jeffrey from acting as liquidator of the company thereunder.

G. H. Watson, K.C., for plaintiff.

W. H. Blake, K.C., for the defendant company and the defendant Jeffrey.

H. E. Rose, for defendant Miller.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—The Ontario Winding-up Act assigns the duties thereunder to the County Court, and provides the means whereby the orders and decisions of the Judge may be reviewed. If an order to wind up is made in violation of the provisions of the statute, or is obtained by fraud or misrepresentation, or is otherwise open to attack, any shareholder prejudicially affected may obtain redress either by direct application to the Judge, when the order has been made ex parte as far as he is concerned, or, if made after notice to him, by way of appeal to the appellate court provided by the statute, i.e., the Court of Appeal. No jurisdiction appears to be possessed by or given to any branch of the High

Court to intervene and set aside or vacate or declare invalid what has been done by the County Court Judge under the Ontario Winding-up Act. All the matters complained of in this action are open for the consideration of the Judge of the County Court, with an appeal from his decision (if not satisfactory) to the Court of Appeal. It is incompetent for the plaintiff as a shareholder to seek relief in this Court against what has been done in the winding-up of the company by the County Court Judge. The course to be pursued when it is contended that the Judge has made a void order or is misled by fraud, etc., is considered in Re Equitable Savings Loan and Building Association, 6 O. L. R. 26, 2 O. W. R. 366. Section 27 of the Act, which enables any "party" to apply for relief, is not restricted to one who is a party to the proceeding complained of, but is to be read as including at least every member of the company who feels aggrieved. See also sec. 33; Welford v. Brogley, 3 Atk. 503; and Barber v. Osborne, 6 H. L. C. 556.

I would dismiss the appeal . . . . on this ground, with costs.

OCTOBER 11TH, 1907.

C.A.

REX v. HARRISON.

Criminal Law—Conviction—Leave to Appeal—County Court Judge's Criminal Court—Court of Record—Habeas Corpus and Certiorari—Proceedings Renewed by Certiorari and not Returned when Sentence Pronounced—Application for Reserved Case—No Substantial Wrong or Miscarriage.

Motion by the prisoner for leave to appeal from a conviction for perjury by WINCHESTER, Co.C.J., in the County Court Judge's Criminal Court for the county of York, and for an order requiring the Judge to state a case. See ante 35.

The motion was heard by MOSS, C.J.O., OSLER, MACLAREN, MEREDITH, JJ.A., and MAGEE, J.

J. B. Mackenzie, for the prisoner.

J. R. Cartwright, K.C., for the Crown.

MEREDITH, J.A.:—The prisoner, who was accused of the crime of perjury, elected to be tried without a jury, and was tried accordingly in the County Judge's Criminal Court, and was found guilty. An application was made at the trial for a reserved case, on several questions of law, but it was refused; the pronouncement of the judgment of the Court upon the prisoner was, however, postponed to enable him to appeal to this Court. An application was accordingly made to this Court for a reserved case, but that was also refused. Subsequently a writ of habeas corpus was obtained on the prisoner's behalf, in the High Court, and after that a writ of certiorari in aid, as it is called, of the habeas corpus. A return was made to the writ of certiorari, and the prisoner was brought up on the other writ, and then an application for his discharge from custody was in due course brought on. That application was refused, and the prisoner was remanded for sentence in the inferior Court, on the ground that the writ of habeas corpus, and consequently the writ of certiorari, had been improvidently issued, because habeas corpus does not lie to a court of record (ante 35). The judgment of the inferior court upon the prisoner for the indictable offence of which he had been there found guilty was thereupon moved for, and it was pronounced, without any sort of objection being made on account of the writ of certiorari or of anything that had been done under it.

The return to the writ of certiorari was never filed in the superior court, nor were any of the papers which were returned with it, nor was the writ, but these papers had not been brought back to the custody of the Clerk of the Peace when the judgment was pronounced; they were apparently yet in the hands of one of the officers of the superior court. Some time after the sentence had been so pronounced, the point in question was for the first time raised, and an application was then made for a reserved case in respect of it, which was refused, and this application is an appeal from that refusal.

It is not necessary to determine the point, but I may say that I am far from being convinced that the judgment so pronounced was invalid. The case is very different from that of a conviction of a justice of the peace brought up to the High Court and then filed, on a motion to quash it. The purposes of a writ of certiorari, issued, as this writ was, under the 5th section of the Act for more effectually securing the liberty of the subject, are by that enactment expressly

limited to the end that the proceedings may be viewed and considered, "and to the end that the sufficiency thereof, to warrant such confinement or restraint, may be determined."

Its purposes had been completely fulfilled, and, in addition to that, it had been adjudged that the writs ought never to have been issued—the provincial Habeas Corpus Act expressly excepting a court of record out of its provisions, and the inferior court in question being a court of record—and the prisoner had been sent back to be dealt with in the inferior court in the very manner which is now complained of—to be dealt with in that court just as if the proceedings there had not been wrongly interfered with and interrupted.

It is easy to understand why the authority of the magistrate should be superseded when a conviction has been brought up on a writ of certiorari, to a higher court, with a view to questioning it—the superior court having jurisdiction in the matter—and when the conviction has been filed in that court, and why it should continue superseded until the proper process or order of the superior court convey authority to the inferior court to proceed; but none of those obvious reasons are applicable to such a case as this; and it is to be observed that its having that effect is conditional upon the proper recognizances having been entered into, when that is necessary. But, however that may be, the enactment allowing an appeal to this Court provides that "no conviction shall be set aside or any new trial directed although it appears . . . . that something not according to law was done at the trial . . . unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial . . .;" and that provision plainly covers this case, the pronouncement of judgment by the trial Judge being, of course, part of the trial.

If effect were given to this application, what would be the practical result? The judgment in question would be set aside, but only to be followed by a regular return of the papers to the Clerk of the Peace, with a procedendo or otherwise to the inferior court, and a repronouncing of the sentence—a mere waste of energy and expense to no sort of practical use. That is quite without any of the purposes of allowing an appeal to this Court.

I have assumed, without considering the point, that there is a right to appeal to this Court, although there was no application either orally or in writing to the Court "during

the trial" to reserve the question now raised; and I express my own views only.

I would dismiss the application.

OSLER, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., MACLAREN, J.A., and MAGEE, J., concurred.

OCTOBER 11TH, 1907.

C.A.

REX v. EDMONDSTONE AND NEW.

Criminal Law—Motion for Leave to Appeal from Conviction at Sessions and for a Reserved Case—Indictment for Robbery and Wounding—Verdict of Guilty of Assault—Recording Verdict—Interpretation.

Motion by defendants for leave to appeal from a conviction for assault, and for an order requiring the Judge of the County Court of Wentworth, before whom at Quarter Sessions defendants were tried, to state a case for the opinion of this Court. The defendants were indicted for robbery and wounding. The jury found defendants not guilty of robbery, but guilty of assault. The verdict was recorded as one of guilty of "the assault as charged." Defendants were sentenced respectively to 30 months and 18 months in the Kingston penitentiary.

The motion was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

M. J. O'Reilly, Hamilton, for defendants, contended that there was no evidence to found a verdict for assault; that no assault was charged; and that the assault, if any, was a common assault.

J. R. Cartwright, K.C., for the Crown.

OSLER, J.A.:—I think we should direct a special case to be stated by the learned Chairman of the General Sessions

of the Peace for the county of Wentworth. The proceedings at the close of the trial, as reported and disclosed upon affidavit, leave it in some doubt whether the proper verdict was entered upon the finding of the jury, and the proper sentence passed. Enough appears to shew that the matter is one fit for discussion and further consideration, but I express no opinion whatever as to what the result ought to be. The case as stated will, no doubt, disclose fully and accurately what occurred.

MEREDITH, J.A.:—The prisoners are, in the circumstances of this case as stated upon this application, entitled to a reserved case upon the questions: (1) whether the verdict of the jury was rightly recorded; and, if so, (2) whether it was rightly interpreted and acted upon by the learned Chairman of the General Sessions of the Peace.

The case should state the circumstances under which the verdict was recorded, and the interpretation which was placed upon it for the purpose of pronouncing the judgment which was imposed on the prisoners.

The doubts are: whether a verdict of anything in addition to a verdict of assault should have been recorded; and whether the verdict as recorded imports anything more than an assault and battery such as could be included in a verdict of guilty of common assault.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

MAY 10TH, 1907.
OCTOBER 11TH, 1907.

DIVISIONAL COURT.

C. A.

HACKETT v. TORONTO R. W. CO.

Negligence—Street Railway—Injury to Infant—Contributory Negligence—Findings of Jury.

Appeal by defendants from judgment of FALCONBRIDGE, C.J., at the trial, upon the findings of a jury, in favour of the plaintiff, a boy of 11 or 12 years old, in an action for damages for injuries sustained by him owing to the negligence of defendants, as alleged.

Plaintiff was injured upon Gerrard street east, in the city of Toronto, on 23rd July, 1906, by a west-bound car, when he was attempting to cross the north track after getting off the draw-head of an east-bound car, upon which he had been "stealing a ride."

Eleven of the jurors agreed upon the following answers to the questions submitted:—

1. Q. Was the injury to the plaintiff, Gordon Hackett, caused by any negligence or unlawful act of the defendants? A. Yes.

2. Q. If so, wherein did such negligence or unlawful act consist? A. By conductor on east-bound car not being on rear of his car, considering the distance the plaintiff rode, and putting same off as he should have done; the motorman on car causing accident not ringing gong, and not having proper look-out.

3. Q. Or was the injury to Gordon Hackett caused by reason of his own negligence? A. No, considering the speed the boy acquired by getting off east-bound car, and that he was going across the street.

4. Q. Or could Gordon Hackett have by the exercise of reasonable care avoided the accident? A. (Not answered.)

Damages were assessed at $1,225.

H. H. Dewart, K.C., for defendants.

John MacGregor and E. A. Forster, for plaintiff.

The judgment of the Divisional Court (MEREDITH, C.J., TEETZEL, J., MAGEE, J.), was delivered by

MEREDITH, C.J.:—We think that no purpose would be served by taking further time to consider this case. It has been very fully discussed, and the evidence has been referred to. We think that upon the whole evidence there was nothing upon which the jury could reasonably find that the injury to the boy was caused by the negligence of the defendants.

There was evidence, we think, that could not have been withdrawn from the jury, of the defendants' omission to perform the duty the breach of which the plaintiff alleges, and that that omission constituted negligence, but that is not enough to entitle the plaintiff to recover. It must be shewn that that negligence was the effective cause of the injury to the boy.

The circumstances of the case were that the boy was a trespasser upon the property of the defendants; he was stealing a ride, sitting upon the bar behind the car, which was going in the opposite direction to the one which came in contact with him. Getting near to the place where he intended to go, he got off the car, and after, as he says, for a distance of 10 paces running with the car, holding on to some portion of it, he started diagonally across the highway and the tracks, and while doing so a car coming in the opposite direction struck and seriously injured him.

According to the strongest testimony, as I understand it, in favour of the plaintiff, he was, at the time he started to go across the track, only 10 feet away from the car that ran him down. He had then to cross the track and the devil-strip, and got, it is said, upon the other track—which would probably be a distance of 2½ feet; the car was going at the rate of 7 or 8 miles an hour, and he was running fast.

Now, it seems to me it would be most unjust, under such circumstances, to fasten upon the motorman a breach of duty because, in such an emergency—the boy coming out suddenly from a place where he was not expected to be—he did not see and immediately apply the proper remedy. The man had but two eyes; of course, he had to keep a proper look-out, but the occurrence happened in possibly the fraction of an instant, and to say that the motorman was guilty of negligence, and his employers are liable, because, in circumstances such as existed in this case, he did not see the boy and did not apply the remedy, would be, I think, practically to make the defendants insurers against any accident that happens.

The plaintiff contends that the proper inference is that if the motorman had been on the look-out he would have seen the boy and have tripped the fender, and so avoided the accident.

I think it would be mere speculation in this case to say that the tripping of the fender would have had any such effect.

It is suggested that if the gong had been rung, the boy would have been warned, and either would not have got off the draw-bar, or, if he had got off, would have looked out for the car; but his own evidence is against that view. He gave his evidence very frankly, and his testimony was that the noise was such that if the gong had been rung, he did not think he would have heard it; and his own evidence is that

he ran so fast that he could not stop, and that he did not look.

We think, on the evidence, that if anybody was to blame it was the unfortunate boy himself, and, although this is a deplorable accident, it is one for which these defendants ought not to be made liable.

It is manifest that the jury were struggling—whether against their consciences or not, it is difficult to say—to find a verdict for the plaintiff upon some ground or other. It seems an extraordinary finding that, when asked as to contributory negligence, they say there was no contributory negligence, in effect, because the boy was running so fast and crossing the street—the very thing that probably would be thought to amount to negligence is that which according to the jury excuses the negligence.

Then it is said that the principle of Lynch v. Nurdin, 1 Q. B. 29, applies, and that the boy is of such tender years that negligence is not to be attributed to him. That case has no further application than this, that where the child is of such tender years as not to appreciate the danger of what he does, contributory negligence cannot be attributed to him. That is the full extent of the doctrine of that case, and the cases that follow it. In this case, I do not think Lynch v. Nurdin applies, because the boy was not of that type; he was a bright, intelligent boy, and it is not age but intelligence that is the test in applying the principle of that case.

I think that the appeal must be allowed, and the judgment must be entered dismissing the action.

The plaintiff appealed to the Court of Appeal, and his appeal was argued by the same counsel before Moss, C.J.O., Osler, Garrow, Maclaren, and Meredith, JJ.A.

Moss, C.J.O.:—I think the appeal in this case fails, and I am satisfied to rest my opinion upon the grounds stated by the Divisional Court, which appear to me to furnish sufficient reasons against plaintiff's right to succeed.

If I thought that the decision in Preston v. Toronto R. W. Co., 13 O. L. R. 369, 8 O. W. R. 504, so strongly relied upon in argument for plaintiff, governed this case, I should feel no hesitation in applying it in plaintiff's favour. But, as I view this case, plaintiff's position is totally different to that of the plaintiff in the case cited. And I cannot bring myself to think that the answer of the jury to the third

question is anything more than an attempt to shift the blame for plaintiff's negligence upon defendants, by suggesting a cause for which they were in no way responsible.

The appeal must be dismissed and with costs, if defendants demand them.

OSLER, J.A.:—One's sympathy goes out to the unfortunate lad whose injury is the subject of this action, but it is impossible to avoid the conclusion that his own negligence was the direct cause of the accident. That it was so, plainly appears from his own evidence given very frankly and intelligently, as well as from the other evidence in the case for the plaintiff. The jury said "no" to the question whether the injury was caused by his own negligence. Even had their answer stopped there, and the reason for it been rejected, the action should have been dismissed because there was no evidence to justify it, and the facts on which the question turned were not in dispute. The second part of their answer, or the reason given for the first, shews how difficult the jury found it to justify the latter, in effect excusing the negligence which caused the accident by another act of negligence which led to it. Unless defendants are to be treated as insurers against the negligence of those who ride, legally, or, as the plaintiff was doing, illegally, upon their cars, the judgment of the Divisional Court, reversing the judgment at the trial, is right, for the reasons there given, and must be affirmed, with costs, if defendants ask for them.

MEREDITH, J.A.:—There was no reasonable evidence to support the finding that the neglect to sound the gong was the proximate cause of plaintiff's injury; and, if there had been, there was no reasonable evidence which would support any finding that plaintiff was not guilty of contributory negligence. Nor was there any evidence to support the finding of negligence on the part of the conductor of the east-bound car, or that, if there had been, that it was the proximate cause of the injury.

If this were not so, a new trial would be necessary, as there was no finding on the question as to contributory negligence.

The plaintiff, an intelligent lad of 12 years of age, in his testimony at the trial virtually admitted that the neglect

to sound the gong did not affect his actions; a thing which was very evident without it. Had he sworn to the contrary, I am by no means sure that that alone, in the face of all the circumstances of the case, would have afforded any reasonable evidence upon which plaintiff would have been entitled to go to the jury, but it is not necessary to consider that question.

The jury's excuse for the boy's negligence is an extraordinary one. They say that his negligence was not the proximate cause of his injury, "considering the speed the boy acquired by getting off the east-bound car, and that he was going across the street." That is to say, that the impetus acquired by his inexcusable wrong and carelessness in "hanging on" the draw-head of the car and getting off whilst it was in motion, excused his negligence in turning and running into a place of danger, without any sort of precaution, and whilst yet not wholly able to control his movements by reason of such impetus; or, put in other words, the natural and direct effect of plaintiff's negligence in one particular excuses his negligence in another respect.

A good deal was said about the age of the plaintiff excusing his misconduct. But the jury have given no effect to any of the contentions in plaintiff's behalf in that respect. Why should they? The things which were done and which happened were of the simplest kind. Surely such a child knew as well as any one can the dangers which he incurred, and was physically and mentally as well able to avoid them as, if not better able than, most of us.

I have no sort of doubt that the appeal must be dismissed.

GARROW and MACLAREN, JJ.A., concurred.

CARTWRIGHT, MASTER. OCTOBER 11TH, 1907.

CHAMBERS.

BROCK v. CRAWFORD.

Pleading—Joinder of Causes of Action—Claim on Guaranty—Claim to Set aside Transfers of Property—Class Suit—Election—Amendment—Lis Pendens.

Motion by defendants for an order requiring plaintiffs to elect whether they will proceed with their claim under a

certain guaranty, or with their alternative claim in the action, and vacating the registry of a certificate of lis pendens.

W. N. Tilley, for defendants.

H. Cassels, K.C., for plaintiffs.

THE MASTER:—The statement of claim is to the following effect. The defendants (other than Sutcliffe) gave to the plaintiffs in January last a continuing guaranty of the account of Crawford Bros. Limited, up to $10,000. In August that company made an assignment. At that time they owed the plaintiffs over $17,000. In May the defendants (other than Sutcliffe) transferred to him all the assets and properties belonging to them jointly in trust to raise money thereon and pay and satisfy obligations existing with respect thereto.

The statement of claim by way of relief asks: (1) payment by defendants (other than Sutcliffe) of the said sum of $10,000; (2) a declaration that they are entitled to a lien to that amount on the assets transferred to Sutcliffe by his co-defendants; (3) to have such lien realized by sale; (4) in the alternative, a declaration that the trust deed of May last is fraudulent and void as against the plaintiffs and the other creditors of the assignors and to have said trust agreement and all transfers made thereunder set aside; (5) an injunction restraining Sutcliffe from dealing in any way with the said assets.

The plaintiffs have registered a certificate of lis pendens against 4 parcels of real estate in the city of Toronto, which were conveyed to Sutcliffe by his co-defendants.

As soon as the writ was issued the defendants paid $5,500 into Court, and submit there is nothing more due.

The plaintiffs' action is not formally intituled a class action, though relief appropriate thereto is asked as above.

The statement of claim was delivered on 28th September, and the defendants on 7th October instant served notice of motion requiring plaintiffs to elect whether they will proceed with their claim under the guaranty, or with the class action, and asking to have the certificate of lis pendens vacated.

. . . .

It cannot be denied that the statement of claim really joins two separate causes of action, viz.: (1) that of the plaintiffs personally under the guaranty; and (2) the claim on behalf of themselves and the other creditors to have the transfers to Sutcliffe set aside.

The question, therefore, is, can they be joined under Rule 185? In order to do this it was said in Stroud v. Lawson, [1898] 2 Q. B. 44, that the right to relief must arise from the same transaction and involve a common question of law or fact. Both conditions must concur. Do they in this case, as set out in the statement of claim?

The plaintiffs personally are asking for payment by virtue of the guaranty, which is the basis of that claim. Should it be held not to have the effect they contend for, that claim must fail. But, even if this were so, the other branch of the claim might succeed, as no question of the guaranty can arise there.

There does not, therefore, appear any way in which it can be said that these two entirely different claims arise out of the same transaction or series of transactions. The case seems to be very similar on this point to that of Bank of Hamilton v. Anderson, 7 O. L. R. 613, 8 O. L. R. 153, 3 O. W. R. 301, 389, 709.

An order will, therefore, go requiring plaintiffs within a week to amend their writ and statement of claim so as to confine themselves to one cause of action. It will not be necessary, at present, to deal with the question of the certificate of lis pendens, as it would be properly issued in the class action. But the defendants will not be prevented from making a motion under the Judicature Act, sec. 98, if so advised, after this order has been complied with. If the plaintiffs prefer, the order now made will provide that they may deliver an amended statement of claim, if for any reason it may seem more advantageous to do so.

The costs of the motion will be to the defendants in any event.

ANGLIN, J. OCTOBER 12TH, 1907.

WEEKLY COURT.

McLEOD v. CRAWFORD.

McLEOD v. LAWSON.

Settlement of Actions—Agreement for Compromise—Summary Application to Enforce—Jurisdiction of High Court—Unperformed Terms of Agreement—Application Made after Final Judgment—No Agreement to Make Terms a Rule of Court—Terms not Included in the Relief Claimed in the Actions—Grounds upon which Motion Resisted—Perjury—Fraud—Concealment—Undue Pressure—Failure of Grounds—Costs of Application.

Motion by plaintiffs, Murdock McLeod and Donald Crawford, for an order or judgment compelling defendant Thomas Crawford to convey to the Lawson Mine Limited, pursuant to an agreement of settlement of 3rd April, 1907, a one-quarter interest in the Lawson mine, to which he remained beneficially entitled after the judgment of the Court of Appeal in these actions.

G. H. Watson, K.C., for the applicants.

S. H. Blake, K.C., for defendant Lawson.

R. McKay, for defendant John McLeod and his committee.

J. B. Holden, for defendant John McMartin.

S. R. Clarke, for defendant Thomas Crawford.

ANGLIN, J.:—These actions were brought to determine the respective interests of the parties to them in a valuable property known as the Lawson Mine.

By judgment at the trial it was determined that Murdock McLeod, Donald Crawford, Thomas Crawford, and John McLeod, were each entitled to an undivided one-quarter interest in the mine, and that Herbert Lawson had certain limited rights as a licensee. In the Court of Appeal this judgment

was affirmed as to the several interests of the parties other than Lawson, who was held to have somewhat more extensive rights than were given to him by the judgment at the trial. Appeals were taken to the Supreme Court of Canada, which came on for argument in that Court in March, 1907. After argument had proceeded for several days, the parties interested arrived at a settlement, which they embodied in the following document:—

"Ottawa, April, 3, 1907. McLeod v. Lawson. Crawford v. McLeod. Three appeals. We agree that all appeals are to be dismissed without costs here or below. We further agree to the formation of a company to take over the property at a purchase price of $5,000,000 in stock of the company at par value, the stock, after providing for working capital, to be divided between the parties in proportion to their interests as ascertained by the judgments of the Court of Appeal."

This was signed by "S. R. Clarke, J. McMartin, Thomas Crawford, C. Millar, R. McKay, counsel for John McLeod, Herbert E. Lawson, by his counsel S. H. Blake, John B. Holden, counsel for plaintiffs, and J. McMartin, Geo. W. Bedells, p. pro. C. Millar."

It is to be noted that the parties do not in terms covenant or agree to transfer or convey their respective interests to the company to be formed. But I treat the document as necessarily implying such an agreement by those of the signatories who owned the property to be taken by the company.

Pursuant to this agreement judgments were entered in the Supreme Court of Canada dismissing the appeals without costs and affirming the judgments of the Court of Appeal for Ontario.

Messrs. S. R. Clarke, Charles Millar, and George W. Bedells were assignees of portions of the interests of Thomas Crawford in the property in question, and were for that reason made parties to the agreement of settlement, though not parties to the records in the actions.

On 6th April, 1907, an agreement was entered into between Thomas Crawford, S. R. Clarke, G. W. Bedells, and Charles Millar, which recited the terms of the agreement of

settlement, and provided for the division amongst these 4 persons of the shares of stock which should come thereunder to Thomas Crawford. The agreement of 6th April further bound the several parties thereto to facilitate in every way possible the carrying out of the terms of the settlement as agreed to on 3rd April.

Subsequently, at a meeting held at the King Edward hotel, Toronto, attended by Messrs. Crawford, Clarke, Millar, and Bedells, steps were taken for the formation and incorporation of a company pursuant to the agreement of settlement, and it was further arranged that to provide working capital, 5 per cent. of the capital stock of the company should be retained as treasury stock, and not divided amongst the parties interested in the property to be transferred to the company. Neither Mr. Clarke nor Mr. Crawford expressed any dissent from these proceedings, and they were understood to acquiesce therein. Meantime the defendant John McMartin, who had been made a party to the action of McLeod v. Lawson because he held an option to purchase the interests in the property in question which belonged to Donald Crawford, Murdock McLeod, and John McLeod, had, in reliance upon the settlement of 3rd April, paid over to these persons the purchase money under his option, and had become the owner of their interests.

The Lawson Mine Limited having been incorporated with a capital stock of $5,000,000, as agreed upon, Murdock McLeod, Donald Crawford, and Thomas Harold, as committee of John McLeod, at the request of John McMartin, executed a conveyance to the company of the three-quarters undivided interests awarded to these 3 parties by the judgment of the Court of Appeal. Demand was made upon Thomas Crawford for the conveyance of his one-quarter interest, and a conveyance thereof tendered him for execution. He refused to execute the same or to accept his portion of the shares of the capital stock of the company, as agreed upon at the meeting above mentioned. . . . .

In answer to this motion counsel for Thomas Crawford set up that the judgment at the trial was obtained by perjury on the part of Murdock McLeod; that Murdock McLeod and Donald Crawford concealed from Thomas Crawford another discovery in which Thomas Crawford was interested under

their agreement with him, and that, by reason of such fraudulent concealment, Thomas Crawford is entitled to hold as sole beneficial owner the Lawson Mine property, the lease of which had been obtained in his name; that, after the judgment at the trial of these actions, Thomas Crawford obtained in his own name from the Crown a patent in fee of the property in question; that the settlement of 3rd April was brought about by undue pressure upon Mr. S. R. Clarke, one of the parties thereto claiming under Crawford, and was executed by Crawford and Clarke without their fully understanding or appreciating its purport or effect; and that the document itself is vague and uncertain and not susceptible of enforcement by the Court. He further contended that the Lawson Mine Limited were not bound by the agreement made at the King Edward hotel as to the apportionment and division of the stock; that the Court cannot decree specific performance of an agreement to form a company, and therefore should not summarily enforce this agreement of settlement; that the judgments of the Court of Appeal in these actions sustained a collateral attack on the patent of Thomas Crawford, and were, therefore, pronounced without jurisdiction; that the interest of Thomas Crawford in the property was not the subject of litigation in these actions; that one Armstrong had, to the knowledge of all the parties to the settlement of 3rd April, a claim upon the interest of Donald Crawford, and that the settlement, because made without his concurrence, was ineffectual; and, finally, that the conveyance by Murdock McLeod, Donald Crawford, and Thomas Harold to the Lawson Mine Limited amounted to an abandonment of the agreement for settlement, or, if not, that the plaintiffs, Murdock McLeod and Donald Crawford, thereby denuded themselves of all interest in the property, the subject of the litigation, and therefore have no status to maintain the present motion.

The alleged perjury of Murdock McLeod, the alleged fraudulent concealment of an adjacent discovery by Murdock McLeod and Donald Crawford, and the fact that a patent in fee had issued to Thomas Crawford, were all known to Thomas Crawford himself and to those claiming under him before the disposition of this action in the Court of Appeal. The matters in which perjury is said to have been committed by McLeod were fully gone into at the trial. The defendant

Crawford had or could have had the full benefit in the Court of Appeal and in the Supreme Court of any concealment of adjacent discoveries by his co-adventurers. The patent issued to him was, in fact, made a part of the case in appeal, and was before the Court of Appeal and the Supreme Court. With the fullest information as to all these matters, the agreement for settlement of 3rd April was entered into and executed by Crawford, and also by Messrs. Clarke, Millar, and Bedells, who claim under him. I should have no difficulty in declining to give effect to any objection to the enforcement of this agreement based upon these grounds. . .

Until the meeting at the King Edward hotel, when it was arranged that one-fifth of the capital stock should be set aside as working capital, the agreement of settlement was, perhaps, open to the objection that it was in one respect vague and uncertain. But since at that meeting the amount to be set aside for working capital was, with the concurrence of all persons interested, fixed at 5 per cent. of the total capitalization, and the respective shares of the several parties in the remainder of the shares were also agreed upon, any objection upon this ground seems to be entirely removed.

It was argued by counsel that the property covered by the agreement is uncertain, because it does not expressly include or exclude the money realized from the sale of ore and the ore still unsold in which Herbert Lawson was interested. The dismissal of the appeals to the Supreme Court and the affirmance of the judgments of the Court of Appeal, which are provided for, make it clear that Lawson retained his interest under that judgment, and that this interest was not included in the property dealt with by the agreement for settlement.

Though the Lawson Mine Limited were not bound by the proceedings at the King Edward hotel meeting, and although their resolution, passed after Thomas Crawford had repudiated the agreement of settlement, accepting what had been done at that meeting, and binding themselves to carry out the arrangement, may not be effective to make a contract which the company could enforce, or which could be enforced against them, the company are willing to carry out the agreement, and have, by offering to Thomas Crawford the shares to which he would be entitled under his agreement

with his co-adventurers, enabled the other parties to perform their implied undertaking which formed the consideration for Thomas Crawford's promise to them to convey his interest to the company. It is his co-adventurers, to whom, if the agreement of 3rd April is valid, he did bind himself, and not the company, who seek to enforce that agreement. That the company may not be bound seems, therefore, immaterial.

The Court is not asked to decree the formation of a company. The company is already formed, and all the details of the settlement of 3rd April have been carried out except the conveyance by Thomas Crawford of the interest in the property which was left in him by the judgment of the Court of Appeal.

The patent to Thomas Crawford was not attacked in the action. On the contrary, it was affirmed. All that was sought was to have it determined that Thomas Crawford held an undivided three-quarters of the property covered by the patent in trust for Murdock McLeod, Donald Crawford, and John McLeod.

The interest of Thomas Crawford was necessarily the subject of litigation in these actions. He claimed to be entitled to a one-third interest to the exclusion of John McLeod, and the patent in fee of the entire property issued to him was made a part of the case in appeal. The judgment of the Court declaring that Murdock McLeod, Donald Crawford, and John McLeod had each a one-quarter interest in the property, necessarily defined the interest of Thomas Crawford, the only other claimant before the Court, as limited to one-quarter.

If Armstrong has any interest under Donald Crawford, his interest is outstanding, and, as to him, the agreement of 3rd April is, of course, ineffectual. That, however, is no reason why it should not be binding and effectual as between the parties to it, who have all seen fit to proceed upon the assumption that Armstrong had no interest in the property. Armstrong is not represented upon this motion, and his rights cannot be affected by any disposition made of it.

The conveyances by Murdock McLeod, Donald Crawford, and Thomas Harold to the Lawson Mine Limited, were made

pursuant to and for the purpose of carrying out the agreement of 3rd April, and cannot in any sense be regarded as an abandonment by these parties of that agreement. While Murdock McLeod and Donald Crawford may have transferred their interests to the Lawson Mine Limited, they are under obligation to John McMartin, whose purchase money they have obtained, to see that the settlement, on the faith of which that money was paid, is carried into effect. That obligation and the responsibility in damages which it may entail, in my opinion, give them sufficient status to maintain the present application.

If I felt at liberty on this motion to deal with the objections to the validity of the agreement, on the grounds of undue pressure brought to bear upon Mr .Clarke, of want of independent professional advice on the part of Messrs. Clarke and Crawford, and of lack of understanding or appreciation of the purport and effect of the document executed by them, I should find little difficulty in disposing of them. Mr. Clarke is an experienced and shrewd solicitor. He had the assistance of Mr. George Henderson as counsel. Mr. Crawford, himself a business man, had the advice and counsel of Mr. Wallace Nesbitt, K.C., and Mr. Eugene Lafleur, K.C., in the Supreme Court, at the time the settlement was made. The execution by Messrs. Crawford and Clarke of the subsequent agreement of 6th April, and their presence at and tacit concurrence in the proceedings at the King Edward hotel, above referred to, certainly do not tend to strengthen their position when infringing the agreement of 3rd April upon these grounds. Since, however, for reasons which I am now about to state, I am of opinion that the Court has not jurisdiction to grant plaintiffs' motion, I refrain from expressing further my views upon these matters.

That the Court has jurisdiction, upon motion under subsecs. 9 and 12 of sec. 57 of the Judicature Act, where the action is still pending, to enforce an agreement for compromise, of which the validity is admitted, and of which none of the terms are dehors the action, seems reasonably clear, though in at least one recent case the absence of a provision in such an agreement that it should be made a rule of Court or should become an order or judgment of the Court, was the reason assigned by an eminent Judge for holding that there was no jurisdiction to pronounce a sum-

mary order for the enforcement of a compromise: Graves v. Graves, 69 L. T. N. S. 420.

I have examined all the cases referred to by counsel and many others, both in England and in Ontario, in which the right to enforce, upon summons or motion, an agreement for the compromise of an action has been considered. In no case in which the Court has made such an order as the applicants ask do the circumstances at all resemble those with which I have to deal.

Here, whether with justification or not, counsel for Thomas Crawford contests the validity of the agreement for compromise; Mr. Clarke says that it is not binding upon him personally; the agreement deals with matters which would not have been the subject of any judgment pronounced upon the issues involved in the actions. Looking at the agreement itself, it seems manifest that all that the parties contemplated should be made the subject of a judgment is contained in the first sentence—"We agree that all appeals are to be dismissed without costs here or below." Thus far the agreement dealt with the prosecution of the litigation and with the very matter of that litigation; the rest of the agreement, providing for the formation of a company and the apportionment of its stock among the interested parties, covers matters quite dehors the records in the actions. Not only is there no provision in the agreement that its latter terms shall become a rule of Court, or shall take the form of a judgment or order of the Court, but the very form of the agreement itself, which appears to distinctly separate that which is to be embodied in the judgment from the other terms, indicates an intention that as to such other terms the parties were content to rely upon whatever rights the agreement might give them, apart from any judgment in the pending actions. If it had been intended otherwise, no doubt an effort would have been made to have the latter terms of the agreement embodied in the judgment of the Supreme Court of Canada dismissing the appeals. That this was not done affords strong presumptive evidence that it was not intended that these terms of the agreement should be made effective by a judgment in the pending actions.

. . . .

[Reference to Scully v. Lord Dundonald, 8 Ch. D. 658; Alliance Pure White Lead Syndicate v. McIvor's Patents.

7 Times L. R. 599; Turner v. Green, [1895] 2 Ch. 205; Baker v. Blaker, 55 L. T. 725; Hakes v. Hodgkins, 17th May, 1877, unreported, referred to in Eden v. Naish, 7 Ch. D. 781.]

Eden v. Naish, 7 Ch. D. 781, is the only case in which the Court appears to have dealt upon summons with questions raised as to the validity of an agreement for compromise, and to have enforced an agreement for compromise summarily notwithstanding such objections. The Court found, upon examinations of the parties and witnesses, that there were no circumstances which entitled the party opposing the motion to resist its performance, and that the grounds upon which the validity of the agreement was questioned were not well founded. The agreement did not contain a provision that it should be made a rule of Court, and this decision is, perhaps, inconsistent with that of Barnes, J., in Graves v. Graves, supra, from which Eden v. Naish may, however, be distinguished because, in the latter, judgment for dissolution of partnership had been pronounced and a reference directed to take accounts, pending which the compromise was effected, whereas in Graves v. Graves the action had been discontinued. The compromise in Eden v. Naish, moreover, was confined to an adjustment of the matters involved in the reference under the judgment; that in Graves v. Graves went beyond the record. Neither does the course taken by Hall, V.-C., in Eden v. Naish, seems to be in entire harmony with the views of Fry, J., as expressed in In re Gaudet Frères S. S. Co., 12 Ch. D. 882, at p. 885. He directed that a summons to enforce a compromise should stand over until the validity of the agreement, which was denied by the respondent, should be ascertained, saying: "It is not alleged that there is any question of fraud or misrepresentation. If there were, it may be that I should not be able to dispose of the whole matter on this summons. But, if there is no such question or no question at all as to the validity of the compromise, it appears to me that I can dispose of the whole matter on the summons. The summons must, however, stand over to enable Leslie to make out, if he can, his case against the validity of the agreement."

Neither in In re Gaudet Frères S. S. Co. nor in Eden v. Naish did the terms of the compromise include matters beyond those in issue upon the record, the suggestion of

counsel for plaintiff in Eden v. Naish to the contrary not being noticed in the judgment of Hall, V.-C. Moreover, in Eden v. Naish the order pronounced seems to have been merely for a stay of proceedings.

In Gilbert v. Endean, 9 Ch. D. 259, and Emeris v. Woodward, 43 Ch. D. 185, the Court held that a party contesting the validity of an agreement for compromise and seeking to set it aside cannot obtain that relief upon a summary motion; and Mr. Daniell in his Chancery Practice, 7th ed., at p. 16, after stating the general jurisdiction of the Court to enforce a compromise upon motion, says: "The question, however, whether a compromise is invalid should be the subject of a separate action, and cannot be determined upon application in the original action."

Notwithstanding the course taken in Eden v. Naish, therefore, in view of the decisions in Gilbert v. Endean and Emeris v. Woodward, the observations of Fry, J., in In re Gaudet Frères S. S. Co., and the statement of Mr. Daniell in his esteemed work, it seems to me at least doubtful whether the question of the validity of an agreement for compromise, if raised in answer to a motion to enforce it, can be determined upon such motion. It this, however, were the only difficulty in the way of the applicants, I should have been inclined, if not to follow Eden v. Naish, at least to direct the trial of an issue, as was done in Rees v. Carruthers, 17 P. R. 51.

Such cases as Johnson v. Grand Trunk R. W. Co., 25 O. R. 64, and Haist v. Grand Trunk R. W. Co., 22 A. R. 504, in which alleged settlements arrived at before or pending the actions were set up in bar of the plaintiffs' claims, and the existence or validity of such settlements was denied, the issue so raised being dealt with by the Court at the trial, were clearly within sec. 57 (12) of the Judicature Act. They, however, differ entirely from the present case, and afford no guide for the disposition of the present motion.

In Johnson v. Grand Trunk R. W. Co., however, at p. 69, Street, J., says that where something has been done under the settlement which renders it impossible to proceed with the pending action without first getting rid of the settlement, a fresh action to try the question of its validity seems

necessary. The judgment entered in the Supreme Court seems to place the applicants in this difficulty.

In Pirung v. Dawson, 9 O. L. R. 248, 4 O. W. R. 499, the terms of the settlement were clearly confined to matters in controversy in the action, and no judgment had been entered. The judgment of Meredith, C.J., seems to shew that he intended his decision to cover only cases in which the motion might be regarded as analogous to a motion for judgment on the pleadings.

In Rees v. Carruthers, ubi supra, the Chancellor, at p. 52, uses language which seems clearly indicative of his view that the jurisdiction to enforce summarily by motion must be confined to compromises of which no terms go beyond what is in controversy in the action. The decision in Davidson v. Merritton Wood and Pulp Co., 18 P. R. 139, is quite consistent with this view. . . . .

[Reference to Pryer v. Gribble, L. R. 10 Ch. 534; Britain v. Rossiter, 11 Q. B. D. 123, 131; Leggott v. Western, 12 Q. B. D. 287.]

The Court of Chancery had not jurisdiction to enforce an agreement for compromise involving matters distinct from those appearing on the record in the cause: see Askew v. Millington, 9 Hare 65; King v. Pinsonneault, L. R. 6 P. C. 245, 258; and judgment of Malins, V.-C., in Pryer v. Gribble, L. R. 10 Ch. at p. 537.

Sub-section 9 of sec. 57 of the Ontario Judicature Act merely enables the Court to give effect in every action to equitable rights asserted by the parties, which might formerly have been grounds for restraining proceedings by prohibition or injunction; it further affirms the jurisdiction of the Court to stay proceedings in any action upon summary motion upon just and equitable grounds. The jurisdiction conferred or affirmed by this sub-section does not reach the present motion, by which it is not sought to restrain the prosecution of any proceedings. Under sub-sec. 12—the only other provision invoked by the applicants—the Court is required and empowered in every cause or matter pending before it to grant such remedies as any of the parties appear to be entitled to "in respect of any and every legal or equitable claim properly brought forward by them respectively in such

cause or matter." The limitation imposed by the words which I quote excludes, in my opinion, from the purview of this section, such extraneous matters as the parties have included in the latter portion of the agreement of 3rd April, 1907.

While it may be—and I think it is—most regrettable that, by raising objections apparently unfounded and devoid of merit, the parties opposing the present motion should be able to put the other persons interested to the expense, trouble, and delay of a fresh action to enforce their agreement, that is not a reason why the Court should assume a jurisdiction which, however advantageous and desirable to enable it to do speedy and effective justice in such a case as that now before me—in other cases it might be found embarrassing if not dangerous—did not exist before the Judicature Act, and was not, I think, conferred by that enactment.

In my opinion, I have not jurisdiction, upon this summary motion, after final judgment has been entered in the action, to pronounce a judgment or order for the enforcement of the unperformed terms of this compromise (the validity of which is denied)—terms not covered by such final judgment—terms which the parties have not agreed, and apparently did not intend, should be made a rule or judgment of the Court in these actions—and, above all, terms which were not included in the relief claimed in the actions themselves, and are not such as are "within the ordinary range of the Court in such an action," and in enforcing which the Court "must adjudicate upon equities distinct from those appearing on the records."

The motion must, therefore, be refused.

Inasmuch as the costs incurred upon this application have been very largely increased by issues raised by defendant Crawford upon which he entirely fails, I do not think he is entitled to an order for costs.

ANGLIN, J. OCTOBER 12TH, 1907.

WEEKLY COURT.

LAWSON v. CRAWFORD.

Injunction—Interim Order—Contract—Prima Facie Right.

Motion by plaintiffs for an interim injunction to restrain defendant from interfering with the operations of the plaintiffs in respect of the mining properties in question in McLeod v. Crawford and McLeod v. Lawson, supra, in pursuance of the agreement of 3rd April, 1907, referred to in the opinion in those cases.

G. H. Watson, K.C., for plaintiffs.

S. R. Clarke, for defendant.

ANGLIN, J.:—The agreement of 3rd April, 1907, is prima facie binding upon defendant. Having regard to all the circumstances disclosed in the evidence upon this motion, it seems to me improbable that he can, upon the grounds on which he impugns the validity and efficacy of that agreement, eventually succeed in obtaining relief from it. (See my opinion in McLeod v. Crawford and McLeod v. Lawson, supra.)

If the agreement is good, the defendant, though he holds the legal title to it, has no beneficial interest in the property in question. Until he has been relieved from this agreement, he should not, I think, be permitted to interfere with or hinder the operations of the plaintiffs.

The injunction will be continued to the trial. Costs of the motion will be costs in the cause.

OCTOBER 12TH, 1907.

DIVISIONAL COURT.

ALLAN v. PLACE.

Appeal to Divisional Court—County Court Appeal—Time—Delivery of Judgment Appealed against—Date of Notification to Parties.

Motion by plaintiff to quash an appeal by defendant from the judgment of the County Court of Welland upon an interpleader issue, on the ground that the appeal was not set down for the first sittings of a Divisional Court commencing "after the expiration of one month from the judgment, order, or decision complained of," as prescribed by sec. 57 of the County Courts Act, R. S. O. 1897 ch. 55.

G. H. Kilmer, for plaintiff.

R. McKay, for defendant.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

ANGLIN, J.:—The interpleader issue was tried in the County Court in June, and judgment was reserved, no date being fixed for its delivery. Subsequently the County Court Judge handed the record to the clerk of the Court, with an indorsement of his findings, dated 17th July, 1907.

The material does not disclose upon what day the Judge gave the record so indorsed to the clerk, but it was stated at bar that this occurred on the 12th or 13th September last. At all events, the clerk first notified defendant's solicitors of the judgment on 13th September, and they were until then unaware that any judgment had been pronounced. Notice of appeal was served on 23rd September, and the appeal was duly set down for the October sittings of the Divisional Court.

In Fawkes v. Swayzie, 31 O. R. 256, Armour, C.J. delivering the judgment of a Divisional Court, said obiter, at p. 261, in discussing sec. 57 of the County Courts Act:

"If the judicial opinion or decision, oral or written, is not pronounced or delivered in open Court, then it cannot be said to be pronounced or delivered until the parties are notified of it."

With great respect, I may be permitted to say that this common sense view of the law commends itself entirely to my judgment.

Motion dismissed with costs to defendant in any event of the appeal.